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CHAPTER 4

Giving Effect to Community Law

"The doctrine of direct effect seeks to ensure that rights accruing from Community law are available to the individual, whilst the doctrine of primacy ensures that such rights will take precedence over any national rule or practice."

*"Of course a British court will always be willing and anxious to conclude that United Kingdom law is consistent with Community law. Where an Act is passed for the purpose of giving effect to an obligation imposed by a Directive or other instrument a British court will seldom encounter difficulty in concluding that the language of the act is effective for the intended purpose. But the construction of a British Act of Parliament is a matter of judgment to be determined by the British courts and to be derived from the language of the legislation considered in the light of the circumstances prevailing at the date of enactment. [...] section 2(4) of the ECA 1972 does not in my opinion enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community Directive which has no direct effect between individuals. Section 2(4) applies and only applies where Community provisions are directly applicable."*²

Giving effect to Community law

This chapter discusses the various techniques available to give effect to Community law in national courts and their application by the UK courts.

First the ECJ had to ensure that Community law could be invoked before national courts. Then the ECJ had to provide national courts with guidance on how to deal with substantive conflicts between national law and Community law. To this end, it developed the doctrine of primacy of Community law over national law. Primacy renders automatically inapplicable any conflicting provisions of national law; national judges must set aside any provisions of national law which conflict with the Community rule, whether prior or subsequent to the Community rule³. However, Community law cannot always be applied by national courts as it stands. In a number of circumstances Community law can only be used as an aid to the interpretation of national law. In the last resort it can also give rise to an action for damages against the Member State which has breached Community law.

4.1 Direct effect or the justiciability of Community law

Direct effect has a dual meaning. On the one hand, it refers to the fact that, on accession, Community law becomes an integral part of the legal systems of the Member States which their courts are bound to apply, irrespective of the national constitutional arrangements governing the relationship between international agreements and domestic law. In other words, Community law can be invoked. On the other hand, direct effect is sometimes used to refer to the capacity of a specific Community provision to be applied as it stands. Community law,

in certain circumstances, confers rights on, and/or creates duties for individuals which must be recognised by the national legal systems and must be enforced in the national courts against or for the benefit of individuals or companies.

Today, throughout the Union, Community law is invoked and applied by national courts in a wide range of situations; what remains a matter of some contention and difficulty is *what* litigants are entitled to expect from national courts. Practically, for national judges, direct effect involves anything from the straightforward application of a detailed obligation to an investigation of sophisticated economic evidence. Thus Article 86 (2) gives rise to:

"the duty of the national court to investigate whether an undertaking which invokes the provisions of article 90 (2), for the purpose of claiming a derogation from the rules of the Treaty has in fact been entrusted with the operation of a service of general economic interest, and if so, whether its conduct is necessary to enable it to perform its task".

Given that the literature often contains references to concepts such as *horizontal* or *vertical* direct effect, concepts never approved by the ECJ, these will be touched upon. Nevertheless, it is contended that this nomenclature can often detract from an understanding of this area of Community law which, put simply, involves consideration of the different duties imposed on national judges. It is contended that the duties imposed on national judges vary depending on the nature of the Community obligations which are the object of the proceedings. It is further suggested that one should depart from the idea that the duties imposed on the national judges depend on the identity of the parties involved in the litigation.

4.2 National judges as Community judges

The decision by the Court that Community law could be enforced by national courts led to the creation of what is sometimes described as 'decentralised enforcement', 'private enforcement', or 'private policing' of Community law. Since direct effect is a judicial invention, and the criteria used in its application are sometimes subject to differing interpretations by the ECJ and national courts. Furthermore, the usefulness of direct effect varies and is dependent upon the particular field of Community policy under consideration. Enforcing Community law before national courts is done with varying success from one policy area to another. Thus, the principle has so far been of limited use in the field of Community environmental protection⁵. Given that Community obligations vary, direct effect should not be a uniform concept. It involves a wide range of tasks and duties for national judges. Finally, the capacity to apply Community law directly varies with the type of provisions in which the Community right is embodied.

The ECJ has developed a number of conditions which must be observed to decide whether a provision is capable of being applied as it stands by national courts. Focus on the conditions for direct effect appears to constitute the wrong approach to the question of deciding whether or not a provision has direct effect. As was established by the ECJ right from the outset, direct effect is first and foremost a route through which national courts are involved in the policing of EC law. Accordingly, the test for national courts is whether enabling individuals to force Member States to comply with their Community obligations is something which is compatible with what they consider to be appropriate judicial function:

*"direct effect appears to be in a way L'ART DU POSSIBLE, as from the point of view of Community law, it is to be expected that national courts are willing to carry the operation of the rules of Community law up to the limits of what appears to be feasible, considering the nature of their judicial function"*⁶.

4.2.1 The Direct effect of Treaty Provisions:

When is a Treaty provision capable of having direct effect, and which Treaty provisions fall into the category? A Treaty provision must fulfil certain requirements in order to have direct effect, but the question of whether this is so should be a matter for the ECJ rather than one for national courts, as the latter may take differing views on the matter. Still, such decisions have been taken by UK courts for example in relation to Articles 14⁷ and 17⁸ EC.

First, the provision must be clear and sufficiently precise. The Community's vision of what can be considered as clear and sufficiently precise might not necessarily match the UK courts' understanding of these notions. For the ECJ, what matters is that Community law be effective. A striking illustration is provided by the interpretation of 'principle' in Article 141 EC: in *Defrenne*⁹, the ECJ found that rather than indicating a lack of precision or referring to a policy objective, the term actually stressed the fundamental nature of the provision. Often, rules acquire the clarity and precision required during the enforcement process itself.

*"The interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177 (now 234), the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force"*¹⁰.

Second, the provision must be unconditional, that is not dependent, in its implementation or effects, on further action being taken by Community or national authorities. As with clarity and precision these requirements bear their own meaning in the Community legal order. So, reference in the Treaty to implementing measures is no bar to the recognition of a certain degree of direct

effect, as the case law on the direct effect of Articles 43, 49, 141 EC exemplifies¹¹. Equally – and consistent with the approach in national administrative law – existence of a discretionary power does not *per se* preclude the possibility of judicial control. Still, it is difficult to ascertain the frontier between conditions that prevent and do not prevent direct effect because this is dependent on the willingness of the ECJ to set out the parameters for the operation of the conditions giving rise to judicial control¹². In addition, Community law provisions may develop from being clearly non directly effective into provisions which can have direct effect¹³.

Some Treaty provisions can have direct effect in any type of litigation, whatever the nature and identity of the parties to the dispute. Article 141 EC, although addressed to Member States, is capable of being applied directly in all types of disputes, irrespective of the identity of the defendants:

*"Since Article 119 is mandatory in nature, 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"*¹⁴.

Equally, the rules on the free movement of workers impose obligations on individuals, private employers, trade associations and interested professional bodies as the Treaty does not distinguish between the sources of discrimination or restriction to be abolished:

*"Article 48 not only applies to the action of public authorities, but extends also TO RULES OF ANY OTHER NATURE aimed at regulating gainful employment in a collective manner"*¹⁵

*"the prohibition of discrimination on grounds of nationality laid down in Article 48 of the Treaty must be regarded as applying to private persons as well."*¹⁶

Articles 25, 28, 29, 31, 43, 49, 81, 82, 86, 88 EC also have direct effect, although not every provision in these articles can be enforced by national courts.

