TABLE OF CONTENTS: SUPPLEMENTARY BACKGROUND READING

This is intended to assist those students who have no background in the study of EU law.

Cases and Materials on EU Law (8th Edition)

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(Extracts) The Direct Effect of Directives

SECTION 1: ESTABLISHING THE PRINCIPLE

The most difficult area relating to 'direct effect' arises in the application of the notion to EC *Directives.* Although the rest of this Chapter concentrates on this area, it is important not to develop an inflated notion of the importance of the problem of the direct effect of Directives. Directives are after all only one source of Community law. However, the issue deserves examination in some depth, not least because Directives play a major role in elaborating the detailed scope of Community policy-making in respect of which the Treaty provides a mere framework. Moreover, Directives are a rather peculiar type of act - Community law but implemented at national level through national legal procedures. An examination of this area, then, should reveal much about the general problem of the interrelation of national law with the Community legal order.

The starting point is Article 249 EC, formerly Article 189, set out at p.30. This suggests that a Directive, in contrast to a Regulation, would not be directly effective. Regulations are directly applicable, and if they meet the *Van Gend en Loos* (Case 26/62) test for direct effect they are directly effective too. They are law in the Member States (direct applicability) and they may confer legally enforceable rights on individuals (direct effect). Directives, in marked contrast, are clearly dependent on implementation by each State, according to Article 249. When made by the Community, they are not designed to be law in that form at national level. Nor are they designed directly to affect the individual. (The same is true of the European framework law, envisaged by Article 1-33 of the Treaty establishing a Constitution as the functional successor to the Directive, p.34 above.) Yet in *Van Duyn* (Case 41/74), at p.114 above, the Court held that a Directive might be relied on by an individual before a national court. In the next case, *Pubblico Ministero* v *Ratti* (Case 148/78), the European Court explains how, when and why Directives can produce direct effects (or, at least, effects analogous thereto) at national level.

***Pubblico Ministero* v *Ratti* (Case 148/78)**

[1979] ECR 1629, [1980] 1 CMLR 96, Court of Justice of the European Communities

Directive 73/173 required Member States to introduce into their domestic legal orders rules governing the packaging and labelling of solvents. This had to be done by December 1974. Italy had failed to implement the Directive and maintained in force a different national regime. Ratti produced his solvents in accordance with the Directive, not the Italian law. In 1978 he found himself the subject of criminal proceedings in Milan for non-compliance with Italian law. Could he rely on the Directive which Italy had left unimplemented?

[18] This question raises the general problem of the legal nature of the provisions of a directive adopted under Article 189 of the Treaty.

[19] In this regard the settled case law of the Court, last reaffirmed by the judgment of 1 February 1977 in Case 51/76 *Nederlandse Ondernemingen* [1977] 1 ECR 126, lays down that, whilst under Article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of acts covered by that article can never produce similar effects.

[20] It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude on principle the possibility of the obligations imposed by them being relied on by persons concerned.

[21] Particularly in cases in which the Community authorities have, by means of directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such an act would be weakened if persons were prevented from relying on it in legal proceedings and national courts prevented from taking it into consideration as an element of Community law.

[22] Consequently *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 own failure to perform the obligations which the directive entails.

[23] 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.

[24] Therefore the answer to the first question must be that after the expiration of the period fixed for the implementation of

a directive 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.

NOTE: Directive 77/728 applied a similar regime to varnishes. But here Ratti had jumped the gun. The deadline for implementation was November 1979. Yet in 1978 his varnishes were already being made according to the Directive, not Italian law. In the criminal prosecution for breach of Italian law he sought to rely on this Directive too. He argued that he had a legitimate expectation that compliance with the Directive prior to its deadline for implementation would be permissible:

***Pubblico Ministero* v *Ratti* (Case 148/78)**

[1979] ECR 1629, [1980] 1 CMLR 96, Court of Justice of the European Communities

[43] It follows that, for the reasons expounded in the grounds of the answer to the national court's first question, it is only at the end of the prescribed period and in the event of the Member State's default that the directive - and in particular Article 9 thereof - will be able to have the effects described in the answer to the first question.

[44] Until that date is reached the Member States remain free in that field.

[45] If one Member State has incorporated the provisions of a directive into its internal legal order before the end of the period prescribed therein, that fact cannot produce any effect with regard to other Member States.

[46] In conclusion, since a directive by its nature imposes obligations only on Member States, it is not possible for an individual to plead the principle of 'legitimate expectation' before the expiry of the period prescribed for its implementation.

[47] Therefore the answer to the fifth question must be that Directive No 77/728 of the Council of the European Communities of 7 November 1977, in particular Article 9 thereof, cannot bring about with respect to any individual who has complied with the provisions of the said directive before the expiration of the adaptation period prescribed for the Member State any effect capable of being taken into consideration by national courts.

NOTE: A small indentation into the Court's insistence that the expiry of the period prescribed for a Directive's implementation is the vital trigger for its relevance in law before national courts was made in Case C-129/96 *Inter-Environnement Wallonie ASBL* v *Region Wallone* [1997] ECR I-7411. In advance of the deadline, Member States are obliged 'to refrain ... from adopting measures liable seriously to compromise the result prescribed' by the Directive. A violation was established in Case C-14/02 *ATRAL* [2003] ECR 1-4431. In normal circumstances, however, it is the expiry of the prescribed deadline which converts an unimplemented (and sufficiently unconditional) Directive into a provision on which an individual may rely before a national court.

• QUESTION

Why did the European Court decide to uphold Ratti's ability to rely on the unimplemented 1973 solvents Directive in the face of the apparently conflicting wording of the Treaty (Article 189, now 249)? One may return to Judge Mancini for one explanation:

F. Mancini, 'The Making of a Constitution for Europe' (1989) 26 CML Rev 595

(Footnotes omitted.)

3. Costa v *Enel* may be therefore regarded as a sequel of *Van Gend en Loos.* It is not the only sequel, however. Eleven years after Von *Gend en Loos,* the Court took in *Van Duyn* v *Home Office* a further step forward by attributing direct effect to provisions of Directives not transposed into the laws of the Member States within the prescribed time limit, so long as they met the conditions laid down in *Van Gend en Loos.* In order to appreciate fully the scope of this development it should be borne in mind that while the principal subjects governed by Regulations are agriculture, transport, customs and the social security of migrant workers, Community authorities resort to Directives when they intend to harmonise national laws on such matters as taxes, banking, equality of the sexes, protection of the environment, employment contracts and organisation of companies. Plain cooking and haute cuisine, in other words. The hope of seeing Europe grow institutionally, in matters of social relationships and in terms of quality of life rests to a large extent on the adoption and the implementation of Directives.

Making Directives immediately enforceable poses, however, a formidable problem. Unlike Regulations and the Treaty provisions dealt with by *Van Gend en Loos,* Directives resemble international treaties, in so far as they are binding *only* on the States and *only* as to the result to be achieved. It is understandable therefore that, whereas the *Van Gend en Loos* doctrine established itself within a relatively short time, its extension to Directives met with bitter opposition in many quarters. For example, the French Conse/7 *d'Etat* and the German *Bundesfinanzhof* bluntly refused to abide by it and Professor

Rasmussen, in a most un-Danish fit of temper, went so far as to condemn it as a case of 'revolting judicial behaviour'.

Understandable criticism is not necessarily justifiable. It is mistaken to believe that in attributing direct effect to Directives not yet complied with by the Member States, the Court was only guided by political considerations, such as the intention of by-passing the States in a strategic area of law-making. Non-compliance with Directives is the most typical and most frequent form of Member State infraction; moreover, the Community authorities often turn a blind eye to it and, even when the Commission institutes proceedings against the defaulting State under Article 169 of the Treaty, the Court cannot impose any penalty on that State. [See now Article 228 EC, a Maastricht innovation, p.110 above.] This gives the Directives a dangerously elastic quality: Italy, Greece or Belgium may agree to accept the enactment of a Directive with which it is uncomfortable knowing that the price to pay for possible failure to transpose it is non-existent or minimal.

Given these circumstances, it is sometimes submitted that the *Van Duyn* doctrine was essentially concerned with assuring respect for the rule of law. The Court's main purpose, in other words, was 'to ensure that neither level of government can rely upon its malfeasance - the Member State's failure to comply, the Community's failure or even inability to enforce compliance', with a view to frustrating the legitimate expectation of the Community citizens on whom the Directive confers rights, indeed, 'if a Court is forced to condone wholesale violation of a norm, that norm can no longer be termed law'; nobody will deny that 'Directives are intended to have the force of law under the Treaty'.

Doubtless, in arriving at its judgment in *Van Duyn,* the Court may also have considered that by reducing the advantages Member States derived from non-compliance, its judgment would have strengthened the 'federal' reach of the Community power to legislate and it may even have welcomed such a consequence. But does that warrant the revolt staged by the *Conseil d'Etat* or the *Bundesfinanzhof?* The present author doubts it; and so did the German Constitutional Court, which sharply scolded the *Bundesfinanzhof* for its rejection of the *Van Duyn* doctrine. This went a long way towards restoring whatever legitimacy the Court of Justice had lost in the eyes of some observers following *Van Duyn.* The wound, one might say, is healed and the scars it has left are scarcely visible.

• QUESTION

Do you agree with Mancini that the Court's work in this area is 'essentially concerned with assuring respect for the rule of law'? See also N. Green, 'Directives, Equity and the Protection of Individual Rights' (1984) 9 EL Rev 295.

NOTE: Difficult constitutional questions arise at Community level and at national level in relation to the direct effect of Directives. You will quickly notice that many of the issues hav$_c$ arisen in the context of cases about sex discrimination. This has happened because equality between the sexes constitutes an area of Community competence which is given shape by ; string of important Directives, often inadequately implemented at national level.

SECTION 2: CURTAILING THE PRINCIPLE

The next case allowed the Court to refine its approach to the direct effect of Directives.

***Marshall* v *Southampton Area Health Authority* (Case 152/84)**

[1986] ECR723, [1986] 1 CMLR 688, Court of Justice of the European Communities

Ms Marshall was dismissed by her employers, the Health Authority, when she reached the age of 62. A man would not have been dismissed at that age. This ***was*** discrimination on grounds of sex. But was there a remedy in law? Apparently not under the UK's Sex Discrimination Act 1975, because of a provision excluding discrimination arising out of treatment in relation to retirement. Directive 76/207 requiring equal treatment between the sexes, *did* appear to envisage a legal remedy for such discrimination, but that Directive had not been implemented in the UK even though the deadline was past. So could Ms Marshall base a claim on the unimplemented Community Directive before an English court? The European Court was asked this question in a preliminary reference by the Court of Appeal

The European Court first held that Ms Marshall's situation was an instance of discrimination on grounds of sex contrary to the Directive. It continued:

[39] Since the first question has been answered in the affirmative, it is necessary to consider whether Article 5(1) of Directive No 76/207 may be relied upon by an individual before national courts and tribunals.

[40] The appellant and the Commission consider that that question must be answered in the affirmative. They contend

in particular, with regard to Articles 2(1) and 5(1) of Directive No 76/207, that those provisions are sufficiently clear to enable national courts to apply them without legislative intervention by the Member States, at least so far as overt discrimination is concerned.

[41] In support of that view, the appellant points out that directives are capable of conferring rights on individuals which may be relied upon directly before the courts of the Member States; national courts are obliged by virtue of the binding nature of a directive, in conjunction with Article 5 of the EEC Treaty, to give effect to the provisions of directives where possible, in particular when construing or applying relevant provisions of national law (judgment of 10 April 1984 in Case 14/83 *von* Co/son *and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891). Where there is any inconsistency between national law and Community law which cannot be removed by means of such a construction, the appellant submits that a national court is obliged to declare that the provision of national law which is inconsistent with the directive is inapplicable.

[42] The Commission is of the opinion that the provisions of Article 5(1) of Directive No 76/207 are sufficiently clear and unconditional to be relied upon before a national court. They may therefore be set up against section 6(4) of the Sex Discrimination Act, which, according to the decisions of the Court of Appeal, has been extended to the question of compulsory retirement and has therefore become ineffective to prevent dismissals based upon the difference in retirement ages for men and for women.

[43] The respondent and the United Kingdom propose, conversely, that the second question should be answered in the negative. They admit that a directive may, in certain specific circumstances, have direct effect as against a Member State in so far as the latter may not rely on its failure to perform its obligations under the directive. However, they maintain that a directive can never impose obligations directly on individuals and that it can only have direct effect against a Member State *qua* public authority and hot against a Member State qua employer. As an employer a State is no different from a private employer. It would not therefore be proper to put persons employed by the State in a better position than those who are employed by a private employer.

[44] With regard to the legal position of the respondent's employees the United Kingdom states that they are in the same position as the employees of a private employer. Although according to United Kingdom constitutional law the health authorities, created by the National Health Service Act 1977, as amended by the Health Services Act 1980 and other legislation, are Crown bodies and their employees are Crown servants, nevertheless the administration of the National Health Service by the health authorities is regarded as being separate from the government's central administration and its employees are not regarded as civil servants.

[45] Finally, both the respondent and the United Kingdom take the view that the provisions of Directive No 76/207 are neither unconditional nor sufficiently clear and precise to give rise to direct effect. The directive provides for a number of possible exceptions, the details of which are to be laid down by the Member States. Furthermore, the wording of Article 5 is quite imprecise and requires the adoption of measures for its implementation.

[46] It is necessary to recall that, according to a long line of decisions of the Court (in particular its judgment of 19 January 1982 in Case 8/81 Becter v *Finanzamt Munster-lnnenstadt* [1982] ECR 53), wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.

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

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

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

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

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

[52] Finally, with regard to the question whether the provision contained in Article 5(1) of Directive No 76/207, which implements the principle of equality of treatment set out in Article 2(1) of the directive, may be considered, as far as its contents are concerned, to be unconditional and sufficiently precise to be relied upon by an individual as against the State, it must be stated that the provision, taken by itself, prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, in a general manner and in unequivocal terms. The provision is therefore sufficiently precise to be relied on by an individual and to be applied by the national courts.

[53] It is necessary to consider next whether the prohibition of discrimination laid down by the directive may be regarded as unconditional, in the light of the exceptions contained therein and of the fact that according to Article 5(2) thereof the Member States are to take the measures necessary to ensure the application of the principle of equality of treatment in the context of national law.

[54] With regard, in the first place, to the reservation contained in Article 1 (2) of Directive No 76/207 concerning the application of the principle of equality of treatment in matters of social security, it must be observed that, although the reservation limits the scope of the directive *rations materiae,* it does not lay down any condition on the application of that principle in its field of operation and in particular in relation to Article 5 of the directive. Similarly, the exceptions to Directive No 76/207 provided for in Article 2 thereof are not relevant to this case.

[55] It follows that Article 5 of the Directive No 76/207 does not confer on the Member States the right to limit the application of the principle of equality of treatment in its field of operation or to subject it to conditions and that that provision is sufficiently precise and unconditional to be capable of being relied upon by an individual before a national court in order to avoid the application of any national provision which does not conform to Article 5(1).

[56] Consequently, the answer to the second question must be that Article 5(1) of Council Directive No 76/207 of 9 February 1976, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, may be relied upon as against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to Article 5(1).

NOTES

1. Ms Marshall was able to rely on the Directive because she was employed by the State. Her subsequent quest for compensation took her back to the European Court, where it was made clear that national limits on compensatory awards should not be applied in so far as they impede an effective remedy (Case C-271/91 [19931 ECR 1-4367). However, had she been employed by a private firm she would have been unable to rely on the direct effect of the Directive. So, as far as direct effect is concerned, there are requirements which always apply - those explained above in *Van Gend en Loos* (Case 26/62) (p. 114). But for Directives there are extra requirements: first, that the implementation date has passed; and, second, that the State is the party against which enforcement is claimed. Directives may be vertically directly effective, but not horizontally directly effective.

2. In rejecting the horizontal direct effect of Directives, the Court in fact made a choice between competing rationales for the direct effect of Directives. In its early decisions the Court laid emphasis on the need to extend direct effect in this area in order to secure the 'useful effect' of measures left unimplemented by defaulting States. Consider para 12 of *Van Duyn* (Case 41/74) (p.114 above); and, for example, in *Nederlandse Ondernemingen* (Case 51/76) [1977] ECR 113, the Court observed (at para 23) that:

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.

This dictum came in the context of a case against the State, but this logic would lead a bold court to hold an unimplemented Directive enforceable against a private party too, in order to improve its useful effect. However, in *Ratti* (Case 148/78) (p.133 above) and in *Marshall* (Case 152/84) (p.136 above), the Court appears to switch its stance away from the idea of 'useful effect' to a type of 'estoppel' as the legal rationale for holding Directives capable of

direct effect. See para 49 of the judgment in *Marshall* (Case 152/84).

3. The Court's curtailment of the impact of Directives before national courts may also be seen as a manifestation of judicial minimalism, mentioned at p.28 above. The realist would examine the awareness of the Court that in this area it risks assaulting national sensitivities if it insists on deepening the impact of Community law in the national legal order. The next case was mentioned in passing by Judge Mancini (p.135 above), but the decision deserves further attention.

Minister* of the *Interior* v *Cohn Bendit

[1980] 1 CMLR543, Conseil d'Etat

The matter concerned the exclusion from France of Cohn Bendit, a noted political radical (who subsequently became a Member of the European Parliament!). He relied on Community rules governing free movement to challenge the exclusion. The Conseil d'Etat, the highest court in France dealing with administrative law, addressed itself to the utility of a Directive in Cohn Bendit's action before the French courts.

According to Article 56 of the Treaty instituting the European Economic Community of 25 March 1957, no requirement of which empowers an organ of the European Communities to issue, in matters of *ordre public,* regulations which are directly applicable in the member-States, the co-ordination of statute and of subordinate legislation *(dispositions legislatives et reglementaires)* 'providing for special treatment for foreign nationals on grounds of public policy *(ordre public),* public security or public health' shall be the subject of Council directives, enacted on a proposal from the Commission and after consultation with the European Assembly. It follows clearly from Article 189 of the Treaty of 25 March 1957 that while these directives bind the member-States 'as to the result to be achieved' and while, to attain the aims set out in them, the national authorities are required to adapt the statute law and subordinate legislation and administrative practice of the member-States to the directives which are addressed to them, those authorities alone retain the power to decide on the form to be given to the implementation of the directives and to fix themselves, under the control of the national courts, the means appropriate to cause them to produce effect in national law. Thus, whatever the detail that they contain for the eyes of the member-States, directives may not be invoked by the nationals of such States in support of an action brought against an individual administrative act. It follows that M. Cohn-Bendit could not effectively maintain, in requesting the Tribunal Administratif of Paris to annul the decision of the Minister of the Interior of 2 February 1976, that that decision infringed the provisions of the directive enacted on 25 February 1964 by the Council of the European Communities with a view to coordinating, in the circumstances laid down in Article 56 of the EEC Treaty, special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. Therefore, in the absence of any dispute on the legality of the administrative measures taken by the French Government to comply with the directives enacted by the Council of the European Communities, the solution to be given to the action brought by M. Cohn-Bendit may not in any case be made subject to the interpretation of the directive of 25 February 1964. Consequently, without it being necessary to examine the grounds of the appeal, the Minister of the Interior substantiates his argument that the Tribunal Administratif of Paris was wrong when in its judgment under appeal of 21 December 1977 it referred to the Court of Justice of the European Communities questions relating to the interpretation of that directive and stayed proceedings until the decision of the European Court. In the circumstances the case should be referred back to the Tribunal Administratif of Paris to decide as may be the action of M. Cohn-Bendit.

NOTE: See, similarly, the *Bundesftnanzhof* (German federal tax court) in *VAT Directives* [1982] 1 CMLR 527.

As D. Anderson observed in the wake of the Court's rejection in *Marshall* (Case 152/ 84) of the enforceability of unimplemented Directives against private parties, '[t]he present concern of the Court is to consolidate the advances of the 1970s rather than face the legal complexities and political risks of attempting to extend the doctrine [of direct effect] further' *(Boston College International & Comparative Law Review* (1988) XI 91, 100). This implies that the Court might have been expected to return to the matter. This proved correct. In 1993 and 1994 three Advocates-General pressed the Court to reconsider its rejection of the horizontal direct effect of Directives: Van Gerven in *'Marshall 2'* (Case C-271/91) [1993] ECR 1-4367; Jacobs in *Vaneetveld* v *SA Le Foyer* (Case C-316/93) [1994] ECR 1-763 and Lenz in *Paola Faccini Dori* v *Recreb Sri* (Case C-91/92) [1994] ECR 1-3325. Advocate-General Lenz insisted that the Citizen of the Union was entitled to expect equality before the law throughout the territory of the Union and observed that, in the absence of horizontal direct effect, such equality was compromised by State failure to implement Directives. Advocate-General Jacobs thought that the effectiveness principle militated against drawing distinctions based on the status of a defendant. All three believed that the pursuit of coherence in the Community legal order dictated acceptance of the horizontal direct effect of Directives. Only in the third of these cases, *Faccini Dori* v *Recreb,* was the European Court unable to avoid addressing the issue directly.

Paolo *Faccini Dori* v *Recreb Sri* (Case C-91/92)

[1994] ECR I-3325, Court of Justice of the European Communities

Ms Dori had concluded a contract at Milan Railway Station to buy an English language correspondence course. By virtue of Directive 85/577, which harmonizes laws governing the protection of consumers in respect of contracts negotiated away from business premises, the so-called 'Doorstep Selling Directive', she ought to have been entitled to a 'cooling-off period of at least seven days within which she could exercise a right to withdraw from the contract. However, she found herself unable to exercise that right under Italian law because Italy had not implemented the Directive. She therefore sought to rely on the Directive to defeat the claim brought against her by the private party with which she had contracted. The ruling in *Marshall* (Case 152/84) appeared to preclude reliance on the Directive and the Court, despite the promptings of Advocate-General Lenz, *refused* to overrule *Marshal].* It maintained that Directives are incapable of horizontal direct effect.

[23] It would be unacceptable if a State, when required by the Community legislature to adopt certain rules intended to govern the State's relations - or those of State entities - with individuals and to confer certain rights, on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights. Thus the Court has recognised that certain provisions of directives on conclusion of public works contracts and of directives on harmonisation of turnover taxes may be relied on against the State (or State entities) (see the judgment in Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839 and the judgment in Case 8/81 *Becker* v *Finarizamt Munster-lnnenstadt* [1982] ECR 53).

[24] The effect of extending that case law to the sphere of relations between individuals would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.

[25] It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.

NOTE: Paragraph 48 of the ruling in *Marshall* expresses comparable sentiments to those expressed in para 24 of the *Dori* ruling, but the emphasis in the latter on the limits of Community competence (specifically under Article 189 - now 249 - EC) is noticeably firmer. Although the Court did not consider that Ms Dori was wholly barred from relying on the Directive (see p.156 below on 'indirect' effect and p.164 on a claim against the defaulting State), it nevertheless refused to allow a Directive to exert direct effect in relations between private individuals. In rulings subsequent to *Dori,* the Court has repeated its rejection of the horizontal direct effect of Directives: e.g., Case *C-192/94 El Corte Ingles v Cristma Blasquez Rivera* [1996] ECR 1-1281; Case C-97/96 *Verband Deutscher Daihatsu Handler eV v Daihatsu Deutschland GmbH* [1997] ECR 1-6843. The reader is invited to consider whether, just as the Conseil d'Etat's ruling in *Cohn Bendit* (p. 139 above) may have prompted the European Court's caution in *Marshall,* so too national judicial anxieties, expressed with particular force by the the *Bundesverfassungsgericht,* about Treaty amendment in the guise of judicial interpretation may have prompted the European Court in *Dori* to emblazon its fidelity to the text of the EC Treaty by declining to extend Community legislative competence to include the enactment of obligations for individuals with immediate effect. Chapter 21 will examine this material in depth.

SECTION 3: THE SCOPE OF THE PRINCIPLE: THE STATE

Whatever one's view of the Court's motivations in ruling against the horizontal direct effect of Directives in *Marshall* (Case 152/84), confirmed in *Don* (Case C-91/92) and subsequently, the decision left many questions unanswered. First, what is the 'State'? The more widely this is interpreted, the more impact the unimplemented Directive will have.

Foster v British Gas (Case C-188/89)

[1990] ECR 1-3133, Court of Justice of the European Communities

The applicant wished to rely on the Equal Treatment Directive 76/207 against her employer before English courts. She and other applicants had been compulsorily retired at an age earlier than male employees. This raised the familiar issue of the enforceability of Directives before national courts where national law is inadequate. The Court examined the nature of the defendant (the British Gas Corporation: BGC).

[3] By virtue of the Gas Act 1972, which governed the BGC at the material time, the BGC was a statutory corporation responsible for developing and maintaining a system of gas supply in Great Britain, and had a monopoly

of the supply of gas.

[4] The members of the BGC were appointed by the competent Secretary of State. He also had the power to give the BGC directions of a general character in relation to matters affecting the national interest and instructions concerning its management.

[5] The BGC was obliged to submit to the Secretary of State periodic reports on the exercise of its functions, its management and its programmes. Those reports were then laid before both Houses of Parliament. Under the Gas Act 1972 the BGC also had the right, with the consent of the Secretary of State, to submit proposed legislation to Parliament.

[6] The BGC was required to run a balanced budget over two successive financial years. The Secretary of State could order it to pay certain funds over to him or to allocate funds to specified purposes.

It then proceeded to explain the legal approach to defining the 'State' for these purposes:

[13] Before considering the question referred by the House of Lords, it must first be observed as a preliminary point that the United Kingdom has submitted that it is not a matter for the Court of Justice but for the national courts to determine, in the context of the national legal system, whether the provisions of a directive may be relied upon against a body such as the BGC.

[14] The question what effects measures adopted by Community institutions have and in particular whether those measures may be relied on against certain categories of persons necessarily involves interpretation of the articles of the Treaty concerning measures adopted by the institutions and the Community measure in issue.

[15] It follows that the Court of Justice has jurisdiction in proceedings for a preliminary ruling to determine the categories of persons against whom the provisions of a directive may be relied on. It is for the national courts, on the other hand, to decide whether a party to proceedings before them falls within one of the categories so defined.

The Court then disposed of the question referred:

[16] As the Court has consistently held (see the judgment of 19 January 1982 in Case 8/81, *Becker* v *Hauptzollamt Munster-lnnenstadt,* [1982] ECR 53 at paragraphs 23 to 25), where the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

[17] The Court further held in its judgment of 26 February 1986 in Case 152/84 *(Marshall,* at paragraph 49) that where a person is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.

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

[19] The Court has accordingly held that provisions of a directive could be relied on against tax authorities (the judgments of 19 January 1982 in Case 8/81, *Becker,* cited above, and of 22 February 1990 in Case C-22188, *ECSC* v *Acciaierie e Ferriere Busseni (in liquidation)),* local or regional authorities (judgment of 22 June 1989 in Case 103/88, *Fratelli Costanzo* v *Comune di Milano),* constitutionally independent authorities responsible for the maintenance of public order and safety (judgment of 15 May 1986 in Case 222/84, *Johnston* v *Chief Constable of the Royal Ulster Constabulary,* [1986] ECR 1651), and public authorities providing public health services (judgment of 26 February 1986 in Case 152/84, *Marshall,* cited above).

[20] It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between

individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.

[21] With regard to Article 5(1) of Directive 76/207 it should be observed that in the judgment of 26 February 1986 in Case 152/84 *(Marshall,* cited above, at paragraph 52), the Court held that that provision was unconditional and sufficiently precise to be relied on by an individual and to be applied by the national courts.

[22] The answer to the question referred by the House of Lords must therefore be that Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 may be relied upon in a claim for damages against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

NOTE: The case has been widely commented upon; see, e.g., N. Grief, (1991) 16 EL Rev 136; E. Szyszczak, (1990) 27 CML Rev 859. For a full examination of the policy issues, see D. Curtin, The Province of Government', (1990) 15 EL Rev 195. For another case discussing the reach of unimplemented Directives in this vein see Case C-157/02, *Rieser International Transport* (judgment of 5 February 2004).

• QUESTION

The case arose before British Gas was 'privatized' under the Gas Act 1986 (sold to the private sector). What difference would this sale make to the application of the Court's test?

NOTE: The notion of the 'State' embraces local authorities.

***Fratelli Costanzo* v *Milano* (Case 103/88)**

[1989] ECR 1839, Court of Justice of the European Communities

The case arose out of the alleged failure of the municipal authorities in Milan to respect *inter alia* a Community Directive in awarding contracts for the construction of a football stadium for the 1990 World Cup. Could a disappointed contractor rely on the unimplemented Directive before Italian courts against the municipal authorities? The matter reached the European Court by way of a preliminary reference.

[28] In the fourth question the national court asks whether administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305 and to refrain from applying provisions of national law which conflict with them.

[29] In its judgments of 19 January 1982 in Case 8/81 *Becker* v *Finanzamt Munster-lnnenstadt* [1982] ECR 53, at p.71 and 26 February 1986 in Case 152/84 *Marshall* v *Southampton and* South-West *Hampshire Area Health Authority* [1986] ECR 723, at p.748, the Court held that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the Directive correctly.

[30] It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.

[31] It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows 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.

[32] With specific regard to Article 29(5) of Directive 71/305, it is apparent from the discussion of the first question that it is unconditional and sufficiently precise to be relied upon by an individual against the State. An individual may therefore plead that provision before the national courts and, as is clear from the foregoing, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply it.

SECTION 4: 'INCIDENTAL EFFECT'

It has been shown that Directives are incapable of application against private individuals before national courts. It is only when the State has fulfilled its Treaty obligation of implementation pursuant to Articles 10 and 249 EC that the Directive, duly transformed, becomes 'live' for the purposes of imposing obligations on private parties.

But this is not to say that an unimplemented Directive will never exert an effect before a national court that is prejudicial to a private party. Without abandoning its stance against horizontal direct effect, the Court has nevertheless chosen to recognise circumstances in which the State's default may incidentally affect the position of a private individual.

Case C-201/94 *R* v *The Medicines Control Agency, ex. parte Smith & Nephew Pharmaceuticals Ltd* and *Primecrown Ltd* v *The Medicine Control Agency* [1996] ECR 1-5819 concerned Article 3 of Directive 65/65. This provided that no proprietary medicinal product could be placed on the market in a Member State unless a prior authorisation had been issued by the competent authority of that Member State - the Medicines Control Agency (MCA) in the UK. The UK's Medicines Control Agency (MCA) had issued to Primecrown a licence to import a proprietary medicinal product of Belgian origin bearing the same name, and manufactured under an agreement with the same (American) licensor, as a product for which Smith & Nephew already held a marketing authorisation in the United Kingdom. But the MCA decided it was in error and it withdrew the authorisation. Both Primecrown and Smith & Nephew initiated proceedings before the English courts and, in a preliminary reference, the European Court was asked to provide an interpretation of the Directive's rules governing authorisation. But it was also asked whether Smith & Nephew, as the holder of the original authorisation issued under the normal procedure referred to in Directive 65/65, could rely on the Directive in proceedings before a national court in which it contested the validity of a marketing authorisation granted by a competent public authority to one of its competitors. The Court decided that it could. The consequence is that Primecrown's position could be detrimentally affected by a competitor's reliance on a Directive in proceedings against the public authorities. True, Smith & Nephew did not rely on the Directive in an action against Primecrown. This is *not* horizontal direct effect of the type painstakingly excluded by the Court in Don (Case C-91/92, p.141 above). But it is a case in which the application of a Directive by a national court *incidentally* affected the legal position of a private party.

The Court has developed this case law further. Without any direct challenge to its dogged resistance to the horizontal direct effect of Directives, it has nevertheless extended the *incidental* effect of Directives on private parties in national proceedings.

Council Directive 83/189/EEC provided for Member States to give advance notice to the Commission and other Member States of plans to introduce new product specifications. The amendments were consolidated in Directive 98/34 [1998] OJ L204/37, itself amended by Directive 98/48 [1998] OJ L217/18. The purpose of this notification system is to avoid the introduction of new measures having equivalent effect to quantitative restrictions on trade (and to supply the Commission with a possible basis for developing its harmonisation programme). It is an 'early warning system' (see Chapter 9 more generally on 'market management').

In the next case the Court decided that non-notification of a draft technical regulation (as defined by the Directive) affected the enforceability of that measure before the courts of the defaulting Member State.

***CIA Security International SA* v *Signalson SA and Securitel Sprl* (Case C-194/94)**

[1996] ECR 1-2201, Court of Justice of the European Communities

Signalson and Securitel sought a court order from a Belgian court requiring that their competitor CIA Security cease marketing a burglar alarm. The alarm was not compatible with Belgian technical standards. But the Belgian technical standards had not been notified to the Commission, as was required by Directive 83/189. Did this State default have any effect in the national proceedings involving two private parties? The Directive did not address the matter. This did not deter the Court.

[42] It is settled law that, wherever provisions of a directive appear to be, from the point of view of their content, unconditional and sufficiently precise, they may be relied on against any national provision which is not in accordance with the directive (see the judgment in Case 8/81 *Becker* [1982] ECR 53 and the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357).

[43] The United Kingdom considers that the provisions of Directive 83/189 do not satisfy those criteria on the ground, in particular, that the notification procedure contains a number of elements that are imprecise.

[44] That view cannot be adopted. Articles 8 and 9 of Directive 83/189 lay 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 may be relied on by individuals before

national courts.

[45] It remains to examine the legal consequences to be drawn from a breach by Member States of their obligation to notify and, more precisely, whether Directive 83/189 is to be interpreted as meaning that a breach of the obligation to notify, constituting a procedural defect in the adoption of the technical regulations concerned, renders such technical regulations inapplicable so that they may not be enforced against individuals.

[46] The German and Netherlands Governments and the United Kingdom consider that Directive 83/189 is solely concerned with relations between the Member States and the Commission, that it merely creates procedural obligations which the Member States must observe when adopting technical regulations, their competence to adopt the regulations in question after expiry of the suspension period being, however, unaffected, and, finally, that it contains no express provision relating to any effects attaching to non-compliance with those procedural obligations.

[47] The Court observes first of all in this context that none of those factors prevents non-compliance with Directive 83/189 from rendering the technical regulations in question inapplicable.

[48] For such a consequence to arise from a breach of the obligations laid down by Directive 83/189, an express provision to this effect is not required. As pointed out above, it is undisputed that the aim of the directive is to protect freedom of movement for goods by means of preventive control and that the obligation to notify is essential for achieving such Community control. 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.

[49] That interpretation of the directive is in accordance with the judgment given in Case 380/87 *Enichern Base and Others* v *Cornune di Cinisello Balsamo* [1989] ECR 2491, paragraphs 19 to 24. In that judgment, in which the Court ruled on the obligation for Member States to communicate to the Commission national draft rules falling within the scope of an article of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p.39), the Court held that neither the wording nor the purpose of the provision in question provided any support for the view that failure by the Member States to observe their obligation to give notice in itself rendered unlawful the rules thus adopted. In this regard, the Court expressly considered that the provision in question was confined to imposing an obligation to give prior notice which did not make entry into force of the envisaged rules subject to the Commission' s agreement or lack of opposition and which did not lay down the procedure for Community control of the drafts in question. The Court therefore concluded that the provision under examination concerned relations between the Member States and the Commission but that it did not afford individuals any right capable of being infringed in the event of breach by a Member State of its obligation to give prior notice of its draft regulations to the Commission.

[50] In the present case, however, the aim of the directive is not simply to inform the Commission. As already found in paragraph 41 of this judgment, the directive has, precisely, a more general aim of eliminating or restricting obstacles to trade, to inform other States of technical regulations envisaged by a State, to give the Commission and the other Member States time to react and to propose amendments for lessening restrictions to the free movement of goods arising from the envisaged measure and to afford the Commission time to propose a harmonising directive. Moreover, the wording of Articles 8 and 9 of Directive 83/189 is clear in that those articles provide for a procedure for Community control of draft national regulations and the date of their entry into force is made subject to the Commission' s agreement or lack of opposition.

NOTE: The *effectiveness* rationale contained in para 48 is remarkably far-reaching. It was also encountered in *Ratti* (Case 148/78 para 21, p.134 above)). But the reasoning in *Ratti* was treated more circumspectly by the Court subsequently in *Marshall* (Case 152/84, p. 136), and the approach taken in *CIA Security* has also been curtailed in the light of the salutary experience provided by litigation.

***Johannes Martinus Lemmens* (Case C-226/97)**

[1998] ECR 1-3711, Court of Justice of the European Communities

Lemmens was charged with driving while under the influence of alcohol. He argued that the breathalyser was made according to a technical standard that had not been notified to the Commission and that accordingly, following *CIA Security,* it was incompatible with Community law to rely on such evidence before national (criminal) courts. Para 12 of the judgment records Mr Lemmens' disingenuous but ingenious idea:

It is apparent from the order for reference that, in the course of the criminal proceedings instituted against him, Mr Lemmens said 1 understand from the press that there are difficulties regarding the breath-analysis apparatus. I maintain that this apparatus has not been notified to Brussels and wonder what the consequences of this could be for my case'.

The Court concluded that the Dutch Regulation governing breathalyser kits constituted a technical regulation which should, prior to its adoption, have been notified to the Commission in accordance with Article 8 of the Directive. But with what consequence?

[32] . . . it should be noted that, in paragraph 40 of its judgment in *CIA Security International,* cited above, the Court emphasised that the Directive is designed to protect, by means of preventive control, freedom of movement for goods, which is one of the foundations of the Community. This control serves a useful purpose in that technical regulations covered by the Directive may constitute obstacles to trade in goods between Member States, such obstacles being permissible only if they are necessary to satisfy compelling requirements relating to the public interest.

[33] In paragraphs 48 and 54 of that judgment, the Court pointed out that the obligation to notify is essential for achieving such Community control and went on to State that the effectiveness of such 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, and thus unenforceable against individuals.

[34] In criminal proceedings such as those in the main action, the regulations applied to the accused are those which, on the one hand, prohibit and penalise driving while under the influence of alcohol and, on the other, require a driver to exhale his breath into an apparatus designed to measure the alcohol content, the result of that test constituting evidence in criminal proceedings. Such regulations differ from those which, not having been notified to the Commission in accordance with the Directive, are unenforceable against individuals.

[35] While failure to notify technical regulations, which constitutes a procedural defect in their adoption, renders such regulations inapplicable inasmuch as they hinder the use or marketing of a product which is not in conformity therewith, it does not have the effect of rendering unlawful any use of a product which is in conformity with regulations which have not been notified.

[36] The use of the product by the public authorities, in a case such as this, is not liable to create an obstacle to trade which could have been avoided if the notification procedure had been followed.

[37] The answer to the first question must therefore be that the Directive is to be interpreted as meaning that breach of the obligation imposed by Article 8 thereof to notify a technical regulation on breath-analysis apparatus does not have the effect of making it impossible for evidence obtained by means of such apparatus, authorised in accordance with regulations which have not been notified, to be relied upon against an individual charged with driving while under the influence of alcohol.

Paragraph 35 of *Lemmens* provides a re-focusing of the test applied in *CIA Security.* Paragraph 36 constitutes a narrower reading of the *effectiveness* rationale. In the next case the Court explicitly adopts the reasoning advanced in *Lemmens* but accepts the application of the notification Directive in litigation between two contracting parties in which, at first glance, the State had no involvement.

***Unilever Italia SpA* v *Central Food SpA* (Case C-443/98)**

[2000] ECR I-7535, Court of Justice of the European Communities

Unilever had supplied Central Food with a quantity of virgin olive oil. Central Food rejected the goods on the basis that they were not labelled in accordance with a relevant Italian law. This law had been notified to the Commission but Italy had not observed the Directive's 'standstill' obligation, which required it to wait a defined period before bringing the law into force. The Court treated breach of the 'standstill' obligation as indistinguishable for these purposes from outright failure to notify (which was the nature of the default in both *CIA Security* and *Lemmens).* Unilever submitted that the law should not be applied and sued Central Food under the contract for the price of the goods.

[46] … in civil proceedings of that nature, application of technical regulations adopted in breach of Article 9 of Directive 83/189 may have the effect of hindering the use or marketing of a product which does not conform to those regulations.

[47] That is the case in the main proceedings, since application of the Italian rules is liable to hinder Unilever in marketing the extra virgin olive oil which it offers for sale.

[48] Next, it must be borne in mind that, in *CIA Security,* the finding of inapplicability as a legal consequence of breach of the obligation of notification was made in response to a request for a preliminary ruling arising from proceedings between competing undertakings based on national provisions prohibiting unfair trading.

[49] Thus, it follows from the case law of the Court that the inapplicability of a technical regulation which has not been notified in accordance with Article 8 of Directive 83/189 can be invoked in proceedings between individuals for the reasons set out in paragraphs 40 to 43 of this judgment. The same applies to non-compliance with the

obligations laid down by Article 9 of the same directive, and there is no reason, in that connection, to treat disputes between individuals relating to unfair competition, as in the *CIA Security* case, differently from disputes between individuals concerning contractual rights and obligations, as in the main proceedings.

[50] Whilst it is true, as observed by the Italian and Danish Governments, that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20), that case-law does not apply where non-compliance with Article 8 or Article 9 of Directive 83/189, which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable.

[51] In such circumstances, and unlike the case of non-transposition of directives with which the case-law cited by those two Governments is concerned, Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals.

[52] In view of all the foregoing considerations, the answer to the question submitted must be that a national court is required, in civil proceedings between individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation which was adopted during a period of postponement of adoption prescribed in Article 9 of Directive 83/189.

NOTE: This is *not* horizontal direct effect. The Directive did not impose an obligation on Central Food. The contract with Unilever imposed the obligation. This seems to be the Court's point in para 51. But the invocation of the Directive completely changed the legal position that had appeared to prevail between the two parties under the contract. It transplanted the commercial risk.

Advocate-General Jacobs had argued vigorously in his Opinion in *Unilever that* legal certainty would be damaged by a finding that the notification Directive be relevant to the status of the contractual claim between private parties.

ADVOCATE-GENERAL JACOBS:

[99] . . . The fact that a Member State did not comply with the procedural requirements of the directive as such should not, in my view, entail detrimental effects for individuals.

[100] That is, first, because such effects would be difficult to justify in the light of the principle of legal certainty. For the day-to-day conduct of trade, technical regulations which apply to the sale of goods must be clearly and readily identifiable as enforceable or as unenforceable. Although the present dispute concerns a relatively small quantity of bottled olive oil of a value which may not affect the finances of either Unilever or Central Food to any drastic extent, it is easy to imagine an exactly comparable case involving highly perishable goods and sums of money which represent the difference between prosperity and ruin for one or other of the parties concerned. In order to avoid difficulties in his contractual relations, an individual trader would have to be aware of the existence of Directive 83/189, to know the judgment in *CIA Security,* to identify a technical regulation as such, and to establish with certainty whether or not the Member State in question had complied with all the procedural requirements of the directive. The last element in particular might prove to be extremely difficult because of the lack of publicity of the procedure under the directive. There is no obligation on the Commission to publish the fact that a Member State has notified or failed to notify a given draft technical regulation. In respect of the standstill periods under Article 9 of the directive, there is no way for individuals to know that other Member States have triggered the six-month standstill period by delivering detailed opinions to the Commission. Similarly, the Commission is also not required to publish the fact that it has informed a Member State of intended or pending Community legislation.

[101] The second problem is possible injustice. If failure to notify were to render a technical regulation unenforceable in private proceedings an individual would lose a case in which such a regulation was in issue, not because of his own failure to comply with an obligation deriving from Community law, but because of a Member State's behaviour. The economic survival of a firm might be threatened merely for the sake of the effectiveness of a mechanism designed to control Member States' regulatory activities. That would be so independently of whether the technical regulation in question constituted an obstacle to trade, a measure with neutral effects on trade, or even a rule furthering trade. The only redress for a trader in such a situation would be to bring ex post a hazardous and costly action for damages against a Member State. Nor is there any reason for the other party to the proceedings to profit, entirely fortuitously, from a Member State's failure to comply with the directive.

[102] It follows, in my view, that the correct solution in proceedings between individuals is a substantive solution. The applicability of a technical regulation in proceedings between individuals should depend only on its compatibility with Article 30 [now 28: Chapter 11 of this book] of the Treaty. If in the present case Italian Law No 313 complies with Article

30, I can see no reason why Central Food, which understandably relied on the rules laid down in the Italian statute book, should lose the case before the national court. If, however, Italian Law No 313 infringes Article 30 then the national court should be obliged to set the Law aside on that ground.

[103] I accordingly conclude that as against an individual another individual should not be able to rely on a Member State's failure to comply with the requirements of Directive 83/189 in order to set aside a technical regulation.

NOTE: Plainly these anxieties did not move the Court in *Unilever.* It did not follow the Advocate-General and it did not limit the matter to resolution under Article 28 (ex 30) EC, concerning the free movement of goods. It accepted the incidental effect of the notification Directive on the contractual claim. This thrusts EC law of market integration deep into national contract law in so far as private compliance with technical standards is at stake. In the next case the Court nonetheless adopts an additional line of reasoning which may be capable of providing a basis for softening some of the harsh commercial uncertainty likely to flow from the principle that technical standards may be treated as unenforceable by national courts if the requirements of the notification Directive are not observed bv the State.

***Sapod Audic* v *Eco-Emballages SA* (Case C-159/00)**

[2002] ECR 1-5031, Court of Justice of the European Communities

[49] … it should be observed, first, that according to settled case law Directive 83/189 must be interpreted as meaning that a failure to observe the obligation to notify laid down in Article 8 of that directive constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable and thus unenforceable against individuals (see, in particular, *CIA Security International,* paragraphs 48 and 54, and *Lemmens,* paragraph 33).

[50] Second, it should be borne in mind that according to the case law of the Court the inapplicability of a technical regulation which has not been notified to the Commission in accordance with Article 8 of Directive 83/189 may be-invoked in legal proceedings between individuals concerning, *inter alia,* contractual rights and duties (see *Unilever,* paragraph 49).

[51] Accordingly, if the national court were to interpret the second paragraph of Article 4 of Decree No 92-377 as establishing an obligation to apply a mark or label and, hence, as constituting a technical regulation within the meaning of Directive 83/189, it would be incumbent on that court to refuse to apply that provision in the main proceedings.

[52] It should, however, be observed that the question of the conclusions to be drawn in the main proceedings from the inapplicability of the second paragraph of Article 4 of Decree No 92-377 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. However, those rules and principles may not be less favourable than those governing similar domestic actions (principle of equivalence) and may not be framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness) (see, *inter alia,* Case 33/76 *Rewe* v *Landwirtschaftskammer fur das Saarland* [1976] ECR 1989, paragraph 5, and Joined Cases C-52/99 and C-53/99 *Camorotto and Vignone* [2001] ECR 1-1395, paragraph 21).

NOTE: The principles of equivalence and effectiveness, mentioned in para 52, were examined above in Chapter 4, p.122 above. With reference to relevant national rules on remedies with which you are familiar, consider what they may mean in the context sketched by the Court in para 52 of *Sapod Audic.*

In conclusion, none of these decisions on 'incidental' effect overturns the Court's long-standing exclusion of the horizontal direct effect of Directives. After all in none of these cases did a Directive impose an obligation directly on a private party. However these decisions do demonstrate that the legal position of private parties may be prejudicially affected by the lurking presence of an unimplemented Directive of which they may be perfectly unaware.

• QUESTION

The Court's case law places a sharp distinction between the horizontal direct effect of Directives (which is not allowed) and the 'incidental' effect of Directives of private parties (which is allowed). Is this distinction fair?

SECTION 5: THE PRINCIPLE OF INDIRECT EFFECT, OR THE OBLIGATION OF 'CONFORM-

INTERPRETATION'

The previous section questioned the extent to which the rejected notion that Directives may exert horizontal direct effect can be rationally sealed off from the phenomenon of incidental effect. But however one chooses to categorize the horizontal direct effect/incidental effect case law, and however one defines the 'State' for the purposes of fixing the outer limits of 'vertical' direct effect (Case 152/84 *Marshall,* p.136 above), an unavoidable anomaly taints the law governing the scope of the direct effect of Directives. Consider the sex discrimination Directives. If a State has failed to implement a Directive properly, then, provided that the standard *Van Gend en Loos* (Case 26/62) 'test' for direct effect is met by the provision in question, a State employee can rely on the direct effect of the Directive (vertical direct effect). A private employee cannot (horizontal direct effect). So, in the UK, where Directive 76/207 on Equal Treatment of the Sexes was not properly implemented in time, Ms Marshall (above), a State employee, succeeded in relying on Community law, whereas Ms Duke *(Duke vGEC Reliance* [1988] 2WLR359, [1988] 1 All ER 626), who was making the same complaint, failed, for she happened to be a private sector employee.

The UK had made this point in *Marshall* (Case 152/84) as a reason for *withholding* direct effect, but its objections were swept aside by the Court in para 51 of the judgment (p.138 above). Yet the anomaly is real, even if the Court's refusal to permit a recalcitrant State to benefit from pointing it out is understandable. Submissions in Don (Case C-91/92, p.141 above) urged the Court to eliminate the anomaly by *extending* direct effect, but these were not successful.

The European Court's contribution to the resolution of this anomaly first began to take shape in *Von Colson and Kamann* v *Land Nordrhein-Westfalen* (Case 14/83) and *Harz* v*Deutsche Tradax* (Case 79/83). Mention is made of Case 14/83 in para 41 of the judgment in *Marshall* at p.137 above, but the Court's approach in the case deserves careful separate attention.

***Von Colson and Kamann* v *Land Nordrhein-Westfalen* (Case 14/83)**

[1984] ECR 1891, [1986] 2 CMLR 430, Court of Justice of the European Communities

The case was a preliminary reference from Germany, and concerned that fertile source of litigation, the Equal Treatment Directive 76/207. The issue was described by the Court as follows:

[2] Those questions were raised in the course of proceedings between two qualified social workers, Sabine von Colson and Elisabeth Kamann, and the Land Nordrhein-Westfalen. It appears from the grounds of the order for reference that Werl prison, which caters exclusively for male prisoners and which is administered by the Land Nordrhein-Westfalen, refused to engage the plaintiffs in the main proceedings for reasons relating to their sex. The officials responsible for recruitment justified their refusal to engage the plaintiffs by citing the problems and risks connected with the appointment of female candidates and for those reasons appointed instead male candidates who were however less well-qualified.

[3] The Arbeitsgehcht Hamm held that there had been discrimination and took the view that under German law the only sanction for discrimination in recruitment is compensation for 'Vertrauens-schaden', namely the loss incurred by candidates who are victims of discrimination as a result of their belief that there would be no discrimination in the establishment of the employment relationship. Such compensation is provided for under Paragraph 611 a(2) of the Burgerliches Gesetzbuch.

[4] Under that provision, in the event of discrimination regarding access to employment, the employer is liable for 'damages in respect of the loss 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 such a breach [of the principle of equal treatment]'. That provision purports to implement Council Directive No 76/207.

[5] Consequently the Arbeitsgericht found that, under German law, it could order the reimbursement only of the travel expenses incurred by the plaintiff von Colson in pursuing her application for the post (DM 7.20) and that it could not allow the plaintiffs' other claims.

Von Colson's objection centred on Article 6 of the Directive:

[18] Article 6 requires Member States to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by discrimination 'to pursue their claims by judicial process'. It follows from the provision that Member States are required to adopt measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned. Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation, backed

up where necessary by a system of fines. However the directive does not prescribe a specific sanction; it leaves Member States free to choose between the different solutions suitable for achieving its objective.

Was this adhered to in the German legal order? The Court's approach was markedly different from standard 'direct effect' analysis:

[22] It is impossible to establish real equality of opportunity without an appropriate system of sanctions. That follows not only from the actual purpose of the directive but more specifically from Article 6 thereof which, by granting applicants for a post who have been discriminated against recourse to the courts, acknowledges that those candidates have rights of which they may avail themselves before the courts.

[23] Although, as has been stated in the reply to Question 1, full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.

[24] In consequence it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the directive.

[25] The nature of the sanctions provided for in the Federal Republic of Germany in respect of discrimination regarding access to employment and in particular the question whether the rule in Paragraph 611a (2) of the Burgerliches Gesetzbuch excludes the possibility of compensation on the basis of the general rules of law were the subject of lengthy discussion before the Court. The German Government maintained in the oral procedure that that provision did not necessarily exclude the application of the general rules of law regarding compensation. It is for the national court alone to rule on that question concerning the interpretation of its national law.

[26] However, the Member States' obligation arising from *a* directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.

[27] On the other hand, as the above considerations show, the directive does not include any unconditional and sufficiently precise obligation as regards sanctions for discrimination which, in the absence of implementing measures adopted in good time may be relied on by individuals in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law.

[28] It should, however, be pointed out to the national court that although Directive No 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.

NOTE: J. Steiner, (1985) 101 LQR 491, observed that the decision marks 'a subtle but significant change of direction' in the European Court's approach to the enforceability of EEC Directives before national courts'. P. Morris, (1989) JBL 233, at p.241, suggested that 'if national judiciaries respond positively to this exhortation [in *Von Colson]* something approaching horizontal direct effect may be achieved by a circuitous route'. B. Fitzpatrick, (1989) 9 OJLS 336, at p.346, refers to *Von Colson* having established a principle of 'indirect effect' and suggests that 'it may effectively bridge the gap between vertical and horizontal direct effect'.

• QUESTION

To what extent do you think the *Von Colson* approach offers a route for resolving the anomalies of the horizontal/vertical direct effect distinction which emerges from the Court's ruling in *Marshall* (Case 152/84)?

NOTE: In the *Von Colson* (Case 14/83) judgment itself, one can pick out important contradictions in respect of the national court's task of 'conform-interpretation' (para 28). Compare the second sentence of para 26 with the more qualified statement in the concluding sentence of the Court's ruling in answer to the questions referred to above. The next two cases are both worthy of examination from the perspective of clarifying the ambit of *Von Colson* (Case 14/83).

Offic/er *van* Just/tie v *Kolpinghuis Nijmegen* (Case 80/86)

[1987] ECR 3969, Court of Justice of the European Communities

A criminal prosecution was brought against a cafe owner for stocking mineral water which was in fact simply fizzy tap water. The Dutch authorities sought to supplement the basis of the prosecution by relying on definitions of mineral water detrimental to the defendant which were contained in a Directive which had not been implemented in The Netherlands. A preliminary reference was made to the European Court.

The Court ruled that 'a national authority may not rely, as against an individual, upon a provision of a Directive whose necessary implementation in national law has not yet taken place'. It then turned to the third question referred to it:

[11] The third question is designed to ascertain how far the national court may or must take account of a directive as an aid to the interpretation of a rule of national law.

[12] As the Court stated in its judgment of 10 April 1984 in Case 14/83 *Von* Co/son and *Kamann* v Land *Nordrhein-Westfalen* [1984] ECR 1891, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement the directive, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty.

[13] However, that obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity. Thus the Court ruled in its judgment of 11 June 1987 in Case 14/86 Pretore *di* So/6 v X [1987] ECR 2545 that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.

[14] The answer to the third question should therefore be that in applying its national legislation a court of a Member State is required to interpret that legislation in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty, but a directive cannot, 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.

NOTE: The Court is anxious to emphasise the importance of preserving legal certainty and protecting reasonable expectations. See also Case C-168/95 *Luciano Arcaro* [1996] ECR 1-4705.

***Marleasing SA* v *La Comercial International de Alimentation SA* (Case C-106/89)**

[1990] ECR 1-4135, Court of Justice of the European Communities

The case arose out of a conflict between the Spanish Civil Code and Community Company Law Directive (68/151) which was unimplemented in Spain. The litigation was between private parties, which, following *Marshall* (Case 152/84), ruled out the direct effect of the Directive. The European Court explained the national court's duty of interpretation in the following terms:

[8]… [T]he Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and

thereby comply with the third paragraph of Article 189 of the Treaty.

NOTE: The obligation imposed on national courts in *Marleasing* (Case C-108/89) has a firmer feel than that in *Von Colson* (Case 14/83, p.152 above). See J. Stuyck and P. Wytinck, (1991) 28 CMLRev205.

The Court also confirmed the obligation of sympathetic interpretation that is cast on national courts by virtue of what was Article 5 and is now Article 10 EC post-Amsterdam in its ruling in *Paola Faccini Dori* (Case C-91/92). Even though Ms Dori was not able to rely directly on the unimplemented Directive in proceedings involving another private party (p.141 above), she was entitled to expect that the national court would not simply ignore the Directive in applying national law.

***Paola Faccini Dori* v *Recreb Sri* (Case C-91/92)**

[1994] ECR I-3325, Court of Justice of the European Communities

[26] It must also be borne in mind that, as the Court has consistently held since its judgment in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. The judgments of the Court in Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentation* [1990] ECR 1-4135, paragraph 8, and Case C-334/92 *Wagner Miret* v *Fonda de Garantia Salahal* [1993] ECR 1-6911, paragraph 20, make it clear that, when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the Treaty.

NOTE: The logic of this reasoning leads to the conclusion that the Community law obligations pertaining to the absorption of a Directive into the national legal order are enduring, and do not come to an end on the Directive's transposition 'on paper' into national law. This is made clear in the next case.

***Marks and Spencer pic* v *Commissioners of Customs and Excise* (C-62/00)**

[2002] ECR 1-6325, Court of Justice of the European Communities

[24] … it should be remembered, first, that the Member States' obligation under a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty (now Article 10 EC) to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, *inter alia,* Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 41). It follows that in applying domestic law the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording and purpose of the directive, in order to achieve the purpose of the directive and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) (see, in particular, Case C-106/89 *Marleasing* [1990] ECR 1-4135, paragraphs, and Case C-334/92 *Wagner Miret* [1993] ECR 1-6911, paragraph 20).

[25] Second, as the Court has consistently held, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, *inter alia,* Case 8/81 *Becker* [1982] ECR 53, paragraph 25; Case 103/88 Prate/// *Costanzo* [1989] ECR 1839, paragraph 29; and Case C-319/97 *Kortas* [1999] ECR 1-3143, paragraph 21).

[26] Third, it has been consistently held that implementation of a directive must be such as to ensure its application in full (see to that effect, in particular, Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 31, and Case C-214/98 *Commission* v Greece [2000] ECR 1-9601, paragraph 49).

[27] Consequently, the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it.

[28] As the Advocate General noted in point 40 of his Opinion, it would be inconsistent with the Community legal

order for individuals to be able to rely on a directive where it has been implemented incorrectly but not to be able to do so where the national authorities apply the national measures implementing the directive in a manner incompatible with it.

NOTE: The scope of the obligation to interpret national law in conformity with a Directive was taken a step further in the next case. However, the Court did not help to stabilize and clarify the State of the law by introducing textual anomalies into its ruling.

***Centrosteel Sri* v *Adipol GmbH* (Case C-456/98)**

[2000] ECR I-6007, Court of Justice of the European Communities

[15] It is true that, according to settled case law of the Court, in the absence of proper transposition into national law, a directive cannot of itself impose obligations on individuals (Case 152/84 *Marshall* v *Southampton and* South-West *Hampshire Health Authority* [1986] ECR 723, paragraph 48, and Case C-91/92 *Facdni Don* v *Recreb* [1994] ECR I-3325, paragraph 20).

[16] However, it is also apparent from the case law of the Court (Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentation* [1990] ECR 1-4135, paragraph 8; Case C-334/92 *Wagner Miret* v Fondo de *Garantia Salarial* [1993] ECR 1-6911, paragraph 20; *Facdni* Dor/, paragraph 26; and Joined Cases C-240/98 to C-244/98 Oceano *Grupo Editorial* v *Salvat* Ed/tores [2000] ECR 1-4941, paragraph 30) that, when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC).

[17] Where it is seised of a dispute falling within the scope of the Directive and arising from facts postdating the expiry of the period for transposing the Directive, the national court, in applying provisions of domestic law or settled domestic case law, as seems to be the case in the main proceedings, must therefore interpret that law in such a way that it is applied in conformity with the aims of the Directive...

The reference in para 17 to the application of 'settled domestic case law' in conformity with the aims of the Directive is striking. However, this phrase is missing from the formal ruling.

Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents precludes national legislation which makes the validity of an agency contract conditional upon the commercial agent being entered in the appropriate register. The national court is bound, when applying provisions of domestic law predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive, so that those provisions are applied in a manner consistent with the result pursued by the Directive.

NOTE: In its subsequent ruling in *AXA Royal Beige* (Case C-386/00 [2002] ECR1-2209) the Court referred explicitly to its own ruling in *Centrosteel* (Case C-456/98), but cited only paragraphs 15 and 16, not 17!

This peculiarity was not addressed directly by the Court in the next case, but the Court did take the opportunity to refer to *Centrosteel* and to revisit its view of the nature of the obligation imposed on national judges.

***Bernhard Pfeiffer* v *Deutsches Rotes Kreuz* (Joined Cases C-397/01 to C-403/01)**

Judgment of 5 October 2004, Court of Justice of the European Communities

The litigation, originating before German labour courts, concerned matters falling within the scope of Directive 89/391 on health and safety at work and Directive 93/ 104 on the organization of working time. After confirming its long-standing refusal to accept that Directives are capable of application in litigation before national courts exclusively involving private parties - that is, no horizontal direct effect -the Court insisted:

[111] It is 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.

[112] That is *a fortiori* the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned (see Case C-334/92 *Wagner Miret[1*993] ECR 1-6911, paragraph 20).

[113] Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see to that effect, inter alia, the judgments cited above in *Von* Co/son *and Kamann,* paragraph 26; /War/easing, paragraph 8, and *Faccini* Dor/, paragraph 26; see also Case C-63/97 *BMW* [1999] ECR I-905, paragraph 22; Joined Cases C-240/98 to C-244/98 *Oceano Grupo Editorial and Salvat* Ed/tores [2000] ECR 1-4941, paragraph 30; and Case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-OOOO, paragraph 21).

[114] The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it (see, to that effect, Case C-160/01 *Mau* [2003] ECR 1-4791, paragraph 34).

[115] Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive (see, to that effect, *Carbonari* [Case C-131/97], paragraphs 49 and 50).

[116] In that context, if the application of interpretative 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.

[117] In such circumstances, the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive (see, to that effect, the judgment in Case C-456/98 Centrostee/[2000] ECR I-6007, paragraphs 16 and 17).

[118] In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 93/104 is fully effective, in order to prevent the maximum weekly working time laid down in Article 6(2) of the directive from being exceeded (see, to that effect, /War/easing, paragraphs 7 and 13).

[119] Accordingly, it must be concluded that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded.

The assertion in para 114 that the principle of conform-interpretation is 'inherent in the system of the Treaty' is strikingly bold. However, this cements a direct connection between this principle and the Court's finding in *Francovich* (Cases C-6/90 & C-9/90) that a State may be liable for damage caused to individuals as a result of breach of EC law. That judgment too locates the principle as 'inherent in the system of the Treaty' (para 35 of the judgment in *Francovich,* p.162 below).

If the obligation cast on national courts is inherent in the system of the Treaty it is not to be confined to the impact of Directives. A Regulation is directly applicable but may in some circumstances leave room for necessary national implementation (for example in fixing penalties in the event of infringement). In Case C-60/02 *Rolex* judgment of 7 January 2004 the Court transposed the principle of 'conform-interpretation' from the sphere of Directives to the context of a Regulation of this type. It stated that 'National courts are required to interpret their national law within the limits set by Community law, in order to achieve the result intended by the Community rule in question', referring to Case C-106/89 *Marleasing* [1990] ECR 1-4135 (para 59 of the ruling in *Rolex).* However, the Court accepted the relevance of principles of legal certainty and of non-retroactivity in criminal matters, which preclude an EC act from determining or aggravating the liability in criminal law of persons who act in contravention of its provisions, referring to Case C-168/95 *Arcaro* [1996] ECR 1-4705, mentioned at p. 155 above.

Cases and Materials on EU Law (8th Edition)

Stephen Weatherill
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Pps 59-66 (Extracts): Proportionality

The principle of proportionality is not spelled out in those terms in the EC Treaty. But Article 5(3) captures the concept.

ARTICLE 5(3) EC

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

This statement is amplified by the Protocol attached to the EC Treaty on the application of the principles of subsidiarity and proportionality, which, admittedly, is more concerned to elucidate the former principle than the latter.

NOTE: Article 5(3) is a relative newcomer to the EC Treaty. It was inserted by the Maastricht Treaty and therefore entered into force only in 1993 (p.9 above). The Court had long before already developed proportionality as a basis for checking the exercise of power in the Community. So Article 5(3) clearly establishes the shape of the principle, but it is the Court's case law that amplifies what is at stake in applying the principle of proportionality.

The following case arose before English courts. It reached the European Court *via* the Article 234 preliminary reference procedure which allows national courts to cooperate with the Community Court and is discussed in Chapter 7. It allows the European Court to answer questions about Community law referred to it by a national court. The European Court took the opportunity in this case to insist that Community legislation must conform to the principle of proportionality.

***R* v *Intervention Board,* exports *Man (Sugar) Ltd* (Case 181/84)**

[1985] ECR 2889, Court of Justice of the European Communities

The case involved the sugar market, which is regulated by Community legislation administered at national level. Man, a British sugar trader, submitted to the Intervention Board, the regulatory agency, tenders for the export of sugar to States outside the Community. It lodged securities with a bank. Under relevant Community legislation, Man ought to have applied for export licences by noon on 2 August 1983. It was nearly four hours late, because of its own internal staff difficulties. The Board, acting pursuant to Community Regulation 1880/83, declared the security forfeit. This amounted to £1,670,370 lost by Man. Man claimed that this penalty was disproportionate; a small error resulted in a severe sanction. It accordingly instituted judicial review proceedings before the English courts in respect of the Board's action and argued that the authorising Community legislation was invalid because of its disproportionate effect. The matter was referred to the European Court under the preliminary reference procedure. Man's submission was explained by the Court as follows:

[16] ... Man Sugar maintains that, even if it is accepted that the obligation to apply for an export licence is justifiable, the forfeiture of the entire security for failure to comply with that obligation infringes the principle of proportionality, in particular for the following reasons: the contested regulation unlawfully imposes the same penalty for failure to comply with a secondary obligation - namely, the obligation to apply for an export licence - as for failure to comply with the primary obligation to export the sugar. The obligation to apply for an export licence could be enforced by other, less drastic means than the forfeiture of the entire security and therefore the burden imposed is not necessary for the achievement of the aims of the legislation. The severity of the penalty bears no relation to the nature of the default, which may, as in the present case, be only minimal and purely technical.

The Court held:

[20] It should be noted that, as the Court held in its judgments of 20 February 1979 (Case 122/78, *Buitoni* v *FORMA,* [1979] ECR 677) and of 23 February 1983 (Case 66/82, Fromonco *SA* v *FORMA,* [1983] ECR 395), in order to establish whether a provision of Community law is in conformity with the principle of proportionality it is necessary to ascertain whether the means which it employs are appropriate and necessary to attain the objective sought. Where Community legislation makes a distinction between a primary obligation, compliance with which is necessary in order to attain the objective sought, and a secondary obligation, essentially of an administrative nature, it cannot, without breaching the principle of proportionality, penalize failure to comply with the secondary obligation as

severely as failure to comply with the primary obligation.

[21] It is clear from the wording of the abovementioned Council and Commission regulations concerning standing invitations to tender for exports of white sugar, from an analysis of the preambles thereto and from the statements made by the Commission in the proceedings before the Court that the system of securities is intended above all to ensure that the undertaking, voluntarily entered into by the trader, to export the quantities of sugar in respect of which tenders have been accepted is fulfilled. The trader's obligation to export is therefore undoubtedly a primary obligation, compliance with which is ensured by the initial lodging of a security of 9 ECU per 100 kilograms of sugar.

[22] The Commission considers, however, that the obligation to apply for an export licence within a short period, and to comply with that time-limit strictly, is also a primary obligation and as such is comparable to the obligation to export; indeed, it is that obligation alone which guarantees the proper management of the sugar market. In consequence, according to the Commission, failure to comply with that obligation, and in particular failure to comply with the time-limit, even where that failure is minimal and unintentional, justifies the forfeiture of the entire security, just as much as the total failure to comply with the primary obligation to export justifies such a penalty.

[23] In that respect the Commission contended, both during the written procedure and in the oral argument presented before the Court, that export licences fulfil four separate and important functions:

(i) They make it possible to control the release onto the market of sugar.

(ii) They serve to prevent speculation.

(iii) They provide information for the relevant Commission departments.

(iv) They establish the system of monetary compensatory amounts chosen by the exporter.

[24] As regards the use of export licences to control the release onto the world market of exported sugar, it must be noted that the traders concerned have a period of five months within which to export the sugar and no Community provision requires them to export it at regular, staggered intervals. They may therefore release all their sugar onto the market over a very short period. In those circumstances export licences cannot be said to have the controlling effect postulated by the Commission. That effect is guaranteed, though only in part, simply by staggering the invitations to tender.

[25] The Commission considers, secondly, that the forfeiture of the entire security for failure to comply with the time-limit for applying for an export licence makes it possible to prevent traders from engaging in speculation with regard to fluctuations in the price of sugar and in exchange rates and accordingly delaying the submission of their applications for export licences.

[26] Even if it is assumed that there is a real risk of such speculation, it must be noted that Article 12(c) of Regulation No 1880/83 requires the successful tenderer to pay the additional security provided for in Article 13(3) of the same regulation. The Commission itself recognised at the hearing that that additional security removes any risk of speculation by traders. It is true that at the hearing the Commission expressed doubts about the applicability of Article 13(3) before export licences have been issued. However, even if those doubts are well founded, the fact remains that a simple amendment of the rules regarding the payment of an additional security, requiring for example that, in an appropriate case, the additional security should be paid during the tendering procedure, in other words, even before the export licence has been issued, would make it possible to attain the objective sought by means which would be much less drastic for the traders concerned. The argument that the fight against speculation justifies the contested provision of Regulation No 1880/83 cannot therefore be accepted.

[27] With regard to the last two functions attributed by the Commission to export licences, it is true that those licences make it possible for the Commission to monitor accurately exports of Community sugar to non-member countries, although they do not provide it with important new information not contained in the tenders and do not, in themselves, guarantee that the export will actually take place. It is also true that the export licence makes it possible for the exporter to state whether he wishes the monetary compensatory amounts to be fixed in advance.

[28] However, although it is clear from the foregoing that the obligation to obtain export licences performs a useful administrative function from the Commission's point of view, it cannot be accepted that that obligation is as important as the obligation to export, which remains the essential aim of the Community legislation in question.

[29] It follows that the automatic forfeiture of the entire security, in the event of an infringement significantly less serious than the failure to fulfil the primary obligation, which the security itself is intended to guarantee, must be considered too drastic a penalty in relation to the export licence's function of ensuring the sound management of the market in question.

[30] Although the Commission was entitled, in the interests of sound administration, to impose a time-limit for the submission of applications for export licences, the penalty imposed for failure to comply with that time-limit should have been significantly less severe for the traders concerned than forfeiture of the entire security and it should have been more consonant with the practical effects of such a failure.

[31] The reply to the question submitted must therefore be that Article 6(3) of Regulation No 1880/83 is invalid inasmuch as it prescribes forfeiture of the entire security as the penalty for failure to comply with the time-limit imposed for the submission of applications for export licences.

NOTE: A key element in the practical expression of the principle of proportionality is the need to show a link between the nature and scope of the measures taken and the object in view. The next extract is taken from a case in which a firm sought to show that a measure affected it disproportionately and that it was accordingly invalid. The issue arose in the coal and steel sector, and therefore the provisions in question were found in the ECSC Treaty, which has now expired. However, the Court explained the nature of the principle of proportionality in terms of general application.

***Valsabbia* v *Commission* (Case 154/78)**

[1980] ECR 907, Court of Justice of the European Communities

[117] It is now necessary to examine whether in view of the omissions established the obligations imposed upon the undertakings cast disproportionate burdens upon the applicants which would constitute an infringement of the principle of proportionality. In reply to the applicants' allegations on this matter, the Commission states that the validity of a general decision cannot depend on the existence or absence of other formally independent decisions.

[118] That argument is not relevant in this case and the Court must inquire whether the defects established imposed disproportionate burdens upon the applicants, having regard to the objectives laid down by Decision No 962/77. But the Court has already recognised in its judgment of 24 October 1973 in Case 5/73, *Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091, that 'In exercising their powers, the Institutions must ensure that the amounts which commercial operators are charged are no greater than is required to achieve the aim which the authorities are to accomplish; however, it does not necessarily follow that that obligation must be measured in relation to the individual situation of any one particular group of operators'.

[119] It appears that, on the whole, the system established by Decision No 962/77 worked despite the omissions disclosed and in the end attained the objectives pursued by that decision. Although it is true that the burden of the sacrifices required of the applicants may have been aggravated by the omissions in the system, that does not alter the fact that that decision did not constitute a disproportionate and intolerable measure with regard to the aim pursued.

[120] In those circumstances, and taking into consideration the fact that the objective laid down by Decision No 962/77 is in accordance with the Commission's duty to act in the common interest, and that a necessary consequence of the very nature of Article 61 of the ECSC Treaty is that certain undertakings must, by virtue of European solidarity, accept greater sacrifices than others, the Commission cannot be accused of having imposed disproportionate burdens upon the applicants.

NOTE: The nature of the Court's scrutiny is influenced by the type of act subject to challenge. (See, for example, Hermann, G., 'Proportionality and Subsidiarity' Ch. 3 in Barnard, C. and Scott, J., *The Law of the Single European Market* (Oxford: Hart Publishing, 2002).) It was mentioned above (p.43) that the UK's submission that Directive 93/104 on Working Time violated the principle of proportionality was rejected. The Court explained its role in the following terms.

***United Kingdom* v *Council* (Case C-84/94)**

[1996] ECR I-5755, Court of Justice of the European Communities

[57] As regards the principle of proportionality, the Court has held that, in order to establish whether a provision of Community law complies with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it (see, in particular, Case C-426/93 *Germany* v *Council* [1995] ECR I-3723, paragraph 42).

[58] As to judicial review of those conditions, however, the Council must be aiiowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has

been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion.

There were no such flaws and consequently the plea failed. Notice that in Case 181/84 (p.59 above) Man Sugar was not complaining about a broad legislative choice. The matter was more specific to its circumstances. In Case C-84/94 the Court's concession that the legislature be allowed a 'wide discretion' in areas of policy choice means that the principle of proportionality, though flexible and therefore a tempting addition to any challenge to the validity of a Community act, is only infrequently held to have been violated where broad legislative choices are impugned. This is well illustrated by revisiting a ruling already considered above.

R v Secretary of State for *Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (Case C-491/01)

[2002] ECR 1-11543, Court of Justice of the European Communities

The validity of Directive 2001/37, which amended and extended common rules governing tar yields and warnings on tobacco product packaging, was challenged in this case. As explained above (p.51), the Court was not persuaded that an incorrect legal base had been chosen. The applicant fared no better by alleging the measure violated the principle of proportionality.

[122] As a preliminary point, it ought to be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (see, *inter alia,* Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15; Case C-339/92 *ADM Qlmuhlen* [1993] ECR I-6473, paragraph 15, and Case C-210/00 *Kaserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 59).

[123] With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see, to that effect, Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 58; Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraphs 55 and 56, and Case C-157/96 *National Farmers' Union and Others* [1998] ECR 1-2211, paragraph 61).

[124] With regard to the Directive, the first, second and third recitals in the preamble thereto make it clear that its objective is, by approximating the rules applicable in this area, to eliminate the barriers raised by differences which, notwithstanding the harmonization measures already adopted, still exist between the Member States' laws, regulations and administrative provisions on the manufacture, presentation and sale of tobacco products and impede the functioning of the internal market. In addition, it is apparent from the fourth recital that, in the attaining of that objective, the Directive takes as a basis a high level of health protection, in accordance with Article 95(3) of the Treaty.

[125] During the procedure various arguments have been put forward in order to challenge the compatibility of the Directive with the principle of proportionality, particularly so far as Articles 3, 5 and 7 are concerned.

[126] It must first be stated that the prohibition laid down in Article 3 of the Directive on releasing for free circulation or marketing within the Community cigarettes that do not comply with the maximum levels of tar, nicotine and carbon monoxide, together with the obligation imposed on the Member States to authorise the import, sale and consumption of cigarettes which do comply with those levels, in accordance with Article 13(1) of the Directive, is a measure appropriate for the purpose of attaining the objective pursued by the Directive and one which, having regard to the duty of the Community legislature to ensure a high level of health protection, does not go beyond what is necessary to attain that objective.

[127] Secondly, as pointed out in paragraph 85 above, the purpose of the prohibition, also laid down in Article 3 of the Directive, on manufacturing cigarettes which do not comply with the maximum levels fixed by that provision is to avoid the undermining of the internal market provisions in the tobacco products sector which might be caused by illicit reimports into the Community or by deflections of trade within the Community affecting products which do not comply with the requirements of Article 3(1).

[128] The proportionality of that ban on manufacture has been called into question on the ground that it is not a

measure for the purpose of attaining its objective and that it goes beyond what is necessary to attain it since, in particular, an alternative measure, such as reinforcing inspections of imports from non-member countries, would have been sufficient.

[129] It must here be stated that, while the prohibition at issue does not of itself make it possible to prevent the development of the illegal trade in cigarettes in the Community, having particular regard to the fact that cigarettes which do not comply with the requirements of Article 3(1) of the Directive may also be placed illegally on the Community market after being manufactured in non-member countries, the Community legislature did not overstep the bounds of its discretion when it considered that such a prohibition nevertheless constitutes a measure likely to make an effective contribution to limiting the risk of growth in the illegal trafficking of cigarettes and to preventing the consequent undermining of the internal market.

[130] Nor has it been established that reinforcing controls would in the circumstances be enough to attain the objective pursued by the contested provision. It must be observed that the prohibition on manufacture at issue is especially appropriate for preventing at source deflections in trade affecting cigarettes manufactured in the Community for export to non-member countries, deflections which amount to a form of fraud which, ex *hypothesi,* it is not possible to combat as efficiently by means of an alternative measure such as reinforcing controls on the Community's frontiers.

[131] As regards Article 5 of the Directive, the obligation to show information on cigarette packets as to the tar, nicotine and carbon monoxide levels and to print on the unit packets of tobacco products warnings concerning the risks to health posed by those products are appropriate measures for attaining a high level of health protection when the barriers raised by national laws on labelling are removed. Those obligations in fact constitute a recognised means of encouraging consumers to reduce their consumption of tobacco products or of guiding them towards such of those products as pose less risk to health.

[132] Accordingly, by requiring in Article 5 of the Directive an increase in the percentage of the surface area on certain sides of the unit packet of tobacco products to be given over to those indications and warnings, in a proportion which leaves sufficient space for the manufacturers of those products to be able to affix other material, in particular concerning their trade marks, the Community legislature has not overstepped the bounds of the discretion which it enjoys in this area.

[133] Article 7 of the Directive calls for the following observations.

[134] The purpose of that provision is explained in the 27th recital in the preamble to the Directive, which makes it clear that the reason for the ban on the use on tobacco product packaging of certain texts, such as 'low-tar', light', 'ultra-light', 'mild', names, pictures and figurative or other signs is the fear that consumers may be misled into the belief that such products are less harmful, giving rise to changes in consumption. That recital states in this connection that the level of inhaled substances is determined not only by the quantities of certain substances contained in the product before consumption, but also by smoking behaviour and addiction, which fact is not reflected in the use of such terms and so may undermine the labelling requirements set out in the Directive.

[135] Read in the light of the 27th recital in the preamble, Article 7 of the Directive has the purpose therefore of ensuring that consumers are given objective information concerning the toxicity of tobacco products.

[136] Such a requirement to supply information is appropriate for attaining a high level of health protection on the harmonization of the provisions applicable to the description of tobacco products.

[137] It was possible for the Community legislature to take the view, without overstepping the bounds of its discretion, that stating those tar, nicotine and carbon monoxide levels in accordance with Article 5(1) of the Directive ensured that consumers would be given objective information concerning the toxicity of tobacco products connected to those substances, whereas the use of descriptors such as those referred to in Article 7 of the Directive did not ensure that consumers would be given objective information.

[138] As the Advocate-General has pointed out in paragraphs 241 to 248 of his Opinion, those descriptors are liable to mislead consumers. In the first place, they might, like the word 'mild', for example, indicate a sensation of taste, without any connection with the product's level of noxious substances. In the second place, terms such as 'low-tar', 'light', 'ultra-light', do not, in the absence of rules governing the use of those terms, refer to specific quantitative limits. In the third place, even if the product in question is lower in tar, nicotine and carbon monoxide than other products, the fact remains that the amount of those substances actually inhaled by consumers depends on their manner of smoking and that that product may contain other harmful substances. In the fourth place, the use of descriptions which suggest that consumption of a certain tobacco product is beneficial to health, compared with other tobacco

products, is liable to encourage smoking.

[139] Furthermore, it was possible for the Community legislature to take the view, without going beyond the bounds of the discretion which it enjoys in this area, that the prohibition laid down in Article 7 of the Directive was necessary in order to ensure that consumers be given objective information concerning the toxicity of tobacco products and that, specifically, there was no alternative measure which could have attained that objective as efficiently while being less restrictive of the rights of the manufacturers of tobacco products.

[140] It is not clear that merely regulating the use of the descriptions referred to in Article 7, as proposed by the claimants in the main proceedings and by the German, Greek and Luxembourg Governments, or saying on the tobacco products' packaging, as proposed by Japan Tobacco, that the amounts of noxious substances inhaled depend also on the user's smoking behaviour would have ensured that consumers received objective information, having regard to the fact that those descriptions are in any event likely, by their very nature, to encourage smoking.

[141] It follows from the preceding considerations concerning Question 1(c) that the Directive is not invalid by reason of infringement of the principle of proportionality.

R v Secretary *of State for Health, ex parte Swedish Match AB* (Case C-210/03)

Judgment of 14 December 2004, Court of Justice of the European Communities

This is the decision, encountered above *(p.52),* in which the Court found that Directive 2001/37's ban on the marketing of tobacco for oral use was validly based on Article 95 EC. Faced with the submission that the measure was nonetheless invalid for violation of the proportionality principle, the Court made an explicit connection with the direction in Article 95(3) that the Community legislature shall take as a base a high level of health protection in setting harmonized standards.

