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### UK courts and EC law

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**National Remedies for Breach of EC Law**



*"The Court supplemented the classic public international law scheme of judicial supervision of Member-State compliance with Community law, with one that essentially relies on the initiative of private parties and the authority of national judicial systems. As a consequence, the Community must trust these systems, particularly the efficiency of their rules of procedure."*

*"It is for the national legal system of each Member State to determine which court has jurisdiction to hear disputes involving individual rights derived from Community law, but at the same time the Member States are responsible for ensuring that those rights are effectively protected in each case; subject to that reservation it is not for the Court to intervene in order to resolve any questions of jurisdiction which may arise, within the national judicial system, as regards the definition of certain legal situations based on Community law".*

## National remedies for breach of EC Law

This chapter considers the extent to which Community law influences the working of national judicial systems. The Community requirements will be studied through a selection of cases where national procedural rules or substantive rules governing the remedy were challenged as falling below the standard of protection which Community law requires. As will be shown, Community law has had a real impact at all stages of the judicial process, from access to the domestic courts to the final outcome of the litigation. The question as to whether or not, in the absence of specific Community provisions, Community law grants a right to a specific remedy, which national courts should provide, will be addressed. The chapter will first examine some of the factors which can impair the enforcement of Community law at national level.

### 5.1 Where do national obstacles come from? The principle of national procedural autonomy

The ECJ declared that the Community constitutes a new and independent legal order. Yet, the Community is also a dependent legal order, inasmuch as it relies for its enforcement on the legal orders of the Member States. Whilst there is an important distinction between the different sources of Community law, the question of how a Community obligation becomes part of the law of the Member States is only *one* element in the chain of action necessary to ensure the effective operation of that particular Community obligation. Characteristic features of the Community legal system are its decentralised structures and mechanisms for the monitoring of the implementation, application and enforcement of rules. The Community system is in the hands of national authorities: administrations and courts. Except in some specific fields where the Commission plays a direct role in ensuring that the Community obligations are observed, or

where Community legislation has laid down specific remedies and procedures<sup>3</sup>, compliance with Community obligations rests with national authorities, whose responsibility it is to secure payment of agricultural levies, take appropriate measures for the conservation of fishing stocks, etc. Once, through whatever legislative process, the Community obligations have acquired the force of law in the Member States, national administrations and courts still have a very important role to play. Community obligations need to be made operative in practice; national mechanisms for investigation, control and sanctions have to be relied upon or provided. The Community system needs the laws and authorities of the Member States to determine the procedures for the enforcement of Community law<sup>4</sup>. This two tier system, whereby the Community enacts rules which national authorities apply and which national courts have to enforce and/or protect is known as the principle of national procedural autonomy.

In practice this means that the availability and effectiveness of remedies to enforce the law are dependent upon national solutions, which are designed to protect national-based claims, and which may therefore not necessarily be well suited to the protection of Community-based claims.

#### 5.1.1 Going to Court

Often the predictability of gaining access to the courts may constitute the first obstacle for the enforcement of Community law. The costs of litigation<sup>5</sup>, the conditions relating to the availability of legal aid, legal expertise or knowledge of EC law, the existence of enforcement agencies and the size of their budget all have a significant bearing on the decision to pursue a claim. Some of these obstacles can sometimes be reduced by the existence of an enforcement agency. This has been the case in the UK in the area of equal pay and equal treatment, through the Equal Opportunity Commission from which financial and legal assistance has been available.<sup>6</sup> Perhaps, if it wants to reconnect with the citizens and ensure the proper enforcement of Community law, the Union should consider funding national enforcement agencies specifically tasked with the enforcement of Community law-based claims.

#### 5.1.2 Lack of knowledge or awareness of Community law

Many areas of legal practice have a Community flavour. Apart from the well-known and commonly used "euro-defences" in commercial and criminal matters, Community law impacts *inter alia* on immigration law, social security and health and safety. In this latter area, Community law influences manufacturing requirements regulating the working environment as well as standards of care in personal injuries cases. It is impossible to know how many cases involving a potential Community law point will never see it discussed. Proceedings in which Community rules are being ignored cannot be covered by systematic research, but it is likely that Community law points are often not argued, for lack

of awareness. Studies uncovered the fact that some law firms, mainly smaller ones, practising in fields of law with a high level of Community law content did not recognise the Community law implications.<sup>7</sup>

The study of Community law is a requirement for entry into both branches of the profession, and British judges have on many occasions listened to sophisticated, ambitious and inventive Community law arguments. Employment and equal opportunities lawyers in particular, have been quick to realise and exploit the fact that Community law is a very fertile source of new lines of arguments. Yet, awareness of the wide range of opportunities offered by Community law, and usage of these, seem to remain the remit of a few specialists. In fact, a quick perusal of the names involved in such litigation will reveal the names of only a handful of solicitors and counsels.

*"According to the opinions of judges, the failure to make references is sometimes the product of the parties' and their legal advisers' lack of knowledge of Community law"*<sup>8</sup>.

This obstacle is in no way particular to Community law; the same remarks have been made in relation to judicial review, where it has been observed that only a small minority of solicitors are likely to have any experience handling judicial review cases<sup>9</sup>. Moreover, in Social Security Appeals in which legal representation of parties is rare, it must be expected that litigants themselves will be aware of their Community rights or that the Chairman will raise a Community law point *ex proprio motu*.

The lack of awareness is by no means peculiar to the UK and the reality of the problem prompted the Commission to make a proposal for a European Parliament and Council Decision establishing an action programme to improve awareness of Community law for the legal professions – the Robert Schuman Project.<sup>10</sup>

*"Citizens will be unable to enforce all their rights under the Community legal system before any national court within the Union unless those members of the legal professions involved in the administration of justice, i.e. judges, prosecutors and lawyers are sufficiently informed and trained to do so."*<sup>11</sup>

More recently, in its White Paper on Governance<sup>12</sup>, the Commission drew the same negative assessment and reiterated the need for better knowledge of Community law. For the Commission it is clear that the feeling persists that Community rules are "foreign laws". The Commission reminds Member States that EU law is part of the national legal order and must be enforced as such:

*"Despite long-standing co-operation with the European Court of Justice, national lawyers and courts should be made more familiar with Community law, and assume*

*responsibility in ensuring the consistent protection of rights granted by the Treaty and by European legislation."*

The Commission stated its continued willingness to support judicial co-operation and the training of lawyers and judges in Community law, but also asked the Member States to step up their efforts in this field.

### 5.1.3 Financial considerations

In the same way that prosecution rates and powers of enforcement depend on the financial resources and enforcement personnel at the disposal of the authority responsible for enforcement, the decision for an individual to pursue or not to pursue a Community claim will be heavily influenced by financial considerations, particularly given the existence in the UK courts – unlike in those of some of the other Member States – of the notion of 'expenses follow success'. Where such a rule applies -i.e. the loser pays-, the risk of losing, even if minimal, becomes an important factor in deciding whether to embark upon litigation. It remains to be seen whether an argument would succeed to the effect that a factor to which significant weight should be attached in exercising a discretion in relation to expenses is a right to an adjudication in a Community law context where the law is not straightforward, as opposed to the weight attached to success on the merits. The basis of such an argument could be the full and effective protection of Community law .

Financial considerations include *inter alia* the lack of availability of legal aid, the disproportion between the sums at stake and the cost of litigation. All of these considerations are evidently compounded where a reference to Luxembourg has to be made, and in turn induce a practical, and understandable, reluctance to refer.

*"The cost of a reference to Luxembourg is substantial. In a huge dispute between large multinational companies that really does not matter, but in a modest dispute between private parties, one is reluctant to see the burden of costs increased in a way that might be quite out of proportion to the sum in dispute."*<sup>3</sup>

Additional evidence is provided by the case of *Maxim's Ltd v. Dye*<sup>4</sup>, in which the judge refrained from ordering a reference where one of the parties – and ironically the one who might have benefited from the reference – opposed it on grounds of expense.