For example, with regard to the State Aids rules, the role of national courts is limited. A failure to comply with the procedural obligation laid down in Article 88(3) is justiciable in the national courts, which also have an active role to play in relation to repayment of unlawful aids and aids which have not been notified. Accordingly, national courts may have cause to interpret and apply the concept of aid¹⁷. However, national courts have no competence to decide on the compatibility of a State aid with the common market; only the Commission possesses such a power, subject to review by the ECJ.

4.2.2 The Direct effect of Regulations and Decisions

The language of Article 249 EC envisages that regulations will immediately become part of the domestic law of the Member States. The Court confirmed that they are capable of being relied upon by individuals and against individuals and can be subject to direct enforcement in national courts¹⁸. Still not all provisions of regulations have immediate effect¹⁹ in the national legal systems. It is also the case that in some instances it is necessary for national authorities to adopt measures of application. Especially in the agricultural field, they require further measures by the Member States. This raises some interesting issues. Indeed, the transfer of regulatory responsibility from the Community back to the national level undermines, and even by-passes, whatever modicum of legislative supervision the European Parliament should otherwise have been able to exercise in regard to the matters concerned. These regulations are perhaps those most in need for scrutiny at national level, and perhaps national parliaments should concentrate their scrutiny of Community legislation on these areas. This issue, however, is outwith the remit of this work.

For our purposes what matters is that where the provisions of a regulation necessitate, for their implementation, the adoption of measures of application by the Member States, then individuals cannot rely on these provisions²⁰.

In the light of the discretion enjoyed by the Member States in respect of the implementation of those provisions, it cannot be held that individuals may derive rights from those provisions in the absence of measures of application adopted by the Member States.

Then again, it is suggested that there is nothing stopping UK courts from allowing a Community Regulation which requires implementation to be invoked in judicial review proceedings of the UK implementing regulations on the grounds that, for example, the UK regulations are in contradiction with the objectives of the Community Regulation. In our view the question of whether a Community obligation creates rights which can be directly enforced by national courts is just one of the facets of direct effect. National courts can still allow a provision of Community law to be invoked in proceedings before them for purposes other than giving effect to those rights.

Decisions can also be invoked before national courts²¹ as it would be incompatible with the binding effect attributed to them by the Treaty to exclude in principle the possibility that persons affected may invoke the obligation imposed thereby. The Community legislative instruments which have given rise to most debate are directives.

4.2.3 The Direct effect of Directives

Directives only lay down a binding obligation of result, and Member States have a margin of discretion as to the means of implementation of this obligation. In practice, this discretion is strictly supervised by the Court²² which has consistently ensured that the existing national legislation leaves no doubt as to the effects of the directive upon the legal position of individuals.

*"it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts."*²³

Implementation is required within a defined period of time, usually 2 to 3 years. Although addressed to Member States, directives do not seek merely to regulate relationships between individuals; in fact, they regulate more and more legal relationships between natural or legal persons: to quote but a few, the Product liability Directive, the Equal Pay and Equal Treatment Directives, the Directive on Unfair Terms of Contract and the Directive on Misleading Advertising. Yet, the nature of a Directive as a legal instrument remains unchanged in the Treaty. Directives therefore, seemed, by definition, unable to qualify for direct effect. The ECJ found otherwise²⁴, on grounds of effectiveness. The very first UK reference to the ECJ provided the ECJ with this opportunity.

The UK Immigration authorities, relying on public policy grounds, refused entry to a Dutch national, Ms van Duyn. The High Court referred several questions, in particular whether Article 3(1) of Directive 64/221, which provides "that measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned", conferred on individuals rights, enforceable by them in national courts. The ECJ found that this provision did not require the intervention of any other measures either of Community institutions or of Member States, that it was intended to limit the discretionary power generally conferred on national authorities responsible for the entry and expulsion of foreign nationals and that legal certainty for the persons concerned required that they should be able to rely on this provision. Consequently it held that:

*"it would be incompatible with the BINDING EFFECT attributed to a directive by Article 189 to exclude in principle the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Communities 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."*²⁵

This ruling was confirmed in subsequent cases²⁶, but from *Ratti*²⁷, the ECJ reasoning shifted away from binding effect. Member States cannot take advantage of their own failure to comply with their Community obligations to deprive individuals of the rights contained in a directive.

4.2.3.1 Conditions

The provisions of a directive must fulfil certain requirements in order to be relied upon directly. Such requirements have had to be relaxed since, as they stand, they would appear never capable of being satisfied. Given that, by definition, directives require Member States' intervention, they are not unconditional; they also lack clarity and precision in so far as Member States have, again by definition, discretion as to the forms and methods used to reach the specific objective fixed. As with Treaty Articles, the requirements for direct effect have a Community and not a domestic meaning; clarity and precision are evolving concepts: certain provisions of a directive may acquire clarity and precision over time, as the ECJ clarifies the requirements of Community law²⁸. It is also significant to bear in mind that, just as many Regulations are not self-sufficient instruments, many directives contain provisions which are drafted with considerable precision.

Another key consideration concerns the date from which a Directive can be used in litigation. Does a directive become relevant from the date of its adoption, or is a Directive irrelevant until the time limit set for its implementation has elapsed? In principle directives cannot be enforced as such before the expiry of the deadline for implementation. However, in *Inter-Environnement Wallonie*²⁹, the ECJ established that all authorities in the Member States are obliged to refrain, during the period laid down for transposition of a directive, from taking any measures which may seriously compromise the aims of that directive. In *Salamander*³⁰ the CFI had to consider whether this case law could be extended to private parties. It found that

"this obligation, to which the Member States are subject in accordance with the INTER-ENVIRONNEMENT WALLONIE judgment, may not be extended to individuals."

In other words, private law subjects are not obliged to refrain during the period laid down for the adoption of a Directive from taking measures which may seriously compromise the Directive.

4.2.3.2 National courts' duties vary, as do the obligations that directives contain

The obligations that directives may impose vary. What individuals may invoke and what the UK courts may be asked to take into consideration as the relevant Community law dimension to the dispute also varies. The justiciability of

directives can sometimes be approached as a question of judicial control of discretionary power. Individuals are given the opportunity (the right) to invoke directives before national courts in order for these courts to check whether the competent national authority, in exercising the choice left to them as to the form and methods for implementing the directive, have kept within the limits of their discretion as set out in the Directive³¹. So a private company may rely upon the provisions of a directive to challenge the validity of the authorisation issued by a national authority, on the basis of that directive, to one of its competitors³². Directives imposing the introduction of particular procedures would also fall within this category. Obviously, in such circumstances, the national judge can verify *only* whether or not such a procedure exists, whether it is open in all required circumstances and whether or not it offers the guarantees it ought to afford. Where no procedure has been introduced, the directive is incapable of giving individuals a right to which the judge could give effect. Certainly, UK judges have no power to make a positive order providing for a piece of procedural machinery. Still, the individual has the right to invoke the directive for the purpose of seeking a public remedy such as a remedy for a failure to respect procedural obligations. The consequences to be attached by national judges to the non respect of procedural obligations will vary.

Some directives clearly involve the creation of a 'private law' right, for example a private law right to equal pay or to equal treatment. These can be relied upon for the purpose of asking the national court to substitute the directive for conflicting national legislation, or for the purpose of asking the national court to interpret national legislation in conformity with the directive.