[56] To satisfy its obligation to take as a base a high level of protection in health matters, in accordance with Article 95(3) EC, the Community legislature was thus able, without exceeding the limits of its discretion in the matter, to consider that a prohibition of the marketing of tobacco products for oral use was necessary, and in particular that there was no alternative measure which allowed that objective to be achieved as effectively.

[57] As the Advocate General observes in points 116 to 119 of his Opinion, no other measures aimed at imposing technical standards on manufacturers in order to reduce the harmful effects of the product, or at regulating the labelling of packagings of the product and its conditions of sale, in particular to minors, would have the same preventive effect in terms of the protection of health, inasmuch as they would let a product which is in any event harmful gain a place in the market.

[58] It follows from the above considerations that, with respect both to the objective of ensuring a high level of protection of human health given to the Community legislature by Article 95(3) EC and to its obligation to comply with the principle of proportionality, the contested prohibition cannot be regarded as manifestly inappropriate.

NOTE: The principle of proportionality applies not only to Community legislation, but also arises in the application of substantive Treaty provisions.

J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009

Chapter 5: Principles of direct applicability and direct effects

5.1 Introduction

It has already been seen that EC law, if not EU law, is supreme to national law and that domestic courts are under an obligation to give full effect to EC law (see Chapter 4). With this in mind, the question then arises to what extent individuals can rely on EC law before the national courts, particularly where a Member State has failed to implement a particular measure, or where the implementation is in some way defective and does not provide the full extent of the rights an individual should enjoy by virtue of the relevant EC measure. To deal with this question, and very much in accordance with the principle of supremacy, the European Court of Justice (ECJ) has developed three interrelated doctrines: direct effect, indirect effect, and state liability. Taken together, these seek to ensure that individuals are given the greatest possible level of protection before their national courts. This chapter considers the scope of the doctrines of direct and indirect effect, as well as identifying difficulties in the jurisprudence. One particular area in which problems arise is that of ensuring the enforceability of directives. This chapter will look at this issue and the various approaches that the ECJ has developed with regard to it. Chapter 9 will examine the jurisprudence in the field of state liability.

5.2 Doctrine of direct effects

5.2.1 Direct applicability

As was noted in Chapter 4, the European Community Treaties were incorporated into UK law by the European Communities Act 1972. With the passing of this Act all Community law became, in the language of international law, directly applicable, that is, applicable as part of the British internal legal system. Henceforth, 'Any rights or obligations created by the Treaty are to be given legal effect in England without more ado' (per Lord Denning MR in *HP Bulmer Ltd v JBollinger SA* [1974] Ch 401). As directly applicable law, EC law thus became capable of forming the basis of rights and obligations enforceable by individuals before their national courts.

Provisions of international law which are found to be capable of application by national courts *at the suit of individuals* are also termed 'directly applicable'. This ambiguity (the same ambiguity is found in the alternative expression 'self-executing') has given rise to much uncertainty in the context of EC law. For this reason it was suggested by Winter that the term 'directly effective' be used to convey this secondary meaning. Although this term has generally found favour amongst British academic writers, the ECJ as well as the British courts tend to use the two concepts of direct applicability and direct effects interchangeably. However, for purposes of clarity it is proposed to use the term 'directly effective' or 'capable of direct effects' in this secondary meaning, to denote those provisions of EC law which give rise to rights or obligations which individuals may enforce before their national courts.

Not all provisions of directly applicable international law are capable of direct effects. Some provisions are regarded as binding on, and enforceable by states alone; others are too vague to form the basis of rights or obligations for individuals; others are too incomplete and require further measures of implementation before they can be fully effective in law. Whether a particular provision is directly effective is a matter of construction, depending on its language and purpose as well as the terms on which the treaty has been incorporated into domestic law. Although most states apply similar criteria of clarity and completeness, specific rules and attitudes inevitably differ, and since the application of the criteria often conceals an underlying policy decision, the results are by no means uniform from state to state.

5.2.2 Relevance of direct effect in EC law

The question of the direct effects of Community law is of paramount concern to EC lawyers. If a provision of EC law is directly effective, domestic courts must not only apply it but, following the principle of primacy of EC

law (discussed in Chapter 4), must do so in priority over any conflicting provisions of national law. Since the scope of the EC Treaty is wide, the more generous the approach to the question of direct effects, the greater the potential for conflict.

Which provisions of EC law will then be capable of direct effect? The EC Treaty merely provides in Article 249 (ex 189; post Lisbon, Article 288 TFEU) that regulations (but only regulations) are 'directly applicable'. Since, as has been suggested, direct applicability is a necessary precondition for direct effects, this would seem to imply that only regulations are capable of direct effects.

This has not proved to be the case. In a series of landmark decisions, the ECJ, principally in its jurisdiction under Article 234 EC (ex 177; post Lisbon, Article 267 TFEU) to give preliminary rulings on matters of interpretation of EC law on reference from national courts, has extended the principle of direct effects to treaty articles, directives, decisions, and even to provisions of international agreements to which the EC is a party.

5.2.3 Treaty articles

s.2.3. 1 *The Starting Point: Van Gend en Loos*

The question of the direct effect of a treaty article was first raised in *Van Gend en Loos v Nederlandse Administratie der Belastingen* (case 26/62). The Dutch administrative tribunal, in a reference under Article 234, asked the ECJ 'Whether Article 12 of the EEC Treaty [now 25 EC] has an internal effect... in other words, whether the nationals of Member States may, on the basis of the Article in question, enforce rights which the judge should protect?'

Article 25 (ex 12) EG (Article 30 TFEU) prohibits states from 'introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect'.

It was argued on behalf of the defendant customs authorities that the obligation in Article 25 was addressed to states and was intended to govern rights and obligations between states. Such obligations were not normally enforceable at the suit of individuals. Moreover the treaty had expressly provided enforcement procedures under what are now Articles 226-7 EC (ex 169-70; post Lisbon, Articles 258-9 TFEU) (see Chapter 11) at the suit of the Commission or Member States, respectively. Advocate-General Roemer suggested that Article 25 was too complex to be enforced by national courts; if such courts were to enforce Article 25 directly there would be no uniformity of application.

Despite these persuasive arguments the ECJ held that Article 25 was directly effective. The Court stated that 'this Treaty is more than an agreement creating only mutual obligations between the contracting parties. . . Community law . . . not only imposes obligations on individuals but also confers on them legal rights'. These rights would arise:

not only when an explicit grant is made by the Treaty, but also through obligations imposed, in a clearly denned manner, by the Treaty on individuals as well as on Member States and the Community institutions.

... The text of Article 12 [now 25] sets out a clear and unconditional prohibition, which is not a duty to act but a duty not to act. This duty is imposed without any power in the States to subordinate its application to a positive act of internal law. The prohibition is perfectly suited by its nature to produce direct effects in the legal relations between the Member States and their citizens.

And further:

The vigilance of individuals interested in protecting their rights creates an effective control additional to that entrusted by Articles 169-70 [now 226-7] to the diligence of the Commission and the Member States.

Apart from its desire to enable individuals to invoke the protection of EC law the Court clearly saw the principle of direct effects as a valuable means of ensuring that EC law was enforced uniformly in all Member States, even when states had not themselves complied with their obligations.

s.2.3.2 *Subsequent developments*

It was originally thought that, as the Court suggested in *Van Gend,* only prohibitions such as (the then) Article

25 ('standstill' provisions) would qualify for direct effects; this was found in *Alfons Liitticke GmbHvHauotzollamt Saarlouk* in relation to the obligation that 'Member States shall, not later than at the beginning of the second stage, repeal or amend any provisions existing when this Treaty enters into force which conflict with the preceding rules'.

The ECJ found that the then Article 95(1) was directly effective; what was Article 95(3), which was subject to compliance within a specified time limit, would, the Court implied, become directly effective once that time limit had expired.

The Court has subsequently found a large number of treaty provisions to be directly effective. All the basic principles relating to free movement of goods and persons, competition law, and discrimination on the grounds of sex and nationality may now be invoked by individuals before their national courts.

5.2.3.3 *Criteria for direct effect*

In deciding whether a particular provision is directly effective certain criteria are applied: the provision must be sufficiently clear and precise; it must be unconditional, and leave no room for the exercise of discretion in implementation by Member States or Community institutions. The criteria are, however, applied generously, with the result that many provisions which are not particularly clear or precise, especially with regard to their scope and application, have been found to produce direct effects. Even where they are conditional and subject to further implementation they have been held to be directly effective once the date for implementation is past. The Court reasons that while there may be discretion as to the means of implementation, there is no discretion as to ends.

5.2.3.4 *Vertical and horizontal effect of treaty provisions*

In *Van Gend* the principle of direct effects operated to confer rights on Van Gend exercisable against the Dutch customs authorities. Thus the obligation fell on an organ of the state, to whom Article 25 was addressed. (This is known as a 'vertical' direct effect, reflecting the relationship between individual and state.) But treaty obligations, even when addressed to states, may fall on individuals too. May they be invoked by individuals against individuals? (This is known as a 'horizontal effect', reflecting the relationship between individual and individual.)

Van Gend implies so, and this was confirmed in *Defrenne* v *Sabena (No 2)* (case 43/75). Ms Defrenne was an air hostess employed by Sabena, a Belgian airline company. She brought an action against Sabena based on what was then Article 119 of the EEC Treaty (now 141 EC; post Lisbon Article 157 TFEU). It provided that 'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work'.

Ms Defrenne claimed, inter alia, that in paying their male stewards more than their air hostesses, when they performed identical tasks, Sabena was in breach of the then Article 119. The gist of the questions referred to the ECJ was whether, and in what context, that provision was directly effective. Sabena argued that the treaty articles so far found directly effective, such as Article 25, concerned the relationship between the State and its subjects, whereas former Article 119 was primarily concerned with relationships between individuals. It was thus not suited to produce direct effects. The Court, following Advocate-General Trabucci, disagreed, holding that 'the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals'.

This same principle was applied in *Walrave v Association Union Cycliste Internationale* (case 36/74) to Article 12 (ex 6, originally 7) EC which provides that 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

The claimants, Walrave and Koch, sought to invoke Article 12 (post Lisbon, Article 18 TFEU) in order to challenge the rules of the defendant association which they claimed were discriminatory.

The ECJ held that the prohibition of any discrimination on grounds of nationality 'does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective

manner gainful employment and the provision of services'.

To limit the prohibition in question to acts of a public authority would risk creating inequality in their application. Even now, the precise scope of the horizontal nature of the provisions relating to free movement of individuals (Articles 39, 43, and 49; post Lisbon Articles 45, 49 and 56 TFEU respectively) is not clear. Whilst the judgment in *Walrave* can be read as a form of effectiveness, which could then extend the scope of the provisions to all non-state actors, it can equally be read as relating to collective agreements, or to situations where there is a violation of the principle of non-discrimination. Subsequent cases have not cleared up this ambiguity (see Chapter 21). It is generally accepted that the provisions on the free movement of goods (Articles 28-9 EC; post Lisbon Articles 34-5 TFEU) do not have horizontal direct effect, although the ECJ's jurisprudence has operated to compensate for this limitation (see Chapter 20). Nonetheless, many treaty provisions have now been successfully invoked vertically and horizontally. The fact of their being addressed to, and imposing obligations on, states has been no bar to their horizontal effect.

5.2.4 Regulations

A regulation is described in Article 249 EC as of 'general application ... binding in its entirety and directly applicable in all Member States'. It is clearly intended to take immediate effect without the need for further implementation.

Regulations are thus by their very nature apt to produce direct effects. However, even for regulations direct effects are not automatic. There may be cases where a provision in a regulation is conditional, or insufficiently precise, or requires further implementation before it can take full legal effect. But since a regulation is of 'general application', where the criteria for direct effects are satisfied, it may be invoked vertically or horizontally.

In *Antonio Munoz Cia SA v Frumar Ltd* (case C-253/00), the ECJ confirmed that regulations by their very nature operate to confer rights on individuals which must be protected by the national courts. In this case, Regulation 2200/96 ([1996] OJ L 297/1) laid down the standards by which grapes are classified. Munoz brought civil proceedings against Frumar who had sold grapes under particular labels which did not comply with the corresponding standard. The relevant provision in the regulation did not confer rights specifically on Munoz, but applied to all operators in the market. A failure by one operator to comply with the provision could have adverse effects, since the purpose of the regulation was to keep products of unsatisfactory quality off the market, and to ensure the full effectiveness of the regulation, it must be possible for a trader to bring civil proceedings against a competitor to enforce the regulation. This decision is noteworthy for several reasons. As with the early case law on the treaty articles, it reasons from the need to ensure the effectiveness of Community law. It also confirms that, as directly applicable measures, regulations can apply horizontally between private parties as well as vertically against public bodies. In terms of enforcement, it also seems to suggest that it is not necessary that rights be conferred expressly on the claimant before that individual may rely on the sufficiently clear and unconditional provisions of a regulation. Insofar as the ECJ's jurisprudence requires individuals seeking to rely on a directive to have received rights under that directive (see 5.2.5.3 below), there seems to be the beginning of a divergence between the jurisprudence on regulations and that on directives.

5.2.5 Directives

5.2.5.1 *The problem of the direct effect of directives*

A directive is (Article 249 EC) 'binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

Because directives are not described as 'directly applicable' it was originally thought that they could not produce direct effects. Moreover the obligation in a directive is addressed to states, and gives the state some discretion as to the form and method of implementation; its effect thus appeared to be conditional on the implementation by the state.

5.2.5.2 *The principle of direct effect of directives*

This was not the conclusion reached by the ECJ, which found, in *Grad v Finanzamt Traunstein* (case 9/70) that a directive could be directly effective. The claimant in *Grad* was a haulage company seeking to challenge a tax levied by the German authorities that the claimant claimed was in breach of an EC directive and decision. The

directive required states to amend their VAT systems to comply with a common EC system and to apply this new VAT system to, inter alia, freight transport from the date of the directive's entry into force. The German government argued that only regulations were directly applicable. Directives and decisions took effect internally only via national implementing measures. As evidence they pointed out that only regulations were required to be published in the *Official Journal.* The ECJ disagreed. The fact that only regulations were described as directly applicable did not mean that other binding acts were incapable of such effects:

It would be incompatible with the binding effect attributed to Decisions by Article 189 [now 249] to exclude in principle the possibility that persons affected may invoke the obligation imposed by a Decision. . . the effectiveness of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law.

Although expressed in terms of a decision, it was implied in the judgment that the same principle applied in the case of directives. The direct effect of directives was established beyond doubt in a claim based on a free-standing directive in *Van Duyn v Home Office* (case 4 1/74). Here the claimant sought to invoke Article 3 of Directive 64/221 to challenge the Home Office's refusal to allow her to enter to take up work with the Church of Scientology. Under EC law Member States are allowed to deny EC nationals rights of entry and residence only on the grounds of public policy, public security and public health (see Chapter 25). Article 3 of Directive 64/22 1 provided that measures taken on the grounds of public policy must be based exclusively on the personal conduct of the person concerned. Despite the lack of clarity as to the scope of the concept of 'personal conduct' the ECJ held that Mrs Van Duyn was entitled to invoke the directive directly before her national court. It suggested that even if the provision in question was not clear the matter could be referred to the ECJ for interpretation under Article 234 EC.

So both directives and decisions may be directly effective. Whether they will in fact be so will depend on whether they satisfy the criteria for direct effects—they must be sufficiently clear and precise, unconditional, leaving no room for discretion in implementation. These conditions were satisfied in *Grad.* Although the directive was not unconditional in that it required action to be taken by the state, and gave a time limit for implementation, once the time limit expired the obligation became absolute. At this stage there was no discretion left. *Van Duyn* demonstrates that it is not necessary for a provision to be particularly precise for it to be deemed 'sufficiently' clear. Significantly, the ECJ held in *Riksskatterverket v Soghra Gharehveran* (case C-441/99) that a provision in a directive could be directly effective where it contained a discretionary element if the Member State had already exercised that discretion. The reason for this was that it could then no longer be argued that the Member State still had to take measures to implement the provision.

The reasoning in *Grad* was followed in *Van Duyn* and has been repeated on many occasions to justify the direct effect of directives once the time limit for implemen tation has expired. A more recent formulation of the test for direct effects, and one that is generally used, is that the provision in question should be 'sufficiently clear and precise and unconditional'.

A directive cannot, however, be directly effective before the time limit for implementation has expired. It was tried unsuccessfully in the case of *Pubblico Ministero v Ratti* (case 148/78). Mr Ratti, a solvent manufacturer, sought to invoke two EC har-monisation directives on the labelling of dangerous preparations to defend a criminal charge based on his own labelling practices. These practices, he claimed, were not illegal according to the directive. The ECJ held that since the time limit for the implementation of one of the directives had not expired it was not directly effective. He could, however, rely on the other directive for which the implementation date had passed.

Even when a state has implemented a directive it may still be directly effective. The ECJ held this to be the case in *Verbond van Nederlandse Ondernemingen (VNO) v Inspecteur der Invoerrechten en Accijnzen* (case 51/76), thereby allowing the Federation of Dutch Manufacturers to invoke the Second VAT Directive despite implementation of the provision by the Dutch authorities. The grounds for the decision were that the useful effect of the directive would be weakened if individuals could not invoke it before national courts. By allowing individuals to invoke the directive the Union can ensure that national authorities have kept within the limits of their discretion. Indeed, it seems possible to rely on even a properly implemented directive if it is not properly applied in practice *(Marks and Spencer* (case G-62/00)).

Arguably, the principle in *VNO* could apply to enable an individual to invoke a 'parent' directive even before the

expiry of the time limit, where domestic measures have been introduced for the purpose of complying with the directive (see *Offtcier van Justitie v Kolpinghuis Nijmegen* (case 80/86)). This view gains some support from the case of *Inter-Environment WallonieASBL vRegion Wallonie* (case C-129/96). Here the ECJ held that even within the implementation period Member States are not entitled to take any measures which could seriously compromise the result required by the directive. This applies irrespective of whether the domestic measure which conflicts with a directive was adopted to implement that directive (case C-14/02 *ATRAL).* In *Mangold* (case C-l 44/04, see further below), the ECJ strengthened this view. According to its ruling, the obligation on a national court to set aside domestic law in conflict with a directive before its period for implementation has expired appears to be even stronger where the directive in question merely aims to provide a framework for ensuring compliance with a general principle of Community law, such as non-discrimination on the grounds of age (see Chapter 6). Note also the approach in regards to the obligation for consistent interpretation (see, eg, *Adeneler v ELOG* (case C-2 12/04) below).

5.2.5.3 ***Must rights be conferred by the directive?***

The ECJ's test for direct effects (the provision must be sufficiently clear, precise, and unconditional) has never expressly included a requirement that the directive should be intended to give rise to rights for the individual seeking to invoke its provisions. However, the justification for giving direct effect to EC law has always been the need to ensure effective protection for individuals' Community rights. Furthermore, the ECJ has, in a number of recent cases, suggested that an individual's right to invoke a directive may be confined to situations in which he can show a particular interest in that directive. In *Becker v Finanzamt MunsterInnenstadt* (case 8/81), in confirming and clarifying the principle of direct effect as applied to directives, the Court held that 'provisions of Directives can be invoked by individuals *insofar as they define rights which individuals are able to assert against the state'* (emphasis added).

Drawing on this statement in *Verholen* (cases C-87 to C-89/90), the Court suggested that only a person with a direct interest in the application of the directive could invoke its provisions: this was held in *Verholen* to include a third party who was directly affected by the directive. In *Verholen,* the husband of a woman suffering sex discrimination as regards the granting of a social security benefit, contrary to Directive 79/7, was able to bring a claim based on the directive in respect of disadvantage to himself consequential on the discriminatory treatment of his wife.

In most recent cases in which an individual seeks to invoke a directive directly, the existence of a direct interest is clear. The question of his or her standing has not therefore been in issue. Normally the rights he or she seeks to invoke, be it for example a right to equal treatment or to employment protection, are contained in the directive. Its provisions are clearly, if not explicitly, designed to benefit persons such as the individual. There are circumstances, however, where this is not so.

5.2.5.4 ***Member States' initial response***

Initially national courts were reluctant to concede that directives could be directly effective. The Conseil d'Etat, the supreme French administrative court, in *Minister of the Interior v Cohn-Bendit* ([1980] 1 CMLR 543), refused to follow *Van Duyn vHome Office* and allow the claimant to invoke Directive 64/221. The English Court of Appeal in *O'Brien v Sim-Chem Ltd* ([1980] ICR 429) found the Equal Pay Directive (75/117) not to be directly effective on the grounds that it had purportedly been implemented in the Equal Pay Act 1970 (as amended 1975). *VNO* was apparently not cited before the court. The German Federal Tax Court, the Bundesfinanzhof, in *Re VAT Directives* ([1982] 1 CMLR 527) took the same view on the direct effects of the Sixth VAT Directive, despite the fact that the time limit for implementation had expired and existing German law appeared to run counter to the directive. The courts' reasoning in all these cases ran on similar lines. Article 249 expressly distinguishes regulations and directives; only regulations are described as 'directly applicable'; directives are intended to take effect within the national order via national implementing measures.

On a strict interpretation of Article 249 EC this is no doubt correct. On the other hand the reasoning advanced by the ECJ is compelling. The obligation in a directive is 'binding "on Member States" as to the result to be achieved'; the useful effects of directives would be weakened if states were free to ignore their obligations and enforcement of EC law were left to direct action by the Commission or Member States under Articles 226 or 227. Moreover states are obliged under Article 10 (post Lisbon, Article 4 of the Treaty on European Union (TEU)) to 'take all appropriate measures... to ensure fulfilment of the obligations arising out of this Treaty or

resulting from action taken by the institutions of the Community'. If they have failed in these obligations why should they not be answerable to individual litigants?

5.2.5.5 ***Vertical and horizontal direct effects: A necessary distinction***

The reasoning of the ECJ is persuasive where an individual seeks to invoke a directive against the state on which the obligation to achieve the desired results has been imposed. In cases such as *VNO, Van Duyn,* and *Ratti,* the claimant sought to invoke a directive against a public body, an arm of the state. This is known as *vertical* direct effect, reflecting the relationship between the individual and the state. Yet as with treaty articles, there are a number of directives, impinging on labour, company or consumer law for example, which a claimant may wish to invoke against a private person. Is the Court's reasoning in favour of direct effects adequate as a basis for the enforcement of directives against individuals? This is known as *horizontal* direct effect, reflecting the relationship between individuals.

The arguments for and against horizontal effects are finely balanced. Against horizontal effects is the fact of uncertainty. Prior to the entry into force of the TEU, directives were not required to be published. More compelling, the obligation in a directive is addressed to the state. In *Becker v Finanzamt MunsterInnenstadt* (case 8/8 1) the Court, following dicta in *Pubblico Ministero v Ratti* (case 148/78), had justified the direct application of the Sixth VAT Directive against the German tax authorities on the grounds that the obligation to implement the directive had been placed on the state. It followed that:

a Member State which has not adopted, within the specified time limit, the implementing measure$ prescribed in the Directive, cannot raise the objection, as against individuals, that it has not fulfilled the obligations arising from the Directive. This reasoning is clearly inapplicable in the case of an action against a private person. In favour of horizontal effects is the fact that directives have always in fact been published; that treaty provisions addressed to, and imposing obligations on,Member States have been held to be horizontally effective; that it would be anomalous, and offend against the principles of equality, if an individual's rights to invoke a directive were to depend on the status, public or private, of the party against whom he wished to invoke it; and that the useful effect of Community law would be weakened if individuals were not free to invoke the protection of Community law against *all* parties.

Although a number of references were made in which the issue of the horizontal effects of directives was raised, the ECJ for many years avoided the question, either by declaring that the claimant's action lay outside the scope of the directive, as in *Burton v British Railways Board* (case 19/8 1) (Equal Treatment Directive 76/207) or by falling back on a directly effective treaty provision, as in *Worringham v Lloyds Bank Ltd* (case 69/80) in which the then Article 119 (now 141) was applied instead of Directive 75/117, the Equal Pay Directive.

The nettle was finally grasped in *Marshall v Southampton & South West Hampshire Area Health Authority (Teaching)* (case 152/84). Here Mrs Marshall was seeking to challenge the health authority's compulsory retirement age of 65 for men and 60 for women as discriminatory, in breach of the Equal Treatment Directive 7 6/207. The difference in age was permissible under the Sex Discrimination Act 1975, which expressly excludes 'provisions relating to death or retirement' from its ambit. The Court of Appeal referred two questions to the ECJ:

(a) Was a different retirement age for men and women in breach of Directive 7 6/207?

(b) If so, was Directive 76/207 to be relied on by Mrs Marshall in the circumstances of the case?

The relevant circumstances were that the area health authority, though a 'public' body, was acting in its capacity as employer.

The question of vertical and horizontal effects was fully argued. The Court, following a strong submission from Advocate-General Slynn, held that the compulsory different retirement age was in breach of Directive 7 6/207 and could be invoked against a public body such as the health authority. Moreover 'where a person involved in legal proceedings is able to rely on a Directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority'.

On the other hand, following the reasoning of *Becker,* since a directive is, according to Article 249, binding only on '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.

If this distinction was arbitrary and unfair:

Such a distinction may easily be avoided if the Member State concerned has correctly implemented the Directive in national law.

So, with *Marshall v Southampton & South West Hampshire Area Health Authority (Teaching)* the issue of the horizontal effect of directives was, it seemed, finally laid to rest (albeit in an *obiter* statement, since the health authority was arguably a public body at the time). By denying their horizontal effect on the basis of Article 249 the Court strengthened the case for their vertical effect. The decision undoubtedly served to gain acceptance for the principle of vertical direct effects by national courts (see, eg, *R v London Boroughs Transport Committee, ex parte Freight Transport Association Ltd* [1990] 3 CMLR 495). But problems remain, both with respect to vertical and horizontal direct effects.

5.2.5.6 *Vertical direct effects: Reliance against public body*

First, the concept of a 'public' body, or an 'agency of the State', against whom a directive may be invoked, is unclear. In *Fratelli Costanzo SPA v Comune di Milano* (case 103/88), in a claim against the Comune di Milano based on the Comune's alleged breach of Public Procurement Directive 71/305, the Court held that since the reason for which an individual may rely on the provisions of a directive in proceedings before the national courts is that the obligation is binding on all the authorities of the Member States, where the conditions for direct effect were met, 'all organs of the administration, including decentralised authorities such as municipalities, are obliged to apply these provisions'. The area health authority in *Marshall* was deemed a 'public' body, as was the Royal Ulster Constabulary in *Johnston v RUC* (case 222/84). But what of the status of publicly owned or publicly run enterprises such as the former British Rail or British Coal? Or semi-public bodies? Are universities 'public' bodies and what is the position of privatised utility companies, or banks, which are in the main owned by the taxpayer?

These issues arose for consideration in *Foster v British Gas pic* (case C-l 88/89). In a claim against the British Gas Corporation in respect of different retirement ages for men and women, based on Equal Treatment Directive 7 6/207, the English Court of Appeal had held that British Gas, a statutory corporation carrying out statutory duties under the Gas Act 1972 at the relevant time, was not a public body against which the directive could be enforced. On appeal the House of Lords sought clarification on this issue from the ECJ. That court refused to accept British Gas's argument that there was a distinction between a nationalised undertaking and a state agency and ruled (at para 18) that a directive might be relied on against organisations or bodies which were 'subject to the authority or control of the State or had special powers beyond those which result from the normal relations between individuals'.

Applying this principle to the specific facts of *Foster v British Gas pic* it ruled (at para 20) that a directive might be invoked against:

a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State arid has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

On this interpretation a nationalised undertaking such as the then British Gas would be a 'public' body against which a directive might be enforced, as the House of Lords subsequently decided in *Foster* v *British Gaspic* ([1991] 2 AC 306).

It may be noted that the principle expressed in para 18 is wider than that of para 20, the criteria of 'control' and 'powers' being expressed as alternative, not cumulative; as such it is wide enough to embrace any nationalised undertaking, and even bodies such as universities with a more tenuous public element, but which are subject to *some* state authority or control. However, in *Rolls-Royce pic v Doughty* ([1992] ICR 538), the English Court of Appeal, applying the 'formal ruling' of para 20 of *Foster,* found that Rolls-Royce, a nationalised undertaking at the relevant time, although 'under the control of the State', had not been 'made responsible pursuant to a measure adopted by the State for providing a public service'. The public services which it provided, for example, in the defence of the realm, were provided to the *state* and not to the *public* for the purposes of benefit to the state: nor did the company possess or exercise any special powers of the type enjoyed by

British Gas. Mustill LJ suggested that the test provided in para 18 was 'not an authoritative exposition of the way in which cases like *Foster* should be approached': it simply represented a 'summary of the (Court's) jurisprudence to date'.

There is little evidence to support such a conclusion. The Court has never distinguished between its 'formal' rulings (ie, on the specific issue raised) and its more general statements of principle. Indeed such general statements often provide a basis for future rulings in different factual situations. A restrictive approach to the Court's rulings, as taken in *Rolls-Royce pic v Doughty,* is inconsistent with the purpose of the ECJ, namely to ensure the effective implementation of Community law and the protection of individuals' rights under that law by giving the concept of a public body the widest possible scope. This was acknowledged by the Court of Appeal in *National Union of Teachers v Governing Body ofSt Mary's Church ofEngland (Aided) Junior School* ([1997] 3 CMLR 630) when it suggested that the concept of an emanation of the state should be a 'broad one'. The definition provided in para 20 of *Foster* should not be regarded as a statutory definition: it was, in the words of para 20, simply *'included among* those bodies against which the provisions of a Directive can be applied'.

The English courts' approach to whether a particular body is an 'emanation of the state' for the purpose of enforcement of EC directives is unpredictable. It is not altogether surprising that they fail to take a generous view when the result would be to impose liability on bodies which are in no way responsible for the non-implementation of directives, a factor which was undoubtedly influential in *Rolls-Royce pic v Doughty.* But even if national courts were to adopt a generous approach, no matter how generously the concept of a 'public' body is defined, as long as the public/private distinction exists there can be no uniformity in the application of directives as between one state and another. Neither will it remove the anomaly as between individuals. Where a state has failed to fulfil its obligations in regard to directives, whether by non-implementation or inadequate implementation, an individual would, it appeared, following *Marshall,* be powerless to invoke a directive in the context of a 'private' claim.

s.2.5.7 *Horizontal direct effects*

In 1993, in the case of *Dori v Recreb Sri* (case C-9 1/92), the Court was invited to change its mind on the issue of horizontal direct effects in a claim based on EC Directive 85/577 on Door-step Selling, which had not at the time been implemented by the Italian authorities, against a private party. Advocate-General Lenz urged the Court to reconsider its position in *Marshall* and extend the principle of direct effects to allow for the enforcement of directives against *all* parties, public and private, in the interest of the uniform and effective application of Community law. This departure from its previous case law was, he suggested, justified in the light of the completion of the internal market and the entry into force of the Treaty on European Union, in order to meet the legitimate expectations of citizens of the Union seeking to rely on Community law. In the interests of legal certainty such a ruling should however not be retrospective in its effect (on the effect of Article 234 rulings—see Chapter 10).

The Court, no doubt mindful of national courts' past resistance to the principle of direct effects, and the reasons for that resistance, declined to follow the Advocate-General's advice and affirmed its position in *Marshall:* Article 249 distinguished between regulations and directives; the case law establishing vertical direct effects was based on the need to prevent states from taking advantage of their own wrong; to extend this case law and allow directives to be enforced against individuals 'would be to recognise a power to enact obligations for individuals with immediate effect, whereas (the Community) has competence to do so only where it is empowered to adopt Regulations'. This decision was confirmed in subsequent cases, such as *El Corte Ingles SA vRivero* (case C-192/94) *Arcaro* (case C-l68/95), and more recently in *Carp v Ecorad* (case C-80/06).

However, in denying horizontal effects to directives in *Dori,* the Court was at pains to point out that alternative remedies might be available based on principles introduced by the Court prior to *Dori,* namely the principle of indirect effects and the principle of State liability introduced in *Francovich v Italy* (cases C-6 and 9/90— see Chapter 9). *Francovich* was also suggested as providing an alternative remedy in *El Corte Ingles SA v Rivero. Pfeiffer* (joined cases C-397/01 to 403/0 1) confirmed that directives could not have horizontal direct effect, but it emphasised, in the strongest possible terms, that a court was obliged to interpret domestic law in so far as possible in accordance with a directive (see 5.3, below). In the circumstances of that case, the practical outcome would have been akin to admitting horizontal direct effect, albeit by following the 'indirect effect' route. It must be borne in mind that one of the principal justifications for rejecting 'horizontal direct effect' has been that directives cannot, of themselves, impose obligations on individuals. In two-party situations, this

reasoning is straightforward. It is less so in a three-party situation where an individual is seeking to enforce a right under a directive against the Member State where this would have an impact on a third party. This issue arose in *Wells v SoSfor Transport, Local Government and the Regions* (case C-201/02), where Mrs Wells challenged the government's failure to carry out an environmental impact assessment (as required under Directive 85/337/EEC, [1985] OJ LI 7 5/40) when authorising the recommencement of quarrying works. The UK government argued that to accept that the relevant provisions of the directive had direct effect would result in 'inverse direct effect' in that UK government would be obliged to deprive another individual (the quarry owners) of their rights. The ECJ dismissed this, holding that permitting an individual to hold the Member State to its obligations was not linked to the performance of any obligation which would fall on the third party (at para 58), although there would be consequences for the third party as a result. It would be for the national courts to consider whether to require compliance with the directive in the particular case, or whether to compensate the individual for any harm suffered. A similar approach can be seen m *Arcor* (case C- 152-4/07). The case concerned a decision by the German telecommunications authority, approving a connection charge for calls from Deutsche Telekom's national network to a connection partner to cover the costs of maintaining the local telecommunications infrastructure. Third-party telecommunications operators sought to challenge that decision and it was this challenge that formed the basis of the reference. The ECJ held that the decision was incompatible with the directives regulating the area. The ECJ then referred to its decision in *Wells,* although the referring court had not raised the question in these terms, and re-emphasised that 'mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from relying on the provisions of a directive against the Member State concerned' (para 36). In coming to its conclusion in *Wells,* the ECJ relied, in part, on case law developed in the context of Directive 83/1 89/EEC on the enforceability of technical standards which have not been notified in accordance with the requirements of that directive. It had been suggested that these cases create something akin to 'incidental' horizontal effect, and it is therefore necessary to examine these in more detail.

5.2.5.8 *'Incidental' horizontal effect*

There have been cases in which individuals have sought to exploit the principle of direct effects not for the purposes of claiming Community rights denied them under national law, but simply in order to establish the illegality of a national law and thereby prevent its application to them. This may occur in a two-party situation, in which an individual is seeking to invoke a directive, whether as a sword or a shield, against the state. It presents particular problems in a three-cornered situation, in which a successful challenge based on an EC directive by an individual to a domestic law or practice, although directed at action by the state, may adversely affect third parties. In this case the effect of the directive would be felt horizontally. To give the directive direct effects in these cases would seem to go against the Court's stance on horizontal direct effects in the line of cases beginning with *Dori v Recreb Sri,* and the reasoning in these cases. Two cases, with contrasting outcomes, *CIA Security International SA v Signalson SA* (case C-194/94) and *Lemmens* (case C-226/97), illustrate the difficulty. Both cases involve Directive 83/189 (Directive 83/189 has been replaced and extended, by Directive 98/34 ([1998] OJ L204/37, amended by Directive 98/44, OJ L217/18), see 16.3.6). The directive, which is designed to facilitate the operation of the single market, lays down procedures for the provision of information by Member States to the Commission in the field of technical standards and regulations. Article 8 prescribes detailed procedures requiring Member States to notify, and obtain clearance from, the Commission for any proposed regulatory measures in the areas covered by the directive. In *CIA Security International SA v Signalson SA,* the defendants, CIA Security, sought to rely on Article 8 of Directive 83/189 as a defence to an action, brought by Signalson, a competitor, for unfair trading practices in the marketing of security systems. The defendants claimed that the Belgian regulations governing security, which the defendants had allegedly breached, had not been notified as required by the directive: they were therefore inapplicable. Contrary to its finding in the earlier case of *Enichem Base v Comune di Cinsello Balsamo* (case C-380/87), involving very similar facts and the same directive, the ECJ accepted this argument, distinguishing *Enichem* on the slenderest of grounds. Thus the effects of the directive fell horizontally on the claimant, whose actions, based on national law, failed.

Article 8 of Directive 83/189 was again invoked as a defence in *Lemmens* (case C-226/97). Lemmens was charged in Belgium with driving above the alcohol limit. Evidence as to his alcohol level at the relevant time had been provided by a breath analysis machine. Invoking *CIA Security International SA v Signalson SA,* he argued that the Belgian regulations with which breath analysis machines in Belgium were required to conform had not been notified to the Commission, as required by Article 8 of Directive 83/189. He argued that the consequent

inapplicability Of the Belgian regulations regarding breath analysis machines impinged on the evidence obtained by using those machines; it could not be used in a case against him. The ECJ refused to accept this argument. It looked to the purpose of the directive, which was designed to protect the interest of free movement of goods. The Court concluded:

Although breach of an obligation (contained in the Directive) rendered (domestic) regulations inapplicable inasmuch as they hindered the marketing of a product which did not conform with its provisions, it did not have the effect of rendering unlawful any use of the product which conformed with the unnotified regulations. Thus the breach (of Article 8) did not make it impossible for evidence obtained by means of such regulations, authorized in accordance with the regulations, to be relied on against an individual.

This distinction, between a breach affecting the marketing of a product, as in *CIA Security International SA v Signalson SA,* and one affecting its use, as in *Lemmens,* is fine, and hardly satisfactory. The decision in *CIA Security International SA* v *Signalson SA* had been criticised because the burden imposed by the breach (by the state) of Article 8, the non-application of the state's unfair practice laws, would have fallen on an individual, in this case the claimant. This was seen as a horizontal application in all but name. In two other cases decided, like *CIA Security International SA v Signalson SA,* in 1996, *Ruiz Bemaldez* (case C-129/94) and *Panagis Parfitis* (case C-441/93), individuals were permitted to invoke directives to challenge national law, despite their adverse impact on third parties.

Lemmens, on the other hand, did not involve a third-party situation. The invocation by the defendant of Article 8 of Directive 83/189 did, however, smack of abuse. The refinement introduced in *Lemmens* may thus be seen as an attempt by the ECJ to impose some limits on the principle of direct effects as affected by *CIA Security* and as applied to directives.

The *CIA Security* principle was, however, confirmed and extended to a contractual relationship between two companies in *Unilever Italia SpA v Central Food SpA* (case C443/98). Italy planned to introduce legislation on the geographical origins of various kinds of olive oil and notified this in accordance with Article 8 of the directive after the Commission requested that this be done. The Commission subsequently decided to adopt a Community-wide measure and invoked the 'standstill' procedure in Article 9 of the directive, which requires a Member State to delay adoption of a technical regulation for- 12 months if the Commission intends to legislate in the relevant field. Italy nevertheless adopted its measure before the 12-month period had expired. The dispute leading to the Article 234 reference arose when Unilever supplied Central Foods with olive oil which had not been labelled in accordance with Italian law. Unilever argued that Italian legislation should not be applied because it had been adopted in breach of Article 9 of the directive. Advocate-General Jacobs argued that the C/A principle could not affect contractual relations between individuals, primarily because to hold otherwise would infringe the principle of legal certainty. The Court disagreed and held that the national court should refuse to apply the Italian legislation. It noted that there was no reason to treat the dispute relating to unfair competition in *CIA Security* differently from the contractual dispute in *Unilever.* The Court acknowledged the established position that directives cannot have horizontal direct effect, but went on to say that this did not apply in relation to Articles 8-9 of Directive 83/189. The Court did not feel that the case law on horizontal direct effect and the case law under Directive 83/189 were in conflict, because the latter directive does not seek to create rights or obligations for individuals.

The initial reaction to *CIA Security* was that the Court appeared to accept that directives could have horizontal direct effect. But after *Unilever,* it is clear that this has not been its intention. However, this area remains one of some uncertainty. The position now seems to be that private parties to a contract for the sale or supply of goods need to investigate whether any relevant technical regulations have been notified in accordance with the directive. There may then be a question of whether the limitation introduced by *Lemmens* comes into play. The end result appears to be the imposition on private parties of rights and obligations of which they could not have been aware—this was the main reason *against* the acceptance of horizontal direct effect in the case of directives. Although the Court in *Unilever* was at pains to restrict this line of cases to Directive 83/189 (and its replacement, Directive 98/34), this is not convincing. Nevertheless, the ECJ has maintained its approach under this Directive (see, eg, *Lidl Italia Sri v Comune di Stradella* (case C-303/04)), and it would appear to be best to regard the case law under Directive 9 8/34 (and its predecessor) as being confined to the context of that and similar directives (see also, eg, *R v Medicines Control Agency exparte Smith & Nephew Ltd* (case C-201/94) in the context of the authorisation of medicinal products under Directive 65/65/EEC (superseded by 1993 measures),

permitting the holder of a marketing authorisation to rely on Article 5 of that directive in challenging the grant of an authorisation to a competitor). It should also be noted that the ECJ has not adopted this approach in analogous situations involving decisions *(Carp v Ecorad* (case C-80/06)). Such a view should, of course, not be understood as reducing the significance of these cases in the context of an important field of EC law, and *Wells* (case C-20 1/02) and *Arcor* (case C-1 52-4/07) have taken this approach into the field of direct effect generally.

5.2.5.9 ***No direct effect to impose criminal liability***

One important limitation to the direct effect principle was confirmed in *Berlusconi and others* (joined cases C-387/02, C-39 1/02, and C-403/02). Here, Italian company legislation had been amended after proceedings against Mr Berlusconi and others had been commenced to make the submission of incorrect accounting information a summary offence, rather than an indictable offence. The Italian criminal code provides that a more lenient penalty introduced after proceedings have been commenced but prior to judgment should be imposed, and in the instant cases, proceedings would therefore have to be terminated as the limitation period for summary offences had expired. The ECJ was asked (in Article 234 proceedings) if Article 6 of the First Company Law Directive (68/15 1/EEC) could be relied upon directly against the defendants. Having observed that the directive required an appropriate penalty and that it was for the national court to consider whether the revised provisions of Italian law were appropriate, the Court confirmed that it is not permissible to rely on the direct effect of a directive to determine the criminal liability of an individual (paras 73-8). In so holding, the ECJ followed the principles developed in the context of indirect effect (5.3.2, below) and reflects general principles of law (see Chapter 6).

s.2.5.10 ***Direct effect of directives: Conclusions***

The jurisprudence of the ECJ in this area has matured sufficiently to permit the conclusion that, as a general rule, directives cannot take direct effect in the context of a two-party situation where both parties are individuals. Directives can only be relied upon against a Member State (in a broad sense) by an individual (on limitations on the obligations an individual can enforce, note *Verholen* (case C-87/90)). A directive cannot impose an obligation on an individual of itself; it needs to be implemented to have this consequence. Nevertheless, it is apparent that the clear-cut distinction between vertical and horizontal direct effect in two-party situations becomes blurred when transposed into a tripartite context. The enforcement by an individual of an obligation on the Member State may affect the rights of other individuals, which, according to *Wells* (case C-201/02), is a consequence of applying direct effect, but does not appear to change its vertical nature. The rather specific context of notification and authorisation directives, which may also have an effect on relationships not involving Member States, adds to the uncertainty. But whilst the case law may seem settled, the debate as to whether directives *should* have horizontal direct effect is one that is unlikely to go away soon.

5.2.6 Decisions

A decision is 'binding in its entirety upon those to whom it is addressed' (Article 249 EC). Decisions may be addressed to Member States, singly or collectively, or to individuals. Although, like directives, they are not described as 'directly applicable', they may, as was established in *Grad v Finanzamt Traustein* (case 9/70), be directly effective provided the criteria for direct effects are satisfied. The direct application of decisions does not pose the same theoretical problems as directives, since they will only be invoked against the addressee of the decision. If the obligation has been addressed to him and is 'binding in its entirety', there seems no reason why it should not be invoked against him, providing, of course, that it satisfies the test of being sufficiently clear precise and unconditional. In the recent case of *Fosele v Sud-Ouest-Sarl* (case C- 18/08), which concerned a decision which permitted the state to exempt certain vehicles from motor tax, the ECJ held that due to the element of choice left to the Member State, the individual could not rely on the decision to obtain such an exemption. An individual may seek to rely on a decision addressed to a Member State against that Member State (eg, recently, *Fosele v Sud-Ouest-Sarl* (case C- 18/08)). In *Ecorad* (case C80/60), Ecorad sought to rely on the contents of a decision, adopted according to the terms of a directive, addressed to a Member State in the context of a contractual dispute with Carp. Carp claimed it was not bound by the decision. The ECJ reviewed the cases on the horizontal application of directives and concluded that:

the considerations underpinning the case-law referred to in the preceding paragraph with regard to directives apply *mutatis mutandis* to the question whether Decision 1999/93 may be relied upon as against an individual. [Para 21.]

5.2.7 Recommendations and opinions

Since recommendations and opinions have no binding force it would appear that they cannot be invoked by individuals, directly or indirectly, before national courts. However, in *Grimaldi v Fonds des Maladies Professionnelles* (case C-322/88), in the context of a claim by a migrant worker for benefit in respect of occupational diseases, in which he sought to invoke a Commission recommendation concerning the conditions for granting such benefit, the ECJ held that national courts were:

bound to take Community recommendations into consideration in deciding disputes submitted to them, in particular where they clarify the interpretation of national provisions adopted in order to implement them or where they are designed to supplement binding EEC measures.

Such a view is open to question. It may be argued that recommendations, as non-binding measures, can at the most only be taken into account in order to resolve ambiguities in domestic law.

5.2.8 International agreements to which the EC is a party

There are three types of international agreements capable of being invoked in the context of EC law arising from the Community's powers under Articles 281, 300, 133, and 310 (ex 210, 228, 113 and 238 EC, post Lisbon, Articles 243, 260, 294, and 272 TFEU respectively—see Chapter 3). First, agreements concluded by the Community institutions falling within the treaty-making jurisdiction of the EC; secondly, 'hybrid' agreements, such as the WTO agreements, in which the subject matter lies partly within the jurisdiction of Member States and partly within that of the EC; and thirdly, agreements concluded prior to the EC Treaty, such as GATT, which the EC has assumed as being within its jurisdiction, by way of succession. There is no indication in the EC Treaty that such agreements may be directly effective.

The ECJ's case law on the direct effect of these agreements has not been wholly consistent. It purports to apply similar principles to those which it applies in matters of 'internal' law. A provision of an association agreement will be directly effective when 'having regard to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'. Applying these principles in some cases, such as *International Fruit Co NV v Produktschap voor Groenten en Fruit (No 3)* (cases 21 and 22/72), the Court, in response to an enquiry as to the direct effects of Article XI of GATT, held, following an examination of the agreement as a whole, that the Article was not directly effective.

In others, such as *Bresciani* (case 87/75) and *Kupferberg* (case 104/81), Article 2(1) of the Yaounde Convention and Article 21 of the EC-Portugal trade agreement were examined respectively on their individual merits and found to be directly effective. The reasons for these differences are at not at first sight obvious, particularly since the provisions in all three cases were almost identical in wording to EC Treaty articles already found directly effective. The suggested reason (see Hartley (1983) 8 EL Rev 383) for this inconsistency is the conflict between the ECJ's desire to provide an effective means of enforcement of international agreements against Member States and the lack of a solid legal basis on which to do so. The Court justifies divergences in interpretation by reference to the scope and purpose of the agreement in question, which are clearly different from, and less ambitious than, those of the EC Treaty *(Opinion 1/91* (on the draft EEA Treaty)). As a result, the criteria for direct effects tend to be applied more strictly in the context of international agreements entered into by the EC.

Since the *International Fruit Co* cases the Court has maintained consistently that GATT rules cannot be relied upon to challenge the lawfulness of a Community act except in the special case where the Community provisions have been adopted to implement obligations entered into within the framework of GATT. Because GATT rules are not unconditional, and are characterised by 'great flexibility', direct effects cannot be inferred from the 'spirit, general scheme and wording of the Treaty'. This principle was held in *Germany v Council* (case C280/93) to apply not only to claims by individuals but also to actions brought by Member States. As a result the opportunity to challenge Community law for infringement of GATT rules is seriously curtailed. Despite strong arguments in favour of the direct applicability of WTO provisions from Advocate-General Tesauro in *THermes International v FH Marketing Choice BV* (case C-53/96), the Court has not been willing to change its mind. It appears that there is near-unanimous political opposition to the direct application of WTO. (See recently *Merck Genericos-Produtos Farmaciuticos Lda v Merck & Co Inc, and Merck Sharp & Dohme Lda* (case C-43 1/05)).

However, where the agreement or legislation issued under the agreement confers clear rights on

individuals the ECJ has not hesitated to find direct effects (eg, *Sevince* (case C192/89); *Bahia Kziber* (case C- 18/90)).

Thus, paradoxically, an individual in a dualist state such as the UK will be in a stronger position than he would normally be vis-a-vis international law, which is not as a rule incorporated into domestic law.

5.2.9 Exclusions from the principle of direct effects

In extending the jurisdiction of the ECJ to matters within the third—justice and home affairs (JHA)—pillar of the TEU to encompass decisions and framework decisions in the field of political and judicial cooperation in criminal matters taken under Title VI TEU, the Treaty of Amsterdam (ToA) expressly denied direct effects to these provisions (Article 34(2) TEU). Similarly, although areas within the third pillar of the TEU, relating to visas, asylum, immigration, and judicial cooperation in civil matters, were incorporated into the EC Treaty (new Title IV), the ToA excluded the ECJ's jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) 'relating to the maintenance of law and order and the safeguarding of internal security' (Article 68(2) EC); thus access to the ECJ via a claim before their national court was denied to individuals in areas in which they may be significantly and adversely affected. It should be noted that if the Treaty of Lisbon comes into force, Article 34 TEU would be deleted, all the provisions relating to judicial cooperation in criminal matters and to police cooperation being relocated to the TFEU (the EC Treaty after Lisbon corrfes into effect) as part of the area of freedom security and justice provisions. With the unitary structure, it will no longer be possible to distinguish between the policy areas in the current manner and thus these areas would seem to have the potential to become directly effective, though it should be noted that the CFSP provisions will remain in the TEU and therefore structurally separate. Arguably, distinctions may continue to be made here.

Although not an express exclusion from the principle of direct effects, a situation in which an individual was not be able to rely on Community law arose in the case of *Rechberger and Greindle v Austria* (case C-140/97). The case, a claim based on *Francovich,* concerned Austria's alleged breaches of Directive 90/134 on package travel both before Austria's accession, under the EEA Agreement, and, following accession, under the EC Treaty. The ECJ held that where the obligation to implement the directive arose under the EEA Agreement, it had no jurisdiction to rule on whether a Member State was liable under that agreement prior to its accession to the European Union (see also *Ulla-Brith Andersson v Swedish State* (case C321/97)).

5.3 Principle of indirect effects

Although the ECJ has not shown willing to allow horizontal direct effect of directives, it has developed an alternative tool by which individuals may rely on directives against another individual. This tool is known as the principle of 'indirect effect', which is an interpretative tool to be applied by domestic courts interpreting national legislation which conflicts with a directive in the same area. It is sometimes also called the principle of consistent interpretation.

The principle of indirect effects was introduced in a pair of cases decided shortly before *Marshall,* namely: *von Colson v Land Nordrhein-Westfalen* (case 14/83) and *Harz v Deutsche Tradax GmbH* (case 79/83). Both cases were based on Article 6 of Equal Treatment Directive 76/207. Article 6 provides that:

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment... to pursue their claims by judicial process after possible recourse to other competent authorities.

The claimants had applied for jobs with their respective defendants. Both had been rejected. It was found by the German court that the rejection had been based on their sex, but it was justifiable. Under German law they were entitled to compensation only in the form of travelling expenses. This they claimed did not meet the requirements of Article 6. Ms von Colson was claiming against the prison service; Ms Harz against Deutsche Tradax GmbH, a private company. So the vertical/ horizontal, public/private anomaly was openly raised and argued in Article 234 proceedings before the ECJ.

The Court's solution was ingenious. Instead of focusing on the vertical or horizontal effects of the directive it turned to Article 10 of the EC Treaty. Article 10 requires states to 'take all appropriate measures' to ensure fulfilment of their Community obligations,

This obligation, the Court said, applies to *all* the authorities of Member States, including the courts. It thus falls on the courts of the Member States to interpret national law in such a way as to ensure that the objectives of the directive are achieved. It was for the German courts to interpret German law in such a way as to ensure an effective remedy as required by Article 6 of the directive. The result of this approach is that although Community law is not applied directly—it is not 'directly effective'—it may still be applied indirectly as domestic law by means of interpretation.

The success of the *von Colson* principle of indirect effect depended on the extent to which national courts perceived themselves as having a discretion, under their own constitutional rules, to interpret domestic law to comply with Community law. Although the courts in the UK showed some reluctance initially to apply this principle, relying on a strict interpretation of s 2(1) of European Communities Act 1972 as applying only to directly effective Community law (see the House of Lords in *Duke v GEC Reliance Ltd* ([1988] AC 618)), the position soon changed *(Litster v Forth Dry Dock & Engineering Co Ltd* ([1990] 1 AC 546). Occasional 'hiccups' still occurred, however, and may still do so today. In *Finnegan v Clowney Youth Training Programme Ltd* ([1990] 2 AC 407) the House of Lords had refused to interpret Article 8(4) of the Sex Discrimination (Northern Ireland) Order 1976 (SI 1976/1042) in line with *Marshall,* even though the order had been made after the ECj 's decision in *Marshall.* This was because that provision was enacted in terms identical to the parallel provision considered in *Duke v GEC Reliance Ltd,* and 'must have been intended to' have the same meaning as in that Act. In the light of *Marleasing* (case 106/89, see below), such a decision would be unsustainable now, and today, the UK courts are taking their obligation seriously (see, eg, *Braymist Ltd* v *Wise Finance Co Ltd* [2002] Ch 273; *Director-General ofFair Trading* v *First National Bank* [2002] 1 AC 481).

5.3.1 The scope of the doctrine: *Marleasing*

The ECJ considered the scope of the 'indirect effect' doctrine in some depth in *Marleasing SA v La Comercial Internacional de Alimentation SA* (case C-106/89). In this case, which was referred to the ECJ by the Court of First Instance, Oviedo, the claimant company was seeking a declaration that the contracts setting up the defendant companies were void on the grounds of 'lack of cause', the contracts being a sham transaction carried out in order to defraud their creditors. This was a valid basis for nullity under Spanish law. The defendants argued that this question was now governed by EC Directive 68/151. The purpose of Directive 68/151 was to protect the members of a company and third parties from, inter alia, the adverse effects of the doctrine of nullity. Article 11 of the directive provides an exhaustive list of situations in which nullity may be invoked. It does not include 'lack of cause'. The directive should have been in force in Spain from the date of accession in 1986, but it had not been implemented. The Spanish judge sought a ruling from the ECJ on whether, in these circumstances, Article 11 of the directive was directly effective.

The ECJ reiterated the view it expressed in, *Marshall* that a directive cannot of itself 'impose obligations on private parties'. It reaffirmed its position in *von Colson* that national courts must *as far as possible* interpret national law in the light ot the wording and purpose of the directive in order to achieve the result pursued by the directive (para 8). And it' added that this obligation applied *whether the national provisions in question were adopted before or after the directive.* It concluded by ruling specifically, and without qualification, that national courts were 'required' to interpret domestic law in such a way as to ensure that the objectives of the directive were achieved (para 13).

Given that in *Marleasing* no legislation had been passed, either before or after the issuing of the directive, to comply with the directive, and given the ECJ's suggestion that the Spanish court must nonetheless strive to interpret domestic law to comply with the directive, it seems that, according to the ECJ, it is not necessary to the application of the *von Colson* principle that the relevant national measure should have been introduced for the purpose of complying with the directive, nor even that a national measure should have been specifically introduced at all.

5.3.2 The limits of *Marleasing*

The strict line taken in *Marleasing was* modified in *Wagner MiretvFondo de Garantira Salaria* (case C-334/92), in a claim against a private party based on Directive 80/987. This directive is an employee protection measure designed, inter alia, to guarantee employees arrears of pay in the event of their employer's insolvency. Citing its ruling in *Marleasing* the Court suggested that, in interpreting national law to conform with the objectives of a

directive, national courts must *presume* that the state intended to comply with Community law. They must strive 'as far as possible' to interpret domestic law to achieve the result pursued by the directive. But if the provisions of domestic law cannot be interpreted in such a way (as was found to be the case in *Wagner Miret)* the state may be obliged to make good the claimant's loss on the principles of state liability laid down in *Francovich v Italy* (cases 6 and 9/90).

Wagner Miret thus represents a tacit acknowledgment on the part of the Court that national courts will not always feel able to 'construe' domestic law to comply with an EC directive, particularly when the provisions of domestic law are clearly at odds with an EC directive, and there is no evidence that the national legislature intended national law to comply with its provisions, or with a ruling on its provisions by the ECJ. This limitation proved useful for courts which were unwilling to follow *Marleasing.* Thus, in *R v British Coal Corporation, ex parte Vardy* ([1993] ICR 720), a case decided after, but without reference to, *Marleasing,* the English High Court adverted to the House of Lords judgment in *Litster* but found that it was 'not possible' to interpret a particular provision of the Trade Union and Labour Relations Act 1992 to produce the same meaning as was required by the relevant EC directive (see also *Re Hartlebury Printers Ltd* [1993] 1 All ER 470 at 478b, ChD).

Thus the indirect application of EC directives by national courts cannot be guaranteed. Some reluctance on the part of national courts to comply with the *von Colson* principle, particularly as applied in *Marleasing,* is hardly surprising. It may be argued that in extending the principle of indirect effect in this way the ECJ is attempting to give horizontal effect to directives by the back door, and impose obligations, addressed to Member States, on private parties, contrary to their understanding of domestic law. Where such is the case, as the House of Lords remarked in *Duke v GEC Reliance Ltd* (see also *Finnegan v Clowney Youth Training Programme Ltd),* this could be 'most unfair'. Indeed, the dividing line between giving 'horizontal direct effect' to a directive and merely relying on the interpretative obligation under the doctrine of 'indirect effect' can be a very fine and technical one in the circumstances of a particular case, as evidenced by *Mangold* (case C-144/04). This case involved an interpretation of the notion of 'working time' in the context of the Working Time Directive (93/104/EC [1993] OJ L307/1 8). German case law had developed a distinction between duty time, on-call time and stand-by time, with only the first being regarded as 'working time'. Emergency workers employed by the German Red Cross had challenged a provision in their collective labour agreement which, they argued, extended their working time beyond the prescribed 48-hour limit. The Court suggested that this agreement may be in breach of the directive, but that the claimants could not rely on the directive itself as against their employer. Having restated the basic principle that national law must be interpreted in accordance with the treaty, in particular where this has been enacted to implement a directive, the Court went on to say that this obligation was not restricted to the provisions themselves, but extended to 'national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive' (para 115).

A national court must do 'whatever lies within its jurisdiction' to ensure compliance with EC law. The ECJ did not go so far as to state expressly that existing case law might have to be reviewed to ensure such compliance, but the force of its reasoning appears to point in that direction. On the facts of the case, the outcome would be very close to allowing the individuals to invoke the direct effect of the directive against their employer.

The ECJ in *Adeneler* (case C-2 12/04) referred to another limitation on indirect effect, legal certainty and non-retroactivity. This line of reasoning finds its basis in the case of *Kolpinghuis Nijmegen* (case 80/8 6). Here, in the context of criminal proceedings against Kolpinghuis for breach of EC Directive 80/777 on water purity, which at the relevant time had not been implemented by the Dutch authorities, the Court held that national courts' obligation to interpret domestic law to comply with EC law was 'limited by the general principles of law which form part of Community law [see Chapter 6] and in particular the principles of legal certainty and non-retroactivity'.

Although expressed in the context of criminal liability, to which these principles were 'especially applicable', it was not suggested that the limitation should be confined to such situations. Where an interpretation of domestic law would run counter to the legitimate expectations of individuals *afortiori* where the state is seeking to invoke a directive against an individual to determine or aggravate his criminal liability, as was the case in *Arcaro* (case C-l68/95, see further below), the doctrine will not apply. Where domestic legislation has been introduced to comply with a Community directive, it is legitimate to expect that domestic law will be interpreted in conformity with Community law, provided that it is capable of such an interpretation (cf *Mangold,* case C-144/04, above). Where legislation has not been introduced with a view to compliance domestic law may still be interpreted in the

light of the aims of the directive as long as the domes'tic provision is reasonably capable of the meaning contended for. But in either case an interpretation which conflicts with the clear words and intentions of domestic law is unlikely to be acceptable to national courts. This has repeatedly been acknowledged by the Court *(Wagner Miret* (case C-334/92) and *Arcaro* (case C-1 68/95)).

Mangold could, however, be seen as a more unsympathetic approach to the limits of interpretation. A^-similarly unsympathetic approach to the difficulties of the national court can be seen in *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbdnde* (case C-404/06), where it was argued that, as the national court had ruled that there was only one possible interpretation and it was prohibited under national law from making a ruling *contra legem,* the reference should be declared inadmissible as the referring court would not be able to take account of any differing interpretation from the ECJ. The ECJ rejected the argument, on the basis of the separation of functions between the ECJ and the national court (see Chapter 10). It continued:

The uncertainty as to whether the national court—following an answer given by the Court of Justice to a question referred for a preliminary ruling relating to interpretation of a directive—may, in compliance with the principles laid down by the Court... interpret national law in the light of that answer cannot affect the Court's obligation to rule on that question. [Para 22.]

In effect, the ECJ held here that the problems of dealing with the doctrine of indirect effect are for the national court. It should not be thought that *Quelle* signals an end to the *contra legem* principle. It was a ruling of one of the chambers. The Grand Chamber shortly before *Quelle* in *Impact v Minister for Agriculture and Food and others* (case C-268/06) reaffirmed the principle, holding that the national court's duty under indirect effect is 'limited by general principles of law, particularly those of legal certainty and non-retroactivity' and therefore indirect effect 'cannot serve as the basis for an interpretation of national law *contra legem'* (para 100). *Quelle* and *Mangold* seem then to be exceptions, but the uncertainty they introduced is not helpful.

Arcaro (case C-1 68/9 5) could also be seen as introducing further limitations on the scope of indirect effect. There, the ECJ held that the:

obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law *reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed* or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions.

The Court has subsequently affirmed that the obligation to interpret domestic law in accordance with EC law cannot result in criminal liability independent of a national law adopted to implement an EC measure, particularly in light of the principle of non-retroactivity of criminal penalties in Article 7 of the European Convention on Human Rights (case C-60/02 *Criminal Proceedings againstX ('Rolex')).* This reasoning has also been applied in the context of direct effect (see *Berlusconi and others* (joined cases C-387/02, C-39 1/02 and C-403/02)).

The phrase 'imposition on an individual of an obligation' in *Arcaro* could be interpreted to mean that indirect effect could never require national law to be interpreted so as to impose obligations on individuals not apparent on the face of the relevant national provisions. It is submitted, however, that the ECJ's view in *Arcaro* is limited to the context of criminal proceedings, and that the application of the doctrine of indirect effect can result in the imposition of civil liability not found in domestic law (see also Advocate-General Jacobs in *Centrosteel Sri v Adipol GmbH* (case C-456/98), paras 31-5).

This seems to be the result of *Oceano Grupo Editorial vRocio Murciano Quintero* (case C240/9 8). Here, Oceano had brought a claim in a Barcelona court for payment under a contract of sale for encyclopaedias. The contract contained a term which gave jurisdiction to the Barcelona court rather than a court located near the consumer's home. That court had doubts regarding the fairness of the jurisdiction clause. The Unfair Contract Terms Directive (93/13/EEC) requires that public bodies be able to take steps to prevent the continued use of unfair terms. It also contains a list of unfair terms, including a jurisdiction clause, but this only became effective in Spanish law *after* Oceano's claim arose. Spanish law did contain a general prohibition on unfair terms which could have encompassed the jurisdiction clause, but the scope of the relevant Spanish law was unclear. The question arose whether the Barcelona court should interpret Spanish legislation in accordance with the Unfair

Contract Terms Directive. The ECJ reaffirmed the established position that a 'national court is obliged, when it applies national law provisions predating or postdating [a directive], to interpret those provisions, so far as possible, in the light of the wording of the directive' (para 32).

The Court went on to say that in light of the emphasis on public enforcement in the Unfair Contract Terms Directive, the national court may be required to decline of its own motion the jurisdiction conferred on it by an unfair term. As a consequence, Oceano would be deprived of a right which it might otherwise have enjoyed under existing Spanish law. This latter consideration should not prevent the national court from interpreting domestic law in light of the directive. In terms of the scope of the doctrine of indirect effect, it would be nonsensical to distinguish between cases which involve the imposition of obligations and those which concern restrictions on rights. Often, in a relationship between individuals, one individual's right is an obligation placed on another individual. The reasoning in *Arcaro* is best confined to the narrow context of criminal penalties.

Some questions have arisen as to when the obligation to use a consistent interpretation arises and in particular should it be the date the directive is enacted, or the date by which it must be implemented. This question came before the ECJ in *Adeneler.* The ECJ distinguished a positive and a negative duty for the courts of Member States. The positive aspect is the obligation to interpret all national law in line with the directive; that arises from the date by which the directive must be transposed. The negative aspect is based on the ECJ's reasoning in *Inter-Environnement Wallonie* (see 5.2.5.2 above). According to this line of reasoning, the national courts must, once the directive is in force (but before it is due to be transposed), refrain from interpreting national law in a way liable seriously to compromise the attainment of the result prescribed by the directive.

It may therefore be stated that the doctrine of indirect effect continues to be significant. However, there will be circumstances when it wilfhot be possible to apply it. In such a situation, as the Court suggested in *Wagner Miret,* it will be necessary to pursue the alternative remedy of a claim in damages against the state under the principles laid down in *Francovich v Italy* (cases C-6 and 9/90—see Chapter 9).

It may be significant that in *El Corte Ingles SA v Rivero* (case C-l92/94) the Court, in following the *Dori* ruling that a directive could not be invoked directly against private parties, did not suggest a remedy based on indirect effect, as it had in *Dori,* but focused only on-the possibility of a claim against the state under *Francovich.*

5.3.3 Indirect effect in other contexts

The discussion has, so far, concentrated on the application of this principle in the context of directives. However, *mMariaPupino* (case C-l05/03), the ECJ held that the obligation to interpret national law in accordance with European rules can extend to framework decisions adopted under Article 34(2) TEU, and that a national court is required to interpret domestic law, in so far as possible, in accordance with the wording and purpose of a corresponding framework decision. The decision is controversial, because it extends the notion of indirect effect into the domain of criminal law, an area in respect of which the Community has no competence to act and seems also to circumvent the limitation on the direct effect of JHA provisions noted at 5.2.9.

5.4 Conclusions

The principle of direct effects, together with its twin principle of supremacy of EC law, discussed in Chapter 4, has played a crucial part in securing the application and integration of Community law within national legal systems. By giving individuals and national courts a role in the enforcement of Community law it has ensured that EC law is applied, and Community rights enforced, even though Member States have failed, deliberately or inadvertently, to bring national law and practice into line with Community law. Thus, as the Court suggested in *Van Gend* (case 26/62), the principle of direct effects has provided a means of control over Member States additional to that entrusted to the Commission under Article 226 and Member States under Article 227 (see further Chapter 11). But there is no doubt that the ECJ has extended the concept of direct effects well beyond its apparent scope as envisaged by the EC Treaty. Furthermore, although the criteria applied by the ECJ for assessing the question of direct effects appear straightforward, in reality they have in the past been applied loosely, and any provision which is justiciable has, until recently, been found to be directly effective, no matter what difficulties may be faced by national courts in its application, or what impact it may have on the parties, public or private, against whom it is enforced. Thus the principle of direct effects created problems for national

courts, particularly in its application to directives.

In recent years there have been signs that the ECJ, having, with a few exceptions, won acceptance from Member States of the principle of direct effects, or at least—in the case of directives—of vertical effects, had become aware of the problems faced by national courts and was prepared to apply the principles of direct and indirect effect with greater caution. Its more cautious approach to the question of standing, demonstrated in *Lemmens* (case C-226/97), has been noted above. In *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* (case C-236/92), the Court found that Article 4 of Directive 7 5/442 on the Disposal of Waste, which required states to 'take the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment', was not unconditional or sufficiently precise to be relied on by individuals before their national courts. It 'merely indicated a programme to be followed and provided a framework for action' by the Member States. The Court suggested that in order to be directly effective the obligation imposed by the directive must be 'set out in unequivocal terms'. In *R v Secretary of State for Social Security, exparte Sutton* (case C-66/95) the Court refused to admit a claim for the award of interest on arrears of social security benefit on the basis of Article 6 of EC Directive 79/7 on Equal Treatment for Men and Women in Social Security, although in *Marshall (No 2)* (case C-27 1/91) it had upheld a claim for compensation for discriminatory treatment based on an identically worded Article 6 of Equal Treatment Directive 7 6/207. The Court's attempts to distinguish between the two claims ('amounts payable by way of social security are not compensatory') were unconvincing. In *El Corte Ingles SA v Rivero* (case C-192/94) it found the then Article 1 29a (now 153) of the EC Treaty requiring the Community to take action to achieve a high level of consumer protection insufficiently clear and precise and unconditional to be relied on as between individuals. This may be contrasted with its earlier approach to the former Article 128 EC, which required the Community institutions to lay down general principles for the implementation of a vocational training policy, which was found, albeit together with the non-discrimination principle of (the then) Article 7 EEC, to be directly effective (see *Gravier v City of Liege* (case 293/83)). Thus, a directive may be denied direct effects on any of the following the grounds:

(a) the right or interest claimed in the directive is not sufficiently clear, precise and unconditional

(b) the individual seeking to invoke the directive did not have a direct interest in the provisions invoked *(Verholen,* cases C-87-9/90)

(c) the obligation allegedly breached was not intended for the benefit of the individual seeking to invoke its provisions *(Lemmens).*

In the area of indirect effects, in *Dori v Recreb Sri* (case C-9 1/92), the ECJ, following its lead in *Marshall* (case 152/84), declared unequivocally that directives could not be invoked horizontally. This view was endorsed in *El Corte Ingles SA v Rivero, Arcaro* (case C- 168/95) and, most recently, in *Pfeiffer* (joined cases C-397/01 to C-403/01). In *Wagner Miret* (case C3 34/92) the ECJ acknowledged that national courts might not feel able to give indirect effect to Community directives by means of 'interpretation' of domestic law. This was also approved in *Arcaro.* In almost all of these cases, decided after *Francovich,* the Court pointed out the possibility of an alternative remedy based on *Francovich,* discussed in Chapter 9.

J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009

Chapter 6: General Principles of Law

6.1 Introduction

6.1.1 The relevance of general principles

After the concept of direct effects and the principle of supremacy of EC law the third major contribution of the European Court of Justice (ECJ) has been the introduction of general principles of law into the corpus of EU law. Although primarily relevant to the question of remedies and enforcement of EC law, a discussion of the role of general principles of law is appropriate at this stage in view of their fundamental importance in the jurisprudence of the ECJ.

General principles of law are relevant in the context of EU law in a number of ways. First, they may be invoked as an aid to interpretation: EU law, including domestic law implementing EC law obligations, must be interpreted in such a way as not to conflict with general principles of law. Secondly, general principles of law may be invoked by both states and individuals to challenge Community action, either to annul or invalidate acts of the institutions (under Articles 230, 234, 236, and 241 (ex 173, 177,179, and 184) EC post Lisbon 263, 267, 270 and 277 TFEU), or to challenge inaction on the part of these institutions (under Articles 232 or 236 (ex 175 and 179) EC post Lisbon 265 and 270 TFEU). Thirdly, as a logical consequence of its second role, but less generally acknowledged, general principles may also be invoked as a means of challenging action by a Member State, whether in the form of a legal or an administrative act, where the action is performed in the context of a right or obligation arising from Community law (see *Klensch* (cases 201 and 202/85); *Wachaufv Germany* (case 5/88); *Lageder v Amministrazione delle Finanze dello Stato* (case C31/91); but cf*R v Ministry ofAgriculture, Fisheries and Food, ex parte Bostock* (case C2/93)). The degree to which general principles of law affect actions by Member States will be discussed in more detail later in this chapter. General principles of law may be invoked to support a claim for damages against the Community, under Article 288(2) (ex 2 15(2) post Lisbon Article 340 TFEU) (see Chapter 14).

These reasons are all practical reasons, based in the arena of legal action. There are other reasons, too, which relate to how the Union is seen; what sort of values it has. The jurisprudence in this area expands the rights of individuals beyond the economic rights found in the original treaty. In parallel with the concept of citizenship, the protection of such rights suggests the Union itself has greater links with the individuals and is, itself, obtaining greater legitimacy.

This area has become a steadily evolving aspect of Union law. This chapter examines the general historical development of the Court's jurisprudence to explain how general principles have been received into Union law. It will be seen that general principles, in particular fundamental rights, are invoked with increasing frequency before the European courts. Some of these general principles are examined in more detail. However, this chapter does not provide a full survey of the substantive rights which are now recognised in Union law. Such a discussion is beyond the scope of this book and readers should refer to the specialist texts which are now available.

6.1.2 Fundamental principles

General principles of law are not to be confused with the fundamental principles of Community law, as expressed in the EC Treaty, for example, the principles of free movement of goods and persons, of non-discrimination on the grounds of sex (Article 141 (ex 119, as amended) EC) or nationality (Article 12 (ex 6) EC), although there may be some overlap or commonality between the two. General principles of law constitute the 'unwritten' law of the Union and they have been developed—or discovered—over time by the ECJ.

6.2 Rationale for the introduction of general principles of law

The original legal basis for the incorporation of general principles into Union law was slim, resting precariously on three articles. Article 230 gives the ECJ power to review the legality of Community acts on the basis of, inter alia, 'infringement of this Treaty', or 'any rule of law relating to its application'. Article 288(2), which

governs Community liability in tort, provides that liability is to be determined 'in accordance with the general principles common to the laws of the Member States'. And Article 220, governing the role of the ECJ, provides that the Court 'shall ensure that in the interpretation and application of this Treaty the law is observed'.

In the absence of any indication as to the scope or content of these general principles, it has been left to the ECJ to put flesh on the bones provided by the treaty. This function the Court has amply fulfilled, to the extent that general principles now form an important element of EU law.

One of the reasons for what has been described as the Court's 'naked law-making' in this area is best illustrated by the case of *Internationale Handelsgesellschaft mbH* (case 11/70). There the German courts were faced with a conflict between an EC regulation requiring the forfeiture of deposits by exporters if export was not completed within an agreed time, and a number of principles of the German constitution, in particular, the principle of proportionality. It is in the nature of constitutional law that it embodies a state's most sacred and fundamental principles. Although these principles were of particular importance, for obvious reasons in post-war Germany, other Member States also had written constitutions embodying similar principles and rights. Clearly it would not have done for EC law to conflict with such principles. Indeed, as the German constitutional court made clear ([1974] 2 CMLR 540), were such a conflict to exist, national constitutional law would take precedence over EC law. This would have jeopardised not only the principle of primacy of EC law but also the uniformity of application so necessary to the success of the new legal order. So while the ECJ asserted the principle of primacy of EC law in *Internationale Handelsgesellschaft,* it was quick to point out that respect for fundamental rights was in any case part of EC law.

Another reason now given to justify the need for general principles is that the Community's powers—and now those of the Union—have expanded to such a degree that some check on the exercise of the institutions' powers is needed. Furthermore, the expansion of Union competence means that the institutions' powers are now more likely to operate in policy areas in which human rights have an influence. Although those who wish to see sovereignty retained by the nation state may originally have been pleased to see the limitation of the institutions' powers, the development of human-rights jurisprudence in this context can be seen as a double-edged sword, giving the ECJ increased power to impugn both acts of the Union institutions and implementing measures taken by Member States on grounds of infringement of general principles.

6.3 Development of general principles

6.3.1 Fundamental human rights

The Court's first tentative recognition of fundamental human rights was prior to *Internationale Handelsgesellschaft,* in the case of *Stauder v City ofUlm* (case 29/69). Here the applicant was claiming entitlement to cheap butter provided under a Community scheme to persons in receipt of welfare benefits. He was required under German law to divulge his name and address on the coupon which he had to present to obtain the butter. He challenged this law as representing a violation of his fundamental human rights (namely, equality of treatment). The ECJ, on reference from the German court on the validity of the relevant Community decision, held that, on a proper interpretation, the Community measure did not require the recipient's name to appear on the coupon. This interpretation, the Court held, contained nothing capable of prejudicing the fundamental human rights enshrined in the general principles of law and protected by the Court.

The ECJ went further in *Internationale Handelsgesellschaft.* There it asserted that respect for fundamental rights forms an integral part of the general principles of law protected by the Court—such rights are inspired by the constitutional traditions common to the Member States. One point to note here is that the ECJ was not comparing EC law with *national* law but with the principles of *international* law which are embodied in varying degrees in the national constitutions of Member States. A failure to make the distinction between general principles of international law (even if embodied in national laws) which the Community legal order respects and national law proper could erode the doctrine of supremacy of Community law vis-a-vis national laws.

The *International Handelsgesellschaft* judgment can be taken as implying that only rights arising from traditions common to Member States can constitute part of EC law (a 'minimalist' approach). It may be argued that if the problem of conflict between Community law and national law is to be avoided in *all* Member States it is necessary for *any* human right upheld in the constitution of *any* Member State to be protected under EU law (a maximalist approach). In *Hoechst* v *Commission* (cases 46/87 and 227/88), in the context of a claim based on

the fundamental right to the inviolability of the home, the Court, following a comprehensive review by Advocate-General Mischo of the laws of all the Member States on this question, distinguished between this right as applied to the 'private dwelling of physical persons', which was common to all Member States (and which would by implication be protected as part of Community law), and the protection offered to commercial premises against intervention by public authorities, which was subject to 'significant differences' in different Member States. In the latter case the only common protection, provided under various forms, was protection against arbitrary or disproportionate intervention on the part of public authorities. Similarly, but dealing with administrative law, in *Australian Mining & Smelting Europe Ltd v Commission* (case 155/79), in considering the principle of professional privilege, the Court found that the scope of protection for confidentiality for written communications between lawyers and their clients varied from state to state; only privilege as between independent (as opposed to in-house) lawyers and their clients was generally accepted, and would be upheld as a general principle of Community law.

These cases suggest that where certain rights are protected to differing degrees and in different ways in Member States, the Court will look for some *common* underlying principle to uphold as part of Union law. Even if a particular right protected in a Member State is not universally protected, where there is an apparent conflict between that right and EU law, the Court will strive to interpret Union law so as to ensure that the substance of that right is not infringed. An exception to this approach can be seen in *Society for the Protection of the Unborn Child v Grogan* (case 159/90). This case concerned the officers of a students' union who provided information in Ireland about the availability of legal abortion in the UK. SPUC brought an action alleging that this was contrary to the Irish constitution. The officers' defence was based on the freedom to provide services within the Community and on the freedom of expression contained in the ECHR which also forms part of Community law as a general principle (see further below). The ECJ evaded this issue. Since the students' union did not have an economic link with the clinics whose services they advertised, the provision of information about the clinics was not an economic activity within the treaty. As the issues fell outside the scope of EC law, the officers could not rely on either the provisions on freedom to provide services in the treaty or on general principles of law. (See further Chapter 21.)

6.3.2 Role of international human-rights treaties

Following *Internationale Handelsgesellschaft* the scope for human-rights protection was further extended in the case of *Nold KG v Commission* (case 4/73). In this case J Nold KG, a coal wholesaler, was seeking to challenge a decision taken under the ECSC as being in breach of the company's fundamental right to the free pursuit of business activity. While the Court did not find for the company on the merits of the case, it asserted its commitment to fundamental rights in the strongest terms. As well as stating that fundamental rights form an integral part of the general principles of law, the observance of which it ensures, it went on to say: In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

The reasons for this inclusion of principles of certain international treaties as part of EU law are clearly the same as those upholding fundamental constitutional rights; it is the one certain way to guarantee the avoidance of conflict.

In this context, the most important international treaty concerned with the protection of human rights is the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), to which all Member States are now signatories. The Court has on a number of occasions confirmed its adherence to the rights protected therein, an approach to which the other institutions gave their support 0oint Declaration, [1977] OJ C 103/1). In *R v Kirk* (case 63/83), in the context of criminal proceedings against Kirk, the captain of a Danish fishing vessel, for fishing in British waters (a matter subsequently covered by EC regulations), the principle of non-retroactivity of penal measures, enshrined in Article 7 of the ECHR, was invoked by the Court and applied in Captain Kirk's favour. The EC regulation, which would have legitimised the British rules under which Captain Kirk was charged, could not be applied to penalise him retrospectively. (See also *Johnston v Chief Constable of the Royal Ulster Constabulary* (case 222/84) (ECHR, Article 6, right to

judicial process); *Hoechst* (cases 46/87, 227/88) contrast substantive ruling in *Roquette Freres* (case C-94/00); *National Panasonic v Commission* (case 136/79) (ECHR Article 8, right to respect for private and family life, home and correspondence—not infringed).) The impact of Article 8 ECHR can be seen clearly in the case law on free movement of people (see Chapter 25).