*"If, however, the party does not feel able by reason of expense to agree to a reference, what is the judge to do? He may well find it difficult to reconcile with his judicial oath a decision deliberately given in ignorance of the correct view of Community law.[...] It is suggested that a procedure should be worked out as soon as possible*

*whereby legal aid can be obtained to enable the judge to receive the help he needs from the ECJ."*

The question of legal aid is relatively simple in the case of an individual party; however no provision for legal aid is available when the party is a commercial entity. A small company cannot itself justifiably be asked to bear the costs of finding out what the relevant Community law is<sup>15</sup>. Given that a preliminary ruling is, for the parties to the main proceedings, a step in the proceedings before the national court, the extension of a legal aid certificate should be available to cover the reference. Where legal aid is not available in the main proceedings, it is unavailable for the reference<sup>16</sup>. In *Venter v. SLAB*<sup>17</sup> the First Division of the Court of Session held that excessive costs was a relevant consideration in refusing legal aid. Whether such a decision may have had any influence on the low level of references from Scottish courts is unknown.

In special circumstances<sup>18</sup>, legal aid is available from the ECJ itself<sup>19</sup>. An application for legal aid to the ECJ can be made at any time, but the legal aid budget of the Court is small and amounts awarded are likewise small. In *Jenkins*<sup>20</sup>, Mrs Jenkins was supported throughout the proceedings by her trade union and the EOC; the defendant, Kingsgate, a small company not in a strong financial position, took the view it could not be represented before the ECJ, and its application for legal aid to the ECJ having been turned down, no argument was made on its behalf.

The rights of individuals to take enforcement action on their own initiative is undoubtedly a necessary, but not a sufficient, condition for effective enforcement. If individuals are to secure the various benefits Community law intends to bring about, they need financial resources. Without financial means they will be barred from access to the judicial process and will be deprived of any remedies, let alone effective ones.

#### 5.1.4 Finding the appropriate forum and choosing the correct form of action

Being creatures of statute, Industrial Tribunals and the Employment Appeal tribunals have their jurisdictions specifically delimited by the statute conferring jurisdiction upon them; there was no reference to Community law in these statutes. The first English judicial response to this question was that Industrial Tribunals had no jurisdiction to decide questions of Community law.<sup>21</sup> The EAT held that it was not open to a claimant before an Industrial Tribunal to seek to enforce her or his rights under Article 141 EC. Such a claim would have to be brought in the High Court as an independent claim to an "enforceable Community right", with all the consequences involved, in particular in relation to costs. Soon afterwards, these jurisdictional problems were resolved<sup>22</sup>, but have on occasion resurfaced<sup>23</sup>. In *Wright & Hannah*, the Scottish EAT refused to uphold the argument that the Industrial Tribunal had no jurisdiction to entertain an



application brought directly under Article 141 EC and Directive 76/207. It had been argued that the Industrial Tribunal should not be considered the appropriate forum since the application raised issues of public law as it related to a decision taken in the exercise of statutory powers; it was therefore felt to be within the supervisory jurisdiction of the Court of Session.

Choosing the correct forum in which to commence proceedings may involve drawing a distinction between a private and a public law matter, and can be quite difficult. The English Law Commission<sup>24</sup> has recognised that the procedural exclusivity principle has given rise to much case law on the boundary between public and private law rights, and even generated needless litigation over procedural issues, rather than dealing with the substance of the dispute<sup>25</sup>, so much so that it has recommended the transfer of issues or proceedings into or out of Order 53 so as to avoid serious detriment to cases involving a combination of public law and private law issues<sup>26</sup>.

Having decided on a forum, consideration must then be given to the correct form of action or process. If choosing the right process – which is not peculiar to English law – is already a complex issue in the domestic context, Community law complicates it further. Indeed, with the presence of Community law, the uncertainty and potential for litigation over procedural issues where private rights and issues of public law are inter-mingled is increased<sup>27</sup>. EC law does not fit in with classifications made for other – domestic – purposes. Community law confers rights and obligations in private and public law, irrespective of traditional national legal boundaries. Thus, EC law imposes obligations on bodies, whatever their nature, which perform public functions, in both public and private law. Furthermore, EC obligations which are clearly in the public sphere may yet give rise to rights in private law, and *vice versa*.

Competition law is a good case in point. Undertakings, whether under public or private ownership, are subject to the application of the competition rules laid down in Articles 81 & 82 EC Treaty. In *Garden Cottage Foods*<sup>28</sup>, an alleged breach of Article 82, by the Milk Marketing Board – considered to be acting as an undertaking, rather than a public body in the exercise of its statutory powers – which caused damage to a private party gave rise to a cause of action in English law for breach of statutory duty. The Treaty also recognises that undertakings – whether public or private – to which Member States grant special or exclusive rights for the purpose of running services of general economic interest can, in well-defined circumstances, avail themselves of the normal application of the competition rules. Thus, Article 86 (2) provides for the so-called “public-mission defence”. The competition rules are only applicable in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. In such situations seeking redress for breach of Community competition rules gives rise to many questions. When the defender is a public body performing a public law function in breach of EC law there seems to be little doubt that the appropriate form of process is an application/petition for judicial review. However, when public bodies perform a

commercial activity, should the appropriate form of process be other than judicial review<sup>29</sup>? The Keeper of the Registers of Scotland – an executive agency- was considered to be

*"in the relevant sense and for pertinent purposes an undertaking.[...] The fact that an entity which is [...] a public officer charged with statutory responsibilities, may in certain circumstances be subject to the rules on competition, is evident from Article 90 EC. The critical issue is whether the entity in question is, in respect of the matters at issue, involved in an economic activity."*

Identifying the competent form of process to challenge the decision under review allegedly in breach of Article 82 EC was more difficult. Are contractual decisions of the Keeper amenable to judicial review or are they to be challenged by private action? The Petitioner argued that "although a contractual mechanism had been employed in substance what had occurred was an administrative step by the Keeper of a kind amenable to judicial review." But this was not accepted: "contractual decisions are not open to challenge in this form of process." When the defender is a private body exercising public powers, should the action be based on a private law remedy or be subject to judicial review? At present no straight answers to these questions are available.

Related questions have also arisen as to whether enforcement by means of a private law action is precluded where a particular Community instrument makes express provision for enforcement through public law mechanisms. This issue is of particular relevance in the UK context as, in such factual circumstances, the proper form of action would be considered to be a breach of statutory duty actionable through judicial review. Private enforcement is regarded in the Community system as a useful and necessary complement to centralised enforcement by the Commission. Given that this is so, does it follow that at national level too the individual should be considered as the useful and necessary adjunct to the activities of national authorities charged with enforcement of a particular Community regime? Some of these issues were considered in *Muñoz and Superior Fruiticola*<sup>30</sup>. The ECJ had to consider whether a trader could enforce compliance by a competitor with the provisions of a Regulation on quality standards for agricultural products through civil proceedings. It ruled that:

*"the full effectiveness of the rules on quality standards and, in particular, the practical effect of the obligation laid down by Article 3(1) of both Regulation No 1035/72 and Regulation No 2200/96 imply that it must be possible to enforce that obligation by means of civil proceedings instituted by a trader against a competitor".*

The EOC litigation<sup>31</sup> provides another illustration of the forms of process conundrum. An ex-employee (joined to proceedings by the EOC) brought a claim for judicial review of the Employment Secretary's refusal to introduce amending

legislation to the Employment Protection (Consolidation) Act 1978. The individual applicant, who was directly affected, could not succeed in her application as her claim was essentially a private law claim which should have been brought in an industrial tribunal. On the other hand, the EOC which the relevant legislation did not directly affect was able to bring a challenge by way of judicial review.

In cases where litigants seek restitution of sums, they must first obtain annulment of the imposition of the charge via judicial review, then restitution through a private law action. The Law Commission recommended that, as is the case for damages, the court may order restitution in judicial review proceedings provided such restitution would have been granted in an action begun by writ.<sup>32</sup>

### 5.1.5 The immediacy of the remedy

The importance of interim protection is well-known. The delay in obtaining a remedy is a critical factor in deciding whether to proceed in the courts at all. In many cases involving Community law, notably in the competition and environmental law areas, it is important for plaintiffs to try and obtain an interim remedy at the commencement of proceedings. In the absence of a right to seek interim relief and a concomitant power on the part of the national courts to grant it, a case may be rendered nugatory. In this respect, the picture is pretty bleak. This may be due to the broad nature of the tests applied at this stage or to the perceived complexity of the Community law argument. Nevertheless there is no reason why one should not adjudicate on such issues at the interim stage, and it may be essential that they do so if an appeal is to be taken against the refusal of an interim order.