4.2.3.3. Enforcing directives against the State or an emanation thereof

The most important limit to the direct effect of directives is that a directive can only be applied directly against the State or an emanation thereof – the so-called 'vertical effect'. The ECJ has the last word on what falls to be regarded as an emanation of the State, otherwise the uniform application of Community law would be jeopardised. It is on a reference from a UK court that this question was first addressed. In *Marshall*, the ECJ decided that:

"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.... 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

at Community level, the lack of hierarchy of norms and the fact that ultimately the qualification of a Community act as a Directive rather than as Regulation or *vice versa* is largely haphazard, reliance on this Treaty distinction is bewildering. The ECJ seems to be the only Community institution which still attaches any importance and quite drastic consequences to the classification and characterisation of norms established by the Treaty. Perhaps the main protagonists in the decision-making process should not ignore the classification of acts, as this has consequences for the enforcement of the obligations they lay down.

4.2.3.4 Broadening the concept of the State or an emanation thereof

Having introduced a limitation on the scope of the direct effect of directives, the ECJ proceeded to broaden the notion of the State. The State, in any of its manifestations, is bound by Community obligations and should not, in any of its forms, benefit from its own wrong and deprive individuals of the rights which directives may confer. This view is consistent with the general approach of Community and public international law which refuses to differentiate among the various constitutional organs of the State, and the same line has been adopted in the context of Article 226 EC proceedings, but also in relation to State liability for breach of Community law⁴⁰. The definition of an 'emanation of the State' is under strict supervision by the ECJ as the Community legal order cannot be bound by domestic definitions, variable between Member States. A wide range of bodies, entities and authorities fall within the category; including those so far removed from the responsibility for the implementation of the directives, that it may be asked how the rationale that the State may not benefit from its own wrong still validly applies.

UK Courts have made three references on this issue. Various bodies have been held as bound to apply the provisions of directives. In *Marshall P*⁴¹, the ECJ held that the provisions of a directive could be relied on against a health authority, irrespective of the capacity in which the latter is acting, whether public authority or employer. Directives can also be relied upon in litigation against constitutionally independent authorities responsible for the maintenance of public order and security, namely a Chief Constable⁴², and against nationalised companies⁴³.

Directives can also be used by individuals against a City Council⁴⁴, so Member States cannot rely on local government reorganisation as a way to escape their Community obligations:

*"all organs of the administration, including DECENTRALISED AUTHORITIES regional or local such as municipalities, are obliged to apply those provisions"*⁴⁵.

'Emanation of the State' is such a flexible concept that, at least on one occasion, a local authority has been assimilated to an individual and held entitled to rely on the provisions of a directive for the purpose of opposing the application of a

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*³³.

This decision to limit the direct effect of directives, a decision arguably prompted by some hostile reactions from the French Conseil d'Etat and the German Bundesfinanzhof, has been the source of academic controversy³⁴, and, without a doubt, a source of serious obstacles to the enforcement of Community rights in litigation between private parties³⁵. Moreover, the idea that in a Community governed by the rule of law, the outcome of a litigation may be determined by the identity of the defendant is disturbing. An elaboration on the different arguments in favour of, or against the full direct effect of directives is an issue which itself would justify a full dissertation. This work is not devoted to this issue. However, it is necessary in this work to point out that if the justification for direct effect is to charge national courts with the duty to ensure that Member States are prevented from taking advantage of their own failure, the nature of the legal relationships involved should play no role at all.

The many anomalies created by *Marshall*³⁶ have been well documented and have prompted repeated calls³⁷ to the ECJ to change its case law. None of these calls, including those of three of its Advocates General³⁸, has had any success. The decision that the provision of a directive may not of itself impose obligations on another individual, or as such, be relied upon against an individual has been maintained, most forcefully, in *Dori*³⁹. In this case, an individual sought to withdraw from a contract for a language correspondence course under the conditions laid down in Directive 85/577 on doorstep selling, namely the right of cancellation of the contract during the "cooling-off" period. The ECJ held:

"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."

Given the justification provided, it seems unlikely that without a Treaty amendment this issue could ever be reconsidered:

"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 when it is empowered to adopt regulations".

The consequences of this ruling will be explored fully below. Nonetheless, at this juncture, two particular implications deserve to be brought into focus. A rather strange paradox results, the more a directive is concerned with relationships between individuals, and the more a directive appears to lay down obligations between and for individuals, the less likely it is going to be legally capable of doing so, at least directly. In addition, given the lack of legislative discipline

national provision making it subject to VAT payments⁴⁶. An indication that the concept is interpreted in the way which best achieves the objectives of the directive at issue, even if it leads to further confusion, as in *Carpaneto*, a distinction was drawn between the different activities in which a public body may engage, a distinction which the ECJ had specifically ruled out in *Marshall I*. Some confusion may also arise when trying to reconcile the approach of the ECJ in *Brinkmann*⁴⁷ from that adopted in *Haim*⁴⁸.

4.2.3 Giving effect to Directives using alternative therapies

However flexible, the concept of 'emanation of the State' cannot stretch indefinitely. What then are the limits to the duties of national courts to carry the operation of Community rules contained in Directives? In which types of circumstances are national courts pre-empted from remedying defective implementation? Are national courts barred from giving effect to directives in litigation between private parties, in cases of wrongful or non implementation? Do their provisions remain without effect?

This section explores how, even where the provisions of a directive cannot be applied directly, they remain of *considerable relevance* in litigation between private parties. National courts are still charged with duties in relation to the enforcement of these Directives. The ECJ has instructed national courts to give effect to Directives by resorting to other techniques. Where a Member State fails to implement a directive within the given time period or does so incorrectly, national courts are still required either to secure the judicial protection of the rights the directive may create or to secure compliance with the obligations contained in the directives. National courts are still expected to carry out a number of duties, even when the litigation is between private parties.

It is now clear that a directive can confer rights without being capable of having direct effect⁴⁹. The 'rights' conferred by a directive may be given effect to by means other than direct effect, namely through the interpretative duty or State liability for breach of Community law. Directives cannot, of themselves, impose obligations on individuals, but this does not mean that the rights they are capable of creating cannot be protected. Recent cases⁵⁰ confirm that direct effect has become one of several judicial techniques available to ensure that obligations laid down in Directives are complied with. The ECJ has now shifted the focus from enforceable rights of individuals both to the obligation of national courts to interpret the terms of their national law in the light of the requirements of Community Law and to State liability. The link between direct effect, uniform interpretation and damages was also made clear in *Dori*⁵¹. Still, the standard of protection of the rights conferred by a given directive is not necessarily the same⁵². It may be better to abandon the language of rights altogether and to rely instead on the different types of obligations created, which in turn trigger different duties for national courts.

4.2.3.1 Useful effect through interpretation

The first of these alternative techniques to give effect to the obligations imposed by a directive known as the 'uniform interpretation'⁵³ – *interprétation conforme* – simply consists in imposing on national courts an interpretative duty. Community law is to be applied indirectly as domestic law by way of interpretation. National courts are not asked to enforce the provisions of the Directive as such; rather they are asked to *interpret national law in such a way as to ensure that the objectives of the Directive are achieved*. Through this device, what is at issue is not the direct effect of the directive; rather the emphasis is on the *effect of national law* as interpreted by the national courts, in accordance with Community Law. Community law is invoked, but it is not applied; it only comes into play indirectly. National judges are not asked to apply the provisions of the directive; rather they are required to use the directive as an aid to the interpretation of national legislation.