Thus, it seems that any provision in the ECHR may be invoked, provided it is done in the context of a matter of EU law. In *Kaur* v *Lord Advocate* ([1980] 3 CMLR 79), an attempt was made to invoke the Convention (Article 8 'respect for family life') by an Indian immigrant seeking to challenge a deportation order made under the Immigration Act 1971. She failed on the grounds that the Convention had not been incorporated into British law. Its alleged incorporation via the European Communities Act 1972 did not enable a party to invoke the Convention before a Scottish court in a matter wholly unrelated to EU law (see also *SPUC v Grogan* (case 159/90) and *Kremzow v Austria* (case C-299/95)). In *Mannesmannrohren-Werke AG* v *Commission* (Case T-l 12/98), the Court of First Instance (CFI) emphasised that although the ECHR has special significance in defining the scope of fundamental rights recognised by the Community, because it reflects the constitutional traditions common to the Member States, the Court has no jurisdiction to apply the ECHR itself. The CFI therefore rejected arguments based directly on Article 6 ECHR in relation to an application to annul a Commission decision, but allowed the application on other grounds (see 6.6.7). The CFI's view with regard to invoking ECHR articles may be technically correct, but it sits somewhat uneasily with other judgments both by the CFI and the ECJ in which the courts appeared more willing to refer directly to ECHR provisions, and even to the jurisprudence of the European Court of Human Rights itself (see, eg, *Roquette Freres* (case C-94/00); *Orfanopoulos* (case C-482/0 1), citing *Boultifv Switzerland* concerning right to family life; *Connolly v Commission* (case C-274/99P): civil servants' freedom of expression under Article 10 ECHR).

Other international treaties concerned with human rights referred to by the Court as constituting a possible source of general principles are the European Social Charter (1971) and Convention 111 of the International Labour Organisation (1958) *(Defrenne v Sabena (No 3)* (case 149/77)). In *Ministere Public v Levy* (case C-158/91) the Court suggested that a Member State might even be obliged to apply a national law which conflicted with a ruling of its own on the interpretation of EC Directive 7 6/207 where this was necessary to ensure compliance with an international convention (in this case ILO Convention 89,1948) concluded prior to that state's entry into the EC. The list has grown over the years, with the ECJ adding recently, for example, Convention on the Protection and Promotion of the Diversity of Cultural Expressions *(UTECA v Administracion General del Estado* (case C-222/07)) and the UN Convention on the Rights of the Child *(Dynamic Medien* (case C-244/06)).

6.3.3 Relationship between different legal systems protecting human rights

6.3.3.1 *Relationship with national constitutions*

We saw at the beginning of this chapter that one of the central reasons for the introduction of fundamental rights into EU law was the resistance of some of the constitutional courts to giving effect to Community rules which conflicted with national constitutional principles. The ECJ's tactics to incorporate these principles and stave off rebellion were undoubtedly successful as exemplified by the *Wilnsche* case ([1987] 3 CMLR 225), in which the German constitutional court resiled from its position in *InternationaleHandelsgesellschaft* ([1974] 2 CMLR 540) (see Chapter 4). This does not, however, mean that the ECJ can rest on its laurels in this regard. The Italian constitutional court in Fragd *(SpA Fragd v Amministrazione delle Finanze* Decision No 232 of 21 April 1989) reaffirmed its right to test Community rules against national constitutional rules and stated that Community rules that, in its view, were incompatible with the Italian constitution would not be applied. Similarly, the German constitutional courts have reasserted the right to challenge Community legislation that is inconsistent with the German constitution (see, eg, *Brunner v European Union Treaty* [1994] 1 CMLR 57; *M GmbH v Bundesregierung* (case 2 BvQ3/89) [1990] 1 CMLR 570 (an earlier tobacco-advertising case) and the bananas cases—*Germany v Council (Re Banana Regime)* (case C-280/93), *Germany v Council (Bananas II)* (case C-l22/95) and T Porr *GmbH v Hauptzollamt Hamburg-Jonas* (cases C-364 and 365/95)—discussed further in Chapter 4). Although the supremacy of Community law vis-a-vis national law might not be threatened by the possibility of its review in accordance with provisions of national constitutions embodying general principles of international law, its uniformity and the supremacy of the ECJ might well be eroded if national courts seek themselves to interpret these broad and flexible principles, rather than referring for a ruling on these matters from the ECJ. Equally, a failure on the part of national courts to recognise fundamental principles, in conjunction with a failure to refer, may have a similar effect.

6.3.3.2 *Accession to the ECHR*

Deferring to the ECJ does, however, concentrate a significant degree of power in that court, against whose rulings there is no appeal. One suggested safeguard for fundamental rights would be for the Community to accede to the ECHR. Questions of human rights and, in particular, interpretation of the ECHR, could then be taken to the European Court of Human Rights, a court which specialises in these issues. This would minimise the risk of the ECJ misinterpreting the ECHR and avoid the possibility of two conflicting lines of case law developing (eg, *Orkem* (case 3 74/87) and *FunkevFrance* (case SA 256A)). The ECJ, however, has ruled that accession to the ECHR would not be within the present powers of the Community: treaty amendment would be required before the Community could take this step *(Opinion 2/94 on the Accession by the Community to the European Convention on Human Rights).*

This was one of the issues discussed by the Convention on the Future of Europe preparing for the 2004 IGC. The treaty establishing a Constitution would not only have incorporated the EU Charter of Fundamental Rights (a separate document, not to be confused with the ECHR) into the Constitution (see further below), but would also have included an article in Part I which provided that the Union 'shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'. A further declaration provided for cooperation between the ECHR and the ECJ. As we know, the Constitution has been abandoned and replaced by the Lisbon Treaty. Although Lisbon does not incorporate the charter, it continues the intention to accede to the ECHR (Article 6(2) TEU), but the status of the Lisbon Treaty is, like the Constitution before it, in doubt (see Chapter 1). Even if it were in force, the details of timing and other practicalities of accession remain to be worked out. The Treaty on European Union (TEU) (as amended by Lisbon) also specifies that accession would not affect the Union's competence as defined in the treaties. Yet, this remains a significant step forward. It also follows the line established by recent treaty amendments, which have seen a progressive raising of the profile of human-rights protection within the Community and, indeed, the Union.

6.3.3.3 *Enforcing respect for the ECHR within the EU structure*

The TEU had included in the Union general provisions a reference to the ECHR to the effect that:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. . . and as they result from the constitutional tradition common to the Member States, as general principles of Community law. [Article 6(2) (ex F(2) TEU).]

The Constitution provided, to a similar effect, that:

Fundamental Rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. [Article 1-9(3).]

This wording has been reproduced by the Lisbon Treaty at Article 6(3) TEU.

Additionally, Article 6(1) (ex F(l)) TEU stated that the Union was founded on respect for 'liberty, democracy and respect for human rights'. However, by Article L TEU, as it then was (now amended and renumbered as Article 46 TEU), the ECJ's jurisdiction as regards the general Union provisions was excluded. The Treaty of Amsterdam (ToA) amended Article 46 TEU to give the ECJ express competence in respect of Article 6(2) TEU with regard to action of the institutions 'insofar as the ECJ has jurisdiction either under the treaties establishing the Communities or under the TEU'. This would seem to be little more than a confirmation of the existing position, at least as far as the EC Treaty is concerned, though it might have some significance in respect of the ECJ's (limited) jurisdiction regarding justice and home affairs (JHA). Article 46 TEU will be repealed should the Lisbon Treaty come in to force.

The ToA inserted Article 7 into the TEU. This provided that where there has been a persistent and serious breach of a principle mentioned in Article 6(1) TEU, the Council may suspend certain of the rights of the offending Member State, including its voting rights. Were this provision used, it could have serious consequences for the Member State in question; such a Member State would lose its opportunity to influence the content of Union legislation by which it would be bound, even in sensitive areas where otherwise it could have vetoed legislation. Thus, one might suggest that the need to comply with fundamental principles is being taken seriously indeed. It is likely, though, that this provision will be used only rarely given the severity of the breach needed to trigger the procedure, which itself is long-winded, requiring unanimity

(excluding the offending Member State) in the first instance. Given the potential consequences for Member States, however, the complexity of the procedure is perhaps appropriate. The Lisbon Treaty contains a new provision, Article 269 TFEU, which gives the ECJ the jurisdiction to decide on the legality of such a decision on procedural grounds only.

6.3.3.4 *Relationship with international law*

The relationship between EU and international law has been the subject of consideration recently. The factual backdrop concerned Union measures implementing UN Resolutions on economic sanctions. Effectively, these measures allowed for the freezing of individuals' assets, without prior warning. The matter came before the CFI, as an action for annulment. It held that the courts are not empowered to review decisions of the UN, including the Security Council, even in the light of Community law or the fundamental rights recognised by Union law *(Ahmed AH Yusufand Others v Council of the European Union* (cases T-306 and 3 15/01), known as *Kadi).* The CFI based this decision on the fact that, according to its interpretation of the requirements of international law, the obligations of the Member States of the United Nations prevail over any other obligation. The Community, although not itself a member of the UN, must, in the CFI's opinion, be bound by the obligations flowing from the Charter of the United Nations. Nonetheless, the CFI reserved the rights of the Community courts to check the lawfulness of the Council Regulation (which implemented the UN Security Council Resolution and was under challenge in this case), and therefore implicitly the underlying resolution, by reference to the higher rules of international law *(jus cogens),* from which neither the Member States nor the bodies of the Union should, under international law, be able to derogate. This includes provisions intended to secure universal protection of fundamental human rights. On the facts, the CFI found the application unfounded.

The ECJ heard the appeal in *Kadi* (joined cases C-402 and 415/05 P) and approached the matter in a completely different way, overturning the CFI's internationalist approach. While the ECJ accepted that the EU (and its Member States) were subject to international obligations, such as those contained in the UN, this does not change the allocation of powers within the EU. Furthermore, the EU was characterised by the ECJ, drawing on its previous jurisprudence, as an autonomous legal order built on the rule of law and respect for fundamental human rights. Thus there is a distinction between international obligations and the effect of Community norms, and the fact that Community measures might arise from those international obligations does not affect the fact that Union law must comply with human rights, as recognised by the EU. On this basis, the ECJ reviewed whether the EU implementing measures (not the UN Resolutions) complied with a number of procedural rights and the right to respect for property, and in this, it is arguable that the ECJ was taking a stronger line that had the European Court of Human Rights. This is a significant judgment, which re-emphasises the centrality of the rule of law and the protection of human rights within the EU.

6.4 Relationship between the EC/EU and the ECHR in the protection of human rights: View from the ECHR

All Member States of the EU have signed the ECHR, and in most Member States, the Convention has been incorporated into domestic law. (It was incorporated in the UK by the Human Rights Act 1998, which came into force in October 2000.) When it is so incorporated, the Convention's provisions may be invoked before the domestic courts in order to challenge *national* rules or procedures which infringe the rights protected by the Convention. Even without the Convention being incorporated into domestic law, the Member States are bound by its terms and individuals, after they have exhausted national remedies, have a right of appeal under the Convention to the European Court of Human Rights.

The ECJ has done a great deal to ensure the protection of human rights within the context of the application of Community law, whether by Community institutions or by Member States. But, as the ECHR has not so far been incorporated into *Community* law, its scope has been limited and the relationship between the ECHR and the Union legal system is somewhat unclear. The difficulties are illustrated by the decision of the European Court of Human Rights in the *Matthews* case (European Court of Human Rights judgment, 18 February 1999).

Matthews concerned the rights of UK nationals resident in Gibraltar to vote in European Parliamentary elections. They were excluded from participating in the elections as a result of the 1979 agreement between the Member States which established direct elections in respect of the European Parliament. The applicants argued that this was contrary to Protocol 1, Article 3 of the ECHR, which provides that signatory States to the

Convention are under an obligation 'to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'. The British government argued that not only was Community law not within the jurisdiction of the ECHR (as the Community had not acceded to the Convention), but also that the UK government could not be held responsible for joint acts of the Member States. The European Court of Human Rights found, however, that there had been a violation of the Convention.

The Court held that States which are party to the ECHR retain residual obligations in respect of the rights protected by the Convention, even as regards areas of lawmaking which had been transferred to the Union. Such a transfer of power is permissible, provided Convention rights continue to be secured within the Community framework. In this context the Court of Human Rights noted the ECJ's jurisprudence in which the ECJ recognised and protected Convention rights. In this case, however, the existence of the direct elections was based on a *sui generis* international instrument entered into by the UK and the other Member States which could not be challenged before the ECJ, as it was not a normal Community act. Furthermore, the TEU, which extended the European Parliament's powers to include the right to co-decision thereby increasing the Parliament's claim to be considered a legislature and taking it within the terms of Protocol 1, Article 3 of the ECHR, was equally an act which could not be challenged before the ECJ. There could therefore be no protection of Convention rights in this regard by the ECJ. Arguing that the Convention is intended to guarantee rights that are not theoretical or illusory, the Court of Human Rights held that:

The United Kingdom, together with all other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol 1, for the consequences of that Treaty. [Para 33.]

It may be noted that it is implicit in the reasoning in this judgment that the EU is regarded by the Court of Human Rights as being the creature of the Member States, which remain fundamentally responsible for the Community's actions—and for those of the Union. This corresponds with the conception of the EU expressed by some of the Member States' constitutional courts (eg, see the German constitutional court's reasoning in *Brunner* [1994] 1 CMLR 57).

Arguably, this judgment opens the way for the Member States to be held jointly responsible for those Community (or Union) acts that currently fall outside the jurisdiction of the ECJ, sealing lacunae in the protection offered to individual human rights within the Community legal order. The difficulty is, of course, that in this case only the UK was the defendant. The British government is dependent on the cooperation of the other Member States to enable it to fulfil its own obligations under the ECHR. It is possible that a case could be brought under the ECHR against all Member States jointly. (See, eg, *Societe Guerin Automobiles* (Application No 51717/99), inadmissible on other grounds; *DSR Senator Lines,* (Application No 56672/00) (Grand Chamber), dismissed as the applicant could not claim on the facts to be a victim, though note third-party representations, including that of the ICJ.) Although this would not obviate the need for cooperation to remedy any violation found, it would avoid the situation where one Member State alone was carrying the responsibility for Union measures that were the choice of all (or most) Member States. The implication that the European Court of Human Rights will step in only where there is no effective means of securing human-rights protection within an existing international body (ie, that the ECJ has primary responsibility for these issues in the EU) is underlined by its approach in another case involving another European supranational organisation, Euratom *(Waite and Kennedy v Germany,* European Court of Human Rights judgment, 18 February 1999). There the Court emphasised the necessity for an independent review board which is capable of protecting fundamental rights to exist within the organisational structure. More recently, we can see this approach in *Bosphorus Airways v Ireland* (European Court of Human Rights judgment, 30 June 2005 (GC)), which concerned alleged human-rights violations resulting from Community secondary legislation which the ECJ had upheld. There the European Court of Human Rights held that it would not interfere provided the rights protection awarded by the ECJ was equal to that under the ECHR, noting that in this context, 'equal' means equivalent or comparable rather than identical (para 155). It should be noted that in a concurring judgment, one of the European Court of Human Rights judges did make the point that, although there have been reviews of ECJ jurisprudence, they have looked at the level of protection in a general or formal way, rather than looking at the substance of a right in an individual case (Concurring Opinion of Judge Ress, para 2), highlighting a potential weakness in the system of protection awarded to individuals. Of course, this may all change should the EU accede to the ECHR.

6.5 The EU Charter of Fundamental Rights

6.5.1 Background

We have already seen that there has been a debate about whether the EC/EU should accede to the ECHR. In 1999, the Cologne European Council set up a Convention, under the chairmanship of Roman Herzog (a former German federal president), to produce a draft Union charter as an alternative mechanism to ensure the protection of fundamental rights. This was completed in time for the 2000 European Council meeting at Nice, where the European institutions solemnly proclaimed the charter (published at [2000] OJ C364/1— hereinafter EUCFR). At the present time, the EUCFR does not have legal effect. As with the Constitution, the Lisbon Treaty proposes to give legal effect to the Charter. It does so by a different route, though. The Constitution would have incorporated the Charter as Part II and Article 1-9(1) specified that 'the Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights'. Lisbon instead refers to the Charter rather than incorporating it. Thus, Article 6(1) TEU (as amended by Lisbon) states:

the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights. . . which shall have the same legal value as the Treaties.

Nonetheless the scope of the rights granted is as limited as it was under the Charter (see 6.5.2). Further provisions clarify that the reference to the Charter does not create any new rights or extend the Union's competence.

Despite some contention about the status and impact of the Charter, the ECJ has alreadymentioned the EUCFR in a number of judgments by way of reference in confirming that the European legal order recognises particular fundamental rights (see, eg, *R v SoS ex parte BAT* (Case C-491/01), where the Court observed that 'the right to property ... is recognised to be a fundamental human right in the Community legal order, protected by the first subparagraph of Article 1 of the First Protocol to the European Convention on Human Rights ("ECHR") and *enshrined in Article 17 of the Charter of Fundamental Rights of the European Union'* (para 144, emphasis added). See also *Jego-Quere et Cie v Commission* (case T-177/01 para 42; see further Chapter 12 and *Mannesmannrohren-Werke AG* v *Commission* (case T-l 12/98) paras 15 and 76). These have begun to cover a wide range of rights: we have already noted the *Kadi* judgment. In *Dynamic Medien,* the ECJ referred to the rights of the child protected by the Charter and in *Varec v Belgian State* (case C-450/06), the ECJ refers to the right to private life. However, there has been no judgment to date in which the ECJ has *based* its judgment on the EUCFR.

6.5.2 Scope

By virtue of Article 51(1) EUCFR, its provisions are addressed to the institutions and bodies of the Union and to the Member States only when they are implementing Union law. As far as the institutions and bodies of the Union are concerned, due regard is to be had to the principle of subsidiarity. It is not entirely clear what the significance of this reference is, other than perhaps to confirm that the Union must always act in accordance with the principle of subsidiarity. With regard to the Member States, Article 51(1) EUCFR confirms existing case law which has held that there is only an obligation on the Member States to respect fundamental rights under EU law when they are acting in the context of Community law (see *Karlsson and ors* (case C-292/97), para 37). Outside this context, Member States are, of course, obliged to respect fundamental rights under the ECHR (see above, on 'residual obligations').

Article 52(1) EUCFR provides that limitations on the exercise of the rights and freedoms guaranteed by the EUCFR must be provided by law. Any such limitations must be proportionate and are only permitted if they are necessary and genuinely meet objectives recognised by the EU. In this, there are similarities to the approach taken with regard to the derogation provisions in the ECHR. Article 52(2) EUCFR further confirms that those rights which derive from the treaties are subject to the conditions and limitations that apply to the corresponding treaty provisions.

6.5.3 Substance

The EUCFR is divided into six substantive chapters. Chapter I, Dignity, includes:

(a) human dignity

(b) the right to life

(c) the right to the integrity of the person

(d) prohibitions on torture, inhuman or degrading treatment or punishment, slavery and forced labour.

Chapter II, Freedoms, provides for:

(a) right to liberty and security

(b) respect for private and family life

(c) protection of personal data

(d) right to marry and found a family

(e) freedom of: (i) thought, conscience and religion (ii) expression and information (iii) assembly and association (iv) the arts and sciences (v) a right to education; (vi) choice in an occupation and a right to engage in work; (vii) ability to conduct a business, right to property, right to asylum, and protection in the event of removal, expulsion or deportation.

Chapter III, Equality, guarantees:

(a) equality before the law, non-discrimination, cultural, religious and linguistic diversity

(b) equality between men and women

(c) the rights of the child and the elderly

(d) the integration of persons with disabilities.

The solidarity rights in Chapter IV are:

(a) the workers' right to information and consultation with the right of collective bargaining and action

(b) right of access to placement services

(c) protection in the event of unjustified dismissal

(d) fair and just working conditions

(e) prohibition of child labour and protection of young people at work

(f) family and professional life

(g) social security and social assistance

(h) health care

(i) access to services of general economic interest

(j) environmental protection

(k) consumer protection.

Chapter V provides for citizenship rights (see also Chapter 24), which are the right to:

(a) vote and stand as candidate at elections to the European Parliament and at municipal elections

(b) good administration

(c) access to documents

(d) access to the Ombudsman

(e) petition the European Parliament

(f) have freedom of movement and residence

(g) diplomatic and consular protection.

Finally, Chapter VI, Justice, guarantees a right to:

(a) effective remedy and to a fair trial

(b) presumption of innocence and right of defence

(c) principles of legality and proportionality of criminal offences and penalties;

(d) not to be tried or punished twice in criminal proceedings for the same criminal offence.

The preceding enumeration of all the rights contained in the EUCFR demonstrates that the Charter consists of a mixture of human rights found in the ECHR, rights derived from other international conventions and provisions of the EC Treaty. The Council of the European Union has published a booklet which explains the origin of each of the rights contained in the EUCFR (see 'Further Reading' at the end of this chapter).

6.5.4 Overlap between the Charter and the ECHR

Article 52(3) deals with the complex problem of overlap between the ECHR and the EUCFR. It specifies that those rights in the EUCFR which correspond with ECHR rights must be given the same meaning and scope as the ECHR rights. EU law may provide more generous protection, but not a lower level of protection than guaranteed under the ECHR and other international instruments (Article 53).

At present, the question of overlap is not a cause for concern, because the EUCFR has no legal status. However, if the Lisbon Treaty comes into force, it will be necessary to determine to what extent the ECJ has jurisdiction to enforce the Charter. Presumably, Article 51 would mean that the EUCFR rights are not free-standing rights, but are only relevant in matters of European law. In that case, the position would probably not be any different from the current situation.

If, however, certain EUCFR rights (such as those based on the ECHR) are regarded as free-standing rights, then the ECJ may be in danger of 'competing' with the European Court of Human Rights. The ECJ would be obliged to interpret EUCFR rights in accordance with the ECHR, but a difficulty may arise if the ECJ interprets an ECHR-based right in one way and the Court of Human Rights subsequently takes a different view. Member States may then face a conflict between complying with their obligations under European law, in particular the doctrine of supremacy (see Chapter 4) and under the ECHR, respectively. It is submitted that in such a case, the ECHR should prevail. This seems to be the current position under the ECJ's case law. In *Roquette Freres* (case C-94/00), the question arose whether business premises could be protected under Article 8 ECHR against 'dawn raids' by the Commission under Regulation 17 (now replaced by Regulation 1/2003). In its earlier decision in *Hoechst* (case C-46/87), the ECJ had held that Article 8 required no such protection. However, subsequent ECHR case law has extended the scope of Article 8 to cover business premises. In *Roquette,* the ECJ held that the case law under the ECHR must be taken into account in applying the *Hoechst* decision. The ECJ therefore appears to recognise that ECHR case law can have an impact on the scope of fundamental rights guaranteed by Union law. Interestingly, it has been noted the Court of Human Rights has likewise taken account of relevant case law of the ECJ. It seems that in their respective jurisdictions the two courts are endeavouring to minimise conflict. Whilst this is good practice, the risk of inconsistency remains.

6.5.5 Conclusion on EUCFR

Currently, the EUCFR has only declaratory status and it remains to be seen whether it will become legally binding. If this were to happen, some thought would need to be given to the relationship between the ECHR and the EUCFR and the role of the ECJ in interpreting the fundamental rights contained in the EUCFR. The potential accession of the EU to the ECHR, which would be possible if the Lisbon Treaty became effective in its current form, would acknowledge the supremacy of the Convention and the European Court of Human Rights.

The general principles of Union law have been expanded through the case law of the ECJ to cover a wide variety of rights and principles developed from many sources. We will now look at some specific examples of those rights. The following is not, however, an exhaustive list, and there may be degrees of overlap between the categories mentioned.

6.6 Rules of administrative justice

6.6.1 Proportionality

This was the principle invoked in *Internationale Handelsgesellschaft mbH* (case 11/70). It is now enshrined in Article 5 (ex 3b) EC (see 6.8 below). The principle, applied in the context of administrative law, requires that the means used to achieve a given end must be no more than that which is appropriate and necessary to achieve that end. The test thus puts the burden on an administrative authority to justify its actions and requires some consideration of possible alternatives. In this respect it is a more rigorous test than one based on reasonableness.

The principle has been invoked on many occasions as a basis of challenge to EC secondary legislation, often successfully (eg, *Werner A Bock KG v Commission* (case 62/70); *Bela-Muhle JosefBergmann KG v Grows-Farm GmbH & Co KG* (case 114/76). It was applied *in Rv Intervention Boardfor Agricultural Produce, exparte ED & F Man (Sugar) Ltd* (case 181/84) in the context of a claim by ED & F Man (Sugar) Ltd before the English Divisional Court, on facts very similar to *Internationale Handelsgesellschaft.* Here the claimant, ED & F Man (Sugar) Ltd, was seeking repayment of a security of £1,670,370 forfeited when it failed to comply with an obligation to submit licence applications to the Board within a specified time limit. Due to an oversight they were a few hours late. The claimant's claim rested on the alleged illegality of the EC regulations governing the common organisation of the sugar market. The regulations appeared to require the full forfeiture of the deposit (lodged by the exporter at the time of the initial offer to export) in the event of a breach of both a *primary* obligation to export goods as agreed with the Commission and a *secondary* obligation to submit a licence application following the initial offer within a specified time limit. The ECJ held, on a reference from the Divisional Court on the validity of the regulations, that to require the same forfeiture for breach of the secondary obligation as for the primary obligation was disproportionate, and to the extent that the regulation required such forfeiture, it was invalid. As a result of this ruling, the claimant was held entitled in the Divisional Court to a declaration that the forfeiture of its security was unlawful: a significant victory for the claimant.

The proportionality principle has also been applied in the context of the EC Treaty, for example, in the application of the provisions relating to freedom of movement for goods and persons. Under these provisions States are allowed some scope for derogation from the principle of free movement, but derogations must be 'justified' on one of the grounds provided (Articles 30 (ex 36) and 39(3) (ex 48(3) post Lisbon Articles 36 and 45(3) TFEU). This has been interpreted by the ECJ as meaning that the measure must be *no more than is necessary* to achieve the desired objective (see Chapters 20 (goods), and 25 (persons)).

In *Watson* (case 118/75) the proportionality principle was invoked in the sphere of the free movement of persons to challenge the legality of certain action by the Italian authorities. One of the defendants, Ms Watson, was claiming rights of residence in Italy. The right of free movement of workers expressed in Article 39 EC is regarded as a fundamental Community right, subject only to 'limitations' which are 'justified' on the grounds of public policy, public security or public health (Article 39(3)). The Italian authorities sought to invoke this derogation to expel Ms Watson from Italy. The reason for the defendants' expulsion was that they had failed to comply with certain administrative procedures, required under Italian law, to record and monitor their movements in Italy. The ECJ, on reference from the Italian court, held that, while states were entitled to impose penalties for non-compliance with their administrative formalities, these must not be disproportionate; and they must never provide a ground for deportation. Here, it is worth noting, it is a Member State's action which was deemed to be illegal for breach of the proportionality principle. Likewise, in *Wijsenbeek* (case C-378/97) the ECJ held that, although Member States were still entitled to check the documentation of EC nationals moving from one Member State to another, any penalties imposed on those whose documentation was unsatisfactory must be proportionate: in this case, imprisonment for failure to carry a passport was disproportionate. (See further Chapter 25.)

Similarly, in the context of goods, in a case brought against Germany in respect of its beer purity laws (case 178/84), a German law imposing an absolute ban on additives was found in breach of EC law (Article 28 EC) and not 'justified' on public-health grounds under Article 30. Since the same (public health) objective could have been achieved by other less restrictive means, the ban was not 'necessary'; it was disproportionate.

More recently, however, there seems to have been a refinement of the principle of proportionality. In the case of *Sudzucker Mannheim/Ochsenfiirt AG v HauptzoUamt Mannheim* (case C-161/96) the ECJ confirmed the

distinction between primary and secondary (or administrative) obligations made in *R v Inteivention Board for Agricultural Produce* (case 181/84). The breach of a secondary obligation should not be punished as severely as a breach of a primary obligation. On the facts of the case, the ECJ held that a failure to comply with customs formalities by not producing an export licence was a breach of a primary and not a secondary obligation. The ECJ stated that the production of the export licence was necessary to ensure compliance with export requirements and thus the production of the export licence was part of the primary obligation. On this reasoning, it may be difficult to distinguish between primary and secondary obligations.

Further, the ECJ has held that, where an institution has significant discretion in the implementation of policies, such as in CAP, the ECJ may only interfere if the 'measure is manifestly inappropriate having regard to the objectives which the competent institution is seeking to pursue' *(Germany v Council (Re Banana Regime)* (case C-280/93), para 90). The same is also true of actions of Member States where they have a broad discretion in the implementation of Community policy (see *R v Minister ofAgriculture, Fisheries and Food,* ex parte *National Federation of Fishermen's Organisations* (case C-44/94)). In these circumstances, the distinction between proportionality and *Wednesbury* reasonableness is not great.

6.6.2 Legal certainty

The principle of legal certainty was invoked by the ECJ in *Defrenne v Sabena (No 2)* (case 43/75). The principle, which is one of the widest generality, has been applied in more specific terms as:

(a) the principle of legitimate expectations

(b) the principle of non-retroactivity (c) the principle of *resjudicata.*

The principle of legitimate expectations, derived from German law, means that, in the absence of an overriding matter of public interest, Community measures must not violate the legitimate expectations of the parties concerned. A legitimate expectation is one which might be held by a reasonable person as to matters likely to occur in the normal course of his affairs. It does not extend to anticipated windfalls or speculative profits. In *Efisol SA v Commission* (case T-336/94) the CFI commented that an individual would have no legitimate expectations of a particular state of affairs existing where a 'prudent and discriminating' trader would have foreseen the development in question. Furthermore, in *Germany v Council* (case C-280/93), the ECJ held that no trader may have a legitimate expectation that an existing Community regime will be maintained. In that the principle requires the encouragement of a reasonable expectation, a reliance on that expectation, and some loss resulting from the breach of that expectation, it is similar to the principle of estoppel in English law.

The principle was applied in *August Tbpfer & Co GmbH v Commission* (case 112/77) (see Chapter 2). August Topfer & Co GmbH was an exporter which had applied for, and been granted, a number of export licences for sugar. Under Community law, as part of the common organisation of the sugar market, certain refunds were to be payable on export, the amount of the refunds being fixed in advance. If the value of the refund fell, due to currency fluctuations, the licence holder could apply to have his licence cancelled. This scheme was suddenly altered by an EC regulation, and the right to cancellation withdrawn, being substituted by provision for compensation. This operated to Topfer's disadvantage, and it sought to have the regulation annulled, for breach, inter alia, of the principle of legitimate expectations. Although it did not succeed on the merits, the principle of legitimate expectations was upheld by the Court. (See also *CNTA SA v Commission* (case 74/74), monetary compensation scheme ended suddenly and without warning: Chapter 14.) In *Opel Austria GmbH v Council* (case T-l 15/94) the Court held that the principle of legitimate expectations was the corollary of the principle of good faith in public international law. Thus, where the Community had entered into an obligation and the date of entry into force of that obligation is known to traders, such traders may use the principle of legitimate expectations to challenge measures contrary to any provision of the international agreement having direct effect.

The principle of non-retroactivity, applied to Community secondary legislation, precludes a measure from taking effect before its publication. Retrospective application will only be permitted in exceptional circumstances, where it is necessary to achieve particular objectives and will not breach individuals' legitimate expectations. Such measures must also contain a statement of the reasons justifying the retroactive effect *(Diversinte SA v Administration Principal de Aduanos e Impuestos Especiales de la Junqueros* (case C-260/91)).

In *R v Kirk* (case 63/83) the principle of non-retroactivity of penal provisions (activated in this case by a

Community regulation) was invoked successfully. However, retroactivity may be acceptable where the retroactive operation of the rule in question improves an individual's position (see, for example, *Road Air BV v Inspecteur der Invoerrechten enAccijnzen* (case C-3 10/95)).

This principle also has relevance in the context of national courts' obligation to interpret domestic law to comply with Union law when it is not directly effective (the *Von Colson* principle, see Chapter 5). In *Pretore di Said v Persons Unknown* (case 14/86) in a reference from the Said magistrates' court on the compatibility of certain Italian laws with EEC Water Purity Directive 78/659, which had been invoked against the defendants in criminal proceedings, the Court held that:

A Directive cannot of itself have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of the Directive.

The Court went further in *Offtcier van Justitie v Kolpinghuis Nijmegen* (case 80/86). Here, in response to a question concerning the scope of national courts' obligation of interpretation under the *von Colson* principle, the Court held that that obligation was 'limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity'. Thus national courts are not required to interpret domestic law to comply with EC law in violation of these principles. This would appear to apply even where the EC law in question has direct effects, at least where criminal proceedings are in issue (see *Berlusconi* (joined cases C-387/02, C-391/02 and C-403/02), discussed in Chapter 5).

Problems also arise over the temporal effects of ECJ rulings under Article 234. In *Defrenne v Sabena (No 2)* (case 43/75) the Court held that, given the exceptional circumstances, 'important considerations of legal certainty' required that its ruling on the direct effects of the then Article 119 (now 141 post Lisbon, 157 TFEU) should apply prospectively only. It could not be relied on to support claims concerning pay periods prior to the date of judgment, except as regards workers who had already brought legal proceedings or made an equivalent claim. However, in *ArieteSpA* (case 811/79) and *Meridionale Industria Salumi Sri* (cases 66, 127 and 128/79) the Court affirmed that *Defrenne* was an exceptional case. In a 'normal' case a ruling from the ECJ was retroactive; the Court merely declared the law as it always was. This view was approved in *Barra* (case 309/85). However, in *Blaizot* (case 24/86), a case decided the same day as *Barra,* 'important considerations of legal certainty' again led the Court to limit the effects of its judgment on the lines of *Defrenne.* It came to the same conclusion in *Barber v Guardian Royal Exchange Assurance Group* (case 262/88). These cases indicate that in exceptional cases, where the Court introduces some new principle, or where the judgment may have serious effects as regards the past, the Court will be prepared to limit the effects of its rulings. *Kolpinghuis Nijmegen* may now be invoked to support such a view. Nevertheless, the Court did not limit the effect of its judgment in *Francovich* (cases C-6 and 9/90) contrary to Advocate-General Mischo's advice, despite the unexpectedness of the ruling and its 'extremely serious financial consequences' for Member States. Nor did it do so in *Marshall (No 2)* (case C-271/91) when it declared that national courts were obliged, by Article 5 of Directive 76/207 and their general obligation under Article 10 (ex 5) EC to ensure that the objectives of the directives might be achieved, to provide full compensation to persons suffering loss as a result of infringements of the directive, a matter which could not have been deduced either from the ECJ's case law or from the actual wording of the directive (see further Chapter 8).

The question of the temporal effect of a ruling from the ECJ under Article 234 EC was considered by the Italian constitutional court in *Fragd (SpA Fragd v Amministrazione delle Finanze* Decision No 232 of 21 April 1989) in the light of another general principle. Although the point did not arise out of the reference in question, the Italian court considered the effect that a ruling under Article 234 holding a Community measure void should have on the referring court if the ECJ had held that the ruling would apply for future cases only, excluding the judgment in which it was given. The Italian constitutional court suggested that in the light of the right to judicial protection given under the Italian constitution, such a holding should have effect in the case in which the reference was made. A finding of invalidity with purely prospective effect would offend against this principle and would therefore be unacceptable.

Resjudicata is a principle accepted in both the civil- and common-law traditions; its significance has been recognised also by the Human Rights Court in Strasbourg (see eg *Brumarescuv Romania* (28342/05)). Essentially it operates to respect the binding force of a final judgment in a matter; once any relevant time limits for appeal have expired, the judgment cannot be challenged. The ECJ has recognised this principle in many cases. In *Kobler* (case C-224/01), the ECJ held that:

attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of *resjudicata.* In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question. [Para 38.]

Applying this in *Kapferer* (case C-234/04) the ECJ ruled that in the light of *resjudi cata,* a national court does not have to disapply domestic rules of procedure con ferring finality on a decision, even though doing so would enable it to remedy an infringement of Community law by the decision at issue. Surprisingly, in *Lucchini Siderurgica* (case C-l 19/05), the ECJ came to the opposite conclusion. An undertak ing was seeking to claim state aid, which had been granted by the Italian government in breach of the state aid rules. The undertaking had a decision of an Italian court to this effect, whose judgment was protected by the principle of *resjudicata.*

In proceedings to challenge this decision, the ECJ addressed the question of whether Community law precluded the appplication of *resjudicata.* The ECJ concluded that it did. The Advocate-General in *Lucchini* pointed out that the principle is not absolute; the systems of the various Member States allow exceptions under certain strict conditions and the ECtHR has accepted this. Some commentators have questioned whether the circumstances in *Lucchini* come within the ECHR case law, however. Certainly, *Lucchini* is best regarded as an isolated case on exceptional facts.

6.6.3 Procedural rights

Where a person's rights are likely to be affected by EC law, EC secondary legislation normally provides for procedural safeguards (eg, Regulation 1/2003, competition law; and Directive 2004/38/EC, free movement of workers, Chapter 25). However, where such provision does not exist, or where there are lacunae, general principles of law may be invoked to fill those gaps.

6.6.4 Natural justice: The right to a hearing

The right to natural justice, and in particular the right to a fair hearing, was invoked, this time from English law, in *Transocean Marine Paint Association v Commission* (case 17/74) by Advocate-General Warner. The case, which arose in the context of competition law, was an action for annulment of the Commission's decision, addressed to the claimant association, that their agreements were in breach of EC law. The Court, following Advocate-General Warner's submissions, asserted a general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his views known. Since the Commission had failed to comply with this obligation its decision was annulled. The principle was affirmed in *Hoffman-La Roche & Co AG v Commission* (case 85/76), in which the Court held that observance of the right to be heard is, in all proceedings in which sanctions, in particular fines and periodic payments, may be imposed, a fundamental principle of law which must be respected even if the proceedings in question are administrative proceedings.

Another aspect of the right to a fair hearing is the notion of 'equality of arms'. This is exemplified in a series of cases against the Commission following a Commission investigation into alleged anti-competitive behaviour on the part of ICI and another company, Solvay. In the *Solvay* case (case T-30/91) the Court stated that the principle of equality of arms presupposed that both the Commission and the defendant company had equal knowledge of the files used in the proceeding. That was not the case here, as the Commission had not informed Solvay of the existence of certain documents. The Commission argued that this did not affect the proceedings because the documents would not be used in the company's defence. The Court took the view that this point was not for the Commission to decide, as this would give the Commission more power vis-a-vis the defendant company because it had full knowledge of the file whereas the defendant did not. Equally, in the *ICI* cases (T-36 and 37/9 1) the Commission's refusal to grant ICI access to the file was deemed to infringe the rights of the defence.

There are, however, limits to the rights of the defence: in *Descom Scales Manufacturing Co Ltd v Council* (case T-171/94), the ECJ held that the rights of the defence do not require the Commission to provide a written record of every stage of the investigation detailing information which needed still to be verified. In this case, the Commission had notified the defendant company of the position although it had not provided a written record and the ECJ held that this was sufficient.

The right to a hearing within Article 6 ECHR also includes the right to a hearing within a reasonable period of

time. The ECJ, basing its reasoning on Article 6 ECHR, thus held that, in respect of a case that had been pending before the CFI for five years and six months, the CFI had been in violation of its obligation to dispose of cases within a reasonable time *(Baustahlgewerbe v Commission* (case C-1 85/95 P)).

The right to a hearing has arisen in more difficult circumstances, that of the freezing of assets of persons thought to be involved in or supporting terrorism. Even in these circumstances, the European courts have reiterated the principle of the right to be heard *(OMPI v Council (OMPI I)* (case T-228/02). Nonetheless, the CFI recognised that this right is subject to broad limitations in the interests of the overriding requirement of public security, which relate to all aspects of procedural justice rights, including the hearing of certain types of evidence, It seems in these circumstances the right to a hearing is limited to a right to be notified as soon as possible as to the adoption of an economic sanction; given this finding, the duty to state reasons has a still greater significance than it usually would have. The rule of law is protected by the right to seek a review of the decision-making process subsequently. In *OMPI II* (case T-256/07) the CFI clarified that the right to a hearing does not necessitate a formal hearing if the relevant legislation does not provide for it; nor is there a right to continuous conversation. Rather, it suffices if the persons involved have the right to make their views known to the competent authorities (See *OMPI II,* para 93; see also *Common Market Fertilisers* v *Commission* (cases T-l 34-5/03, para 108)).

6.6.5 The duty to give reasons

The duty was affirmed in *Union Nationale des Entraineurs et Cadres Techniques Professionels du Football (UNECTEF) v Heylens* (case 222/86). In this case, M Heylens, a Belgian and a professional football trainer, was the defendant in a criminal action brought by the French football trainers' union, UNECTEF, as a result of his practising in Lille as a professional trainer without the necessary French diploma, or any qualifications recognised by the French government as equivalent. M Heylens held a Belgian football trainers' diploma, but his application for recognition of this diploma by the French authorities had been rejected on the basis of an adverse opinion from a special committee, which gave no reasons for its decision. The ECJ, on a reference from the Tribunal de Grande Instance, Lille, held that the right of free movement of workers, granted by Article 39 EC, required that a decision refusing to recognise the equivalence of a qualification issued in another Member State should be subject to legal redress which would enable the legality of that decision to be established with regard to Community law, and that the person concerned should be informed of the reasons upon which the decision was based.

Similarly in *Al-Jubail Fertiliser Company (SAMAD) v Council* (case C-49/88) in the context of a challenge to a Council regulation imposing antidumping duties on the import of products manufactured by the applicants, the Court held that since the applicants had a right to a fair hearing the institutions were under a duty to supply them with all the information which would enable them effectively to defend their interests. Moreover if the information is supplied orally, as it may be, the Commission must be able to prove that it was in fact supplied.

The duty to give reasons was considered in the OMPI cases. These have a greater significance due to the potential for a limited right to a hearing. In *OMPI II,* the CFI emphasised that the Council was under an obligation to provide actual and specific reasons justifying the inclusion of a person on a sanctions list. This requires the Council not only to identify the legal conditions found in the underlying regulation, but why the Council considered that they applied to the particular person, justifying their inclusion on the sanctions list. The duty to give reasons does not, however, include the obligation to respond to all points made by the applicant.

6.6.6 The right to due process

As a corollary to the right to be informed of the reasons for a decision is the right, alluded to in *UNECTEF v Heylens* (case 222/86), to legal redress to enable such decisions and reasons to be challenged. This right was established in *Johnston* v *Chief Constable of the Royal Ulster Constabulary* (case 222/84). The case arose from a refusal by the RUC (now the Police Service of Northern Ireland) to renew its contracts with women members of the RUC Reserve. This decision had been taken as a result of a policy decision taken in 1980 that henceforth full-time RUC Reserve members engaged on general police duties should be fully armed. For some years women had not been issued with firearms nor trained in their use. Ms Johnston, who had been a full-time member of the Reserve for some years and wished to renew her contract, challenged the decision as discriminatory, in breach of EC Directive 76/207, which provides for equal treatment for men and women in all

matters relating to employment. Although the measure was admittedly discriminatory, since it was taken solely on the grounds of sex, the Chief Constable claimed that it was justified, arguing from the 'public policy and public security' derogation of Articles 30 (goods, see Chapter 20) and 39 (workers, see Chapter 25), and from Article 297, which provides for the taking of measures in the event of, inter alia, 'serious internal disturbances affecting the maintenance of law and order'. As evidence that these grounds were made out the Chief Constable produced before the industrial tribunal a certificate issued by the Secretary of State certifying that the act refusing to offer Ms Johnston further employment in the RUC Reserve was done for the purpose of safeguarding national security and safeguarding public order. Under Article 53(2) of the Sex Discrimination (Northern Ireland) Order 1976 (SI 1976/1042) a certificate that an act was done for that purpose was 'conclusive evidence' that it was so done. A number of questions were referred to the ECJ by the industrial tribunal on the scope of the public order derogation and the compatibility of the Chief Constable's decision with Directive 76/207. The question of the Secretary of State's certificate and the possibility of judicial review were not directly raised. Nevertheless this was the first matter seized upon by the Court. The Court considered the requirement of judicial control, provided by Article 6 of Directive 7 6/207, which requires states to enable persons who 'consider themselves wronged' to 'pursue their claims by judicial process after possible recourse to the competent authorities'. This provision, the Court said, reflected:

a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ...

It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the Directive provides.

The Court went on to say that Article 5 3(2) of the Sex Discrimination (Northern Ireland) Order 1976, in requiring the Secretary of State's certificate to be treated as conclusive evidence that the conditions for derogation are fulfilled, allowed the competent authority to deprive an individual of the possibility of asserting by judicial process the rights conferred by the directive. Such a provision was contrary to the principle of effective judicial control laid down in Article 6 of the directive. A similar approach has, in fact, been taken by the European Court of Human Rights in relation to such certificates issued in relation to a variety of substantive issues (eg, *Tinnelly and ors v UK,* ECHR judgment, 10 July 1998).

Although the ECJ's decision was taken in the context of a right provided by the directive it is submitted that the right to effective judicial control enshrined in the European Convention on Human Rights and endorsed in this case could be invoked in any case in which a person's Community rights have been infringed. The case of *UNECTEF* v *Heylens* (case 222/8 6) would serve to support this proposition. Further, the CFI has held that the Commission, in exercising its competition-policy powers, must give reasons sufficient to allow the Court's review of the Commission's decision-making process, if that decision is challenged (eg, *Ufex v Commission* (case C-1 19/97P)).

In the *OMPI* cases, the CFI made clear that reasons of public security could not remove the decisions and the decision making processes at issue from the scope of judicial review (see also *Kadi,* para 344 and see comments of Advocate-General at para 45), although that review may necessarily be limited. In *OMPI II,* the CFI clarified (at paras 138-41) the scope and standard of review, at least as regards decisions concerning economic sanctions. While the Council has broad discretion as to whether to impose sanctions, the CFI must ensure that a threefold test is satisfied: whether the requirements of the applicable law are fulfilled; whether the evidence contains all information necessary to assess the situation and whether it is capable of supporting the inferences drawn from it; and whether essential procedural guarantees have been satisfied. The CFI seems to have taken a surprisingly tough stance in favour of the protection of procedural rights here.

Thus general principles of law act as a curb not only on the institutions of the Union but also on Member States, which are required, in the context of EU law, to accommodate these principles alongside existing remedies and procedures within their own domestic systems of administrative law and may result eventually in some modification in national law itself. There are, in any event, problems in determining the boundaries between matters of purely national law and matters of Union law (see 6.9 below).

6.6.7 Right to protection against self-incrimination

The right to a fair trial and the presumption of innocence of 'persons charged with a criminal offence' contained in Article 6 ECHR are undoubtedly rights which will be protected as general principles of law under Community law. However, in *Orkem* (case 3 74/87) and *Solvay* (case 27/8 8) the ECJ held that the right under Article 6 not to give evidence against oneself applied only to persons charged with an offence in criminal proceedings; it was not a principle which could be relied on in relation to infringements in the economic sphere, in order to resist a demand for information such as may be made by the Commission to establish a breach of EC competition law. This view was placed in doubt following a ruling from the Court of Human Rights in the case of *Funke v France* (case SA 25 6A) ([1993] 1 CMLR 897) and has been the subject of some academic criticism.

Funke involved a claim, for breach of Article 6 ECHR, in respect of a demand by the French customs' authorities for information designed to obtain evidence of currency and capital transfer offences. Following the applicant's refusal to hand over such information fines and penalties were imposed. The Court of Human Rights held that such action, undertaken as a 'fishing expedition' in order to obtain documents which, if found, might produce evidence for a prosecution, infringed the right, protected by Article 6(1) ECHR, of anyone charged with a criminal offence (within the autonomous meaning of that phrase in Article 6 ECHR), to remain silent and not incriminate himself. It appears that Article 6, according to its 'autonomous meaning', is wide enough to apply to investigations conducted under the Commission's searchand-seizure powers under competition law, and that *Orkem* and *Solvay* may no longer be regarded as good law. This view, assimilating administrative penalties to criminal penalties, appears to have been taken by the ECJ in *Otto BVv Postbank NV* (case C60/92). Moreover, in *Mannesmannrbhren-Werke AG v Commission* (case T-l 12/98), also a case involving a request for information about an investigation into anticompetitive agreements, the CFI held that although Article 6 ECHR could not be invoked directly before the Court, Community law offered 'protection equivalent to that guaranteed by Article 6 of the Convention' (para 77). A party subject to a Commission investigation could not be required to answer questions that might involve an admission of involvement in an anticompetitive agreement, although it would have to respond to requests for general information.

6.7 Equality

The principle of equality means, in its broadest sense, that persons in similar situations are not to be treated differently unless the difference in treatment is objectively justified. This, of course, gives rise to the question of what are similar situations. Discrimination can only exist within a framework in which it is possible to draw comparisons, for example, the framework of race, sex, nationality, colour, religion. The equality principle will not apply in situations which are deemed to be 'objectively different' (see *Les Assurances du Credit SA v Council* (case C63/89), public export credit insurance operations different from other export credit insurance operations). What situations are regarded as comparable, subject to the equality principle, is clearly a matter of political judgement. The EC Treaty expressly prohibits discrimination on the grounds of nationality (Article 12 (ex 6) EC) and, to a limited extent, sex (Article 141 (ex 119) EC provides for equal *pay* for men and women for equal work). In the field of agricultural policy, Article 34(3) (ex 40(3)) prohibits 'discrimination between producers or consumers within the Community'. The To A introduced further provisions, giving the EC powers to regulate against discrimination on grounds of race, religion, sexual orientation or disability (Article 13 EC). There has been some discussion as to whether these aspects of discrimination constitute separate general principles of law, as seemed to be suggested by the ECJ in *Mangold* (Case C-l44/04). Although a number of Advocates-General have discussed the issue, it is indicative of the matter's sensitive nature that in each of the cases, the ECJ has handed down rulings without addressing the *Mangold* point. (See, eg, *Chacon Navas* (case C-l3/05) concerning disability discrimination and see Opinion of Advocate-General at paras 46-56; *Lindorfer* (case C-227/04) and the Opinion of the Advocate-General at paras 87-97 and 132-8; *Palacios de la Villa* (case C-41 1/05) and *Maruko* (case C-267/06) on discrimination based on sexual orientation—see Opinion of Advocate-General at para 78; *The Queen, on the application of The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for BERR* (case C-388/07) and *Bartsch v Bosch und Siemens Hausgerdte (BSH) Altersfursorge GmbH* (case C-427/06).) Directive 2000/43/EC ([2000] OJ L1 80, p 22) has been adopted to combat discrimination, both direct and indirect, on grounds of racial or ethnic origin, in relation to employment matters, social protection, education, and access to public goods and services (see, eg, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Feryn* (case C-54/07)). Directive 2000/78/EC ([2000] OJ L303, p 16) has been adopted to combat discrimination on the grounds of religion or belief,

disability, age, or sexual orientation with regard to employment and occupation. These directives are discussed further in Chapter 27.

However, a general principle of equality is clearly wider in scope than these provisions. In the first isoglucose case, *Royal Scholten-Honig (Holdings) Ltd v Intervention Board for Agricultural Produce* (cases 103 and 145/77), the claimants, who were glucose producers, together with other glucose producers, sought to challenge the legality of a system of production subsidies whereby sugar producers were receiving subsidies financed in part by levies on the production of glucose. Since glucose and sugar producers were in competition with each other the claimants argued that the regulations implementing the system were discriminatory, ie in breach of the general principle of equality, and therefore invalid. The ECJ, on a reference on the validity of the regulations from the English court, agreed. The regulations were held invalid. (See also *Ruckdeschel* (case 117/76); *Pont-d-Mousson* (cases 124/76 and 20/77).)

Similarly, the principle of equality was invoked in the case of *Airola* (case 21/74) to challenge a rule which was discriminatory on grounds of sex (but not pay), and in *Prais* (case 130/75) to challenge alleged discrimination on the grounds of religion. Neither case at the time fell within the more specific provisions of Community law, although would now fall within the scope of Directive 2000/78/ EC (see above).

6.8 Subsidiarity

The principle of subsidiarity in its original philosophical meaning, as expressed by Pope Pius XI (Encyclical letter, 1931), is that:

It is an injustice, a grave evil and disturbance of right order for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies.

It was invoked in the Community context during the 1980s when the Community's competence was extended under the Single European Act. It was incorporated into that Act, in respect of environmental measures, in the then Article 1 30r (now 174) EC (post Lisbon Article 191 TFEU), and introduced into the EC Treaty in Article 5 (ex 3b) by the TEU. Article 5 EC requires the Community to act 'only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale or the effects of the proposed action, be better achieved by the Community'. Article 5 EC will, should Lisbon come into force, be replaced in substance by Article 5 TEU.

As expressed in Article 5 EC, subsidiarity appears to be a test of comparative efficiency; as such it lacks its original philosophical meaning, concerned with fostering social responsibility. This latter meaning has however been retained in Article 1 (ex A) TEU, which provides that decisions of the European Union 'be taken as closely as possible to the people'. Although it has not been incorporated into the EC Treaty it is submitted that this version of the principle of subsidiarity could be invoked as a general principle of law if not as a basis to challenge EC law then at least as an aid to the interpretation of Article 5 EC (see Chapter 3). The principle of subsidiarity in its narrow form in Article 5 has, on occasion, been referred to as a ground for challenge of EC legislation *(R v Secretary ofState for Health, exparte British American Tobacco and others* (case C-491/01); *R v SoSfor Health exparte Swedish Match* (case C-210/03)), but this has never succeeded.

6.9 Effectiveness

The doctrine of effectiveness is not usually recognised as a general principle of Union law, save—perhaps—when it is equated with the idea of effective judicial protection. Nonetheless, the principle is ubiquitous and has had a significant effect on the development of Union law. Notably, it was an effectiveness argument that was used to develop the doctrine of supremacy, direct effect *(Van Gend en Loos* (case 26/62) and *Costa vENEL* (case 6/64), and state liability *(Francovich and Bonifaci v Italy* (joined cases C-6 and 9/90), and was used to extend the loyalty principle found in Article 10 EC to the third pillar *(Pupino* (case C-105/03)). As we shall see in Chapter 8, it has been used to ensure effective protection for EC law, and for individuals' rights; indeed sometimes the ECJ seems to blur the boundaries between the two (eg *Courage v Creehan* (case C -453/99)). Should the Lisbon Treaty come into force, Article 19 TEU (as amended by Lisbon) expressly requires Member States to provide remedies so as to ensure effective legal protection of Union law rights. The concept is a somewhat slippery one, used in different contexts for different purposes. Crucially, it can operate both to determine the scope of Union law (identifying the boundary between national and EU law) and to determine the scope of any remedial action needed within the national legal system. While it may be argued that fundamental rights arguments may be used

on both these ways (see below), the broad and amorphous nature of the effectiveness principle(s) make it particularly difficult to determine its proper scope and appropriate use.

6.10 General principles applied to national legislation

It has been suggested that general principles of law, incorporated by the ECJ as part of Union law, also affect certain acts of the Member States. These fall into three broad categories:

(a) when EC rights are enforced within national courts

(b) when the rules of a Member State are in (permitted) derogation from a fundamental principle of Community law, such as free movement of goods (Articles 25 and 28 EC) or persons (Articles 39 and 49)

(c) when the Member State is acting as an agent of the Community in implementing Community law (eg, *Klensch v Secretaire d'Etat a VAgriculture eta la Viticulture* (cases 201 and 202/85)).

6.10.1 Enforcement of Community law in national courts

The ECJ has repeatedly held that, in enforcing Community rights, national courts must respect procedural rights guaranteed in international law; for example, individuals must have a right of access to the appropriate court and the right to a fair hearing (see, eg, *Johnston vRUC* (case 222/84) and *UNECTEF v Heylens* (case 222/86)). This applies, however, only where the rights which the individual seeks to enforce are derived from *Community* sources: Ms Johnston relied on the Equal Treatment Directive (Directive 76/207); M Heylens on the right of freedom of movement for workers enshrined in Article 39 EC. In *Konstantinidis* (case C-l68/91), a case concerning the rules governing the transliteration of Greek names, the ECJ handed down a judgment which did not follow the Opinion of the Advocate-General. The Advocate-General suggested that such rules, which resulted in a change in a person's name as a result of the way the transliteration was carried out, could constitute an interference with the rights protected by Article 8 ECHR. Although the ECJ agreed that this could be the case, it held that such rules would only be contrary to EC law where their application causes such inconvenience as to interfere with a person's right to free movement.

The constraints implied by this case seem to have been undermined. *Carlos Garcia Avello* (case C-148/02) concerned a Spanish national's right to register his children's names in the Spanish style in Belgium, where they were born. The case is based not on free-movement rights, but on European citizenship, a factor which both the European Commission and the Advocate-General agree allows a broader scope to EC protection of human rights. The ECJ agreed with the outcome without expressly considering human rights. The decision seems to limit the notion of the internal situation seen in *Kaur* (discussed above) and *Uecker and facquet* (joined cases C64/96 and C-65/96, discussed in Chapter 21) and to extend the scope of circumstances in which the ECJ would be required to respect ECHR rights (see 6.10.4 below). A similar extension can be seen in *Chen* (case C-200/02), in which a baby holding Irish nationality but born in the UK was deemed to have rights to have her mother, a Chinese national, remain in the UK with her (see further Chapter 21).

The extension of human-rights protection is not limited to circumstances in which citizenship is in issue, but arises in the context of any of the treaty freedoms. in *Karner* (case C-71/02), a case concerning advertising on the Internet, the ECJ held that the national rules complained of were not selling arrangements and therefore they would not fall within Article 28 EC (see Chapter 19). In this aspect, the case is different from the preceding cases, as those cases concerned situations where the national legislation fell within the relevant treaty provision. Despite the fact that the situation seemed to lie outside the prohibition in Article 28 (thus rendering a consideration of a derogation, discussed at 5.9.2, unnecessary), the ECJ then went on to give the national court 'guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights whose observance the Court ensures' (para 49). According to the ECJ, in this case the national legislation fell within the scope of application of EC law (see further 6.10.4 below).

Finally, any penalties imposed by national judicial bodies must be proportionate (eg, *Watson and Belmann* (case 118/75)).

6.10.2 Derogation from fundamental principles

Most treaty rules provide for some derogation in order to protect important public interests (eg, Articles 30 and 39(3)). The ECJ has insisted that any derogation from the fundamental principles of Community law must be narrowly construed. When Member States do derogate, their rules may be reviewed in the light of general prin-

ciples, as the question of whether the derogation is within permitted limits is one of Community law. Most, if not all, derogations are subject to the principle of proportionality (eg, *Watson* (case 118/75)). The *ERT*case *(Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis* (case C-260/89)) concerned the establishment by the Greek government of a monopoly broadcaster. The ECJ held that this would be contrary to Article 49 (ex 59) regarding the freedom to provide services. Although the treaty provides for derogation from Article 49 in Articles 46 and 55 (ex 56 and 66), any justification provided for by Community law must be interpreted in the light of fundamental rights, in this case the principle of freedom of expression embodied in Article 10 ECHR. Similarly, in *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* (case C-368/95), the need to ensure plurality of the media (based on Article 10 ECHR) was accepted as a possible reason justifying a measure (the prohibition of prize games and lotteries in magazines) which would otherwise breach Article 28 EC. More recently, in *Schmidberger* (C-l 12/00), Advocate-General Jacobs argued that the right to freedom of expression and assembly permits a derogation from the free movement of goods (Article 28 EC)) in a context where the main transit route across the Alps was blocked for a period of 28 hours on a single occasion and steps were taken to ensure that the disruption to the free movement of goods was not excessive. The ECJ came to the same end conclusion, noting the wide margin of discretion given to the national authorities in striking a balance between fundamental rights and treaty obligations (and contrast *Commission v France* (case C-265/95)). (See also on Article 8 ECHR, *Mary Carpenter v SoS for the Home Department* (case C-60/00).)

One issue in this context is whether fundamental human rights should properly be seen as a derogation from treaty freedoms, perhaps falling within the scope of the public-policy objection, or whether they should be seen as operating to limit treaty freedoms at an earlier point in the legal analysis. In *Omega Spielhallen* (case C3 6/02), human dignity was seen as forming part of the public-policy grounds of derogation. In her Opinion in this case, Advocate-General Stickx-Hackl emphasised, the importance of the protection of human dignity, and suggested that public policy should be interpreted in the light of the Community-law requirement that human dignity should be protected. Nonetheless, this still leaves human-rights protection with the status of an exception to EC Treaty freedoms rather than constraining the scope of those rights in the first place. Recognition that human-rights protection forms part of the public-policy exception can be seen in *Dynamic Medien Vertiiebs GmbH v Avides Media AG* (C-244/06). The potential problem with this approach is that exceptions to the treaty freedoms are normally narrowly construed and subject to the proportionality test, which hardly puts them on the same footing as the economic treaty freedom. In *Schmidberger* (case C-l 12/00), the ECJ suggested that rather than the usual proportionality test, in such cases the different interests should be balanced; whether this approach is consistently adopted in cases concerning fundamental rights, remains to be seen.

6.10.3 State acting as agent

When Member States implement Union rules, either by legislative act or as administrators for the Union, they must not infringe fundamental rights. National rules may be challenged on this basis: for example, in *Commission v Germany* (case 249/86), the Commission challenged Germany's rules enforcing Regulation 1612/86 which permitted the family of a migrant worker to install themselves with the worker in a host country provided that the worker has housing available for the family of a standard comparable with that of similarly employed national workers. Germany enforced this in such a way as to make the residence permit of the family conditional on the existence of appropriate housing for the duration of the stay. The ECJ interpreted the regulation as requiring this only in respect of the beginning of their period of residence. Since the regulation had to be interpreted in the light of Article 8 ECHR concerning respect for family life, a fundamental principle recognised by Community law, German law was incompatible with Community law. When Member States are implementing obligations contained in Union law, they must do so without offending against any fundamental rights recognised by the Union. In *Wachaufv Germany* (case 5/88)) the ECJ held that 'Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements' (para 19).

6.10.4 Scope of Union law

In all three situations listed above, general principles have an impact because the situations fall within the scope of Union law, specifically Community law. The ECJ has no power to examine the compatibility with the ECHR of national rules which do not fall therein *(Cinetheque SA v Federation Nationale des Cinemas Frangaises* (cases 60 and 61/84), noting the different approach of Advocate-General and Court, and contrast *Karner* (case C-

71/02)). The problem lies in defining the boundary between Community law and purely domestic law, as can be seen in, for example, *Karner.* The scope of Community law could be construed very widely, as evidenced by the approach of the Advocate-General in *Konstantinidis v Stadt Altensteig-Standesamt* (case C-168/91). As noted above, he suggested that, as the applicant had exercised his right of free movement under Article 43 (ex 52) EC, national provisions affecting him fell within the scope of Community law; therefore he was entitled to the protection of his human rights by the ECJ. The Court has not expressly gone this far although some of the citizenship cases can be seen in this light (see *Garcia Avello* (case C-148/02), *Carpenter* (case C-60/00), *Chen* (case C-200/02)).

One particular problem area is where an individual seeks to extend the nature of the fundamental principles recognised in his or her home state by reference to rights protected in other Member States and recognised as such by the ECJ. This can be illustrated by contrasting two cases which arose out of similar circumstances: *Wachaufv Germany* (case 5/8 8) and *R v Ministry ofAgriculture, Fisheries and Food, ex parte Bostock* (case C-2/93).

Wachauf was a tenant farmer who, upon the expiry of his tenancy, requested compensation arising out of the loss of 'reference quantities' on the discontinuance of milk production. When this was refused, he claimed that this was an infringement of his right to private property, protected under the German constitution. The German authorities claimed that the rules they applied were required by the Community regulation, but the ECJ held that on its proper interpretation the regulation required no such thing: although the regulation did not itself provide the right to compensation, equally it did not preclude it. The discretion thereby given to the Member States by the regulation should be exercised in accordance with fundamental rights, thus, in practice meaning that the applicant should receive the compensation.

Bostock, similarly, had been a tenant farmer. Following *Wachauf* (case 5/8 8) he argued that he too should be entitled to compensation for the value of the reference quantities on the expiry of his lease. Unlike the situation in Germany, though, this right was not protected by British law at the time when Bostock's lease ended. Bostock therefore sought to challenge that British law on the basis that the provisions breached general principles of non-discrimination and unjust enrichment. Despite its approach in *Wachauf,* the ECJ ruled that the right to property protected by the Community legal order did not include the right to dispose of the 'reference quantities' for profit. The ECJ held that the question of unjust enrichment, as part of the legal relations between lessor and lessee, was a matter for national law and therefore fell outside the scope of Community law.

It is difficult to reconcile these two cases if one accepts that general principles accepted by the ECJ should apply across the EU. From recent case law we can still see differences in the approach to the scope of rights deemed worthy of protection. In *Omega Spielhallen* (case C-36/02), the German authorities sought to prevent a laser-dome game operating on the basis that a game based on shooting people infringed respect for human dignity; no such problem arose in the UK where the game operator originated. One clear message seems to be that there are limits to the circumstances when general principles will operate and that a challenge to national acts for breach of a general principle is likely to be successful only when national authorities are giving effect to clear obligations of Community law. In matters falling within the discretion of Member States, national authorities are not required to recognise general principles not protected by that state's national laws.

6.11 Conclusions

This chapter illustrates the importance of general principles of law in the judicial protection of individual rights. Member States' commitment to fundamental human rights has now been acknowledged in Article 6 TEU. Nonetheless, certain points should be noted.

The fact that a particular principle is upheld by the ECJ and appears to be breached does not automatically lead to a decision in favour of the claimant. Fundamental rights are not absolute rights. As the Court pointed out in / *Nold KG v Commission* (case 4/73), rights of this nature are always subject to limitations laid down in the public interest, and, in the Community context, limits justified by the overall objectives of the Community (eg, *O'Dwyer* v *Council* (cases T-466, 469, 473-4 and 477/93)). The pursuit of these objectives can result in some hard decisions (eg, *Dowling v Ireland* (case C-85/90)), although the Court has held that it may not constitute a 'disproportionate and intolerable interference, impairing the very substance of those rights' *(Wachauf (case* 5/88) at para 18). This principle was applied in *Germany v Commission (Re Banana Regime)* (case C-280/93), para 78, another harsh decision,

Thus, where the objectives are seen from the Union standpoint to be essential, individual rights must yield to the common good. In / *Nold KG* v *Commission* the system set up under an ECSC provision, whereby Nold, as a small-scale wholesaler, would be deprived of the opportunity, previously enjoyed, to buy direct from the producer, to its commercial disadvantage, was held to be necessary in the light of the system's overall economic objectives. 'The disadvantages claimed by the applicant', held the Court, 'are in fact the result of economic change and not of the contested Decision'.

The latitude shown to the Union institutions, particularly where they are exercising discretionary powers in pursuit of common Community policies (most notably the CAP) does not always extend to Member States in their implementation of Union law. Where Member States are permitted a certain discretion in implementation (and Member States have little discretion as regards the ends to be achieved), the Court will not substitute its own evaluation for that of the Member State: it will restrict itself solely to the question of whether there was a patent error in the Member State's action *{R v Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations* (case C-44/94)). Otherwise, general principles of law are strictly enforced. Thus, under the guise of the protection of individual rights, general principles of law also serve as a useful (and concealed) instrument of policy.

The adoption of the Charter of Fundamental Rights marks a significant further step. Although little more than a summary of the current level of protection recognised by the Union, it may evolve into a legally binding instrument which reaches beyond fundamental human rights to include employment and social rights and for this, we wait upon the ratification of the Lisbon Treaty. Nonetheless difficulties remain with its relationship with the ECHR, a convention to which the Union, it now seems, is intended to accede. Of crucial significance in the successful and equal protection of individuals' rights is the relationship between the European Court of Human Rights and both the CFI and, most importantly, the ECJ. This issue has yet to be fully resolved.

J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009

Chapter 9: State Liability

9.1 Introduction

The preceding chapters have identified that the ECJ, relying to a significant extent on the need to make EC law effective, extended the possible mechanisms by which individuals could seek access to rights derived from EC law in their national courts. Giving individuals incentives through the possibility of financial redress to bring legal action not only protects their rights but ensures enforcement of Community law. Whether these two objectives are equally weighted has been the subject of some debate. Perhaps the most significant development in this area over the past 25 years has been the creation and development of the principle of state liability under *Francovich* (cases C-6 and & 9/90). A logical development of the notion of direct effect, it can enable an individual, before his national court, to seek a remedy for losses suffered as a result of the failure by a Member State to implement, or apply correctly, provisions of EC law. While the national courts may have accepted this development, despite it potential impact on the autonomy of the national legal systems, there are still questions about the scope of the doctrine. This chapter will outline the development of the state liability doctrine and, in doing so, will examine its scope and the conditions for liability, as well identifying its relationship with other provisions. In all this, we question what the doctrine's underlying rationale is and, consequently, whether state liability can be extended beyond Community law to other pillars.

9.2 Principle of state liability under *Froncovich v Italy* 9.2.1 The *Francovich* ruling

The shortcomings of the principles of direct and indirect effects, particularly in the context of enforcement of directives, as outlined in Chapter 5, led the European Court of Justice (ECJ) to develop a third and separate principle in *Francovich v Italy* (cases C-6 and 9/90), the principle of state liability. Here the claimants, a group of ex-employees, were seeking arrears of wages following their employers' insolvency. Their claim (like that in the subsequent case of *Wagner Miret* (case C-334/92)) was based on Directive 80/987, which required Member States, inter alia, to provide for a guarantee fund to ensure the payment of employees' arrears of wages in the event of their employers' insolvency. Since a claim against their former employers would have been fruitless (they being insolvent and 'private' parties), they brought their claim for compensation against the state. There were two aspects to their claim. The first was based on the state's breach of the claimants' (alleged) substantive rights contained in the directive, which they claimed were directly effective. The second was based on the state's primary failure to implement the directive, as required under Article 249 and Article 10 EC (post Lisbon Articles 288 TFEU and Art 4 TEU). The Court had already held, in Article 226 EC post Lisbon Article 258 TFEU proceedings, that Italy was in breach of its Community obligations in failing to implement the directive *(Commission v Italy* (case 22/87)).

Withregard to the first claim, the Court found that the provisions in question were not sufficiently clear, precise, and unconditional to be directly effective. Although the content of the right, and the class of intended beneficiaries, was clear, the state had a discretion as to the appointment of the guarantee institution; it would not necessarily itself be liable under the directive. The claimants were, however, entitled in principle to succeed in their second claim. The Court held that where, as here, a state had failed to implement an EC directive it would be obliged to compensate individuals for damage suffered as a result of its failure to implement the directive if certain conditions were satisfied—that is, where:

(a) the directive involved rights conferred on individuals

(b) the content of those rights could be identified on the basis of the provisions of the directive and

(c) there was a causal link between the state's failure and the damage suffered by the persons affected.

The Court's reasoning was based on (i) the Member States' obligation to implement directives under Article 249 and their general obligation under Article 10 EC to 'take all appropriate measures ... to ensure fulfilment of their obligations under Community law; (ii) on its jurisprudence in *Van Gend en Loos* (case 26/62) and *Costa v ENEL* (case 6/64) that certain provisions of EC law are intended to give rise to rights for individuals; and (iii) that national courts are obliged to provide effective protection for those rights, as established in *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (case 106/77) and *Factortame* (case C-213/89)—see further Chapter 4). It concluded that 'a principle of state liability for damage to individuals caused by a breach of Community law for which it is responsible is inherent in the scheme of the Treaty'.

Thus, where the three conditions of *Francovich* are fulfilled, individuals seeking compensation as a result of activities and practices which are inconsistent with EC directives may proceed directly against the state. There will be no need to rely on the principles of direct or indirect effects. Responsibility for the non-implementation of the directive will be placed not on the employer, 'public' or 'private', but squarely on the shoulders of the state, arguably, where it should always have been. Rather than changing the law, it provides compensation for a Member State's failure to do so and, as well as providing protection for individuals' rights, creates an indirect mechanism for enforcement of Community law.

9.2.2 Scope of the principle

The reasoning in *Francovich* is compelling; its implications for Member States, however, remained unclear. Although expressed in terms of a state's liability for the non-implementation of a directive, *Francovich* appeared to lay down a wider principle of liability for all breaches of Community law 'for which the state is responsible'. Would it then apply to legislative or administrative acts and omissions in breach of treaty articles or other provisions of EC law? Would it be an additional remedy, or available only in the absence of other remedies based on direct or indirect effects? Apart from the three conditions for liability, which are themselves open to interpretation, what other conditions would have to be fulfilled? Would liability be strict or dependent on culpability, even serious culpability, as was the case with actions for damages against Community institutions under Article 288 (2) (ex 2 15(2) EC, post Lisbon 340 TFEU) (see Chapter 14)? In the case of non-implementation of directives, as in *Francovich* itself, the state's failure is clear; *afortiori* when established by the Court under Article 226. But in cases of faulty or inadequate implementation it is not. The state's 'failure' may only become apparent following an interpretation of the directive by the Court (see, eg, the sex-discrimination cases such as *Marshall* and *Barber—see* Chapter 27). Here the case for imposing liability in damages on the state is less convincing.

9.2.2.1 *Type of action*

Many of these questions were referred to the Court of Justice for interpretation in *Brasserie du Pecheur SA v Germany* and *R v Secretary of State for Transport, exparte Factortame* (cases C46 and 48/93). The Court held that the principle of state liability is not confined to a failure to implement EC directives; rather, *all* domestic acts and omissions, legislative, executive, and judicial, in breach of Community law, can give rise to liability. Provided the conditions for liability are fulfilled it applies to breaches of *all* Community law, whether or not directly effective. However, arguing from the principles applicable to the Community's non-contractual liability under Article 288(2), the Court held that where a state is faced with situations involving choices comparable to those made by Community institutions when they adopt measures pursuant to a Community policy it will be liable only where three conditions are met (see paras 50 and 51 of the judgment):

(a) the rule of law infringed must be intended to confer rights on individuals

(b) the breach must be sufficiently serious

(c) there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.

The 'decisive test' for whether a breach is sufficiently serious is whether the institution concerned has 'manifestly and gravely exceeded the limits of its discretion' (para 55). The factors to be taken into account in assessing this question included:

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 voluntary, 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. [Para 56.]

9.2.2.2 *For whose actions is the state liable?*

One question left open by *Brasserie de Pecheur* is for whose action a Member State can be liable. There can be little doubt as to the state's liability for actions taken by the government itself in the context of the obligation to implement EC measures. But what about other parts of the state? In *Haim* v *Kassenzahnartzliche Vereinigung Nordrhein* (case C-424/97) it was established that a legally independent body may be liable under *Francovich,*

as well as the Member State itself.

In *AGM-COS MET Sri v Suomen Valtio and Tarmo Lehtinen* (case C-470/03), the Court held, without exploring the point fully, that an individual official may be liable in addition to a Member State for any damage caused by that individual's actions which are in breach of Community law. Article 4(1) of Directive 98/37/ EC on machinery requires that Member States do not restrict the marketing and use of machinery which complies with the Directive. Lehtinen was an official who had been involved in safety inspections of vehicle lifts in respect of which he had doubts as to their safety. His actions included making various public statements about his concerns, although Finland did nothing to arrange for the machinery to be withdrawn from the market. The manufacturer's sales plummeted in the wake of this, and an action was brought for state liability. The Court held that statements such as the ones made by Lehtinen, if attributable to the state as giving the impression of reflecting official rather than personal opinions (which was for the national court to determine), could give rise to liability. It went on to say that Lehtinen's statements could be a breach of Article 4(1) of the Directive and could not be justified on the basis of public health or freedom of expression. As the provision conferred rights on individuals and left no discretion to the Member States, the conditions for liability were satisfied. Crucially, as well as the Member State itself, the individual official could also be held liable under national law. The Court appears to treat this (cf para 98 of the judgment) as the corollary of its ruling in *Haim* that a public body may also be liable under the state liability principle. However, the prospect of individual officials being held liable for actions carried out in their official capacity is a worrying one. The Court has tempered its ruling on this point by adding the proviso that Community law does not *require* such liability, although it does not preclude it.

Of course, the argument that the Member State is the appropriate body to sue because it is at fault, is also challenged in these circumstances, as the behaviour complained of is hardly within the control of the Member State. A similar argument could be made about the actions of regional and local government. In these scenarios, it seems state liability is more about compensating individuals than enforcing EC law. The key point is that the liability—which remains with the state at central government level—is then decoupled from the body actually in breach. From the perspective of the individual claiming compensation, this matters not.

Brasserie de Pecheur also suggested that there may be liability for judicial failures, which was controversial. However, in *Kobler v Austria* (case C-224/01), the ECJ confirmed that such liability may arise in particular circumstances. The case concerned the refusal by the Austrian Administrative Supreme Court (Verwaltungsgerichtshof) to grant Mr Kobler a 'length of service' increment on the basis that the payment would be a loyalty bonus, for which time spent in similar positions in other Member States could not be taken into account. This was a wrong interpretation of EC law and in direct conflict with an earlier ruling by the ECJ *(Schoning-Kougebetopoulou* (case C15/96)), and Mr Kobler therefore brought a new claim under *Francovich* for the failure of the Verwaltungsgerichtshof to apply EC law correctly.

The ECJ stated that, in international law, state liability can arise on the basis of acts by the legislature, executive and judiciary, and that the same must be true of EC law (para 32). In addition, the principle of effectiveness (see 8.3) requires that there must be instances when a state will incur liability for actions by its courts which are in breach of EC law (para 33). However, the ECJ limited this to instances where courts are adjudicating at the last instance (para 33) and emphasised the mandatory jurisdiction of such a court under Article 234 to request a preliminary ruling on the interpretation of EC law (see Chapter 10). In order to ensure the effective protection of individual's rights under Community law, there has to be a possibility of claiming compensation for damage caused by an infringement of these rights by a court adjudicating at last instance (para 36). Such an infringement must be manifest, and it is for the national legal system to designate the courts that would hear such claims. This ruling, it is submitted, follows logically from the basic justification for state liability, and its restrictions to courts of last instance is entirely appropriate because at that point there would be no possibility of an appeal against a ruling which infringes an individual's Community rights. In order to avoid opening the floodgates to claims of state liability or Article 234 references in such circumstances, the ECJ is at pains to emphasise that 'state liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law' (para 53), although this is not limited to intentional fault or serious misconduct by the national court *(Traghetti del Mediterraneo SpA v Italy* (case C-l 73/03)). Whether this will serve as an appropriate brake to such actions remains to be seen.

In coming to its conclusion, the Court had to deal with several fundamental objections. The first was that the principle of *res judicata* (finality of judgments) might be undermined by imposing liability on the state for a serious infringement of EC law. The Court, somewhat optimistically, stated that state liability in such circumstances would not affect the finality of the judgment at issue, especially because the parties to the state liability action would be different, and a finding of liability would not result in a revision of the original decision (para 39). At a technical level, that may be correct, although it cannot be denied that the authority of the ruling in the original case would be undermined. Secondly, there was concern that the independence of the judiciary may be affected, and the authority of the court undermined, by the possibility of a state liability claim. This, too, was given short shrift by the Court, simply denying that there would be 'any particular risk to the independence' of the court concerned (para 42), and that the possibility of a state liability action might be 'regarded as enhancing the quality of a legal system and. . . the authority of the judiciary' (para 43). However, the Court did not expand on this in any detail, and its assertion remains somewhat unconvincing. Finally, there was concern as to whether there would be an appropriate domestic court which might hear a claim for state liability. In this regard, the ECJ referred back to established principles according to which it is for national legal systems to determine the appropriate court to hear such claims. That, however, does not solve the difficulties that may arise in practice. Presumably, a Member State found liable before a domestic court has a right of appeal. In the UK, this might produce the rather strange situation whereby the House of Lords might eventually be called upon to hear a case in state liability based on one of its own judgments. Whilst the basic outcome in *Kbbler* therefore can be defended at a purely logical level, there are many practical difficulties which remain unresolved by this decision. As a final point, it may be noted that in *Kobler* itself, the ECJ thought that the breach by the Austrian Verwaltungsgerichtshof was not sufficiently serious for a claim in state liability to succeed.

9.2.2.3 *Liability only where measure confers rights*

One of the key requirements of liability under *Francovich/Brasserie de Pecheur* is that the rule of law infringed must be intended to confer rights on individuals. Consequently, where a directive in issue does not confer rights on individuals, then there can be no claim under *Francovich.* Thus, in *Peter Paul v Germany* (case C222/02), the failure of the German banking supervisory authority correctly to supervise a bank, which subsequently failed, in accordance with the relevant directive (94/19/EC), did not permit depositors to maintain an action for compensation for lost deposits beyond the maximum threshold of 20,000 provided for in the directive. This was because the obligation to ensure supervision was not combined with an independent right to compensation for the consequences of any failure in that regard, and the individual rights under this directive were limited to a specified amount of compensation (which had been paid already).

9.2.3 Conditions of liability

For liability to arise it is not necessary for the infringement of Community law to have been established by the Court under Article 226 or 234; nor is it necessary to prove fault on the part of the national institution concerned *going beyond that of a sufficiently serious breach of Community law.* In *Brasserie du Pecheur* the Court rephrased the three conditions laid down in *Francovich* and incorporated a requirement that the breach be. sufficiently serious. Condition (b) of *Francovich* (the content of the right infringed must be sufficiently clear) may now be regarded as contained within the definition of 'sufficiently serious'.

The Court based its decision on its past case law, particularly its reasoning in *Francovich:* states are obliged under Articles 249 and 10 to provide effective protection for individuals' Community rights and ensure the full effect of Community law. As regards its own jurisdiction to rule on the matter of states' liability in damages, challenged by the German government, it reasoned that, since the EC Treaty had failed to provide expressly for the consequences of breaches of Community law, it fell to the Court, pursuant to its duty under Article 220 EC (ex 164, post Lisbon Article 19 TEU), to ensure that 'in the interpretation and application of this treaty the law is observed'. The application of the Court's ruling and questions of damages and causation are discussed further below.

Despite the hostility with which this decision was greeted in anti-European quarters, it is submitted that the Court's ruling on the question of, and conditions for, liability is *prima facie* consistent with existing principles and, provided that the multiple test in para 56 of what will constitute a 'sufficiently serious' breach is rigorously applied, strikes a fair balance between the interests of the Community in enforcing Community law and the interests of Member States in restricting liability to culpable breaches of Community law.