In the field of competition law there seems to be evidence to the effect that UK courts are generally reluctant to give plaintiffs their remedies as soon as possible, namely at the interlocutory injunction stage<sup>33</sup>. In the environmental law field, the insistence on a requirement of a cross-undertaking in damages prevented the Royal Society for the Protection of Birds from securing an "interim declaration" regarding the legal impropriety of the decision to exclude the Lappel Bank from a special protection area<sup>34</sup>. Accordingly the development plan proceeded, with the result that when the decision of the Secretary of State was declared unlawful, the expansion of the Port of Sheerness was completed. Where a public authority is bringing, in the public interest, law enforcement proceedings, there is no requirement for a cross-undertaking in damages where interim relief is sought<sup>35</sup>. Given that this is so, and given that enforcement of environmental matters could be regarded as being in the public interest, it has been suggested that the requirement of a cross-undertaking in damages be abandoned<sup>36</sup>. Community law will be of no avail to support such a claim as it does not seem to require taking such a step<sup>37</sup>.

### 5.1.6. Time limits in which to commence proceedings

This is an area where Community law in the form of directives gives rise to many questions. In particular, where a Member State implements a directive badly, when should the time limit for lodging a claim start to run? Should it start to run from the date of the adoption of the defaulting implementing legislation or should it start to run from the time where proper implementation has taken place? On one view, individuals can only start legal proceedings if they are able to ascertain their rights. When can individuals reasonably be considered to be capable of ascertaining the content of their Community rights? When can individuals reasonably be expected to be aware they may have a Community law based claim? Should national limitations applicable to claims in arrears be legitimately opposed to a litigant where the Member State is the guilty party responsible for non transposition of the directive? Most of these issues are still unsettled. Nonetheless, national courts ought to be able to rely on some clear guidance on this rather important issue. It is suggested that, given that national courts are primarily charged with the task of securing compliance with Community obligations, there should be a clear and unequivocal principle governing the date from which national time limits should start to run. Further, it is contended that the principle of uniform application of Community law requires that national time limits should in fact be harmonised. It seems rather pointless to grant a right to equal pay, but accept that, depending on the Member State, or in the UK context, the jurisdiction within the one Member State where the claim is made, different time bars will apply.

### 5.2 Balancing effectiveness with national procedural autonomy

In the absence of specific Community provisions, is the national court hearing a Community based claim bound by domestic rules of procedure? This question has been addressed by the ECJ. Initially, it recognised that the manner in which national courts protected Community rights was left essentially untouched, however as national courts have been seeking increasingly precise guidance, the ECJ has had to become significantly bolder.

The general principles are that in the (regrettable) absence of any relevant Community rules, it is for the domestic legal system of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of rights which individuals acquire from Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter nor framed so as to render the application of Community law impossible or excessively difficult<sup>8</sup>. These two principles are cumulative. Accordingly, where these conditions are not met, the national rule will have to be set aside, even with the result that the pursuer of the Community law based claim will have an advantage over the

litigant pursuing a national law based claim<sup>39</sup>. Equally where there is no judicial protection for the purely internal claim, protection will have to be provided for the Community based claim<sup>40</sup>.

The requirement that the conditions laid down by national provisions governing remedies should not make it impossible, or excessively difficult in practice to exercise the Community rights, has been qualified by *the principle of effectiveness*<sup>41</sup>. Furthermore, the duty of national courts to give effective protection to Community rights is no longer limited to those rights which can be construed as directly effective<sup>42</sup>.

These principles, although easy to state, are not simple to apply in practice, as will now be shown.

### 5.2.1 Finding an equivalent comparator

The non-discrimination principle in effect requires national courts to enforce a Community law based claim in the same way that they would enforce similar claims in national law. But what is a similar action or sanction of a domestic nature? National courts are responsible for ascertaining what claims under national law are similar and have found the exercise to be quite a tricky one. As a result they have sent many references. The ECJ is repeatedly confronted with the issue, and gives vague or rather inconsistent indications. In *Draehmpaehl*<sup>43</sup>, the ECJ had regard to *other provisions of domestic civil law and labour law*, when assessing whether a given sanction met the comparability test. By contrast in *Edis*<sup>44</sup>, the ECJ indicated that the principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are *similar*, but that it does not require extending the most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law. This was confirmed in *B.S. Levez v. T.H. Jennings (Harlow Pools) Ltd*<sup>45</sup>. The principle of equivalence is not to be interpreted as requiring Member States to extend their most favourable rules to all actions brought in the field of employment law. In order to determine whether the principle of equivalence has been complied with, national courts – which alone have a direct knowledge of the procedural rules governing actions in a particular field – must consider both the *purpose and the essential characteristics* of allegedly similar domestic actions.

In *BP*<sup>46</sup> Advocate General Jacobs held that:

*"it follows from the principle that claims based on Community law must not be treated less favourably than claims based on national law that, wherever taxable persons are entitled to a refund of tax in respect of a particular tax year on grounds recognised by national law, that possibility must extend to claims based on Community law; that is so regardless of the nature of the grounds recognised by national law. It is not, in my view, necessary to engage in the difficult and somewhat artificial*

*exercise of seeking a comparable claim under national law. Indeed such an approach does not follow from the Court's case-law on this matter... it is for the Member States, in the absence of harmonised rules, to decide upon the appropriate balance between the requirements of legal certainty and sound administration and the need to ensure the correct application of the tax in a particular tax year. Where a Member State allows a tax year to be re-opened at the instance of the taxable person within a certain period on any ground, it accepts by implication that for the period for which the claim is permitted it is the need to ensure correct application of the tax which takes precedence. The Member State cannot therefore object that a claim based on the Community law must be refused on grounds of legal certainty or sound administration."*

In this case, a remedy existed, and had to be made available to the Community based claims even where the Community claim was not strictly identical to the domestic one. Accordingly, it would appear that the relevant test hinges on the *existence* of a remedy giving the required redress and not on the *availability* of a particular remedy under national law. However, in the light of subsequent case law<sup>47</sup> where the ECJ seems prepared to leave national courts a broader discretion in their approach to the principle of equivalence, it may be asked whether the general test proposed by Advocate General Jacobs should still be used. Here again, what national courts need is a general test and/or principle that can be easily understood and applied. At the moment the only rule of thumb is that the principle of equivalence does not require that the most favourable national rules be extended to all actions based on Community law.

It is worth mentioning that in the UK context finding an equivalent comparator may involve comparing remedies for the same action North and South of the Border. For example it is not clear how a UK court should deal with an argument to the effect that Community law requires that time limits for bringing claims for equal pay which currently vary between England and Scotland should in fact be the same, since the degree of protection afforded to the same Community based claim varies between England and Scotland. In spite of all the case law on the principle of equivalence, it is likely that this should be referred to the ECJ.

### 5.2.2 What is an effective remedy? The ECJ case law generates more questions than answers

National rules must not make the application of Community law or the exercise of Community rights impossible or excessively difficult. This formulation has invited litigation. Whilst it might be straightforward to establish that it is impossible to exercise a Community right, "excessively difficult" is an ambiguous formulation, and presumably one which will vary from Member State to Member State. Has integration now reached the stage where it is considered that across the Union, individuals are supposed to be granted the same Community rights, which ought to be available with the same ease? Does this mean that the same degree of protection must be available to them wherever they start their

Community law based claim? Does this mean that there should be an exercise in assessing the equivalence of the effectiveness of the remedies available in the national courts throughout the Union?

Let us consider a particular scenario. Litigants from a Member State with a long-standing tradition of public interest litigation might regard limitations on *locus standi* of associations in another Member State where they might happen to have to pursue their claim as making it excessively difficult for them to pursue the exercise of what remains the same Community right. The challenge is how to ensure consistent judicial protection of the same Community based claim throughout the Community,

Uncertainties remain with regard to the *right* level of protection. The ECJ has recognised that the *choice* of an *appropriate remedy*<sup>48</sup> or *sanction*<sup>49</sup> falls to the national courts. On occasion, the chosen remedy is challenged as failing to attain the right level of protection. Does Community law require the granting of a specific relief. For example, could a party insist on specific performance, where compensatory damages would be available<sup>50</sup>? Certainly these are questions that national courts are already facing in relation to national based claims. It is suggested that other principles of Community law militate for these questions to be at the very least addressed.