This duty for national courts to interpret national law in accordance with the terms and objectives of a directive extends to all national legislation existing in the field which the directive purports to regulate, whether adopted prior to or following the adoption of the directive. The duty exists in relation to all relevant national law and not just for the specific implementing provisions. Indeed, it is most useful when it operates in cases of non-implemented directives. Further, the duty applies regardless of the identities of the parties to the litigation. Interpreting legislation which purports to implement a directive in conformity with it should not pose major problems for national courts. They could simply consider that when doing so they simply apply the doctrine according to which Parliament must be presumed to be willing to conform with its international obligations. Yet, difficulties arise when the legislation pre-dates the directive and can hardly benefit from such a presumption. Furthermore, at times, uniform interpretation requires national judges to "set aside" classic canons of statutory interpretation.

4.2.3.2 Limits to interpretation

The uniform interpretation duty has considerable *breadth*, and it is not without limit⁵⁴. The first, obvious, limit is that for national judges to be able to interpret national legislation in the light of the directive, there must be some national legislation existing in the field which can be considered as covering roughly the same field as the directive. If there is no implementing legislation or no legislation within the scope regulated by the directive, then, put simply, there is nothing to interpret and therefore no uniform interpretation duty to discharge⁵⁵.

The second limit is that national courts are not under such a duty when such interpretation would have the effect, on the basis of the directive, and independently of national law, of determining or aggravating the liability in criminal law

of persons acting in contravention of its provisions⁵⁶. In practice, primacy is set aside since

*"there is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to the provisions of a directive not transposed where that directive cannot be relied upon before the national court"*⁵⁷.

However, neither Community law nor the principle of non-retroactivity of penal sanctions prevent national courts from applying the provisions of a directive, even where the offence took place before the date set for compliance with that directive, if this leads to the retroactive effect of a more favourable provision of criminal law. Accordingly, an individual who holds a valid Community model driving licence issued by one Member State, and who has taken up residence in another Member State, but has not exchanged his driving licence within the one-year period prescribed by Directive 80/1263, is entitled to rely directly on Directive 91/439 in order to challenge the imposition, in the Member State in which he has established his new residence, of a term of imprisonment or a fine for driving without a licence even where the offence took place before the date set for compliance with Directive 91/439⁵⁸. This begs the question whether *Ratti*⁵⁹ is still good law. Indeed Mr Ratti was denied the possibility to resist criminal prosecution on the ground that although his products were in conformity with the requirements laid down in a particular directive, the implementation period had not yet expired and the directive could not have direct effect.

The third limit is that a directive should never be construed as imposing obligations on individuals where that would confer rights on the defaulting State⁶⁰. The idea that a Member State, having failed to discharge its obligations to implement the directive, could then be allowed to rely on it against an individual, short of national implementing measures, seems in breach of natural justice.

There is another limit to the interpretative duty, the parameters of which are difficult to determine with precision, as the ECJ uses such formulae as:

*"the national court called upon to interpret it (its domestic 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 result pursued by the latter"*⁶¹.

or

*"it is for the national court to interpret and apply the legislation in conformity with the requirements of Community law IN SO FAR AS IT IS GIVEN DISCRETION TO DO SO UNDER NATIONAL LAW"*⁶².

Since it is for judges – through interpretation – to ensure that directives are properly incorporated into national law, different views will arise as to the proper

role of the judiciary, the proper extent of judicial powers. Moreover, given that judicial protection of the rights contained in the directive proceeds on a case by case basis, it is subject to inconsistencies. The interpretative duty also generates a great deal of uncertainty as to the exact scope of national law and conflicts with legal certainty – a general principle of Community law – particularly when obligations are imposed on private parties. This is evidently so when one considers that, on many occasions, the objectives pursued by a directive will only be revealed through interpretation by the ECJ. Individuals may expect that national law would be construed in accordance with national canons of interpretation. The difficulties encountered by the UK courts in relation to the uniform interpretation duty are discussed later in this chapter.

4.2.3.3 Legal basis

The duty of national courts to ensure the protection of Community rights is based on Article 10 EC:

“Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks, they shall abstain from any measure which could jeopardise the attainment of the Community’s tasks”.

The reasoning that underpins the development of the ‘uniform interpretation duty’ is as follows. The obligation imposed on Member States by Article 10 EC to achieve the result laid down in a directive applies to all national authorities, including judicial authorities. When interpreting national law in conformity with the provisions of a directive, judicial authorities must facilitate the achievement of the Community’s objectives. National courts are charged with giving full effect to Community obligations. As such this interpretation technique is not limited to giving effect to directly effective provisions of Community law. This is confirmed by the very case⁶³ in which the duty was developed.

4.2.3.4 Objections

The uniform interpretation duty raises a number of objections. First, it charges national courts with tasks normally discharged by other branches of government. Further directives may have a decisive impact on the outcome of a dispute between two private parties through an interpretation of domestic provision⁶⁴. Such interpretation, although in conformity with Community requirements, could not be expected by the parties on which obligations are thus imposed, and therefore can be said to breach legal certainty.

The main objection, however, is of a constitutional nature. On the one hand the ECJ has indicated that directives were constitutionally unable to impose

obligations upon individuals directly. On the other hand the ECJ insists that national courts are to give directives useful effect through interpretation. But interpretation often results in obligations being placed on private parties⁶⁵, albeit indirectly. As will be shown this particular paradox has given rise to particular problems in the UK courts.

In a number of circumstances, greater rights for individuals following a particular "construction" of national law often translates into greater obligations for another party. Sometimes that party happens to be a private one. Thus, in *Ruiz Bernaldes*⁶⁶, the compatibility of an exclusion of cover from a compulsory insurance contract with Directive 72/166 was considered. The ECJ held that a compulsory insurance contract may not provide that in certain cases, in particular where the driver of the vehicle was intoxicated, the insurer is not obliged to pay compensation for the damage to property and personal injuries caused to third parties by the insured vehicle. The practical result is that third parties have a right against private insurance companies to be compensated for the damage to property and personal injuries caused by the insured vehicle, and insurance companies have the corresponding obligation to provide compensation. In *Pafitis*⁶⁷, the Second Company Directive came into play between, on the one hand a private bank and its new shareholders, and on the other, the old shareholders who objected to the increase in the capital of TKE Bank by decision of the Governor of the Bank of Greece. The ECJ found that the directive precludes national legislation under which the capital of a bank constituted in the form of a plc may be increased by an administrative measure, without a resolution of a general meeting.

4.2.3.5 National law may become inapplicable

The last section considered how directives come into play in litigation between private parties as an aid to construction of national law and demonstrated how, as a result, they may even impose obligations on private parties. This section will examine how directives may also be relied upon in litigation between private parties, this time for the purpose of rendering national law inapplicable. In the UK however, the "distinction between using a directive as a source of rights and as a means of disapplying a restriction on rights which would otherwise be available in domestic law" has not found much sympathy in the House of Lords⁶⁸.

In *CIA*⁶⁹, the inapplicability of a technical regulation adopted in breach of a procedural obligation imposed by a Community directive was sought and secured. National provisions adopted in violation of requirements laid down in Directive 83/189⁷⁰ could not be applied nor enforced. CIA, a private company, brought an action for unfair trade practices against trade competitors advertising that the alarm systems manufactured and distributed by CIA were not in compliance with Belgian technical specifications. As a defence, the competitors argued that CIA should be barred from marketing non-approved security

systems. CIA relied on the Directive and argued that the technical standards imposed by the Belgian legislation ought to be considered as inapplicable since the notification procedure had not been respected. The case was referred to the ECJ. The central issue in the case concerned the consequences of a failure to comply with an obligation to notify technical regulations. In other words, what sort of effects should a national court attach to the breach by a Member State of procedural requirements imposed by Community law.