9.2.3.1 *Meaning of 'sufficiently serious'*

For liability to arise, the institution concerned must have 'manifestly and gravely exceeded the limits of its discretion': the breach must be 'inexcusable'. If there is to be equality of *responsibility* as between the liability of the Community under Article 28 8(2) EC and Member States under *Francovich,* the criterion of a 'sufficiently serious' breach laid down in *Brasserie du Pecheur* should be interpreted strictly. The question remaining was whether the Court would apply the 'sufficiently serious' test to *all* claims based on *Francovich,* including claims for damage resulting from breaches of Community law which do *not* involve legislative 'choices' analogous to those made by Community institutions when implementing policy. Alternatively it might continue to 'interpret' Member States' actions as involving such choices, as it did, surprisingly, in *Brasserie du Pecheur.* To limit the application of the sufficiently serious test to situations in which Member States are involved in 'legislative choices', by analogy with the position of Community institutions under Article 288(2) (see Chapter 14), as was suggested in *Brasserie du Pecheur,* would be to ignore the essential difference between the position of Member States, when *implementing* Community law, and that of Community institutions when *making* Community law. Since liability depends on the breach by a Member State of a Community obligation, liability should in all cases depend on whether the breach is sufficiently serious. This is reflected in the multiple test laid down in para 56.

Given the lack of clarity of much EC law, and that Member States have no 'choice' to act in breach of Community law, it is submitted that the crucial element in para 56 will often be the clarity and precision of the rule breached, as suggested by Advocate-General Tesauro in *Brasserie du Pecheur.*

This view obtained some support in *R v Her Majesty's Treasury, ex parte British Telecommunications pic* (case C-392/93), a case decided shortly after *Brasserie du Pecheur.* The case, brought by BT, concerned the alleged improper implementation of Council Directive 90/351 on public procurement in the water, energy, transport, and telecommunication sectors ([1990] OJ L297/1). BT, which claimed to have been financially disadvantaged as a result of this wrongful implementation, was claiming damages based on *Francovich.* The Court, appearing to presume that the other conditions for liability were met, focused on the question whether the alleged breach was sufficiently serious. It applied the test of para 56 of *Brasserie du Pecheur.* Although it found that the UK implementing regulations were contrary to the requirements of the directive, it suggested that the relevant provisions of the directive were sufficiently unclear as to render the UK's error excusable. At para 43 of its judgment the Court said that the article in question (Article 8(1)) was:

imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it [by the ECJ] the interpretation given to it by the United Kingdom in good faith and on the basis of arguments which are not entirely void of substance. The interpretation, which was also shared by other Member States, was not manifestly contrary to the wording of the Directive or to the objective pursued by it.

This interpretation was, it is submitted, generous to the UK. The Court held that in the context of the transposition of directives, 'a restrictive approach to state liability is justified' for the same reasons as apply to Community liability in respect of legislative measures, namely:

that the exercise of legislative functions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests. [Para 40.]

The Court adopted a rather different approach in *R v Ministry of Agriculture, Fisheries and Food,* ex parte *Hedley Lomas (Ireland) Ltd* (case C-5/94). This case concerned a claim for damages by an exporter, Hedley Lomas, for losses suffered as a result of a UK ban on the export of live sheep to Spain. The ban was imposed following complaints from animal welfare groups that Spanish slaughterhouses did not comply with the requirements of Council Directive 74/5 77 on the stunning of animals before slaughter ([1974] OJ L3 16/10). The Spanish authorities had implemented the directive, but had made no provision for monitoring compliance or providing sanctions for non-compliance. The UK raised the matter with the Commission, which, following discussion with the Spanish authorities, decided not to take action against Spain under Article 226. Although the UK ban was clearly in breach of Article 29 of the EC Treaty, the UK argued that it was justified on the grounds of the protection of health of animals under Article 30 (for further discussion of the substantive issues see Chapter 20). However, the UK provided no evidence that the directive had in fact been breached, either by particular slaughterhouses or generally.

The Court found that the ban was in breach of Article 29, and was not justified under Article 30. The fact that the Spanish authorities had not provided procedures for monitoring compliance with the directive or penalties for non-compliance was irrelevant. 'Member States must rely on trust in each other to carry out inspections in their respective territories' (para 19). Furthermore, the breach was 'sufficiently serious' to give rise to liability under *Francovich.* The Court suggested (at para 28) that:

where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

This ruling, delivered two months after *R v Her Majesty's Treasury, ex parte British Telecommunications pic,* was surprising. While a finding that the UK would in principle be liable in damages was justified on the facts, the UK having produced no evidence of breach of the directive constituting a threat to animal health to justify the ban under Article 30, the suggestion that a 'mere infringement' of Community law might be sufficient to create liability where the state is not 'called upon to make any legislative choices' or has 'considerably reduced, or no, discretion' is questionable. While a state may have a choice as to the 'form and method of implementation' of directives, and some discretion under the treaty to derogate from basic treaty rules, its discretion is strictly circumscribed, and it has no discretion to act in breach of Community law. The UK had no more legislative discretion in implementing Directive 90/531 in *BT,* indeed possibly less, than it had under Article 30 in *Hedley Lomas.* Indeed, prior to the Court's decision in *Hedley Lomas,* it was thought that a Member State *would* have a discretion to derogate from the prohibition of Article 29 where this was necessary to protect a genuine public interest (see Chapter 20). To pursue the analogy between the Community's liability for 'legislative choices involving choices of economic policy' and Member States' liability under *Francovich,* as the Court has done in all these cases, is to disguise the fact that *the two situations are not similar.* The principal reason for limiting liability under *Francovich* is not because Member States' 'discretion' in implementing Community law must not be fettered, but because the rules of Community law are often not clear. To hold them liable in damages for 'mere infringements' of such rules, thereby introducing a principle akin to strict liability, would not only be politically dangerous, it would be contrary to the principle of legal certainty, itself a respected principle of Community law (for further analysis see Chapter 14).

Nevertheless the principle of liability for a 'mere infringement' of Community law in situations in which Member States are not required to make legislative choices was invoked by the ECJ in *Dillenkofer v Germany* (cases C-178,179,188,189 and 190/94). That case Germany's failure fully to implement Directive 90/314, designed to protect consumers in the event of travel organisers' insolvency, was on all fours with that of the Italian government in *Francovich,* was clearly 'inexcusable', and therefore, as the Court acknowledged, 'sufficiently serious' to warrant liability. Similarly, in *Rechberger and Greindle v Austria* (case C-140/97), concerning the same directive, the ECJ found that the implementing measures set the period for the commencement of claims at a date some months later than the time limit for implementation of the directive, which was 'manifestly' incompatible with the directive, and sufficiently serious to attract liability. In neither *Hedley Lomas* nor *Dillenkofer* did the Court attempt to apply the multiple test laid down in para 56 of *Brasserie du Pecheur.*

However, in *DenkavitInternationalBV v Bundesamt fur Finanzen* (cases C-283, 291 and 292/94), which were cases involving claims for damages resulting from the faulty implementation of a directive decided shortly after *Dillenkofer,* the Court followed its approach in *BT.* On the basis of a strong submission from Advocate-General Jacobs, it applied the criteria of para 56 of *Brasserie du Pecheur* and concluded that, as a result of the lack of clarity and precision of the relevant provisions of the directive, and the lack of clear guidance from the Court's previous case law, Germany's breach of Community law could not be regarded as sufficiently serious to justify liability. Significantly, the Court did not draw a distinction, for the purposes of liability, between acts of Member States involving 'choices of economic policy' and 'mere infringements' of Community law.

In an attempt to rationalise this aspect of state liability, Advocate-General Jacobs in *Sweden v Stockholm Lindopark AB* (case C-1 5 0/99) commented on the origins of the phrase 'sufficiently serious breach'. At para 59 of his opinion, he noted that:

In French, the Court has always used—originally with regard to liability incurred by the Community—the term 'violation suffisamment caracterisee'. This is now normally translated into English as 'sufficiently serious breach'. However, the underlying meaning of 'caracterise', which gives rise to its inherent implication of seriousness, includes the

notion that the breach (or other conduct) has been clearly established in accordance with its legal definition, in other words, that it is a definite, clear-cut breach. This may help to explain why the term was previously translated as 'sufficiently flagrant violation' and may throw additional light on the choice of factors which the Court has indicated should be taken into consideration when deciding whether a breach is 'sufficiently serious'.

On this reasoning, in order to be sufficiently serious, the breach of Community law would have to be definite and clear-cut. Nevertheless, establishing whether a breach is of that nature can be a difficult issue, and the approach by the ECJ to the assessment of the matter of a 'sufficiently serious' breach has not been fully consistent. In *Lindbpark* itself, the Court effectively followed *Hedley Lomas.* Lindopak had not been entitled to deduct VAT on goods and services used for the purposes of its business activities in breach of the sixth VAT directive (91/680/EEC, [1991] OJ L376/1). Sweden had amended its VAT legislation with effect from 1 January 1997, following which Lindopak was entitled to deduct VAT. It claimed for a return of VAT payments made between Sweden's accession to the Community on 1 January 1995 and 1 January 1997. The ECJ observed that the right to deduct VAT was capable of being directly effective. Although the question of Member State liability did not strictly speaking arise, the ECJ was nevertheless prepared to indicate whether Sweden had committed a sufficiently serious breach. It noted that 'given the clear wording of [the directive], the Member State concerned was not in a position to make any legislative choices and had only a considerably reduced, or even no, discretion'. The mere infringement of the directive was therefore enough to create liability.

Although the ECJ has, in some cases, concluded whether a breach was sufficiently serious to give rise to liability, that assessment is properly left to the national courts, with the ECJ only able to provide general guidance (which is correct, in principle, given the nature of the ECJ's jurisdiction under Article 234). Thus, in *Norbrook Laboratories Ltd v Minister of Agriculture, Fisheries and Food* (case C-l 27/95), a case involving a claim for damages for wrongful implementation of EC directives on the authorisation of veterinary products, the ECJ, following an extensive examination of the provisions of the directive allegedly breached, which revealed a number of clear breaches, invoked the *Hedley Lomas/Dillenkofer* mantra:

Where ... the Member State was not called upon to make legislative choices, and had considerably reduced, if no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

The ECJ then left it to the national court to assess whether the conditions for the award of damages were fulfilled. Similarly, in *Klaus Konle v Austria* (case C-302/97), in a claim for damages for losses suffered as a result of laws of the Tyrol governing land transactions, allegedly contrary to Article 46 EC (ex 56) post Lisbon Article 52 TEFU and Article 70 of the Act of Accession, the Court examined these provisions for their compatibility with Community law. and finding some (but not all) of the laws to be 'precluded' by Community law, left it to the national court 'to apply the criteria to establish the liability of Member States for damage caused to individuals by breaches of Community law in accordance with the guidelines laid down by the Court of Justice' (see also *Haim v KLV*(case C-424/97)). If national courts are to assess this crucial question of the seriousness of the breach, it is essential that these guidelines are clear. The multiple criteria laid down in para 56 of *Brasserie du Pecheur* are clear and comprehensive. The *Hedley Lomas* requirement, that in some circumstances a 'mere infringement' of Community law will suffice to establish liability, clouds the issue. It is submitted that if it is to be invoked, it will be applicable only *following* an examination of the Community law allegedly breached under the multiple test in para 56; for only then will the issue of whether the state has any 'discretion' in the exercise of its legislative powers be resolved. If the aim, and the substance, of the Community obligation allegedly infringed is 'manifest', the state will have no discretion to act in its breach. If it is not, the breach will not be sufficiently serious. The *Hedley Lomas* mantra is, it is submitted, superfluous. Nevertheless, it was invoked in *Haim vKLV* alongside the multiple test of para 56 and has been referred to since, though in cases in which the ECJ seems to suggest that the clarity and precision of the rule are key *(The Queen, on the application of: Synthon BVv Licensing Authority of the Department ofHealth* (case C-452/06), para 39).

One factor which may assist the national court is the rulings by the ECJ on the interpretation of the measure in issue. Indeed, it seems that even if there is some ambiguity in the text of the relevant measure, the *ex parte BT* approach will not be followed where the ECJ has interpreted a particular provision of Community law and a Member State has subsequently failed to apply that provision in accordance with the ECJ's interpretation *{Gervais Larsy v Lnstitut national d'assurances sociales pour travail-leurs independants (Inasti)* (case C-l 18/00)).

In that case, it can no longer be said that the Member State has a legislative choice. However, where the exact position only emerges gradually through several rulings by the Court, the national court can take this into account when considering the clarity of the rule in question and whether any errors of law were excusable or inexcusable *(Test Claimants in the FTI Group Litigation v Commissioners ofInland Revenue* (case C-446/04)). By way of contrast, see *Robins v SoSfor Work and Pensions* (case C-278/05), where the ECJ held that the UK had incorrectly implemented Article 8 of Directive 80/987/EEC on protecting employees in the event of insolvency of their employer by not ensuring that a sufficient proportion of expected pension benefits were protected. The UK's liability turned on the interpretation of 'protect' in Article 8, and as its meaning had been unclear prior to the interpretation given in this case, it seemed unlikely that the UK's breach would be sufficiently serious, although it was for the national court to come to a final decision.

9.2.3.2 *The claimant must prove that damage has been suffered*

It is also important that the claimant is able to establish that he has suffered loss or damage. In *Schmidberger v Austria* (case C-l 12/00), Austria had allowed a public protest to take place on the main motorway across the Alps which closed the motorway for 28 hours. Schmidberger claimed damages for delay to his business of transporting goods from Germany to Italy on the basis that this amounted to a breach of Articles 28-30 EC (post Lisbon Articles 34-36 TFEU) (see Chapter 19). Advocate-General Jacobs noted that it was necessary for the claimant to establish loss or damage which is attributable, by a direct causal link, to a sufficiently serious breach of Community law. Importantly, this included a right to claim for lost profit. However, if the claimant is unable to establish the existence of any loss or damage, then there cannot be a claim for state liability. The Advocate-General was willing to accept that it may not be possible to quantify exactly the loss suffered, in which case this may be calculated on an appropriate flat-rate basis. On the facts, the Advocate-General thought that the breach of Articles 28-30 in that case was not sufficiently serious. Austria had authorised a 28-hour demonstration which blocked the main transit route across the Alps, which was technically a breach of Articles 28-30, but this had to be balanced against the freedom of expression of the demonstrators (see further Chapter 6). This and the short duration of the disruption would not be a sufficiently serious breach of Community law. The ECJ, having decided that there was no breach of Articles 28-30, did not address the question of state liability in its judgment. As far as the requirement that damage be proven is concerned, it is submitted that the reasoning of this Advocate-General is sound.

9.2.3.3 *The damage must have been caused by the breach*

It is also necessary that the claimant can demonstrate that any damage suffered was caused by the Member State's breach of EU law. In *Brinkmann Tabakfabriken GmbH v Skatteministeriet* (case C-3 19/96), a case along the more moderate line in *BT* (case C-392/93), the Court found that the Danish authorities' failure properly to implement Directive 79/3 0 on taxes other than turnover taxes affecting the consumption of manufactured tobacco was not sufficiently serious to incur liability. The classification adopted by the authorities, which resulted in the applicant having to pay the higher rates of taxes, was not 'manifestly contrary' to the wording and aim of the directive. It was not clear from the directive whether the tobacco rolls imported by the applicant, which had to be wrapped in paper to be smoked, constituted 'cigarette tobacco' or 'cigarettes'. Significantly, both the Commission and the Finnish government supported the classification adopted by the Danish authorities. The question of liability turned on the question of causation. The directive in question had not been implemented in Denmark by legislative decree, although the authorities had given immediate (albeit imperfect) effect to its provisions. There was no direct causal link between that former (legislative) failure and the damage suffered by the applicant. It is implicit in the decisions that, contrary to the view of some commentators, provided that the requirements of a directive are complied with in practice, a failure to implement a directive by legislative means will not necessarily constitute a sufficiently serious breach to warrant liability.

9.2.4 *Brasserie du Pecheur* in the English courts

In 1997 the ECJ's ruling in *Brasserie du Pecheur* and *R v Secretary ofStatefor Transport, exparte Factortame Ltd* (cases C-46 and 48/93) was applied in the English High Court with a view to ascertaining whether the UK's action in introducing the Merchant Shipping Act 1988 in fact constituted a sufficiently serious breach of Community law *{R v Secretary ofStatefor Transport, exparte Factortame Ltd (No 5)* [1998] 1 CMLR 1353). Hobhouse LJ considered the ECJ's case law on state liability and concluded that whether or not a Member State's action involved the exercise of discretion (ie, 'legislative choices') the same test, requiring proof of a sufficiently serious breach of Community law, applied. That test, requiring a 'manifest and grave disregard of whatever discretion

the Member State might possess', was based on the same principles as applied to Community liability under Article 288(2), and was a relatively difficult one to meet. Having reasoned impeccably thus far he concluded that the UK's breach as regards the Merchant Shipping Act 1988 was sufficiently serious to warrant liability and referred the case back to the Divisional Court to decide the question of causation. Two factors in particular were cited by Hobhouse L as rendering the breach of Community law (Article 43 (ex 52) EC) sufficiently serious:

(a) The UK had introduced the measures in question in primary legislation in order to ensure that the implementation would not be delayed by legal challenge (at the time it was thought that primary legislation could not be challenged, but see now *R v Secretary of State for Transport, exparte Factortame Ltd* (case C-213/89), noted in Chapter 4).

(b) The Commission had from the start been opposed to the legislation on the grounds that it was (in its opinion) contrary to Community law.

Both the Court of Appeal and the House of Lords agreed with Hobhouse L that the UK's breach of Community law was sufficiently serious to warrant liability. Both courts applied the multiple test laid down in para 56 of *Brasserie du Pecheur* (cases C-46 and 48/93) (although they suggested that the list was 'not exhaustive') and found that the balance tipped in favour of the respondents. In pressing ahead with its legislation, against the advice of the Commission, despite its clear adverse impact on the respondents, and in a form (statute) which it was thought could not be challenged, the UK Government was clearly taking a 'calculated risk'. Lord Slynn did, however, express the opinion, contrary to the view of Hobhouse L and the Court of Appeal, that the considered views of the Commission, although of importance, could not be regarded as conclusive proof as to:

(a) whether there had been a breach of Community law

(b) whether the breach (if any) was sufficiently serious to justify an award of damages.

Lords Hoffmann and Clyde expressed a similar view; the position taken by the Commission was 'a relevant factor to be taken into account' in deciding whether a breach was sufficiently serious, but it was not conclusive.

Following the House of Lords' decision in *Factortame,* Sullivan in the English High Court, in assessing the seriousness of the Department of Social Security's breach of Article 7(1) of the Sex Discrimination Directive 79/7 in *R v Department of Social Security, ex parte Scullion* ([1999] 3 CMLR 798), also applied the multiple test of para 56 of *Brasserie du Pecheur,* which he described as the 'global' or 'basket' approach, and decided that, since there the scope of Article 7(1) was not clear at the relevant time, and there was no evidence that the Department had sought legal advice on the matter either from the Commission or from its own legal advisers, the breach was sufficiently serious.

9.2.5 Relationship of the principle of state liability with direct effect

The principle of state liability is an important complement to the principles of direct and indirect effect, particularly in the context of enforcement of directives. Of course, liability under the principles of both direct and indirect effect has been strict (this was confirmed in *Draehmpaehl v Urania Immobilienservice OHG* (case C-1 80/9 5)); there has been no need to consider whether the alleged breach of Community law is 'sufficiently serious'. For direct effects, the criteria have in the past been loosely applied; sometimes, in the case of indirect effects (and sometimes in the case of direct effects), they have not been applied at all. On the other hand, national courts' reluctance to apply these principles in some cases (eg, *Duke v GEC Reliance Ltd; Rolls-Royce pic v Doughty)* appears to have stemmed in part from the perceived injustice of imposing liability, retrospectively, on parties, public or private, when the precise nature of their obligations under Community law at the relevant time was not clear. The existence of a remedy under *Francovich* effectively completes the picture of ensuring the effective protection of individual rights under EU law. A good example is *Francovich* itself, following the ECJ's denial of the direct effects of the relevant provisions of Directive 80/987.

One question that arises is whether state liability can be used in preference to direct effect and indirect effect, or whether it can only be used if neither of these two mechanisms are available. In many decisions (eg, *Faccini Don),* the ECJ has pointed out a gap in protection— in particular due to the fact that directives do not have horizontal effect—can be remedied through the use of state liability. The doctrine on this view has a fallback role. In *Brasserie du Pecheur* the ECJ viewed state liability in a slightly different light, seeing it as a corollary of direct effect (para 22). Nonetheless, the preferred approach seems to see state liability as the approach of last resort. It was suggested in *Lindopark* that a damages claim is unnecessary where the applicant can obtain relief

by instituting an alternative course of action set down in national law. Some commentators have suggested that *Bonifaci v FNPS* (case C-94 and 95/95) implies it is possible to make admissibility of such proceedings dependent on the exhaustion of other domestic remedies which offer full reinstatement of rights. None of this however requires such an approach before an action in state liability may be brought.

9.2.6 State liability and the other pillars

The original judgment in *Francovich* refers to remedies for a breach of Community law. Does this mean that the remedy is not available for a failure to comply with Union law under the JHA and CFSP pillars? Member States certainly sought to exclude direct effect (but not other doctrines such as indirect effect and state liability), and the ECJ's jurisdiction is limited in both these pillars. Nonetheless, as we have seen in Chapter 5, the boundary between the pillars is porous and, in *Pupino* (case C-105/03), the ECJ held that the duty of cooperation which gave rise to the doctrine of indirect effect applied to Union law just as much as to Community law. This is a significant judgment. Of particular importance here is the fact that the doctrine of state liability is likewise based on Article 10 EC, which could imply that state liability—like indirect effects—applies to Union law. This is a contentious issue, but the removal of the pillar structure, should the Lisbon Treaty come into force, would reinforce this argument. For the time being, the question remains open.

9.2.7 Classifying state liability in national law

The principle of state liability remains a hybrid, part national, part Community law, with national courts ultimately responsible for applying the conditions to a particular case. This has created problems for national courts. Prior to *Brasserie du Pecheur* it was assumed, following *Francovich,* that a claim for damages against the state must be brought on the same basis, and according to the same rules, as the 'equivalent' claim based on national law.

However, regrettably, as noted above, the rules governing state liability laid down in *Brasserie du Pecheur* were not comprehensive. It was left to national courts to decide, according to the principles applicable to equivalent claims based on national law, whether the Community law breached was intended to benefit persons such as the applicant (condition (a)); whether there existed the appropriate direct causal link between the state's breach and the applicant's damage (condition (c), which was raised, but not decided, in *Schmidberger* (case C-l 12/00)); and whether the damage suffered was of a kind in respect of which damages might be awarded.

Although a principle of state liability for executive acts, and judicial remedies in respect of such acts, already exists in all Member States, these claims will now also be subject to the rules laid down in *Brasserie du Pecheur.* As with legislative acts, existing national remedies may need to be modified to ensure that they are effective in protecting individuals' rights; alternatively (and preferably) claims may be brought under a new *Francovich* tort.

A principle of liability for judicial acts in breach of Community law, as laid down in *Brasserie du Pecheur,* clearly breaks new constitutional ground in most if not all Member States. If available in theory, it is unlikely to be applied freely in practice. If only for reasons of polity, neither the ECJ nor a national court is likely to find a judicial breach of Community law sufficiently serious to warrant liability.

There is a degree of freedom for the Member States to specify the circumstances in which Member State liability may arise, provided that these are not stricter than those laid down in Community law. Thus, in *Traghetti del Mediterraneo SpA v Italy* (case C-l73/03), Italian legislation excluded state liability for judicial functions involving the interpretation of legal provisions or the assessment of facts and evidence. Following on from its ruling in *Kbbler* (case C-224/01), the Court observed that whilst the interpretation of the law is part of the essence of judicial activity, it is possible that a manifest breach of Community law might occur during the process of interpretation (paragraph 35). Consequently, excluding liability for damages caused by interpretation of law or assessment of facts is incompatible with national law, as is a limitation of liability to instances of intentional fault or serious misconduct by the national court, especially where this would narrow the criteria laid down in *Kobler.* In *AGM-COS MET Sri v Suomen Valtio and Tarmo Lehtinen* (case C-470/03), the Court held that national law may lay down specific conditions, provided that they do not make it impossible or excessively difficult in practice to obtain compensation caused by a Member State's breach of Community law. The Finnish limitation to damage caused by a criminal offence, the exercise of public authority, or on the basis that there are other especially serious reasons for awarding compensation were too restrictive because there may be conduct otherwise giving rise to liability not covered by these factors.

9.3 Conclusions

The principle of state liability provides individuals with a strong tool before their national courts to secure the enforcement of their rights under Community law. Although controversial, the decision in *Kobler v Austria* strengthens this further.

However, as the case law on state liability has shown, *Francovich* is not a universal panacea. To succeed in a claim for damages the applicant must establish that the law infringed was intended to confer rights on individuals and that the breach is sufficiently serious (as well as the requisite damage and causation). In cases of non-implementation of directives, as in *Francovich* or *Dillenkofer,* where there is no doubt about the nature of the Community obligation, the breach is likely to be sufficiently serious. However, where the Community obligation allegedly breached is less clear, the breach may well be found to be excusable. This then is a limitation on the ability of the doctrine to provide an effective remedy—or an effective enforcement mechanism—in every circumstance. Nonetheless, the introduction of state liability was a significant moment in the jurisprudence of the ECJ as it undermined the principle found in the legal systems of many Member States: that the state would not be liable for legislative (in)action. At a systemic level, the introduction of the doctrine emphasises that in the field of Community (if not Union) law, Member States play a subordinate role. It is surprising perhaps, that the doctrine has been so well accepted in the legal systems of the Member States.

J Steiner and L Woods, 'EU Law' (10th ed), OUP 2009

Chapter 10: The Preliminary Rulings Procedure

10.1 Introduction

The European legal system has several enforcement mechanisms. The most obvious is the possibility for the Commission or Member States to begin actions against Member States for breaching the EC Treaty^ As we have seen however (and will see again in Part III), the role of individuals in the enforcement and development of EC law has been vital. This has been possible through private actions begun in the national courts where private litigants assert their directly effective rights derived from EC law against the state or, in some cases, other private persons. In practice this private enforcement has been critical to the success of the European legal order. Given the need to accord EC law priority, it is perhaps surprising, that the system created by the EC Treaty was not, however, one based upon an appellate structure whereby cases begun in national courts could be appealed to the European Court of Justice (ECJ) for final disposal. Rather the system is one of reference whereby national courts conduct the proceedings throughout but may (and sometimes must) ask the ECJ for its view on the interpretation pf any point of EC law relevant to the case before the national court. The national court is described as making a 'reference' to the ECJ to obtain a 'preliminary ruling'. After the ECJ has given its view on the point of EC law, the case is finally resolved by the national court in light of the legal opinion received. The ECJ does not have the power to make final orders or enforce its judgments in the Member States national legal systems. As a result, the willingness of the national courts to refer cases to the ECJ and follow its interpretations of the EC law in good faith has been critical to the whole evolution of the European legal system.

This chapter seeks to consider the relationship between the national courts and the ECJ in the context of preliminary rulings. In particular we consider the following key issues:

the relative importance of the Article 234 preliminary reference procedure to the development of EC law and European integration, and the role of individuals in that process;

the extent to which the national courts are willing and able to gain access to the ECJ in order to resolve questions of EC law before them;

how far the Article 234 system has ensured that EC law is interpreted uniformly throughout the Member States;

the nature of the relationship between the national courts and the ECJ, and whether that remains one of cooperation between equal partners or whether it has evolved into something more hierarchical, with the ECJ effectively acting as a supreme court for the Union; the extent to which the Article 234 procedures adequately protect fundamental rights and give effective remedies to private litigants; and

the problems raised by the special procedures laid down in the amended treaties which restrict references from national courts to the (ECJ in cases involving justice and home affairs.

10.2 The text of Article 234 and an overview of the procedure

Article 234 EC (EX 177) provides that:

(1) The Court of Justice shall have jurisdiction to give preliminary rulings concerning: the interpretation of this Treaty;

the validity and interpretation of acts of the institutions of the Community;

the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Lisbon makes some textual changes and renumbers the provision Article 267 TFEU

10.2.1 The historical importance of the Article 234 procedure

It is not clear that the framers of the EC Treaty realised the full significance that the Article 234 procedure, linking national courts to the ECJ, would come to have on the development of EC law. The text is fairly humble, suggesting that the ECJ might be called upon to adjudicate to avoid conflicting interpretations of EC law by the national courts. Thus its original purpose was to ensure, by authoritative rulings on the interpretation and validity of EC law, the correct and uniform application of EC law by the courts of Member States. By contrast, it is likely that the framers saw enforcement action by the Commission in cases brought directly before the ECJ (under Article 226 EC; post Lisbon, Article 258 TFEU) as the key to the effectiveness of Community law. The role of citizens and legal persons as enforcers was less obvious. In its early case law however the ECJ suggested that the possibility of individuals bringing cases to it through the national court reference procedure under Article 234 indicated that the treaty was more than simply an 'ordinary' international agreement between states. Citizens too could use Article 234 to gain access to the ECJ and this was one factor that inspired the development of the doctrines of direct effect and supremacy in *Van Gend en Loos* (case 26/62), *Costa vENEL* (case 6/64) (see Chapter 5). The ECJ jurisprudence giving powerful rights to individuals has in turn encouraged more litigation and thus more Article 234 references to be made.

10.2.1.1 *Impact on claimant*

The reference procedure has thus been very valuable to the individual, since it has provided him or her with the primary means of access to the ECJ to challenge Member State actions alleged to breach EC law. It will be recalled that there is no possibility for individuals themselves to begin enforcement action against a Member State under Article 226 EC Treaty. This is reserved to the Commission. In this way the individual has been able indirectly to challenge action by Member States (eg, *Van Gend en Loos).* Similarly, individuals have found it difficult to begin direct actions before the ECJ under Article 230 against the acts and legislation of Community institutions under because of the restrictive rules on standing (see Chapter 12). By bringing a case in the national courts to challenge domestic measures implementing EC law a reference can be made to the ECJ which can rule that the Community legislation is invalid. Using this 'indirect' action, the individual can then obtain an appropriate remedy from his national court, following the decision by the ECJ to declare a Community measure null and void (see Chapter 6 and, eg, *Royal Scholten-Honig*—EC regulation invalid for breach of principle of equality).

10.2.1.2 *Impact on development of Community law*

The importance of the Article 234 procedure has been greatly increased by the development by the ECJ of the concept of direct effects. Where originally only 'directly applicable' regulations might have been expected to be invoked before national courts, these courts may now be required to apply treaty articles, decisions, and even directives. Even where EC law is not directly effective it may be invoked before national courts on the principles of indirect effects or state liability under *Francovich.* As a result, national courts now play a major role in the enforcement of EC law. As we will see, the cooperative relationship between the ECJ and the national courts has been a key factor in the success of the preliminary-rulings procedure. The ECJ has also used the preliminary rulings to pronounce many new legal doctrines vital for the substantive development of EC law. A glance through the preceding chapters of this book will reveal that the majority of cases cited, and almost all the major principles established by the ECJ, were decided in the context of a reference to that court for a preliminary ruling under Article 234.

Cases such as *Van Gend en Loos* (case 26/62), *Costa v ENEL* (case 6/64) and *Defrenne v Sabena (No 2)* (case 43/7 5), concerned with questions of interpretation of EC law, enabled the ECJ to develop the crucial concepts of direct effects and the supremacy of EC law. *Internationale Handelsgesellschaft mbH* (rase 11/70); *Stauder v City ofUlm* (case 29/69) and *Royal Scholten-Honig (Holdings) Ltd* (cases 103 and 145/77) (see Chapter 6), which raised questions of the validity of EC law, led the way to the incorporation of general principles of law into EC law. The principle of state liability in damages was laid down in *Francovich* (cases C-6 and 9/90) in preliminary ruling proceedings. In all areas of EU law, the Article 234 procedure has played a major role in developing the substantive law. The procedure accounts for over 50 per cent of all cases heard by the ECJ. This percentage has of course increased as the Court of First Instance (CFI) has taken over responsibility for judicial review actions (Chapters 12 and 13) and actions for damages (Chapter 14). Nonetheless, the preliminary rulings procedure plays a central part in the development and enforcement of European law

10.2.2 Nature of the preliminary rulings procedure

The preliminary-rulings procedure is not an appeals procedure. An appeals procedure implies a hierarchy between the different types of court, some courts being higher and having more authority than those lower down the judicial architecture. Typically, appeal courts can overrule the decisions of lower courts. The decision whether or not to appeal lies, in the first place, in the hands of the parties, although in some instances leave to appeal from certain courts is required. In contrast, the preliminary-rulings procedure merely provides a means whereby national courts, when questions of EC law arise, may apply to the ECJ for a preliminary ruling on matters of interpretation or validity prior to themselves applying the law. In principle, it is a matter for the national courts to decide whether or not to make a reference. It is an example of shared jurisdiction, depending for its success on mutual cooperation. As Advocate-General Lagrange said in *De Geus en Uitdenbogerdv Robert Bosch GmbH* (case 13/6 1), the first case to reach the ECJ on an application under the preliminary-rulings procedure:

Applied judiciously—one is tempted to say loyally—the provisions of Article 177 [now 234] must lead to a real and fruitful collaboration between the municipal courts and the Court of Justice of the Communities with mutual regard for their respective jurisdiction.

We shall consider how far the ECJ has attempted to go beyond this view and impose itself on the national courts in ways that may have departed from the original text and purpose of the treaty.

10.3.1 The generous approach of the EC to Article 234 references

We have noted above that the ECJ has relied heavily upon Article 234 references to develop the jurisprudence of EC law. It has adopted a purposive approach in its rulings on the meaning of EC law aiming to strengthen the effectiveness of EC law and build the single market. Article 234 has thus been crucial to the ECJ securing its own vision of European law. For this reason we can see that, for a long time, the ECJ adopted an open-door approach to national courts and tribunals seeking to refer questions to it. Certainly until fairly recently, the ECJ encouraged wide use of preliminary rulings in order to both secure uniformity of EC law throughout Member States but seemingly also to have more opportunity to develop new principles giving greater rights to individuals. As a result, the ECJ has followed a generous approach to the interpretation of Article 234 whenever parties or Member States sought to prevent a reference from being ruled upon by the court, by arguing that the reference was in some way inadmissible. This can be seen by the ECJ's willingness to accept reference from a wide range of bodies (see 10.3.1 and 10.3.2 below) but also by its lack of formality and flexibility in giving rulings on references from national courts in as many situations as possible (see 10.3.6 below).

We can however detect some changes in the outlook of the ECJ over time. One concern is that the ECJ has become overloaded with cases. This has caused delay, extra cost, and uncertainty for parties and the EC legal system overall. Consequently the ECJ has adopted certain decisions to limit the number of cases brought before it. Here, we can see the ECJ is becoming more like a superior court for Europe in that it wishes to be more than a passive recipient of whatever national courts send it. The ECJ has developed jurisprudence aimed at controlling the types of cases it will hear and a doctrine similar to precedent. Thus whilst the early period of the reference procedure saw the ECJ largely allow any reference to proceed to a hearing with a full preliminary ruling being given, this has changed overtime. The relationship between the ECJ and national courts has shifted to some extent from one of cooperation amongst equal partners towards a hierarchy with the ECJ attempting to position itself at the apex of the European legal system. This is, however, always subject to the important reality that the ECJ has no means of ensuring that national courts actually follow its rulings or make references when required to do so under Article 234 (but see *Kobler* (case C-244/01) 10.5.3).

10.3.1 What is a 'court or tribunal'?

Jurisdiction to refer to the ECJ under Article 234 is conferred on 'any court or tribunal'. With rare exceptions (eg, *Nordsee Deutsche Hochseefischerei GmbH* (case 102/81) to be discussed below; *Corbiau* v *Administration des Contributions* (case C-24/92) (a fiscal authority is not a court or tribunal); *Victoria Film A/S v Riksskattenverkert* (case C-134/97) (a court exercising its administrative duties is not a court or tribunal)) this has been interpreted in the widest sense. Whether a particular body qualifies as a court or tribunal within Article 234 is a matter of *Community* law. National-law classifications are not determinative. Arguably, this facilitates equality of access across the Union. A broad interpretation reduces the risk of rulings which are inconsistent with EC law coming into being.

The ECJ is generally accepted as having set down a number of criteria by which a 'court or tribunal' might be identified. The early case law identified five criteria:

statutory origin

permanence

inter partes procedure

compulsory jurisdiction

the application of rules of law

(See also *Dorsch Consult v Bundesbaugesellschaft Berlin* (case C-54/96), para 23).

Subsequent decisions, such as *Preto di Salo vPersons Unknown* (case 14/86), made it clear than the independence of the body would also be a factor.In *Broekmeulen* (case 246/80) the Court was faced with a reference from the appeal committee of the Dutch professional medical body. One of the questions referred was whether the appeal committee was a 'court or tribunal' within what is now Article 234. The Court held that it was:

in the practical absence of an effective means of redress before the ordinary courts, in a matter concerning the application of Community law, the appeal committee, which performs its duties with the approval of the public authorities and operates with their assistance, and whose decisions are accepted following contentious proceedings and are in fact recognised as final; must be deemed to be a court of a Member State for the purpose of Article 177 [now 234].

It was held that it was imperative, to ensure the proper functioning of Community law, that the ECJ should have the opportunity of ruling on issues of interpretation and validity raised before such a body. More recently, the ECJ has held that a person appointed to hear appeals against home affairs ministry decisions in immigration cases, an Immigration Adjudicator, could make a reference *(El-Yassini v Secretary of Statefor the Home Department* (case C-4 16/96)). In this case, the office of Immigration Adjudicator was a permanent office, established by statute which gives the officer in question the power to hear and determine disputes in accordance with rules set down by statute. The ECJ further agreed with the Advocate-General, who had emphasised the *inter partes* nature of the procedure (para 20) and the fact that the adjudicators are required to give reasons for their decisions.

The ECJ has since been criticised by the Advocate-General in *de Coster* (case C-17/00) for an approach to the interpretation of a 'court or tribunal' that is confused, especially as regards the criteria of whether the body is established by law, the independent nature of the body and the need for *inter partes* procedure, as well as the requirement that the body's decision be of a judicial nature. Although in cases such as *Criminal Proceedings against X*(cases C-74 and 129/95), in which the ECJ declared it did not have jurisdiction because the prosecutor making the reference was not independent, and *Dorsch Consult* (case C-54/96), in which the Court emphasised the need for the referring body to carry out its responsibilities 'independently' (para 35), in other instances, such as *El-Yassini,* the ECJ has not stringently assessed the requirement of independence. Another such example is *Gabalfrisa v AEAT* (cases C-l 10-47/98). There the ECJ held that the Spanish Economic-Administrative Courts, which do not form part of the judiciary but are part of the Ministry of Economic Affairs and Finance, fell within Article 234. The ECJ accepted that the separation of functions between the departments of the Ministry responsible for tax collection and the Economic-Administrative Courts, which ruled on complaints lodged against the collection departments, was sufficient to ensure independence, despite the Opinion of Advocate-General Saggio in that case to the contrary.

In *de Coster,* the Court, contrary to the view of the Advocate-General, accepted the reference. It noted that the body in question was 'a permanent body, established by law, that it gives legal rulings and that the jurisdiction thereby invested in it concerning local tax proceedings is compulsory' (para 12). In the subsequent *Schmid* case (case C-5 16/99), however, the ECJ went to great lengths to distinguish the Fifth Appeal Chamber for the Regional Finance Authority, the referring body in *Schmid,* from the bodies found to fall within the definition of a 'court or tribunal' in *Dorsch Consult* and *Gabalfrisa,* which the Advocate-General in *de Coster* had criticised. Like the bodies in those cases, the appeal chamber was linked in organisational terms to the body whose decisions it reviewed. The ECJ held that the appeal chamber was not independent. In *Synetairismos Farmakopoion Aitolias* & *Akamanias* v *GlaxoSmithKlinepic* (Case C-5 3/03), the ECJ held that the Greek

competition tribunal was subject to control by the relevant government department and therefore not sufficiently independent to be regarded as a 'court or tribunal' for the purposes of Article 234. Whether these cases indicate that the ECJ has taken the comments of the Advocate-General in *de Coster* into account, or rather reflects the fact that some administrative bodies simply cannot be seen as independent is debatable.

Moreover, the ECJ has sometimes emphasised the importance of the *inter partes* nature of proceedings (see, eg, *El Yassini* (case C-4 16/96)), although there have been cases, such as *Dorsch Consult* which concerned undefended proceedings, where this criterion has seemed less central to the determination of the question as to whether a body constitutes a 'court or tribunal'. In a more recent case, *Roda Golf and Beach Resort* (C-l 4/08) Advocate-General Ruiz Jarabo Colomer gave an opinion allowing a reference from a court where proceedings had not yet commenced and a single party was seeking to require the court to effect service a notice cancelling a contract on counterparties to the contract. He sought to argue that the *inter partes* rule should not be rigidly applied and it is suggested that this is right. Where there is a genuine issue of EC law that affects legal rights or remedies then a reference should be possible even in the absence of *inter partes* proceedings being on foot.

10.3.2 Can arbitrators be a 'court or tribunal'?

The position of arbitrators has always given rise to problems in this context. The Court took a narrow view of a 'court or tribunal' in the early case of *Nordsee Deutsche Hochseefischerei GmbH* (case 102/81). The case arose from a joint shipbuilding project which involved the pooling of EC aid. The parties agreed that in the event of a dispute they would refer their differences to an independent arbitrator. Their agreement excluded the possibility of recourse to the ordinary courts. They fell into disagreement and a number of questions involving the interpretation of certain EC regulations were raised before the arbitrator. He sought a ruling from the ECJ as to, inter alia, whether he was a 'court or tribunal' within the meaning of Article 234. The Court held that he was not. According to the Court, the key issue was the nature of the arbitration. Here the public authorities of Member States were not involved in the decision to opt for arbitration, nor were they called upon to intervene automatically before the arbitrator. If questions of Community law were raised before such a body, the ordinary courts might be called upon to give them assistance, or to review the decision; it would be for *them* to refer questions of interpretation or validity of Community law to the ECJ.

The Court's decision in *Nordsee* ignored the fact that in this case recourse to the courts was excluded, and the arbitrator was thus required to interpret a difficult point of Community law, of central importance in the proceedings, unaided. Since in *Nordsee Deutsche Hochseefischerei GmbH* there was no effective means of redress before the ordinary courts and the decisions of the arbitrator were accepted following contentious proceedings and recognised as final it seems that the only factor distinguishing it from *Broekmeulen* was the element of *public* participation or control. This, it seems, will be essential. Certainly, in subsequent cases, such as *Danfoss* (case 109/88), the ECJ has focused on the compulsory nature of an arbitrator's jurisdiction, by contrast to the position in *Nordsee,* when the parties agreed to refer their dispute to arbitration.

The position was confirmed in *Denuit v Transorient* (C-l 25/04) involving a dispute under the Package Travel Directive (90/3 14/EEC) before the arbitration panel of the Belgian Travel Dispute Committee. Having confirmed its case law, the ECJ rejected the reference on the basis that the panel was not a 'court or tribunal', because the parties were 'under no obligation, in law or in fact, to refer their disputes to arbitration' (at para 16). No regard was had to the fact that, in a consumer situation,arbitration may be the only formal procedure which may practically be available to a consumer because of the comparatively high cost of court action; a matter which surprises in view of the increasing emphasis on out-of-court procedures in consumer cases.

10.3.3 'Court or tribunal': Evaluation

In general, the ECJ's approach to the definition of 'court or tribunal' for the purposes of Article 234 has been generous. This approach would seem to have been driven by the need to ensure correct and uniform interpretation of the treaty. One might argue that access to justice from the perspective of the parties would also argue in favour of such a broad definition, especially when the referring body did not meet the criterion of independence. Against this, however, a number of other factors should be weighed. One of the significant problems in the current jurisprudence is a lack of certainty as to where the ECJ will draw the line between a 'court or tribunal' for the purposes of the EC Treaty and other bodies. The current approach, which (usually) takes a broad view of the bodies permitted to refer, means that the ECJ receives more references. An approach which encourages references was understandable during the early years of the Community when both the substantive law and the

relationship between the ECJ and national courts needed to be consolidated, but what of the position now? It has been suggested that although there is much to be said for encouraging national courts, now more experienced in the application of EC law, to decide matters for themselves, there is no justification for a position whereby access to the ECJ is totally excluded. The Advocate-General in *de Coster,* however, commented that '[o]ne well thought out and well-founded decision resolves more problems that a large number of hasty judgments which do not go deeply into the reasoning and do not address the questions submitted to them'. Essentially, it seems that the ECJ is a victim of its own success, with longer delays in dealing with references, delays themselves that do not assist in the proper administration of justice. The Advocate-General suggested that the ECJ should tighten its definition of 'court or tribunal', with the likely consequence that the relationship between the national courts and the ECJ would change. The national courts from this perspective would need to take greater responsibility for Community law.

10.3.4 The question must be a matter of Community law

The Court is only empowered to give rulings on matters of Community law (and, as noted below, limited aspects of the second pillar on justice and home affairs (JHA)). It has no jurisdiction to interpret domestic law, nor to pass judgment on the compatibility of domestic law with EC law. The Court has frequently been asked such questions (eg, *Van Gend en Loos* (case 26/62); *Costa v ENEL* (case 6/64); *Netherlands v Ten Kate Holding BV*(case C-5 11/03)), since it is often the central problem before the national court. But as the Court said in *Costa v ENEL:*

a decision should be given by the Court not uppn the validity of an Italian law in relation to the Treaty, but only upon the interpretation of the above-mentioned [Treaty] Articles in the context of the points of law stated by the Giudice Conciliatore.

Where the Court is asked to rule on such a matter it will merely reformulate the question and return an abstract interpretation on the point of EC law involved. This respects the division of competences laid down in the treaty and avoids the ECJ becoming involved in national law issues over which it has no jurisdiction.

The Court's role is one of interpretation of EC law not application to the facts

The Court maintains a dividing line in principle between interpretation and application. It has no jurisdiction to rule on the application of Community law by national courts. However, since the application of Community law often raises problems for national courts, the Court, in its concern to provide national courts with 'practical' or 'worthwhile' rulings, will sometimes, when interpreting Community law, also offer unequivocal guidance as to its application (see eg, *Stoke-on-Trent City Council v B&Q* (case C-l69/9 1); *R v Her Majesty's Treasury, exparte British Telecommunications pic* (case C-392/93); *Arsenal Football Club v Reed* (case C-206/01)).

The Court must not interfere with the matters within national court discretionThe Court maintains a strict policy of non-interference over matters of what to refer, when to refer, and how to refer. Such matters are left entirely to the discretion of the national judge. As the Court said in *De Geus en Uitdenbogerd v Robert Bosch GmbH* (case 13/61), its jurisdiction depends 'solely on the existence of a request from the national court'. However, it has no jurisdiction to give a ruling when, at the time when it is made, the procedure before the court making it has already been terminated *(Pardini* (case 338/85); *Grogan* (case C-159/90)). In contrast, the Court does have jurisdiction where a court is involved in preparatory inquiries in criminal proceedings which may or may not lead to a formal prosecution, where the question of EC law may determine whether the inquiries will continue (case C-60/02, *Criminal proceedings against X ('Rolex')).*

No formal requirements are imposed on the framing of the questions. Where the questions are inappropriately phrased the Court will merely reformulate the questions, answering what it sees as the relevant issues. It may interpret what it regards as the relevant issues even if they are not raised by the referring court (eg, *OTO SpA v Ministero delle Finanze* (case C-130/92)). Nor will it question the timing of a reference. However, since 'it is necessary for the national court to define the legal context in which the interpretation requested should be placed', the Court has suggested that it might be convenient for the facts of the case to be established and for questions of purely national law to be settled at the time when the reference is made, in order to enable the Court to take cognisance of all the features of fact and law which may be relevant to the interpretation of Community law which it is called upon to give *(Irish Creamery Milk Suppliers Association v Ireland* (cases 36 and 71/80); approved in *Pretore di Said* (case 14/8 6)). In *Telemarsicabruzzo SpA v Circostel* (cases C-320, 321, 322/90) it rejected an application for a ruling from an Italian magistrates' court on the grounds that the reference had provided no background factual information and only fragmentary observations

on the case. The ECJ has since reaffirmed this approach in several cases (eg, *Pretore di Genova v Banchero* (case C-1 57/92); *Monin Automobiles v France* (case C-386/92)). The ECJ has held, however, that the need for detailed factual background to a case is less pressing when the questions referred by the national court relate to technical points *(Vaneetveld v Le Foyer SA* (case C3 16/93)) or where the facts are clear, for example, because of a previous reference *(Crispoltoni* v *Fattoria Autonoma Tabacchi* (cases C-133, 300 and 3 62/92)). The concern seems to be that not only must the ECJ know enough to give a useful ruling in the context, but that there is also enough information for affected parties to be able to make representations. This, according to the ECJ, is especially relevant in competition cases *(Deliege* (case C-191/97), paras 30 and 36 (see further Chapter 29). The Court has issued an 'Information Note on references from national courts for a preliminary ruling' ([2005] OJ C 143/1, replacing guidance issued in 1996), consolidating its rulings in these cases. The circumstances in which the ECJ will decline jurisdiction are discussed further below.

The national courts may refer cases on the validity of EC measures As confirmed in Article 234 itself, the validity EC measures may be called into question within national proceedings. Thus for example a regulation or directive passed by the Council and Parliament may be said to be ultra vires the EC Treaty. If an individual is adversely affected by the measure, they may begin proceedings in the national courts to challenge it. The national courts have often made references to the ECJ in such cases. The ECJ has been receptive to such cases (subject to 10.4.4 below) and is willing to rule that EC measures are invalid in responding to Article 234 references. The only limit placed upon national courts is that they themselves do not have the power to declare EC measures invalid (see *Foto-Frostv Hauptzollamt Lubeck-Ost* (case 314/85)). The ECJ has been keen to maintain a monopoly over this power because of the danger that national courts may undermine the effectiveness of EC law if they were unilaterally to declare measures invalid. The ECJ did however confirm that national courts can grant interim relief suspending the implementation of EC measures that they believe to be invalid in *Zuckerfabrik Siiderdithmarschen AG v Hauptzollamt Itzehoe* (cases C-143/88 and C-92/89). The national courts must use this power with great care and make an urgent reference to the ECJ. This is a good example of the cooperative nature of the relationship between the ECJ and the national courts. The ECJ sought to balance the concerns of national courts about invalid EC legislation affecting individuals with its own concerns about the effectiveness and uniform application of EC law.

10.3.5. The practical reality of the ECJ's jurisdiction

Some of the above limitations of the Court's jurisdiction are more apparent than real. The line between matters of Community law and matters of national law, between interpretation and application are more easily drawn in theory than in practice. An interpretation of EC law may leave little room for doubt as to the legality of a national law and little choice to the national judge in matters of application if he is to comply with his duty to give priority to EC law. The Court has on occasions, albeit in abstract terms, suggested that a particular national law is incompatible with EC law (eg, *R v Secretary of Statefor Transport, exparteFactortameLtd* (case C-221/89); *Johnston v RUC* (case 222/84)). The Court may even offer specific guidance as to the application of its ruling. In the *BT* case (case C-392/93), for example, the ECJ commented:

Whilst it is in principle for the national courts to verify whether or not the conditions of State liability for a breach of Community law are fulfilled, in the present case the Court has all the necessary information to assess whether the facts amount to a sufficiently serious breach of Community law.

The Court then went on to hold that there had been no breach. Further, in rephrasing and regrouping the questions the Court is able to select the issues which it regards as significant, without apparently interfering with the discretion of the national judge.

It may be argued that some encroachment by the ECJ on to the territory of national courts' jurisdiction is necessary to ensure the correct and uniform application of Community law. However, its very freedom of manoeuvre in preliminary rulings proceedings, combined with its teleological approach to interpretation, have resulted on occasions in the Court overstepping the line, laying down broad general (and sometimes unexpected) principles, with far-reaching consequences, in response to *particular* questions from national courts (eg, *Barber* (case 262/88); *Marshall (No 2)* (case C-27 1/91)). This has not been conducive to legal certainty. Such activism has not gone without criticism, as calculated to invite 'rebellion', even 'defiance' by national courts.

The potential difficulties arising from the ECJ overstepping the boundary between its role of interpreting EC

law and the national courts' role of applying that ruling to the facts can be seen in the case of *Arsenal Football Club v Reed* ([2002] All ER (D) 180 (Dec)). The case before the national court concerned the action commenced by Arsenal to prevent Reed from continuing to sell souvenirs which carried its name and logos. The national court referred a number of questions to the ECJ on the interpretation of the Trade Mark Directive (see case C-206/01). The main issue was whether trade mark protection extended only to the circumstances in which the sign was used as a trade mark or whether an infringement would occur irrespective of how the marks were used. The ECJ handed down a judgment in the following terms:

In a situation which is not covered by Article 6(1) of the First Council Directive 89/104/ EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, where a third party uses in the course of trade a sign which is identical to a validly registered trade mark on goods which are identical to those for which it is registered, the trade mark proprietor of the mark is entitled, in circumstances such as those in the present case, to rely on Article 5(l)(a) of that directive to prevent that use. It is immaterial that, in the context of fhat use, the sign is perceived as a badge of support for or loyalty or affiliation to the trade mark proprietor.

The phrase 'in circumstances such as those in the present case' would seem to give the national court little freedom in its determination of the case for which the preliminary ruling was originally made. In the *Arsenal* case, however, the referring court accepted the argument of the defendant's counsel to the effect that in the course of its judgment and in particular by tying the operative part of its judgment to the facts of the case, the ECJ had made a determination of fact which in some aspects was inconsistent with the finding of fact made by the national court. On this basis, the national court commented: 'If this is so, the ECJ has exceeded its jurisdiction and I am not bound by its final conclusion. I must apply its guidance on the law to the facts as found at the trial' (para 27) It further remarked:

The courts of this country cannot challenge rulings of the ECJ within its areas of competence. There is no advantage to be gained by appearing to do so. Furthermore national courts do not make references to the ECJ with the intention of ignoring the result. On the other hand, no matter how tempting it may be to find an easy way out, the High Court has no power to cede to the ECJ a jurisdiction it does not have. [Para 28.]

Although the court has phrased this in terms of the limits ofjurisdiction, rather than an overt defiance, the assertion by the national court of the limits of the ECJ's jurisdiction was itself a form of rebellion because the trial judge refused to follow the application of law to the facts that had been suggested by the ECJ. The High Court before which the *Arsenal case* was heard did point out that there was the possibility of an appeal to the Court of Appeal, which might make a different application of the law to the facts but in the absence of this, he declined to accept the ECJ's, as he saw it, improper ruling on factual matters. This is what happened subsequently (see [2003] 2 CMLR 25), when the Court of Appeal held that the ECJ's reference to the facts was *not* at variance with those of the trial judge, but that there was a difference in legal reasoning. The trial judge had therefore been wrong to disagree with the ECJ in this case, although the Court of Appeal did confirm the principle on which the first-instance decision was based. We can see in *Reed* a good example of a case where the ECJ was perceived to have exceeded its proper jurisdiction as a court of reference by taking the final decision on the case away from the national court. The nature of cooperation requires that both national courts and ECJ respect each others jurisdictions.

10.4 The ECJ's refusal to give rulings in some cases

As was noted above, for many years, the ECJ generally encouraged national courts to refer and did not seek to limit the kinds of cases sent to it. There have however been important limitations upon the ECJ's policy of being willing to provide rulings in all cases referred to it. These limitations are controversial because some of them go against the text of Article 234 which seems to require the ECJ to give a ruling whenever this is 'necessary' to resolve an issue of EC law. There appears to be no inherent jurisdiction in the ECJ to refuse to give a ruling. Furthermore, refusal to answer may lead to uncertainty in national courts about when to refer and this may damage the uniform application of EC law. One practical, thus justifiable, limitation that we have already seen is that the ECJ will refuse jurisdiction when the referring court has not included enough information to enable the ECJ to give a ruling on the question referred (see eg, *Telemarsicabruzzo SpA v Circostel* (cases C-320, 321, 322/90)).

We now consider some more important limitations developed by the court. These show the ECJ developing the idea that, as a kind of supreme court for the EU, it should have the inherent power to decide which kinds of cases it will hear. This is sometimes referred to as the compentence to determine its own jurisdiction (Kompetenz-

Kompetenz is the German phrase). 10.4.1 The ECJ can decline to hear cases brought in artificial proceedings

The most important limitation was first laid down by the ECJ in the cases of *Foglia v Novello (No 1)* (case 104/79) and *Foglia v Novello (No 2)* (case 244/80). Here for the first time the Court refused its jurisdiction to give a ruling on a question of EC law. The questions, which were referred by an Italian judge, concerned the legality under EC law of an import duty imposed by the French on the import of wine from Italy. It arose in the context of litigation between two Italian parties. Foglia, a wine producer, had agreed to sell wine to Mrs Novello, an exporter. In making their contract the parties agreed that Foglia should not bear the cost of any duties levied by the French in breach of EC law. When duties were charged and eventually paid by Foglia, he sought to recover the money from Mrs Novello. In his action before the Italian court for recovery of the money that court sought a preliminary ruling on the legality under EC law of the duties imposed by the French. The ECJ refused its jurisdiction. The proceedings, it claimed, had been artificially created in order to question the legality of the French law; they were not 'genuine'. The parties were no more successful the second time when the judge referred the case back to the ECJ having not received a satisfactory answer to his previous reference. In a somewhat peremptory judgment the Court declared that the function of Article 234 was to contribute to the administration of justice in the Member States; not to give advisory opinions on general or hypothetical questions.

The ECJ's decision has been criticised. Although the parties had contrived their contractual arrangements so as to bring a claim in their own national court, rather than challenging the French duty in the French courts, they did genuinely think the duty was in breach of EC law and the Italian judge called upon to decide the case was faced with a genuine problem, central to which was the issue of EC law. If, in his discretion, he sought guidance from the ECJ in this matter, surely it was not for that Court to deny it. The principles expressed in *Foglia v Novello* were, however, applied in *Meilicke v AD V/OR GA AG* (case C-83/91). Here the Court refused to answer a lengthy and complex series of questions relating, inter alia, to the interpretation of the second Company Law Directive. The dispute between the parties centred on a disagreement as to the interpretation of certain provisions of German company law. It appeared that the EC directive was being invoked in order to prove the theories of one of the parties (a legal scholar). The Court held that it had no jurisdiction to give advisory opinions on hypothetical questions submitted by national courts (contrast *Mangold* (case C-144/Q4, discussed in Chapter 5), which also appeared to have been raised to prove an argument made by one of the parties (cf para 32), but a contract forming the basis of the dispute and the Article 234 reference had been performed—thereby causing the ECJ to reject the German government's claim that the case was artificial). It is not unusual for supreme courts to limit cases to those where parties really are in dispute with each other. The reasons are partly those of docket control but also to prevent the courts becoming the forum for political rather than legal disputes.

It has also been suggested that political considerations and national rivalries played their part in the *Foglia* decision (the Court held it 'must display special vigilance when ... a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community law': *Foglia v Novello (No 2)).* This assessment is supported by the more recent case of *Bacardi-Martini SAS v Newcastle United Football Company Ltd* (case C-3 18/00). Bacardi entered into a contract for advertising time on an electronic revolving display system during a match between Newcastle and Metz, a French football club. The match was to be televised live in the United Kingdom and France. Although the advertising deal was in cbmpliance with English law, it contravened French law and Newcastle therefore pulled out of the advertising agreement. Bacardi brought an action against Newcastle, claiming that it could not rely on the French law to justify its actions, as the French law was incompatible with Article 49 EC (ex 59; post Lisbon 56 TFEU) on the freedom to provide services. The High Court made a reference on this point. When discussing the question of admissibility, the ECJ referred to *Foglia* and the special need for vigilance when the law of another Member State was in issue; it then reviewed whether the national court had made it clear why an answer was necessary. The ECJ concluded:

In those circumstances, the conclusion must be that the Court does not have the material before it to show that it is necessary to rule on the compatibility with the Treaty of legislation of a Member State other than that of the court making the reference. [Para 53.]

From this case, it seems that although a national court is not precluded from referring questions relating to the national laws of other Member States, the ECJ will review the justification for the reference more stringently than it would otherwise do.

10.4.2 The case must relate to a cross-border issue and not a purely internal situation

Another area in which the ECJ has sometimes limited references has been when the subject matter of the case is 'internal' and does not involve Community law directly. Internal law issues are governed by national not EC law. The ECJ has generally been careful not to rule on cases which appear to concern internal situations because to do so would be to assume a power not conferred upon it by the EC Treaty. This issue came before the Court in *Dzodzi v Belgium* (cases C-297/88 and C-l97/89). Here the Court was prepared to provide a ruling on the interpretation of EC social security law in a purely 'internal' matter, for the purpose of clarifying provisions of Belgian law invoked by a Togolese national. The Court held that it was 'exclusively for national courts which were dealing with a case to assess, with regard to the specific features of each case, both the need for a preliminary ruling in order to enable it to give judgment, and the relevance of the question'. Following *Dzodzi,* in *LeurBloem* (case C-28/95), the ECJ held that it has jurisdiction to interpret provisions of Community law where the facts of the case lie outside these provisions but are applicable to the case because the national law governing the main dispute has transposed the Community rule to a non-Community context ('spontaneous harmonisation'). This is subject to the proviso that national law does not expressly prohibit it *(Kleinwort Benson* (case C-346/93)). Similarly, the ECJ has accepted references for a preliminary ruling in circumstances where a national provision is tied into a Community rule in order to avoid nondiscrimination even in purely internal situations (case C-300/01, *Salzmann*—internal situation affected by rules on free movement of capital in Article 56 (ex 73b) EC; post Lisbon 63 TFEU).

10.4.3 A preliminary ruling must be 'objectively required'

Another potential limitation on the ECJ's willingness to accept references can be seen in *Motrin Automobiles—Maison du Deux-Roues* (case C-428/93). There the ECJ suggested that the questions referred must be 'objectively required' by the national court as 'necessary to enable that court to give judgment' in the proceedings before it as required under Article 234(2). This case concerned a company which was in the process of being wound up. The company argued that it should not be finally wound up until certain questions relating to EC law had been answered. Conversely, the company's creditors thought that the company had been artificially kept in existence for too long already and should be wound up immediately. The national court referred the EC-law questions to determine the strength of the company's argument. The ECJ held that, although there was a connection between the questions and the dispute, answers to the question would not be *applied* in the case. The ECJ therefore declined jurisdiction.

10.4.4 The parties must challenge EC measures directly under Article 230 if they have standing

Another limitation on the ECJ's willingness to give preliminary rulings relates to cases where a party is seeking to challenge an EC measure indirectly using proceedings in the national courts. Whilst we saw that often the ECJ will rule on such issues where national courts refer questions to the ECJ under Article 234 (see 10.3.7 above), there are some limits to this open-door policy. The Court has been concerned to prevent parties using Article 234 to get round the rules on direct challenges under Article 230. This was the situation in *TWD Textilwerke GmbHv Germany* (case C-l 88/92) where the Court refused to give a ruling on the validity of a Commission decision, addressed to the German government, demanding the recovery from the applicants of state aid granted by the government in breach of EC law. Its refusal was based on the fact that the applicants, having been informed by the government of the Commission's decision, and advised of their right to challenge it under Article 230, had failed to do so within the two-month limitation period. Having allowed this period to expire the Court held that the applicants could not, in the interests of legal certainty, be permitted to attack the decision under Article 234. This would defeat the restrictions on challenging Community acts imposed by Article 230 because a party could wait many months or years before attempting to invalidate long-standing EC decisions or legislation.

This decision, wholly out of line with its previous jurisprudence, which has been to encourage challenges to validity under Article 234 rather than (the more restrictive) Article 230, has caused concern, as calculated to drive parties, perhaps prematurely, into action under Article 230, for fear of being denied a later opportunity to challenge Community legislation under Article 234 (see further, Chapter 12). However, the ECJ has since mitigated some of the effects of its judgment in *TWD. InRv Intervention BoardforAgriculture, exparteAccrington Beef Co Ltd* (case C-24 1/9 5), the parties had not sought to bring an action for annulment within the time limits set out in the then Article 230. Nonetheless, the ECJ was prepared to hear the preliminary ruling reference because it was not clear, as the parties were seeking to challenge a regulation, that they would have had standing to bring an action under Article 230 (see also *Atzeni and others* (cases C-346 and 529/03), discussed at 11.4.3.4). It seems therefore

that Article 234 can be used in such cases as long as it is not obvious that the party would have had standing to challenge the EC measure directly under Article 230.

10.5 National courts and the reference procedure

We should note at the outset the position of the national courts is in some ways more powerful than that of the ECJ. Because there is no right of appeal to the ECJ, it is up to the national-court judge whether to decide to refer matters to Luxembourg. As will be seen, in some cases Article 234 imposes a duty to refer cases but there is no method of compelling this if a national court declines to do so. The ECJ has thus relied very much upon judges cooperating with it in order to develop European law and to ensure uniform application throughout the Member States. In this sense, national courts are also part of the Union legal order.

10.5.1 When must a national court refer and when does it have choice?

Although any court or tribunal may refer questions to the ECJ under Article 234, a distinction must be drawn between those courts or tribunals which have a discretion to refer ('permissive' jurisdiction) and those for which referral is mandatory ('mandatory' jurisdiction). Under Article 234(3), where a question concerning interpretation is raised 'in a case pending before a court or tribunal of a Member State, *against whose decisions there is nojudicial remedy under national law,* that court or tribunal *shall* bring the matter before the Court of Justice' (emphasis added). For all courts other than those within Article 234(3) referral is discretionary. The treaty therefore created a system whereby most of the time the national courts would have a choice about when to refer questions to the ECJ. Decisions of national courts which are disputed (including on points of EC law) could be appealed internally (subject to the national law regarding appeals of the particular Member State). Only when a case could go no further within the domestic legal system does the treaty require a reference to the ECJ.

10.5.2Article 234(3): The mandatory obligation to refer for courts against whom no appeal lies

The purpose of Article 234(3) must be seen in the light of the function of Article 234 as a whole, which is to prevent a body of national case law not in accordance with the rules of Community law from coming into existence in any Member State *(Hoffman-La Roche AG v Centrafarm Vertiebsgesellschaft Pharmazeutischer Erzeugnisse mbH* (case 107/76)). To this end Article 234(3) seeks to ensure that, when matters of EC law arise, there is an obligation to refer to the ECJ if the proceedings can go no further in the domestic court system. This purpose should be kept in mind when questions of interpretation of Article 234(3) arise.

The scope of Article 234(3) is not entirely clear. While it obviously applies to courts or tribunals at the apex of the legal system whose decisions are *never* subject to appeal (the 'abstract theory'), such as the House of Lords in England, or the Conseil d'Etat in France, it is less clear whether it applies also to courts whose decisions *in the case in question* are not subject to appeal (the 'concrete theory'), such as the Italian magistrates' court *{giudice conciliatore)* in *Costa v ENEL* (case 6/64) (no right of appeal because sum of money involved too small). Furthermore, if leave to appeal is required to go to a higher court and this is refused, does this mean the lower court becomes a court 'against whose decisions there is no judicial remedy under national law'? In the UK we see this in appeals from the Court of Appeal where leave to the House of Lords is refused, or when the High Court refuses leave for judicial review from a tribunal decision. These cases all involve courts not at the apex of the system but whose decision has effectively concluded the domestic proceedings. If a point of EC law remained in dispute, the parties would not have had the benefit of a ruling from the ECJ and so their fundamental rights might have been impaired. Furthermore, the interpretation and application of EC law in that Member State might be wrong thus threatening the uniformity of the EC law system across the Member States.

The judgment of the ECJ in *Costa v ENEL* was seen, albeit *obiter,* to support the wider, 'concrete' theory. In that case, in the context of a reference from the Italian magistrates' court, from which there was no appeal due to the small amount of money involved, the Court said, with reference to the then Article 177(3) (now 234(3)): 'By the terms of this Article ... national courts against whose decisions, *as in the present case,* there is no judicial remedy, *must* refer the matter to the Court of Justice' (emphasis added). Taking into account the function of Article 234(3) and particularly its importance for the individual, this would have seemed to be the better view.

The issue has finally been resolved by the ECJ in favour of the concrete theory in the *Lyckeshog* (case C-99/00). The ECJ ruled that where there was a right for a party to seek to appeal against the decision under challenge, that was not a final court. It followed that if there was no right to appeal against the decision then that court was a 'final court' regardless of its status in the judicial hierarchy.

In *Lyckeshog* case the ECJ was also referred the question of whether national courts are 'final' courts for the purposes of Article 234(3) if an appeal against their decision is possible but only with leave to appeal having been granted by a higher court (or the lower court itself). The ECJ noted that the function of the obligation on courts against whose decisions there was no judicial remedy to refer questions to the ECJ was to prevent a body of national case law coming into being that was inconsistent with the requirements of Community law. The ECJ argued that 'the fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy' (para 16). In coming to this conclusion, the ECJ noted that 'uncertainty as to the interpretation of the law applicable, including Community law, may give rise to review, at last instance, by the supreme court' (para 17). In this light, the ECJ concluded that, where leave depends on permission from a superior 'final' court, that latter court is obliged to grant the requested leave and make a reference to the ECJ when a question of EC law arises. Any other course would frustrate the purpose of Article 234 and amount to a denial of the individual's Community law rights.

10.5.3 When does a 'question' of EC law arise?

Whether a national court is a final court or merely one that has a discretion to refer cases to the ECJ, the national judge must consider if a case raises a 'question' of Community law such that a ruling from the ECJ is *'necessary* to enable it to give judgment'. If the case does raise such a question then, if the court is a final court, the judge must, in principle, refer the case to the ECJ. Of course, not every case where a party relies on Community law may be said to involve a 'question' of EC law. Only those cases where the point of EC law concerned is in doubt really involve a question of law requiring the ECJ's interpretation.

Guidelines on these matters have been supplied by the ECJ and by national courts. It is submitted that as the ultimate arbiter on matters of Community law the ECJ must decide whether a 'question' of EC law arises. We can see a tension in relation to this issue. On the one hand the ECJ has been keen to encourage references to be made to ensure uniformity of application of EC law. On the other hand, there has been the concern that overloading the ECJ with references diminishes the effectiveness of judicial protection for parties because of delay this produces. The ECJ has also been mindful of national courts being reluctant to refer cases that are too 'obvious' seriously to raise EC law issues. It has sought to find a rule that allows national courts not to refer cases where there clearly is no danger that they will misinterpret the issue of EC concerned.

The ECJ considered a number of relevant matters in this context in the important case of *CILFIT Sri* (case 283/81). The reference was from the Italian Supreme Court, the Cassazione, and concerned national courts' mandatory jurisdiction under Article 234(3). On a literal reading of Article 234(2) and (3) it would appear that the question of whether 'a decision on a matter of Community law if necessary' only applies to the national courts' discretionary jurisdiction under Article 234(2). Thus in principle the highest national court would have to refer all questions of EC law to the ECJ even if not strictly necessary to resolve the case before it. This would have been an absurd result whereby the lower courts had more discretion than the supreme court. However, in *CILFIT* the ECJ held that:

it followed from the relationship between Article 177(2) and (3) [now 234(2) and (3)] that the courts or tribunals referred to in Article 177(3) [now 234(3)] have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment.

Thus both final courts and other courts have the power to consider if the 'question' of EC law that requires resolution through a ruling from the ECJ is actually material to deciding the case before them. While it is clearly not necessary for 'final' courts to refer questions of Community law in every case, a lax approach by such courts towards their need to refer, resulting in non-referral, may lead to an incorrect application of Community law and, for the individual concerned, a denial of justice. Since *Kbbler* (case C-224/01), 'final' courts choosing not to make a reference run the risk of incurring liability under *Francovich* should they get the point of EC law significantly wrong (see 9.2.2.2).

10.5.3.1 *A doctrine of precedent in EC law*

One way in which the ECJ has allowed national courts to avoid referring cases was the early development of a form of principle of precedent. The doctrine was first invoked in the sphere of EC law by Advocate-General Lagrange in *Da Costa en Schaake NV* (cases 28-30/62), in the context of a reference on a question of interpretation almost identical to a matter already decided by the Court in *Van Gend en Loos* (case 26/62). Like *CILFITSrl,* it arose in a case concerning the court's mandatory jurisdiction under Article 234(3). While asserting

that Article 234(3) 'unqualifiedly' required national courts to submit to the ECJ 'every question of interpretation raised before the court', the Court added that this would not be necessary if the question was materially identical with a question which had already been the subject of a preliminary ruling in a similar case. This was an important step because it established the ECJ as laying down general interpretations that could and should be followed by all the national courts rather than individual rulings only addressed to the particular court that made the reference.

However, the *Da Costa* criteria are not foolproof and have been criticised as providing national courts with an excuse not to refer, undermining the very purpose of Article 234(3). In *R v Secretary of State for the Home Department, exparte Sandhu (The Times,* 10 May 1985), the House of Lords was faced with a request for a ruling on the interpretation of certain provisions of Regulation 1612/68 (concerning rights of residence of members of the family of workers), in the context of a claim by an Indian, the divorced husband of an EC national, threatened with deportation from the UK as a result of his divorce. The *Da Costa* criteria were cited, as was *Diatta v Land Berlin* (case 267/83), a case dealing with the rights of residence of a *separated* wife living apart from her husband, which was decided in the wife's favour. The House of Lords found that the matter had already been interpreted in *Diatta,* and, on the basis of certain statements delivered *obiter* in *Diatta,* decided not to refer. On their Lordships' interpretation Mr Sandhu was not entitled to remain in the UK.

The existence of a previous decision may not negate a national court's obligation to refer under Article 234(3) where the matter involves the legality of an *EC measure* (as opposed to a challenge to Member State measures). The ECJ has always been very concerned to ensure that it has a monopoly on declaring EC measures invalid rather than see national courts do so. Thus it made clear in *Gaston Schul v Minister van Landbouw* (case C-461/03) that invalidity cases should always be referred by final courts. This case involved a question as to the validity of Article 4(l)-(2) of Commission Regulation 1423/95 on import rules for products in the sugar sector ([1995] OJ L14 1/16). The provisions corresponded with those in another regulation (1484/95) which had been declared invalid by the ECJ in an earlier decision *(Kloosterbooer Rotterdam,* case C-3 17/99). The Dutch court in *Gaston* therefore asked whether it was still subject to the mandatory obligation to refer the question of validity to the ECJ under Article 234(3). The ECJ held that questions of *validity* of EC law differed from questions of *interpretation,* and a reference should always be made, even where there is an earlier ruling dealing with corresponding provisions in another measure (para 25). The possible time delay was not a justification for changing the position that questions of invalidity are only for the ECJ to decide upon (para 23).

10.5.3.2 *Acte clair*

For some time, it seemed that once a relevant 'question' of EC law had arisen before a final court, so long as the point had not been previously ruled upon by ECJ, the national court must make a reference. This was so even if the point of law was very simple and incapable of more than one interpretation. The ECJ was under some pressure from the highest courts within the Member States to allow them a means of not referring such cases which they felt they could safely rule upon themselves. The ECJ had no means to compel referral and faced the embarrassing prospect of final courts in Member States declining to pass cases on to it according to a variety of different national principles of interpretation. The solution fashioned by the ECJ was to create an EC law exception to Article 234(3) allowing final courts not to refer cases where the issue of law is particularly obvious. This is known as *acte clair.*

Acte clair is a doctrine originating in French administrative law whereby, if the meaning of a provision is clear, no 'question' of interpretation arises. The ECJ eventually accepted a very limited version of *acte clair* in *CILFIT Sri* (case 283/81) in the context of a question from the Italian Cassazione (Supreme Court) concerning its obligation under Article 234(3). The national court asked if Article 234 created an absolute obligation to refer, or was referral conditional on a prior finding of a reasonable interpretative doubt in relation to the question of EC law? The ECJ summarised its case law thus far saying that there was no need to refer if the matter was (a) irrelevant, (b) materially identical to a question already the subject of a preliminary ruling, or (c) so obvious as to leave 'no scope for reasonable doubt'. This third criteria may be taken as endorsing a version, albeit a narrow one, of *acte clair.* Of particular importance to its third criterion is the Court's rider that, in deciding whether a matter was free from doubt, account must be taken of the specific characteristics of Community law, its particular difficulties, and the risk of divergence in judicial interpretation. The ECJ also required the national court to consider each of the different language versions of the EC law measure under consideration. Thus, if *acte clair* is to be invoked by a final court so as not to refer a case to the ECJ, the issue of EC law must meet the *CILFIT* criteria. This will be rare. As such, the ECJ did not actually cede much power to national courts through the *acte*

clair doctrine. It set the benchmark so high that, whilst theoretically possible, in practice final courts will find it difficult to safely conclude that there is no 'question' of EC law requiring resolution. This means that whilst formally paying deference to the expertise of the national courts, the ECJ has maintained its monopoly over interpretation. The ECJ has however been urged by some commentators to relax the *CILFIT* criteria in recent years to help reduce the burden of its caseload.

The ECJ's caution is probably justified as there is some danger that national courts acting in accordance with their own views without seeking a reference may make errors of interpretation even in relation to matters they consider to be 'obvious'. This was revealed in the Court of Appeal in the case of *R v Henn* ([1978] 1 WLR 1031). There Lord Widgery suggested that it was clear from the case law of the Court of Justice that a ban on the import of pornographic books was not a quantitative restriction within Article 28 (ex 30) of the EC Treaty (post Lisbon, Article 34 TFEU). A subsequent referral on this matter by the House of Lords revealed that it undoubtedly was. Lord Diplock, giving judgment in the House of Lords ([1981] AC 850), warned English judges not to be too ready to hold that because the meaning of an English text seemed plain to them no question of interpretation was involved: the ECJ and the English courts have very different styles of interpretation and may ascribe different meanings to the same provision. He did, however, approve a version of *acte clair* consistent with that of the ECJ in *Da Costa en Schaake NV* and *CILFIT Sri* in *Garland v British Rail Engineering Ltd* ([1983] 2 AC 751) when he suggested that where there was a 'considerable and consistent line of case law' from the ECJ the answer would be 'too obvious and inevitable' to be capable of giving rise to what could properly be called a question within the meaning of Article 234.

Moreover, the doctrine, depending as it does on a subjective assessment as to what is clear, can all too easily be used as a means of avoiding referral. This appears to have occurred in *Minister of the Interior v Cohn-B endit* ([1980] 1 CMLR 543). In this case, heard by the French Conseil d'Etat, the supreme administrative court, Cohn-Bendit sought to invoke an EC directive to challenge a deportation order made by the French authorities. Certain provisions of the directive had already been declared by the ECJ to be directly effective (*Van Duyn v Home Office* (case 4 1/74); see Chapter 5). Despite urgings from the Commissaire du Gouvernement, M Genevois, that in such a situation the Conseil d'Etat must either follow *Van Duyn* and apply the directive or seek a ruling from the Court under Article 234(3), the Conseil d'Etat declined to do either. In its opinion, the law was clear. The directive was not directly effective.

10.5.3.3 *The question may not be relevant to the case*

The ECJ had confirmed in *CILFIT* that there was no obligation to refer questions relating to EC law that were not relevant to the case before the national court. This is in one sense obvious but there is potential for final national courts to misuse this discretion so as to decline to refer cases that should be referred. A court may avoid its obligations under Article 234(3) by deciding the case before it without considering the possibility of referral (see, eg, *Mees v Belgium* [1988] 3 CMLR 137, Belgian Conseil d'Etat). In *Wellcome Foundation Ltd v Secretary of State for Social Services* ([1988] 1 WLR 635) the House of Lords, in considering the factors to be taken into account by a licensing authority in issuing a licence to parallel import a trade-mark medicine, thought it 'highly undesirable to embark on considerations of Community law which might have necessitated a referral to the Court of Justice under Article 177 [now 234]'. This suggests the national court did not consider closely enough the relevance of EC law to the case in question.

In contrast, the German federal constitutional court has emphasised national courts' duty to refer under Article 234(3'),' according to the *CILFIT* criteria, in the strongest terms. In quashing the German Bundesfinanzhof's decision on the direct effects of directives in *Re VATDirectives* ([1982] 1 CMLR 527), *Kloppenburg v Finanzamt Leer* ([1989] 1 CMLR 873), it held that a court subject to Article 234(3) which deliberately departs from the case law of the ECJ and fails to make a reference under that article is acting in breach of Article 101 of the German constitution. The principle of *acte clair* could not operate where there existed a ruling from the ECJ to the contrary *(Re VAT exemption* [1989] 1 CMLR 113). In *Re Patented Feedingstuffs* ([1989] 2 CMLR 902), the same court declared that it would review an 'arbitrary' refusal by a court subject to Article 234(3) to refer to the ECJ. A refusal would be arbitrary:

where the national court gave no consideration at all to a reference in spite of the accepted relevance of Community law to the judgment and the court's doubt as to the correct answer

where the law consciously departs in its judgment from the case law of the ECJ on the relevant questions, and

nevertheless does not make a reference or a fresh reference

where there is not yet a decisive judgment of the ECJ on point, or such judgments may not have provided an exhaustive answer to the relevant questions or there is a more than remote possibility of the ECJ developing its case law further, and the national court exceeds to an indefensible extent the scope of its necessary judicial discretion, as where there may be contrary views of the relevant question of Community law which should obviously be given preference over the view of the national court.

It is suggested that these principles, applied in good faith, would ensure that a reference to the ECJ will be made in the appropriate case. Although a decision of a domestic court rather than of the ECJ, these principles should prove useful to the courts from all the Member States.

10.5.4 Article 234(2): Courts that have a discretion whether to refer or not

Courts or tribunals which do not fall within Article 234(3) enjoy, according to the ECJ, an unfettered discretion in the matter of referrals. This reflects the importance of the cooperative nature of the relationship between the ECJ and national courts. The ECJ has sought to respect the unfettered jurisdiction of national courts, where a case falls under Article 234(2), by refraining from being prescriptive about when cases should be referred to it. A court or tribunal at any level is free, 'if it considers that a decision on the question is necessary to enable it to give judgment', to refer to the ECJ in any kind of proceedings, including interim proceedings *(Hoffman-La Roche AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* (case 107/76)), at any stage in the proceedings. In *De Geus en Uitdenbogerd v Robert Bosch GmbH* (case 13/61) the Court held that national courts have jurisdiction to refer whether or not an appeal is pending; the ECJ is not even concerned to discover whether the decision of the national judge has acquired the force of *resjudicata.* However, following *Pardini* (case 338/85) and *Grogan* (case C-l59/90), if proceedings have been terminated and the Court is aware of this fact, it may refuse jurisdiction on the grounds that its ruling is not necessary to enable the national court to give judgment.