Another dimension to this question concerns situations where Community law arises as a public law issue<sup>51</sup>. In such cases, no identifiable economic loss exists and no loss is suffered by the parties bringing the action. Where recompense is not available, or is irrelevant, does 'effectiveness' require that domestic courts exercise the power to compel action in accordance with Community law? In such circumstances, a power vested in national courts to make an order to amend the legislation might be the most appropriate remedy<sup>52</sup>. Yet, it is not clear-cut whether and in which circumstances Community law requires such action.

Certainly, cases<sup>53</sup> indicate that the jurisdiction of a national court, when deployed for the purpose of enforcing Community law, must be exercised in a specific way<sup>54</sup>. In *Simmenthal*, one of the issues was whether an ordinary Italian court could ignore that the Constitutional Court alone has jurisdiction to set aside national legislation. Protection of Community rights must be immediate and not dependent on the Italian Constitutional court ruling – admittedly, many years – . Accordingly, the allocation of jurisdiction had to be set aside by an inferior court. *Simmenthal* did not merely contain a restatement of primacy according to which national rules contrary to Community law must necessarily be disapplied. Beyond providing national courts with a solution on how to deal with issues of substantive incompatibility between national law and Community law, *Simmenthal* concerned the right to a specific remedy, as a remedy was available, albeit not an immediate one, and not from the court hearing the case. *Simmenthal* charged national courts with the duty to give immediate full force and effect to Community rights even if it is beyond their jurisdiction as a matter of national law to do so. In *Factortame*<sup>55</sup>, the ECJ merely followed these principles

when it had to consider a gap in the availability of administrative law remedies which affected protection of Community law based claims.

### 5.2.3 More on effectiveness

Effectiveness, a rather ambiguous notion, does not lend itself easily to objective assessment. It can either be measured from the individual litigant's perspective or from a public interest perspective, i.e. ensuring that a public interest behind a particular rule is upheld by securing enforcement of the rule. How are national courts supposed to measure the public interest in securing compliance with Community rules?

As more specific questions have been referred by national courts, the ECJ had to become more precise in confirming the duties of national courts. Thus, with regard sanctions it held:

*"whilst the choice of penalties remains within the Member States' discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are ANALOGOUS to those applicable to INFRINGEMENTS OF NATIONAL LAW of a SIMILAR NATURE and IMPORTANCE, and which, in any event, make the PENALTY EFFECTIVE, PROPORTIONATE and DISSUASIVE<sup>56</sup>."*

The notion of "effectiveness of legal control at a distance" has been the subject of some academic debate<sup>57</sup>. It has been suggested that if the doctrine of primacy is relatively well-known, the obligation of loyalty derived from Article 10 EC remains rather vague and at any rate is an obligation of result rather than method. The criteria laid down by the ECJ still lack specificity. Many questions remain unanswered, such as to the existence of any imperative requirement for the use of particular means of enforcement in a juridical sense, e.g. criminal as opposed to administrative proceedings; such as what must be taken into account when granting an effective remedy. Does effectiveness depend on the context of enforcement; on the nature of the rule or principle infringed? Should the gravity of the infringement, or that of the damage caused, or both be taken into account? Should the need to guarantee future respect of the rule be considered? To what extent is the current discretion to choose any particular sanction limited? All of these issues need tackling.

Some were addressed in *Hansen*<sup>58</sup> where criminal proceedings were initiated against a driver's employer, on the ground that his driver had infringed certain provisions of the tachograph Regulation. The use of a particular penalty – a system of criminal liability under which the employer of the offending driver was liable to a fine without proof of any intentional act or negligence on the part of that employer – was challenged as contrary to Community law. The ECJ noted<sup>59</sup> that the introduction of strict criminal liability corresponded to the system generally applicable in Denmark for the protection of the working envi-



ronment, and was therefore in conformity with the assimilation principle. The Court then remarked that such sanction may prompt the employer to organise the work of his employee in such a way as to ensure compliance with the regulation thereby satisfying the effectiveness test. The choice of such a sanction was justified by the fact that road safety, one objective of the regulation, was a public interest matter. Finally, the sanction was found to satisfy the proportionality test – proportionality measured in relation to the objective pursued. The need to take account of the particular context of enforcement, of the rule breached and interests violated was also considered by the Advocate General.

*"The promotion of road safety and the improvement of working conditions of employees and environmental protection are interests of a general nature, in the sense that infringement of the rule is not necessarily detrimental to specific individuals – which in fact greatly reduces the risk of prosecution and punishment but instead can be economically advantageous to the employer. In those circumstances, a Member State's interest in protecting such interests (values) by recourse to criminal law – without any recourse to fault or culpability – can take precedence over the right of employees or undertakings as a matter of principle to be penalised only in respect of facts which can be imputed to them personally<sup>60</sup>."*

#### 5.2.4 Assessing proportionality and dissuasion

Proportionality can simply be assessed having regard to alternative methods of enforcement. A less invasive method, if it exists, must be preferred. Proportionality may also require employing a level of resources and exercising powers appropriate to the nature of the interest to be protected. The nature of the interest to be protected determines the appropriate level of resources to be allocated and/or the exercise of a particular power. If proportionality must be defined by reference to the nature of the interest to be protected, this involves careful consideration of a number of dimensions which at present not only vary from Member State to Member State – and even within Member States – but are regarded as embodying cultural diversity.

In other words, if assessing proportionality does not simply require analysing whether or not other methods are available, then any determination of a proportionate response presupposes a ranking of both method and sanction in relation to the *nature* of the interest to be guaranteed. Such ranking is a matter of policy and moral evaluation greatly influenced by national perceptions, and is likely to remain so, if any of the calls for subsidiarity are meant to deliver anything. How does the interest in fisheries conservation compare with that of the health and safety of workers within a single Member State; and then from Member State to Member State? In the same way, the ambivalence between the desire to reduce the costs of transport operators, ensure road safety and maintain good air quality is unlikely to call for the same response in the different Member States. Determination of a proportionate response is also determined

by the costs issue. The nature of the interest at stake determines not just the power to be exercised, but the appropriate level of resources to be used. Again this calls for a ranking of interests and a balancing exercise between the nature of the interest to be enforced and what is regarded as the appropriate investment of resources. National courts are ill-equipped to make such assessment. Moreover, making such an assessment and ranking is often considered to be beyond the boundaries of judicial function.

### 5.2.5 A methodology to help national courts to strike the right balance

The ECJ has given further indication as to how national courts should approach the question whether a national procedural provision prevents effective protection of a Community right<sup>61</sup>.

The national procedural provision must be analysed by reference to the *role of that provision in the procedure*; its *progress* and its *special features*, viewed as a whole, before the various national instances. In the light of that analysis, the basic principles of the domestic judicial system, such as *protection of the rights of the defence*, *legal certainty* and *proper conduct of the procedure*, must, where appropriate, be taken into consideration.

But, one must bear in mind that national systems engage in such a balancing exercise all the time, and that such an exercise is, in the main, not altogether that far removed from the test proposed by the ECJ, an aspect which seems to be forgotten. The integrity of the various national systems has been built over time after each system has in its own way balanced these various considerations each in the particular fashion which best reflected its own tradition. Ultimately, therefore, national rules should remain untouched, even if it might lead to a denial of Community law based claims. The ECJ insistence on the need to assess national rules by reference to the national legal system as a whole is a further basis to the argument that hardly any national rule should be changed because of the consequent domino effect for the entire legal system. The rather piecemeal intervention and/or interference into the national legal system which follows the application of the principle of effective judicial protection can have a ripple effect which then leads to a decrease in the integrity of national legal systems. Such an exercise is one which many regard as one which should not be carried out by national courts<sup>62</sup>.

A different reading of this case law has been proposed according to which once it is established that the national provision hinders the application of Community law, the national court must examine whether the limitation at issue can be justified by some fundamental principles of the domestic legal system. The national court must balance the interests served by the national rules at issue and the effectiveness of Community law<sup>63</sup>. In this way, a rule of reason is introduced to the field of remedies. If this reading is correct, it is suggested that this might be of little use for national courts, for instead of balancing effectiveness against national procedural autonomy, they will have

to balance the Community interest of effective judicial protection against the particular national interest protected by the national rule. What national courts find difficult and at times inappropriate as a task for the judiciary is precisely the balancing of competing interest. As the application of the rule of reason in the Article 28 EC context has shown, this in turn needs to be carried by the ECJ itself as national courts reach different results<sup>64</sup>.