The consequences of a failure to comply with a notification procedure depends on the nature and intended effect of a notification procedure, both of which are matters for the ECJ. In *Enichem*⁷¹, a municipal council – i.e. a decentralised authority bound by the directive⁷² – had introduced a prohibition on the sale and use of plastic bags and non-biodegradable containers. It did not however notify this measure as required by Community law⁷³. In this instance, the ECJ held that the notification procedure was only intended to inform the Commission, which might then decide to take steps for harmonisation and did not make the entry into force of the envisaged rules subject to the Commission's approval. The procedure did not grant individuals any right capable of being infringed by a failure to notify. Individuals had no Community right which they could enforce before national courts in order to obtain annulment or suspension of national rules adopted in breach of this notification procedure. The practical result for traders was that they could sell only products complying with the national legislation, even though it had not been notified. It is certainly noteworthy that the measures challenged in *Enichem* were in fact in conformity with the purpose of the directive, namely protection of the environment⁷⁴. In *CIA*, the ECJ distinguished *Enichem*: the aim of the notification procedure in Directive 83/189 was not merely to inform the Commission, but to eliminate or restrict obstacles to trade. The *effectiveness* of this Community control would be enhanced if breach of the obligation to notify was treated as a substantial procedural defect, thereby rendering the technical regulations inapplicable between individuals⁷⁵. The practical result is that, unlike in the *Enichem* scenario, traders can sell products which do not comply with national technical specifications.

By contrast with the notification procedure under consideration in *Enichem*, the procedure in *CIA* was found capable of giving rights to individuals to the effect that rules adopted in breach thereof were inapplicable. Another way of differentiating between the two cases is to highlight the consequences of absence of notification, in breach of the Community regime: in *Enichem* it serves the purpose of the Directive; in *CIA* it defeats the purpose of the Community procedure. Breach by a Member State of its obligation to notify technical specifications may render them inapplicable. Directive 83/189 served as a basis to invalidate technical regulations, in litigation between private parties. The distinction between *Dori* and *CIA* has been found *unconvincing*⁷⁶. It appears on the contrary that the two cases can be very easily differentiated for, in *CIA*, the provisions of the directive do not have to come into play whereas in *Dori* what is sought is the application of the provisions of the directive in preference to

national provisions. Litigants may use a directive to protect themselves against national law, even in a litigation against private parties, since the provisions of the directive *as such* are not applied directly by the national court. This point was made clear in *Unilever*⁷⁷, where the ECJ confirmed that a national court is required, in civil proceedings between individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation adopted in breach of the Directive:

"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."

Individuals like the Commission are empowered to take action to force Member States to comply with their Community obligations. As a result of private enforcement, the validity of technical specifications which have not been notified is affected. Private enforcement of the Community regime ensures a better level of compliance on the part of Member States. This position is consistent with the view the ECJ took from the outset⁷⁸: supervision and application of Community law by Member States should not be a matter for the Commission and the Member States alone. Individuals, and national courts too, have a role to play in ensuring Member States discharge their Community obligations. It is however a position which does not appear to apply consistently to all Community obligations and national courts may, in the future, be faced with arguments to the effect that individuals should be able to force their Member States to comply with each and every Community obligation.

Directives may also be relied upon for the purpose of founding a claim in damages. In *Francovich*, the ECJ established the principle that Member States may be liable for loss caused by the failure to implement a directive, even where the directive does not give rise to directly effective rights. The principle of State liability has since been extended to breach of Treaty provisions and is considered in detail further in this work.

From the foregoing, it can be seen that the role of directives in litigation has become increasingly complex, and clarification of the case law is needed in the interests of judicial protection of *all* parties, but also in order to facilitate the task of national courts which are faced with the duty of giving full effect to Community law. It is also in the interests of the Community that Community law should not become an impenetrable jungle. The duty for national courts appears to be one which can be simply stated. National courts must give effect to Community law, such effect must be divined from the objective(s) which the specific Community obligation pursue.

The next paragraphs will explore the ways in which these rather shifting concepts and at times inconsistent messages have been applied by the UK courts.

4.3 The Practice in the UK courts

4.3.1 Enforcing directives against an emanation of the State.

In *Foster* the ECJ held that:

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

This ruling created some uncertainty and the UK courts were asked to consider whether the tests laid down were alternative or cumulative, how to define public service in Community law, and the degree of control exercised by the State⁷⁹.

Considerations of whether the tests are alternative or cumulative may have been attributable to the tendency of UK courts to adopt a literal rather than a purposive interpretation of Community law. For the ECJ, the tests are undoubtedly alternative, since the underlying objective is to broaden the scope of 'vertical direct effect'. This was made evident in *Marshall* ⁸⁰ where the ECJ rejected the argument according to which the Health authority was acting *qua* an employer in private law and not *qua* an emanation of the State. The ECJ held that the Equal Treatment Directive could be invoked against the Health authority, "regardless of the capacity in which that body is acting".

In *Kampelmann*⁸¹, the ECJ took special care to remove any remaining ambiguity:

"An individual may rely on a precise and unconditional directive directly before the national courts as against the State and any organisations or bodies which are subject to the authority OR control of the State OR have special powers beyond those which result from the normal rules applicable to relations between individuals, either where the State has failed to transpose the Directive into national law within the prescribed period or where it has not done so correctly"

An indication that the UK courts' problems might be resolved is provided by the case of *St Marys*⁸²:

"In my judgment it is NOT APPROPRIATE to apply the tripartite test in Foster as though it were a statutory definition. Education can be regarded as a public service. That service is under the control of the State. The Secretary of State has duties and powers in respect of the provision of education and so do LEAs. Those powers amount to sufficient control by the State for present purposes to come within the concept of control. In my judgment for the purposes of the doctrine of direct vertical effect the governors of the schools must be regarded as emanations of the State and I therefore consider that this appeal must be allowed."

4.3.2. Direct effect: an elusive concept

Griffin⁸³ raised the question whether Article 2 of the collective redundancies Directive⁸⁴ was directly enforceable against South West Water Services Ltd ('SWW') – a newly privatised company – and if so, whether SWW could be required to consult with a particular trade union. The High Court approached the matter on the basis that the threefold test had to be satisfied, and finding it was so, regarded the privatised company as an emanation of the State. However, it decided that the Directive did not have direct effect. The High Court, after acknowledging that direct effect was "a somewhat elusive concept"⁸⁵, proceeded to decide itself upon the issue. For the High Court, the provision of a directive may be unconditional and sufficiently precise notwithstanding that a difficult question of construction arises under a particular provision, a question which may warrant a reference to the ECJ. But it found that in the circumstances no such interpretation was required. The High Court was satisfied that 'workers representatives' did not have a Community definition since the concept refers to the laws or practices of the Member State. The Member State had a wide discretion in designating who the workers' representatives should be, and a particular trade union could not insist on being consulted on the basis of the Directive. As a result, the declaration sought, namely that SWW should also consult with UNISON, was not granted. In *Evans v. Reading and Motor Insurers Bureau*⁸⁶, the Court of Appeal rejected the plaintiffs' argument that they were entitled to compensation from the Motor Insurers Bureau under the terms of Directive 84/5⁸⁷. The Court of Appeal found the provisions of the directive to be unconditional and sufficiently precise in terms of identifying the persons entitled to compensation, but not clear and precise as to the identity of the person liable to provide compensation. In other words, an interested individual could not rely upon the directive to ask a national court to effectuate directly a right to compensation against the Motor Insurance Bureau. The decision was taken without a reference to the ECJ.