10.5.4.1 *Courts may make a referral even where there is a previous ECJ ruling on the issue*

Even if the ECJ has already ruled on a similar question, national courts are not precluded from requesting a further ruling. This point was made in *Da Costa en Schaake NV*(cases 28-30/62). There the Court held, in the context of a reference for interpretation of a question substantially the same as that referred in *Van Gend en Loos,* that the Court should retain a legal right to depart from its previous judgments. It may recognise its errors in the light of new facts. It ruled in similar terms in the context of a request concerning the effect of a prior ruling of validity in *International Chemical Corporation SpA v Amministrazione delleFinanze dello Stato* (case 66/80). Here it held that while national courts could assume from a prior declaration of invalidity that the regulation was invalid, they should not be deprived of an opportunity to refer the same issue if they have a 'real interest' in making a further reference.

10.5.4.2 *National Courts can ignore national rules of precedent in order to refer cases*

This discretion to refer is in no way affected by national rules of precedent within the Member State. This important principle was established in the case of *Rheinmuhlen-Dusseldorf* (case 146/73). In this case, which concerned an attempt by a German cereal exporter to obtain an export rebate under Community law, the German federal tax court (the Bundesfinanzhof), hearing the case on appeal from the Hessian tax court (Hessische Finanzgericht), had quashed the Hessian court's judgment and remitted the case to that court for a decision on certain issues of fact. The Hessian court was not satisfied with the Bundesfinanzhof's ruling since questions of Community law were involved. It sought a ruling from the ECJ on the interpretation of the Community law, and also on the question of whether it was permissible for a lower court to refer in this way when its own superior court had already set aside its earlier judgment on appeal. On an appeal by Rheinmuhlen-Dtisseldorf to the Bundesfinanzhof challenging the Hessian court's right to refer to the ECJ, the Bundesfinanzhof itself referred certain questions to the Court of Justice. The principal question, raised in both cases, was whether Article 234 gave national courts an unfettered right to refer or whether that right is subject to national provisions whereby lower courts are bound by the judgments of superior courts. The Court's reply was in the strongest terms. The object of the preliminary rulings procedure, the Court held, was to ensure that in all circumstances the law was the same in all Member States. No provision of domestic law can take away the power provided by Article 234. The lower court must be free to make a reference if it considers that the superior court's ruling could lead it to give judgment contrary to Community law. It would only be otherwise if the question put by the lower court were substantially the same. The ECJ's view may be compared with that of Wood J in the

Employment Appeal Tribunal in *Enderby v Frenchay Health Authority* ([1991] ICR 382). Here he suggested that lower English Courts were bound even in matters of Community law by decisions of their superior courts; thus they should not make references to the ECJ but should leave it to the House of Lords, a fortiori when the House has decided on a particular issue that British law does not conflict with EC law. Wood J's observations are clearly at odds with Community law. It appears that *RheinmiihlenDiisseldorf* was not cited before the tribunal. A reference to the ECJ was subsequently made in this case by the Court of Appeal ([1992] 1RLR 15) resulting in a ruling (case C-1 27/92) and a decision on an important issue of equal pay for work of equal value contrary to that of Wood J and in the claimant's favour.

10.5.4.3 ***How should non-final courts exercise their discretion to refer?***

When the national court hears a case in which there arises a question of EC law a number of factors will obviously have to be taken into account in deciding whether or not to refer. These are largely questions for domestic courts according to the particular features of the domestic legal system. They have not been subject to detailed scrutiny by the ECJ because they are largely outside its jurisdiction.

There has been some interesting discussion in the lower courts of the UK on this question. In an early opinion, Lord Denning in *HP Bulmer Ltd v Bollinger SA* ([1974] Ch 401) sitting in the Court of Appeal adopted a broad approach which required the national judge to consider a wide range of factors before making a reference. He suggested that a decision would only be 'necessary' if it was 'conclusive' to the judgment. Even then it would not be necessary if:

the ECJ had already given judgment on the question or the matter was reasonably clear and free from doubt.

Although the criteria in both cases are similar, the first and third *CILFIT Sri* criteria are clearly stricter; it would be easier under Lord Denning's guidelines to decide that a decision was not 'necessary'. If courts within the area of discretionary jurisdiction consider, applying the *CILFIT* criteria, that a decision from the ECJ is necessary, how should they exercise their discretion? With regard to other factors, Lord Denning suggested in *HP Bulmer Ltd v JBollinger SA* that time, cost, workload of the ECJ, and the wishes of the parties should be taken into account by national courts in the exercise of their discretion. In a contrasting view, however, Bingham J in *Commissioners of Customs and Excise v Samex ApS* ([1983] 3 CMLR 194) said that factors such as time and cost need to be treated with care, weighing the fact that deferring a referral may in the end increase the time and cost to the parties: there may be cases where it is appropriate to refer at an early stage. He also stressed the ECJ's 'panoramic' view of the Community law system that a national judge would find it impossible to match. The more difficult and uncertain the issue of EC law, the greater the likelihood of appeal, requiring, in the end, a referral to the ECJ under Article 234(3). The workload of the ECJ is an increasing problem and no doubt a reason for some modification in recent years of its open-door policy. However, whereas it may justify non-referral in a straightforward case, it should not prevent referral where the point of EC law is difficult or novel. The *CILFIT* criteria should operate to prevent unnecessary referrals.

On the question of timing, the ECJ has suggested that the facts of the case should be established and questions of purely national law settled before a reference is made *(Irish Creamery Milk Suppliers Association v Ireland* (cases 36 and 71/80)). This would avoid referrals being made too early, and enable the Court to take cognisance of all the features of fact and law which may be relevant to the issue of Community law on which it is asked to rule. A similar point was made by Lord Denning MR in *HP Bulmer Ltd v IBollinger SA* ([1974] Ch 401) ('decide the facts first') and approved by the House of Lords in *R v Henn* ([1981] AC 850). However, Lord Diplock did concede in *R v Henn* that in an urgent, eg interim, matter, where important financial interests are concerned, it might be necessary to refer *before* all the facts were found.

The wishes of the parties also need to be treated with caution. If the point of EC law is relevant (which under *CILFIT* it must be) and difficult or uncertain, clearly *one* of the parties' interests will be better served by a referral. As Templeman LJ said in the Court of Appeal in *Polydor Ltd v Harlequin Record Shops Ltd* ([1980] 2 CMLR 413) when he chose to refer a difficult point of EC law in proceedings for an interim injunction, 'it is the right of the plaintiff [claimant] to go to the European Court'. Furthermore, the ECJ has held that the question of referral is one for the national court and that a party to the proceedings in the context of which the reference is made cannot challenge a decision to refer, even if that party thinks that the national court's findings of fact are inaccurate *(SATFluggesellschaft mbH v European Organization for the Safety ofAir Navigation* (case C-364/92)).

Another factor which might point to an early referral, advanced by Ormrod LJ in *Polydor Ltd v Harlequin Record*

Shops Ltd is the wider implications of the ruling. In *PolydorLtd v Harlequin Record Shops Ltd* there were a number of similar cases pending. The issue, which was a difficult one, concerned the protection of British copyright law in the context of an international agreement between the EC and Portugal, and affected not merely the parties to the case but the record industry as a whole.

Finally, in *R v Henn* Lord Diplock suggested that in a criminal trial on indictment it might be better for The question to be decided by the national judge and reviewed if necessary through the hierarchy of the national courts. Although this statement could be invoked to counter spurious defences based on EC law, and unnecessary referrals, it is submitted that where a claim is genuinely based on EC law, and a ruling from the ECJ would be conclusive of the case, delay would serve no purpose. The time and cost of the proceedings would only be increased.

10.6 What is the temporal effect of a ruling from the ECJ?

There are a number of issues concerning the effect of a preliminary ruling by the ECJ. These Ramifications can often go well beyond the particular proceedings that led to the reference. Particularly because of development of what is effectively a doctrine of precedent discussed earlier, important rulings from the ECJ can affect legal relations across all the Member States and lead to wide economic and social impacts. There have therefore been some cases in which the ECJ has limited the effects of its rulings so that they are only 'prospective' and do not affect prior legal relations. More narrowly, clearly a ruling from the ECJ under Article 234 is binding in the individual case and will govern the legal effects between the parties. Given Member States' obligation under Article 10 (ex 5) EC to 'take all appropriate measures ... to ensure fulfilment of the obligations arising out of this treaty or resulting from action taken by the institutions of the Community' the ruling should also be applied in all subsequent cases. This does not preclude national courts from seeking a further ruling on the same issue should they have a 'real interest' in making a reference *(Da Costa en Schaake* (cases 28-30/62)—interpretation; *International Chemical Corporation SpA* (case 66/80) validity).

10.6.1 Rulings involving interpretation are generally retrospective in effect

The question of the temporal effect of a ruling on persons not party to the case, namely whether it should take effect retroactively *(ex tunc,* ie from the moment of entry into force of the provision subject to the ruling) or only from the date ofjudgment *(ex nunc)* is less clear. In *Defrenne v Sabena (No 2)* (case 43/75) the Court was prepared to limit the effect of the then Article 119 (now 141) to future cases (including *Defrenne* itself) and claims lodged prior to the date of judgment. important considerations of legal certainty', the Court held, 'affecting all the interests involved, both public and private, make it impossible to reopen the question as regards the past'. The Court was clearly swayed by the arguments of the British and Irish governments that a retrospective application of the equal pay principle would have serious economic repercussions on parties (ie, employers) who had been led to believe they were acting within the law.

However, in *ArieteSpA* (case 811/79) and *Salumi Sri* (cases 66,127 andl28/79) the Court made it clear that *Defrenne* was to be an exceptional case. As a general rule an interpretation under Article 234 of a rule of Community law 'clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to be understood and applied*from the time ofits coming intoforce* (emphasis added). A ruling under that article must therefore be applied to legal relationships arising prior to the date of the judgment provided that the conditions for its application by the national court are satisfied. The court said:

It is only exceptionally that the Court may, in the application of the principle of legal certainty inherent in the Community legal order and in taking into account the serious effects which its judgments might have as regards the past, on legal relationships established in good faith, be moved to restrict for any person concerned the opportunity of relying on the provision as thus interpreted with a view to calling into question those legal relationships.

Moreover, 'such a restriction may be allowed *only* in the actual judgment ruling upon the interpretation sought' and 'it is for the Court of Justice *alone* to decide on the temporal restrictions as regards the effects of the interpretation which it gives'.

These principles were applied in *Blaizot* (case 24/86) and *Barra* (case 309/85). Both cases involved a claim for reimbursement of the Belgian minerval, based on *Gravier* (case 293/83, see Chapter 23). In both cases the claims were in respect of periods prior to the ECJ's ruling in *Gravier.* In *Barra* it was not disputed that the course for

which the minerval had been charged was vocational; but Blaizot's university course in veterinary medicine was, the defendant university argued, not vocational, not being within the scope of the *Gravier* ruling.

Since *Barra's* case fell squarely within *Gravier* and the Court had imposed no temporal limits on the effect of its judgment in *Gravier* itself, that ruling was held to apply retrospectively in *Barra s* favour. *Blaizot,* on the other hand, raised new issues. In deciding that university education could, and a course in veterinary science did, constitute vocational training the Court, clearly conscious of the impact of such a ruling on Belgian universities if applied retroactively, decided that 'important considerations of legal certainty' required that the effects of its ruling should be limited on the same lines as *Defrenne*— that is, to future cases and those lodged prior to judgment.

Unless the Court can be persuaded to change its mind and reconsider the question of the temporal effect of a prior ruling in a subsequent case when *no* new issues are raised, the question of the temporal effect will need to be considered in every case in which a retrospective application may give rise to serious repercussions as regards the past. Yet it is in the nature of this kind of ruling that it and, therefore, its consequences are unpredictable. Should a party wish, subsequently, to limit the effects of an earlier ruling, it will be necessary to ensure, as in *Blaizot,* that some new issue of EC law is raised.

In *Barber v Guardian Royal Exchange Assurance Group* (case C-262/88) the Court was again persuaded by 'overriding considerations of legal certainty' to limit the effects of its ruling that employers' contracted-out pension schemes fell within the then Article 119 (now 141) EC. Unfortunately the precise scope of the non-retroactivity principle that 'Article 119 [now 141] may not be relied upon in order to *claim entitlement* to a pension with effect prior to that of this judgment (except in the case of workers... who have initiated proceedings before this date or raised an equivalent claim under the applicable national law)' was disputed as being unclear. This lack of specificity, a characteristic of the Court's style ofjudgment, can create problems in the context of rulings on interpretation under Article 234. The Court's judgments can on occasions be too Delphic, leaving too much to be decided by national courts. It has taken a protocol to the Maastricht Treaty and further cases to spell out the precise scope of the *Barber* ruling (see Chapter 27). Only now are the *full* implications of the Court's rulings in *Francovich* (cases C-6, 9/90) and *Marshall (No 2)* (case C271/91) being revealed.

Despite its commitment to the principle of legal certainty the Court has chosen not to limit the effect of its rulings in a number of cases in which it has introduced new and unexpected principles with significant consequences for Member States and even (in the case of treaty articles) for individuals. It did not limit the effects of its judgment in *Francovich* despite Advocate-General Mischo's warnings as to the 'extremely serious' financial consequences for Member States if the judgment were not so limited: nor did it do so when it laid down a principle of full compensation for breach of a directly effective directive in *Marshall (No 2).* Where a ruling is likely to result in serious consequences, whether for states or 'public' or private bodies, for example employers, Member States would be advised to take advantage of their opportunity to intervene in Article 234 proceedings as they are entitled to do, to argue against retroactivity, as they did successfully in *Defrenne* and *Barber.* Other 'interested parties' may also apply to intervene.

The effects of the ECJ's strict approach to retroactivity may be mitigated by its more recent approach to Member States' procedural rules. In a number of cases *(IN CO GE* '90 (cases C-10 and 22/97) and *EDIS* (case C-23 1/96)), it has held that the principle of retroactivity should not prevent the application of detailed procedural rules (in these cases relating to limitation of actions) governing legal proceedings under national law, provided that these national rules do not make it 'impossible or excessively difficult' for individuals to exercise their Community rights (see further Chapter 8).

The impact of an interpretation on previous rulings by domestic administrative authorities which conflict with the ECJ's ruling was considered in *Kuhne* & *Heitz NV v Productschap voorPluimvee en Eieren* (case C-453/00). The case involved a claim for reimbursement of export refunds made by a Dutch administrative authority against Kuhne. The latter's objection had been rejected by a court and the claim had therefore become a final decision by the administrative authority. The ECJ then delivered a ruling *(Voogd Vleesimport en-export* (case C-1 51/93)) which rendered the previous Dutch decision incorrect. Kuhne therefore requested a reopening of the administrative procedure. The ECJ held that there was an obligation on administrative authorities to comply with an interpretation given by the Court in respect of all legal relationships, because the effect of a ruling is to clarify and define the meaning of a European rule 'as it ought to have been understood and applied from the time of its coming into force' (para 21). This was subject to the principle of legal certainty, requiring finality of

administrative decisions once a reasonable time-limit for legal remedies had expired or those remedies had been exhausted (para 24); in such circumstances, there was no obligation to reopen previous decisions which had become final. However, on the facts of the case, the Dutch authority could reopen its decision, and the ECJ held that in such a situation, where a decision had become final and was based on a misinterpretation of EC law adopted without a preliminary ruling, and the matter had been raised without delay after the ECJ's intepretation, the administrative authority should review its decision.

10.6.2 Rulings as to the validity of EC measures: More flexible temporal effects

The cases considered above relate to rulings on interpretation. Where matters of validity of EC measures are concerned, the Court's approach is more flexible. This is logical because where a prima facie valid EC measure has been in place for some time, the finding that it is invalid may cause serious disruption to those that relied upon it. On grounds of legal certainty there are good arguments to decide in each case what effect the finding of invalidity should have. The ECJ has adopted the same approach to the effects of a ruling of invalidity to those of a successful annulment action, as a result of which the illegal act is declared void. However, arguing from Article 231(2) (ex 174(2)), which enables the Court, in a successful annulment action, to limit the effects of a regulation which it has declared void (see Chapter 12), the Court has limited the effects of a finding of invalidity in a number of cases, sometimes holding the ruling to be purely prospective (ie, for the future only, *excluding* the present case, eg, *Roquette Freres v France* (case 145/79); policy doubted in *Roquette Freres SA v Hauptzollamt Geldem* (case C-228/92), see Chapter 12). The Court has not so far insisted that the effect of a ruling of invalidity can only be limited in the case in which the ruling itself is given. The Court is more likely to be prepared to limit the effects of a ruling on validity than one on interpretation. Where matters of validity are concerned parties will have relied legitimately on the provision in question. A retrospective application of a ruling of invalidity may produce serious economic repercussions: thus it may not be desirable to reopen matters as regards the past. On the other hand too free a use of prospective rulings in matters of interpretation would seriously threaten the objectivity of the law, its application to all persons and all situations. Moreover, as the Court no doubt appreciates, a knowledge on the part of Member States and individuals that the law as interpreted may not be applied retrospectively could foster a dangerous spirit of non-compliance.

10.7 Special limits on references in JRA

Thus far we have discussed the system that operates for references under Article 234. This constitutes the vast majority of cases. There is one notable exception to this system—that of home affairs. When the EC (and EU) came to have powers in the field of JRA, some of the Member States were reluctant to allow easy access to the ECJ from the national courts. This was partly because of concerns that the broad purposive approach to interpretation taken by the ECJ might lead to greater obligations being placed upon Member States than they anticipated. On the other hand, it was clear that there had to be some judicial means of resolving questions of interpretation relating to EC justice and home affairs legislation. The result was a compromise which created special, more restrictive, arrangements in relation to references in this field such that not all national courts can make references to the ECJ. The first instance of this was in the Maastricht Treaty, more properly known as the Treaty of the European Union (TEU), which introduced the possibility for preliminary references within the JRA second pillar by virtue of Article 35 TEU which relates to police and judicial cooperation issues in criminal and civil cases. Following this, the Treaty of Amsterdam (ToA) led to the introduction of the new Title IV into the EC Treaty relating to asylum and immigration cases.

This created a separate preliminary-rulings mechanism in Article 68 EC for questions relating to that title. Thus we have two separate systems for different aspects of JRA. As we shall see below, each has restrictions not found in Article 234.

The ECJ only has jurisdiction in relation to certain limited JRA provisions of the TEU comprising 'framework decisions and decisions' and conventions established under the JRA. Thus, cases regarding certain measures simply cannot be brought before the ECJ for a preliminary ruling. Furthermore, the ECJ only has jurisdiction to hear any references insofar as each Member State accepts its jurisdiction (Article 35 TEU). There is no compulsory jurisdiction. Even then, each Member State has the option of limiting the rights of the national courts to refer a question to the ECJ to courts against whose decision there is no judicial remedy under national law. So far, most Member States have accepted the ECJ's jurisdiction at least as regards 'final' courts and around half have conferred jurisdiction upon all national courts. This 'flexible' approach to jurisdiction has led to confusion, but may also be criticised for the uncertainties and inequalities it introduces into the system: individuals' rights

of access to the ECJ will vary depending on the Member State in which the action is brought. There is real danger that there will be a failure of effective legal protection, which is particularly significant because JRA measures touch upon individual liberty. This still may be better than the previous position under the TEU, where there was no such access. The courts of some Member States are availing themselves of the possibility to refer questions in the field of JRA (see Chapter 26).

The Article 68 provisions relating to asylum and immigration in Title IV of the EC Treaty create a different regime as regards the jurisdiction of the ECJ in respect of the provisions in Title IV. Although a preliminary ruling procedure will apply in all Member States to all these provisions, there are certain differences from Article 234. Most notably, only the courts against whose decisions there is no judicial remedy are required to ('shall') make a reference 'if they consider it necessary' to do so. Furthermore, the ECJ will not have jurisdiction in relation to measures taken under new Article 62(1) EC (concerning the crossing of external borders) relating to 'the maintenance of law and order and safeguarding of internal security'. These provisions create holes in the judicial protection offered; unlike the JRA Pillar of the TEU, the ECJ's jurisdiction under Article 234 prior to the ToA applied to the whole of the EC Treaty. The ToA amendments undermine the homogeneity and generality of access to the ECJ. Many important references under Article 234 came from the lower courts: now these courts are, in this new area, precluded from making references. Consequently, individuals seeking a European ruling will be forced to litigate through their national appeal structure. The provision also creates uncertainty: when will circumstances necessitating the maintenance of law and order or safeguarding internal security arise? Indeed, who decides this question? It affects those most in need of protection: an asylum seeker, for example, may not be in a position to exhaust national remedies. Even if he does, he may find he falls outside the ECJ's jurisdiction. This approach, accepted with reluctance by the Commission on the insistence of Member States, hardly matches up with a Union which claims to be based on the rule of law and respect for human rights. The position will be improved if the Lisbon Treaty comes into force because this provides for the normal preliminary rulings procedure to apply to justice and home affairs issues subject to limitations relating to validity of law enforcement and national security (Article 276 TFEU). CFSP, which remains in the TEU, continues by Article 275 TFEU to fall outside the preliminary rulings procedure contained in what will, should the Lisbon Treaty come into force, become Article 267 TFEU.

10.8 The increasing workload of the ECJ: The need for reform

The current system governing preliminary rulings is under stress as, despite the *acte clair* doctrine, the number of references made to the ECJ remains high. With enlargement, the backlog can only get worse. There will probably be an increased number of referrals as an enlarged geographic jurisdiction will lead to a greater number of people (and courts) covered by EU law. The very fact that the new Member States are still new to the EU legal system could mean that they are likely to create initially a disproportionate number of references. This arises from two linked points. The first is that there are more likely to be questions arising in the new Member States as their legal systems adjust to the Union legal order. Further, their courts are less likely to have the experience and confidence to deal with many EU law questions without guidance from the ECJ, especially given that many of the new Member States are relatively new to democracy and a market economy.

There are many proposals to reform the current system to ensure that the ECJ can better provide effective judicial protection by removing the delays in the reference system. The difficulty remains one of how to reduce the number of references without damaging the uniform interpretation of EU law. The easy access of national courts to the ECJ has been the key to the relationship between domestic and EU legal systems. Some have suggested that the ECJ should become a true appeal court which decides for itself which cases to hear by granting or refusing leave to appeal from the national courts. This would require treaty amendments and would be controversial because it would more openly establish the ECJ as the supreme court in the Union legal order. This would look rather too much like a federal state to be politically acceptable to the Member States. Other suggestions have been to create Union Courts located in the Member States (rather like the federal Circuit Courts in the United States of America).

The Treaty of Nice attempted to address the problem by providing in Article 225(3) that the CFI is to have jurisdiction to hear preliminary references in areas specified in the Statute of the Court. As a safety mechanism, the same paragraph further provides that where a 'case requires a decision of principle likely to affect the unity or consistency of Community law' the CFI 'may refer the case to the Court of Justice for a ruling'. Additionally, decisions of the CFI on preliminary references may be subject to review by the ECJ. This possibility is stated to be

available 'exceptionally' and 'where there is a serious risk of the unity or consistency of Community law being affected'. In the November 2005 version of the Statute, no areas were allocated to the CFI under Article 225(3).

Once the power in Article 225(3) is exercised, the restriction of access to the ECJ may cut down that Court's workload and, subject to the CFI not being swamped by the cases diverted to it, may reduce the backlog in cases—especially the preliminary references. In any event, this would constitute a significant change in the judicial architecture within the European Union.

More modestly the ECJ itself has introduced new rules into its Rules of Procedures and Statute that allow for expedited procedures to be used in some cases which are simple or raise no new issues. Thus the ECJ is taking steps to devote less resources to cases that do not merit them because they are legally straightforward. This change emphasises the importance of the ECJ in the Union's court system, suggesting a more hierarchical structure to the system than that found in the early days. Unlike the power in Article 225(3) EC, these steps are actually being put into practice. Thus Article 1 04a provides for an accelerated procedure where the case involves a matter of 'execeptional urgency'. This provision is particularly important in cases involving persons in detention, those facing deportation or children. The court can fix a hearing date within weeks in these cases. Article 104(3) allows the ECJ to dispense with oral hearings and proceed simply by issuing a 'reasoned order' where the case referred raises identical issues upon which the ECJ has already ruled or is free from reasonable doubt. Thus if a national court refers a case that meets the *CILFIT* rules, the ECJ can deal swiftly with the matter. The Statute was also amended by the Nice Treaty so that where no new point of law arises, the ECJ can dispense with the requirement for an Advocate-General's opinion. These procedural steps have helped to focus the ECJ's resources upon cases that really need them because they raise new issues of EU law but they have preserved the crucial right of access that national courts have to refer any question that they wish to.

10.9 Conclusions

The success of the preliminary rulings procedure depends on a fruitful collaboration between the ECJ (and, at some point, the CFI) and the courts of Member States. Generally speaking both sides have played their part in this collaboration. The ECJ has rarely refused its jurisdiction or attempted to interfere with national courts' discretion in matters of referral and application of EC law. National courts have generally been ready to refer; cases in which they have unreasonably refused to do so are rare. Equally rare are the cases in which the ECJ has exceeded the bounds of its jurisdiction without justification. However, this very separation of powers, the principal^ strength of Article 234, is responsible for some of its weaknesses. The decision whether to refer and what to refer rests entirely with the national judge. No matter how important referral may be to the individual concerned (eg, *Sandhu)* he cannot compel referral; he can only seek to persuade. And although the ECJ will extract the essential matters of EC law from the questions referred it can only give judgment in the context of the questions referred (see *Hessische Knappschaft v Maison Singer etFils* (case 44/65)). Thus, it is essential for national courts to ask the right questions. As the relevance of the questions can only be assessed in the light of the factual and legal circumstances of the case in hand, these details must also be supplied. A failure to fulfil both these requirements may result in a wasted referral or a misapplication of EC law. Given the increasing pressures on the ECJ, wasted references and the drafting of sloppy questions can also be seen as a waste of the limited judicial resources at the Union level.

As the body of case law from the ECJ has developed and national courts have acquired greater confidence and expertise in applying EC law and ascertaining its relevance to the case before them, there should be less need to resort to Article 234. The initial issue, of whether a decision on a 'question' of EC law arises during the proceedings, has become crucial. As we have seen *CILFITSrl* (case 283/81) has supplied guidelines to enable national courts to answer this question. Where a lower court is in doubt as to whether a referral is necessary the matter may be left to be decided on appeal. On the other hand, where a final court has the slightest doubt as to whether a decision is necessary, it should always refer—bearing in mind the purpose of Article 234(3) and its particular importance for the individual litigant. The danger that final courts will fail to refer seems to have been one of the factors that influenced the ECJ in its ruling in *Kobler* (Case C-224/0 1) which allows individuals to sue for damages where a reference was not made when it should have been. This case, along with others like *CILFIT* and *Foglia v Novello* is illustrative of the trend that we have noted whereby the ECJ has been positioning itself not as an equal partner in a horizontally structured relationship, but as a superior court. Some might even say it sees itself as the Supreme Court for the Union. In so doing, it has sought to put itself firmly in control of the development of European law and not simply to act as the servant of the national courts.

The historical significance of the ECJ's rulings and the Article 234 procedure has been well recognised by courts, commentators and Member States. The current issue of importance for the procedure is the delay inherent in the legal system of the expanded European Union which is jeopardising effective judicial proctection and uniform application of EC law. The solutions to these problems are not clear but the procedural steps taken by the ECJ so far have had some effect in limiting any increase in the length of references if not actually reducing it. Further steps would require serious changes to reduce the number of cases heard by the ECJ which would entail a system of prioritising cases. This would remove the ease of access to the ECJ that has hitherto been so successful. Nevertheless, such a change is probably justified given the growing maturity of the EC law system and the increased familiarity of judges with it. The alternative of increasing delay is just as unattractive as that of some risk of 'wrong' decisions being made by national courts.

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CHAPTER 12. UNION CITIZENSHIP

A. INTRODUCTION

So far we have considered the position of those nationals who have exercised their rights of free movement as workers, the self-employed, and the providers and recipients of services. These migrants have been described as market citizens (*homo economicus* or the *bourgeois*) who participate in, and benefit from, the common market as economic actors.[1] Yet, they constitute only a small percentage of the EU's working population: prior to the 2004 enlargement, approximately 1.5 per cent of EU-15 citizens lived and worked in a different Member State from their country of origin (less than 3 million people)—a proportion that had hardly changed for the last 30 years.[2] Post enlargement, the figure stands at about 8 million[3] (out of a total population of about 500 million), albeit that many more millions of EU citizens exercise their right to travel to other Member States temporarily—particularly as tourists or as students.

This means that the vast majority of Union nationals who are economically active have never exercised their rights of free movement under Articles 45, 49, and 56 (except possibly in their capacity as tourists); by definition, those who are not economically active cannot enjoy the rights of free movement (although they have been assisted by decisions of the Court on work-seekers, tourists, and students as well as by the original 1990 Residence Directives[4]). Yet, Union law continues to affect many aspects of the daily lives of those nationals who do not, or cannot, exercise their rights of free movement. Such individuals often feel at best removed, and at worst alienated, from those taking decisions in their name. This legitimacy gap has presented a major challenge for the EU: what can be done to enable all nationals to identify with, and feel loyalty to, the EU?

The concept of 'Citizenship of the Union', introduced at Maastricht, formed a key part of the Union's response, aiming to provide the glue to help bind together nationals of all the Member States. Union citizenship is both a retrospective and prospective concept: retrospective in that it contains a recognition that the EU has its own people; prospective in that it is through citizenship that communities and identities are constituted.[5] However, the concept of Union citizenship is itself subject to an important limitation: it can be enjoyed only by those holding the nationality of one of the Member States. It has therefore not helped the 18.5 million (and rising) third-country nationals (TCNs) who are legally resident in the EU.[6] Many contribute to the economies of the host country and so,

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[1] M. Everson, 'The legacy of the market citizen' in J. Shaw and G. More (eds.), *New Legal Dynamics of the European Union* (Oxford: Clarendon Press, 1995).

[2] <http://www.ec.europa.eu/employment_social/workersmobility_2006>. See also A. Taylor, 'Skilled staff reluctant to move in Europe', *Financial Times*, 11 Dec. 2006. As we have seen, obstacles included differences in tax systems, healthcare, benefits, lack of EU-wide integrated employment legislation, patchy cross-border recognition of professional qualifications, difficulty finding work for spouses, and availability of housing and schools.

[3] 5th Report on Citizenship of the Union: COM(2008) 85.

[4] Council Dir. 90/364/EEC ([1990] OJ L180/26) on the rights of residence for persons of sufficient means; Council Dir. 90/365/EEC on the rights of residence for employees and self-employed who have ceased their occupational activity ([1990] OJ L180/28) and Council Dir. 93/96 on the rights of residence for students ([1993] OJ L317/59). These directives have been repealed and replaced by the Citizens' Rights Dir. 2004/38 ([2004] OJ L158/77).

[5] See J. Shaw, *Citizenship of the Union: Towards post-national membership*, specialized course delivered at the Academy of European Law, Florence, Jul. 1995.

[6] Commission, *First Annual Report on Migration and Integration*, COM(2004) 508.

indirectly, to the EU, but they are excluded from the rights granted to citizens.[7] This chapter will examine the concept of Union citizenship and the rights EU citizens enjoy; in Chapter 14 the position of TCNs is considered.

B. CITIZENSHIP OF THE UNION

While a desire to create a 'Europe for Citizens'[8] or a 'People's Europe'[9] dates back to the early 1970s, it was not until the Spanish pressed the issue at Maastricht[10] that the idea of Union citizenship took concrete form. A new Part Two, entitled 'Citizenship of the Union', was added to the EC Treaty by the Maastricht Treaty in 1992, establishing 'Citizenship of the Union' and listing a number of specific rights which citizens can enjoy.

The inclusion of the citizenship provisions into the Treaties started a lengthy and ongoing debate about the nature of EU citizenship, focusing on two interrelated questions. First, what model of citizenship can and should the Union adopt? The copious literature is full of suggestions, including market citizenship (focusing on the rights of economic actors), social citizenship (emphasizing the social-welfare rights of citizenship), or republican citizenship (based on active citizen participation in the decision-making process). Secondly, given that the EU is a *sui generis*, transnational polity, should EU citizenship aim to replicate citizenship of a nation state (so that European citizenship means citizenship of a European nation state), or should the EU aim to create a new, post-national form of citizenship based on multiple-level associations and identifications at regional, national, and European level. If the latter model, this raises the further question of the extent to which it is legitimate to draw on the literature and ideas relating to the development of citizenship of a nation state in mapping and analysing what is occurring at EU level.

In practice, many writers do take this literature as their starting point since this informs most individuals' understanding of citizenship. This chapter draws on one particular strand of the literature, examining whether the term citizenship is or should be based on ideas of inclusion or exclusion.[11] An approach to citizenship based on inclusionary ideologies casts the net of potential beneficiaries widely, including not only nationals (whether economically active or not) but also those TCNs who are lawfully resident. It envisages that these citizens enjoy a broad range of civil, political, economic, and social rights. This version of citizenship is sometimes referred to as 'social citizenship'[12] and has some resonance in the EU as the EU develops, albeit in a piecemeal fashion, a broad range of social policies.[13]

By contrast, the exclusionary approach to citizenship constructs the identity of the citizen through the 'Other': the TCN who needs to be excluded to make the citizen 'secure'.[14] For a while this model seemed to be in the ascendancy in the EU. At Amsterdam a new objective was introduced into

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[7] They are sometimes described as 'denizens'. See, e.g., K. Groenendijk, 'The Long Term Residents Directive, denizenship and integration' in A. Baldaccini, E. Guild, and H. Toner (eds.), *Whose Freedom, Security and Justice? EU immigration and asylum law and policy* (Oxford: Hart Publishing, 2007), 429.

[8] See the Tindemans Report on the European Union which contained a chapter entitled 'Towards a Europe for citizens' (Bull. EC (8) 1975 II no. 12, 1) which was drawn up at the request of the Paris summit in 1974.

[9] See the two Adonnino Reports of 1985 to the European Council on a People's Europe (Bull. EC Suppl. 7/85).

[10] For a full discussion of the background see S. O'Leary, *The Evolving Concept of Community Citizenship* (The Hague: Kluwer, 1996), Ch. 1. See also the Spanish memorandum on citizenship, 'The road to European citizenship', Co.SN 3940/90, 24 Sep. 1990.

[11] See, e.g., J. D'Oliveira, 'European citizenship: Its meaning, its potential' in R. Dehousse (ed.), *Europe after Maastricht: An ever closer union*? (Munich: Law Books in Europe, 1994), 141–6; J. Shaw, 'The many pasts and futures of citizenship in the European Union' (1997) 22 *ELRev*. 554.

[12] M. Dougan, 'Free movement: The workseeker as citizen' (2001) 4 *CYELS* 93, 103.

[13] C. Barnard, 'EU social policy: From Employment Law to Labour Market Reform' in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford: OUP, forthcoming).

[14] Shaw, above n. 11, 571. See also G. de Búrca, 'The quest for legitimacy in the European Union' (1996) 59 *MLR* 349, 356–61.

(now) Article 3(2) TEU of maintaining and developing 'an area of freedom justice and security without internal frontiers' in which 'the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. This idea is developed further by Title V of Part Two TFEU. Yet the reality is inevitably more complex than this and, as we shall see in Chapter 14, the need to welcome TCN migrant workers to fill jobs in areas where there are skills gaps and to help address problems created by an ageing population has forced the EU to rethink any exclusionary agenda suggested by Article 3 TEU.

We begin by examining the citizenship offered by the EU to its nationals, taking Held's understanding of citizenship as our starting point:[15]

Citizenship has meant a reciprocity of rights against, and duties towards, the community. Citizenship has entailed membership, membership of the community in which one lives one's life. And membership has invariably involved degrees of participation in the community.

Held's definition suggests that there are three interconnected strands to citizenship: rights and duties, membership, and participation. These ideas will form the framework in which we examine EU citizenship.

C. RIGHTS AND DUTIES

1. INTRODUCTION

1.1 The Main Treaty Provisions

In his classic work on (British) citizenship,[16] Marshall argued that citizenship involves full membership of the community which has gradually been achieved through the historical development of individual rights, starting with civil rights (basic freedoms from state interference), followed by political rights (such as electoral rights), and, most recently, social rights (including rights to education, health care, unemployment insurance, and old-age pensions—the rudiments of a welfare state). Where does the EU stand against this yardstick? Article 20(2) TFEU provides that 'Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*':[17]

- the right to move and reside freely within the territory of the Member States[18]
- the right to vote in local and European elections in the host state and stand as a candidate
- the right to diplomatic and consular protection from the authorities of any Member State in third countries[19]
- the right to petition the European Parliament and the right to apply to the ombudsman and to address the institutions and advisory bodies of the Union in any one of the official languages of the EU.

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15 D. Held, 'Between state and civil society: Citizenship' in G. Andrews (ed.), *Citizenship* (London: Lawrence and Wishart, 1991), 20, cited in Shaw, above n. 11.

16 T. H. Marshall, *Citizenship and Social Class* (Cambridge: CUP, 1950), 28–9.

17 Art. 25 TFEU requires the Commission to report every three years on the application of these provisions. On this basis, the Council, acting unanimously in accordance with the special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Art. 20(2) TFEU. These provisions will enter into force only after their approval by the Member States in accordance with their respective constitutional requirements (Art. 25, para. 2 TFEU).

18 See also Art. 45(1) of the Charter.

19 See also Art. 46 of the Charter. Of 166 countries outside the EU, there are only three where all 27 Member States are represented (COM(2009) 262). An estimated 8.7% of EU citizens (7 million people) travelling outside the EU do so to countries where their Member State is not represented (COM(2009) 263). The implementation of this provision can be found in Dec. 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council of 19 Dec. 1995 regarding protection for citizens of the EU by diplomatic and consular representations ([1995] OJ L314/73). See also the Commission's Green Paper, 'Diplomatic and consular protection of Union citizens in third countries' COM(2006) 712. The Lisbon Treaty added a new Art. 23(2) giving powers to the Council to adopt directives to facilitate diplomatic and consular protection in accordance with the special legislative procedure and after consulting the European Parliament.

These rights are to be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

This rather motley collection of rights falls far short of the full panoply envisaged by Marshall. In part this is due to the Union's lack of competence, particularly in fields connected with the welfare state, and in part due to the principle of subsidiarity—can and should the Union be attempting to replicate welfare-state provision which is already extensively and expensively provided for at national level? This demonstrates the problem of using literature written in the context of the nation state as a measure by which to assess the EU. For this reason, it might be fairer to say that the rights contained in Part Two supplement and complement rights granted at national level.[20]

It is also a mistake to look at the four substantive rights listed in Part Two in isolation. Article 20(2) makes clear that the four rights listed are merely examples ('*inter alia*'). The reference to the fact that '[c]itizens shall enjoy the rights . . . provided for in the Treaties' means that *migrant* citizens also enjoy the right to non-discrimination on the ground of nationality found in Article 18 TFEU,[21] while all citizens (not just those who have exercised their rights of free movement) can enjoy the right to equal treatment, originally on the ground of sex, now on other grounds,[22] along with other social, environmental, and consumer rights.[23] This prompted Advocate General La Pergola in *Stöber and Pereira* to describe Part Two TFEU as progress of 'major significance in the construction of Europe'.[24]

1.2 The Charter

Given that a number of citizens' rights do exist, albeit scattered across primary and secondary sources, the Cologne European Council decided that the fundamental rights should be consolidated into a charter and so become more visible.[25] Eventually the Charter on Fundamental Rights was signed in 2000, bringing together in a single text both civil and political rights on the one hand and economic and social rights on the other.[26] The Charter, which draws on the European Convention on Human Rights, the constitutional traditions of the Member States, and general principles of Union law, is grouped around six fundamental values shared by the 'peoples' (not just the citizens) of Europe:[27] dignity (Articles 1–5); freedoms (Articles 6–19); equality (Articles 20–6); solidarity (Articles 27–38); citizens' rights (Articles 39–46); and justice (Articles 47–50).[28] The Charter's significance is all the greater following the Lisbon Treaty's entry into force giving the Charter legal effect,[29] albeit subject to

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[20] See also Art. 9 TEU: 'Citizenship of the Union shall be additional to national citizenship and shall not replace it', repeated in Art. 20(1) TFEU.

[21] See, e.g., Case C–274/96 *Bickel and Franz* [1998] ECR I–7637 considered below n. 47.

[22] See Art. 19 TFEU (ex Art. 13 EC) and the directives adopted under it: Dir. 2000/43 on Race and Ethnic Origin ([2000] OJ L180/22) and the Framework Dir. 2000/78 ([2000] OJ L303/16) prohibiting discrimination on grounds of age, religion, belief, disability and sexual orientation.

[23] See, e.g., N. Reich, 'A European constitution for citizens: Reflections on the rethinking of Union and Community law' (1997) 3 *ELJ* 131, 142–57 and 'Union citizenship: Metaphor or source of rights?' (2001) 7 *ELJ* 4, 7.

[24] Joined Cases C–4 and 5/95 *Stöber and Pereira* v. *Bundesanstalt für Arbeit* [1997] ECR I–511, para. 50.

[25] See the conclusions of the Cologne European Council setting up a Convention to draft a human rights Charter: <http://www.ue.eu.int/newsroom/newmain.asp?lang=1>, Annex IV, para. 44. Academics have long called for this: e.g. K. Lenaerts, 'Fundamental rights to be included in a Community catalogue' (1991) 16 *ELRev.* 367; P. Alston and J. Weiler, 'An "ever closer union" in need of a human rights policy: The European Union and human rights' in P. Alston (ed.), *The EU and Human Rights* (Oxford: OUP, 1999).

[26] See, e.g., I. Hare, 'Social rights as fundamental human rights' in B. Hepple (ed.), *Social and Labour Rights in a Global Context: International and comparative perspectives* (Cambridge: CUP, 2002); J. Kenner, 'Economic and social rights in the EU legal order: The mirage of indivisibility' in J. Kenner and T. Hervey (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Oxford: Hart Publishing, 2003). Cf. S. Smismans, 'The European Union's fundamental rights myth' (2010) 48 *JCMS* 45.

[27] 1st recital.

[28] For criticism see J. H. H.Weiler, 'Editorial: Does the European Union truly need a charter of rights?' (2000) 6 *ELJ* 95.

[29] See Art. 6(1) TEU. Prior to 1 Dec. 2009, the Charter was not legally binding, described instead as a 'solemn proclamation'. However, a number of AGs referred to it in their Opinions (see, e.g., Jacobs AG's Opinion in Case C–50/00

the special position of the UK and Poland as laid down by the protocol.[30] The protection of human rights will be further reinforced by the EU's accession to the European Convention on Human Rights provided for by Article 6(2) TEU.[31]

However, the Charter's existence serves to highlight an ongoing tension that pervades the area of law concerning citizenship. Fundamental rights are seen as universal, capable of being enjoyed by all human beings. By contrast, the majority of the rights in Part Two TFEU on citizenship of the Union can be enjoyed only by EU citizens who benefit from them by virtue of their nationality. It might also be thought that the rights outlined by Part Two TFEU and the Charter are all enforceable vertically against the body bestowing the title 'citizen', i.e. the EU. In fact, most are enforced vertically but against the state—either the citizen's own state (in the case of social, consumer, and environmental rights) or the host state (in respect of the free movement rights). Only a few rights are enforceable vertically against the EU (the right to petition the Parliament and to contact the ombudsman).[32] Therefore, one of the conundrums of EU citizenship is that rights intended to foster a commitment to the Union are actually being exercised against the Member States.

The relationship between the Union citizen and the Member States also explains another potential tension. The Union gives rights but—despite the wording of Article 20(2)—demands little by way of duties from its citizens (e.g., to pay taxes, to participate in the defence of the country, to obey the law, to vote, willingness to work).[33] These duties are owed to the Member States and thus it is the Member States which bear the burden—using national taxpayers' money—of the rights. And because the Member States hold the purse strings, and ultimately the decision-making power, they are not prepared to relinquish their sovereignty fully. Therefore, while, under international law, citizens of a state cannot be deported, no matter how mad, bad, or impecunious they might be, migrant EU citizens can still be deported from the host state.[34] In this respect EU citizenship is more partial than would first appear.

1.3 Article 21(1) TFEU

Of the rights laid down in Articles 20–5 TFEU, Article 21(1) (ex Article 18(1) EC) is considered the 'primary'[35] right. It gives EU citizens the right to move *and* reside freely within the territory of the Member States,[36] subject to the limitations and conditions laid down in the Treaties and by the

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Unión de Pequeños Agricultores v. *Council of the European Union* [2002] ECR I–6677; Geelhoed AG's Opinion in Case C–224/98 *D'Hoop* v. *Office National d'Emploi* [2002] ECR I–6191), as did the General Court (Case T–177/01 *Jégo Quéré et Cie SA* v. *European Commission* [2002] ECR II–2365) and the Court of Justice: Case C–540/03 *EP v Council (Family Reunification Directive)* [2006] ECR I–5769, paras. 38 and 58. So far the position following the entry into force of the Lisbon Treaty is not so different: Case C-555/07 *Kücückdeveci* v. *Swedex GmbH* [2010] ECR I–000.

[30] Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom. The Heads of States have agreed to extend that protocol to the Czech Republic: Conclusions of the European Council of 29 and 30 Oct. 2009 (Doc. 15265/09 Concl. 3). For a discussion of the protocol, see C. Barnard, 'The 'opt-out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of rhetoric over reality?' in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty* (New York: SpringerWien), 2008, 257.

[31] See also the Commission's Communication 'An area of freedom, security and justice serving the citizen', COM(2009) 262, 7. The fundamental rights agency (established by Council Reg. 168/2007 ([2007] OJ L53/1)) assists the EU institutions and Member States through research projects and data collection. See also the complementary programme, 'Fundamental rights and citizenship' adopted by Council Dec. 2007/252/JHA ([2007] OJ L110/33).

[32] See S. O'Leary, 'The relationship between Community citizenship and the protection of fundamental rights in Community law' (1995) 32 *CMLRev*. 519.

[33] See, e.g., C. Closa, 'Citizenship of the Union and nationality of the Member States' (1995) 29 *CMLRev*. 487, 509.

[34] This issue is considered in more detail in Ch. 13. Note, in the same spirit, that Member States can still reserve certain senior jobs in the public service to nationals only (Art. 45(4) TFEU and Arts. 51 and 62 TFEU).

[35] La Pergola AG in Case C–85/96 *Martínez Sala* v. *Freistaat Bayern* [1998] ECR I–2691, para. 18. See also 1st recital to CRD 2004/38.

[36] As La Pergola AG said in Case C–85/96 *Martínez Sala* [1998] ECR I–2691, para. 18 in emphasizing the right to move *and* the right to reside, Art. 21(1) extracted the kernel from the other freedoms of movement.

measures adopted to give them effect.[37] The initial question facing the Court was whether Article 21(1) merely codified the existing law (as the drafters had intended), in which case it was largely unremarkable,[38] or whether it went beyond the existing law and created a free-standing right to movement for *all* Union citizens, irrespective of their economic or financial standing. If so, then Article 21 was of considerable importance. After a certain amount of prevarication, when the Court made passing reference to the citizenship provisions but only to reinforce its interpretation of Articles 45, 49, or 56,[39] the Court finally decided on the importance of citizenship when it declared in *Grzelczyk*[40] that:

Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[41]

This paved the way for the Court in *Baumbast*[42] to sever the link between migration and being economically active:

the Treaty on European Union does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two [TFEU], on citizenship of the Union.

This resulted in the finding in *Chen*[43] that a baby, born to Chinese parents in Northern Ireland which gave the baby the nationality of the Republic of Ireland (i.e., Irish nationality), enjoyed the rights of Union citizenship. She therefore enjoyed the right to reside in the UK under Article 21(1), subject to the limitations and conditions laid down by the Person of Independent Means Directive 90/364 (now Article 7(1)(b) of the CRD 2004/38) which had to be interpreted narrowly.

From the case law it is now possible to say that, subject to the limitations and conditions laid down in the Treaties and the secondary legislation, all EU citizens enjoy under Article 21(1) TFEU:[44]

• the initial right of entry into another Member State[45]

• a free standing and directly effective right of residence in another Member State[46]

• the right to enjoy social advantages on equal terms with nationals[47] for those lawfully resident[48] in another Member State.

2. THE CITIZENS' RIGHTS DIRECTIVE 2004/38

2.1 Introduction

[37] The European Parliament and Council, acting in accordance with the ordinary legislative procedure, may 'adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1' (Art. 21(2)) where the Treaties have not provided the necessary powers. However, in respect of social security or social protection Art. 21(3) TFEU provides that the Council can act in accordance with the special legislative procedure.

[38] Even prior to Maastricht there were a number of decisions which can be seen with the benefit of hindsight to have a citizenship component: e.g., Case 186/87 *Cowan* [1989] ECR 195; Case 293/83 *Gravier* v. *City of Liège* [1985] ECR 593.

[39] See, e.g., Case C–193/94 *Skanavi* [1996] ECR I–929; Case C–274/96 *Bickel and Franz* [1998] ECR I–7637.

[40] Case C–184/99 [2001] ECR I–6193, para. 31, echoing La Pergola AG in Case C–85/96 *Martínez Sala* [1998] ECR I–2691, para. 18. For a full discussion, see D. Kostakopoulou, 'Ideas, norms and European citizenship: Explaining institutional change' (2005) 68 *MLR* 233.

[41] See also La Pergola AG in Case C–85/96 *Martínez Sala* [1998] ECR I–2691, para. 20., who said the introduction of Union citizenship creates a new status for the individual, 'a new individual legal standing in addition to that already provided for', and Art. 21 attaches to that new status the right to move and reside freely.

[42] Case C–413/99 *Baumbast and R.* v. *Secretary of State for the Home Department* [2002] ECR I–7091, para. 83.

[43] Case C–200/02 *Chen* v. *Secretary of State for the Home Department* [2004] ECR I–9925. Cf. *McCarthy v. Secretary of State* [2008] EWCA 641 now on appeal to the House of Lords.

[44] A full discussion of the development of this case law can be found in Ch. 15 of the first edition of this book.

[45] Case C–357/98 *Ex p. Yiadom* [2000] ECR I–9265.

[46] Case C–413/99 *Baumbast* [2002] ECR I–7091, para. 84.

[47] Case C–274/96 *Bickel and Franz* [1998] ECR I–7637 (translation facilities); Case C–85/96 *Martínez Sala* [1998] ECR I–2691 (child allowance); Case C–184/99 *Grzelczyk* [2001] ECR I–6193 (minimex).

[48] Case C–85/96 *Martínez Sala* [1998] ECR I–2691; Case C–456/02 *Trojani* [2004] ECR I–7573.

The rights provided by Article 21(1) must now be viewed in the context of the Citizens' Rights Directive (CRD) 2004/38,[49] which repeals and replaces the directives facilitating the migration of the economically active: Directive 68/360[50] on the rights of entry and residence; Regulation 1251/70[51] on the right to remain; the two Union directives on establishment and services;[52] and the three 1990 Residence Directives, together with the provisions on family rights laid down in Articles 10 and 11 of Regulation 1612/68 (now 492/2011). At the heart of the directive lies the basic idea that the rights enjoyed by the migrant citizen and their family members increase the longer a person is resident in another Member State.[53]

Because the Court sees this directive as central to citizens' rights it insisted in *Metock*[54] that it must not be interpreted restrictively nor must the provisions of the CRD be interpreted so as to deprive them of their effectiveness. Furthermore, the Court notes that there is a continuum between the pre- and post-CRD,[55] as well as a raising of standards. It said that the CRD 'aims in particular to strengthen the right of free movement and residence of all Union citizens, so that citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals'.[56]

2.2 The Personal Scope of the Citizens' Rights Directive

(a) The rules

The directive applies to Union citizens, defined, as with Article 20(1) TFEU, as 'any person having the nationality of a Member State'[57] who moves to, or resides in, a Member State other than that of which he or she is a national.[58] In fact, as we shall see, for the first five years, it really applies only to those Union citizens who have sufficient resources, either through employment or independently, who will not become an unreasonable burden on the host state.

The directive also applies to family members, irrespective of nationality,[59] who 'accompany *or* join them'.[60] As with the original Article 10 of Regulation 1612/68, the family members fall into two groups: (1) those who must be admitted[61] and (2) those whose entry and residence the host state must merely facilitate[62] (see fig. 12.1). In respect of the first group, the definition of family members is drafted more broadly than in the original Regulation 1612/68. According to Article 2(2) CRD, family member means:[63]

Fig. 12.1 Family members under the CRD

[49] In its Report on the Application of the Directive (COM(2008) 840/3, 3) the Commission notes that 'The overall transposition of Directive 2004/38 is rather disappointing. Not one Member State has transposed the Directive effectively and correctly in its entirety. Not one Article of the Directive has been transposed effectively and correctly by all Member States.'

[50] [1968] OJ SE (II) L257/13/485.

[51] This was repealed by Commission Reg. 635/2006 (OJ [2006] L112/9).

[52] Dir. 73/148 OJ [1973] L172/14 and Dir. 75/34 (OJ [1975] L14/10).

[53] The cross-border element remains essential: Case C–127/08 *Metock and others v Minister for Justice, Equality and Law Reform* [2008] ECR I–6241, para. 77. See also 3rd recital of CRD: 'Union citizenship should be the fundamental status of nationals of the Member States *when* they exercise their right of free movement and residence' (emphasis added).

[54] Case C–127/08 *Metock* [2008] ECR I–6241, paras. 84 and 93.

[55] Para. 59.

[56] Ibid.

[57] Art. 2(1).

[58] Art. 3(1).

[59] See also the fifth recital to the directive: 'The right of all citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.'

[60] Ibid. Emphasis added.

[61] Art. 3(1).

[62] Art. 3(2).

[63] Art. 2.

(a) spouse
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State
(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in (b)
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in (b).

In respect of the second group (those whose admission must be facilitated), according to Article 3(2) two sorts of family members fall into this category:

(a) any other family members,[64] not falling under Article 2(2) who, in the country from which they have come,[65] are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen[66]
(b) the partner with whom the Union citizen has a durable relationship, duly attested.[67]

While Article 3(2) requires the host state merely to 'facilitate entry and residence' of this second group, the directive provides a strong steer that the normal rule will be to permit entry. Article 3(2)(b) provides: 'The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.'

We shall now consider the meaning of the various terms to describe family members, particularly in the light of the Court's case law under (the now repealed) Article 10 of Regulation 1612/68.

(b) Spouses, registered partners, and partners in a durable relationship duly attested

(i) Spouses

Who is a 'Spouse'? The Court has approached the term 'spouse' in a conventional manner:[68] it is the person to whom the EU citizen is married under the laws of the state where the marriage was entered into. In *Diatta*[69] the Court considered the situation of a couple who were married but separated. The case concerned a Senegalese woman married to a French national who lived and worked in Germany. Eventually she separated from her husband and lived in separate accommodation with the intention of divorcing. The authorities refused to renew her residence permit on the ground that she was no longer a family member of an EU national and did not live with her husband. The Court ruled that the (then) Article 10 of Regulation 1612/68 did not require members of a migrant's family to live permanently together. It reasoned that if cohabitation of spouses was a mandatory condition for a residence permit, the worker could cause his spouse to be expelled from the Member State at any moment, simply by throwing her out of the house.

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[64] The degree of relatedness is not specified: COM(2009) 313, 5.

[65] The meaning of this phrase was considered by the British Court of Appeal in *KG (Sri Lanka*) v. *Secretary of State for the Home Department* [2008] EWCA Civ 13.

[66] The fact that these conditions are satisfied must be proved by a document issued by the relevant authority in the country of origin or country from which they are arriving in the case of those seeking residence under Art. 7: Art. 8(5)(e).

[67] By contrast, the fact that a 'durable relationship, duly attested' exists is satisfied merely by 'proof' for those seeking residence under Art. 7: Art. 8(5)(f).

[68] Although cf. Case C–117/01 *KB* v. *National Health Service Pensions Agency* [2004] ECR I–541, paras. 33–4 interpreting Art. 157 TFEU (ex Art. 141 EC) on equal pay where the Court held that national legislation preventing a transsexual man from marrying a woman interfered with the right to marry under Art. 12 ECHR, thereby preventing the man from receiving a survivor's pension, and so breached Art. 157.

[69] Case 267/83 *Diatta* v. *Land Berlin* [1985] ECR 567.

Diatta therefore suggests that separated couples must be allowed to remain in the host state, a decision compatible with the Court's approach in *Commission* v. *Germany*[70] that Regulation 1612/68 had to be interpreted in the light of the requirement of the respect for family life set out in Article 8 ECHR. However, the position under the CRD may be different. To enjoy a right of residence under Article 7(1)(d) the family members must be 'accompanying or joining a Union citizen', and to acquire permanent residence under Article 16(2) the family members must have 'legally resided with the Union citizen in the host state for a continuous period of five years'.[71] This suggests a requirement of actual cohabitation.

A divorced spouse's position is different again. In *Diatta*[72] the Court said that a 'marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority'.[73] This would suggest that only on the completion of all the formal stages of divorce proceedings, including the grant of a decree absolute, will the spouse's dependent right of residence in the Member State cease. However, as we shall see, Article 13 of Directive 2004/38 does give certain legal protection to divorcees.[74]

The term 'spouse' does not include cohabitees. This was shown in *Reed*[75] where the Court ruled that an English woman wishing to join her cohabitee in the Netherlands could not rely on the then Article 10 of Regulation 1612/68 because she was not a spouse. However, on the facts of the case Reed was successful because under *Dutch* law foreigners in a stable relationship with a Dutch national were entitled to reside in the Netherlands. If Ms Reed were not allowed to remain in the Netherlands, this would be discriminatory, contrary to Articles 18 and 45 TFEU and Article 7(2) of Regulation 1612/68 (now 492/2011). The position of cohabitees is now also covered, at least in part, by the discretionary admission provisions in Article 3(2)(b) CRD, provided the relationship is durable and duly attested (see below).

Forced, arranged and polygamous marriages: To date the Court has not willingly looked behind the marriage 'veil' to see whether the marriage is valid. However, Article 35 CRD provides:

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience.

This provision comes with the caveat that any measure taken has to be proportionate and subject to the procedural safeguards provided in the directive.[76] In its guidance on the directive,[77] the Commission is more expansive: 'Marriages validly contracted anywhere in the world must be in principle recognized for the purpose of the application of the Directive.' It continues that:

Forced marriages, in which one or both parties is married without his or her consent or against his or her will, are not protected by international or Union law. Forced marriages must be distinguished from arranged marriages, where both parties fully and freely consent to the marriage, although a third party takes a leading role in the choice of partner, and from marriages of convenience.

This suggests that the host state is not obliged to admit the spouse of a forced marriage but must admit the spouse of an arranged marriage. The Commission also says that Member States are not obliged to recognize polygamous marriages, contracted lawfully in a third country, which may be in conflict with their own legal order. It adds 'This is without prejudice to the obligation to take due account of the best interests of children of such marriages.'

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[70] Case 249/86 [1989] ECR 1263, para. 10.

[71] Cf. the more favourable position under the Long Term Residents Dir. 2003/109 ([2003] L16/44, adopted under Art. 63(3)(a) and (4) EC discussed in Ch. 14. The TCN family member will enjoy a right to permanent residence and equal treatment rights in the first state without having to move to a second Member State.

[72] Case 267/83 [1985] ECR 567.

[73] Para. 20.

[74] See below, text attached to nn. 183–185.

[75] Case 59/85 [1986] ECR 1283.

[76] Arts. 30–1, considered in detail in Ch. 13.

[77] Commission Guidance for better transposition and application of Dir. 2004/38: COM(2009) 313, 4.

Marriages of convenience: Marriages of convenience are given special attention in the guidance in the section on abuse and fraud. The Commission says:[78]

Recital 28 defines marriages of convenience for the purposes of the Directive as marriages contracted for the *sole* purpose of enjoying the right of free movement and residence under the Directive that someone would not have otherwise. A marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage. The quality of the relationship is immaterial to the application of Article 35.[79]

The Commission lists a set of indicative criteria for cases where there is *unlikely* to be an abuse of Union rights (e.g., the third-country spouse would have no problem obtaining a right of residence in his/her own capacity or has already lawfully resided in the EU citizen's Member State beforehand; the couple had been in a relationship for a long time; or they had a common domicile/household) and some criteria which indicate the possible intention to abuse the rights conferred by the directive (e.g., the couple have never met before their marriage; they are inconsistent about their respective personal details; they do not speak a language understood by both).

The Commission says that these criteria are possible triggers for investigation only; they are not in anyway conclusive. It continues that due attention has to be given to all the circumstances of the individual case and that the investigation may involve a separate interview with each of the two spouses but any investigation must respect fundamental rights, in particular Articles 8 ECHR (right to respect for private and family life) and 12 ECHR (right to marry) (Articles 7 and 9 of the EU Charter). The burden of proof lies on the Member States seeking to restrict rights under the directive. On appeal, it is for the national courts to verify the existence of abuse in individual cases, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of Union law is not undermined.

(ii) Registered partners and partners in a durable relationship duly attested

So far we have examined the position of spouses. We turn now to consider the position of 'partner', a new category introduced by the directive. In respect of registered partners,[80] the CRD follows the approach adopted in *Reed*. It gives rights to 'the partner with whom the Union citizen has contracted a registered partnership, on the basis of legislation of a Member State' provided that 'the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in any such legislation'.[81] In other words, only if the partnership is recognized by both the home and host state will the registered partner enjoy the rights laid down by the CRD.

While unmarried heterosexual couples may be able to benefit from this provision if they are able to enter into a 'registered partnership' recognized in both the home and host state, the most immediate beneficiaries will be homosexual couples. Therefore a British man who has entered into a civil partnership under the British Civil Partnership Act 2004 with a Brazilian man, would be able to go with his Brazilian civil partner to Sweden to reside and work there under the CRD since Swedish law recognizes registered partnerships of homosexual couples. By contrast, this couple will not be able to rely on the directive to reside and work in Greece since Greece does not recognize registered partnerships. Partners in this situation, as well as unmarried heterosexual couples whose relationship is not formally recognized by law, will have to rely on the discretionary provisions in Article 3(2)(b) in order to persuade the host state to admit the Union citizen's partner. However, Article 3(2)(b) is dependent on the individuals showing that the relationship is durable and duly attested, terms not

[78] Ibid., 15 (emphasis in the original).

[79] It adds: 'The definition of marriages of convenience can be extended by analogy to other forms of relationships contracted for the sole purpose of enjoying the right of free movement and residence, such as (registered) partnership of convenience, fake adoption or where an EU citizen declares to be a father of a third country child to convey nationality and a right of residence on the child and its mother, knowing that he is not its father and not willing to assume parental responsibilities.'

[80] See generally, H. Toner, *Partnership Rights, Free Movement and EU Law* (Oxford: Hart Publishing, 2004).

[81] [81] Art. 2(2)(b).

defined in the directive, although the Commission suggests that it could be determined by reference to a certain minimum period of being together. If partners cannot satisfy these requirements, their only avenue of recourse is to rely on the principles in *Reed* (outlined above).

(iii) First point of entry principle and the principle of abuse

It had long been thought that the family provisions of Regulation 1612/68 and now the CRD meant that TCN spouses could either accompany the migrant spouse when moving from Member State A to B, or join the migrant spouse in State B directly from a third country.[82] *Akrich*[83] cast doubt on this orthodoxy.

Akrich, a Moroccan national, was convicted of theft in the UK and deported to Algeria. He then returned to the UK on a false French identity card, was deported again, and again clandestinely returned to the UK. He then married a British national, who went to work in Ireland; he was deported to Ireland. Relying on the principles in *Surinder Singh*,[84] Mrs Akrich wanted to return to the UK, bringing her husband with her. The Court said that Union law did not apply. At paragraphs 50–1 the Court said that in order to benefit from the rights under Article 10 of Regulation 1612/68 a TCN spouse (Mr Akrich) could move to another Member State with the migrant citizen (Mrs Akrich) only once the TCN spouse/registered partner had lawfully entered one EU state under national law (the first point of entry principle) and lawfully resided there (the prior lawful residence (PLR) principle). This suggested that Mr and Mrs Akrich could not return together to the UK. However, the Court added that where the marriage was genuine, the UK had to have regard to respect for Mrs Akrich's family life under Article 8[85] which suggested that the UK should admit husband and wife on human rights grounds.

The decision, particularly in respect of the PLR principle, was subject to much criticism. Although based on the idea of separation of competence between Member States (deciding who could enter their territory) and the EU (guaranteeing movement between states after initial entry),[86] the PLR principle rested on shaky foundations, particularly in the light of decisions such as *MRAX*[87] (Member States cannot deny entry to TCN spouses on the sole ground that the TCN has not obtained the required visa) and *Carpenter*[88] (TCN visa overstayer who subsequently married EU citizen allowed to stay in UK to enable citizen to provide services).

The Court responded to this criticism in *Jia*[89] by limiting *Akrich* to the situation where the TCN spouse was not lawfully resident in one Member States before he moved to another.[90] However, in *Metock*[91] the Court expressly reversed the PLR principle, as laid down in paragraphs 50–1 in *Akrich* (but not the rest of the judgment), following a careful textual analysis of the directive.[92] *Metock* concerned four TCNs who arrived in Ireland and unsuccessfully applied for asylum. While still resident in Ireland they married migrant EU citizens who were also resident in Ireland. None of the marriages was a marriage of convenience. The TCN spouses were all refused a residence card by the Irish authorities on the ground that they did not satisfy the PLR principle.

Relying on the 'restrictions' approach used extensively in respect of free movement of persons, the Court said that 'if Union citizens were not allowed to lead a normal family life in the host Member

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[82] See, e.g., M. Elsmore and P. Starup, case note on *Jia*, (2007) 44 *CMLRev.* 787.
[83] Case C–109/01 *Secretary of State for the Home Department* v. *Akrich* [2001] ECR I–9607, noted by E. Spaventa (2005) 42 *CMLRev.* 225.
[84] Case C–370/90 [1992] ECR I–4265, see Ch. 8.
[85] Para. 58.
[86] Para. 49.
[87] Case C–459/99 *Mouvement contre le racisme l'antisémeitisme et la xénophobie ASBL (MRAX)* v. *Belgium* [2002] ECR I–6591, para. 61.
[88] Case C–60/00 [2002] ECR I–6279.
[89] Case C–1/05 *Jia* v. *Migrationsverket* [2007] ECR I–1.
[90] Para. 26.
[91] Case C–127/08 *Metock* [2008] ECR I–6241, para. 58. See A. Tryfonidou, 'Family reunification rights of (migrant) Union citizens: Towards a more liberal approach' (2009) 15 *ELJ* 634.
[92] Paras. 49–55.

State, the exercise of the freedoms they are guaranteed by the [Treaties] would be seriously obstructed'.[93] It continued that the directive applied to all Union citizens who moved to, or resided in, a Member State other than that in which they were a national, and to their family members who accompanied *or* joined them in that Member State, regardless of whether the TCN has already been lawfully resident in another Member State.[94]

Thus, by giving a broad interpretation to the verb 'joined', the Court abandoned the PLR principle. However, the Court went further than that since it also gave rights not only to pre-existing couples but also to couples that met in the home state.[95] The reason for this was that the refusal of the host state to grant TCN family members a right of residence might discourage Union citizens from continuing to reside in the host state.[96] As Costello points out, in reaching this conclusion, the Court rejects the usual conception of spousal dependency underpinning family reunification law, where the trailing spouse follows the worker to another Member State.[97] Instead, 'the Directive becomes an instrument for both family formation and family reunification, two modes of family migration that Member States often seek to differentiate'.[98]

A number of Member States, especially Denmark,[99] were deeply worried about the implications of the Court's rights-based approach for their conception of discretionary migration control.[100] The Court tried to assuage these concerns by pointing out that first, its ruling applied not to TCNs generally but only to TCN family members of migrant EU citizens.[101] Secondly, it said that Member States could still control migration using the express derogations (public policy, public security, and public health) laid down by the directive.[102] It added that even if the personal conduct of the TCN did not justify the adoption of measures of public policy or security, 'the Member State remains entitled to impose other penalties on him which do not interfere with freedom of movement and residence, such as a fine, provided that they are proportionate'.[103] Thirdly, the Court pointed out that, in accordance with Article 35 CRD, Member States could adopt the necessary measures to refuse, terminate or withdraw any right conferred by that directive in the case of abuse of rights or fraud, such as marriages of convenience,[104] 'it being understood that any such measures must be proportionate and subject to procedural safeguards provided for in the directive'.[105]

The Commission also responded to Member State concerns by issuing guidance[106] on when Union law is being abused in the case of family reunification. It says that abuse occurs 'when EU citizens, unable to be joined by their third country family members in their Member State of origin because of the application of national immigration rules preventing it, move to another Member State

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93 Para. 62.
94 Para. 70.
95 Para. 99. See also Case C–551/07 *Sahin*, Reasoned Order of 19 Dec. 2008.
96 Para. 92.
97 C. Costello, '*Metock*: Free movement and "normal family life" in the Union' (2009) 46 *CMLRev.* 587, 601.
98 Ibid.
99 COM(2008) 840/3, 4. See also A. Willis, 'New guidelines will reduce fake marriages, Brussels says', <http://www.euobserver.com/22/28407>.
100 Costello, above n. 97, 588. See e.g., Justice and Home Affairs Council Conclusions Press release 16325/1/08, 27 and 28 Nov. 2008: 'The Council considers that, in compliance with and in the interests of the right of free movement, every effort must be made to prevent and combat any misuses and abuses, as well as actions of a criminal nature, with forceful and proportionate measures with due regard to the applicable law, against citizens who break the law in a sufficiently serious manner by committing serious or repeated offences which cause serious prejudice.'
101 Para. 73.
102 These derogations are considered further in Ch. 13.
103 Para. 97.
104 The 28th recital adds 'or any other form of relationships contracted for the sole purpose of enjoying the right of free movement or residence'. See also Council Res. 97/C382/01 of 4 Dec. 1997.
105 Para. 75.
106 COM(2009) 313, 17–18.

with the *sole* purpose to evade, upon returning to their home Member State, the national law that frustrated their family reunification efforts'. It continues that the defining characteristics of the line between genuine and abusive use of Union law should be based on the assessment of whether the exercise of Union rights in a Member State from which the EU citizens and their family members return was genuine and effective, an assessment made on a case-by-case basis. If, in a concrete case of return, the use of Union rights was genuine and effective, the Member State of origin should not inquire into the personal motives that triggered the previous move.

(c) Dependants

Directive 2004/38 gives rights to the Union citizen's direct descendants under the age of 21 and dependent descendants, as well as to those of the spouse or registered partner.[107] It also gives rights to the dependent ascendants (e.g., parents, grandparents) of the Union citizen and the Union citizen's spouse or registered partner.[108] In *Lebon*[109] the Court made clear that dependency was a question of fact. It said that a dependant is 'a member of the family who is supported by the worker',[110] adding that there was no need to determine the reasons why the dependant needed the worker's support or to enquire whether the dependants could support themselves by working.[111]

In *Jia*[112] the Court developed the definition of dependency in the context of dependent relatives in the ascending line (Chinese mother-in-law (Mrs Jia) of German self-employed migrant (Mrs Li) working in Sweden). It said that, in order to determine dependency, an individual assessment was necessary. This meant that the host state (Sweden) had to assess whether, having regard to the applicant's 'financial and social conditions', she was not in a position to support herself. The need for material support from the Union national or her spouse had to exist in Mrs Jia's state of origin (China) (or the country from which she came) when she applied to join the Union national.[113] The Court said that the host state could require proof of dependency, adduced by 'appropriate means',[114] but that did not necessarily mean a document from the Chinese authorities. On the other hand, a mere undertaking from a Union national or his spouse to support the family member 'need not be regarded as establishing the existence of that family member's situation of real dependence'.[115]

In respect of the Union citizen's other family members (e.g., aunts, uncles, cousins) who are dependants *or* members of his household, the state must 'facilitate their entry and residence'. The same applies to those whose 'serious health grounds strictly require the personal care of the family member of the Union citizen'.

2.3 Rights of Departure, Entry, and Return

(a) The right to depart from the home state

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[107] The children do not need to be blood relatives: Case C–275/02 *Ayaz* v. *Land Baden-Württemberg* [2004] ECR I–8765, para. 45, a case under the EU–Turkey Association Agreement which the Court said was to be interpreted in line with Reg. 492/2011 and the CRD. The Court ruled that stepchildren are also covered. The Commission's Guidance (COM(2009) 313, 5) adds that the provision includes 'relationships or minors in custody of a permanent legal guardian. Foster children and foster parents who have temporary custody may have rights under the Directive, depending upon the strength of the ties in the particular case. There is no restriction as to the degree of relatedness.'

[108] In respect of all of these categories of family members 'documentary evidence that the conditions laid down' are met is required for those seeking a right of residence: Art. 8(5)(d).

[109] Case 316/85 [1987] ECR 2811.

[110] Para. 22. The support must be material rather than emotional: COM(2009) 313, 5.

[111] Para. 22.

[112] Case C–1/05 *Jia* [2007] ECR I–1.

[113] Para. 37. The Commission's Guidance (COM(2009) 313, 5) adds 'The Directive does not lay down any requirement as to the minimum duration of the dependency or the amount of material support provided, as long as the dependency is genuine and structural in character.'

[114] Para. 41.

[115] Paras. 42–3.

National rules which preclude or deter nationals of a Member State from leaving their state of origin interfere with freedom of movement, even if they apply to all migrants.[116] Directive 2004/38 reinforces, and the case law confirms,[117] the Treaty right to depart from a Member State—not necessarily the state of origin—where Union citizens and their families currently live.[118] According to the directive, Union citizens and their family members may leave the Member State by producing a valid identity card or passport (passport only for TCN family members) which the Member State is obliged to issue or renew.[119] The passport[120] must be valid for all Member States and for any states through which the holder must pass when travelling between Member States.[121] Expiry of the identity card or passport on the basis of which the person entered the host state and was issued with a registration certificate or card (see below) is not to constitute a ground for expulsion from the host state.[122]

(b) The right to enter the host state

Host states must allow Union citizens and their families to enter their territory but, in order to find out who is on their territory,[123] host states can ask the migrant to produce an identity card or passport (passport only for TCN family members).[124] No visa or other entry formality can be demanded from Union citizens[125] but they can be demanded from a member of the worker's family who is not an EU national.[126] This is one of the many examples of the way in which the CRD distinguishes between the treatment of EU and non-EU national family members. However, in *MRAX*[127] the Court said that a refusal to allow entry due to the non-production of valid passports/identity cards, and where necessary a visa, would be disproportionate if TCN spouses were able to prove their identity and marital ties in other ways and there was no evidence that they represented a risk to public policy, security, or health. This position is now confirmed in Article 5(4) CRD.

Although Member States are entitled to check passports/identity cards (and visas where necessary) at the frontier, the compatibility of such border formalities with the notion of a 'Europe without internal frontiers' laid down in Article 26 TFEU has been questioned in two cases brought by the Commission. In the first, *Commission* v. *Belgium*,[128] non-Belgian EU nationals residing in Belgium were required to produce their residence or establishment permits in addition to their passports or

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[116] See, e.g., the workers' cases: Case C–10/90 *Masgio* v. *Bundesknappschaft* [1991] ECR I–1119, paras. 18–19; Case C–415/93 *Bosman* [1995] ECR I–4921, para. 104; and Case C–232/01 *Hans van Lent* [2003] ECR I–11525, para. 21.

[117] See Case C–33/07 *Ministerul Administratiei şi Internelor* v. *Jipa* [2008] ECR I–5157, paras. 17–20; Case C–127/08 *Metock* [2008] ECR I–6241, para. 68.

[118] Art. 4(1).

[119] Art. 4(3). No exit visa or equivalent formality may be imposed.

[120] If the passport is the only document with which the person may lawfully leave the country, it must be valid for at least five years: Art. 4(4).

[121] Art. 4(4). Having produced a passport or identity card, the Member State may not demand from the worker an exit visa or similar document (Art. 4(2)).

[122] Art. 15(2).

[123] Case C–265/88 *Messner* [1989] ECR 4209.

[124] Art. 5(1). Art. 5(4) provides that where an EU citizen or a TCN family member does not have the necessary travel documents (or visas), the Member State must give them every reasonable opportunity to obtain the documents or to corroborate or prove by other means that they are covered by the right to freedom of movement and residence.

[125] Art. 5(1), 2nd para.

[126] Art. 3(2). Case 157/79 *R* v. *Pieck* [1980] ECR 2171, para. 10. The list of third countries whose nationals need visas when crossing the external border of the Member States is determined by Council Reg. 539/2001 ([2001] OJ L81/1). Member States must grant TCN family members 'every facility' to obtain the necessary visas which must be issued free of charge and on the basis of an accelerated procedure. The Commission considers that delays of more than four weeks are not reasonable. Citing Case C–503/03 *Commission* v. *Spain* [2006] ECR I–1097, the Commission also says (COM(2009) 313, 6) that TCN family members have a right to obtain a visa on presentation of a valid passport and evidence of the family link only. Member States can also encourage integration of EU citizens and their TCN family members by offering language course on a voluntary basis but no consequence can be attached to their refusal to attend them (COM(2009) 313, 7). Possession of a valid residence card issued under Art. 10 CRD exempts family members from the visa requirement.

[127] Case C–459/99 *MRAX* v. *Belgium* [2002] ECR I–6591, para. 61.

[128] Case 321/87 *Commission* v. *Belgium* [1989] ECR 997.

identity cards. The Court said that such controls could constitute a barrier to free movement if carried out in a systematic, arbitrary, or unnecessarily restrictive manner.[129] In the second case, *Commission* v. *Netherlands*,[130] the Court ruled that national legislation requiring citizens to answer questions put by border officials regarding the purpose and duration of their journey and the financial means at their disposal was incompatible with Directive 68/360. In these two cases the Court has curtailed the level of checks that can occur at an internal frontier. Nevertheless, it said in *Wijsenbeek*[131] that, despite Article 26 TFEU (ex Article 14 EC) (on the single market) and Article 21 TFEU (on the free movement of citizens), Member States could still require individuals, whether EU citizens or not, to establish their nationality on entering a Member State at an internal frontier of the EU.[132] Therefore, a Dutch MEP was required to hand over his passport to immigration control when he arrived in the Netherlands on a flight from Strasbourg. Further, Member States could impose penalties for breach of the requirement to present an identity card or passport, provided that the penalties are comparable to those which apply to similar national infringements and are proportionate.[133]

Finally, Article 5(5) CRD permits the host Member State to require the migrant to report his/her presence to the authorities within a reasonable and non-discriminatory period of time. Failure to comply may make the migrant 'liable to proportionate and non-discriminatory sanctions'. In this regard the directive confirms the decision in *Watson and Belmann*[134] where the Court found that an Italian law providing for migrants to be deported if they failed to register with the Italian authorities within three days of entering Italy was unlawful.[135]

(c) The right to return to the home state

The right to return to the home state is not expressly dealt with by the CRD but is covered by the Treaties, as interpreted by the Court. The issue was considered in *Surinder Singh*,[136] examined in Chapter 8, and arose again in *Eind.*[137] The case concerned a Dutch worker who was employed in the UK where he was joined by his 11-year-old Surinamese daughter. The UK gave her a right to reside as a family member of a worker under what is now Article 2(2) CRD. Less than two years later, father and daughter returned to the Netherlands but Mr Eind could not work because he was ill and so received social assistance. The daughter's application for a residence permit was turned down on the ground that since her father was not economically active, he was no longer covered by Union law and so neither was she.

The Court said that while Article 2(2) gave the TCN daughter a right to install herself with the worker in the UK,[138] it did not entail an autonomous right to free movement for the family member.[139]

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129 Para. 15.

130 Case C–68/89 *Commission* v. *Netherlands* [1991] ECR I–2637.

131 Case C–378/97 *Criminal Proceedings against Florus Ariël Wijsenbeek* [1999] ECR I–6207. The facts of *Wijsenbeek* occurred in Dec. 1993 before the provisions of Title IV of Part Three of the Treaty of Amsterdam came into force (now Title V of Part Three TFEU). However, the Schengen provisions were operative at that time and these allowed for the crossing of internal borders without checks. Yet, because this freedom is subject to derogations on the grounds of public policy and national security, the Court said that until common rules were adopted checks could be made (para. 43): C. Jacqueson, 'Union citizenship and the Court of Justice: Something new under the sun? Towards social citizenship' (2002) 27 *ELRev*. 260, 264.

132 Para. 45.

133 Case C–215/03 *Oulane* [2005] ECR I–1215, para. 38.

134 Case 118/75 *Watson and Belmann* [1976] ECR 1185. In Case C–357/98 *Ex p. Yiadom* [2000] ECR I–9265, para. 25: provisions protecting Union nationals who exercise the fundamental freedom of movement under Art. 21(1) TFEU had to be interpreted in their favour.

135 See also Case C–265/88 *Messner* [1989] ECR 4209. In respect of a TCN spouse of a migrant worker, see Case C–459/99 *MRAX* [2002] ECR I–6591, para. 78.