A selection of specific remedies will now be analysed. State liability for breach of Community law will be studied separately.

### 5.3 Specific remedies

#### 5.3.1 Existence of a judicial remedy

The principle of effective judicial protection is included in a number of specific legislative provisions. Moreover, it has become a general principle of Community law, a principle with far-ranging practical applications.

The ECJ found that Community law confers rights. The existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection of his right. Therefore an individual must be able to challenge in the courts the legality of a decision by a public body refusing to accept that he has a Community law right. The right to effective judicial protection first enunciated in *Johnston*<sup>65</sup>, now encompasses a right to a judicial remedy, the possibility for the judge hearing the proceedings to seek from the competent authorities disclosure of the grounds on which the contested measures was based, and a duty for the judge to impose a sanction which has a real deterrent effect. In this way, Community law brought about basic minimum standards with regard to judicial review.

The principle of effective judicial protection, initially affirmed in relation to a directive, was extended in *Heylens*<sup>66</sup> to the exercise of a fundamental Treaty freedom. Its scope is even wider, since it applies to any national decision taken in application of Community law or which is part of a Community procedure<sup>67</sup>. Its reach is further broadened by another aspect of the case law of the ECJ. The Court has shown a willingness readily to identify rights where mere legal interests were at stake<sup>68</sup>:

*"whenever non-compliance with the measures required by the directives in question might endanger the health of persons, those concerned should be able to rely on mandatory rules in order to enforce their rights."*

The right to have decisions judicially reviewed has in practice also meant that the category of reviewable acts under national law has to be widened for the purpose of Community law based claims. First, an 'ouster clause' excluding the

jurisdiction of the courts had to be set aside. Accordingly, a certificate issued by a national authority, stating that the conditions for derogating from the principle of equal treatment, which is normally to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts<sup>69</sup>, had to be subject to judicial review. As the ECJ explained, if the principle of legality does not exclude consideration of the demands of public order, this concept cannot be used as justification to exclude all possibility of judicial review of government action<sup>70</sup>. Second, preparatory acts which normally are not subject to judicial review may have to be reviewed<sup>71</sup>.

The right to effective judicial protection has also influenced the pre-litigation stage in so far as it requires that national administrations take a reasoned opinion, and national judges are empowered to ask public bodies to provide a proper statement of reasons.

*"Any decision must be justiciable and its legality under Community law can be reviewed; and in any event, the person concerned must be given proper notice, in due time, of the grounds on which it is based"*<sup>72</sup>.

Effective judicial review must be able to cover the legality of the reasons for the contested decision. It therefore presupposes that the court to which the matter is referred may require the competent authority to notify its reasons<sup>73</sup>. Such a statement of reasons, in turn, enables the judge to exercise judicial control on the reasoning of the decision maker. Hence, in the context of claims based on a breach of the principle of proportionality, the statement of reasons plays a central role. Lastly, the right to effective judicial protection may impact on the right of the parties to raise new issues at a late stage in proceedings. This point is closely connected with the extent to which national courts are permitted or obliged to raise new issues of their own motion and will be explored below.

### 5.3.2 Title and Interest

The principle of effective judicial protection has also influenced national rules governing the individual's standing and legal interest in bringing proceedings. The Court has ruled that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down<sup>74</sup>. This principle was later extended to Directives

*"While it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection."*<sup>75</sup>.

In *Verholen*, an individual was allowed to rely on Directive 79/7 before a national court because he bore the effects of a discriminatory national provision regarding his spouse, who came within the scope of the Directive although she was not herself a party to the proceedings. The ECJ held that the right to rely on the provisions of Directive 79/7 was not confined to individuals coming within the scope *rationae personae* of the Directive. Other persons may have a direct interest in ensuring that the principle of non discrimination is respected as regards persons who are protected<sup>76</sup>. So the category of persons concerned includes not only those who are directly protected by or named in a particular Community instrument, but also those who have an interest in the application of the rule. However, the boundaries of this latter category are vague<sup>77</sup>. The judgment therefore raises the question of how national courts are to decide who has an interest in securing compliance with Community obligations. Is it the case that national courts must approach the question of interest in bringing proceedings by reference to the nature of the Community rules which are alleged to have been breached? Both in *Defrenne* and *Verholen* the Community rule allegedly breached was the principle of non discrimination which the ECJ regards as a fundamental principle of Community law. Can one derive from these judgments a general rule to the effect that national courts should recognise that whenever a fundamental principle of Community law is breached, title and interest should be construed broadly? Are national courts charged with upholding Community law fundamental principles, or are they entrusted with the more general task of helping in the private policing of Community law? At present it does not appear that a straight answer can be given to these questions. Even now, 40 years after national courts were charged with the role of policing the application of Community law there is no general principle available to guide national courts on how they should approach the question of deciding when an individual should be considered as having an interest in forcing a Member State to comply with its Community obligations. Yet, this is an issue of some relevance for a number of Community obligations. This is because, on occasion, the scope *rationae personae* of Community instruments cannot easily be deduced from the wording of their provisions, or because a breach of the obligations which they contain does not affect a particular interest. Thus, many environmental directives aim at protecting the environment as such, rather than being concerned with securing advantages to individual members of a given class<sup>78</sup>.

How are national courts supposed to identify who might be recognised as having an interest in securing compliance with Community obligations? Advocate General Capotorti was strongly against an *actio popularis* to be allowed, pointing notably to the fact that too many people would have an interest in the Member States complying with their Community obligations<sup>79</sup>. This is an argument which could be used to deny individuals the capacity to invoke Community law before national courts in each and every instance where they are trying to force Member States to comply with their Community obligations. Furthermore, since *van Gend en Loos*, the ECJ has decided to empower individuals and

national courts, and it would be strange if it was now decided that, given that Member States fail all too often to comply with Community law, decentralised enforcement should stop on the basis that national courts would be swamped with claims for non-compliance.

What is required is some reflection on the processes which are required to enable individuals to force compliance with each and every Community obligations. National courts will only be swamped with claims if Member States fail to take their Community obligations seriously. However, as a matter of legal policy, it might be contentious to approach the definition of legal interest in bringing proceedings by reference to the fact that too many breaches may be occurring, which in turn would mean that too many individuals might be wanting to secure compliance with Community obligations.

In the *Butter Buying Cruises* case<sup>80</sup> an action was brought by traders against German customs authorities requesting the German court to order proper application of Community law. The plaintiffs were requesting the court to order the customs authorities to comply with the Common Customs Tariffs. In this case, the plaintiffs, rather than claiming damages for the loss incurred by them as a result of these unlawful exemptions, wanted the customs authorities to discontinue the exemptions from customs duties – exemptions in breach of Community law – available to other traders in competition with themselves. The ECJ therefore had to consider whether Community law gave the right to a trader to request a national court to require the authorities of a Member States to observe Community law in a given situation in which that trader was not involved, but was economically adversely affected by the failure to observe Community law. The ECJ observed that if the economic interests of a person to whom Community law applies are adversely affected by the non application of a Community provision to a third party – either through the action of a Member State or through that of the Community authorities – that person may institute proceedings before national courts in order to compel national authorities to apply the provisions in question or to refrain from infringing them<sup>81</sup>. However, the ECJ insisted on the fact that the remedy sought was in fact available under German law, so that it merely had to be extended to the Community law based claim. Accordingly, an unconditional Community law right to a private action to compel public authorities to act to enforce the law does not seem to exist at present. The failure by a Member State to apply a particular provision of Community law to another person can only be remedied by a private person through an action in the national courts under the conditions fixed under national law. So, a national rule which makes the right of an individual to compel public authorities to act to enforce the law conditional upon this individual's ability to show a special interest, beyond that of the public at large, does not appear to breach Community law. This may need to evolve, first on the ground that a number of Community instruments require the implementation of specific group actions of a preventative nature<sup>82</sup>; in addition, this may need revisited at a time when thoughts are given to governance issues. As is often

suggested the Union needs to reconnect with its citizens and all institutions should be involved in finding methods to do so. This includes all Community courts. What better way to convince individuals of the relevance of integration than by enabling them to force Member States to comply with their obligations?