4.3.3 The duty of uniform interpretation

The interpretative duty provides that national courts are under the duty to interpret domestic provisions so as to conform with the requirements of a directive,

and with the interpretation placed on it by the ECJ, whether the national provision existed prior to or later than the directive i.e. whether the national provisions do or should give effect to Community law and, by implication, irrespective of whether or not such provisions have anything whatsoever to do with the Directive other than subject matter. The somewhat inconsistent approach⁸⁸ of the UK courts when trying to come to terms with the "interpretative duty" is well documented⁸⁹, and will only be briefly discussed. On the one hand, the House of Lords has shown itself willing to interpret UK legislation in the light of a directive, where such legislation was intended to implement the directive, even where it involved resorting to Hansard, departing from the apparently unambiguous provisions of UK regulations⁹⁰, or even adding a few words⁹¹.

*"If the legislation can reasonably be construed so as to conform with those obligations – obligations which are to be ascertained not only from the wording of the relevant directive, but from the interpretation placed upon it by the European Court of Justice at Luxembourg – such a purposive interpretation will be applied even though, perhaps, it may involve some departure from the strict and literal application of the words which the legislature has elected to use."*⁹²

On the other hand, where the legislation was found not intended to implement the Directive, the interpretative duty was not discharged⁹³.

4.3.3.1 Enforceable Community rights: a Community or national definition?

Understanding what lies behind this apparent contradiction deserves some attention. In Chapter 2, it was argued that the ECA is often the key to understanding the approach taken by the UK courts to their role as UK courts. This is certainly the key to understanding their approach to the duty of uniform interpretation.

Duke raised two separate issues. The first issue is whether UK courts are required, by virtue of section 2(4) of the ECA, to distort UK legislation. The second is whether the UK courts are, by virtue of Community law, required to discharge the interpretative duty where this would result in obligations being placed on to private parties which they understood *Marshall* to pre-empt. In *Duke*, The House of Lords refused to interpret the Sex Discrimination Act in the light of the Equal Treatment Directive on the grounds that it was impossible under national law, but also impossible under Community law. The duty of construction only exists in relation to rights granted by provisions which are directly effective⁹⁴. In *Webb*⁹⁵, whilst *Duke* was extensively discussed, the House of Lords departed from it in one very significant way: no mention was made of *enforceable Community rights*. The House of Lords considers itself bound by the interpretative duty even though "Directive 76/207 does not have direct effect between a worker and an employer who is not the State or an emanation

of the State". The House of Lords was prepared to accept that directives may, through interpretation of national law, place obligations between private parties, although it did not explain why. The reluctance to apply provisions of a directive against a private party resurfaces on occasion:

*"The effect of the decisions in MARSHALL and FACCINI DORI is that, except in proceedings which bring into question the legal relations between the individual and the State or its emanations, directives do not give rise to rights or restrictions which without further enactment are required to be given legal effect. Accordingly, section 2(4) does not enable them to affect the validity or construction of domestic legislation"*⁹⁶.

And, as a matter of fact, the practical effect of allowing individuals to rely on the provisions of the Directive directly or through the effect of the interpretative duty can on occasion be the same:

*"the dispute is between two persons governed by private law and the Court has not so far held that directives have horizontal direct effect"*⁹⁷.

4.3.3.2 The UK courts' focus should be on section 3 (1) of the ECA

As a matter of Community law, the interpretative duty does not require application of directives. Rather, it involves the application of *national* law construed in accordance with the objectives of the directive as interpreted by the ECJ. If the ECJ has held that a directive may not *of itself* impose obligations on individuals, nor be relied upon *as such* against private parties, it has consistently ensured that the duties and obligations contained in directives are available in private relationships through the medium of national law⁹⁸. In other words, the ECJ has decided that Directives, while incapable of creating private obligations directly, may be capable of doing so indirectly. Couched in the language of the ECA this means that directives create enforceable rights. These enforceable rights must be enforced, either directly or indirectly, through a particular interpretation.

Reconciling the ECJ case law on the direct and indirect effect of directives has, sometimes, proved difficult for the UK courts⁹⁹. If a legislative instrument is not capable of creating obligations on private parties directly, it should not be capable of doing so indirectly either. It might be that the UK courts refusal to place obligations on private parties through interpretation is based on the following logic: if a provision is not capable of imposing obligations directly in certain types of litigation, why should that same provision be capable of doing so indirectly?

The ECJ *only* said that directives could not *as such* impose obligations on private parties, not that they could not give rights. Furthermore, the interpretative duty ensures that directives do not create rights directly, as the rights are derived from national law. Thus, if the reasoning followed by the UK courts

may seem logical, it is wrong as a matter of *Community law*. From a Community perspective, the interpretative obligation exists, *irrespective* of its results on private legal relationships. The UK courts are bound by section 3 (1) of the ECA as well as by section 2 (4). They are instructed to follow the case law of the ECJ, which includes that on the interpretative duty¹⁰⁰.

4.3.3.3 When legal certainty and fairness come into play.

Other considerations have played a role. The UK courts have also based their refusal on the principle of legal certainty:

"The effect – of the declaration sought – would be to give the Directive, by an easy two-stage process, the very effect which the jurisprudence of the Court says it cannot have, namely to impose obligations upon an individual. Furthermore, those obligations would be imposed arbitrarily and retrospectively, depending upon whether and when some interested person brought proceedings in public law to assert his "right" against the State to have incompatible domestic law set aside. This seems to me inconsistent with the principle of legal certainty, which is one of the fundamental doctrines of European law."

There are additional objections to the placing of obligations on private parties via an interpretation of national law. In the context of employment law, Community obligations often translate into obligations placed upon individual employers and courts feel uneasy about placing costs on them¹⁰¹. The fairness of placing obligations on private parties is not merely a British concern. In *Dekker*¹⁰², the employer's decision not to appoint Ms Dekker was based on the Dutch legislation on Social Security benefits. Still, as a result of the case, the employer is ultimately the party liable¹⁰³ for a failure of the State to introduce legislation in conformity with Community obligations.

4.4. Conclusion

Direct effect and primacy ensure that Community law can be invoked in the UK courts and can prevail over inconsistent UK law, yet these doctrines do not categorise the rights Community law may confer, or indicate which remedies are available to sanction violation of Community law.

This chapter started with the suggestion that

*"The doctrine of direct effect seeks to ensure that rights accruing from Community law are available to the individual, whilst the doctrine of primacy ensures that such rights will take precedence over ANY national rule or practice."*¹⁰⁴

There is real force in the proposition that, if the primacy of Community law requires, as a general rule, that in case of conflict between a substantive provision of national law and a substantive provision of Community law, the Community provision should prevail, then, *a fortiori*, primacy requires that rules governing procedures or remedies be overridden. Still, in practice, the full requirements of primacy are still a matter of contention, as the next chapter will show.