136 Case C–370/90 [1992] ECR I–4265.

137 Case C–291/05 *Minister voor Vreemdelingenzaken en Integratie v Eind* [2007] ECR I–10719.

138 Para. 21.

139 Para. 23.

However, following references to the citizenship provisions,[140] the Court did say that the right of the migrant worker to return and reside in the Netherlands, after having been gainfully employed in the UK, was 'conferred by [Union] law, to the extent necessary to ensure the useful effect of the right to free movement for workers under Article [45]'.[141] The Court said that Eind would be deterred from exercising his right of free movement if he could not return to the Netherlands, economically active or not.[142] Likewise he would also be deterred from exercising his rights of free movement if he could not continue living together with close family members on his return to the Netherlands. So, under (unspecified) Union law, the daughter had the 'right to install herself with her father' in the Netherlands, even though her father was not economically active, provided that she was under 21 or dependent.[143]

2.4 The Right of Residence in the Host State

Not only does the directive guarantee the right to leave the home state and enter the host state, it also grants the migrant the right of residence. The directive essentially envisages three tiers of residence (see fig 12.2): up to three months; three months to five years; and (generally) five years and beyond.

(a) Right of residence for up to three months

Those resident for up to three months enjoy a 'right of residence'. According to Article 6, if Union citizens (whether economically active or not)[144] can produce a valid identity card or passport, and they wish to stay for up to three months only, Member States must grant them the right of residence.[145] The same applies to TCN family members, including TCNs accompanying or joining the Union citizen, on production of a valid passport.[146] However, this right of residence is not unlimited: apart from the general derogations, it is also subject to the condition that the migrants do not become 'an unreasonable burden on the social assistance system of the host state'.[147]

(b) Right of residence for more than three months and up to five years

(i) Citizens' and family members' rights

Those resident for more than three months but less than five years also enjoy a 'right of residence'. According to Article 7(1) CRD, all Union citizens have the right of residence on the territory of another Member State for more than three months if they are workers, self-employed,[148] have sufficient resources and medical insurance, or they are students, also with sufficient resources and medical insurance.[149] The same right also applies to family members accompanying or joining the Union citizen,[150] whether they are nationals of a Member State or not.[151] Only where the host state has a reasonable doubt as to whether a Union citizen or his/her family members satisfies these conditions can the Member States verify whether the conditions are fulfilled. This verification cannot be carried out systematically.[152]

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[140] Paras. 28–32.
[141] Para. 32.
[142] Para. 35.
[143] Paras. 38–9.
[144] In this respect the directive does not depart so much from the position under the case law when, following Case 186/87 *Cowan* [1989] ECR 195, all tourists were recipients of services.
[145] Art. 6(1).
[146] Art. 6(2).
[147] Art. 14(1). This term is considered further in Ch. 13.
[148] Union citizens retain the right of residence so long as they remain workers/self-employed persons: see Art. 7(3) considered further in Ch. 9.
[149] The conditions as to sufficient resources and medical insurance are considered in more detail in Ch. 13.
[150] A more limited range of family members can enjoy the Art. 7 rights where the Union citizen is a student: Art. 7(4).
[151] Art. 7(1)(d) and Art. 7(2).
[152] Art. 14(2).

The host state can require Union citizens to register with the relevant authorities.[153] The deadline for registration may not be less than three months from the date of arrival.[154] A registration *certificate* must then be issued[155] on production of a valid identity card or passport,[156] a confirmation of engagement from the employer or certificate of employment or proof that they are self-employed, or proof that they satisfy the conditions of being of independent means or a student.[157] Failure to comply with the registration requirement may render the person concerned liable to 'proportionate and non-discriminatory sanctions'. The issuing of a registration certificate or equivalent (see below) gives the host state the opportunity to check not only whether the migrant satisfies the conditions laid down in the CRD but also whether the migrant is a 'desirable' person. This is confirmed by Article 27(3) which provides the host state may request the Member State of origin and, if necessary, other Member States to provide information concerning any previous police record the migrant may have. However, this is the exception not the rule: the Article makes clear that the host state may request this information only if it considers it 'essential' and '[s]uch enquiries shall not be made as a matter of routine'.

A registration certificate is also issued to family members of Union citizens who are themselves Union citizens. The host Member State may, however, require the EU family members to produce not only a valid identity card or passport but also the Union citizen's registration certificate, together with documentary evidence that the family members fall within a relationship covered by Article 2(2).[158] By contrast, TCN family members must[159] be issued with a 'residence *card*'[160] provided they produce broadly equivalent documents to those required for EU national family members.[161] The residence card (but not the registration certificate) is valid for five years from the date of issue (or for the envisaged period of residence of the Union citizen if that is less than five years)[162] but will expire as a result of prolonged absences.[163] The renewal requirement makes it easier for the host state to monitor the activities of TCNs. In respect of both the registration certificate and the residence card, the host state can carry out checks on compliance with any requirement deriving from national legislation for non-nationals to carry these documents, provided the same requirement applies to their own nationals as regards identity cards.[164]

A migrant worker can reside and start working before completing the formalities to obtain a residence permit[165] because the right of residence is a fundamental right derived from the Treaties and

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153 Art. 8(1).

154 Art. 8(2).

155 Ibid. The issuing of these certificates or equivalent documents must be free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents: Art. 25(2).

156 The expiry of the identity card/passport which was the basis for entering the host state and the issuing of a registration certificate or registration card (see below) cannot constitute a ground for expulsion: Art. 15(2).

157 Art. 8(3).

158 Art. 8(5).

159 The obligation to issue the residence card is mandatory because European Union—not national—immigration law applies.

160 This exempts TCN family members from the visa requirement under Art. 5(2).

161 Arts. 9–10. The list of documents to be produced is exhaustive: recital 14 and Case C–127/08 *Metock* [2008] ECR I–6241, para. 53. Member States may require that documents be translated, notarised or legalised where the national authority concerned cannot understand the language in which the particular document is written, or have a suspicion about the authenticity of the issuing authority (COM(2009) 313, 7).

162 Art. 11(1).

163 The validity of the residence card is not affected by temporary absences not exceeding six months or longer absences up to 12 months for important reasons such as pregnancy and childbirth (Art. 11(2)).

164 Art. 26. See also Case C–327/02 *Panayotova* v. *Mininster voor Vreemdelingenzaken en Integratie* [2004] ECR I–11055, para. 27: the granting of residence permits must be based on a procedural system which is easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time, and refusals to grant a permit must be capable of being challenged in judicial or quasi-judicial proceedings. According to the Commission (COM(2009) 313, 7), the residence card for a TCN must be issued within six months.

165 Art. 25.

is not dependent upon the possession of particular documents;[166] residence permits have only probative value,[167] as *Martínez Sala*[168] shows. A Spanish national living in Germany since 1968 held various residence permits which had expired and a series of documents saying that she had applied for an extension of her permit. She then had a baby and applied for a child allowance but her application was rejected on the grounds that she had neither German nationality, nor a residence entitlement, nor a residence permit. The Court said that it was discriminatory to require a national of another Member State to produce a document (the residence permit) to obtain the benefit when its own nationals were not required to do the same.[169] In *Oulane* the Court added that since the right of residence was derived directly from the Treaties, it was not legitimate for the host state to require the EU migrant to produce a passport when he could prove his identity by other means.[170] Further, it said that detention and deportation based solely on the failure of the person to comply with legal formalities concerning the monitoring of aliens 'impair the very substance of the right' and are 'manifestly disproportionate to the seriousness of the infringement'.[171]

Once Union citizens have registered themselves, what use can the host-state authorities make of the information supplied? This question arose in *Huber*[172] concerning a centralized register held by the German authorities which contained certain personal data relating to foreign nationals who were resident in Germany for more than three months. The register was used for statistical purposes and by the security and police services and by the judicial authorities. Mr Huber, an Austrian national, worked in Germany as a self-employed insurance agent. He asked for his data to be deleted from the register, alleging discrimination since no similar database existed for German nationals.

The Court ruled that the use of a register of data for the purpose of providing support to the authorities responsible for applying the rules on residence was, in principle, legitimate and compatible with the prohibition of discrimination on grounds of nationality laid down by Article 18(1) TFEU (ex Article 12(1) EC).[173] However, the Court said that such a register should not contain any information other than what was 'necessary', within the meaning of Article 7(e)[174] of the Data Protection Directive 95/46.[175] The Court then distinguished between personal data contained in the documents referred to in Articles 8(3) (proof of (self)employment) and 27(1) CRD (derogations), which it considered was 'necessary' for applying the rules on residence,[176] and personal data containing individualized personal information for statistical purposes, which was not.[177] The Court also said that, as a citizen who had migrated under Article 21 TFEU, Mr Huber enjoyed the right to non-discrimination under Article 18 TFEU.[178] Because Union citizens were treated differently to nationals in respect of the systematic

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166 Case 118/75 *Watson and Belmann* [1976] ECR 1185, paras. 15–16. This is now confirmed in Art. 25(1) CRD and recital 11. See also Poiares Maduro AG's Opinion in Case C–524/06 *Huber* v. *Germany* [2008] ECR I–9705, para. 19.

167 To this effect, see Case 48/75 *Royer* [1976] ECR 497, para. 50. The same rule also applies to a TCN spouse of a migrant worker: Case C–459/99 *MRAX* [2002] ECR I–6591, para. 74.

168 Case C–85/96 [1998] ECR I–2691.

169 For an extension of this principle to the member of a Turkish worker's family legally residing in a Member State, see Case C–262/96 *Sürül* v. *Bundesanstalt für Arbeit* [1999] ECR I–2685.

170 Case C–215/03 *Oulane* [2005] ECR I–1215 Para. 25.

171 Para. 40.

172 Case C–524/06 *Huber* v. *Germany* [2008] ECR I–9705.

173 Para. 58.

174 'Member States shall provide that personal data may be processed only if: . . . (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed'.

175 OJ [1995] L281/31.

176 Para. 59.

177 Para. 68.

178 Para. 73.

processing of personal data for the purposes of fighting crime, this constituted discrimination prohibited by Article 18(1) TFEU.[179]

(ii) Family members' rights on the death or departure of the Union citizen or on divorce

Articles 12–13 of the Citizens' Rights Directive 2004/38 give family members the right to retain their residence in the host state on the death or departure of the EU citizen or in the event of divorce, annulment of marriage, or termination of registered partnership. In the case of the death or departure of the Union citizen, family members who are EU nationals[180] will continue to enjoy the right of residence.[181] In the case of the death (but not departure) of the EU citizen, the TCN family members retain the right of residence provided that they have been residing in the host state as family members for at least a year before the citizens' death.[182] In order to attain permanent residence they must be workers/self-employed/have independent means or be members of the family, already constituted in the host Member State, of a person satisfying these requirements.

In the case of divorce or equivalent, the CRD makes new provision for 'legal safeguards to people whose right of residence is dependent on a family relationship by marriage and who could therefore be open to blackmail with threats of divorce'.[183] Article 13(2) therefore says that TCN family members do not lose the right of residence where:

• prior to the divorce or equivalent, the marriage or registered partnership lasted at least three years including one year in the host Member State, or

• by agreement between the spouses or partners or by court order, the TCN spouse or partner has custody of the Union citizen's children, or

• this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting, or

• by agreement between the spouses or partners or by court order, the TCN spouse or partner has the right of access to a minor child, provided that the court has ruled that such access must be in the host state and for as long as is required.[184]

In addition, in order to obtain *permanent* residence the TCN family members must show that they are workers/self-employed/have independent means (but not a student) or they are members of the family already constituted in the host Member State of a person satisfying these requirements. These conditions laid down in Article 13(2) do not apply to family members who are nationals of a Member State[185] who will continue to enjoy a right of residence, no matter how short the original marriage or equivalent. However, they will also need to show they are economically active or self-sufficient or be a student or family member to obtain *permanent* residence.

Despite the strictness of the rules in relation to TCN family members, there is one important exception: if the EU citizen leaves the host state or dies his/her children will not lose their right of residence, nor will the parent with actual custody of the children irrespective of nationality, provided that the children reside in the host state and are enrolled at an educational establishment for the purposes of studying there, until the completion of their studies.[186]

(c) Right of permanent residence

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[179] Para. 80.

[180] Art. 12(1), para. 1.

[181] From the way Art. 12(1) is drafted, it would appear that the conditions to be a worker/self-employed/otherwise self-supporting/student/family member do not apply to the right of residence under Art. 7. They apply only to the right to acquire permanent residence.

[182] Art. 12(2), para. 1.

[183] COM(2001) 257, 15.

[184] Art. 13(2).

[185] Art. 12(1).

[186] Art. 12(3) reflecting the decisions in Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR I–723, Case C–413/99 *Baumbast and R* [2002] ECR I–7091.

The third 'tier' of residence rights is the right to permanent residence. There are two ways of acquiring permanent residence: (1) through five years' continuous legal residence; or (2) through a shorter period for those who were economically active either as a worker or as a self-employed person who satisfy the conditions under what was Regulation 1251/70[187] and Directive 75/34.[188] In both situations the directive considers the migrants to be so assimilated into the host state that they are regarded and treated as nationals in all but name. This is a remarkable development. We shall examine the two situations in turn.

(i) Article 16: Five years' residence

Union citizens and their family members, including TCNs,[189] who have resided legally for a continuous period of five years in the host state, have the right of permanent residence there.[190] This right is not dependent on the Union citizen being a worker/self-employed person or having sufficient resources/medical insurance,[191] albeit that in most cases[192] the migrant will have been a worker/self-employed/student/person of independent means/family member under Article 7 during the previous five years in order to accrue the five-year period of residence. The family members of a Union citizen to whom Article 12(2) (death/departure of the Union citizen) or Article 13(2) (divorce or equivalent) apply, who satisfy the conditions laid down in those Articles (e.g., the family members are workers/ self-employed etc.) will also acquire the right of permanent residence after residing legally for a period of five consecutive years in the host state.[193]

Continuity of residence is not affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.[194] On the other hand, continuity of residence is broken by any expulsion decision duly enforced against the person concerned.[195] Once acquired, the right of permanent residence is lost only through absence from the host Member State for a period exceeding two consecutive years.[196]

(ii) Article 17: Other ways of acquiring permanent residence

While five years' residence is the usual way for acquiring a right to permanent residence, it is also possible for a migrant or their family members to acquire a right to permanent residence before they have completed a continuous period of five years' residence in the situations which were originally laid down in Regulation 1251/70[197] and Directive 75/34. This made provision for workers and their family members to remain in a Member State after having been employed there. This regulation has now been repealed[198] and replaced by Article 17 of Directive 2004/38 which maintains the existing *acquis* but changes the language from the 'right to remain' to the 'right of permanent residence'. Article 17(1) provides that workers and the self-employed have the right to permanent residence in three situations:

(a) retirement at the pension age[199] or through early retirement, provided they have been employed

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187 On the right of workers to remain in the territory of the host state after having been employed there [1970] OJ L142/24.
188 On the right of the self-employed to remain [1975] OJ L14/10.
189 Art. 16(2).
190 Art. 16(1).
191 Ibid., 2nd sentence.
192 Cf. Case C–456/02 *Trojani* [2004] ECR I–7573. Cf. also Art. 12(1) para. 2 which expressly requires EU national *family members* to be economically active/student/have sufficient resources before they acquire the right of permanent residence.
193 Art. 18.
194 Art. 16(3).
195 Art. 21.
196 Art. 16(4).
197 [1970] OJ SE L142/24, 402.
198 Commission Reg. 635/2006 (OJ [2006] L112/9). Dir. 75/34 was repealed by the CRD.
199 If the law of the host state does not grant the right to an old-age pension to certain categories of self-employed persons, the age condition is deemed to have been met once the person has reached the age of 60.

in the host state for the preceding 12 months[200] and resided in the host state continuously for more than three years

(b) incapacity, provided they have resided for more than two years in the host state[201] and have ceased to work due to some permanent incapacity

(c) frontier workers, provided after three years of continuous employment and residence in the host State A, they work in an employed or self-employed capacity in State B, while retaining their residence in State A to which they return each day or at least once a week.

The conditions as to length of residence and employment in (a) and (b) do not apply if the worker/self-employed person's spouse or partner[202] is a national of the host state or has lost the nationality of the host state through marriage to the worker/self-employed person.[203]

The worker/self-employed person's family members residing with him in the host state (irrespective of nationality) are also entitled to benefit from the reduced period of residence. According to Article 17, they too can enjoy permanent residence in the host state where either (1) the worker/self-employed person is entitled to permanent residence under Article 17(1);[204] or (2) under Article 17(4) the worker/self-employed person dies during his working life but before having acquired the right to permanent residence under 17(1) and:

(a) the worker/self-employed person had resided continuously in the host state for two years at the time of death, or

(b) the death resulted from an accident at work or occupational disease, or

(c) the surviving spouse lost the nationality of the host state through marriage to the worker/self-employed person.

In *Givane*[205] the Court showed that it will interpret these requirements strictly. Givane, a Portuguese national, worked in the UK as a chef for three years before going to India for ten months. He then returned to the UK with his Indian wife and three children but died less than two years later. The Court upheld the British authorities' decision refusing Givane's family indefinite leave to remain on the grounds that Givane had not satisfied the requirements of what is now Article 17(4) which required him to have resided in the UK for the two years immediately preceding his death.[206] Such a literal reading of the requirement stands in stark contrast to the generous approach to the interpretation of other provisions of Union law based on the right to family life in cases such as *Carpenter*.[207] More striking still is the fact that the Court uses the integration argument to justify *excluding* Givane's family from the UK. It said that the two-year requirement was intended to establish a significant connection between the Member State and the worker and his family and 'to ensure a certain level of their integration in the society of that state'.[208]

As we saw above, in the case of those family members faced with the death or departure of the Union citizen in circumstances not covered by Article 17, and in the case of those family members faced with divorce or equivalent, they can acquire permanent residence only if they meet the requirements laid down in Article 7(1) (i.e., they must be workers/self-employed/persons of

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[200] Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness, or accident are to be regarded as periods of employment: Art. 17(1), para. 3.

[201] If the incapacity is due to an occupational accident or disease entitling the worker to a pension for which an institution of the state is entirely or partially responsible, then no condition to length of residence is imposed.

[202] Partner as defined in Art. 2(2)(b) CRD.

[203] Art. 17(2).

[204] Art. 17(3).

[205] Case C–257/00 *Givane and others* v. *Secretary of State for the Home Department* [2003] ECR I–345.

[206] Para. 46.

[207] Case C–60/00 *Carpenter* [2002] ECR I–6279, para. 38. See also Case C–413/99 *Baumbast* [2002] ECR I–7091; Case C–459/99 *MRAX* [2002] ECR I–6591, paras. 53–61.

[208] Para. 46.

independent means/student[209]/family member[210]) and have resided legally for a period of five consecutive years in the territory of the host state.[211]

(iii) Administrative formalities

Proof of permanent residence is given by the Member State issuing, as soon as possible, a 'document certifying permanent residence', having verified the Union citizen's duration of residence.[212] Article 21 provides that continuity of residence is attested by any means of proof in use in the host Member State. In respect of the family members who are not nationals of a Member State, the host state must issue a permanent residence card, renewable automatically every ten years,[213] within six months of the submission of the application.[214] According to Article 20(3), interruption in residence not exceeding two consecutive years will not affect the validity of the permanent residence card.

2.5 The Right to Equal Treatment

(a) Introduction

The cornerstone of the CRD is Article 24(1) laying down a general right of equal treatment (ie no direct or indirect discrimination) 'within the scope of the [Treaties]' for all Union citizens residing on the basis of the directive in the territory of the host state. The Article continues that the benefit of this right is to be extended to family members who are not nationals of a Member State but who have the right of residence or permanent residence. However, Article 24(1) expressly makes the principle of equal treatment '[s]ubject to such specific provisions as are expressly provided for in the [Treaties] and secondary law'. Therefore, it is possible to derogate from the principle of equal treatment on the grounds, *inter alia* of public policy, public security, public health and employment in the public service as well as in respect of the conditions as to sufficient resources and medical insurance found in the original 1990 Residence Directives, now replicated in the CRD (see Chapter 13).

As we saw in the Workers' Regulation 492/2011, the principle of equal treatment will apply in respect of both initial access to a job as well as the exercise of that position. It will also apply in respect of enjoyment of social advantages and tax advantages. However, here Article 24(2) contains an important limitation (see fig. 12.2). In respect of *social assistance* (defined in *Chakroun* in the context of the Family Reunification Directive 2003/86 as assistance granted by public authorities which can be claimed by individuals not having stable and regular resources sufficient to maintain himself and his family), the host state is not obliged to confer entitlement to it during the first three months of residence or, in the case of a work seeker, the period during which Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.[215] Therefore, students and persons of independent means can call on equal treatment in respect of social assistance only after the first three months of residence; job-seekers entering the state to look for work under Article 14(4)(b) will not enjoy entitlement to social assistance at all.[216] This restriction, a 'derogation from the principle of equal treatment',[217] does not apply to workers, self-employed persons, persons who retain such status and members of their families. If Union citizens do have recourse to

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[209] This does not apply to TCN family members: Art. 12(2), para. 2 concerning death or departure; Art. 13(2), para. 2 concerning divorce or equivalent.

[210] With the added condition in the case of TCN family members that they are members of the family already constituted in the host Member States, of a person satisfying those requirements: Art. 12(2), para. 2 concerning death or departure; Art. 13(2), para. 2 concerning divorce or equivalent.

[211] Art. 18 referring to Art. 12(2) concerning death or departure; Art. 13(2) concerning divorce or equivalent.

[212] Art. 19.

[213] Details of the re-application process are found in Art. 20(2).

[214] Art. 20(1).

[215] Art. 14(4)(b). See Case C–578/08 *Chakroun* [2010] ECR I–000, para. 46.

[216] Joined Cases C–22/08 and 23/08 *Vatsouras* [2009] ECR I–000, para. 35. This case also considers the meaning of the terms social assistance and social advantage, considered in Ch. 9.

[217] Ibid, para. 34.

social assistance, 'An expulsion measure shall not be the automatic consequence'.[218] Furthermore, except on the grounds of public policy, security, and health, an expulsion measure may not be adopted against Union citizens or their family members if the Union citizens are workers/self-employed/work-seekers with a genuine chance of being engaged.[219]

Fig. 12.2 Residence and equality under Dir. 2004/38. (On the meaning of equality see fig. 8.1.)

In respect of *maintenance aid* for studies, including vocational training, the host state is not obliged to give grants or student loans to Union citizens or their family members until they have acquired permanent residence except to those who are economically active and their family members.

What then is meant by the principle of equal treatment? As yet, there is no case law under Article 24(1) CRD, although there are many decisions under Regulation 492/2011 which were discussed in Chapter 9. There are, however, a number of cases decided under Article 21(1) TFEU in respect of social advantages for citizens lawfully resident[220] in the host state and it is these cases that we shall consider in determining the meaning of equal treatment.

(b) Social advantages and equal treatment

(i) Direct and indirect discrimination

Martínez Sala[221] is the first case on equal treatment in respect of social advantages decided under Article 21(1) TFEU. She was a Spanish national who had been living in Germany since 1968 when she was 12. She had various jobs and various residence permits in that time. When she gave birth in 1993 she did not have a residence permit but she did have a certificate saying that an extension of the permit had been applied for. The German authorities refused to give her a child-raising allowance on the grounds that she was neither a German national nor did she have a residence permit. If she had been a worker she would have been entitled to the benefit as a social advantage under Article 7(2) of Regulation 492/2011. Given her background, it was unlikely that she was a worker (or an employed person within the meaning of Regulation 883/04 (ex Regulation 1408/71)).[222] The Court therefore considered her situation under Part Two TFEU on non-discrimination and citizenship.

It said that, as a national of a Member State lawfully residing in the territory of another Member State,[223] Martínez Sala came within the personal scope of the citizenship provisions.[224] She therefore enjoyed the rights laid down by Article 20(2) TFEU, including the right not to suffer discrimination on grounds of nationality under Article 18 TFEU[225] in respect of all situations falling within the material scope of the Treaties.[226] This included the situation where a Member State delayed or refused to grant a benefit provided to all persons lawfully resident in the territory of that state on the ground that the claimant did not have a document (a residence permit) which nationals were not obliged to have.[227] On this basis the Court concluded that Martínez Sala was suffering from direct discrimination on the ground of nationality contrary to Article 18[228] and, since it was direct discrimination, it could not be objectively justified (see fig.12.3).[229]

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[218] Art. 14(3). If they are expelled, the procedural protection provided in Arts. 30 (notification) and 31 (judicial/administrative redress) apply to any such decision: Art. 15(1).

[219] Art. 14(4).

[220] See generally, A. P. van der Mei, *Free Movement of Persons within the European Community: Cross-border access to public benefits* (Oxford: Hart Publishing, 2003).

[221] Case C–85/96 [1998] ECR I–2691.

[222] It was for the national court to make the final decision.

[223] This was merely probative and not constitutive of the right to residence: see above n. 167.

[224] Para. 61. See the essays on this case in M. Poiares Maduro and L. Azoulai (eds), *The Past and Future of EU Law* (Oxford: Hart Publishing, 2010).

[225] It also includes the right to free movement under Art. 21(1) TFEU: Case C–221/07 *Zablocka-Wehrmüller* v. *Land Baden-Württemberg* [2008] ECR I–9029, para. 25.

[226] Para. 62.

[227] Ibid.

[228] Para. 64.

[229] Ibid.

The Court fudged the issue of what was meant by 'all situations' falling within the material scope of Union law.[230] It seems that the Court thought that because the child-raising allowance constituted a social advantage within the meaning of Article 7(2) of Regulation 492/2011[231] it fell within the material scope of Union law, even though the judgment was premised on the fact that Martínez Sala was not a worker. The Court also did not make clear on what basis Martínez Sala was lawfully resident in Germany. Although the Court of Justice left it to the national court to decide whether Martínez Sala was a worker or an employed person, she did not appear to be economically active, nor did she seem to fulfil the conditions of (then) Directive 90/364 on persons of independent means (now Article 7(1)(b) CRD). As a result, she did not appear to be lawfully resident under Union law. Her lawful residence may have derived from national law and specifically from her actual presence and that the German authorities had not requested her to leave.[232] In other words, because she was not *un*lawfully resident in Germany she was entitled to equal treatment. This view is supported by *Trojani*.[233]

Trojani was a French national who had been living in a Salvation Army hostel in Belgium where, in return for board and lodging and some pocket money, he did various jobs for about 30 hours a week. He was denied the minimex (the Belgian minimum income guarantee) on the grounds that he was neither Belgian nor a worker under Regulation 492/2011. In respect of his rights as a citizen, the Court said that while Trojani did not derive from Article 21 the right to reside in Belgium due to his lack of resources,[234] since he was lawfully resident in Belgium, as was shown by the residence permit which the Belgian authorities had issued to him, he could benefit from the fundamental principle of equal treatment laid down in Article 18 TFEU.[235] This is the significant feature of the case:[236] as the Court pointed out in *Trojani*,[237] and subsequently confirmed in *Bidar*,[238] 'a citizen of the Union who is not economically active may rely on Article [18 TFEU] where he has been lawfully resident in the host state for a certain period of time *or* possesses a residence permit'.[239] Thus, legal residence can come about in one of two ways: by having a residence permit or actual presence in the host state for a certain period of time. *Trojani* itself concerned a residence permit; *Bidar*, considered below, concerned lawful residence based on actual presence.[240]

Mr Trojani therefore suffered direct discrimination on the grounds of his nationality in respect of the minimex. The same legal issue was raised in the seminal case of *Grzelczyk* [241] which also concerned direct discrimination. Grzelczyk, a French national studying at a Belgian university, supported himself financially for the first three years of his studies but then applied for the minimex (the Belgium minimum income guarantee) at the start of his fourth and final year. While Belgian students could receive the benefit, migrant students could not,[242] and so Grzelczyk suffered (direct) discrimination contrary to Article 18 TFEU.[243] The question was whether Article 18 TFEU applied to his case. Referring to *Martínez Sala*, the Court said that because Grzelczyk, a citizen of the Union, was

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230 Para. 63.
231 See further Ch. 9.
232 [232] See also Art. 6(a) of the Council of Europe Convention on Social and Medical Assistance 1953 which provides that the Contracting Parties shall abstain from expelling an alien lawfully resident 'on the sole ground that he is in need of assistance'.
233 Case C–456/02 *Trojani* [2004] ECR I–7573.
234 Para. 36.
235 Paras. 37 and 40.
236 Para. 43.
237 Para. 37.
238 Case C–209/03 [2005] ECR I–2119. See also Case C–158/07 *Förster* [2008] ECR I–8507, para. 39.
239 Case C–456/02 *Trojani* [2004] ECR I–7573, para. 43. Emphasis added.
240 As did Case C–85/96 *Martínez Sala* [1998] ECR I–2691.
241 Case C–184/99 [2001] ECR I–6193.
242 Para. 29.
243 Para. 30.

lawfully resident in Belgium he could rely on Article 18 TFEU in respect of those situations which fell within the material scope of the Treaties,[244] including those situations involving 'the exercise of the fundamental freedoms guaranteed by the [Treaties] and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article [21(1) TFEU]'.[245] Therefore, in *Grzelczyk* the Court defined the material scope of Union law, not by reference to the fact that the benefit fell within the scope of Regulation 492/2011 as it had suggested in *Martínez Sala*,[246] but by reference to the fact that Grzelczyk had actually moved.[247] This significantly broadened the scope of the principle of equal treatment.

A question was raised whether the fact that he had applied for the minimex meant that he no longer satisfied the requirements in the Students' Directive 93/96 (now Article 7(1)(c) CRD) of having sufficient resources.[248] The Court said that the Belgian authorities had to provide some temporary support to the migrant citizen, as they would to nationals, given that there exists 'a certain degree of financial solidarity' between nationals of a host Member State and nationals of other Member States,[249] but only for so long as they do not become an unreasonable burden on public finances. While this decision could be seen as opening up social welfare systems of host Member States to migrants,[250] the actual reasoning in the case presents migrants with a dilemma: lawful residency entitles the migrant to equal treatment within the host state; but exercise of that right to equal treatment might enable the host state to consider that the claimant has become an unreasonable financial burden.[251]

Student finance was also at issue in *Bidar*,[252] this time in a case concerning indirect discrimination. It will be recalled from Chapter 9 that Bidar, a French national, had lived in the UK with his grandmother after his mother's death. He subsequently went to university but was turned down for financial assistance to cover his maintenance costs, in the form of a student loan, on the grounds that he did not satisfy the criteria of being settled in the UK nor did he satisfy the residence requirements laid down by British law. The Court found these conditions to be indirectly discriminatory since they risked placing nationals of other Member States at a disadvantage. However, the Court also accepted that while, in the organization and application of their social assistance schemes, Member States had to show a degree of financial solidarity with nationals of other Member States, it was legitimate for a Member State to grant assistance only to students who had demonstrated a certain degree of integration into the society of that state. This integration could be shown through a period of residence. The Court suggested that a three-year residence requirement was compatible with Union law[253] but that the requirement to be settled was not, since it was impossible for a student from another Member State ever to obtain settled status.[254]

In reaching this conclusion, the Court relied on *D'Hoop*[255] which concerned a Belgian national who completed her secondary education in France where she obtained the *baccalauréat* in 1991.[256] She

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[244] Para. 32.
[245] Para. 33, citing Case C–274/96 *Bickel and Franz* [1998] ECR I–7637.
[246] Although it had already established that the minimex was a social advantage (paras. 27–9): Case 249/83 *Hoeckx* [1985] ECR 973.
[247] There must be actual—as opposed to hypothetical—movement: Case C–299/95 *Kremzow* v. *Republik Österreich* [1997] ECR I–2629. Cf. E. Spaventa, 'Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects' (2008) 45 *CMLRev.* 13.
[248] This question is considered further in Ch. 13.
[249] Para. 44.
[250] S. Giubboni, 'Free movement of persons and European solidarity' (2007) 13 *ELJ* 360.
[251] M. Dougan and E. Spaventa, 'Educating Rudy and the (non-)English patient: A double bill on residency rights under Article 18 EC' (2003) 28 *ELRev*. 697.
[252] Case C–209/03 [2005] ECR I–2119.
[253] Cf. the five-year residence requirement in Art. 24(2) CRD which was upheld as proportionate in Case C–158/07 *Förster* [2008] ECR I–8507, para. 53.
[254] See generally K. Hailbronner, 'Union citizenship and access to social benefits' (2005) 42 *CMLRev*. 1245.
[255] C–224/98 *D'Hoop* v. *Office national de l'emploi* [2002] ECR I–6191.

then returned to Belgium for her university education. At the end of her university studies she applied to the Belgian authorities for a tide-over allowance—a type of unemployment benefit granted to young people who have just completed their studies and are seeking their first job. Her application was rejected on the ground that she had not received her secondary education in Belgium. The Court said that, as a Belgian national, she fell within the personal scope of the citizenship provisions,[257] and that as a free mover she fell within the material scope of the Treaty provisions. The Court therefore said that she could rely on the principle of equal treatment even against her own state after having studied abroad.[258]

But what discrimination had she suffered?[259] It could be argued that the national rule was indirectly discriminatory: in order to obtain a tide-over allowance individuals had to receive their secondary education in Belgium. This had a disparate impact on non-nationals (as well as some nationals like D'Hoop) and so breached Article 21 unless objectively justified.[260] Alternatively, the national rule could be seen as discriminatory, not on the ground of nationality but on the ground of the individual having exercised her rights of free movement. Both the Advocate General and the Court seemed to support this interpretation. Advocate General Geelhoed said that Ms D'Hoop had been 'placed at a disadvantage by discriminatory provisions of the Member States of which they are nationals, which penalise them retrospectively for a period of residence in another Member State'.[261] The Court agreed:[262]

By linking the grant of tideover allowances to the condition of having obtained the required diploma in Belgium, the national legislation thus *places at a disadvantage certain of its nationals simply because they have exercised their freedom to move* in order to pursue education in another Member State.

The Court continued that '[s]uch inequality of treatment is contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move'.[263] In subsequent cases, the Court said such disadvantage constituted a 'restriction' on free movement,[264] an analysis the Court has subsequently used, particularly where it is the rules of the home state that create the obstacles to free movement.[265] The national rule therefore breached Article 21(1) unless it could be objectively justified.

The Court examined the question of justification in *D'Hoop* even though no evidence had been submitted to it on this point. It said that since the tide-over allowance aimed at facilitating the transition from education to the employment market it was legitimate for the national legislature to ensure that a 'real link' existed between the applicant for that allowance and the geographic employment market concerned.[266] However, the Court found that the condition concerning the place of secondary education

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[256] The Court said that the provisions on citizenship of the Union were applicable as soon as they entered into force and so they applied to the present discriminatory effects of situations arising prior to the citizenship provisions coming into force (citing Case C–195/98 *Österreichischer Gewerkschaftsbund* v. *Republik Österreich* [2000] ECR I–10497, paras. 54–5, and Case C–290/00 *Duchon* v. *Pensionsversicherungsanstalt der Angestellten* [2002] ECR I–3567, paras. 43–4).

[257] Para. 27.

[258] Para. 31.

[259] See also A. Iliopoulou and H. Toner, 'A new approach to discrimination against free movers' (2003) 28 *ELRev*. 389.

[260] Para. 36.

[261] Para. 53.

[262] Para. 34, emphasis added.

[263] Para. 35. Case C–135/99 *Ursula Elsen* v. *Bundesversicherungsanstalt für Angestellte* [2000] ECR I–10409. See also Case C–28/00 *Kauer* v. *Pensionsversicherungsanstalt der Angestellten* [2002] ECR I–1343, para. 44; Case C–302/98 *Sehrer* v. *Bundesknappschaft* [2000] ECR I–4585, para. 32.

[264] See, e.g., Case C–499/06 *Nerkowska* [2008] ECR I–3993; Case C–221/07 *Zablocka-Wehrmüller* [2008] ECR I–9029, para. 35. The 'restriction' approach is considered below.

[265] M. Cousins, 'Citizenship, residence and social security' (2007) 32 *ELRev.* 386, 394.

[266] Dougan and Spaventa (above n. 251) suggest that the requirement of a 'real link' is inspired by the same spirit as the requirement in *Grzelczyk* of an 'unreasonable financial burden', recognizing that there are limits to solidarity which Union law can superimpose on national welfare states. This requirement may be generously construed in favour of the Member State.

was 'too general and exclusive in nature' and that it unduly favoured an element which was not necessarily representative of a real and effective degree of connection between the applicant for the tide-over allowance and the geographic employment market, to the exclusion of all other representative elements. It therefore went beyond what was necessary to attain the objective pursued.[267]

(ii) Discrimination caused by similar treatment

The cases considered so far all concern discrimination caused by the different treatment of similarly situated groups. *Garcia Avello*[268] concerns the opposite: discrimination arising from the fact that differently situated groups were being treated similarly. Carlos Garcia Avello, a Spanish national, married Isabelle Weber, a Belgian national, and they lived together in Belgium. They had two children, dual nationals, who were given their father's surname (Garcia Avello). He then applied to the Belgian authorities to have the children's surnames changed to Garcia Weber, reflecting the Spanish pattern for surnames which comprise the first element of the father's surname (Garcia) followed by the mother's maiden name (Weber). While Belgian law did permit a change of surname when serious grounds were given, the Belgian authorities did not apply this exception to Garcia Avello because usually 'children bear their father's surname'.

The Court confirmed that the citizenship provisions applied to this case. It noted that since Mr Garcia Avello's children held the nationality of two Member States, they enjoyed the status of citizen of the Union.[269] This meant that they enjoyed equal treatment with nationals of the host state in respect of situations falling within the material scope of the Treaties, in particular those involving the freedom to move and reside in the territory of the Member States.[270] Therefore the children could not suffer discrimination on the ground of nationality in respect of their surname. Because the Garcia Avello children, holding both Spanish and Belgian nationality, were in a different situation from Belgian nationals holding just one (Belgian) nationality,[271] they had a 'right to be treated in a manner different to that in which persons having only Belgian nationality are treated, unless the treatment in issue can be justified on objective grounds'.[272] Since the Court rejected the justifications put forward by the Belgian government (the immutability of surnames as a founding principle of the social order and integration of nationals from other Member States) the Court concluded that Articles 18 and 20 TFEU precluded the Belgian authorities from refusing a name change to the Garcia Avello children.[273]

Fig. 12.3 The restrictions approach to Art. 21

(iii) Restrictions approach

Although most of the landmark citizenship cases were decided under the non-discrimination/equal treatment model, the more general shift to a restrictions/market access based approach seen elsewhere in the free movement case law can now also be seen in the field of citizenship.[274] It was first seriously raised by Advocate General Jacobs in *Pusa*[275] where he argued that 'discrimination on grounds of nationality, whether direct or indirect, is not necessary in order for Article [21] to apply'.[276] He noted that although freedom of movement was originally guaranteed by a prohibition of discrimination on grounds of nationality, 'there has been a progressive extension of that freedom in the Court's case-law

[267] Para. 39. See also Case C–258/04 *Office national de l'empoli* v. *Ioannidis* [2005] ECR I–8275, paras. 30–3.
[268] Case C–148/02 *Carlos Garcia Avello* v. *Etat Belge* [2003] ECR I–11613, noted by T. Ackermann, (2007) 44 *CMLRev.* 141.
[269] Para. 21.
[270] Para. 24.
[271] Paras. 34 and 37.
[272] Para. 34.
[273] Para. 44. The Court may now apply the 'restrictions' approach to such cases: see, e.g., Case C–353/06 *Grunkin-Paul* [2008] ECR I–7639 considered below, n. 298.
[274] See Editorial Comments, 'Two-speed European citizenship? Can the Lisbon Treaty help close the gap?' (2008) 45 *CMLRev.* 1, 2.
[275] Case C–224/02 *Pusa* v. *Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] ECR I–5763. See also F. Jacobs, 'Citizenship of the European Union: A legal analysis' (2007) 13 *ELJ* 591.
[276] Para. 18.

so that non-discriminatory restrictions are also precluded'.[277] He said that the wording of Article 21 was not limited to a prohibition of discrimination,[278] concluding that:[279]

subject to the limits set out in Article [21] itself, no unjustified burden may be imposed on any citizen of the European Union seeking to exercise the right to freedom of movement or residence. Provided that such a burden can be shown, it is immaterial whether the burden affects nationals of other Member States more significantly than those of the State imposing it.[280]

Following the lead of its Advocate General, the Court in *Pusa*[281] appeared to move towards the restrictions/obstacle approach. It confirmed the shift in *Tas-Hagen.*[282] The case concerned a Dutch law that made payment of a benefit to civilian war victims conditional on the applicants being resident in the Netherlands at the time that they made their application. This law, said the Court, was liable to dissuade Dutch nationals such as Mrs Tas-Hagen from exercising her freedom to move and reside outside the Netherlands.[283] It therefore constituted a 'restriction on the freedoms conferred by Article [21(1)] on every citizen of the Union'.[284] The Court recognized that the Dutch law could be justified on the grounds of solidarity with the population of the Netherlands both before and after the war but thought the requirement of residence to be disproportionate. While acknowledging that, in respect of benefits not covered by Union law, Member States enjoyed a wide margin of appreciation in deciding what criteria were to be used in assessing connection to society,[285] a residence criterion was not a satisfactory indicator of the degree of connection of civilian war victims to the Netherlands when it was liable to lead to different results for individuals resident abroad whose integration into Dutch society was in all respects comparable.[286]

The careful scrutiny of the proportionality of the national rules is the hallmark of subsequent case law. For example, *Nerkowska*[287] shows how the Court has insisted that the personal circumstances of each individual be taken into account, despite the administrative burden this might entail.[288] Ms Nerkowska, a Polish national, was a product of her country's tumultuous history. Born in 1946 in the territory of present-day Belarus, her parents were deported to Siberia where they died. She was then deported in 1951 to the former USSR where she lived under 'difficult conditions'. She returned to Poland in 1957 and lived there until 1985 when she moved to Germany. She was denied payment of a disability pension granted by Poland to civilian victims of war and repression because she was resident in another Member State. The Court said that the Polish rule constituted a restriction on free movement of citizens[289] but could be justified on the grounds of (1) ensuring that there was a connection between

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277 Para. 20.
278 Ibid.
279 Para. 22.
280 See also Jacobs AG's views in Case C–96/04 *Niebüll* [2006] ECR I–3561, para. 54: 'While the practical difficulties which he is likely to encounter may not stem from discrimination on the grounds of nationality, they constitute a clear obstacle to his right as a citizen to move and reside freely.'
281 Case C–224/02 *Pusa* [2004] ECR I–5763. Compare para. 19 (restrictions based) and para. 20 (discrimination based).
282 Case C–192/05 *Tas-Hagen* v. *Raadskamer WUBO van de Pensioen- en Uitkeringsrad* [2006] ECR I–10451, paras. 30–1. See also Case C–345/05 *Commission* v. *Portugal (transfer of property)* [2006] ECR I–10633, para. 24.
283 Para. 32.
284 Para. 31.
285 Para. 36.
286 Para. 38. Cf. Case C–103/08 *Gottwald* v. *Bezirkshautmannschaft Bregenz* [2009] ECR I–000, para. 36. See further G. Davies, ' "Any place I hang my hat?" or: Residence is the new nationality' (2005) 11 *ELJ* 43 who laments challenges to a residence requirement for the damage it does to a community's ability to offer benefits to local residents.
287 Case C–499/06 *Nerkowska Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* [2008] ECR I–3993.
288 Cf. the Art. 110 TFEU (ex Art. 90 EC) case, Case C–74/06 *Commission* v. *Greece (registration tax on imported cars)* [2007] ECR I–7585, para. 29, where the Court was mindful of the administrative burden imposed in assessing the depreciation of each and every car. The Court therefore said it was sufficient to use fixed scales calculated on the basis of criteria such as a vehicle's age, mileage, general condition to determine value.
289 Para. 34.

the society of the Member State concerned and the recipient of a benefit and (2) the necessity of verifying that the recipient continued to satisfy the conditions for grant of that benefit.[290]

However, the Court found the Polish rule requiring residence throughout the period of payment of the benefit was disproportionate: the fact that a person was a national of the Member State granting the benefit and had lived in Poland for more than 20 years was sufficient to establish a connection between that State and the recipient of the benefit. Furthermore, the objective of verifying that the recipient of a disability pension continued to satisfy the conditions for its grant could be achieved by other means which, although less restrictive, were just as effective.[291]

This robust—and case-by-case—approach to proportionality was also emphasized in *Morgan*.[292] Under German law the award of education and training grants for studies in another Member State was subject to a twofold obligation (the 'first-stage studies condition'): (1) to have attended an education or training course for at least one year in Germany and (2) to continue only that same education or training in another Member State. The application of these conditions meant that Rhiannon Morgan, a German national, who moved to the UK where she worked for a year as an au pair before commencing her studies at a British university, was refused a grant by the German authorities.

The Court found that because of the personal inconvenience, additional costs and possible delays which it entailed, the first stage studies condition was liable to discourage citizens of the Union from leaving Germany in order to pursue studies in another Member State.[293] It therefore constituted a restriction on freedom of movement for citizens of the Union contrary to Article 21(1).[294] The German government put forward a number of justifications for its rule, all of which were subject to a strict proportionality review. For example, it said that the condition was justified as a way of showing integration into German society.[295] However, the Court noted the personal situation of the applicant: she had been raised in Germany and completed her schooling there. This demonstrated her integration into German society. Therefore, the first-stage studies condition as a proxy for showing integration was too general and exclusive and so was disproportionate.[296]

There is, however, a risk attendant on such an individualized approach. As the healthcare cases considered in Chapter 11 show, the emphasis on protecting the individual over the interests of the community reflects what Newdick terms an 'institutional "asymmetry" within the EU, in which the Court of Justice favours private "economic" interests over the public "welfare" policies identified by national governments'.[297] He argues that this market citizenship is consistent with inequality because individual choice, rather than government policy, is the dominant influence.

(iv) The implications of the restrictions approach

As *Tas-Hagen*, *Nerkowska*, and *Morgan* show, the Court has made effective use of the restrictions approach to strike down state rules that deter departure from the state. Traditional discrimination analysis can be difficult to apply in this context, as we saw in *D'Hoop*. The Court also recognized this in *Grunkin-Paul*.[298] Leonhard Matthias Grunkin-Paul was born in Denmark to Mr Grunkin and Dr Paul,

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[290] Paras. 37–9.

[291] Para. 46. See also Case C–221/07 *Zablocka-Wehrmüller* [2008] ECR I–9029, para. 41. Cf. Case C–103/08 *Gottwald* [2009] ECR I–000, para. 32 where the Court found that a residence criterion could be justified as a condition for the granting of a free annual road toll disc for people with disabilities in Austria and was proportionate since there was no minimum period of residence required, the term residence was interpreted broadly and the disc was also provided to non-residents who regularly travelled in Austria.

[292] Joined Cases C–11/06 and C–12/06 *Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren* [2007] ECR I–9161.

[293] Para. 30.

[294] Para. 32.

[295] See also Case C–209/03 *Bidar* [2005] ECR I–2119, paras. 56–7.

[296] Paras. 42–6.

[297] C. Newdick, 'The European Court of Justice, Trans-national health care, and social citizenship: Accidental death of a concept' (2008) 26 *Wisconsin International Law Journal* 844, 864.

[298] Case C–353/06 *Grunkin-Paul* [2008] ECR I–7639.

a German husband and wife. Their child was also German but had always lived in Denmark. The child was given the surname Grunkin-Paul which was entered on his Danish birth certificate. However, the German authorities refused to register his surname because under German law a German child cannot bear a double-barrelled surname composed of the surnames of both the father and mother. Because Grunkin-Paul and his parents were German, he could not allege discrimination on grounds of nationality, a point the Court acknowledged.[299] However, in applying the restrictions model[300] the Court may have implicitly recognized the risk that it could be all-embracing. It therefore added a threshold requirement: it said that a discrepancy in surnames is likely to result in 'serious inconvenience'[301] in the child's day-to-day life as he moved between Denmark and Germany. The Court found that the German rule could not be justified.

While the 'restrictions' approach might serve to simplify analysis, it has been used in rather unexpected ways—as *De Cuyper*[302] shows. The case concerned the withdrawal of an unemployment allowance payable by the Belgian government to a Belgium national on the ground that he no longer resided in Belgium. Article 10 of the then Social Security Regulation 1408/71[303] (now Regulation 883/04) allows certain benefits to be subject to a residence requirement and so the case should have stopped there. Instead, the Court subjected the residence requirement to review under Article 21 TFEU and found that since the Belgian legislation 'places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another Member State [it] is a restriction on the freedoms conferred by Article [21]'.[304] However, the Court did find that the residence requirement could be justified by the need to monitor the employment and family situation of the unemployed[305] and that no less-restrictive monitoring measures existed to achieve the objective of allowing inspectors to check whether the situation of, for example, a person who had declared that they were living alone and unemployed had changed which might have an effect on the benefit granted.[306] In reaching this conclusion, the Court appeared to protect the integrity of the complex Social Security Regulation 1408/71 (Regulation 883/04 from 1 March 2010) from challenge.[307] However, subsequent cases, like *Hendrix*,[308] suggest that opening up the Social Security Regulation to review under the restrictions model has the potential to undermine the carefully negotiated settlement reached by (democratically accountable) political actors.

(v) Quantitative and qualitative approach

The Article 21(1) cases considered so far might suggest that migrant citizens who are not economically active now have the right to claim all benefits available in the host State (whether classified as social assistance or social advantages) on the same terms as nationals, unless the benefits are expressly excluded by Union law or there are objectively justified reasons why not. If this analysis is correct, then the creation of citizenship of the Union leads to what Iliopoulou and Toner describe as the 'perfect assimilation' approach, where the treatment of Union migrants is placed on an equal footing with that

[299] Paras. 19–20.
[300] Para. 21.
[301] Paras. 23 and 29.
[302] Case C–406/04 *De Cuyper* v. *Office national de l'emploi* [2006] ECR I–6947.
[303] Para. 37.
[304] Para. 39.
[305] Para. 41.
[306] Paras. 43–4.
[307] As Geelhoed AG noted in para. 116. Although cf. Joined Cases C–502/01 and C–31/02 *Gaumain-Cerri* v. *Kaufmännische Krankenkasse-Pflegekasse* [2004] ECR I–6483, para. 36.
[308] Case C–287/05 [2007] ECR I–6909 considered in Ch. 9. See also M. Dougan, 'Expanding the frontiers of European Union citizenship by dismantling the territorial boundaries of the national welfare states' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009).

of nationals of the host Member State unless Union law specifically provides otherwise.[309] But, when looked at carefully, the cases do not support the full assimilationist approach and actually suggest an incremental approach to residence and equality—the longer migrants reside in the Member State, the greater the number of benefits they receive on equal terms with nationals.

But on what basis are non-economically active migrants entitled to (financially expensive) maintenance on equal terms with nationals? Unlike migrant workers, it cannot be argued that they have contributed to the economy of the host state[310] through taxation.[311] Instead, the answer appears to lie in the degree to which the migrant is integrated into the community of the host state combined with a notion of social solidarity between members of that community.[312] At national level, welfare states are legitimized at least in part by a diffuse sense of solidarity: national taxpayers pay their taxes to help look after their fellow citizens in need. This solidarity is founded on some sense of shared interests which in turn is based on a shared nationality[313] and/or a shared identity. Thus *national* citizenship leads to the evolution of a sense of *national* solidarity. The striking feature of both *Grzelczyk* and *Bidar* is that the Court has taken the concept of *European Union* citizenship, the 'fundamental status of nationals of the Member States',[314] to justify the creation of a sense of *transnational* solidarity between (taxpaying) nationals of a host Member State and (impoverished migrant) nationals of other Member States, with the result that the migrant needs to be treated in the same way as nationals in respect of access to certain social advantages.

However, the reference in *Grzelczyk* and *Bidar* to merely 'a *certain degree* of financial solidarity'[315] indicates that the notion of solidarity is limited. *Grzelczyk* suggests that the limits to the solidarity—and thus the equality—principle are related to the degree to which the migrant is integrated into the society of the host state. *Bidar* makes this point expressly. Having referred to the need for Member States to show 'a certain degree of financial solidarity with nationals of other Member States' in the organization and application of their *social assistance* systems, the Court continued that 'In the case of assistance covering the maintenance costs of students, it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State.'[316] And length of residence is a key indicator of integration: 'the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host state for a certain length of time'.[317]

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[309] A. Iliopoulou and H. Toner (2002) 39 *CMLRev.* 609, 616. This is what Léger AG had in mind in Case C–214/94 *Boukhalfa* v. *Bundesrepublik Deutschland* [1996] ECR I–2253, para. 63. See also S. Friess and J. Shaw, 'Citizenship of the Union: First steps in the European Court of Justice' (1998) 4 *EPL* 533.

[310] Although the Court's case law on the definition workers, to include migrants who received only limited wages and work a small number of hours (e.g., Case 139/85 *Kempf* [1986] ECR 1741 and Case C–357/89 *Raulin* [1992] ECR I–1027), rather undermines the substance of this rationale.

[311] For a criticism of such arguments see Geelhoed AG's Opinion in Case C–209/03 *Bidar* [2005] ECR I–2119, para. 65.

[312] In his opinion in Case C– 70/95 *Sodemare SA* [1997] ECR I–3395, para. 29, Fennelly AG defined solidarity as the 'inherently uncommercial act of involuntary subsidization of one social group by another'. The meaning of solidarity in the EU context is considered further in C. Barnard, 'Solidarity as a tool of new governance' in G. De Búrca and J. Scott (eds.), *New Governance and Constitutionalism in Europe and the US* (Oxford: Hart Publishing, 2006).

[313] See D. Miller, 'In defence of nationality' in D. Miller, *Citizenship and National Identity* (Cambridge: Polity Press), 2000, cited in N. Barber, 'Citizenship, nationalism and the European Union' (2002) 27 *ELRev*. 241, 250 who notes that it is an observable fact that nationality is the principal source of solidarity.

[314] Case C–184/99 *Grzelczyk* [2001] ECR I–6193, paras. 30–1; Case C–148/02 *Garcia Avello* [2003] ECR I–11613, paras. 22–3 and Case C–209/03 *Bidar* [2005] ECR I–2119, para. 31.

[315] *Grzelczyk*, para. 44; *Bidar*, para. 56 (emphasis added). Case C–413/99 *Baumbast* [2002] ECR I–7091, a case decided under Dir. 90/364 (now CRD), can also be explained in terms of solidarity, as Geelhoed AG noted in *Bidar*, para. 31.

[316] Para. 57.

[317] Para. 59. See also Geelhoed AG's remarks in Case C–413/01 *Ninni-Orasche* [2003] ECR I–13187, paras. 90–1. For an emphasis on the contextual approach which takes account of length of residence and degree of integration, see Ruiz-Jarabo Colomer AG's opinion, in Case C–138/02 *Collins* [2003] ECR I–2703, paras. 65–7.

Thus, the Court seems to be adopting a 'quantitative' approach to equality:[318] the longer migrants reside in the Member State, the more integrated they are in that state and the greater the number of benefits they receive on equal terms with nationals.[319] So, the cases appear to span a spectrum: at one end is *Martínez Sala*, a long-term resident (she had lived in Germany for 25 years and had two children there), fully integrated into the host state. She enjoyed full equal treatment (the payment of the child benefit on exactly the same terms as nationals). Having spent most of her life in Germany, she benefited from the principle of solidarity, possibly even national solidarity, and thus enjoyed full equal treatment on the same terms as nationals.

At the other end of the spectrum are those migrant citizens, like *Collins*[320] who have just arrived in the host state. While Article 21(1) gives them the right to move and reside freely in the host state,[321] they are not entitled to equal treatment in respect of social assistance benefits (e.g., the minimex) because they are not yet integrated into the host state's community and thus no solidarity exists (of either the national or transnational variety), although they might receive some social advantages on a non-discriminatory basis.[322] In the middle of this spectrum lies Grzelczyk who was only partially integrated into the society of the host state and so enjoyed only limited equal treatment (he received the minimex on the same terms as nationals but only until he became an unreasonable burden on public funds when his right of residence could be terminated).[323] *Bidar* probably falls somewhere between *Martínez Sala* and *Grzelczyk* on the spectrum. Like Grzelczyk, Bidar had been resident in the UK for three years; unlike Grzelczyk his integration was qualitative as well as quantitative: his surviving family lived in the UK, he had attended a British school, and he was about to go to a British university. His life was in the UK, just as Martinez Sala's was in Germany. When viewed in this light, the decision in *Bidar* that he should enjoy access to maintenance grants and loans on the same terms as nationals seems fair and right.

The 'quantitative' approach to equality is reflected in the Citizens' Rights Directive 2004/38 which, as we have seen, envisages three groups of migrants (fig. 12.2).[324] The first group (up to three months)[325] enjoy a general right to equal treatment[326] but not in respect of social assistance and student finance.[327] The second group (three months to five years) enjoys equal treatment even in respect of social assistance (albeit subject to the justification of requiring a real link with the territory of the host state in the case of an indirectly discriminatory rule).[328] However, host Member States are not obliged to provide them with student grants or loans unless they are economically active or assimilated thereto.[329] The third group (generally those residing in the host state for more than five years) enjoy full equal treatment,[330] including equal treatment in respect of student maintenance.

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[318] This is sometimes referred to as the 'affiliation model': see O. Golynker, 'Job Seekers' Rights in the European Union: Challenges of Changing the Paradigm of Social Solidarity' (2005) 30 *ELRev*. 111, 118–119.

[319] Kokott AG, 'EU citizenship: Citoyens sans frontiers', *Durham European Law Institute European Law Lecture* 2005, 13.

[320] Case C–138/02 *Collins* [2003] ECR I–2703, especially para. 69. See esp. Ruiz-Jarabo Colomer AG's Opinion (para. 76): Union law did not require the benefit to be provided to a citizen of the Union who entered the territory of a Member State with the purpose of seeking employment while lacking any connection with the state or link with the domestic employment market.

[321] See also Geelhoed AG Case C–413/01 *Ninni-Orasche* [2003] ECR I–13187.

[322] E.g., Case C–274/96 *Bickel and Franz* [1998] ECR I–7637 translation services for a court hearing.

[323] See also Case C–413/99 *Baumbast and R* [2002] ECR I–7091.

[324] Cf. A.Somek, 'Solidarity decomposed: Being and time in European citizenship' (2007) 32 *ELRev.* 787.

[325] Art. 6.

[326] Art. 24(1).

[327] Art. 24(2).

[328] Art. 24(1). On the 'real link' test: Joined Cases C–22/08 and 23/08 *Vatsouras* [2009] ECR I–000, paras 38–40 and C. O'Brien 'Real links, abstract rights and false alarms: The relationship between the ECJ's "real link" case law and national solidarity' (2008) 33 *ELRev*. 643.

[329] Art. 24(2). The Dir. draws no distinction between those coming to the host state *qua* student and those not coming in this capacity.

[330] Art. 24(1).

The qualitative approach to integration can also be found in the directive, albeit not in the context of establishing rights to equal treatment in respect of length of residence but in respect of an expulsion decision. Under Article 28 the host State must take account of considerations such as 'how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin'[331] when deciding whether to expel an individual.

(c) Tax advantages

It was only in the mid 2000s that cases began to arise concerning EU citizens alleging that tax rules, often those of the state of origin, constituted an impediment to/restriction on their rights of free movement. These arguments coincided with a more general shift by the Court from the discrimination model towards the restrictions approach in the field of taxation, a move documented in detail in Chapters 9 and 10. As we saw above, *Pusa*,[332] a tax case, appeared to endorse this development in the field of citizenship.

Pusa concerned a Finnish pensioner living in Spain who owed money in Finland. An attachment order was made against his pension for the purpose of recovering the debt. Had he resided in Finland, the income tax he owed would have been deducted first in order to calculate what was left of his monthly pension to which an attachment order could have been made. However, since he resided in Spain, no such initial deduction was made. The Court ruled that the difference in treatment unjustifiably resulted in Mr Pusa being 'placed at a disadvantage by virtue of exercising his right to move and reside freely'[333] contrary to Article 21(1). This reasoning was also followed in *Schwarz*[334] concerning German children attending a school for the exceptionally gifted and talented in Scotland. Their parents did not get tax relief on the schooling; had the children been educated in Germany, the parents would have received the tax relief. The Court said that the German rule disadvantaged the children of nationals merely by reason of the fact that they had exercised their freedom of movement and this obstacle could not be justified.

Pusa and *Schwarz* concerned challenges by nationals who had exercised their rights of free movement against the home state; *Rüffler*[335] concerned a challenge by a migrant citizen to host state tax laws. It concerned a German claimant who retired to Poland where he lived on his German pension. Under Polish law only contributions paid to a Polish health insurance body were tax deductible. Because Mr Rüffler paid his contributions to a German body he did not benefit from the tax advantage. The Court found that the situation of a retired (German) taxpayer resident in Poland and receiving pension benefits paid under the compulsory health insurance scheme of another Member State, and that of a Polish retired person also resident in Poland but receiving his pension under a Polish health insurance scheme, were comparable since both were subject to an unlimited liability to tax in Poland. The Court then found that because the Polish rules disadvantaged taxpayers, like Mr Rüffler, who had exercised their freedom of movement to take up residence in Poland,[336] they therefore constituted 'a

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[331] See also Joined Cases C–482/01 and C–493/01 *Orfanopoulos* v. *Land Baden-Württemberg* [2004] ECR I–5257, para. 99: 'To assess whether the interference envisaged is proportionate to the legitimate aim pursued, in this instance the protection of public policy, account must be taken, particularly, of the nature and seriousness of the offences committed by the person concerned, the length of his residence in the host Member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country of origin of the person concerned.'

[332] Case C–224/02 *Pusa* [2004] ECR I–5763.

[333] Para. 31. See also Case C–520/04 *Turpeinen* [2006] ECR I–10685. See also Case C–152/05 *Commission* v. *Germany (subsidy on dwellings)* [2008] ECR I–39, para. 30

[334] Cases C–76/05 and C–318/05 *Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I–6847. See also Case C–318/05 *Commission* v. *Germany (School Fees)* [2007] ECR I–6957.

[335] Case C–544/07 *Rüffler* v. *Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu* [2009] ECR I–000.

[336] Para. 72.

restriction on the freedoms conferred by Article [21(1)] on every citizen of the Union'[337] which could not be justified.

While the restrictions approach is an effective way of subjecting national tax rules which hinder free movement to review under Union law, this model sits uncomfortably with the international tax law principles of fiscal sovereignty and territoriality. As previous chapters have shown, the Court has more recently developed its understanding of the implications of these principles for its analysis,[338] with the result that it has tended to revert to the discrimination approach. The citizenship tax cases are no exception, as *Lindfors*[339] and *Schempp*[340] made clear. In these cases the Court said that mere difference between the tax regime of one Member State and another was not sufficient to trigger Article 21(1); migrant citizens had to show that they had suffered disadvantage in comparison with nationals. *Schempp* also emphasized that the claimant and the comparator had to be similarly situated. On the facts the Court ruled that the situation of Mr Schempp, a German national, who made maintenance payments to his former spouse now resident in Austria which were not tax deductable, was not comparable with the situation of a German national who made equivalent payments to a former spouse resident in Germany which were tax deductible. There was therefore no breach of the principle of non-discrimination.

2.6 Specific Rights for Family Members

So far we have concentrated on the meaning of equal treatment in the general context of Article 24 CRD and under Article 21(1) TFEU. The CRD, together with Regulation 492/2011, lays down specific rights for families. Not only will they enjoy the right to equal treatment in respect of social advantages, as we have already seen, but also in respect of the right to work, schooling, and housing.

(a) Equal treatment and the right to work for family members

Article 23 of Directive 2004/38 permits the Union citizen's family members who have the right of residence or the right of permanent residence to take up employment or self-employment in the host state (but not in any other state[341]), irrespective of the nationality of the family member.[342] These family members will enjoy equal treatment in respect of their terms and conditions of employment, as well as dismissal rights under Article 24(1) CRD.

(b) Equal treatment and schooling

With a view to encouraging the integration of migrant children into the society of the host state,[343] Article 10 of Regulation 492/2011 requires the children of an EU national who is, or has been, employed in another Member State to be admitted to that state's general educational, apprenticeship, or vocational training courses.[344] This provision remains in Regulation 492/2011 and has not been replicated in the CRD 2004/38. Strictly speaking, the right therefore extends only to the children of *workers*.

Member States are obliged to encourage these children to attend such courses and, if necessary, make special efforts to ensure that the children can take advantage of educational and training facilities on an equal footing with nationals.[345] The reference to 'children' includes not only school age children

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337 Para. 73.
338 See further Chs. 9 and 10.
339 Case C–365/02 *Lindfors* [2004] ECR I–7183, para. 34.
340 Case C–403/33 *Schempp* v. *Finanzamt München* [2005] ECR I–6421, para. 45.
341 Case C–10/05 *Mattern* v. *Ministre du travail et de l'Emploi* [2006] ECR I–3145, para. 27.
342 Case 131/85 *Gül* v. *Regierungspräsident Düsseldorf* [1986] ECR 1573.
343 Case 9/74 *Casagrande* v. *Landeshauptstadt München* [1974] ECR 773, para. 7.
344 These are to be read disjunctively: Joined Cases 389 and 390/87 *Echternach and Moritz* [1989] ECR 723.
345 Case 9/74 *Casagrande* [1974] ECR 773, para. 8. Council Dir. 77/486/EEC ([1977] OJ L199/139) on the education of migrant workers' children requires that free tuition is available, including the teaching of the official language of the host state (Art. 2) and that the host state must promote the teaching of the children's mother tongue and culture (Art. 3). This applies equally to children with a disability: Case 76/72 *Michel S.* [1973] ECR 457, paras. 15–16.

but also those over the age of 21 who are no longer dependent on the working parent. In *Gaal* [346] the Court refused to make a link between the limitations imposed in the original Article 10 of Regulation 1612/69 (identification of family members) and the rights contained in the new Article 10 of Regulation 492/2011. It said that the principle of equal treatment required that the children of migrant workers should be able to continue their studies in order to be able to complete their education successfully.

Article 10 says that admission for migrant workers' children to education and training must be on the same conditions as for nationals. The reference to 'same conditions' is broadly construed. In the early case of *Casagrande*[347] the Court ruled that the term 'conditions' extended to 'general measures intended to facilitate educational attendance', including a grant for maintenance and training. Therefore, it was unlawful for the German authorities to refuse a monthly maintenance grant payable to school age children to the daughter of an Italian working in Germany. The right to a maintenance grant applies even where the children decide to receive their education in their state of origin. For this reason the Court ruled in *Di Leo*[348] that the German authorities could not refuse a grant to the daughter of an Italian migrant worker employed in Germany for 25 years on the grounds that she wished to study medicine in her state of origin (Italy).[349]

The importance of the right to education was emphasized in *Baumbast*[350] which concerned a German national who had been working in the UK. Relying on his rights under Regulation 492/2011 he had brought his Colombian wife and children with him to the UK. However, when he ceased working the British authorities refused to renew his residence permit or those of his family with the result that the children could not complete their education in the UK. The Court found that the UK's decision breached Article 45 because, as the Court explained, to prevent a child of an EU citizen from continuing his education in the host state might 'dissuade that citizen from exercising the rights to freedom of movement laid down in Article [45] and would therefore create an obstacle to the effective exercise of the freedom thus guaranteed by the [EU Treaties]'.[351] For much the same reason in *R*[352] the children of an American woman and her French husband who worked in the UK were entitled to carry on their education in the UK, even though the parents were divorced and the children were living with their mother (a non-EU national).[353]

If the children of migrants can continue receiving their education in the host state, then in order to be able to enjoy that right they need someone to look after them. This was confirmed in *Baumbast and R*. Reading Article 10 of Regulation 492/2011 in the light of the requirement of respect for family life under Article 8 ECHR, the Court said the right conferred by Article 10 'necessarily implies' that the child has the right to be accompanied by the person who is his primary carer and who is entitled to reside with the child during his studies,[354] notwithstanding that the carers might not have had independent rights under EU law[355] because they are TCNs.[356] This case law has now been codified by Article 12(3) CRD.

In *Ibrahim*[357] the Court put together *Gaal* and *Baumbast* to conclude that the children of a national of a Member State (Denmark), who works or has worked in the host Member State (the UK),

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346 Case C–7/94 *Landesamt für Ausbildungsforderung Nordrhein-Westfalen* v. *Gaal* [1995] ECR I–1031.
347 Case 9/74 [1974] ECR 773.
348 Case C–308/89 *Di Leo* v. *Land Berlin* [1990] ECR I–4185.
349 Para. 12.
350 Case C–413/99 [2002] ECR I–7091.
351 Para. 50.
352 Case C–413/99 [2002] ECR I–7091.
353 Paras. 60–2.
354 Para. 73.
355 Para. 71.
356 See also Case C–200/02 *Chen* v. *Secretary of State for the Home Department* [2004] ECR I–9925.
357 Case C-310/08 *London Borough of Harrow* v. *Ibrahim* [2010] ECR I–000.

and the TCN parent who is their primary carer can claim a right of residence in the UK on the sole basis of Article 10, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State. In *Teixeira*[358] the Court added that the right of residence in the host Member State of the parent who was the primary carer for a child of a migrant worker, where that child was in education in that State, was not conditional on one of the child's parents having worked as a migrant worker on the date on which the child started in education. It also said that the right of residence in the host Member State of the parent who was the primary carer for a child of a migrant worker, where that child was in education, ended when the child reached the age of majority, unless the child continued to need the presence and care of that parent in order to be able to pursue and complete his or her education.

(c) Equal treatment and housing

Originally, Article 10(3) of Regulation 1612/68 provided that workers were obliged to have available for their families 'housing considered as normal' for national workers in the region where they are employed. According to *Diatta*,[359] the purpose of Article 10(3) was both to implement public policy and to protect public security by preventing immigrants from living in precarious conditions.[360] In *Commission* v. *Germany*[361] German law required family members of EU migrant workers to have appropriate housing not only upon their arrival but also for the duration of their residence. The Court said that the German law went too far and that Article 10(3) applied solely when the worker and his family were first reunited. Once the family had been brought together the position of the migrant worker was no different from that of a national. Article 10(3) was deleted by the CRD and not replaced.

2.7 The Relationship between the CRD and the Treaties

It is clear that Directive 2004/38 lays down some significant rights for migrants and their families. However, the relationship between the CRD, the relevant Treaty provisions, and the case law is by no means clear, especially in the field of services. Of course, any interpretation of the Treaties—the principal source of rights—will prevail over the directive but, as we saw in Chapter 11, in the field of healthcare services the Court may try to steer its interpretation of the Treaties so as to bring them in line with the requirements of the directive. Alternatively, the Court might say, as it has on several occasions in respect of, for example Regulation 492/2011 on workers,[362] that the secondary measure merely makes explicit the principles formulated by the Treaties and so simply applies the Treaties.

Figure 12.4 shows how the various Treaty provisions and the directive might interact:

• If a worker's case is at issue, Article 45 is the relevant Treaty provision, supplemented by Regulation 492/2011 and, to a certain extent, the CRD.[363]

• If an establishment case is at issue, Article 49 is the relevant Treaty provision, supplemented by the CRD.

• If a services case is at issue, Article 56 is the relevant Treaty provision. Strictly speaking the CRD has no direct relevance in the field of services. However, for service providers/ recipients migrating to another Member State for less than three months, their position is indistinguishable from any other

[358] Case C-480/08 *Teixeira* v. *London Borough of Lambeth* [2010] ECR I–000.
[359] Case 267/83 [1985] ECR 567.
[360] Ibid., para. 10.
[361] Case 249/86 [1989] ECR 1263.
[362] See, e.g., Case C–278/03 *Commission* v. *Italy* [2005] ECR I–3747, para. 15; Case C–465/01 *Commission* v. *Austria* [2001] ECR I–8291, para. 25.
[363] The continued application of Reg. 1612/68 (now 492/2011) after the coming into force of the CRD is confirmed in Case C-310/08 *Ibrahim* [2010] ECR I–000, para. 45.

migrant citizen who can rely on Article 6 CRD.[364] Beyond three months, service providers could argue that they are persons of independent means and so rely on the provision in Article 7 CRD.

• If the migrant is a person of independent means or a student then they will enjoy rights under Article 21(1) TFEU and Article 7 CRD provided that they satisfy the conditions concerning sufficient resources and sickness insurance.

• A non-economically active migrant continues to be in the most precarious position. For the first three months of their stay they will enjoy the rights laid down by Article 6 CRD, albeit with limits on the rights to equality that they will enjoy (see fig. 12.3) and on condition they do not become an unreasonable burden on the social assistance system of the host state. Over and above three months but less than five years, they will be dependent on any rights given by Article 21(1) TFEU.

Fig. 12.4 Summary of the sources of legal rights for individuals who move to another Member State

This analysis suggests that the CRD fills in some of the interstices between the Treaty provisions but its coverage is far from complete. For this reason, litigants will inevitably invoke Article 21(1) in the hope that it may offer greater protection than the directive. As we have already seen, the Court has in the past been prepared to make creative use of the status of Union citizenship to ensure that it is 'not merely a hollow or symbolic concept'.[365] In particular, it has used the advent of Union citizenship to require a rethink of the orthodox case law on the Union provisions on free movement of persons,[366] as well as to strike down national rules which distinguish between nationals and migrants,[367] and between nationals who have migrated and those who have not.[368] It has also used citizenship to justify limiting the limits to the 1990 Residence Directives (now Article 7 CRD) by applying the principle of proportionality in a rigorous fashion.[369]

That said, if experience to date is anything to go by, the Court will decide cases, as far as possible, on the basis of Articles 45, 49, and 56;[370] only where this proves impossible will it resort to Articles 20 and 21(1) (e.g., *Martínez Sala*, *Grzelczyk*, *Baumbast*).[371] In some cases it provides an answer based on Articles 45, 49, or 56 in respect of economic actors and Article 21 in respect of non-economic actors (e.g., *Morgan*).[372] Yet even where the case is decided on the basis of Articles 45, 49, and 56 the Court may take into account citizenship-type principles. For example, its decision in *Carpenter*[373] (concerning the position of the Filipino wife of a British service provider), handed down shortly before *Baumbast* and *Akrich,*[374] can probably best be seen as a citizenship case, with its strong overlay of human rights protection.

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[364] This is the view the Court appears to take in Case C–215/03 *Oulane* v. *Mininster voor Vreemdelingenzaken en Integratie* [2005] ECR I–115, paras. 19–20. See Art. 17(8) of the Services Dir. 2006/123 ([2006] OJ L376/36) which gives precedence to the CRD.

[365] Per Geelhoed AG in Case C–209/03 *Bidar* [2005] ECR I–2119, para. 28.

[366] Case C–138/02 *Collins* [2003] ECR I–2703, para. 63.

[367] Case C–456/02 *Trojani* v. *CPAS* [2004] ECR I–7573.

[368] Case C–224/98 *D'Hoop* [2002] ECR I–6191.

[369] See also Case C–413/99 *Baumbast* [2002] ECR I–7091 and Case C–200/02 *Chen* [2004] ECR I–9925 considered in detail in Ch. 13.

[370] Case C–100/01 *Olazabal* [2002] ECR I–10981, considered further in Ch. 13 where the Court noted that Art. 21 'finds specific expression in Article 45 of the [Treaties]' in relation to the free movement of workers. The Court said that since the facts of the case fell within the scope of Art. 45, it was not necessary to rule on the interpretation of Art. 21. See also Case C–348/96 *Calfa* [1999] ECR I–11, para. 30; Case C–392/05 *Alevizos* v. *Ipourgos Ikonomikon* [2007] ECR I–3505, para. 80; Case C–152/05 *Commission* v. *Germany (subsidy for housing)* [2008] ECR I–39, para. 18.

[371] Although cf. Case C–274/96 *Bickel and Franz* [1998] ECR I–7637; Case C–135/99 *Elsen* [2000] ECR I–10409. See N. Reich and S. Harbacevica, 'Citizenship and family on trial: A fairly optimistic overview of recent court practice with regard to free movement of persons' (2003) 40 *CMLRev*. 615, 627.

[372] See also Case C–345/05 *Commission* v. *Portugal (exemption from capital gains tax*) [2006] ECR I–10633; Case C–104/06 *Commission* v. *Sweden (deferral of capital gains tax*) [2007] ECR I–671.

[373] Case C–60/00 [2002] ECR I–6279, paras. 40–1, considered further in Ch. 8; Case C–291/05 *Eind* [2007] ECR I–10719. See, in a similar vein, Case C–117/01 *KB* v. *National Health Service Pensions Agency* [2004] ECR I–541.

[374] Case C–109/01 *Akrich* [2003] ECR I–9607, paras. 58–9 (where *Carpenter* was cited).

D. MEMBERSHIP

So far we have concentrated on the first strand of David Held's citizenship matrix, rights (and duties). The rights for migrants are extensive. It is, however, surprising, how little reference is made to duties for those migrants. This suggests a structural imbalance in the EU's notion of citizenship. However, it may be that some elements of the notion of duty can be detected through the third strand of citizenship, participation, particularly in respect of getting involved in the process of holding the administration to account. It is less apparent in respect of the second strand, membership to which we now turn.

As far as membership is concerned, it has a legal and psychological dimension. The formal, legal indicator of membership is nationality. Nationality demarcates the national from the alien; it is the manifestation of citizenship to the outside world and the juridical tie between the individual and the community.[375] Two consequences flow from nationality: the state assumes certain responsibilities for the individual holding its nationality and the individual is subject to the government of that particular state.

Nationality is also the principal indicator of membership for the EU. According to Article 20(1) TFEU, '[e]very person holding the nationality of a Member State shall be a citizen of the Union'. From this it is clear that it is the Member States, and not the EU, which are the gatekeepers to EU citizenship.[376] This was confirmed in *Kaur*,[377] where the Court said 'under international law, it is for each Member State, having due regard to [Union] law, to lay down the conditions for the acquisition and loss of nationality'.[378] Furthermore, the host Member State is not in a position to criticize another Member State's attribution of nationality.[379]

The significance of the additional observation made by the Court in *Kaur* that, when exercising their powers in the sphere of nationality, the Member States must have due regard to EU law, can be seen in *Rottmann*.[380] An Austrian national was accused of serious fraud in Austria. He moved to Germany and applied for naturalisation, without mentioning the proceedings against him in Austria. He was granted German nationality and, as a result, he lost his Austrian nationality under Austrian law. However, when the German authorities learned that he was the subject of judicial investigation in Austria, they sought to withdraw his naturalisation with retroactive effect. This decision risked rendering him stateless, as well as depriving him of his status as a citizen of the Union. The Court ruled:[381]

A decision withdrawing naturalisation because of deception corresponds to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special

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375 C. Closa, 'Citizenship of the Union and nationality of Member States' (1995) 32 *CMLRev*. 487.

376 This is confirmed by the Declaration on Nationality of a Member State appended to the TEU. In the case of a person with dual nationality, the Court ruled in Case C–369/90 *Micheletti* v. *Delagación del Gobierno en Cantabria* [1992] ECR I–4239, para. 10 that if a person was able to produce one of the documents referred to in Council Dir. 73/148/EEC ([1973] OJ L172/14) (now CRD) to prove they were nationals of one Member State, other Member States were not entitled to dispute that status on the ground that the persons concerned were also nationals of a non-Member State, the nationality of which took precedence under the host state's law.

377 Case C–192/99 *R*. v. *Secretary of State for the Home Department, ex p. Kaur* [2001] ECR I–1237 noted by H. Toner (2002) 39 *CMLRev*. 881.

378 Para. 19. The conditions might include a period of residence, birth, and family ties. See J. Shaw, 'Citizenship and enlargement: The outer limits of EU political citizenship' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009) who describes the difficulties facing the substantial populations of non-nationals in the new EU states following the break-up of former states (the Soviet Union and Yugoslavia) resulting in minorities not holding national citizenship of the host state and thus not benefitting from EU rights. She also points out that in Estonia, Latvia, and Lithuania there are high barriers to becoming a national citizen for a resident non-national, including strict language tests.

379 Case C–200/02 *Chen* [2004] ECR I–9925. See also B. Kunoy, 'A union of national citizens: The origins of the court's lack of *avant-gardisme* in the *Chen* case' (2006) 43 *CMLRev*. 179.

380 Case C–135/08 *Rottmann* v. *Freistaat Bayern* [2010] ECR I–000.

381 Para. 51.

relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality.
However, the Court continued that the national court had to ascertain whether the withdrawal decision observed the principle of proportionality in respect of the consequences for Rottmann in the light of EU law. It added that the principle of proportionality might include giving Rottmann a reasonable period of time to try to recover Austrian nationality.[382]

So far we have concentrated on the legal indicators of membership. The psychological dimension of membership is harder to articulate, but at its core lies a sense of belonging and identity. To a certain extent legal links can help foster a sense of 'common identity and shared destiny',[383] particularly in the EU where law has been so central to the integration process.[384] The EU has also been proactive in taking other steps to develop a sense of belonging—the EU flag, EU day (9 May), EU motto (United in diversity), and EU anthem ('Ode to Joy' from Beethoven's Ninth Symphony),[385] the red passport, the pink driving licence, town-twinning, and student mobility programmes (Erasmus/Socrates). Some commentators are dismissive of these top-down attempts to create a true European citizenship, arguing that they cannot overcome the historical legacy of market citizenship, which is essentially premised on self-interest.[386] Others are concerned that the continued emphasis on market citizenship excludes those who do not conform[387] and so, for many, citizenship undermines, rather than creates, a sense of identity at EU level. And for those who do not hold the nationality of one of the Member States exclusion may be total.