### 5.3.3. Community law and national evidential rules

On occasion, the principle of effective judicial protection has shifted the onus of proof and has changed evidential requirements. The ECJ has recognised that it is normally for the person alleging facts in support of a claim to adduce proof of such facts, but the onus may shift. Thus, where an undertaking applies a system of pay which is wholly lacking in transparency, it is for the employer to prove that it is not discriminatory<sup>83</sup>. This was seen as necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. Similarly, whenever a national authority relies on a derogation to the rules on free movement, it is for that authority to adduce evidence to the effect that reliance on the derogation is justified. Hence, if a national administration may require an importer to submit all the information in his possession to enable it to adduce such evidence, it cannot make the authorisation to market vitamins subject to proof by the importer that these vitamins are not harmful to health<sup>84</sup>.

Moreover, Community law influences the choice of the form of the evidence to be adduced. In matters of reimbursement of tax unduly paid, while Member States may require proof that the burden of the tax has not been passed on to other persons, special limitations – such as the exclusion of any kind of evidence other than documentary evidence – make the exercise of the Community right virtually impossible and will have to be set aside<sup>85</sup>.

A national court hearing proceedings on the infringement of Community rules and seeking the production of information concerning the existence of the facts constituting these infringements can require the Commission to produce documents and Commission officials to give evidence<sup>86</sup>.

### 5.3.4 Rules on time-limits

Apart from certain specific legislative provisions fixing time limits<sup>87</sup>, procedural autonomy is the norm. The ECJ has recognised that the interests of legal certainty require limitation periods for bringing proceedings, even though the expiry of such limitation periods entails *by definition* the rejection, wholly or in part, of the action brought<sup>88</sup>. Accordingly, the *length* of limitation period has never been questioned. So a time limit of thirty days has been held reasonable both in relation to Dutch tax law<sup>89</sup> and German administrative law<sup>90</sup>. The only limitations to the autonomy of the Member States concerns exceptional circumstances which will now be discussed.

First, the ECJ has denied a Member State the possibility to change a time limit in order to evade claims for repayment of national taxes levied in breach of Community law.

*"A national legislature may not, subsequent to a judgment of the Court from which it follows that certain legislation is incompatible with the Treaty, adopt a procedural rule which specifically reduces the possibility of bringing proceedings for recovery of taxes which were wrongly levied under that legislation<sup>91</sup>."*

Second, in *Emmott*, the ECJ held that so long as a directive had not been properly implemented and transposed into national law, the period laid down in national law within which proceedings must be brought *cannot begin to run*<sup>92</sup>. This is because individuals are unable to ascertain the full extent of their rights until such time as a directive has been properly transposed. In *Steenhorst-Neerings*<sup>93</sup> and *Johnson*<sup>94</sup>, the Court held that the *Emmott* ruling was to be regarded

*"as confined to the particular circumstances of that case, in which a time-bar had the result depriving the applicant of ANY opportunity whatever to rely on her right to equal treatment under the directive".*

So, limitation periods under national law regarding initiation of proceedings cannot begin to run until such time as a directive has been properly transposed. In other words, national rules on time limits governing the *access to a remedy* cannot start running before the right for which the remedy is sought is available in the legal system. On the other hand, Community law does not preclude the application of a generally applicable rule *limiting claims in arrears* even though in such circumstances the Member State may derive a substantial benefit from its failure to implement a directive on time.

Third, when the Court gives a ruling under Article 234 EC as to the interpretation and scope of Community law, the Court's judgment governs all national measures and individual transactions subject to that rule, whether they take place before or after the date of the judgment. Exceptionally, the ECJ may limit the temporal effect of its ruling so that it should only apply for the future<sup>95</sup>. Such restrictions may be allowed only in the judgment ruling upon the interpretation sought. In other words, this power to limit the temporal effect of a ruling on the interpretation of Community law only belongs to the ECJ. Therefore, a legislative provision which limited reimbursement of supplementary enrolment fees solely to students who had brought an action for reimbursement prior to the delivery of the judgment of the ECJ from which it followed that these fees infringed Community law cannot be applied by national courts<sup>96</sup>.



### 5.3.5 Interim measures

Without interim protection judicial protection of Community law may be inadequate or even illusory. In *Factortame* the ECJ was, in substance, asked whether the English courts had, as a matter of Community law, a duty to grant interim injunctive relief against the Crown, when as a matter of English law they had no such power. Having reformulated the question, the Court repeated the wide-sweeping statement made in *Simmenthal*<sup>97</sup>:

*"any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, EVEN TEMPORARILY, Community rules from having full force and effect are incompatible with those requirements".*

*Factortame* established that a rule against granting an interim injunction against the Crown cannot prevent a national court granting a remedy to ensure the effective protection of a Community right. Further, although the ECJ took care to reformulate the questions referred, it is suggested that *Factortame* is an authority for the proposition that a court or tribunal which has no jurisdiction at all to grant interim protection would have such a jurisdiction by virtue of Community law<sup>98</sup>. Finally, the criteria for determining whether to grant interim relief should not solely be a matter of national law<sup>99</sup>.

However, the conditions laid down in *Factortame* remain the ones applied as the next case will show. In *R v. Secretary of State for Trade & Industry, ex parte TUC*<sup>100</sup>, the Court of Appeal refused to grant interim relief in a situation where a reference to the ECJ had been made for determination of the question of whether the Maternity and Parental Leave Regulations 1999 correctly implemented Council Directive 96/34/EC into domestic law. The Court of Appeal held that there was no justification for making an interim declaration, pending the determination that the Regulations were *ultra vires*.

The Trades Union Congress ('TUC') had appealed the decision of the Divisional Court referring to the ECJ a number of questions relating to the interpretation of Directive 96/34/EC for the purpose of establishing the legality of some provisions of the implementing regulations, the Maternity and Parental Leave etc Regulations 1999 SI 99/3312, since the Divisional Court had refused to grant an interim declaration, pending the determination of that reference, that reg.13(3) was *ultra vires*. The TUC had appealed against this refusal. It argued that the Divisional Court had failed properly to consider the balance of convenience; had applied the wrong test in that it held that the TUC's arguments were not so "clearly correct" that effect should not be given to them pending the reference; that it should have held that there was a strong presumption in favour of granting interim relief where to do so would protect the actual or putative EU

rights of parents which would otherwise be lost; that it was wrong in holding that, if it declared the relevant provisions of the regulations to be unlawful, it would also have to declare the whole of the Regulations unlawful; and that it had failed to conclude that the balance of convenience favoured the grant of the relief sought.

The Court of Appeal held that while it was possible – albeit unusual – for an interim declaration to be sought such as to render inoperative domestic legislation which a domestic tribunal had declined to declare unlawful, the starting point for a consideration of the issues was the guidance given by the House of Lords in *Factortame*. Therefore the guidelines laid down in *American Cyanamid* applied. The Court of Appeal acknowledged the special circumstances arising in the case, where damages were clearly an inappropriate remedy for both parties. However, it held that in considering the balance of convenience, Lord Goff had made a number of observations in the *Factortame* case; and while he had recognised that there might be cases where exceptional circumstances made it appropriate to grant interim relief, the importance of not restraining a relevant body was a threshold criterion which a court had to consider first. From Lord Goff's speech could be drawn the following propositions: (i) the decision whether or not to grant interim relief was a matter of discretion for the trial court and the Court of Appeal would only interfere in established circumstances; (ii) in approaching the question of whether interim relief should or should not be granted a court should have regard to the threshold criterion which Lord Goff recognised; and (iii) in thereafter considering the balance of convenience, the concurrent elements which a court had to consider were: (a) the strength of the case referred to the ECJ; and (b) the respective loss to the parties if a declaration was granted or not.

The Divisional Court had not erred in law. The TUC had failed to make a case that its interpretation of the requirements of the Directive were "clearly correct". The Divisional court had correctly concluded that the validity of the law was not so clear as to justify the exceptional course of granting interim relief. In considering the balance of hardship the court had had before it a great deal of material which it could not be said the court had closed its mind to. In considering the severability of the Regulations and whether they could or could not survive having reg.13(3) excised, the Divisional Court had acknowledged the argument, but there was no force in it. In respect of the argument that there should be a presumption that EU law should be upheld it had to be noted that: (i) before upholding EU law a domestic court had to know what that law was and, if it knew, there would not have been a reference; and (ii) Lord Goff's speech in *Factortame* put the presumption in the opposite direction, in that domestic law was to be applied pending the determination of any reference. The Court of Appeal accepted that the time taken for the reference to be determined, an estimated two years "was significant given that the provisions were only to operate until a child reached the age of five". Still to address this problem, no interim protection could be provided, instead, a formal request would be made

for a determination under the accelerated procedure provided by the ECJ rules of procedure.