Endnotes

- ¹ Edward & Lane, *op. cit.* para. 135.
- ² *Duke v. Reliance Systems Ltd.* [1988] A.C. 618 per Lord Templeman.
- ³ Case 6/64 *Costa v. ENEL* [1964] ECR 585, and Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629.
- ⁴ Case C-114/95 & C-115/95 *Texaco* [1997] ECR I-4263, para. 46.
- ⁵ Joined Case 372 to 374/82 *Traen* [1987] ECR 2141, Case C-236/92 *Comitato di Coordinamento per la Difesa della Cava & others v. Regione Lombardia* [1994] ECR I-483; for a fuller discussion see C. Boch, "The Iroquois at the Kirchberg" in J. Usher (ed) *The State of the EU* (Longman 2000).
- ⁶ P. Pescatore, "The Doctrine of Direct Effect: An Infant Disease of Community Law" (1983) 8 ELR 155.
- ⁷ *R. v. Secretary of State for the Home Department ex parte Flynn* [1995] 3 CMLR 397, [1997] 3 CMLR 888, confirmed in Case C-378/97 *Florus Ariël Wijsenbeek*.
- ⁸ *Phull v. Secretary of State for the Home Department* [1996] Imm AR 72.
- ⁹ Case 43/75 *Defrenne v. SABENA* [1976] ECR 455, para. 28.
- ¹⁰ Case 61/79 *Amministrazione delle Finanze dello Stato v. Denavit Italiana* [1980] ECR 1205.
- ¹¹ See C. Boch (1995) *op. cit.*
- ¹² Weatherill & Beaumont, *EC law*, (London Penguin, 2nd ed. 1995) at 340.
- ¹³ As exemplified by the evolution of the case law on Article 86(2); *ibid* at 341.
- ¹⁴ Case 43/75 *Defrenne v. SABENA* [1976] ECR 455 para. 25 emphasis supplied.
- ¹⁵ Case C-415/93 *URBSFA v. Bosman* [1995] ECR I-5050 para. 82 emphasis supplied and Case 36/74 *Walrave and Koch v. Association Union Cycliste Internationale* [1974] ECR 1405.
- ¹⁶ Case C-281/98 *Roman Angonese and Cassa di Risparmio di Bolzano SpA*, para. 36.
- ¹⁷ Case C-39/94 *Syndicat Français de l'Express International and others v. la Poste* [1996] ECR I-3547; see also G.B. Abbamonte "Competitors' Rights to challenge illegally Granted aid and the problem of conflicting decisions in the field of competition law" (1997) ECLR 87.
- ¹⁸ Case 43/71 *Politi* [1974] ECR 1039.
- ¹⁹ So for example Regulation 2027/2000 of the European Parliament and the Council of 29 June 2000 on substances that deplete the ozone layer which had a phased implementation of two years for domestic appliances.
- ²⁰ Case C-403/98, *Azienda Agricola Monte Arcosu Srl and Regione Autonoma della Sardegna, Organismo Comprensoriale No 24 della Sardegna, ERSAT* [2001] ECR I-103, para. 26.
- ²¹ Case 9/70 *Grad v. Finanzamt Traunstein* [1970] ECR 825.
- ²² See Chapter 1 and Case C-59/89 *Commission v. Germany* [1991] ECR I-2607, para. 24 and see Case C-144/99 *Commission v. Netherlands* [2001] ECR I-3541.
- ²³ Case C-236/95 *Commission v. Greece* [1996] ECR I-4459, para. 13.
- ²⁴ Case 33/70 *SACE* [1970] ECR 1214, although the directive was relied upon alongside Treaty provisions.
- ²⁵ Case 41/74 *van Duyn v. Home Office* [1974] ECR 137 emphasis added.
- ²⁶ Case 51/76 *Verbond van Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113; Case 38/77 *Enka v. Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 825.
- ²⁷ Case 148/78 *Ratti* [1979] ECR 1629.
- ²⁸ So in Case C-271/91 *Marshall v. Southampton and South West Hampshire Area Health Authority, Marshall II*, in contrast with earlier case law the ECJ decided that Article 6 of the Equal Treatment Directive had direct effect.

- ²⁹ Case C-129/96 *Inter-Environnement Wallonie ASBL and Région Wallonne* [1997] ECR I-7411; Compare Case C-230/97 *Criminal proceedings against Ibiyinka Awoyemi* [1998] ECR I-6781 with Case 148/78 *Ratti* [1979] ECR 1629.
- ³⁰ Case T-172/98 [2000] ECR II-2487.
- ³¹ Case C-72/95 *Kraaijeveld BV & Others and Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403.
- ³² Case C-201/94 *The Queen v. The Medicines Control Agency, ex parte Smith & Nephew Pharmaceuticals Ltd and Primecrown Ltd v. The Medicine Control Agency* [1996] ECR I-5819.
- ³³ Case 152/84 *Marshall v. Southampton & South West Hampshire Health Authority* [1986] ECR Marshall I.
- ³⁴ For an overview see S. Prechal *op. cit.*
- ³⁵ Advocate General Jacobs at point 33 of his opinion in C-316/93 in *Vaneetveld v. SA le Foyer* [1994] ECR I-763. T. Tridimas "Horizontal Effect of Directives: A Missed Opportunity?" (1994) 19 ELR 621 at 633-635.
- ³⁶ Case 152/84 *Marshall v. Southampton & South West Hampshire Health Authority* [1986] ECR Marshall I.
- ³⁷ Case C-192/94 *El Cortes Ingles SA v. C. Blázquez Rivero* [1996] ECR I-1281.
- ³⁸ In para. 12 of van Gerven's opinion in Case C-271/91 *Marshall II*, [1993] ECR I-4367 para 15 *et seq.* of Jacob's opinion in C-316/93 in *Vaneetveld v. SA le Foyer* [1994] ECR I-763, para. 47 *et seq.* of Lenz's opinion's in Case C-91/92 *Dori v. Recreb srl*, [1994] ECR I-3325.
- ³⁹ Case C-91/92 *Faccini Dori v. Recreb srl*, [1994] ECR I-3325.
- ⁴⁰ Case C-424/97 *Haim and Kassenzahnärztliche-Vereinigung Nordrhein* [2000] ECR I-5123.
- ⁴¹ Case 152/84 *Marshall v. Southampton & South West Hampshire Health Authority* [1986] ECR Marshall I.
- ⁴² Case 222/84 *Johnston v. Chief Constable of RUC* [1986] 1651.
- ⁴³ Case C-188/89 *Foster v. British Gas* [1990] I ECR 3313; a ruling applied to privatised utilities.
- ⁴⁴ Case 103/88 *Fratelli Costanzo SpA v. Comune di Milano* [1989] ECR 1839.
- ⁴⁵ Case 103/88 para. 31.
- ⁴⁶ Case 231/87 *et 129/88 Commune de Carpaneto* [1989] ECR 3233, para 31 & 33.
- ⁴⁷ Case C-319/96 *Brinkmann Tabakfabriken / Skatteministeriet* [1998] ECR I-5255.
- ⁴⁸ Case C-424/97 *Haim* [2000] ECR I-5123.
- ⁴⁹ Case C-6/90 & C-9/90 *Francovich and others v. Italy* [1991] ECR I-5357.
- ⁵⁰ Case C-456/98 *Centrosteeel* [2000] ECR I-6007; Cases C-240/98 to C-244/98 *Oceano Grupo Editorial SA and Rocio Murciano Quintero* [2000] ECR I-4941.
- ⁵¹ Paras 26 & 27. and in C-334/92 *W. Miret v. Fondo de Garantía Salarial* [1993] ECR I-6911.
- ⁵² T. Tridimas *op. cit.*
- ⁵³ First enunciated in Case 14/83 *von Colson & Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891 and Case 79/83 *Hartz v. Deutsche Tradax* [1984] ECR 1891 the principle was further developed in C-106/89 *Marleasing v. La Comercial Internacional de Alimentación* [1990] ECR I-4135; also discussed in D. Curtin, "The effectiveness of judicial protection of individual rights" (1990) 27 CMLRev. 709.
- ⁵⁴ In Case C-456/98 *Centrosteeel* [2000] ECR I-6007 Advocate General Jacobs explore some of these limits.
- ⁵⁵ As in Case C-6/90 & C-9/90 *Francovich and others v. Italy* [1991] ECR I-5357.
- ⁵⁶ Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969 para. 13. C-168/95 *Arcaro* [1996] ECR I-4705, para. 42.
- ⁵⁷ Case C-168/95 *Arcaro op. cit.* para. 43.
- ⁵⁸ Case C-230/97 *Criminal proceedings against Ibiyinka Awoyemi*, [1998] ECR I-6781.
- ⁵⁹ Case 148/78 *Ratti* [1979] ECR 1629, paras 42-47.