A further criticism of the creation of EU citizenship is that it comes at the expense of national or regional identity. The EU is at least aware of these concerns. Article 4(2) TEU requires the Union to respect 'the national identities of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government',[388] while Article 167 TFEU (ex Article 151 EC) requires the Union to contribute to the 'flowering of the cultures of the Member States, while respecting their national and regional diversity'.[389] Advocate General Jacobs picked up on the diversity theme in *Garcia Avello*,[390] noting that the intention of Article 21 TFEU was to allow free, and possibly repeated or even continuous, movement within a single 'area of freedom, security and justice' (AFSJ), in which 'both cultural diversity and freedom from discrimination' are ensured. The Court reached similar conclusions in the same case, reasoning that the Belgian practice of refusing to change a child's surname to reflect the Spanish pattern was 'neither necessary nor even appropriate for promoting the integration within Belgium of the nationals of other Member States'.[391]

The AFSJ introduced at Amsterdam, to which Advocate General Jacobs referred, is part of the EU's response to concerns about exclusion, especially of TCNs, and failure to recognise the diversity of states in the EU. According to Article 67(1) TFEU:

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382 Paras. 55–9.
383 Jacobs AG in Case C–92/92 and 326/92 *Phil Collins* [1993] ECR I–5145, para. 11.
384 See M. Cappelletti, M. Seccombe, and J. H. H. Weiler (eds.), *Integration through Law* (Berlin: De Gruyter, 1985).
385 These were listed in Art. I–8 of the Constitutional Treaty under the heading 'The symbols of the Union'. Many thought that the EU had gone too far with these trappings of statehood and the symbols were dropped from the Lisbon Treaty.
386 S. Douglas-Scott, *Constitutional Law of the European Union* (Harlow: Longman, 2002), 492.
387 Everson, above n. 1.
388 See also the Union's approach to subsidiarity as laid down in Art. 5(3) TEU and Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, and Protocol (No. 3) on the role of national parliaments in the European Union. See further Ch.16.
389 See also Art. 3(3) TEU: The Union shall 'respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'. In Case C–288/89 *Stichting Collectieve Antennevoorziening Gouda* v. *Commissariaat voor de Media* [1991] ECR I–4007, para. 13 the Court took the 'social, cultural, religious and philosophical' diversity of the Netherlands into account (see Case Study 11.2). See also Case 379/87 *Groener* v. *Minister for Education* [1989] ECR 3967, considered in Ch. 9.
390 Case C–148/02 *Garcia Avello* [2003] ECR I–11613, para. 72.
391 Para. 43.

The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

The subsequent paragraphs of Article 67 then consider freedom, security and justice in turn. Article 67(2) TFEU concerns freedom. It provides that the Union shall 'ensure the absence of internal border controls for persons and shall frame a common policy[392] on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals'.[393] Thus 'freedom' means free movement of EU nationals as well as 'fair' Union-based migration policies for TCNs. These latter policies are considered further in Chapter 14

Article 67(3) TFEU (ex Article 29 EU) concerns security:

The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia,[394] and through measures for coordination and cooperation between police[395] and judicial authorities[396] and other competent authorities,[397] as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

As we shall see in Chapter 14, the Hague Programme 2004–9 has prioritized the security agenda and is used to justify keeping out TCNs who might pose a threat to the security of EU insiders. This exclusionary policy serves to undermine the more integrationist stance envisaged by Article 67(2). Finally, Article 67(4) concerns justice and this is considered below.

The Commission is now attempting to locate the citizen more firmly at the heart of the AFSJ. In its 2009 Communication, *An Area of freedom, security and justice serving the citizen*,[398] it outlines a programme 'building a citizen's Europe' where 'All action taken in future should be centred on the citizen', focusing on four priorities: first, 'promoting citizens rights', emphasizing the role of fundamental rights, especially respect for the 'human person and human dignity, and for the other rights enshrined in the Charter. Data protection is particularly emphasized. Secondly, the Commission talks of a 'Europe of justice'. This is considered below. Thirdly, the priority of 'a Europe that protects' emphasizes the need for a domestic security strategy. The final strand, 'Promoting a more integrated society for the citizen—a Europe of solidarity', largely concerns the position of TCNs and is considered in the next chapter. These different policy strands fed into the adoption by the European Council of the Stockholm programme 2010–14, which is considered in Chapter 14. For present purposes, it is sufficient to note the European Council's continued emphasis on security. It says: 'The challenge will be to ensure respect for fundamental rights and freedoms and integrity while guaranteeing security in Europe.'[399] It continues: 'An internal security strategy should be developed in order to further improve security in the Union and thus protect the lives and safety of European citizens

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[392] This language is new but reflects the fact that the Tampere and Hague programmes have already called for this.

[393] The reference to the need to be fair to TCNs is also new. The para. continues that 'For the purpose of this Title, stateless persons shall be treated as third-country nationals'.

[394] See, e.g., Council Framework Decision 2008/913 ([2008] OJ L328/55) on combating certain forms and expressions of racism and xenophobia by means of criminal law.

[395] See, e.g., Council Dec. 2002/630/JHA establishing a framework programme on police and judicial cooperation in criminal matters (AGIS) ([2002] OJ L203/5); Council Dec. 2003/170/JHA on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States ([2003] OJ L67/27); Council Dec. 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime ([2008] OJ L210/1 and Council Dec. 2008/616/JHA implementing Dec. 2008/615/JHA ([2008] OJ L210/12) incorporating the Prüm Treaty into EU legislation, providing indirect access to Member States' databases on fingerprints and DNA information and access to vehicle registration data. See K. Lachmeyer, 'European police cooperation and its limits: From intelligence-led to coercive measures' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009).

[396] See eg the Council Framework Dec. 202/584/JHA on the European Arrest Warrant ([2002] OJ L190/20).

[397] See, e.g., Council Framework Dec. 2006/960/JHA ([2006] OJ L386/89) on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States.

[398] COM(2009) 262.

[399] European Presidency Conclusions 11 Dec. 2009, para. 26.

and tackle organized crime, terrorism and other threats.'[400] Thus, membership means for citizens that safety is the real priority.

E. PARTICIPATION

An important way of fostering a sense of belonging comes through participation in the life of the community. This is the third strand in Held's matrix of citizenship. In the Greek city state (polis) all citizens (for which read free men with property) actively participated in the legislative process. This is the fullest, richest, and most active kind of citizenship, underpinned by ideas of equality (at least among those allowed to participate). Viewed in this light, citizenship is a status, different from nationality, which requires active involvement by the citizen in shaping the polity. In the modern state the concept of democracy has evolved from participative democracy in the republican style (with all men participating) to representative democracy (where the people elect their representatives). Now the only active participation expected of citizens is to vote and possibly to stand as a candidate in elections.[401]

1. REPRESENTATIVE DEMOCRACY

1.1 Introduction

One of the distinguishing features of the Constitutional Treaty was its expressed commitment to democracy. This has survived in the Lisbon Treaty. The title on democratic principles begins, in Article 9 TEU, with a statement of commitment to the principle of democratic equality:

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies.

Article 10(3) TEU adds 'Every citizen shall have the right to participate in the democratic life of the Union.' The centrality of representative democracy to the EU is stated in Article 10(1) TEU: 'The functioning of the Union shall be founded on representative democracy.' Article 10(2) TEU then identifies the two routes by which the citizen's voice is heard at EU level: (1) directly, through their MEPs ('Citizens are directly represented at Union level in the European Parliament'); and (2) indirectly via Member State participation ('Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national parliaments,[402] or to their citizens').

Article 10(2) thus emphasizes the multi-faceted nature of representative democracy in the EU: while recognizing that the EU gains some legitimacy through direct elections to the European Parliament, the Article makes express the parallel legitimacy derived from elections to national parliaments which hold government ministers representing Member State interests in the EU to account. This indirect route to legitimacy is important since the turnout in elections to the European Parliament is so low. Article 10(4) TEU is intended to help to address this problem by encouraging the creation of pan-European political parties. It says 'Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.' Furthermore, the extension of the use of the 'ordinary legislative procedure' which gives equal say to the Parliament and Council,[403] including in controversial areas such as most of the AFSJ and the common commercial policy, means that the European Parliament does now really does count.

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[400] Ibid., para. 29.

[401] Although cf. Dec. 2010/37/EC on the European Year of Voluntary Activities promoting Active Citizenship [2010] OJ L17/43.

[402] National parliaments, too, have a greater role, especially in respect of ensuring compliance with the principle of subsidiarity: see Arts. 5(3) and 12 TEU and Protocol (No. 1) on the Role of National Parliaments in the European Union. See further S. Weatherill, 'Competence and legitimacy' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009), 30–1.

[403] The procedure is laid down in Art. 294 TFEU. The Council acts by qualified majority vote (QMV) save where Arts. 293–4 TFEU provide otherwise.

1.2 Elections to the European Parliament

The only democratically elected body in the EU is the European Parliament.[404] Article 8 of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage[405] provides that 'the electoral procedure shall be governed in each Member State by its national provisions'. However, neither the EU Treaties nor the 1976 Act defines who is entitled to vote and to stand as a candidate in elections to the European Parliament—questions which go to the core of 'the principles of democracy on which the Union is based'.[406] This was at issue in two important and complementary cases decided on the same day: *Spain* v. *United Kingdom* and *Eman*.[407] *Spain* v. *United Kingdom*, a rare example of an Article 259 TFEU (ex Article 227 EC) action, raised the question whether a Member State (the UK) was entitled to extend the right to vote in elections to the European Parliament to nationals of non-member countries resident in Europe (Gibraltar, a British Crown Colony which does not form part of the UK and to which only parts of Union law apply). The European Court of Human Rights had condemned the UK for failing to hold elections to the European Parliament in Gibraltar contrary to Article 3 of Protocol No. 1 of the Convention.[408] In response, the UK established a new electoral region which combined Gibraltar with an existing region in England (the South West) and created a special electoral register. Spain argued that the extension of the right to vote in elections to the European Parliament to people who were not citizens of the Union breached Union law. The Court disagreed. It said that the definition of those entitled to vote and stand as a candidate in elections to the European Parliament fell within the competence of each Member State and that EU law did not preclude a Member State from granting those rights to individuals who had close links to it, as well as to their own nationals or citizens of the Union resident in their territory.[409]

While *Spain* v. *UK* concerned a state extending the right to vote to non-nationals, *Eman* concerned the opposite situation: a state (the Netherlands) excluding certain categories of its own nationals resident in an overseas territory associated to the Union (OCT),[410] in this case Aruba, from the right to vote and to stand as a candidate in European elections. The Court said that individuals who held the nationality of a Member State and who lived or resided in a territory which was one of the OCTs could rely on the rights conferred on citizens of the Union.[411] However, the Court said that Article 22(2) TFEU on voting rights of *migrants* did not apply to a citizen of the Union residing in an OCT who wished to exercise his right to vote in the Member State of which he was a national.[412] On the other hand, the Court said that the Dutch authorities were nevertheless in breach of the principle of equal treatment because Dutch nationals resident in a non-member state did have the right to vote in European elections but Dutch nationals resident in the Netherlands Antilles or Aruba did not,[413] and that

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404 Art. 223 TFEU (ex Art. 190(4) EC).

405 Annexed to Council Dec. 76/787/ECSC, EEC, Euratom ([1976] OJ L278/1) as amended by Council Dec. 2002/772/EC, Euratom ([2002] OJ L283/1). See also Art. 39(2) of the Charter.

406 Tizzano AG in his Joined Opinion in Cases C–145/04 and C–300/04 *Kingdom of Spain* v. *United Kingdom of Great Britain and Northern Ireland; M.G. Eman and O.B. Sevinger* v. *College van burgemeester en wethouders van Den Haag* [2006] ECR I–7917.

407 Cases C–145/04 *Spain* v. *United Kingdom* [2006] ECR I–7917; C–300/04 *Eman and Sevinger* [2006] ECR I–8055 (noted L. Besselink (2008) 45 *CMLRev.* 787).

408 *Matthews* v. *United Kingdom*, no. 24833/94 [1999] ECHR I–251.

409 Para. 78. See also Case C–535/08 *Pignataro* [2009] ECR I–50*: the provisions on Union citizenship permit a national rule requiring a candidate for election to a regional assembly to reside in that region at the time of nomination.

410 Art. 355 TFEU (ex Art. 299(3) EC).

411 Paras. 27–9.

412 The Court justified this decision by reference to the case law of the European Court of Human Rights which had ruled that the criterion linked to residence was acceptable to determine who were entitled to the right to vote and to stand as a candidate in elections: *Melnychenko* v. *Ukraine*, no. 17707/02 ECHR 2004–X, paras. 56–7.

413 Para. 58.

the Dutch had failed to offer an objective justification for such difference in treatment.[414] For good measure, the Court also suggested that a remedy in damages should be available as a result of the breach of Union law.[415]

So far we have concentrated on the rights of *nationals* to vote and stand as a candidate in elections.[416] Article 22 TFEU permits *migrant* EU citizens to vote and stand as a candidate in elections for local[417] and European elections,[418] subject to 'derogations where warranted by problems specific to a Member State'. Two directives have been adopted to implement these rights which provide for equal treatment: migrant EU citizens have the right to vote and stand as a candidate in municipal or European elections provided they satisfy the same conditions as the host state imposes on its own nationals.[419] The flip side of the coin is that migrant citizens cannot participate in the most important elections—those for the national parliaments. This is a further example of the partial nature of EU citizenship.

1.3 Deliberative or Participatory Democracy

Many argue that, with turnout for European Parliament elections being so low, the EU still suffers from a serious democratic deficit. As part of its response, the Commission[420] issued a White Paper on Governance identifying five principles underpinning good governance: openness, participation, accountability, effectiveness, and coherence.[421] The White Paper also placed much emphasis on citizen participation as a way of supplementing representative democracy.[422] In the absence of an identifiable public space and a common language the chances of this happening are slim. More realistic is the possibility of citizen participation through alternative intermediaries, primarily 'civil society'.[423]

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[414] Para. 60.

[415] Para. 70.

[416] Cases C–145/04 *Kingdom of Spain* v. *United Kingdom of Great Britain and Northern Ireland* [2006] ECR I–7917, para. 76.

[417] See also Art. 40 of the Charter; Dir. 94/80/EC ([1994] OJ L368/38), as amended by Dir. 96/30/EC ([1996] OJ L122/14), laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals. See further J. Shaw, *The Transformation of Citizenship in the European Union: Electoral rights and the restructuring of political space* (Cambridge: CUP, 2007).

[418] See also Art. 40 of the Charter; Dir. 93/109/EC ([1993] OJ L329/34) on the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals. This directive provides that entitlement to vote and to stand as a candidate in the Member State of residence is conferred on people, who are citizens of the Union but who are not nationals of the Member State where they reside and who satisfy the conditions applicable to nationals of that state in respect of the right to vote and to stand as a candidate, and are not deprived of those rights in their home Member State. See P. Oliver, 'Electoral rights under Article 8b of the Treaty of Rome' (1996) 33 *CMLRev*. 473 and H. Lardy, 'The political rights of Union citizenship' (1996) 2 *EPL* 611.

[419] In practice, few take advantage of this possibility: only 11.9% of EU citizens resident in another Member State voted in the 2004 elections to the European Parliament: MEMO/06/484, Brussels, 13 Dec. 2006.

[420] Partly to lay to rest its own ghosts: see, e.g., Committee of Independent Experts, *First Report on Allegations Regarding Fraud, Mismanagement and Nepotism in the EC*, presented to the EP, 15 Mar. 1999. See also A. Tomkins, 'Responsibility and resignation in the European Commission' (1999) 62 *MLR* 744 and V. Mehde, 'Responsibility and accountability in the European Commission' (2003) 40 *CMLRev*. 423. See also Commission Communication, 'On a comprehensive EU policy against corruption' (COM(2003) 317).

[421] COM(2001) 428. For a detailed discussion of this document, see C. Joerges, Y. Mény, and J. H. H. Weiler (eds.), *Mountain or Molehill? A critical appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper No. 6/01 and the special edition of the *European Law Journal* (2002) vol. 8(1).

[422] Commission Discussion Paper, 'Commission and non-governmental organisations: Building a stronger partnership', COM(2000) 11: 'The decision-making process in the EU is first and foremost legitimized by the elected representatives of the European people. However, NGOs can make a contribution in fostering a more participatory democracy both within the European Union and beyond.'

[423] According to the Governance White Paper COM(2001) 428, 14, civil society includes the following: trade unions and employers' organizations ('social partners'); non-governmental organizations; professional associations; charities; grass-roots organizations; organizations that involve citizens in local and municipal life with a particular contribution from churches and religious communities. See K. Armstrong, 'Rediscovering civil society: The European Union and the White Paper on Governance' (2002) 8 *ELJ* 102.

According to the White Paper, it is civil society that 'plays an important role in giving voice to the concerns of citizens' and delivers 'services that meet people's needs'.[424] The value of the involvement of civil society is now acknowledged by Article 11 TEU (originally entitled 'The principle of participatory democracy' in Article I–47 of the Constitutional Treaty). Article 11(1) TEU provides that 'The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.' Article 11(2) TEU adds that the institutions must maintain an 'open, transparent, and regular dialogue with representative associations and civil society'.[425]

The Commission is now keen to formalize links with other bodies and, as part of this process, it has issued a Communication on minimum standards for consultation of interested parties by the Commission.[426] This is reinforced by Article 11(3) TEU which requires the Commission to carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.[427] In some sectors, dialogue with representative associations has already been formalized. For example, the Sixth Environment Action programme (2002–12) expressly recognized the need to empower citizens, and the measures proposed included extensive and wide-ranging dialogue with stakeholders in environmental policymaking.[428] This led to specific Union action programmes promoting non-governmental organizations active in the field of environmental policy.[429]

In the field of employment law and labour market regulation, the social partners (management and labour) are the interlocutors.[430] Their involvement was constitutionalized by Articles 154–5 TFEU[431] (ex Articles 138–9 EC) requiring the Commission to consult management and labour about whether there should be any legislation in the field and, if so, its content. Social partners can also negotiate collective agreements which can be given legislative effect by a Council 'decision'.[432] The European Parliament has no formal role in this process except the right to be 'informed'.[433] A number of directives have been adopted using this 'collective' route to legislation, including directives on parental leave, part-time work and fixed-term work.[434] When the validity of the Parental Leave Directive 96/34 was challenged in *UEAPME*[435] by an organization representing small and medium-

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[424] COM(2001) 428, 14.

[425] The Church and non-confessional organizations are singled out in Art. 17(3) TEU.

[426] Commission Communication, 'Towards a reinforced culture of consultation and dialogue: General principles and minimum standards for consultation of interested parties by the Commission' COM(2002) 704 upon which it had previously consulted (COM(2002) 277). See D. Obradovic and Alonso Vizcaino, 'Good governance requirements concerning the participation of interest groups in EU consultations' (2006) 43 *CMLRev*. 1049.

[427] See also Art. 15 TFEU: 'In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.'

[428] EP and Council Dec. 1600/2002 ([2002] OJ L242/1).

[429] See, e.g., EP and Council Dec. No. 466/2002/EC ([2002] OJ L75/1). See also Dir. 2003/35 ([2003] OJ L156/17), amending Dir. 85/337 ([1985] OJ L216/40) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and improving public participation and for provisions on access to justice contributing to the obligations arising under the Århus Convention considered in, e.g., Case C–427/07 *Commission* v. *Ireland* [2009] ECR I–000 and Case C–263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v.Stockholms kommun genom dess marknämnd* [2009] ECR I–000.

[430] C. Barnard, 'Governance and the social partners' (2002) 8 *ELJ* 80.

[431] See also Art. 152 TFEU: 'The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of the national systems. It shall facilitate dialogue between the social partners respecting their autonomy.'

[432] Art. 155(2) (ex Art. 139(2)). The term 'decision' is used in Art. 155(2) but has been interpreted to mean any legally binding act, in particular, directives.

[433] Art. 155(2) TFEU.

[434] Council Dir. 96/34/EC on Parental Leave ([1996] OJ L145/4) repealed and replaced by Council Dir. 2010/18/EU ([2010] OJ L68/13); Council Dir. 97/81/EC on Part-time Work ([1998] OJ L14/9); and Council Dir. 99/70/EC on Fixed-Term Work ([1999] OJ L175/43). See further C. Barnard, *EC Employment Law* (Oxford: OUP, 2006), Ch. 2.

[435] Case T–135/96 *Union Européenne de l'artisanat et des petites et moyennes entreprises* (*UEAPME*) v. *Council* [1998] ECR II–2335.

sized enterprises which had been excluded from the negotiation process, the General Court (formerly the Court of First Instance) endorsed this alternative 'collective' approach to lawmaking. It said that, in respect of measures adopted by the Council under the traditional legislative route, the democratic legitimacy was derived from the European Parliament's participation.[436] However, in respect of measures adopted under the collective route where the European Parliament had no role, the 'principle of democracy on which the Union is founded requires . . . that the participation of the people be otherwise ensured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council . . . with a legislative foundation at [Union] level'.[437]

But this broadening of the consultation and legislative process raises further problems of representativity (and accountability) of the interlocutors. To what extent do they really represent the views of their members and to what extent are these views more generally representative? This issue lay at the heart of UEAPME's challenge to the Parental Leave Directive.[438] The agreement on parental leave had been negotiated by the intersectoral social partners—UNICE (the European employers' association, now called BUSINESSEUROPE), CEEP (the public sector employers' association), and ETUC (the European trades union confederation). UEAPME argued that since the interests of small and medium-sized undertakings differed from those represented by UNICE, UEAPME should also have been at the negotiating table.

The General Court disagreed. It said that it was for the Commission to examine the representativity of the signatories to collective agreements and the Council had to verify whether the Commission had fulfilled this task. Where the degree of representativity was lacking the Commission and Council had to refuse to implement the agreement at Union level.[439] On the facts, the General Court found that the Commission and Council had fulfilled their task. Since the signatories were *general* cross-industry organizations with a general mandate, as distinct from cross-industry organizations representing *certain* categories of workers and undertakings with a specific mandate (the subgroup in which UEAPME was placed), they were sufficiently representative.[440] However, in the light of the problems in *UEAPME* the Commission said in its Governance White Paper that, in return for developing more extensive partnership arrangements, civil society organizations had to 'tighten up their internal structures, furnish guarantees of openness and representativity, and prove their capacity to relay information or lead debates in the Member States'.[441]

Broadening the range of actors involved in the legislative process has also been reflected in the debates leading to the two key constitutional developments in recent years, the Charter of Fundamental Rights and the Constitutional Treaty. For example, membership of the Convention, the body responsible for drafting the Charter was relatively broad, comprising representatives of the Member State governments (15), the Commission (1), the European Parliament (16), and national Parliaments (30), with observer status for representatives of the Council of Europe and the Court of Justice. Documents related to the process were available on the web, submissions were taken from NGOs, and the methods of working were more deliberative[442] (rather than secretive and intergovernmental which

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436 Para. 88.

437 Para. 89. See N. Bernard, 'Legitimising EU law: Is the social dialogue the way forward? Some reflections around the *UEAPME* case' in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Oxford: Hart Publishing, 2000).

438 See G. Britz and M. Schmidt, 'The institutionalised participation of management and labour in the legislative activities of the European Community: A challenge to the principle of democracy under Community law' (2000) 6 *ELJ* 45, esp. 66–7 and A. Adinolfi, 'Admissibility of action for annulment by social partners and "sufficient representativity" of European agreements' (2000) 25 *ELRev*. 165.

439 Para. 90.

440 Paras. 95–6.

441 COM(2001) 428, 17.

442 For an overview of the historical development of 'deliberative democracy' see 'Introduction' in J. Bohman and W. Rehg (eds.), *Deliberative Democracy: Essays on reason and politics* (Cambridge, Mass.:, MIT Press, 1997) and J. Elster, 'Introduction' in J. Elster (ed.), *Deliberative Democracy* (Cambridge: CUP, 1998).

has been characteristic of intergovernmental conferences (IGCs)).[443] However, as De Búrca notes, while the process may have been 'aimed at' the citizen, and a virtue made of the openness and novel nature of the process, this was not to be a genuinely participative process but one which, albeit deliberative in nature, was to be composed only of institutional representatives from the national and European level.[444] By contrast, the conclusion of the Lisbon Treaty bore all the hallmarks of a return to intergovernmentalism.

1.4 Direct Participation

Perhaps the most striking example of direct citizen participation is the introduction by the Lisbon Treaty of Article 11(4) TEU which provides that:

Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.[445]

Inserted as a last-minute addition to the text, this 'Citizens initiative' envisages active and direct participation of EU citizens in a way never before experienced in the EU. However, this provision itself poses a challenge to representative democracy. What if those million, a miniscule percentage of the EU's total population,[446] make a proposal (e.g., the expulsion of all black immigrants) wholly unacceptable to the liberal values on which the EU is based? Will this provision in fact expose the legislative system to unnecessary and undesirable influence?[447]

1.5 Conclusions

Despite the various attempts to make the EU more explicitly democratic many EU citizens were not convinced. The rejection of the Constitutional Treaty by the voters of France and the Netherlands in 2005 caused profound shock waves to reverberate across the EU. The voters of these two countries—founding members of the European project—sent out a strong message of their discontent. It is difficult to say for sure why the voters turned against a text whose aims were, according to the Laeken declaration,[448] to respond to citizens' calls for a 'clear, open, effective, democratically controlled [Union] approach' and to bring citizens closer to the 'European design'. Nevertheless, surveys have indicated that for those voting on the European issues (as opposed to those giving a bloody nose to the incumbent national government), their concerns ranged from specific fears generated by reading the text, in particular its perceived excessive market liberalism (i.e., it was 'too British'[449]), to more general concerns about the EU's expansion, both geographically and in terms of competence. Following a

[443] Similarly, the Convention on the Future of Europe involved in drafting the Constitutional Treaty was comprised of a president and two vice presidents, representatives of the Member States (15), the European Parliament (16), national Parliaments (30), the Commission (2), the accession countries (13) and from their Parliaments (26) and observers from the Committee of the Regions, the European ombudsman, and the social partners (13).

[444] G. de Búrca, 'The drafting of the European Union Charter of Fundamental Rights' (2001) 26 *ELRev*. 126, 131. See also A. Arnull, 'The future of the convention method' (2003) 28 *ELRev*. 573.

[445] The operational detail of this Article, including the minimum number of Member States involved, is to be fleshed out in accordance with the first para. of Art. 24 TFEU.

[446] See D. Chalmers, Editorial, 'Constitutional treaties and human dignity' (2003) 28 *ELRev*. 147 and Editorial Comments, 'Direct democracy and the European Union . . . is that a threat or a promise' (2008) 45 *CMLRev.* 929.

[447] The Commission seeks views on some of these thorny questions in its Green Paper on a European Citizens' Initiative: COM(2009) 622.

[448] <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf>.

[449] T. Garton-Ash, 'What is to be done: Blairism is the answer to Europe's ills but we need someone else to deliver it', *The Guardian*, 2 Jun. 2005, describing the French perception of the Constitutional Treaty as 'too much enlarged to include new countries, too Anglophone, and too enamoured of liberal-free market economics'.

period of reflection,[450] the states decided to repackage the Constitutional Treaty, stripping it of its most overt 'constitutional' garb, and readopt largely the same content as the Lisbon Treaty in 2007. This did not satisfy the Irish who rejected the revised Treaty in 2008. Following the second—and now positive—vote in Ireland in September 2009 and after prevarication in the Czech Republic, the Lisbon Treaty came into force in December 2009.

The whole saga does not reflect well on the Union's own democratic structures, despite various attempts by the Commission to engage with EU citizens, in particular through its 'Plan D for democracy dialogue and debate',[451] dovetailing with its 'Action plan to improve communicating Europe'.[452] This focuses on stimulating wider public debate and promoting citizens' participation in the democratic process. A decision has been adopted, now entitled 'Europe for citizens'[453] (replacing the original title 'Citizens for Europe',[454] a shift deemed psychologically significant in the light of the ratification crisis), establishing a programme promoting active European citizenship. This has been backed up by 'A citizens' agenda: Delivering results for Europe' [455] and attempts to engage the citizen in respect of social policy through the Commission's *Renewed Social Agenda: Opportunities, access and solidarity*.[456] However, many citizens remain to be convinced, a problem exacerbated by the deep financial crisis many states now find themselves in and a perception that the EU's response is not helping.

2. ACCESS TO JUSTICE

2.1 Access to Information

(a) Regulation 1049/2001

There is a further dimension to the right to participate: the need for citizens to have access to courts and other bodies to challenge decisions taken by the lawmakers.[457] First, however, they need to know what is going on. The right for citizens to gain access to information was given a Treaty basis at Amsterdam.[458] Article 15 TFEU (ex Article 255 EC) provides that any citizen of the Union *and* any natural or legal person residing or having a registered office in a Member State has a right of access to the documents of the Union institutions, bodies, offices, and agencies, whatever their medium,[459] subject to the principles laid down in Regulation 1049/2001[460] which are supplemented by rules of procedure for each institution.[461]

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[450] Declaration by the Heads of State or Government of the Member States of the European Union on the ratification of the Treaty establishing a Constitution for Europe, European Council, 16 and 17 Jun. 2005.

[451] COM(2005) 494.

[452] SEC(2005) 985.

[453] COM(2006) 542; EP and Council Dec. 1904/2006 establishing for the period 2007 to 2013 the programme 'Europe for Citizens' to promote active European citizenship ([2006] OJ L378/32), as amended.

[454] COM(2005) 116.

[455] COM(2006) 211.

[456] COM(2008) 412. See C. Barnard, 'Solidarity and the Commission's "renewed social agenda" ' in M. Ross and Y. Borgmann-Prebil (ed.), *Promoting Solidarity in the European Union* (Oxford: OUP, 2010).

[457] For the importance of this dimension, see A. Wiener and V. della Sala, 'Constitution-making and citizenship practice: Bridging the democracy gap in the EU?' (1997) 35 *JCMS* 595, 602–3.

[458] See also the Final Act of the Treaty on European Union signed at Maastricht on 7 Feb. 1992 where the Member States incorporated Decl. 17 on the right of access to information: 'The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration.' In Case C–58/94 *Netherlands* v. *Council* [1996] ECR I–2169, para. 35 the Court noted that Decl. 17 links the public's right of access to documents to the 'democratic nature of the institutions'.

[459] See also Art. 1(1) TEU; Art. 42 of the Charter of Fundamental Rights. This issue is considered further in D. Curtin, 'Citizens' fundamental right of access to EU information: An evolving digital *passepartout*' (2000) 37 *CMLRev*. 7.

[460] [2001] OJ L145/43. The regulation concerns access to *documents*, not to information more generally: Case T-264/04 *WWF European Policy Programme* v. *Council* [2007] ECR II–911, para. 76. A proposal for a revised measure can be found at COM(2008) 229. See M. de Leeuw, 'The regulation on public access to European Parliament, Council and Commission

In *Svenska Journalistförbundet*[462] the Court said that the objective of (the predecessor to) Regulation 1049/2001 was to give effect to the 'principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration'.[463] This point was emphasized in *Sweden v Council*[464] concerning the refusal by the Council to give access to an opinion of its legal service on a proposal for a directive laying down minimum standards for the reception of applicants for asylum. The General Court upheld the Council's decision; the Court of Justice set aside the General Court's judgment. In so doing, it noted the need for the Council to balance the particular interest to be protected by non-disclosure of the document against the public interest in the document being made accessible in the light of the advantages stemming 'from increased openness, in that this enables citizens to participate more closely in the decision-making process'[465] and confers 'greater legitimacy on the institutions in the eyes of European citizens'.[466] It said those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of the preamble to Regulation 1049/2001, according to which wider access must be granted to documents in precisely such cases. It continued:

Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.

However, a problem may arise where the information requested relates specifically to an individual. Regulation 45/2001[467] protects individuals with regard to the processing of personal data by the Union institutions and bodies. The interaction between this regulation and Regulation 1049/2001 was considered in *Bavarian Lager*.[468] Due to exclusive purchasing contracts binding a large number of operators of pubs in the UK requiring them to obtain supplies of beer from certain breweries, Bavarian Lager was not able to sell its product and complained to the Commission. A meeting was held with British officials, who agreed to amend their rules, but the Commission refused to allow Bavarian Lager to attend. Under Regulation 1049/2001 the Commission disclosed the minutes of the meeting to Bavarian Lager but blanked out the names of five people who had attended that meeting, arguing that Bavarian Lager had not established either an express and legitimate purpose or any need for such disclosure, as was required by the Regulation on the protection of personal data, and therefore, the exception concerning the protection of private life, laid down by the regulation on public access to documents, applied. However, the General Court annulled the Commission's decision and said that while the list of participants named in the minutes contained personal data, since the people who

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documents in the European Union' (2003) 28 *ELRev*. 324. For the Commission's own perspective, see its Green Paper, 'Public access to documents held by institutions of the European Community: A review' (COM(2007) 185).

[461] In addition, the EU has given effect to the Århus Convention to Union Institutions and Bodies (Reg. (EC) No. 1367/2006 (OJ [2006] L264/13)), which guarantees the public the right of access to environmental information held by the Union institutions and bodies. These must also make environmental information available to the public in easily accessible electronic databases.

[462] Case T–174/95 *Svenska Journalistförbundet* v. *Council of the European Union* [1998] ECR II–2289.

[463] Para. 66. The europa website (<http://www.europa.eu.int/>) provides free access to information about the EU and its policies; <http://www.eur-lex.europa.eu/en/index.htm> provides free access to all legislation, consultation documents, and the judgments of the Court of Justice.

[464] Joined Cases C–39/05 and C–52/05 *Sweden v Council* [2008] ECR I–4723.

[465] Para. 45.

[466] Para. 59. See also Case C–64/05 P *Sweden* v. *Commission* [2007] ECR I–11389, para. 54. For a more sceptical perspective, see D. Curtin, 'Through the looking glass: The myths of transparency in the European Union', *Durham European Law Institute Lecture* 2004.

[467] OJ [2001] L8/1. See also Art. 16 TFEU (ex Art. 286 EC).

[468] Case T–194/04 *The Bavarian Lager Co. Ltd v Commission of the European Communities* [2007] ECR II–4523. Currently on appeal (Case C–28/08P).

participated at that meeting did so as representatives of their organizations and not in a private capacity, the protection of privacy or integrity of the persons concerned was not compromised.[469]

(b) The principle of good administration

Article 9 TEU says that citizens shall 'receive equal attention from its institution, bodies, offices and agencies'. Article 10(3) TEU adds that decision-making process needs to be based on the principles of transparency and subsidiarity. This is operationalised in Article 15(2) TFEU which says that 'The European Parliament shall meet in public, as shall the Council when it is discussing and adopting a legislative proposal.'[470] The Council has put this into practice by amending its rules of procedure.[471]

Article 41 of the Charter of Fundamental Rights, entitled 'Right to good administration',[472] is more explicit. Article 41(1) contains the general principle that 'Every person [not just an EU citizen] has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.' Article 41(2) spells out more precisely what the right includes:

• the right of every person to be heard before any individual measure which would affect him or her adversely is to be taken

• the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy

• the obligation of the administration to give reasons for its decisions.

When things go wrong, Article 41(3) provides that every person has the right to have the Union make good any damage caused by the institutions or servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

2.2 Non-judicial Avenues

In practice, there are few cases where the Court has, in fact, been prepared to award compensation. This makes the non-judicial routes more important. EU citizens—together with natural or legal persons residing or having their registered office in a Member State—have the right under Article 24 TFEU (ex Article 21 EC) both to petition the European Parliament in accordance with Article 227 TFEU (ex Article 194 EC)[473] and to apply to the ombudsman in accordance with Article 228 TFEU (ex Article 195 EC).[474] They can write in any one of the Union languages and receive a reply in that language.[475] As with a complaint based on good administration under Article 41 of the Charter, a petition to the European Parliament is confined to matters affecting the complainant directly. There is no such limitation in respect of applications to the European ombudsman (nor in respect of access to information) which allows public-spirited citizens to raise matters of more general concern via this route. This range of rights and remedies is available in respect of breaches committed by *Union* institutions. The Treaty appears to offer no specific protection to citizens when faced with maladministration by *national* authorities exercising Union law powers.

2.3 Judicial Avenues

In respect of the courts, the EU envisages access at two levels: at European level to enable citizens to challenge decisions of the Union institutions and at domestic level to challenge decisions of the

[469] Paras. 125–6.

[470] See also Art. 16(8) TEU: 'The Council shall meet in public when it deliberates and votes on a draft legislative act'. By implication, the same transparency does not apply to non-legislative acts.

[471] For discussion on the merits of the change, see M. de Leeuw, 'Openness in the legislative process in the European Union' (2007) 32 *ELRev.* 295.

[472] See also Joined Cases C–154/4 and C–155/04 *R* v. *Secretary of State for Health, ex p. Alliance* [2005] ECR I–8419, para. 82.

[473] See also Art. 44 of the Charter. The Charter applies to residents as well as citizens.

[474] See also Art. 43 of the Charter. See generally K. Heede, 'Enhancing the accountability of Community institutions and bodies: The role of the European Ombudsman' (1997) 3 *EPL* 587.

[475] Art. 24(4) TFEU. See also Art. 41(4) of the Charter.

national authorities which interfere with Union law rights or to challenge the decisions of the EU institutions indirectly. In respect of remedies against national authorities, the Court has been active in guaranteeing Union rights, by developing the principles of direct effect and supremacy of Union law,[476] and the principles of effective judicial protection.[477] These proceedings complement the power to bring Article 258 TFEU (ex Article 226 EC) enforcement proceedings initiated by the Commission but often as a result of complaints by individuals about (in)action by Member States.[478] The Commission has made the complaints process more user-friendly.[479] However, the Court of Justice has been far more reticent about ensuring such full access to the Court by citizens when seeking to challenge the acts of the Union institutions directly. In its now (in)famous line of cases on *locus standi* for non-privileged applicants under Article 263 TFEU (ex Article 230 EC), the Court has ensured that only in the most exceptional circumstances will an individual be granted standing.[480] Interest groups, acting as intermediaries, have fared little better.[481] While the Court has emphasized that proceedings can be started in the national court and then a preliminary reference sought under Article 267 TFEU (ex Article 234 EC), as Advocate General Jacobs explained in *UPA*,[482] in certain circumstances this possibility is not available, leaving individuals without a remedy. While the amendments introduced by the Treaty of Lisbon to Article 263(4) have relieved the situation somewhat, in particular by allowing natural or legal persons to challenge 'regulatory acts' without having to show 'individual concern', the key phrase 'regulatory acts' remains undefined. The Lisbon Treaty has, however, re-emphasized the role of the Member States to provide 'remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[483] It therefore looks like Article 267 TFEU (ex Article 234 EC) references from the national court will remain the main route for natural and legal persons to challenge legislative acts.

The AFSJ deals with a third dimension to the question of justice: access to justice in cross-border disputes. Article 67(4) TFEU says: 'The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters.'[484]

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[476] Case 26/62 *NV Algemene Transport en Expeditie Onderneming Van Gend en Loos* v. *Nederlands Administratie de Belastingen* [1963] ECR 1; Case 6/64 *Costa* v. *ENEL* [1964] ECR 585. See also Decl. 17 concerning primacy added by the Lisbon Treaty.

[477] See, e.g., Joined Cases C–6/90 and C–9/90 *Francovich and Bonifaci* v. *Italy* [1991] ECR I–5357, Case 222/84 *Johnston* v. *RUC* [1986] ECR 1651; Joined Cases C–46 and 48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I–1029; Case C–432/05 *Unibet* v. *Justitiekanslern* [2007] ECR I–2271.

[478] See, e.g., Commission's 5th Report on Citizenship: COM(2008) 85, 9 where the Commission also emphasizes the value of the SOLVIT mechanism. SOLVIT helps EU citizens and businesses find fast and pragmatic solutions to problems arising from the incorrect application of EU law by national administrations, within a deadline of ten weeks. SOLVIT's case flow has increased from 12 to 70 new cases per month. The average resolution rate is around 80%.

[479] A notice containing a standard form for complaints to be submitted to the Commission ([1999] OJ C119/5) and a consolidated version of the internal procedural rules applicable to its relations with the complainant in the context of the infringement proceedings (COM(2002) 141) have been published by the Commission.

[480] Case C–50/00P *UPA* v. *Council* [2002] ECR I–6677. Cf. the strong Opinion of Jacobs AG to the contrary and the decision of the General Court in Case T–177/01 *Jégo Quéré & Cie SA* v. *Commission* [2002] ECR I–2365. For a general discussion see A. Albors-Llorens, 'The standing of private parties to challenge Community measures: Has the European Court missed the boat?' (2003) 62 *CLJ* 72.

[481] Case C–312/95P *Stichting Greenpeace Council (Greenpeace International)* v. *Commission* [1998] ECR I–1651.

[482] Case C–50/00P *UPA* v. *Council* [2002] ECR I–6677. See also Case C–131/03P *R.J. Reynolds Tobacco Holdings Inc*. v. *Commission* [2006] ECR I–7795, paras. 81–2.

[483] Art. 19(1), 2nd para TEU.

[484] This reflected Art. 61(c) EC but is expressed in wider terms to reflect current practice. Legislation has already been adopted under this provision. See, e.g., Council Reg. 743/2002 establishing a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters ([2002] OJ L115/1) (the UK and Ireland gave notice of their wish to participate in the adoption of the regulation; Denmark is not taking part); Council Dir. 2002/8/EC ([2003] OJ L26/41) on improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. The UK and Ireland gave notice of their wish to participate in the adoption of the directive; Denmark is not taking part.

This policy strand now goes by the name of 'a Europe of justice'. In its AFSJ Communication,[485] the Commission says that priority must be given to mechanisms that facilitate people's access to the courts so that they can enforce their rights, especially their contractual rights, throughout the Union.[486]

F. CONCLUSIONS

As Preuß put it, Union citizenship began as a terminological pooling of the few rights which the individual enjoyed in other Member States. It neither generated an inner bond between the Union and the individual nor did it presuppose such an inner connection as a precondition for acquiring it.[487] The recent developments, both legislative and judicial, suggest that the time may have come to reconsider this initial assessment. While it cannot be said that these developments have generated a 'European citizenry' which could 'pave the way for the transition to a European Federal State', they have certainly enriched the status of citizenship, by creating some bonds between individuals and the Union different from (but not stronger than) those which exist between individuals and their own Member States.[488] European citizenship does now allow individuals a multiplicity of associative relations based on manifold economic, social, cultural, scholarly, and even political activities, irrespective of the traditional territorial boundaries of the European nation states, without binding individuals to a particular nationality.[489]

The principle of solidarity has been particularly influential in that regard and here we can see a process of boot-strapping taking place—citizenship (imposed from above) is used to justify taking limited steps in the name of solidarity and solidarity is being used from the bottom up to foster a growing sense of citizenship. However, the Court has shown some awareness of the sensitivities of the issue, in particular concerns about 'benefit tourism'.[490] As a result, it has allowed Member States to insist on a demonstrable link with the host state's territory before an individual becomes entitled to benefits, whether it is through a period of residence as in *Bidar*, or a genuine link with the employment market of the host state as in *D'Hoop*. If it were otherwise then any enforced equality would have the potential to generate such hostility and anti-migrant feeling among host state nationals that, far from fostering a sense of Union citizenship, it could do the reverse. There is a risk that this is already happening in the field of higher education.[491]

There are increasing signs of this alienation from the EU which citizens have expressed in various referenda, in particular the French and Danish votes on the Maastricht Treaty, the initial Irish 'no' to the Nice Treaty, the French and Dutch 'no' votes to the Constitutional Treaty, and the initial Irish 'no' to the Lisbon Treaty. Weiler puts this point succinctly: 'as the [Union] has grown in size, in scope, in reach and despite a high rhetoric including the very creation of "European citizenship" there has been a distinct disempowerment of the individual European citizen, the specific gravity of whom continues to decline as the Union grows'.[492] Is there a way forward? Weiler advocates that EU citizenship should be understood as a supranational construct grounded in belonging simultaneously to

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[485] COM(2009) 262, 2.

[486] See, e.g., Reg. (EC) No. 861/2007 establishing a European Small Claims Procedure ([2007] OJ L199/1); Reg. 1896/2006 creating a European order for payment procedure ([2006] OJ L399/1); Reg (EC) No. 593/2008 ([2008] OJ L177/6) on the law applicable to contractual obligations (Rome I); Reg (EC) No. 1393/2007 ([2007] OJ L324/79) on the service in the Member States of judicial and extrajudicial documents; Dir. 2008/52/EC ([2008] OJ L136/3) on certain aspects of mediation in civil and commercial maters.

[487] U. Preuß, 'Problems of a concept of European citizenship' (1995) 1 *ELJ* 267.

[488] Ibid., 268.

[489] Ibid.

[490] That is 'moving to a Member State with a more congenial social security environment': Case C–456/02 *Trojani* [2004] ECR I–7573, Geelhoed AG's Opinion, para. 13 (and see para. 18). See also his Opinion in *Bidar* in para. 66.

[491] C. Barnard, 'EU citizenship and the principle of solidarity' in Dougan and Spaventa (eds.), *Social Welfare and EU Law* (Oxford: Hart Publishing , 2005). See also C. Newdick, 'Citizenship, free movement and health care: Cementing individual rights by corroding social solidarity' (2006) 43 *CMLRev.* 1645.

[492] J. H. H. Weiler, 'The European Union belongs to its citizens: Three immodest proposals' (1997) 22 *ELRev*. 150.

two different *demoi* based on different subjective factors of identification.[493] At one and the same time, he argues, individuals can, say, be British nationals, based on a strong sense of cultural identification and belonging, and also European citizens, based on, first, an acceptance of the legitimacy and authority of decisions made by fellow European citizens (underpinned by the 'social contract' of the common Treaties) and, secondly, shared values which transcend ethno-national diversity. These shared values include a commitment to principles of solidarity expressed through the welfare state, the European social model,[494] and human rights as embodied in the ECHR and now the Charter. Yet his suggestions have themselves been criticized for being too assimilationist, excluding those who do not share these values.[495]

Others have argued that the EU should aim at decoupling the concepts of state, nation, national identity, and nationality in favour of a form of post-national membership radically different from a (nation) statist concept of citizenship.[496] Underpinning this idea is active participation, as well as the more traditional passive conferral of rights, and it is here that the EU is engaged in some of its most elaborate citizenship-building. The advantage of such an understanding of citizenship is that nationality becomes increasingly unimportant. In this interpretation of citizenship there should be a place for legally resident TCNs. The legal position of TCNs is the subject of Chapter 14. Before that, in Chapter 13, we shall consider the limits to the rights of free movement which, as we shall see, have been significantly influenced by the case law on citizenship.

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493 J. H. H. Weiler, 'To be a European citizen—Eros and civilization' (1997) 4 *JEPP* 495.

494 The Nice European Council offered a definition of the European social model (Annex I, para. 11): 'The European Social Model, characterised in particular by systems that offer a high level of social protection, by the importance of the social dialogue and by services of general interest covering activities vital for social cohesion, is today based . . . on a common core of values.' These values are outlined in para. 11, 'solidarity and justice as enshrined in the Charter of Fundamental Rights' and para. 23, 'Social cohesion, the rejection of any form of exclusion or discrimination and gender equality'.

495 N. Barber, 'Citizenship, nationalism and the European Union' (2002) 27 *ELRev*. 241.

496 Shaw, above n. 5, 47.

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CHAPTER 14: THIRD-COUNTRY NATIONALS AND THE EU

A. INTRODUCTION

According to Article 3 TEU, the Union shall 'offer its citizens an area of freedom, security, and justice without internal frontiers, in which free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.[497] Thus, in an area of freedom, security and justice (AFSJ) citizens have the right to move freely; but they also have a right to security. This is achieved principally at the external borders of the EU where there is greater emphasis on keeping out 'undesirable' third-country nationals (TCNs)[498] and managing the immigration that is permitted. The relationship between EU law and national law is complex. It used to be said that while *Union* law gives EU citizens the right to move freely, *national* immigration law determines the conditions under which TCNs can enter a Member State (either directly from the third country or from another Member State), have access to the labour market, be joined by their families, and become naturalized. However, as we shall see, increasingly EU law is occupying the traditional domain of national law, albeit subject to complicated derogations for certain Member States.

Yet, there remain key differences between Union citizens and TCNs: unlike EU citizens, TCNs generally do not enjoy free movement between Member States (secondary movement), subject to some notable exceptions (students, researchers and in future blue-card holders), and this causes fragmentation in the single market. Furthermore, for EU citizens the state's ability to exclude or expel is interpreted restrictively; for TCNs the relationship between the individual and the state is reversed. Because TCNs do not, as a rule, have a right of admission or protection from expulsion as a matter of EU law, the rights of the state to ensure security take precedence over the rights of the individual.[499]

Migration, particularly of TCNs, is also a highly emotive, politically sensitive subject.[500] Mass migration is both a threat and an opportunity. It is an opportunity because TCNs can bring much-needed skills and youth to reinvigorate an ageing population. It is a threat because an influx of the 'other' poses a significant challenge economically (to jobs for nationals and to the welfare state), culturally (different religions, different values), and socially (how to integrate the TCNs into existing communities). More recently, any discussion about migration is inevitably overlaid by concerns about security, especially in the wake of the terrorist attacks of 9/11 and the London and Madrid bombings,[501] together with more general concern about organized crime. Depending on the economic and security

[497] For detailed discussion, see, e.g., N. Walker, 'In search of the area of freedom, security and justice: A constitutional Odyssey' in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice* (Oxford: OUP, 2004); D. Kostakopoulou, 'The Area of Freedom, Security and Justice and the European Union's Constitutional Dialogue' in C. Barnard (ed.), *The Fundamentals of EU Law Revisited* (Oxford: OUP, 2007).

[498] Commission Communication, 'Towards integrated management of the external borders of the Member States of the European Union', COM(2002) 233, 4. For an example of the Court putting up external frontiers, see Case C–109/01 *Akrich* [2003] ECR I–9607, considered in Ch. 8.

[499] E. Guild, 'Security of residence and expulsion of foreigners: European Community law' in E. Guild and P. Minderhoud (eds.), *Security of Residence and Expulsion: Protection of aliens in Europe* (The Hague: Kluwer, 2000), 63.

[500] COM(2000) 757, 5: 'The social conditions which migrants face, the attitudes of the host population and the presentation by political leaders of the benefits of diversity and of pluralistic societies are all vital to the success of immigration policies.'

[501] Albeit that the London bombers were actually British-born. EU Council, 'European Union plan of action on combating terrorism', Council Doc. 10010/3/04, 11 Jun. 2004. The Commission says that in 2007 almost 600 failed, foiled or successfully executed terrorist attacks were carried out in 11 Member States (COM(2009) 263).

situation of the time, the political discourse ebbs and flows: from encouraging migration (see, for example, the EU–Turkey Association agreement discussed in Section D below) to discouraging migration (see, for example, the central thrust of the Hague programme governing policy in the field of freedom, security and justice for the years 2005–10, now followed by the Stockholm programme).

This basic tension between the opportunities and threats posed by TCN migration gives rise to a number of questions: should there be limits on the numbers of TCNs admitted to a Member State? Once admitted, what rights should they enjoy? Should they enjoy the right to work, to equal treatment with nationals, to move to another Member State? Should they be encouraged (or even required) to integrate? This chapter considers the Union's answer to some of these questions. However, in order to understand the EU's position and any legislation it has adopted, we need first to examine the evolving competences of the EU, including the right to opt-out for certain Member States, and the changing policy domain.

B. THE DEVELOPMENT OF AN AREA OF FREEDOM, SECURITY, AND JUSTICE

1. THE EVOLVING TREATY POSITION

1.1 Introduction

Owing largely to their colonial past, the states of the Union have always had a large number of TCNs lawfully resident on the basis of national law: in 2006 there were 18.5 million non-EU nationals resident in the EU, about 3.8 per cent of the total population.[502] In recognition of this fact, the European Union has long given TCNs certain rights, albeit on an ad hoc basis. As the previous chapters of this book have shown, since the late 1960s Union law has allowed TCN family members of migrant nationals to accompany the migrant when moving to another state, and to enjoy rights once in residence.[503] It also allows companies providing services in other Member States to use their TCN workforce.[504] However, in both situations the rights of the TCN are derived from an EU (natural or legal) person; TCNs do not enjoy their own independent rights.

In addition, the Treaties have given some rights to TCNs who do not move from one state to another. For example, Article 227 TFEU (ex Article 194 EC) on the right to petition the European Parliament and Article 15 TFEU (ex Article 255 EC) on access to documents are enjoyed by those who are legally resident, irrespective of nationality. Article 157 TFEU (ex Article 141 EC) on equal pay for men and women and Article 169 TFEU (ex Article 153 EC) on rights of consumers to information go further still. They apply to all workers and consumers—the individual does not even need to be resident.[505] Furthermore, most of the rights enumerated in the Charter of Fundamental Rights are conferred on all persons regardless of their nationality or place of residence. As the Commission notes,[506] the Charter therefore 'reflects the European Union's traditions and positive attitude to equal treatment of citizens of the Union and third-country nationals'. This view was reinforced by the adoption of the two directives under Article 19 TFEU (ex Article 13 EC): Directive 2000/43 on equal treatment irrespective of racial and ethnic origin[507] and Directive 2000/78 on equal treatment in respect of religion or belief, age, disability, and sexual orientation[508] which apply to 'all persons', irrespective

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502 COM(2009) 262.

503 See, e.g., Reg. 492/2011, discussed in Ch. 9 and Dir. 2004/38 discussed in Ch. 12.

504 Case C–113/89 *Rush Portuguesa* v. *Office national d'immigration* [1990] ECR I–1417.

505 J. D'Oliveira, 'European citizenship: Its meaning, its potential' in R. Dehousse (ed.), *Europe after Maastricht: An ever closer union*? (Munich: Law Books in Europe, 1994), 141–6 and 'Union citizenship: Metaphor or source of rights?' (2001) 7 *ELJ* 4, 7.

506 COM(2001) 127, 3.

507 Dir. 2000/43 ([2000] OJ L180/22).

508 Dir. 2000/78, the so-called horizontal directive; M. Bell, *Anti–discrimination Law and the European Union* (Oxford: OUP, 2002), R. Whittle and M. Bell, 'Between social policy and Union citizenship: The Framework Directive on equal treatment in employment' (2002) 27 *ELRev*. 677.

of nationality or residence. However, enjoyment of these EU rights is still dependent on a Member State's decision—still largely under national law—to admit a TCN to its territory in the first place and to allow them to reside and work there.

The EU has also entered various international agreements granting more favourable rights to certain TCNs. The most substantive agreement, on the European Economic Area (EEA), extends the EU's own *acquis* to Norway, Iceland, and Liechtenstein.[509] In addition, the EU has a number of agreements on migrant workers and social security with countries such as Morocco, Algeria, and Turkey.[510] Under these agreements, the Member States retain the right to admit the migrant to their territory but, once admitted, the agreements give migrants certain rights after they have been resident for a prescribed period. The most ambitious of these agreements is the one between the EU and Turkey, the key provisions of which are considered in section D below.

Title V of Part Three TFEU provides an alternative basis for the EU to regulate the position of TCNs independently of any relationship with an EU citizen. However, the sensitivities at play here mean that the relationship between EU rules and Member State discretion is complex. We turn now to consider the development of the European Union's competence to regulate immigration from third countries.

1.2 The Maastricht Treaty and the Third Pillar

Until 1992, the EU had no express competence to regulate the position of TCNs. Any legislation which affected TCNs (e.g., Regulation 492/2011 on the free movement of workers and the Posted Workers Directive 96/71 which was adopted after the Maastricht Treaty) were based on the free movement provisions in the (then) EC Treaty. However, the changing geo-political climate forced the Member States to re-examine their position. With the fall of the Berlin wall, EU Member States which had been pursuing 'zero' immigration policies became concerned about security issues caused by (potentially) mass migration from former Eastern-bloc countries.[511] Increasingly they insisted on greater controls at the external frontiers, with the result that many economic migrants sought entry to the EU either illegally or through asylum procedures.[512] In response, the Member States agreed at Maastricht that a third, intergovernmental, pillar (Title VI TEU) on cooperation in respect of justice and home affairs (JHA) should be included in the Treaty. This provided that matters concerning the crossing of external borders, immigration,[513] asylum, drug addiction, fraud, judicial cooperation in civil and criminal matters, customs, and police cooperation were matters of common interest for the Member States.[514] These were matters for EU law to which the classic Community method (CCM), including principles such as direct effect, did not apply. New powers were also added to the first pillar (i.e., the EC Treaty—areas in which the CCM did apply) to deal with migration issues, including Article 100c EC

[509] [1994] OJ L1/1; [1995] OJ L86/58.

[510] See, further, S. Peers, 'Towards equality: Actual and potential rights of third country nationals in the European Union' (1996) 33 *CMLRev*. 7.

[511] E. Guild, 'The single market, movement of persons and borders' in C. Barnard and J. Scott (eds.), *The Law of the Single European Market: Unpacking the premises* (Oxford: Hart Publishing, 2002), 296.

[512] COM(2000) 757, 13.

[513] Cf. General Dec. (No. 6) on Arts. 13–19 of the Single European Act (SEA): 'Nothing in these provisions shall affect the right of the Member States to take such measures as they consider necessary for the purposes of controlling immigration from third countries and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques', discussed in R. Plender, 'EC competence and non-Member States nationals' (1990) 39 *ICLQ* 599, 606. However, Decl. 43 annexed to the SEA did provide that the Member States would cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement, and residence of nationals of third countries. They would also cooperate in the combating of terrorism, crime, the traffic in drugs, and illicit trading in works of art and antiques.

[514] Points (1)–(3) of (then) Art. K.1. See D. O'Keeffe, 'Recasting the third pillar' (1995) 32 *CMLRev*. 893 and 'The emergence of a European immigration policy' (1995) 20 *ELRev*. 20.

which empowered the Council to determine which TCNs needed visas.[515] Article 2(3) of the Social Policy Agreement (now Article 153(1)(g) TFEU) also gave the Council the power to adopt measures concerning the conditions of employment for third-country nationals.

Prior to the Maastricht Treaty, a separate, intergovernmental process—Schengen—was already underway. Under the Schengen Agreement of 1985 and the implementing Convention of 1990,[516] the now 25 participating states agreed to remove border formalities at common frontiers, approximate visa formalities, and ensure the cooperation of law enforcement agencies, particularly in relation to drugs and firearms.[517] Often presented as the 'testing ground' for the free movement of persons, the Schengen *acquis* was intended to facilitate the application of Article 26 TFEU (ex Article 14 EC).[518]

The Schengen agreements cover all nationals of the Member States of the European Union, regardless of whether they are members of the Schengen area. All individuals are subject to the same (increased) checks when crossing one of Schengen's *external* frontiers but, once admitted to the Schengen area, they enjoy free movement across internal frontiers.[519] However, the abolition of border controls has not meant an end to the policing powers of the competent authorities, nor has it prevented individual Member States from requiring individuals to hold, carry, and present identity documents.

1.3 The Amsterdam Treaty and the AFSJ

(a) Communitarization of the third pillar

The inevitable overlaps created by the Maastricht Treaty between the Community pillar (the EC Treaty) and the third pillar (JHA) created considerable practical and legal difficulties, not least because the Court of Justice had no jurisdiction to hear immigration and asylum cases arising under the third pillar. As a result, the Heads of State agreed at Amsterdam to 'communitarize' parts of the third pillar,[520] transferring key areas concerning the free movement of persons (asylum, immigration, and the rules governing the crossing of external borders) from the third to the first pillar. These provisions were placed in a new Title IV of Part Three of the EC Treaty entitled 'Visas, asylum, immigration and other policies related to free movement of persons'. EC measures adopted in these areas where intended to 'establish progressively an area of freedom, security and justice'.[521] Police cooperation and judicial cooperation in criminal matters remained in the third pillar, renamed 'Provisions on police and judicial cooperation in criminal matters' (PJC). This continued division generated considerable difficulties, first for the legislature in determining whether the measure was a first or third pillar one,[522] and subsequently for the Court.[523] The Court of Justice now had jurisdiction to hear preliminary

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[515] Council Reg. 1683/95 of 29 May 1995 laying down a uniform format for visas ([1995] OJ L164/1). Council Reg. 2317/95 ([1995] OJ L234/1) in respect of visa requirements for TCNs, now replaced by Reg. 539/2001 ([2001] OJ L81/1). Reg. 2317/95/EC was annulled for procedural reasons: Case C–392/95 *Parliament* v. *Council* [1997] ECR I–3213. See S. Peers, 'The Visa Regulation: Free movement blocked indefinitely' (1996) 21 *ELRev*. 150; *EU Justice and Home Affairs Law* (Oxford: OUP, 2006), 69–71; and K. Hailbronner, 'Visa regulation and third-country nationals in EC Law' (1994) 31 *CMLRev*. 969.

[516] Belgium, France, Germany, Luxembourg, and the Netherlands were the original signatories to the Agreement in 1985.

[517] See, generally, J. Schutte, 'Schengen: Its meaning for the free movement of persons in Europe' (1991) 28 *CMLRev*. 549.

[518] D. O'Keeffe, 'The Schengen Convention: A suitable model for European integration?' (1991) 11 *YEL* 185.

[519] See, esp., Art. 2 'Internal borders may be crossed at any point without any checks on persons being carried out.'

[520] J. Monar, 'Justice and home affairs in the Treaty of Amsterdam: Reform at the price of fragmentation' (1998) 23 *ELRev*. 320.

[521] Art. 61 EC.

[522] This led to the adoption of what became known as the ' "double text practice", whereby the main substance of a given Community policy was included in an EC regulation or a directive (first pillar), while the criminal law aspects of such a policy were separated out and included in a separate framework decision (third pillar)' (E. Sharpston, 'The area of freedom, security and justice ("AFSJ") in the EU:– The story so far and (some of) the challenges ahead', Thomas More Lecture, delivered at Lincoln's Inn, 13 Nov. 2008).

[523] See, e.g., Case C–301/06 *Ireland* v *European Parliament and Council (retention of data)* [2009] ECR I–593. Perhaps better known is Case C–176/03 *Commission v Council (Criminal Penalties)* [2005] ECR I–7879; Case C–440/05

references concerning matters under Title IV of Part Three EC, but only from courts of last resort.[524] It also had jurisdiction to hear references on the validity and interpretation of, for example, framework decisions under the third pillar,[525] but only where Member States had specifically declared that they were prepared to accept the Court's jurisdiction.[526] Even though the Court had reduced jurisdiction, the fact that it had jurisdiction at all is significant, not least for ensuring that Community measures adopted under Title IV were compatible with fundamental rights.[527]

Given the subject matter of the disputes that did arise, the cases often needed speedy resolution. As a result, a new fast-track procedure was introduced, the *procédure préalable d'urgence* (PPU)[528] which applies to cases referred in areas covered by Title VI TEU and Title IV of Part Three of the EC Treaty[529] (now Title V, Part Three TFEU[530]).

The communitarization of the third pillar raised serious problems for three states—the UK, Ireland, and Denmark—and they successfully secured opt-outs from its provisions. These opt-outs were contained in three protocols.[531] The first permitted the UK and Ireland (as a result of its common travel area with the UK[532]) not to apply some aspects of Article 14 EC (now Article 26 TFEU) regarding the elimination of controls at internal borders.[533] In return for this concession, the protocol

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Commission v Council (Ship source pollution) [2007] ECR I–9097. To deal with the problems raised, Art. 83(2) TFEU was subsequently introduced by the Lisbon Treaty which provides: 'If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.' The effect of Protocol No. 21 (see below) is that the UK can opt out from measures adopted under Art. 83(2) TFEU even in fields like criminal penalties for environmental matters (e.g., Dir. 2009/123 ([2009] OJ L280/52), in which it is currently bound.

[524] Art. 68(1) EC. In addition, Art. 68(3) EC gave the Council, the Commission, and the Member States the chance to request the Court to give a ruling on a question of interpretation of Title IV itself or acts taken under it.

[525] Art. 35(1) EU. It also had jurisdiction to review the legality of framework decisions and decisions (Art. 35(6) EU).

[526] Art. 35(2)–(3) EU. For a full discussion, see S. Peers, *EU Justice and Home Affairs Law* (Oxford: OUP, 2007).

[527] See, e.g., Case C–224/02 *Pupino* [2005] ECR I–5285, where the Court was also prepared to check the compatibility of third-pillar measures with human rights. See S. Prechal, 'Direct effect, indirect effect, supremacy and the evolving constitution of the European Union' in C. Barnard (ed.), above n. 1.

[528] Art. 1 Council Dec. 2008/79/EC, Euratom [2008] OJ L24/42; Art. 23a of the Protocol on the Statute of the Court of Justice and Art. 104b of its Rules of Procedure. The first case decided under the PPU was Case C–195/08 PPU *Inga Rinau* [2008] ECR I–5271. For discussion, see C. Barnard, 'The PPU: Is it worth the candle? An early assessment' (2009) 34 *ELRev.* 281.

[529] See the reference to the PPU in the new Art. 267(4) TFEU: 'If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.'

[530] Court of Justice's Information Note on references from national courts for a preliminary ruling', (2009/C 297/01) ([2009] OJ C297/1), para. 33.

[531] Art. 69 EC said that Title IV EC was subject to three protocols added by the Treaty of Amsterdam. See generally M. Hedemann-Robinson, 'The area of freedom, security and justice with regard to the UK, Ireland and Denmark: The "opt-in opt-outs" under the Treaty of Amsterdam' in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty* (Oxford: Hart Publishing, 1999); J de Zwaan, 'Opting in and opting out of rules concerning free movement of persons: Problems and practical arrangements' (1998–9) 1 *CYELS* 107.

[532] If Ireland had participated in Title IV measures, the common travel area would have meant that TCNs could have entered the UK via Ireland without any restrictions. Given that about 70% of all travel from Ireland is to the UK, Ireland was not prepared to surrender its common travel area with the UK and so it also opted out of Title IV. However, in Decl. 55 by Ireland on Art. 3 of the Protocol on the position of the UK and Ireland, Ireland declared that it intended to exercise its right under Art. 3 to take part in the adoption of measures pursuant to Title IV of Part Three EC to the maximum extent compatible with the maintenance of its Common Travel Area with the UK. It added that 'Ireland recalls that its participation in the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community reflects its wish to maintain its Common Travel Area with the United Kingdom in order to maximise freedom of movement into and out of Ireland.'

[533] Protocol on the application of certain aspects of Art. 14 EC to the UK and Ireland.

permitted the other Member States to exercise border controls on people seeking to enter their territory from the UK and Ireland.[534]

The second protocol, 'The Protocol on the position of the UK and Ireland', which to a certain extent overlaps with the first, exempted the UK and Ireland from measures taken under Title IV of Part Three EC, although Article 3 of the protocol permitted the UK and Ireland to notify their desire to participate in measures taken under Title IV.[535] This opt-in had to be exercised within three months after a proposal had been presented to the Council. If, after a reasonable period of time, such a measure could not be adopted with the UK or Ireland taking part, then the Council could adopt the measure without their participation.[536] In essence, the UK has been keen to support measures taken to buttress the external frontiers of the EU while refusing to participate in measures affecting the internal borders.

The third protocol, on the position of Denmark, provided that, with the exception of rules determining the third countries whose nationals had to hold a visa when crossing the external frontiers of the Member States or measures relating to a uniform format of visas (matters which had their origin in the now repealed Article 100c EC), Title IV did not apply to Denmark. Unlike those protocols on the UK and Ireland, the Danish Protocol made no provision for Denmark to opt in to the Title IV measures.

(b) The incorporation of the Schengen *acquis*

The Amsterdam Treaty also incorporated the Schengen *acquis*[537] into the single institutional framework of the Union.[538] Until Amsterdam, Schengen was a purely intergovernmental process from which the EU's political actors were excluded. With the incorporation of Schengen by the Amsterdam Treaty, the Schengen *acquis* became part of EC and EU law. The Council determined the legal basis for each of the provisions of the Schengen Convention and the other *acquis* in the (then) EC and EU Treaties.[539] The Schengen Protocol also provided that future measures, proposals, and initiatives building on the Schengen *acquis* were to be subject to the relevant provisions of the EC and EU Treaties.

Even after the incorporation of the Schengen *acquis* into the EC and EU Treaties, it became obvious that there was a culture clash between the imperatives driving Schengen and those underpinning the single market. As Guild notes, the EC (and now EU) approach was rights-based, with the Court of Justice playing a leading role, privileging the rights of the individual to free movement over the security interests of the state to exclude individuals on public-policy, security, or health grounds. By contrast, the Schengen process has been led by interior ministries, distrustful of the Court of Justice, which are seeking to reclaim this policy area for national discretion, and so detaches immigration issues from a rights-based approach.

The situation was made yet more complex by the position taken by UK, Ireland and Denmark. The United Kingdom, which is opposed to the abolition of border controls envisaged by Schengen, and

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[534] Art. 3.

[535] Protocol on the Position of the UK and Ireland.

[536] The UK and Ireland can also sign up to the measures after they have been adopted, but in these circumstances the conditions governing general flexibility apply (Art. 4). Ireland can also denounce the protocol altogether (Art. 8).

[537] According to the annex to the protocol (repealed by the Lisbon Treaty), the Schengen *acquis* comprises the 1985 Agreement, the 1990 Convention, the Accession Protocols and Agreements, and the Decisions and Declarations adopted by the Executive Committee established by the 1990 Implementation Convention and acts adopted by bodies on which the Executive Committee has conferred powers. A more detailed list of the *acquis* subsequently appeared in Dec. 99/435/EC ([1999] OJ L176/1). The Schengen *acquis* which has been given a legal basis appears at [2000] OJ L239/1.

[538] Protocol Integrating the Schengen *Acquis* into the Framework of the EU. See S. Peers, 'Caveat emptor? Integrating the Scehngen acquis into the European Union legal order' (1999) 2 *CYELS* 87.

[539] Council Dec. 99/436 ([1999] OJ L176/17) adopted under Art. 2(1), para. 2 of the Schengen Protocol. For the practical problems associated with the integration of the Schengen *acquis*, see P. J. Kuijper, 'Some legal problems associated with the communitarization of policy on visas, asylum and immigration under the Amsterdam Treaty and incorporation of the Schengen acquis' (2000) 37 *CMLRev*. 345. In the absence of a legal basis being allocated the measures are deemed to be based on Title VI EU.

Ireland which harmonizes its position with that of the UK, were the only EU–15 Member States not to accede to the Schengen Agreements, and so they were not bound by the Schengen *acquis*. While their continued non-participation was confirmed by Article 4 of the Schengen Protocol, Article 4 also allowed them to take part in some or all of the existing Schengen *acquis*, but only with the unanimous agreement of the other states. Both states have taken advantage of this possibility[540] and, as with measures adopted under the protocol on Article 14 (now Article 26 TFEU), they have signed up to the flanking measures of the area without internal frontiers (police and judicial cooperation in criminal matters) but not those measures linked to the disappearance of internal border controls.

The Schengen Protocol also provides that, in respect of proposals and initiatives building on the Schengen *acquis* (i.e., measures adopted after Amsterdam), the UK and Ireland have a 'reasonable period'[541] in which to notify their desire to participate. In the absence of such notification, authorization for the Council to proceed without them is automatic.[542] Decisions approving the UK and Ireland's part participation in the Schengen *acquis* require the UK and Ireland to participate in further measures building on those aspects of that *acquis*. As Peers puts it, the UK and Ireland are 'locked out' of the Schengen building measure until they have opted into the underlying rules.[543] However, it seems that once they have opted into the underlying rules, the UK and Ireland cannot be regarded as locked into any participation in subsequent measures which build on them.[544]

The Schengen Protocol also made special provision for Denmark.[545] It acceded to Schengen in 1996 and so maintained its rights and obligations under the pre-Amsterdam Schengen *acquis*, even in respect of those measures which had a legal basis in Title IV EC from which, as we saw above, Denmark had an opt-out. However, in respect of *future* Schengen *acquis*, the protocol on the position of Denmark allowed Denmark to decide whether it would implement the decision in its national law. If it decided to do so, this would create an obligation under *international law* between Denmark and the other Member States, not EU law,[546] and so the Court of Justice would have no jurisdiction.

(c) The AFSJ after Amsterdam

In assessing the AFSJ in the aftermath of Amsterdam, Guild et al.[547] considered that the prevailing intergovernmental logic driving policymaking strategies led to the establishment of an AFSJ characterized by five factors: first, differentiation, flexibility and fragmentation illustrated by the opt-outs from Title IV by the UK, Ireland, and Denmark, and the diverging Schengen membership;[548] secondly, the first/third pillar divide; thirdly, alternative methods of cooperation, often not aiming at formal harmonization but at coordinating Member States' policies through the exchange of information and post evaluation mechanisms based on commonly agreed principles and goals. This approach falls

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[540] See Council Dec. 2000/365/EC ([2000] OJ L131/47) on the request of the UK to take part in some of the provisions of the Schengen *acquis* and Council Dec. 2002/192/EC ([2002] OJ L64/20) concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*.

[541] Cf. three-month period under the Title IV Protocol. These protocols are mutually exclusive: Case C–77/05 *UK* v. *Council* [2007] ECR I–11459 and Case C–137/05 *UK v. Council* [2007] ECR I–11593, noted J. Rijpma (2008) 45 *CMLRev.* 835.

[542] Art. 5(1).

[543] 'In a world of their own? Justice and home affairs opt-outs' (2007–8) 10 *CYELS* 383, 389, citing Case C–77/05 *UK* v. *Council* [2007] ECR I–11459 and Case C–137/05 *UK v. Council* [2007] ECR I–11593.

[544] See below for a discussion of the changes introduced by the revised Schengen Protocol adopted under the Lisbon Treaty.

[545] Art. 3. See below for a discussion of the changes introduced by the revised Schengen Protocol adopted under the Lisbon Treaty.

[546] Art. 5.

[547] E. Guild, S. Carrera, and A. Faure Atger, 'Challenges and prospects for the EU's area of freedom, security and justice: Recommendations to the European Commission for the Stockholm Programme', *CEPS Working Document* No. 313/Apr. 2009.

[548] See also K. Lachmeyer, 'European police cooperation and its limits: From intelligence–led to coercive measures' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009).

outside traditional EU law, relying instead on 'new governance' mechanisms, in particular the open method of coordination (OMC).[549] The fourth characteristic of the AFSJ was the 'EU law of minimums' (i.e., standards set at the lowest common denominator driven by unanimous voting in Council) which, they argued, mirrored Member State interests too closely and offered wide discretion at times of domestic transposition.

Fifthly, they argued that fundamental rights and the rule of law were being taken for granted and put into a balancing relationship with the security of the state. They argue that the human rights of TCNs were too often neglected. They also expressed concerns about the exchange of information within and outside Europe[550] for the fundamental right of data protection. Despite the Data Protection Directive 95/46,[551] they argue that the mechanisms put into place to protect the individual from the misuse of their data are 'exceedingly weak and operate badly'. Douglas-Scott goes further, expressing concern about lack of accountability and judicial control.[552] Where the Court of Justice has had the chance to rule on related issues, it too has expressed concerns about the culture of secrecy. This can be seen in *Heinrich.*[553] A passenger was stopped at the security control of Vienna Airport as his cabin baggage contained tennis racquets, considered to be prohibited articles and were listed as such in an unpublished annex to a Union regulation. The Court was robust: an act adopted by a Union institution could not be enforced against natural or legal persons in a Member State before they had an 'opportunity to make themselves acquainted with it by its proper publication in the Official Journal'. Because the annex had not been published it had no binding force on the passenger.[554]

Some, but not all, of the criticisms levelled at the EU's execution of its AFSJ policies have been addressed by the Lisbon Treaty.

1.4 The Lisbon Treaty

(a) Overview

As this brief description of the Amsterdam Treaty shows, the communitarization of parts of the third pillar, the integration of the Schengen *acquis* into the (then) EC and EU Treaties, and the desire to accommodate the diverse interests of the UK, Ireland, and Denmark, have resulted in a complex web of legal provisions which created a serious challenge to the integrity of a single market for persons. The Lisbon Treaty attempted to deal with some of these problems, essentially by 'communitarizing' third-pillar criminal matters. There is now a single Title, Title V of Part Three TFEU, with a unified set of legal bases covering border checks, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters, and police cooperation. The effect of the change is that Union action under the new AFSJ is to be conducted through a newly unified set of legal acts;[555] the specific instruments under the third pillar are to be suppressed and measures adopted in the field of PJC are no

[549] See, e.g., Commission, 'Communication on a common immigration policy for Europe, actions and tools', COM(2008) 359. For further discussion of OMC, see Ch. 16.

[550] See, e.g., the passenger name records, as revealed in Joined Cases C–317/04 and C–318/04 *Parliament* v. *Council (passenger name records)* [2006] ECR I–4721, discussed by S. Douglas-Scott, 'The EU's area of freedom, security and justice: A lack of fundamental rights, mutual trust and democracy' (2008–9) 11 *CYELS* 53, 63–73.

[551] [1995] OJ L281/31. See also Council Framework Decision 2008/977/JHA ([2008] OJ L350/60) on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters. Although cf. the subsequent inclusion of Art. 16 TFEU on data protection by the Lisbon Treaty.

[552] S. Douglas-Scott, 'The rule of law in the European Union: Putting the security into the area of freedom, security and justice' (2004) 29 *ELRev.* 219, 239.

[553] Case C–345/06 *Heinrich* [2009] ECR I–1659, para. 43.

[554] Para. 63. In a similar vein, in respect of the accession states, see Case C–161/06 *Skoma-Lux sro* v. *Celní ředitelství Olomouc* [2007] ECR I–10841.

[555] M. Dougan, 'The Treaty of Lisbon 2007: Winning minds, not hearts' (2008) 45 *CMLRev.* 617, 680–1.

longer prohibited *per se* from having direct effect.[556] The new AFSJ also sees a significant enhancement of the powers of the European Parliament and the use of qualified majority voting in Council: the ordinary legislative procedure[557] (broadly the old co-decision procedure under Article 251) becomes the standard. The role of national parliaments is also enhanced[558] and new governance methodology further entrenched.[559] In addition, the Lisbon Treaty extended the jurisdiction of the Court of Justice. First, the limitation on the Court hearing references only from courts of last resort under Title IV, Part Three EC has been removed, as have the more extensive restrictions on the Court's jurisdiction under the third pillar, although the Court's jurisdiction over pre-existing third-pillar acts are subject to the pre-Lisbon restrictions for five years following the entry into force of the Lisbon Treaty.[560]

Taken together, these changes lead Dougan[561] to conclude that the Lisbon reforms mean that the Union's power to act within the AFSJ is significantly strengthened and the quality of those new powers will considerably improve democratic accountability and individual rights, albeit that the transitional arrangements, particularly in respect of the Court's jurisdiction under the old third pillar, dilute the effectiveness of some of these changes at least initially.

(b) The protocols

The four protocols considered above in section 1.3—now numbered No. 19 on the Schengen *acquis* integrated into the framework of the EU, No. 20 on the application of certain aspects of Article 26 TFEU to the UK and Ireland, No. 21 on the position of the UK and Ireland in respect of the AFSJ, and

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[556] Cf. Art. 34(2) EU. However, under the Transitional provisions set out in Protocol No. 36, the legal effects of pre-existing third-pillar acts, including the exclusion of direct effect, is preserved until those acts are repealed, annulled, or amended in accordance with the new Treaties. (However, under Decl. 50 the Union institutions are encouraged to adopt, in appropriate cases and as far as possible within the five-year period referred to in Art. 10(3) of the protocol (No. 36) on transitional provisions, legal acts amending or replacing the acts referred to in Art. 10(1) of Protocol No. 36.) The Commission will also not be able to bring any enforcement proceedings against defaulting Member States in respect of pre-existing third pillar acts for a period of five years (Art. 10(1) of Protocol No. 36). Special rules apply to the UK at the expiry of the five-year period. Art. 10(4) provides that at the latest six months before the expiry of the transitional period, the UK may notify the Council that it does not accept, with respect to the old third pillar acts, the powers of the institutions referred to in para. 1 as set out in the Treaties. If the UK makes that notification, all acts referred to in para. 1 will cease to apply to it as from the date of expiry of the transitional period referred to in para. 3. Art. 10(5) allows the UK to opt into acts which have ceased to apply to it under para. 4 in accordance with the Schengen Protocol or the Protocol on the Position of the UK and Ireland, as appropriate, with full powers of the Commission and the Court of Justice applicable to those acts. As Dougan points out (below n. 65, 683), this is the first time that a Treaty has allowed a Member State the right to opt out from not just the adoption of future measures but also to repudiate its obligations under an entire corpus of pre-existing measures.

[557] Art. 289 TFEU. The procedure is laid down in Art. 294 TFEU.

[558] Art. 69 TFEU then emphasizes the specific role of national parliaments in ensuring that all measures in the field of police and judicial cooperation in criminal matters comply with the principles of subsidiarity and proportionality in accordance with the protocol (No.2) on subsidiarity and proportionality (under Art. 7(2) of Protocol (No.2) on the application of the principles of subsidiarity and proportionality, the threshold for national parliaments showing a 'yellow card' to a legislative proposal in the field of PJC is lowered to one-quarter).

[559] The new Art. 70 TFEU authorizes the continuance of new governance methodology, in particular OMC. It allows the Council to establish a peer review mechanism of Member States' implementation of Union policies in this area. The Council must also adopt measures to ensure administrative cooperation between the relevant departments of the Member States and between those departments and the Commission: Art. 74 TFEU (ex Art. 66 EC). See, e.g., Council Dec. 2002/463/EC adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum, and immigration (ARGO programme) ([2002] OJ L161/11). Measures ensuring administrative cooperation are to be adopted on a proposal from the Commission or on the initiative of a quarter of the Member States (Art. 76 TFEU). Cf. the original Art. 34(2) TEU which allowed any *one* Member State to make a proposal in the field of police and judicial cooperation.

[560] Art. 10(1) of Protocol No. 36. Art. 276 TFEU also imposes limits on the Court of Justice's jurisdiction in respect of PJC activities. See S. Peers, 'Finally "fit for purpose"? The Treaty of Lisbon and the end of the third pillar legal order' (2008) 28 *YEL* 47.

[561] M. Dougan, 'The Treaty of Lisbon 2007: Winning minds, not hearts' (2008) 45 *CMLRev.* 617.

No. 22 on the position of Denmark—have been extended to the Lisbon Treaty. While all four protocols contain technical amendments reflecting the changes introduced by the Lisbon Treaty,[562] the Schengen Protocol (No. 19), Protocol No. 21 on the position of the UK and Ireland in respect of the AFSJ and the Danish Protocol (No.22) contain more substantial amendments.