### 5.3.6 Recovery of sums unduly paid

A distinction needs to be drawn between situations where the State has perceived sums in violation of Community law, and those where the State has allocated sums in violation of Community law. The latter will be examined first by reference to the recovery of aids that have been illegally granted.

Whilst national courts have no power to decide on the compatibility of a State aid with Community law, they must enforce the procedural obligation to notify a State aid. They may also be confronted with a claim by a trader wanting to prevent a national authority from granting a State Aid in breach of the State Aid rules to a competitor. In addition, national courts must provide assistance to national administrative authorities to recover unlawful State aid. On occasions, this requires setting aside rules of national administrative law on time limits, and legitimate expectations.

*"Although the Community legal order cannot preclude national legislation which provides that the principle of legitimate expectations and the legal certainty are to be observed with regard to recovery, it must be noted that, in view of the mandatory nature of the supervision of State Aids by the Commission under article 93 of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A DILIGENT BUSINESSMAN should normally be able to determine whether that procedure has been followed<sup>101</sup>."*

### 5.3.7 Restitution of charges and duties levied by the public administration in breach of Community law:

The following developments only concern charges which do not fall within the scope of the Community Customs Code<sup>102</sup>.

The question whether and under which conditions, individuals have a right to reimbursement of charges levied in breach of Community law has given rise to an extensive body of case law<sup>103</sup>. The right to obtain a refund of amounts charged by a Member State in breach of Community law is the consequence and complement of the rights conferred on individuals by the Community provisions as interpreted by the ECJ. Still, such a refund has to be sought in the framework of the substantive and procedural conditions laid down by the various relevant national laws<sup>104</sup>, subject to the equivalence and effectiveness tests. A major hurdle in the way of recovery of sums unduly paid stems from the possibility for Member States to take into account the fact that such charges had been incorporated into the price of goods. Provisions which prevent the reimbursement of taxes, charges and duties levied in breach of Community law are

not contrary to Community law where it is established that the person required to pay those charges has in fact passed them on to other persons. The ECJ has recognised that Member States are entitled to refuse repayment when it would result in the unjust enrichment of the recipients, but it has laid down strict limits. A Member State may resist repayment to the trader of a charge levied in breach of Community law *only* where it is established that the charge has been borne *in its entirety* by another person and that reimbursement of the trader would constitute unjust enrichment. Where the burden of the charge has been passed on only in part, the trader must be reimbursed the amount not passed on. Neither the fact that traders have a legal obligation to incorporate the charge in the cost price, nor the fact that failure to comply with that obligation carries a penalty, entail a presumption that the entire charge has been passed on. Finally, the ECJ indicated that even where the charge has been passed on to another person, traders should be able to claim that the illegal levying of the charge has caused them damage. As the ECJ noted, such damage could be caused by, *inter alia*, the fact that the unlawful charge by increasing the price of the imported goods has reduced sales and thus profits. So traders may not be prevented from applying to the competent national courts for reparation of the loss caused by the levying of illegal charges irrespective of whether those charges have been passed on<sup>105</sup>. Such an action would be subject to the conditions laid down by the ECJ in its case law on State liability for breach of Community law<sup>106</sup>. Whether it follows from the case law that individuals would be better advised to bring an action for damages rather than an action for restitution is still unclear. Finally, given that the illegality of a charge under Community law is a defence to an action for unpaid charge<sup>107</sup>, the best course of action for traders might be to resist payment of the charge.

### 5.3.8 Raising Community Law points *ex proprio motu*

For Community law to be applied, it must be invoked. But in adversarial systems where the ambit of the dispute is defined by the parties, which have knowingly or in ignorance not raised a Community law point, the application of Community law is jeopardised. To what extent can a national/Community judge, raise a Community law point of his own motion? To what extent can Community law be regarded as a public policy issue – *moyen d'ordre public* – which the judge should raise *ex officio*? Further, which Community law rules are public policy matters? Some of these issues have been addressed by the ECJ.

The question was first raised in *Rheinmühlen*<sup>108</sup>. Later, in *Verholen*<sup>109</sup>, the ECJ held that Community law does not preclude a national court from examining of its own motion whether national rules are in conformity with the precise and unconditional provisions of a directive where the individual had not relied on the directive before it. In *Peterbroeck*<sup>110</sup> the ECJ held that:

*"Community law precludes the application of a domestic procedural rule whose effect is to prevent a national court from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period."*

By contrast in *Van Schijndel*<sup>11</sup> the ECJ held:

*"Community law DOES NOT REQUIRE national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon THE PASSIVE ROLE ASSIGNED TO THEM BY GOING BEYOND THE AMBIT OF THE DISPUTE DEFINED BY THE PARTIES THEMSELVES and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim."*

However, this begs the following question: if the rationale for judges raising a Community law point is that Community rules are public policy matters, then why should the wishes of the parties be a relevant consideration? In *Kraaijeveld*<sup>12</sup> the ECJ considered again whether a national court should of its own motion raise the question of whether the national authorities exceeded their discretion under a directive. It confirmed that the national court would have this power

*"where under NATIONAL LAW a court must or may raise of its own motion pleas in law based on BINDING DOMESTIC RULES which have not been raised by the parties"*<sup>13</sup>

In *Oceano Gruppo*<sup>14</sup>, at issue was whether a court seized of a dispute concerning a contract between a seller or supplier and a consumer should determine of its own motion whether a term of the contract is unfair when making an assessment as to whether a claim should be allowed to proceed. The ECJ considered the system of protection introduced by the Directive and found that it was based on the idea that the consumer is in a weak position *vis-à-vis* the seller or supplier, as regards both his bargaining power and his level of knowledge. As a result, the consumer agrees to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms. Accordingly it held:

*"The aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair. It follows that effective protection*

*of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion. ... the imbalance between the consumer and the seller or supplier, may only be corrected by positive action unconnected with the actual parties to the contract."*

From this ruling, it would appear that national courts are encouraged to raise Community law points of their own motion by reference to the underlying objective contained in a particular Community instrument.

From the foregoing it can be seen that there is a lack of consistency in the rationale used by the ECJ to found such a duty for national courts.

Whatever the rationale to found such a duty for national courts, it would appear that at any rate in the UK in practice:

*"given the age and background of the judges in the field of Community law, it is a subject which none of them, so to speak, grew up with academically, and therefore it is not particularly likely that at any rate the older judges would spot European problems that the parties had not spotted."*<sup>15</sup>

### 5.3.9. Miscellaneous influences

National rules governing the enforcement of contract law can be affected by the requirements of Community law in other ways, as will now be shown. Community law may well lead to the imposition upon an individual of civil liability or a civil obligation which would not otherwise have existed. In *Haberman Beltermann*<sup>16</sup>, the application of national rules regarding misrepresentation, and nullity of contracts was blocked by Directive 76/207. In *Dekker*<sup>17</sup>, general provisions governing civil liability were affected in so far as the grounds of exemption provided under national law could not be invoked in certain circumstances.

*"Although Directive 76/207 leaves the Member States as regards sanctions for breach of the prohibition of discrimination freedom to choose one of the various methods suitable for achieving this objective, it nevertheless requires that where a Member State chooses a sanction which forms part of the rules on civil liability, any breach of the prohibition of discrimination must in itself be sufficient to impose full liability without it being possible to take account of grounds of exemption provided for by national law."*

*Marshall II* shows how the rules on compensation may be affected as statutory limits on quantum of damages had to be set aside. Equally, the availability of interest appears no longer to be strictly a matter for national law. In *Marshall II* the ECJ held:

*"reparation of the loss and damage sustained by a person injured as a result of a discriminatory dismissal may not be limited by excluding an award of interest to*

*compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid."*

The ECJ might be called upon to adjudicate on the question of the rate of interest or the date from which it is to be paid. Whether the principles developed in *Marshall* in the context of a claim for compensation for breach of a Community right can be extended to claims for restitution is still undecided.