- ⁶⁰ Advocate General Jacobs at point 33 of his opinion in Case C-316/93 *Vaneetveld v. SA le Foyer* [1994] ECR I-763.
- ⁶¹ C-106/89 *Marleasing v. La Comercial Internacional de Alimentación* [1990] ECR I-4135.
- ⁶² Case 14/83 *von Colson & Kamman v. Land Nordrhein-Westfalen* *op. cit.* para 28, emphasis added.
- ⁶³ Case 14/83 *op. cit.*
- ⁶⁴ Case C-472/93, *Luigi Spano and Others v. Fiat Geotech SpA & Fiat Hitachi Excavators SpA* [1995] ECR I-4321.
- ⁶⁵ Case C-106/89 *Marleasing v. La Comercial Internacional de Alimentación* [1990] ECR I-435, Case C-32/93 *Webb v. EMO Air Cargo Ltd* [1994] ECR I-3567; Case C-129/94 *Criminal proceedings against Rafael Ruiz Bernaldez* [1996] ECR I-1829. A point also made by Advocate General Tesauro in his opinion in C46/93 & 48/93 *Brasserie du Pêcheur & BR Deutschland and R v. Secretary of State for Transport, ex parte Factor-tame and others* [1996] ECR I-1029 "so much so that in the ultimate analysis, one is not so far removed from the practical effects which would be achieved by the horizontal effect, pure and simple, of precise and unconditional directives" *fn.* 35 of his opinion.
- ⁶⁶ Case C-129/94 *op. cit.* Spanish legislation provided that cover of damage to property caused when the driver is intoxicated is excluded from the compulsory car insurance.
- ⁶⁷ Case C-441/93 *Pafitis v. Trapeza Kentrikis Ellados AE* [1996] ECR I-1347.
- ⁶⁸ *Regina v. Secretary of State for Employment, Ex parte Seymour Smith* [1997] 3 CMLR 904.
- ⁶⁹ Case C-194/94 *CIA Security International v. Signalson and Securitel* [1996] ECR I-2201; also see *supra* Case C-201/94 *The Queen v. The Medicines Control Agency, ex parte Smith & Nephew Pharmaceuticals Ltd and Primocrown Ltd v. The Medicine Control Agency*.
- ⁷⁰ OJ 1983, L109/8 amended by Directive 94/10 OJ 1994, L100/30.
- ⁷¹ Case 380/87 *Enichem base v. Commune di Cinisello Balsamo* [1989] ECR 2491, paras 19-24.
- ⁷² Case 103/88 *Fratelli Costanzo SpA v. Commune di Milano* [1989] ECR 1839.
- ⁷³ Directive 75/442; OJ 1975 L194/39 on the disposal of waste.
- ⁷⁴ Para. 7 of the judgment.
- ⁷⁵ Case C-194/94, *CIA Security International v. Signalson* para. 48.
- ⁷⁶ J. Coppel Case note on *CIA* in (1997) 26 ILJ 69 at 71-72.
- ⁷⁷ Case C-443/98, *Unilever SpA v. Centrafood SpA* [2000] ECR I-para. 51.
- ⁷⁸ Case 26/62 *van Gend en Loos v. Nederlandse Administratie der Belastingen* *op. cit.*
- ⁷⁹ *Rolls Royce PLC v. Doughty* [1988] 1 CMLR 569, *Griffin v. South West Water services* [1995] IRLR 15.
- ⁸⁰ Case 152/84 *Marshall v. Southampton & South West Hampshire Health Authority* *op. cit.* I.
- ⁸¹ Case C-253/96 to C-258/96 *H. Kampelmann and others* [1997] ECR I-6907, paras 46 & 47.
- ⁸² *National Union of Teachers and others v. Governing Body of St Mary's Church of England (Aided) Junior School* [1997] 3 CMLR 630.
- ⁸³ *Griffin v. South West Water services* [1995] IRLR 15.
- ⁸⁴ Directive 77/129 OJ 1977 L 48/29.
- ⁸⁵ *Blackburne J* at p. 30, para 126.
- ⁸⁶ Court of Appeal, *Times Law Report*, 12 October 1998.
- ⁸⁷ Second Council directive on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, OJ 1984, L8/17.

- ⁸⁸ Compare *Pickstone v. Freemans* [1989] AC 66, and *Litster v. Forth Dry Dock Ltd.* 1989 SC (HL) 96 with *Duke v. Reliance Systems Ltd.* [1988] A.C. 618 and *Finnegan v. Clowney Youth Training Programme* [1990] 2 AC 407. (*op. cit.*).
- ⁸⁹ G. de Búrca, "Giving Effect to European Community Directives" (1992) 55 MLR 215.
- ⁹⁰ *Pickstone v. Freemans op. cit.*
- ⁹¹ *Litster op. cit.*
- ⁹² *Litster* per Lord Oliver.
- ⁹³ *Duke v. Reliance Systems Ltd.* [1988] A.C. 618; *Finnegan v. Clowney Youth Training Programme* [1990] 2 AC 407; *Webb v. EMO Cargo Ltd.* [1992] 2 All ER 43 (C. of A.).
- ⁹⁴ ECA 1972, S.2(1), "enforceable Community rights".
- ⁹⁵ *Webb v. EMO Cargo Ltd.* [1993] I.R.L.R. 27 (HL).
- ⁹⁶ Lord Hofmann in *Regina v. Secretary of State for Employment*, ex parte *Seymour Smith*.
- ⁹⁷ Advocate General Tesaro in his opinion in *Webb* at point 6 of the opinion.
- ⁹⁸ See C. Boch and R. Lane "European Community law in National courts: A Continuing Contradiction" (1992) 5 LJIL 171.
- ⁹⁹ Although it was never at issue in *Pickstone v. Freemans*, or *Litster op. cit.*
- ¹⁰⁰ Case 14/83 *von Colson & Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891; Case 79/83 *Hartz v. Deutsche Tradax* [1984] ECR 1921; D. Curtin: "The effectiveness of judicial protection of individual rights" (1990) 27 CMLRev 709.
- ¹⁰¹ *Duke op. cit.* at ground 35.
- ¹⁰² C-177/88 *Dekker v. Stichting Vormingscentrum voor Jong Volwassensen (VJV-Centrum) Plus* [1990] ECR I-3941.
- ¹⁰³ C. Boch, "From Champagne to Maternity Rights" (1996) 33 CMLRev 547 at 558.
- ¹⁰⁴ Edward & Lane, *op. cit.* para. 135.