The Schengen Protocol now includes the possibility of expelling the UK and Ireland from a pre-existing measure. Where the UK or Ireland has opted into an existing Schengen measure under Article 4, and a new proposal is made to build on that act, the UK or Ireland may decide, under Article 5(2), to opt out of that proposal.[563] In these circumstances Article 5(3) provides that any measure already opted into 'shall, as from the date of entry into force of the proposed measure, cease to apply to the extent considered necessary by the Council', albeit that the Council must retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability of the various parts of the Schengen *acquis* and respecting their coherence. If by the end of four months the Council fails to take a decision, the matter is referred to the European Council;[564] and if the European Council cannot agree, the Commission must take appropriate action.[565]

Protocol No. 21 on the position of the UK and Ireland in respect of the AFSJ also contains some significant revisions. First, and most importantly, it extends the UK opt-out/opt-in to all the areas covered by Title V, Part Three (i.e., the whole of the AFSJ) and not just the matters that were previously covered by Title IV of Part Three EC. So the UK and Ireland will be able to opt-out of areas where they are currently bound, most notably third-pillar (PJC) matters. Secondly, a new Article 4a extends the UK and Ireland's ability to opt-out of measures proposed or adopted under Title V of Part Three TFEU amending an existing measure by which they are bound. However, as with the Schengen Protocol, if the UK or Ireland does this, the Council has the power to exclude them from the existing act. Thirdly, Article 6a provides that the UK and Ireland are not bound by the EU's data protection rules as regards police and judicial cooperation in respect of acts in which they do not participate. Fourthly, Ireland has given up its right to apply the opt-out to matters listed in Article 75 TFEU (ex Article 60)[566] concerning freezing of funds of terrorists or equivalent.[567] The UK has merely declared its intention to opt-into such acts.[568]

The Danish Protocol has also been amended.[569] As with Protocol No. 21 on the UK and Ireland, Denmark's opt-out extends to the whole area of AFSJ and not just to matters previously covered by Title IV EC. Denmark also benefits from the same exclusion in respect of data protection matters.

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[562] For a full discussion, see S. Peers, 'In a world of their own? Justice and home affairs opt-outs and the Treaty of Lisbon' (2007–8) 10 *CYELS* 383.

[563] See also Decl. 44 on Art. 5 of the Schengen Protocol which says that where a Member State has made a notification under Article 5(2) of the Protocol that it does not wish to take part in a proposal or initiative, that notification may be withdrawn at any moment before the adoption of the measure building upon the Schengen *acquis*. Decl. 45 on Art. 5(2) of the Schengen Protocol says that whenever the UK or Ireland indicates to the Council its intention not to participate in a measure building upon a part of the Schengen *acquis* in which it participates, the Council will have a full discussion on the possible implications of the non-participation of that Member State in that measure.

[564] Art. 5(4).

[565] See also Decl. 47 on Art. 5(3), (4), and (5) of the Schengen Protocol which provides that the Member State concerned shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in some or all of the *acquis* referred to in any decision taken by the Council pursuant to Art. 4 of the said protocol.

[566] See further Ch.15.

[567] Art. 9 of the protocol.

[568] Decl. 65 by the United Kingdom of Great Britain and Northern Ireland on Art. 75 TFEU: 'The United Kingdom fully supports robust action with regard to adopting financial sanctions designed to prevent and combat terrorism and related activities. Therefore, the UK declares that it intends to exercise its right under Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice to take part in the adoption of all proposals made under Art. 75 TFEU.

[569] See also Decl. 48 concerning the protocol on the position of Denmark: 'Denmark declares that it will not use its voting right to prevent the adoption of the provisions which are not applicable to Denmark.'

Perhaps most significantly, a new Article 8 allows Denmark to abandon its opt-out in favour of a system where it will be bound by all provisions of the Schengen *acquis* and the follow-on measures as a matter of Union, not international, law. In respect of all other measures adopted under Title V of Part Three, the Danish position will be equivalent to that of the UK and Ireland if Denmark opts to change its legal position.[570]

Returning to the criticisms levelled at the experience of the operation of the post Amsterdam version of the AFSJ by Guild et al, it can be said that while the Lisbon Treaty has more or less overcome the problems of the first/third pillar divide, differentiation, flexibility and fragmentation caused by the opt-outs for the UK, Ireland and Denmark and the diverging Schengen membership remain firmly entrenched. The emphasis on alternative methods of cooperation, noted by Guild et al have also spilled over into the Lisbon Treaty, as the next section will show.

2. THE POLITICAL STRATEGY

The newly introduced Article 68 TFEU reflects the primary role of the European Council in defining 'the strategic guidelines for legislative and operational planning' within the AFSJ. This confirms the role the European Council has long played of steering the direction of the AFSJ, first at Tampere, then at The Hague, and most recently at Stockholm.

2.1 The Tampere Programme

As we have seen, prior to the Amsterdam Treaty, the treatment of TCNs by (the then) Community law was somewhat ad hoc.[571] Title IV of Part Three EC offered a chance for greater coherence. A special European Council was held in Tampere in 1999 which considered, among other things, the implementation of Title IV of Part Three EC. It agreed on a common EU asylum and immigration policy, based on four principles. The first, partnership with the countries of origin, was intended to address political, human rights, and development issues in countries of origin and transit.[572] The idea behind this policy was that by reducing the 'push factors', countries of origin became more attractive to their own people. At Seville, the European Council introduced the stick of including a clause in any future cooperation or association agreement on joint management of migration flows and on compulsory readmission in the event of illegal immigration. It warned that '[i]nadequate cooperation by a country could hamper the establishment of closer relations between that country and the Union'.[573] The carrot comes in the form of financial and technical assistance to those third countries willing to cooperate.[574]

Secondly, the Tampere European Council envisaged a common European asylum system leading to a common asylum procedure and a uniform status for those granted asylum. This is based on the full and inclusive application of the Geneva Convention.

Thirdly, in order to integrate TCNs into the host state, the Tampere European Council insisted upon the principle of fair treatment of TCNs. This allowed TCNs admitted to the host state broadly the

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[570] See also Decl. 26 on non-participation by a Member State in a measure based on Title V of Part Three TFEU: 'the Council will hold a full discussion on the possible implications and effects of that Member State's non-participation in the measure'. It continues that any Member State may ask the Commission to examine the situation on the basis of Art. 116 TFEU.

[571] This was partly because there was an absence of clear competence for the (then) EEC to act. See, e.g., Joined Cases 281, 283–285/85 *Germany, France, Netherlands, Denmark and the United Kingdom* v. *Commission* [1987] ECR 3203, para. 10 on the use of Art. 118 EEC (Art. 156 TFEU).

[572] This requires combating poverty, improving living conditions and job opportunities, preventing conflicts, and consolidating democratic states. See Commission Communication, 'Integrating migration issues in the European Union's relations with third countries', COM(2002) 703. See also European Council: 'Global approach to migration: Priority actions focusing on Africa and the Mediterranean', Brussels, 15–16 Dec. 2005 and the Commission's follow-up: COM(2006) 735.

[573] Presidency Conclusions, Seville, 21–2 Jun. 2002, paras. 33 and 35. See also Commission Communication on the integration of migration issues in the EU's relations with third countries, COM(2003) 703.

[574] COM(2003) 355.

same rights and responsibilities as EU nationals[575] but, with the exception of a 'hard core' of rights available to migrants on their arrival,[576] these rights were to be incremental and related to the length of stay provided for in their entry conditions.[577] So, an individual would receive a (renewable) temporary work permit, followed by a permanent work permit, after a number of years to be determined, with the possibility of long-term residence status after a certain period[578] and even 'civic citizenship', comprising a common set of core rights and obligations based on the Charter of Fundamental Rights 2000, after a minimum period of years.[579]

Finally, the European Council wished to see a more efficient management of migration flows. This idea was subsequently fleshed out by the Commission in a Communication on a 'Community immigration policy'[580] which argued the case for a proactive immigration policy based on 'the recognition that migratory pressures will continue and that there are benefits that orderly immigration can bring to the EU, to the migrants themselves and to their countries of origin'.[581] At the heart of this approach lies the idea of creating a legislative framework for legal immigration into the EU by TCNs, and in particular a common policy on admission for economic reasons, backed up by information campaigns in countries of origin about the possibilities for legal immigration. Two factors influenced this policy. First, the Commission considered that the EU *needed* skilled and unskilled labour[582] to help ensure the success of the Lisbon strategy (of making the EU the most competitive and dynamic knowledge-based economy in the world),[583] to help address the demographic problems caused by an ageing population and a low birth rate,[584] and to help deal with a skills shortage in key industries.[585] Secondly, under the General Agreement on Trade in Services (GATS), the EU and the Member States committed themselves to allowing TCNs to pursue economic activities providing services in the EU, without there being any 'economic needs test'.[586]

The Tampere principles are reflected in Article 79(1) TFEU which provides:[587]

The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

This demonstrates just how the tone of the debate has begun to change in recent years,[588] with a shift in focus towards facilitating legal admission of 'desirable' TCNs (those coming for short visits as tourists or on business and those wishing to remain for the longer term with skills to offer), while keeping out 'undesirable' TCNs (those threatening the security of the EU such as drug and human traffickers,

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[575] See also Tampere Presidency Conclusions, 15 and 16 Oct. 1999, para. 3 and Commission's Communication on a 'Community immigration policy', COM(2000) 757, 3. See also its earlier Communication, 'Immigration and asylum policies', COM(94) 23.

[576] Ibid., 17.

[577] Ibid., 15.

[578] Ibid., 18.

[579] Ibid., 19.

[580] COM(2000) 757. See also 'On an EU approach to managing economic migration' (COM(2004) 811).

[581] Ibid., 13.

[582] COM(2000) 757, 15.

[583] This was emphasized in the Commission's Communication on immigration, integration, and employment: COM(2003) 336, 9–17.

[584] Commission, 'The demographic future of Europe: From challenge to opportunity': COM(2006) 571.

[585] According to figures prepared by Eurostat, and reproduced by the Commission in its Communication above n. 89, the dependency ratio, i.e. the number of people aged 65 years relative to those aged from 16–64, is set to double and reach 51% by 2050, meaning that the EU will change from having four to only two persons of working age for each citizen over 65. Eurostat estimates that 40 million people will emigrate to the EU by 2050.

[586] COM(2000) 757, 15.

[587] See also Art. 67(2) TFEU.

[588] See COM(2000) 757, 6.

smugglers, and other criminals, along with those falsely claiming asylum). This is what is meant by 'managed' migration—the current vogue term.[589]

2.2 The Hague Programme

The balance that characterized the Tampere principles[590] was tipped in favour of the security agenda by the Hague Programme adopted five years later, laying down measures to be taken from 2004–9.[591] It said:[592]

The security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004. The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as terrorism, organised crime, irregular migratory flows and smuggling of human beings as well as the prevention thereof. Notably, in the field of security, the coordination and coherence between the internal and external dimension has been growing in importance and needs to continue to be vigorously pursued.

It continues:[593] 'A key element in the near future will be the prevention and repression of terrorism . . . [P]reserving national security is only possible in the framework of the Union as a whole.'[594] The EU is no longer just concerned with external security but also security within the EU: 'Freedom, justice, control at the external borders, internal security and the prevention of terrorism should henceforth be considered indivisible within the Union as a whole.' But, as the subsequent documentation makes clear, security is not just about terrorism but it is also about organized crime and drugs.[595] This shift in emphasis reflects a change in perception of TCNs—they are no longer a potential benefit to the EU economy but a threat to its security.

The Hague Programme was followed up by an Action Plan put forward by the Commission[596] identifying ten specific priorities on which the Commission believed efforts should be concentrated. These included fundamental rights and citizenship; the fight against terrorism; managed migration; and integration.[597] Close on the heels of the Hague Programme came the Global Approach to Migration in 2005 and the European Migration Policy in 2006[598] based on 'solidarity, mutual trust and shared responsibility of the European Union and its Member States'. The emphasis was now on keeping out 'undesirable' TCNs through international cooperation and dialogue with third countries, strengthening cooperation among Member States in the fight against illegal immigration, improving the management of the EU's external border and only then to develop well-managed migration policies and promote integration. However, by 2008 the Commission's *Common European Immigration Policy*, showed

589 Commission, 'On an EU approach to managing economic migration': COM (2004) 811.

590 For the Commission's review of Tampere: COM(2004) 401 final.

591 EU Council, *The Hague Programme: Strengthening freedom, security and justice in the European Union*, Council Doc. 16054/04.

592 p. 3.

593 p. 4.

594 Although cf. Art. 72 TFEU (ex Art. 64 EC): 'This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to maintenance of law and order and the safeguarding of internal security.'

595 COM(2005) 184, introduction. See also the EU Action Plan on Drugs: COM(2005) 45, following the European strategy on drugs 2005.

596 COM(2005) 184. See also Commission, 'Policy plan on legal migration' COM(2005) 669; Commission, 'Implementing the Hague Programme: The way forward' COM(2006) 331; and the Commission, 'Report on implementation of the Hague Programme for 2007' COM(2008) 373.

597 Commission, 'A common agenda for integration: Framework for the integration of third country nationals in the European Union', COM(2005) 389. See also the Council's 'Common basic principles for immigrant integration policy in the EU' (Council document 14615/04). In addition, a European Fund for Integration, with €825 millions allocated for 2007–13 (Council Dec. 2007/435/E (OJ [2007] L168/18). See also the Annual Reports on Migration and Integration, e.g. COM(2007) 512.

598 Presidency Conclusions, Brussels European Council, 14–15 Dec. 2006, paras. 21 et seq.

some signs of rectifying the imbalance. Six of its ten common principles concerned non-security issues and focused on the themes of the need for clear, transparent and fair rules, matching skills with needs, integration and transparency, trust and cooperation.

2.3 The Stockholm Programme

Yet the security theme is continued through to the Stockholm Programme 2010–14.[599] In its Presidency Conclusions,[600] the European Council considers:

that the priority for the coming years should be to focus on the interests and needs of the citizens and other persons for whom the EU has a responsibility. The challenge will be to ensure respect for fundamental rights and freedoms and integrity while guaranteeing security in Europe. It is of paramount importance that law enforcement measures and measures to safeguard individual rights, the rule of law and international protection rules are coherent and mutually reinforcing.

The European Council then identified six areas of priority, broadly building on the areas identified by the Commission in its 2009 Communication *An Area of Freedom, Security and Justice Serving the Citizen*:[601] promoting citizenship and fundamental rights, creating a 'Europe of law and justice', a 'Europe that protects', and developing the role of Europe in a globalized world—the external dimension. For our purposes, the two strands of most relevance to this chapter are 'Access to Europe in a globalised world' and 'A Europe of responsibility, solidarity and partnership in migration and asylum matters'. The first concerns access to Europe for persons recognized as having a legitimate interest in accessing the EU territory. This has to be made more effective and efficient. It continues that 'At the same time, the Union and its Member States have to guarantee security for its citizens. Integrated border management and visa policies should be construed to serve these goals.' In other words, it should be made easier for desirable TCNs to have access to the EU but those who are not desirable should be kept out, a point picked up in the second strand: 'in order to maintain credible and sustainable immigration and asylum systems in the EU, it is necessary to prevent, control and combat illegal migration as the EU faces an increasing pressure from illegal migration flows and particularly the Member States at its external borders, including at its Southern borders'.

This policy strand also refers to the European Pact on Immigration and Asylum, introduced by the French presidency in 2008, as a tool to realizing well-managed migration. While the pact itself offers little that is new (it talks of organizing legal migration to take account of priorities, needs and reception capacities determined by each Member State, and encouraging immigration, controlling irregular immigration by ensuring the return of irregular aliens to their country of origin, making border controls more effective, constructing a Europe of asylum and creating a comprehensive partnership with the countries of origin and transit to encourage the synergy between migration and development), the techniques are, according to some commentators, driven more by nationalism and intergovernmentalism than by European supranationalism, prioritizing the competences of the Member States over those of an EU of 27.[602] This may not be altogether surprising given the intergovernmental antecedents of much policy in this area. However, the changes introduced by the Lisbon Treaty point somewhat in the opposite direction, with greater emphasis on the use of the 'Community', now Union method, and greater democratic input through the ordinary legislative procedure. We turn now to consider the legislation that has been proposed and adopted to date.

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[599] The full programme can be found in the minutes of the General Affairs Council, 2 Dec. 2009, doc. 17024/09, <http://www.se2009.eu/polopoly_fs/1.26419!menu/standard/file/Klar_Stockholmsprogram.pdf>. See also Commission Communication, 'Delivering an area of freedom, security and justice for Europe's citizens: Action plans implementing the Stockholm programme' COM(2010) 171.

[600] 11 Dec. 2009, para. 26.

[601] COM(2009) 262. See further Ch.12.

[602] S. Carrera and E. Guild, 'The French presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. rights?', *CEPS Policy Brief*, Sep. 2008, 4–5.

C. UNION LEGISLATION ON FREE MOVEMENT, RESIDENCE, EMPLOYMENT, AND FAMILY RIGHTS FOR TCNS

1. INTRODUCTION

Title IV of Part Three EC provided the legal bases necessary to achieve the Tampere objectives and set a timetable by which the relevant measures should be adopted (in most cases five years from the date when the Treaty of Amsterdam came into force).[603] Both Title IV of Part Three EC and now Title V of Part Three TFEU envisage a three-pronged approach to immigration policy with separate legal bases:
(1) measures concerning the physical movement of persons (i.e., travel) (Article 62 EC, Article 77 TFEU)
(2) measures on asylum (Article 63(1) and (2) EC, Article 78 TFEU)
(3) measures on immigration and integration (Article 63(3) and (4) EC, Article 79 TFEU).
Article 80 TFEU adds that EU policies in the area of asylum and immigration, together with their implementation, are to be governed by 'the principle of solidarity and fair sharing of responsibility, including its financial implications between the Member States'. Since asylum is a specialist area we shall not consider it further in this chapter.[604] Instead, we shall concentrate on the Union's approach to physical movement of persons and measures on immigration and integration.

2. BORDER CONTROL: ARTICLE 77 TFEU

There are 1,636 designated points of entry to the EU and about 900 million people cross those external frontiers a year. For the Commission, 'In an open world, with growing mobility, ensuring the effective management of the Union's external borders is a major challenge.[605] Article 77(1) (ex Article 62 EC) provides that the Union is to develop a policy with a view to:

(a) ensuring the absence of any controls on persons, whatever their nationality, when crossing *internal* borders
(b) carrying out checks on persons and efficient monitoring[606] of the crossing of *external* borders
(c) the gradual introduction of an integrated management system for external borders.

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603 The Lisbon Treaty removed this timeframe.

604 See generally, Commission Communication, 'Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum' (COM(2000) 755), and the report COM(2003) 152; Commission Communication, 'Towards more accessible, equitable and managed asylum systems', COM(2003) 315; Commission Communication, 'A policy action plan on asylum: An integrated approach across the EU' (COM(2008) 360). See now, e.g., Council Reg. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ('Dublin II') ([2003] OJ L50/1) adopted under Art. 63(1)(a) EC and the implementation rules: Reg. 1560/2003 ([2003] OJ L222/3). Ireland and the UK gave notice of their wish to participate in the adoption of this reg.; Denmark did not. See also Council Dir. 2003/9/EC laying down minimum standards on the reception of asylum seekers ([2003] OJ L31/18) adopted under Art. 63(1)(b) EC: the UK gave notice of its wish to participate in the directive. The directive does not apply to Ireland and Denmark. Dir. 2004/83 ([2004] OJ L304/12) on minimum standards for the qualification and status of TCNs and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (as interpreted in Joined Cases C–175/08–179/08 *Abdulla* v. *Germany* [2010] ECR I–000 and Case C–465/07 *Elgafaji* v. *Staatssecretaris van Justitie* [2009] ECR I–921): the UK and Ireland are participating in this measure; Denmark is not. In addition Council Dir. 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof ([2001] OJ L212/12) adopted under Art. 63(2)(a) and (b) EC: the UK and Ireland are participating; Denmark is not. Dir. 2005/85 ([2005] OJ L326/13) on minimum standards on procedures in Member States for granting and withdrawing refugee status, adopted under Art. 63(1)(d) EC: the UK and Ireland are participating in this measure; Denmark is not. Note the shift in language in Art. 78(1) TFEU from minimum standards to the development of a 'common asylum policy'.

605 COM(2009) 262, 2.

606 This reference is new in the Lisbon Treaty.

Article 77(2) then provides specific powers for the European Parliament and the Council, acting by the ordinary legislative procedure,[607] to adopt measures concerning:[608]

(a) the common policy on visas and other short-stay residence permits
(b) the checks to which persons crossing external borders are subject
(c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period
(d) any measure necessary for the gradual establishment of an integrated management system for external borders[609]
(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

Finally, Article 77(3) introduces new default powers to adopt measures under the special legislative procedure (unanimity in council, consultation of the European Parliament) concerning passports, ID cards, residence permits, or any other such document to facilitate free movement of citizens.

A lot of the groundwork on border controls had already been done by the Schengen Agreement and Convention[610]. Article 2(1) of the Schengen Convention, subsequently based on Article 62(1) EC, provides that 'Internal borders may be crossed at any point without any checks on persons being carried out' but this is subject to a public-policy/national-security derogation.[611] Since Article 2(1) necessitated the harmonization of visa policy in respect of TCNs requiring visas, this was contained in Article 10 of the Schengen Convention, which provided for the introduction of a uniform visa—valid for the entire territory—for visits not exceeding three months. Visas issued for visits of more than three months are not subject to any common Schengen rules:[612] they are largely national visas issued under national law.[613] The Convention also lays down common rules making carriers responsible for ensuring that TCNs possess the correct travel documents.[614]

In order to compensate for the loss of internal border controls, the Convention provides for a range of additional measures at the external frontiers.[615] For example, Articles 3–8 introduce strict uniform rules about crossing external frontiers which are supplemented by detailed rules issued by the Executive Committee (now replaced by the Council), particularly a common manual on border checks,[616] now the borders code (see below), and common consular instructions (CCI),[617] now replaced by the visa code, on the procedures and conditions for issuing visas. In particular, Article 5 provides that for visits not exceeding three months, entry into Schengen territory will be granted to aliens provided:

• they are in possession of a valid travel document and visa if required
• they have documents substantiating the purpose of the visit and demonstrating sufficient means of support

[607] Under the original EC Treaty the procedural requirements were unanimity and consultation with the European Parliament but the EC Treaty envisaged a phasing in of QMV and co-decision. This process was completed by 1 Jan. 2005 and this change is reflected in Art. 77(2) with its reference to the ordinary legislative procedure.
[608] A new Art. 77(4) adds that Art. 77 is not to 'affect the competence of the Member States concerning the geographical demarcation of their borders in accordance with international law'.
[609] This reference is new in the Lisbon Treaty.
[610] [2000] OJ L239. The Implementing Agreement came into force in Sep. 1993 but was not applied for the purposes of abolishing border checks until 26 Mar. 1995.
[611] Art. 2(2) of the Schengen Convention.
[612] Art. 18.
[613] Cf. Family Reunification Dir. 2003/86 considered below, and proposals for more harmonization: COM(2009) 90–1.
[614] Art. 26.
[615] D. O'Keeffe, 'The emergence of a European immigration policy' (1995) 29 *ELRev*. 20, 34.
[616] Since declassification, the Common Manual appears at [2002] OJ C313/97 with all but three of its annexes.
[617] [2000] OJ L239/317.

• they have not been reported in the Schengen Information System (SIS)[618] as a 'person not to be permitted entry'
• they are not considered to be a threat to public policy or national security or the international relations of any contracting state.
There is a presumption that entry across one Schengen external border constitutes admission to the whole territory and an assumption that a short-stay visa issued by any participating state will be recognized for entry to the common territory.[619]

The Schengen system is based on the principle of mutual recognition of national decisions rather than harmonization. This has posed a number of problems. For example, Article 96 of the Schengen Implementing Agreement provides that individuals may be entered into the SIS database by a Member State if the state deems the individual to be 'a threat to public order or national security and safety'.[620] Since these matters are assessed according to national criteria,[621] different Member States have different conceptions of what constitutes risk. And as a result of the principle of mutual recognition, an individual may be excluded by all states even where he or she satisfies the exclusion criteria of only one.[622] Therefore, a Greenpeace activist and a New Zealand national was excluded from the Netherlands on the basis of an SIS entry against her by France even though many in the Netherlands did not consider her to pose such a risk.[623]

Since the incorporation of the Schengen *acquis* into the EC and EU Treaties by the Treaty of Amsterdam, the EU has adopted legislation concerning:
• the third countries whose nationals must be in possession of visas when crossing the external borders (and those who are exempt) for an intended stay in that Member State or in several Member States of no more than three months[624]
• a uniform format for visas[625]
• a legislative framework for the implementation and operation of the Visa Information System (VIS), facilitating checks at the external border crossing points and the exchange of visa data between Member States.[626]

However, the two most important measures adopted are:
• a Community code on visas,[627] establishing the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States for periods not exceeding three months in any six

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[618] The SIS is a database of people who may pose a threat to security and of objects such as stolen cars and artworks. The legal basis for the SIS is found in Arts. 92–119. Although the UK (Dec. 2000/365/EC ([2000] L131/43) and Ireland (Dec. 2002/192 ([2002] OJ L64/20) participate in principle in the database, their participation has not yet been put into effect. See also EP and Council Reg. 1987/2006 ([2006] OJ L381/4) on the establishment, operation, and use of the second generation SIS. Council Reg. (EC) No. 1104/2008 ([2008] OJ L299/1) on the migration from the SIS I+ to the second generation Schengen Information System (SIS II). SIS II is not yet operational.

[619] Guild, above n. 15, 305 and Arts. 19–20. This also applies to an alien holding a residence permit issued by one of the Member States. No detailed criteria are provided for the grant or renewal of a residence permit (Art. 21); cf. Art. 25 on a resident permit for a person on whom an alert has been issued.

[620] See also Arts. 5–6 of the Schengen Convention. Cf. Case C–503/03 *Commission* v. *Spain (SIS)* [2006] ECR I–1097 considered in Ch. 13.

[621] See COM(2002) 233, 9–10.

[622] Guild, above n. 15, 309. Although cf. Art. 16 of the Convention.

[623] Ibid.

[624] Council Reg. 539/2001 ([2001] OJ L81/1) (as amended). This does not apply to the UK and Ireland.

[625] Council Reg. 334/2002 ([2002] OJ L53/7) based on Art. 62(2)(b)(iii) EC. This applies to the UK but not Ireland. The original Reg. 1683/95 ([1995] OJ L164/1) was adopted on the basis of Art. 100c EEC (now repealed). See also Council Reg. 333/2002 ([2002] OJ L53/4), adopted under 62(2)(b)(iii) EC on a uniform format for affixing the visa issued by Member States to persons holding travel documents not recognized by the Member State drawing up the form. This applies to the UK but not Ireland.

[626] Reg. (EC) No. 767/2008 concerning the Visa Information System (VIS) ([2008] OJ L218/60) adopted under Art. 62(2)(b)(ii) EC. Denmark, the UK, and Ireland are not taking part. The VIS Reg. is not yet applied.

• the Schengen Borders Code,[628] laying down standards and procedures states have to follow in controlling the movement of persons across internal and external EU borders. This measure allows TCNs to stay in the Member State for up to three months.
These measures all constitute a 'follow-on' from the Schengen *acquis* in accordance with the Schengen Protocol.

Secondary movement for short periods (the freedom for TCNs to travel between Member States) is also covered. According to Article 19 of the Schengen Convention, aliens who hold uniform visas and who have legally entered the territory of a Contracting Party may move freely within the territories of all the Contracting Parties during the period of validity of their visas. Article 20 provides that aliens not subject to a visa requirement may move freely within the territories of the Contracting Parties for a maximum period of three months during the six months following the date of first entry. Likewise, aliens with a valid residence permit can travel to another Member State for up to three months under Article 21. Recognizing the importance of these secondary mobility rights, the Commission had proposed a directive relating to the conditions in which TCNs would have had the freedom to travel in the territory of the Member States for periods not exceeding three months and determining the conditions of entry and movement for periods not exceeding six months.[629] However, this proposal was withdrawn.[630]

Finally, FRONTEX, the agency for coordinating border control cooperation between Member States, has been instrumental in the EU's response to securing its external borders.[631] While the responsibility for the control and surveillance of external borders lies with the Member States, the agency facilitates the application of existing and future Union measures relating to the management of external borders by ensuring the coordination of Member States' action in the implementation of those measures.[632]

3. MEASURES ON IMMIGRATION AND INTEGRATION: ARTICLE 79 TFEU

3.1 Legal Immigration

(a) Introduction
As the Tampere Council made clear, facilitating legal immigration is now a central tenet of current EU policy. The Amsterdam Treaty gave the EU the powers to achieve this. Under Article 63 EC the Council could act in the prescribed areas namely, under Article 63(3)(a) EC (now Article 79(2)(a) TFEU), immigration policy in the areas of the conditions of entry and residence, and standards on the issue of long-term visas and residence permits, including those for the purpose of family reunion;[633]

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627 Reg. (EC) No. 810/2009 establishing a Community code on visas (the Visa Code) [2009] OJ L243/1 adopted under Art. 62(2)(a) and (b)(ii) EC. The UK, Ireland, and Denmark are not taking part.
628 Reg. (EC) No. 562/2006 establishing a Community Code on the rules governing the movement of persons across borders ([2006] OJ L105/1), adopted under Art. 62(1) and (2)(a) EC. Denmark, the UK and Ireland are not taking part. This regulation was interpreted for the first time in Joined Case C–261/08 and 348/08 *Zurita Garcia* v. *Delegado del Gobierno en la Región de Murcia* [2009] ECR I–000 (a request for this case to be heard under the PPU was rejected).
629 COM(2001) 388.
630 COM(2005) 462.
631 Reg. (EC) No. 2007/2004 ([2004] OJ L349/1) establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU, based on Arts. 62(2)(a) and 66 EC. The UK, Ireland, and Denmark are not taking part. See Case C–77/05 *UK* v. *Council* [2007] ECR I–11459 on the UK's unsuccessful attempt to opt-in (considered above). On the operation of FRONTEX, see Commission, 'Report on the evaluation and future development of the FRONTEX Agency': COM(2008) 67. See also Commission, 'Examining the creation of a European border surveillance system (EUROSUR)', COM(2008) 68; and Commission 'Preparing the next steps in border management in the EU', COM(2008) 69.
632 4th recital.
633 Art. 63(3)(a) EC.

and, under Article 63(4) EC (now Article 79(2)(b) TFEU), measures defining the rights of TCNs residing legally in a Member State, including the conditions under which legally resident TCNs could move and reside in other Member States.[634] While most of the provisions in Article 63 were subject to a requirement that the Council had to act within five years following the entry into force of the Amsterdam Treaty, this was not the case with the measures listed in Article 63(3)(a) and (4) EC. As a result, only a limited number of measures have actually been adopted so far: under Article 63(3)(a) regulations have been issued on long-term visas[635] and residence permits,[636] together with an important directive on family reunification (considered below);[637] under Article 63(4) EC, Regulation 1408/71 on social security (Regulation 883/04 from 1 March 2010) was extended to TCNs;[638] and under Article 63(3)(a) and (4) EC, the Long-term Residents Directive (also considered below) and the sectoral specific directives (students, researchers and highly qualified workers), all significant measures, were adopted.

The Lisbon Treaty introduced a further change: all measures taken in the areas listed in Article 79(2) are subject to the ordinary legislative procedure.[639] Finally, the new Article 79(4) allows the European Parliament and Council, again acting under the ordinary legislative procedure, to establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of TCNs residing legally in their territories. Harmonization is expressly excluded under this provision.

(b) Family reunification

For the past twenty years, family reunification has been one of the main sources of immigration to the EU.[640] The Family Reunification Directive 2003/86[641] was the first of two measures put forward by the Commission aimed at integrating TCNs into the community of the host state and ensuring fair treatment of TCNs. The directive provides that a TCN ('the sponsor')[642] residing lawfully in the territory of a Member State, holding a residence permit issued by a Member State valid for a year or more, with reasonable prospects of obtaining the right of permanent residence, can apply for family reunification[643] (usually while the TCN family members are outside the territory).[644] As with Article 3(1) of the Citizens' Rights Directive (CRD) 2004/38, the Family Reunification Directive makes a

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634 Art. 63(4) EC. There is no Schengen *acquis* under Art. 63(4) EC.

635 Council Reg. 1091/2001 on giving rights to those TCNs wishing to move with a long-stay visa (but without a residence permit) ([2001] OJ L150/4) based on Arts. 62(2)(b)(ii) and 63(3)(a) EC. This constitutes a development of the Schengen *acquis* and does not apply to the UK or Ireland.

636 Council Reg. 1030/2002 laying down a uniform format for residence permits for TCNs ([2002] OJ L157/1). This constitutes a development of the Schengen *acquis*. The UK and Ireland are participants.

637 Council Dir. 2003/86/EC ([2003] OJ L251/12). The UK, Ireland, and Denmark are not participating in this directive.

638 Council Reg. 859/2003 extending Reg. 1408/71 on social security to TCNs ([2003] OJ L124/1) based on Art. 63(4) EC. The UK and Ireland gave notice of their desire to be bound by the regulation; Denmark did not. Declaration 14 TFEU says that the interests of a Member State should also be taken into account where a proposal under Art. 79(2) TFEU would affect fundamental aspects of its social security scheme.

639 Under the original EC Treaty the procedural requirements were unanimity and consultation with the European Parliament but the EC Treaty envisaged a phasing in of QMV and co-decision. This process was completed by 1 Jan. 2005 in respect of illegal immigration and residence. However, adoption of measures on legal migration required unanimity and simple consultation with the European Parliament after this date.

640 COM(2008) 610, 3.

641 [2003] OJ L251/12 adopted under Art. 63(3)(a) EC. The UK, Ireland, and Denmark are not taking part in this measure. See also the Commission's report on the application of the directive: COM(2008) 610.

642 The directive therefore does not apply to non-migrant nationals wanting to be joined by TCN family members (e.g., a German living in Germany wanting to be joined by his Chinese wife). This situation is covered by national law.

643 Art. 1. Under Art. 8 Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years. This provision was unsuccessfully challenged in Case C–540/03 *EP* v. *Council (Family Reunification Directive)* [2006] ECR I–5769.

644 Art. 5(3).

distinction between those family members who must be admitted (spouse and minor children[645]) and those whom the Member State has a discretion whether to admit (first-degree relatives in the direct ascending line, where they are dependent on the TCN or his or her spouse and do not enjoy proper family support in the country of origin, adult unmarried children where they cannot support themselves, and an unmarried partner (in a duly attested long-term relationship or registered partnership).[646] The list of family members entitled to join the TCN is shorter than in the case of migrant workers under the CRD. The right to reunification is also dependent on evidence of the existence of 'normal' accommodation for a comparable family in the same region, sickness insurance for the TCN and the family members, and stable and regular resources which are higher than or equal to the level of resources which are sufficient to maintain the sponsor and the family members.[647]

If these conditions are not satisfied then the family may not be reunified with the paradoxical result that a so-called 'Family Reunification' Directive actually has the opposite effect.[648] Yet, in the Parliament's challenge to the validity of the directive in *EP v EU Council (Family Reunification Directive)*,[649] the Court upheld the validity of the directive, approving the margin of discretion given to the Member States. The European Parliament had argued that the directive's provisions enabling Member States to restrict family reunification (for example, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorizing entry and residence, verify whether he or she meets an integration condition provided for by its existing legislation on the date of implementation of the directive) were contrary to fundamental rights, in particular the right to respect for family life under Article 8 ECHR and the right to non-discrimination under the EU Charter. The Court dismissed the action but did stress that fundamental human rights are binding on Member States when they implement Union rules and that they had to apply the directive's rules in a manner consistent with the requirements governing human rights protection, especially regarding family life and the principle of protecting the best interests of the child.[650]

In order to ensure the integration of the family members the directive allows Member States to require the TCN family members to comply with integration measures, such as attending language courses.[651] It also provides for family members to enjoy access to employment and self-employment,[652] education, and vocational training,[653] but not social security or social assistance. After five years the spouse and children who have reached majority have the right to an autonomous residence permit independent of that of the sponsor.[654]

(c) Rights of long-term residents

The Long-term Residents Directive 2003/109[655] was the second measure proposed by the Commission aimed at integrating TCNs into the community of the host state and ensuring their fair treatment.[656] The

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645 Art. 4(1), 2nd para., contains a derogation for a child over 12 who arrives independently from the rest of his/her family.
646 Art. 4(2).
647 Art. 7(1)(c). In Case C–578/08 *Chakroun* [2010] ECR I-000, the Court ruled that it was contrary to the Dir., for the Member State to adopt rules resulting in family reunification being refused to a sponsor who has proved that he has stable and regular resources sufficient to maintain himself and his family but who, given the level of his resources, will nevertheless be entitled to claim special assistance to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income or income support measures in the context of local authority minimum income policies.
648 For a detailed discussion, see S. Peers, 'Family reunion and Community law' in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice* (Oxford: OUP, 2004).
649 Case C–540/03 [2006] ECR I–5769.
650 Paras. 104–5.
651 Art. 7(2).
652 Art. 14(2) allows Member States to delay the exercise of employment/self-employment rights for up to 12 months.
653 Art. 14(1).
654 Art. 15(1).
655 [2003] L16/44, adopted under Art. 63(3)(a) and (4) EC. The directive does not apply to the UK, Ireland, and Denmark.

aim of this directive is to establish a common status of long-term resident for those TCNs who have resided 'legally and continuously' for five years in the territory of the Member State concerned.[657] A long-term residence permit, valid for at least five years, will be granted where the TCN has adequate resources and sickness insurance.[658] It is automatically renewable on expiry.[659] Member States can also require TCNs to comply with (unspecified) 'integration conditions',[660] before becoming long-term residents, tests which are usually reserved to granting an individual citizenship of a state, not merely long-term residence status.

Long-term residents enjoy not only a secure residence but also equal treatment with nationals as regards a number of matters, including access to employment (but not in respect of activities which entail even occasional involvement in the exercise of public authority or activities that are reserved to nationals under laws in force on 25 November 2003), education and training (including study grants),[661] recognition of diplomas, social protection and social assistance (including social security),[662] and access to goods and services. The individual can be expelled only on the grounds of personal conduct but not, apparently, lack of resources.[663] In addition, the long-term resident 'with reasonable prospects of obtaining the right of permanent residence' will also enjoy the right to family reunion under Directive 2003/86.[664] Both the Family Reunification Directive and the directive on long-term residents are subject to derogations on the grounds of public policy, security, and health.[665]

Long-term residents with a long-term resident permit (and their families) will also enjoy the rights of free movement to other Member States (i.e. secondary mobility). The directive provides that long-term residents (and their families) can *reside* in (but makes no provision on entry into[666]) the territory of another Member State for more than three months[667] if they are exercising an economic activity as an employed or self-employed person or studying there and have adequate resources and sickness insurance, or simply have adequate resources and sickness insurance.[668] This directive demonstrates the increasing parallelism between the rights of legally resident TCNs and those of nationals of the Member States who are citizens of the Union.[669] The logical conclusion of this process of approximating the position of long-term legally resident TCNs to that of Member State nationals is

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656 COM (2001) 127.

657 There is a long list of lawful residence in Art. 3(2) which will not entitle the TCN to long-term residence status: e.g., students, refugees, au-pairs.

658 Cf. the CRD 2004/38 which does not impose the same obligations on EU citizens who have permanent residence.

659 Art. 9 makes provision for the loss of long-term resident status including in the case of fraudulent acquisition of the status or absence from the territory for more than 12 consecutive months.

660 Art. 5(2). See the 4th recital: 'The integration of third-country nationals who are long term resident in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the [Union] stated in the [Treaties].' Yet, K. Groenendijk suggests ('The Long Term Residents Directive, denizenship and integration' in A. Baldaccini, E. Guild, and H. Toner (eds.), *Whose Freedom, Security and Justice? EU immigration and asylum law and policy* (Oxford: Hart Publishing, 2007), 448) that some Member States have taken advantage of this possibility to create a new barrier to acquiring secure status for TCNs.

661 Subject to limits in Art. 11(3).

662 Although this can be limited: Art. 11(4).

663 Art. 6.

664 Art. 3(1).

665 The 14th preambular para. of Dir. 2003/86 provides that the notion of public policy and public security covers cases in which a TCN belongs to an association which supports terrorism, supports such an association, or has extremist aspirations.

666 S. Bolaert-Souminen, 'Non-EU nationals and Council Directive 2003/109/EC on the status of third country nationals who are long-term residents: Five paces forward and possibly three paces back' (2005) 42 *CMLRev.* 1011, 1030.

667 This goes beyond the rights already provided in the Schengen *acquis* which merely gives rights to move for up to three months. See further S. Peers, 'Implementing equality? The directive on long term resident third country nationals' (2004) 29 *ELRev.* 437

668 For criticism of these provisions, see A. Kocharov, 'What intra-Community mobility for third country nationals' (2008) 33 *ELRev.* 913, 919.

669 COM(2001) 74, para. 1.7.

the opportunity to obtain the nationality of the Member State in which they reside. This was endorsed by the European Council[670] and the Commission.[671]

(d) The 'first admissions' directives

The two directives considered so far—on Family Reunification and Long-term Residents—focused on the integration of TCNs who had already been admitted to a Member State under *national* law. The Commission's other proposals have been concerned with managing legal migration flows and in particular giving certain groups a right of entry—under *Union* law—to the Member States. The first proposal, a directive on the conditions of entry and residence of TCNs for the purpose of paid employment and self-employed economic activities,[672] was seen as the 'cornerstone of immigration policy' and central to addressing the 'shortage of skilled labour in certain sectors of the labour market'.[673] It provided for the grant of a renewable 'residence permit-worker' to a TCN, subject to certain formalities, valid for three years, where a job vacancy could not be filled by an EU citizen or other TCNs already legally resident in the EU (the 'economic needs test' or 'Union preference' test). Such a permit would have allowed the TCN to enter into, and reside in, the territory of the issuing state, exercise the activities authorized by the permit, and enjoy equal treatment with nationals in a number of areas, including working conditions, recognition of qualifications, social security including health care, and access to goods and services.

Given that this proposal was merely a 'first step' in achieving a Union policy, it did not affect Member States' responsibility for deciding whether to admit economic migrants, taking into account the needs of their labour markets and their overall capacity to integrate them (a point now enshrined in Article 79(5) TFEU[674]). Nevertheless, despite the professed importance of this directive, it could not be agreed upon and the proposal was withdrawn.[675]

The Commission therefore focused instead on sectoral specific measures as part of its approach to managing legal economic migration.[676] This led to the adoption of Directive 2004/114, on the conditions of entry and residence for TCNs for the purpose of studies, pupil exchange, vocational training, or voluntary service.[677] This measure is less market-oriented than the unsuccessful proposed directive on the conditions of entry and residence of TCNs for the purpose of paid employment and self-employment because the stay of migrants covered by Directive 2004/114 is temporary and viewed as a form of 'mutual enrichment for the migrants who benefit directly from it, both for their country of origin and for the host country, while helping mutual familiarity between cultures'.[678] Despite these worthy words, the directive does have a labour-market dimension since, as the Commission notes, many Member States provide certain TCNs with the opportunity to remain after their training 'so as to remedy shortages of skilled manpower'.[679] This directive requires those covered to have adequate resources and medical insurance. Students and unremunerated trainees can also have limited access to the employment market. The directive also provides for derogations on public-policy, security, and health grounds.

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670 However, access to nationality is a matter reserved solely for national powers: COM(2001) 127, para. 5.5.
671 COM(2003) 323, 22.
672 COM(2001) 386.
673 Preambular paras. (3) and (6).
674 'This Article shall not affect the right of the Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.'
675 COM(2005) 462.
676 See, e.g., the Commission's Green Paper COM(2004) 811.
677 Council Dir. 2004/114/EC ([2004] OJ L375/12) adopted on the basis of Art. 63(3)(a) and (4) EC. The UK, Ireland, and Denmark are not taking part in the directive.
678 COM(2002) 548, 2.
679 Ibid., 3.

Directive 2004/114 was followed by Directive 2005/71 on a specific procedure for admitting third country nationals for the purposes of scientific research.[680] TCN researchers working with an approved research organization in the Member States are to be given a residence permit for a period of at least a year provided they have the relevant documentation and can show sufficient resources and medical insurance. Their family members can accompany them. The directive does allow the researchers to teach for a certain number of hours and to enjoy equal treatment with Member State nationals in respect of terms and conditions of employment, dismissal, and social security.

The directive also gives TCNs the right to carry out part of their research in another Member State. By allowing secondary mobility, these first admissions directives mark a new stage in the evolution of policy in respect of TCNs. The rationale for this is competition rather than principle: the EU was losing out to the US in attracting the brightest and the best from third countries. Secondary mobility rights are seen as a pull factor to make the EU more attractive as a destination.[681]

The final and perhaps most important of the first admissions directive is Directive 2009/50[682] on highly qualified workers (the so-called 'blue-card' directive). A TCN with a job offer for 'highly qualified' work (i.e., work requiring higher education qualifications or, where permitted by national law, five years' equivalent professional experience) in an EU Member State, who has sickness insurance and is not considered a threat to public policy, security or health, must be issued with an EU blue card.[683] Member States do not, however, need to issue a blue card where, for example, the vacancy could be filled by a member of the national or Union workforce, where the Member State deems the volume of admission of TCNs is too high, or where the job is in a sector suffering form a lack of qualified workers in the country of origin (e.g., healthcare).[684] Once in possession of a blue card, the TCNs must do the work they came for during the first two years; after that, Member States 'may grant' the persons concerned equal treatment with nationals as regards access to highly qualified employment.[685] Blue-card workers also enjoy equality in respect of other matters including working conditions, freedom of association, social security, and goods and services.[686] Directive 2003/86 also gives rights to the family members of the TCN blue-card holder. Finally, the directive allows for secondary mobility. It prescribes the right of residence (but not entry) in the second Member State for the TCN blue-card holder and their family members[687] after 18 months of legal residence in the first Member State in order to undertake highly qualified employment.

Complementing these three sectoral directives is a proposal for a Council directive on a single application procedure for a permit for TCNs to reside and work in the territory of a Member State and on a common set of rights for TCNs legally residing in a Member State.[688] There are thus two limbs to the proposal. The first, concerns those seeking to come to the EU to work. The proposal envisages a single application procedure, resulting in a single permit to work and stay. No additional permits (e.g., work permits) can then be required. The second limb of the proposal concerns those who are already legally residing in an EU Member State. Those legally working but not yet holding long-term resident status are to enjoy equal treatment in respect of employment related matters.

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680 [2005] OJ L289/15 adopted under Art. 63(3)(a) and (4) EC. Ireland has notified its wish to participate in this measure; the UK and Denmark are not participating.

681 S. Iglesias Sánchez, 'Free movement of third country nationals in the European Union? Main features, deficiencies and challenges of the new mobility rights in the area of freedom, security and justice' (2009) 15 *ELJ* 791, 799; A. Kocharov, 'What intra-Community mobility for third-country workers?' (2008) 33 *ELRev* 913, 915 who cites figures that the US attracts 55% of all skilled migrants worldwide, the EU attracts only 1/11th of that number.

682 [2009] OJ L155/17 adopted under Art. 63(3)(a) and (4) EC. The UK, Ireland, and Denmark are not taking part.

683 Arts. 5 and 7.

684 Arts. 6 and 8.

685 Art. 12.

686 Art. 15.

687 Arts. 18–19.

688 COM(2007) 638.

3.2 Illegal Immigration, Residence, and Repatriation

Europol estimates that there are 500,000 illegal—or, using the more neutral term, irregular—immigrants entering the EU each year, many employed as undeclared workers.[689] Article 63(3)(b) EC (now Article 79(2)(c) TFEU) required the Council to take measures within five years of the coming into force of the Amsterdam Treaty to deal with illegal immigration and illegal residence, including repatriation of illegal residents. The Commission began by issuing a Communication on a common policy on illegal immigration[690] followed up by an Action Plan[691] which focused on keeping illegal immigrants out of the EU, particularly through the integrated management of external borders.[692] This has been complemented by a Union Return Policy on Illegal Residents[693] which was also followed up by an Action Plan.[694] The Commission recognizes the sensitive nature of the issue of forced return but stresses that it was essential for the credibility of any policy for fighting illegal immigration. It did, however, note that it had to fit 'smoothly into a genuine management of migration issues, requiring crystal clear consolidation of legal immigration channels'.[695]

In practical terms these policy statements led to the adoption of Directive 2001/40[696] on the mutual recognition of decisions on the expulsion of TCNs. The Schengen states have also agreed Directive 2001/51 on harmonizing financial penalties imposed on carriers transporting into Member States TCNs lacking the documents necessary for admission.[697] In addition, the European Parliament and Council adopted Directive 2008/115/EC[698] on common standards and procedures in Member States for returning illegally staying third-country nationals. This lays down 'clear, transparent and fair rules'[699] for an effective return policy as a 'necessary element' of a well managed migration policy. The directive requires Member States to issue a return decision—usually accompanied by an entry ban—to any TCN staying illegally in their territory, subject to certain exceptions. The Member States must provide an appropriate period for voluntary departure, unless there is a risk of absconding or similar, followed up by enforced removal, with coercive measures, including detention, as a last resort. The

689 COM(2000) 757, 13. In COM(2009) 262 the Commission estimates that there about 8 million illegal immigrants.
690 COM(2001) 672.
691 2002/C 142/23. Commission, 'Policy priorities in the fight against illegal immigration of third country nationals': COM(2006) 402.
692 See, e.g., Commission, 'Reinforcing the management of the European Union's southern maritime borders' (COM(2006) 733) and on 'Strengthening the European neighbourhood policy', COM(2006) 726.
693 COM(2002) 564 following on from the Green Paper COM(2002) 175.
694 For a review of these measures see, e.g., the Commission's Communication on the development of a common policy on illegal immigration, smuggling, and trafficking of human beings, external borders, and the return of illegal immigrants, COM(2003) 323. There were further reviews in 2006 and 2009.
695 COM(2002) 564, 4.
696 [2001] OJ L149/34 adopted under Art. 63(3) EC. This is part of the Schengen *acquis*. The UK, but not Denmark, has agreed to participate in this measure.
697 [2001] OJ L187/45, adopted under Art. 63(3)(b) EC. This is part of the Schengen *acquis*. The UK is participating in this directive but Ireland and Denmark are not. See also Council Dir. 2003/110/EC on assistance in cases of transit for the purposes of removal by air ([2003] OJ L 321/26) adopted under Art. 63(3)(b) EC as part of the Schengen *acquis*. The UK, Ireland, and Denmark are not participating. In addition, two further measures have been adopted, again to be applied by the Schengen states, on strengthening the penal framework to prevent the facilitation of unauthorized entry and residence for TCNs (Council Framework Dec. 2002/946/JHA [2002] OJ L328/1 based on Arts. 29, 31(e), and 34(2)(b) TEU—the UK and Ireland are taking part in this Framework Dec.) and defining the facilitation of unauthorized entry, transit, and residence (Council Dir. 2002/90/EC ([2002] OJ L328/17 based on Arts. 61 and 63(3)(b) EC). The UK and Ireland are taking part in this measure, Denmark is not.
698 [2008] OJ L348/98, adopted under Art. 63(3)(b) EC and builds on the Schengen *acquis*. Denmark, the UK, and Ireland are not taking part in the adoption of this directive. This directive was interpreted by the Grand Chamber in Case C–357/09 PPU *Said Shamilovich Kazoev* [2009] ECR I–000.
699 4th recital.

directive lays down a number of procedural safeguards together with the requirement of an effective remedy.[700]

Article 79(3) TFEU gives the Union the power to conclude agreements with third countries for the readmission of TCNs to their country of origin where those TCNs do not, or no longer, fulfil the conditions for entry, presence or residence in the territory of one of the Member States. This is a new provision but reflect existing practice: readmission agreements have already been negotiated under the (then) Community's implied powers.

There is one further recent measure of considerable practical importance: Directive 2009/52/EC[701] which provides for minimum standards on sanctions against employers of illegally staying TCNs. This measure is seen as particularly important since the possibility of finding work is a pull factor for illegal immigration. Article 3(1) prohibits the employment of illegally staying TCNs. Non-compliance is subject to 'effective, proportionate and dissuasive sanctions against the employer'.[702] It is also to be a criminal offence when committed intentionally in certain circumstances.[703] To that end the directive obliges employers to require TCNs to hold a valid residence permit or authorization for their stay, to hold a copy of that document for inspection by the authorities and to notify the authorities of the employment of TCNs.

Finally, the Member States agreed a Framework Decision 2002/629/JHA under the third pillar on combating trafficking in human beings.[704] This is complemented by a directive designed to encourage the victims of people smugglers to come forward and cooperate with the authorities by giving information in return for a short-term residence permit.[705] As the Commission noted,[706] such steps were necessitated by tragic incidents, such as the one in Dover in June 2000 in which 58 Chinese nationals, trying to enter the UK illegally, died while left in a lorry exposed to the full sun with its refrigeration systems turned off. Various other measures taken under the third pillar also focus the efforts of the Member States and Europol on detecting and dismantling the criminal networks involved.[707] Competence for 'combating trafficking in persons, in particular women and children' has now been communitarized by the Lisbon Treaty and is found in Article 79(2)(d)[708] and subject to the ordinary legislative procedure.

D. THE RIGHTS OF TURKISH WORKERS AND THEIR FAMILIES IN THE EU

1. INTRODUCTION

The EEC–Turkey Association Agreement of 1963 gives the most extensive rights to TCNs legally residing in the EU,[709] other than to EEA and Swiss nationals. While it does not affect the Member

[700] See also Dir. 2002/90 defining the facilitation of unauthorized entry, transit, and residence ([2002] OJ L328/17). The UK and Ireland are taking part, Denmark is not.
[701] [2009] OJ L168/24, proposed under Art. 63(3)(b) EC. The UK, Ireland, and Denmark are not taking part in this directive.
[702] Art. 5(1).
[703] Art. 9.
[704] [2002] OJ L203/1.
[705] Council Dir. 2004/81 ([2004] OJ L261/19). The UK, Ireland, and Denmark are not participating in this legislation. There is a proposal to replace this measure: COM(2009) 136.
[706] COM(2000) 757, 6.
[707] Tampere Presidency Conclusions, para. 23.
[708] See also Art. 83(1) TFEU on criminal offences and sanctions.
[709] For a full discussion, see M. Hedemann-Robinson, 'An overview of recent legal developments at Community level in relation to third country nationals resident within the European Union, with particular reference to the case law of the European Court of Justice' (2001) 38 *CMLRev*. 525.

State's right to decide whether to admit a Turkish national,[710] nor the conditions under which they may take up their first employment, (subject to the application of the legislation outlined above in particular the Family Reunion Directive and the Long-term Residents Directive)[711] it does give Turkish workers an increasing number of rights the longer they are employed in the host state. The Agreement also does not give Turkish nationals the right to move between one EU state and another[712] but, unlike any other Union agreement (apart from the EEA and the EU/Swiss Treaty on free movement of persons), Article 12 of the Turkey Association Agreement envisages eventual free movement of persons between the Union and Turkey, guided by the principles laid down in Articles 45–7 TFEU.[713] This objective has influenced the Court's interpretation of the Agreement and the secondary legislation,[714] particularly Decision 1/80 of the Association Council on the development of the Association. This prompted the Court to observe in *Kurz*[715] that the aim and broad logic of Decision 1/80 is to 'seek to promote the integration of Turkish workers in the host Member State'. In this chapter we shall focus on the most litigated of the rules, those concerning the right to work for Turkish workers and their family members. We shall focus on these rules by way of comparison to the rights enjoyed by EU workers under Article 45 TFEU.

2. EMPLOYMENT RIGHTS

2.1 Introduction

For the purposes of this chapter the relevant secondary legislation is Decision 1/80[716] fleshing out the rights of Turkish workers already legally resident and employed in the EU. Article 6(1) provides that a Turkish worker, duly registered as belonging to the labour force of a Member State, is entitled to:

• the renewal of his permit to work for the same employer, if a job is available, after *one year's* legal employment

• respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that state, for the same occupation, after *three years* of legal employment and subject to the priority to be given to workers of the Member States of the Union

• free access in that Member State to any paid employment of his choice, after *four years* of legal employment.

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[710] Case C–237/91 *Kus* v. *Landeshauptstadt Wiesbaden* [1992] ECR I–6781, para. 25; Case C–434/93 *Ahmet Bozkurt* v. *Staatssecretaris van Justitie* [1995] ECR I–1475, para. 21.

[711] Cf. the EU legislation outlined above which increasingly gives the EU competence over these matters. For discussion, see S. Peers, 'EC immigration law and EC association agreements: Fragmentation or integration?' (2009) *ELRev.* 628 discussing Case C–228/06 *Soysal* [2009] ECR I–1031.

[712] Case C–171/95 *Tetik* v. *Land Berlin* [1997] ECR I–329, para. 29; Case C–325/05 *Derin* v. *Landkreis Darmstadt-Dieburg* [2007] ECR I–6495, para. 66. See M. Cremona, 'Citizens of third countries: Movement and employment of migrant workers within the EU' [1995/2] *LIEI* 87, 94.

[713] Art. 12 is not directly effective since it sets out a programme and its provisions are not sufficiently precise and unconditional: Case 12/86 *Demirel* v. *Stadt Schwäbisch Gmünd* [1987] ECR 3719, paras. 23 and 25. Art. 36 of the additional protocol annexed to the Association Agreement lays down the timetable for the progressive attainment of freedom of movement of workers. This is also not directly effective: Case 12/86 *Demirel* [1987] ECR 3719, paras. 23 and 25.

[714] See, e.g., Case C–1/97 *Birden* v. *Stadtgemeinde Bremen* [1998] ECR I–7747. See also Case C–416/96 *El-Yassini* v. *Secretary of State for the Home Department* [1999] ECR I–1209 where the Court found that its interpretation of the EEC–Turkey Association Agreement did not apply to the EEC–Morocco agreement because the Morocco Agreement did not provide for consideration of Morocco's accession to the EU, nor was it aimed at progressively securing freedom of movement for workers.

[715] Case C–188/00 [2002] ECR I–10691, para. 45.

[716] This is directly effective: Case C–192/89 *Sevince* v. *Staatssecretaris van Justitie* [1990] ECR I–3461, para. 26. For a statement of the supremacy of Dec. 1/80 see Case C–188/00 *Kurz* [2002] ECR I–10691, para. 68.

This shows that while Member States retain the competence to regulate both the entry to their territory and the conditions under which Turkish nationals take up their first employment,[717] Article 6(1) of Decision 1/80 applies after the first year's employment.[718] The basic premises under Article 6(1) is that the longer Turkish workers are employed, the more integrated they are considered in the host state and so the greater the rights they enjoy under that Decision. This means that after four years employment the individual is no longer dependent on the continuing existence of the conditions for access to the rights laid down in the three indents. This means s/he enjoys much greater freedom, including temporarily interrupting the employment relationship.[719] By contrast, those still building up the four years must be engaged in legal employment for one, three, or four years, without any interruption, except for that provided in Article 6(2). This provides that annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness are treated as periods of legal employment. By contrast, periods of involuntary unemployment duly certified by the relevant authorities and long absences on account of sickness are not to be treated as periods of legal employment, but are not to affect rights acquired as the result of the preceding period of employment.[720]

2.2 The Criteria under Article 6(1)

The rights laid down in Article 6(1) are conditional on (1) being a worker, (2) being 'duly registered as belonging to the labour force of a Member State', and (3) on a period of 'legal employment'. The Court enforces these specific requirements of Article 6(1) with some rigour so as not to 'undermine the coherence of the system set up by the Association Council with a view to gradually consolidating the position of Turkish workers in the host Member State'.[721]

The first condition, being a worker, is interpreted consistently with the equivalent term in Article 45 TFEU[722] and so we shall not discuss it further here. The second condition, 'duly registered as belonging to the labour force of a Member State', requires the national courts to consider whether the legal relationship of employment can be located within the territory of a Member State, or retains a sufficiently close link with that territory, taking account of the place where the person was hired, the territory on or from which the paid employment was pursued, and the applicable national legislation in the field of employment and social security law.[723]

In *Altun*[724] the Court elaborated further. It said the concept of being 'duly registered' as belonging to the labour force embraced all workers who have met the conditions laid down by law or regulation in the host Member State and who were thus entitled to pursue an occupation in its territory. It said that notwithstanding a temporary interruption of the employment relationship, a Turkish worker continued to be duly registered as belonging to the labour force in the host Member State during a period reasonably necessary for him to find other paid employment, regardless of the cause of the absence of the individual from the labour force, provided that that absence is temporary. Therefore workers and apprentices are considered duly registered as belonging to the labour force[725] as is an individual, like Mr Altun, who is involuntary unemployed following the declaration of insolvency of

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[717] Case C–294/06 *R (ex p. Payir*) v. *Secretary of State for the Home Department* [2008] ECR I–203.
[718] Case C–237/91 *Kus* [1992] ECR I–6781, para. 25; Case C–434/93 *Bozkurt* [1995] ECR I–1475, para. 21.
[719] Case C–230/03 *Sedef* v. *Freie und Hansestadt Hamburg* [2006] ECR I–157, para. 46.
[720] Case C–4/05 *Güzeli* v. *Oberbürgermeister der Stadt Aachen* [2006] ECR I–10279 confirms that if one of these situations occurs (i.e., involuntary unemployment or long-term sickness), this does not affect the rights that the Turkish worker has already acquired owing to preceding periods of employment. Note in Case C–230/03 *Sedef* [2006] ECR I–157 the lenient and practical approach the Court took to the phrase 'involuntary unemployment duly certified by the relevant authorities' in the case of a Turkish seaman employed in Germany for 15 years.
[721] Case C–230/03 *Sedef* [2006] ECR I–157, para. 37.
[722] See Ch. 9: Case C–1/97 *Birden* [1998] ECR I–7747, para. 23; Case C–188/00 *Kurz* [2002] ECR I–10691, para. 30; Case C–294/06 *ex p. Payir* [2008] ECR I–203; Case C-14/09 *Genc* v. *Land Berlin* [2010] ECR I-000, para. 27.
[723] Case C–98/96 *Ertanir* [1997] ECR I–5179, para. 39; Case C–4/05 *Güzeli* [2006] ECR I–10279, para. 37.
[724] Case C–337/07 *Altun* v. *Stadt Böblingen* [2008] ECR I–10323, paras. 23–6.
[725] Case C–188/00 *Kurz* [2002] ECR I–10691, para. 45.

the undertaking in which he was working. A Turkish worker is excluded from the labour force only if he no longer has any chance of rejoining the labour force or has exceeded a reasonable time limit for finding new employment after the end of the period of inactivity.

In respect of the third condition, 'legal employment', the Court has said that the phrase 'presupposes a stable and secure situation as a member of the labour force'[726] and the existence of an undisputed right of residence.[727] The Court has so far found that there was no legal employment in two situations: first, in *Sevince*[728] where a Turkish worker was able to continue in employment only by reason of the suspensory effect deriving from his appeal against deportation and, secondly, in *Kol*[729] where a Turkish national was employed under a residence permit issued to him as a result of fraudulent conduct (he had entered a marriage of convenience with a German national), for which he was subsequently convicted.

The Court has also strictly enforced the periods of time laid down in the three indents of Article 6(1). This can be seen in *Eroglu.*[730] A Turkish worker worked lawfully for employer A for one year. She then worked for employer B. Subsequently, she sought an extension of her work permit in order to work for employer A again. The Court said that she was not entitled to do this under Article 6(1) because this would allow the worker to change employers under the first indent before the expiry of the three years prescribed in the second indent.[731]

The third indent of Article 6(1) concerns those Turkish workers who are duly integrated into the labour market. They have the right to give up one job to seek any other job.[732] The key feature here is that the worker must be deemed still to be a member of the labour force during any periods of absence from work. Therefore, in *Bozkurt*[733] the Court ruled that a Turkish national was not entitled to remain in the host state if he had reached retirement age or had suffered an industrial accident which left him totally and permanently unfit for further employment, since he was considered to have left the workforce for good. However, where the incapacity was only temporary and did not affect his fitness to continue exercising his right to employment he could still enjoy the right to join the labour force. In *Nazli*[734] the Court took this one stage further and said that a temporary break caused by detainment pending trial did not cause the Turkish worker to forfeit his rights under the third indent of Article 6(1), provided that he found a new job within a reasonable period after his release. In *Dogan*[735] the Court extended the ruling in *Nazli* to a Turkish worker imprisoned for four years. The Court said that the effectiveness of the rights to employment and residence conferred on Turkish workers by the third

[726] Ibid., para. 30.
[727] Ibid., para. 48. This even includes short periods during which the Turkish worker did not hold a valid residence or work permit: Case C–98/96 *Ertanir* [1997] ECR I–5179, para. 69.
[728] Case C–192/89 *Sevince* [1990] ECR I–3461, para. 32. In a similar vein, see also Case C–237/91 *Kus* [1992] ECR I–6781, para. 18 where the Court ruled that a worker did not fulfil the requirement of 'legal employment' where a right of residence was conferred on him only by the operation of national legislation permitting residence in the host country pending completion of the procedure for the grant of the residence permit, on the ground that he had been given the right to remain and work in that country pending a final decision on his right of residence.
[729] Case C–285/95 *Kol* v. *Land Berlin* [1997] ECR I–3069, para. 25. See in a similar vein Case C–37/98 *R*. v. *Secretary of State for the Home Department, ex p. Savas* [2000] ECR I–2927, para. 67 concerning a Turkish national unlawfully present in the host Member State.
[730] Case C–355/93 *Eroglu* v. *Land Baden-Württemberg* [1994] ECR I–5113, para. 14. See also Case C–386/95 *Eker* v. *Land Baden-Württemberg* [1997] ECR I–2697 where the Court ruled that if the worker left employer A before the expiry of one year to work for employer B, the worker had to work for a full year for employer B before he was entitled to the renewal of work and residence permits.
[731] See also Case C–4/05 *Güzeli* [2006] ECR I–10279, para. 45, where the Court said that eight months' employment was insufficient under the first indent.
[732] Case C–340/97 *Nazli* v. *Stadt Nürnberg* [2000] ECR I–957, para. 35.
[733] Case C–434/93 *Bozkurt* [1995] ECR I–1475, paras. 39–40.
[734] Case C–340/97 *Nazli* [2000] ECR I–957, para. 41.
[735] Case C–383/03 *Dogan* v. *Sicherheitsdirektion für das Bundesland Vorarlberg* [2005] ECR I–6237.

indent applied regardless of the cause of absence from the labour force, provided that the absence was temporary.[736]

The decision in *Bozkurt* highlights the unfavourable position in which Turkish nationals find themselves in the absence of express legislation, equivalent to what was Regulation 1251/70 on the right to remain for EU nationals (now the Citizens' Rights Directive (CRD)), which protects their position. While the Long-term Residents Directive 2003/109 may now cover some Turkish workers in this position, the rights of residence under the Turkey Association Agreement, while among the most extensive of all the Union agreements, are still firmly tied to the exercise of economic activity (actual employment) and are far from matching the general rights of residence available to Union citizens.[737]

Although the Court has been strict in the application of the criteria laid down in Article 6(1) to Turkish workers, it has also required the Member States to satisfy their side of the agreement. So, Member States cannot deprive Turkish workers of the rights laid down by Article 6(1) nor 'impede the exercise' of such rights.[738] So, in *Ertanir*[739] the Court said that a German rule permitting specialist chefs to reside in Germany for no more than three years was incompatible with Article 6(1).[740] In *Sevince*[741] the Court said that the employment rights of Turkish workers laid down by Article 6(1) necessarily implied a right of residence because, in the absence of such a right, access to the labour market and the right to work would be deprived of all legal effect.[742]

2.3 Other Rights

Once they are duly registered as belonging to the labour market of the host state, Turkish workers do enjoy equal treatment with Union workers in respect of remuneration and other conditions of work under Article 10 of Decision 1/80.[743] In *Wählergruppe Gemeinsam Zajedno*[744] the Court interpreted the phrase 'other conditions of work' to include the right for Turkish workers to stand as candidates in elections to bodies representing the legal interests of workers. Therefore, Austrian rules restricting eligibility for election to a body such as a chamber of workers to Austrians only breached Article 10.

Worker representation is one of three areas where Turkish workers have more rights than those TCNs covered by the Long-term Residents Directive 2003/109 (considered above). The other two areas are protection from expulsion and access to employment. However, in respect of access to social assistance and equal treatment, Directive 2003/109 offers more favourable rights than Decision 1/80. As Groenendijk points out,[745] the Long-term Residents Directive grants Turkish citizens and other TCNs the right to look for work, to live and work in other Member States and the Directive on Family Reunification gives them the right to family reunion. In this way the directives complement and supplement the provisions under Decision 1/80.

3. FAMILY RIGHTS

3.1 The Right to Employment

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736 Para. 20.
737 Considered in Ch. 12.
738 Case C–188/00 *Kurz* [2002] ECR I–10691, para. 67. The rights in Art. 6(1) are also directly effective: Case C–188/00 *Kurz* [2002] ECR I–10691, para. 26.
739 Case C–98/96 *Ertanir* [1997] ECR I–5179, para. 34: despite the wording of Art. 6(3): 'The procedures for applying paragraphs 1 and 2 shall be those established under national rules.'
740 See also Case C–36/96 *Günaydin* v. *Freiestaat Bayern* [1997] ECR I–5143, paras. 36–8.
741 Ibid., para. 29.
742 See also Case C–237/91 *Kus* [1992] ECR I–6781, para. 23.
743 This provision is directly effective: Case C–171/01 *Wählergruppe Gemeinsam Zajedno/Birklikte Alternative und Grüne GewerkschafterInnen/UG* [2003] ECR I–4301, para. 57.
744 Ibid.
745 K. Groenendijk, above n. 164, 442.

The first paragraph of Article 7 of Decision 1/80 provides that the members of the family of a Turkish worker who is 'duly registered as belonging to the labour force of a Member State'[746] (with no reference this time to the concept of 'legal employment' which appears in Article 6(1) of Decision 1/80) and who have been 'authorized to join him' are, subject to the priority to be given to workers of Member States of the Union, entitled to:[747]

• respond to any offer of employment after they have been legally resident for at least three years in that Member State

• enjoy free access to any paid employment of their choice provided that they have been legally resident there for at least five years.[748]

According to *Kadiman*,[749] the purpose of this first paragraph is to 'create conditions conducive to family unity', first by enabling family members to be with a migrant worker and then by consolidating their position by granting them the right to obtain employment in the host state (and a concomitant right of residence[750]). Therefore, the host state could require actual cohabitation by the Turkish workers[751] and their family members during the first three years, even where there were accusations of domestic violence, subject to absences for a reasonable period and for legitimate reasons in order to take holidays or visit family in Turkey.[752] The Court said that the co-habitation requirement was intended to prevent Turkish nationals from evading the stricter requirements laid down in Article 6 by entering sham marriages and then taking advantage of the generous requirements of Article 7.[753]

However, the Court has made clear that cohabitation does not necessarily mean marriage (unlike the approach adopted under Article 10 of Regulation 1612/68, now Articles 2–3 CRD). In *Eyüp*[754] a Turkish couple living in Austria divorced but continued to live together. During this period of cohabitation they had a further four children. He was a worker and she looked after the children. They then remarried and continued to cohabit. Since they constantly maintained a common legal residence within the meaning of Article 7 the Court said that the period of cohabitation counted towards calculating the periods of legal residence. In *Ayaz*[755] the Court drew on the definition of family members under Regulation 1612/68 (now the CRD) to help determine the meaning of the equivalent term in Decision 1/80. It ruled that the phrase did not require a blood relationship: stepchildren were also covered.

However, Article 7 does not affect the power of the Member State to authorize family members to join the Turkish worker,[756] to regulate their stay until they become entitled to respond to any offer of employment, and, if necessary, to allow them to take up employment before the expiry of the initial

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746 This is interpreted in the same was as the equivalent phrase in Art. 6(1): Case C–337/07 *Altun* [2008] ECR I–000, para. 28.

747 The first para. of Art. 7 is directly effective: Case C–351/95 *Kadiman* v. *Freiestaat Bayern* [1997] ECR I–2133, para. 28. See, generally, G. Barratt, 'Family matters: European Community Law and third country family members' (2003) 40 *CMLRev*. 369.

748 Case C–373/03 *Aydinili* v. *Land Baden-Württemberg* [2005] ECR I–6181: a Turkish national who has resided for five years did not forfeit rights under this provision due to prolonged absence from the labour market due to imprisonment.

749 Case C–351/95 *Kadiman* [1997] ECR I–2133, para. 33.

750 Case C–325/05 *Derin* [2007] ECR I–6495, para. 47.

751 The Turkish workers themselves had to be duly registered as belonging to the labour force of that state: Case C–337/07 *Altun* [2008] ECR I–10323, para. 32.

752 Ibid., para. 48.

753 Ibid., para. 38.

754 Case C–65/98 *Safet Eyüp* v. *Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg* [2000] ECR I–4747.

755 Case C–275/02 *Ayaz* v. *Land Baden-Württemberg* [2004] ECR I–8765, para. 45.

756 Case C–467/02 *Cetinkaya* v. *Land Baden-Württemberg* [2004] ECR I–10895, para. 26: Art. 7 also applies to family members actually born in the host state. The position of a Turkish worker's family members is therefore less favourable than an EU worker's family members who enjoy an unconditional right to install themselves with the migrant Union workers under *Union* law, not national law: Case C–325/05 *Derin* [2007] ECR I–6495, paras. 61–3. However, the Family Reunification Dir. 2003/86 may now affect the Member State's powers.

period of three years,[757] always subject to the provisions of the European Convention on Human Rights.[758] Union law requires only that during the three-year period members of the worker's family must be granted a right of residence.[759] Once those three years have expired, Member States can no longer attach conditions to the residence of a member of a Turkish worker's family.[760] Once five years have expired, the person derives 'an individual employment right directly from Decision 1/80' and 'a concomitant right of residence'.[761]

3.2 The Position of a Turkish Worker's Children

The second paragraph of Article 7,[762] which is more favourable than the first paragraph,[763] provides that children of Turkish workers who have completed a course of vocational training[764] in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided that one of their parents has been legally employed in the Member State for at least three years. Since this paragraph is not intended to create conditions conducive to family unity, the Court said in *Akman*[765] that the child's right to respond to any offer of employment was not conditional on the Turkish worker parent residing in the host Member State at the time when the child wished to take up employment following vocational training. In *Eroglu*[766] the Court extended its rulings in *Sevince* and *Kus* to the second paragraph of Article 7, saying that 'any offer of employment necessarily implies the recognition of a right of residence for that person'.[767]

Finally, in *Derin*[768] the Court considered how the rights under Article 7 could be lost. One way would be because the individual constitutes, on account of his own conduct a 'genuine and sufficiently serious threat to public policy, public security or public health', in accordance with Article 14(1). The second way is that the individual has left the territory of the host state for a significant length of time without legitimate reason. The Court has emphasized that these are the only ways that an individual can lose their rights under Article 7. Therefore, a Turkish national cannot be deprived of his rights either because he was unemployed on account of being sentenced to a term of imprisonment, even one of several years' duration, or because he never acquired rights relating to employment and residence pursuant to Article 6(1) of that decision, or because he was 'not active on the labour market for several years' (i.e., he attended various training course but never completed them).[769]

4. DEROGATIONS

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[757] Case C–351/95 *Kadiman* [1997] ECR I–2133, para. 32.
[758] Case C–325/05 *Derin* [2007] ECR I–6495, para. 64.
[759] Ibid., para. 29.
[760] Case C–329/97 *Ergat* v. *Stadt Ulm* [2000] ECR I–1487.
[761] Ibid., para. 40. See also Case C–467/02 *Cetinkaya* [2004] ECR I–10895, paras. 32–3. Failure to obtain a residence permit in time can be punished, but only by penalties which are proportionate and comparable to those for minor offences committed by nationals but, as with Union nationals, this does not include deportation which would deny the very right of residence (Case C–467/02 *Cetinkaya* [2004] ECR I–10895, paras. 56–7). Therefore, administrative documents such as a residence permit are only 'declaratory of the existence of those rights and cannot constitute a condition for their existence' (Case C–434/93 *Bozkurt* [1995] ECR I–1475, para. 30).
[762] The 2nd para. of Art. 7 is directly effective: Case C–355/93 *Eroglu* [1994] ECR I–5113, para. 17.
[763] Case C–325/05 *Derin* [2007] ECR I–6495, para. 42.
[764] See also Art. 9, which gives Turkish children residing legally in a Member State access to education and training courses on the same terms as nationals as well as possible access to 'benefit from advantages provided for under the national legislation in that area'. According to Case C–374/03 *Gürol* v. *Bezirksregierung Köln* [2005] ECR I–6199, Art. 9 is directly effective and the 'advantages' include grants.
[765] Case C–210/97 *Akman* v. *Oberkreisdirektor des Rheinisch-Bergischen-Kreises* [1998] ECR I–7519, paras. 43–4. See also Case C–462/08 *Bekleyen* [2010] ECR I–000.
[766] Case C–355/93 *Eroglu* [1994] ECR I–5113.
[767] Para. 20.
[768] Case C–325/05 *Derin* [2007] ECR I–6495, para. 54.
[769] Case C–453/07 *Er* v. *Wetteraukreis* [2008] ECR I–7299, para. 31.

Article 14(1) allows states to derogate from the rights provided on the grounds of public policy, public security, and public health.[770] The Court interprets these provisions consistently with those under the EU Treaties (e.g. Article 45(3) TFEU),[771] as far as possible.[772] In *Derin*[773] the Court set out the framework according to which the national authorities could act: they are 'obliged to assess the personal conduct of the offender and whether it constitutes a present, genuine and sufficiently serious threat to public policy and security, and in addition they must observe the principle of proportionality'. In particular, a measure ordering expulsion based on Article 14(1) may be taken only if the personal conduct of the person concerned indicates a specific risk of new and serious prejudice to the requirements of public policy. Consequently, such a measure cannot be ordered automatically following a criminal conviction and with the aim of general deterrence.

E. CONCLUSIONS

This chapter started with the basic dichotomy of insiders versus outsiders, with insiders—nationals of one of the Member States—being in a favoured position. However, on closer examination the rules on EU citizens and those on TCNs show that this picture is less accurate than would at first appear. EU nationals who do not migrate or who are not economically active may find themselves marginalized by the application of rules which prioritize those who exercise their (economic) freedom of movement, while TCNs now may find that, as a result of developments under Title V of Part Three TFEU, they begin to enjoy something of a quasi- or civic citizenship.[774] Of course, this characterization is also not complete. Decisions of the Court of Justice, in particular in *Grzelczyk*[775] and *Baumbast*,[776] have done much to give rights to migrant citizens who are not economically active while the advent of the Charter and developments in the field of social, consumer, and environmental policy have benefited citizens who do not migrate. Meanwhile, the measures which have the most inclusive effect on TCNs still fall far short of Held's three-stranded definition of citizenship (considered in detail in Chapter 12): while legally resident TCNs have some rights, owing to the absence of any clear Union competence they have no ability to participate in the political process in the host state; nor do they have a strong sense of membership. As we have seen, it has already proved difficult for the EU to foster a sense of membership among EU nationals; this task may prove harder in respect of TCNs who come from extraordinarily diverse backgrounds.[777]

However, it is striking that two principles have been used to combat the sense of exclusion experienced by both EU nationals and TCNs: integration and, to a limited extent, solidarity. The language of integration underpinned the Court of Justice's justification for broadening the rights enjoyed by EU migrant workers and their families. It is the same language which has been used by the Heads of State at Tampere, by the Commission in its two Communications[778] and now by the Lisbon Treaty in the concept of 'fair treatment' in respect of TCNs. However, when considering the position of TCNs the Commission makes clear that integration entails bilateral commitments:[779]

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[770] Art. 14(1). This is an exhaustive list: Case C–502/04 *Torun* v. *Stadt Augsburg* [2006] ECR I–1563.
[771] See further Ch. 13.
[772] Case C–467/02 *Cetinkaya* [2004] ECR I–10895, para. 39, which also confirms that the case law on derogations under Dir. 64/221 (now CRD) also applies to Dec. 1/80. Three cases are currently pending on whether the same applies to the provisions of the CRD. See also Case C–136/03 *Dörr* v. *Sicherheitsdirektion für das Bundesland Kärnten* [2005] ECR I–4759; Case C–349/06 *Polat* v. *Rüsselsheim* [2007] ECR I–8167, para. 29 Case C–97/05 *Gattoussi* v. *Stadt Rüsselsheim* [2006] ECR I–11917, para. 41 (in the context of the Eur-Mediterranean Agreement).
[773] Case C–325/05 *Derin* [2007] ECR I–6495, para. 74.
[774] COM(2003) 336, 30 and N. Reich, 'Union citizenship: Metaphor or source of rights?' (2001) 4 *ELJ* 4, 18.
[775] Case C–184/99 [2001] ECR I–6193.
[776] Case C–413/99 *Baumbast and R* [2002] ECR I–7091.
[777] For a critique, see N. Barber, 'Citizenship, nationalism and the European Union' (2002) 27 *ELRev*. 241.
[778] COM(2000) 757 and COM(2003) 336.
[779] COM(2003) 336, 17–18.

integration should be understood as a two way process based on mutual rights and corresponding obligations of legally resident third country nationals and the host society which provides for full participation of the immigrant.
It continued that this implies on the one hand that it is the responsibility of the host society to ensure that the formal rights of immigrants are in place so that the individual can participate in economic, social, cultural, and civil life but, on the other, 'that immigrants respect the fundamental norms and values of the host society and participate actively in the integration process, without having to relinquish their own identity'. In this respect the Union is expecting more of TCNs than it does of migrant EU citizens.[780]

Solidarity has also been used to justify giving rights to both migrant citizens and TCNs.[781] The language of solidarity was used by the Court in *Grzelczyk* to justify giving limited social advantages to a migrant student. It is also used in the Commission's Communication on illegal immigration[782] to justify operational cooperation, and thus financial cooperation, between the Member States to keep illegal immigrants out of the EU or to return them to their Member States, language which is repeated in the strongest terms in the Lisbon Treaty.[783] In this way solidarity is being used to attain both inclusionary and exclusionary results.

[780] See also EU Council, *The Hague Programme: Strengthening freedom, security and justice in the European Union*, Council Doc. 16054/04, 11.
[781] Ibid., 4.
[782] COM(2003) 323, 17.
[783] Art. 80 TFEU.