In *Courage v. Crehan*<sup>18</sup>, in the context of tied house agreements in the breweries sector, the ECJ had to consider whether a national court was obliged, as a matter of Community law, to award damages to an injured party to an illegal contract notwithstanding that under English law no such remedy would be available. The Court first recalled that any individual could rely on a breach of Article 81 of the Treaty before a national court even where he is a party to a contract liable to restrict or distort competition within the meaning of that provision; furthermore that the full effectiveness of Article 81 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 81(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or conduct liable to restrict or distort competition.

Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community. There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules. Article 81 of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract, although it does not preclude a rule of national law barring a party from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition.

Before the ECJ, it was argued that a contract might prove to be contrary to Article 81(1) of the Treaty for the sole reason that it is part of a network of similar contracts which have a cumulative effect on competition, and that therefore in such a case, the party contracting with the person controlling the network cannot bear significant responsibility for the breach of Article 81, particularly where in practice the terms of the contract had been imposed on him by the party controlling the network. It may be asked why such consideration could not be applied directly by the national courts. As a result of the ECJ ruling, it would

now appear that a party to a contract unlawful under Article 81 EC Treaty can rely on this unlawfulness to seek damages before the English courts unless this party played a significant role in the ensuing distortion of competition.

## 5.4 The UK courts and the case law on remedies

The UK courts have adopted an unpredictable approach to the requirements of effective judicial protection. In many instances, they were prepared to grant the remedy sought even though it involved a radical departure from established patterns. In other cases they decided they could not disregard the exclusive sanction Parliament had provided. Remaining within the proper boundaries of the judicial function seems to be a central concern for the UK courts, even though their approach sometimes lack consistency.

### 5.4.1 Compensation

*Marshall II* raised specific questions regarding procedural rules pertaining to concepts of damages and compensation, together with some broader issues regarding the range of duties involved in national courts ensuring full and effective protection of Community-based rights. Where a Member State chooses to provide compensation as a remedy, when is it adequate? Can a national judge substitute his own assessment for that laid down by national law? How far can a UK court go – in terms of frustrating legislative intent – to ensure an effective remedy is granted?

#### 5.4.1.1 Why *Marshall II*?

Ms Marshall was dismissed by her employer, a Health Authority, at the age of 62. Had she been a man she would have been allowed to stay in employment until she reached the age of 65. In 1980, she presented a complaint to an Industrial Tribunal alleging that she had been discriminated against contrary to the Sex Discrimination Act 1975 (hereafter SDA), Article 141 EC and the Equal Treatment Directive<sup>119</sup>. After a lengthy judicial process<sup>120</sup>, it was held that she had been discriminated against. Her complaint was then remitted back to the Industrial Tribunal to consider the question of remedy<sup>121</sup>. Ms Marshall was seeking compensation under the provisions of the SDA; section 65 provided *inter alia* that if the complaint is well founded, the tribunal may choose to award compensation up to a prescribed maximum<sup>122</sup>, at the time £ 6,250. Ms Marshall challenged these provisions on the basis of Article 6 of the Equal Treatment Directive. This provision had already been interpreted by the ECJ<sup>123</sup> and applied by the referring national courts<sup>124</sup>. The ECJ had previously held that the remedy should be real and effective, have a deterrent effect, and if compensation was to be awarded, it should be adequate. Accordingly, the referring national court



relying on the general rules on civil liability – rather than on the implementing legislation – awarded the plaintiffs the equivalent of six months' gross salary payment: DM 21 000, a figure which compares favourably with that of DM 7.20 – corresponding to the outlay in connection with the application for the position – which the plaintiff could have expected under the legislation implementing the Directive<sup>125</sup>.

Ms Marshall argued that the provisions of the SDA did not provide adequate compensation as defined by the ECJ. The Industrial Tribunal accepted it had to interpret and apply the legislation adopted for the implementation of the Directive in conformity with the requirements of Community law, and that it had to provide an adequate remedy. After finding, as a fact, that the remedy available was not adequate, the Industrial Tribunal decided to *ignore*<sup>126</sup> the statutory limit, and substantially increased it so as to provide the adequate compensation required. Accordingly, Miss Marshall was awarded £11,695, rather than the statutory prescribed maximum of £6,250. An additional £7,710 interest was awarded for the period running from the date of Ms Marshall's first application to the Court of Appeal's decision allowing her claim<sup>127</sup>. The decision was appealed<sup>128</sup>, but the only ground related to interest<sup>129</sup>. Whether the award of a sum above the statutory limit was in excess of jurisdiction was never raised. The EAT remarked that at common law,

*"save in some rare cases in the calculation of special damage, there is no power to include an element of interest when assessing damage. The power to grant interest is given by statute"*<sup>130</sup>.

Turning to the question as to whether Community law provided such a power, the EAT found that Article 6 of the Equal Treatment Directive had no direct effect, and that the duty laid down in *von Colson* did not require a national court to construe Article 6 in order to justify an award of interest. The case of *von Colson* was distinguished on the ground that the purely nominal compensation available amounted, in effect, to a situation where there was no judicial remedy, whereas, under the Sex Discrimination Act, a remedy was available. The Employment Appeal Tribunal struck out the amount for interest; however, the amount awarded by the Industrial Tribunal, and paid by the Health Authority, £11,695, remained substantially above the statutory limit of £6,250.

Ms Marshall appealed the EAT's decision to quash the award of the £7701 interest<sup>131</sup>. The Court of Appeal, by a majority of two to one, dismissed it. Although the appeal only related to whether an Industrial Tribunal had any power to award interest in circumstances such as Ms Marshall's case, all three judges decided to address what they considered the central issue, namely whether or not Community law empowered a national judge to override a statutory limit<sup>132</sup>. The majority answered in the negative. All three judges were sympathetic to the argument that the statutory limit on compensation did not provide the adequate and effective remedy required by Article 6 of the Equal

Treatment Directive"<sup>33</sup>. Yet they could not agree that this finding was sufficient to found a power for a national judge to overlook a statutory limitation.

*"Miss Marshall and others must wait until the United Kingdom enacts legislation giving effect to Article 6 as the ECJ has construed it".*

The Court of Appeal decided that it is not for judges to substitute their own appreciation for that of Parliament. Article 6 had no direct effect, and the interpretative duty could not come into play as the wording of the national legislation did not give rise to any ambiguity<sup>34</sup>. Similarly, on appeal, the House of Lords considered that, beyond the question of an Industrial Tribunal's power to award interest lay the fundamental issue, of whether Community law gave national courts power to override national legislation in order to grant the remedy sought. This area ought to have been free of doubt following *Factortame*, yet a reference was sent to Luxembourg.

#### 5.4.1.2 Back in Luxembourg

Ms Marshall argued that the principle of effective protection empowered national judges to set aside where necessary any provisions of domestic law preventing such protection from being granted. In view of that, the statutory limit should be ignored. As for the award of interest, she argued that it should be allowed by analogy with comparable actions, *in casu*, actions for discrimination brought in the County Courts and other actions in tort brought in the High Court. In sum the argument is that where common law and statutory remedies coexist, but the former is more in conformity with the objectives laid down in the Directive, the national judge should *prefer* it to the statutory remedy provided for under the legislation implementing the directive. Such an interpretation can even be reconciled with the principle of institutional autonomy, since the UK judge is merely asked to use a power which is available in the national legal system, albeit not the specific remedy provided by the legislation giving effect to the relevant Community obligation.

*Marshall II's* interest also lies in the fact that it serves to highlight how the preliminary ruling procedure is used to help national courts decide cases on an individual basis. What the UK judge was told to do was precisely what the German judge did when applying the *von Colson* ruling. The German judge applied the general rules on civil liability, in lieu of the specific provisions contained in the implementing legislation. National judges are charged with giving full effect to Community law and this might involve deciding to elect from the various sanctions available the most appropriate one for the protection of Community law.

The ECJ held that Article 6 is an essential factor for attaining the fundamental objective of equal treatment for men and women, and that when financial compensation is the measure adopted in order to restore that equality,

such compensation may not be limited to an upper limit fixed *a priori* in terms of amounts or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of effluxion of time until the capital sum awarded is actually paid. In contrast with *Johnston*<sup>135</sup>, where Article 6 was found "not to contain, as far as sanctions for any discrimination are concerned, any unconditional and sufficiently precise obligation which may be relied upon by an individual", in *Marshall*, Article 6 was found to be a provision which may be relied upon against the State in order to set aside a national provision which imposes limits on the amount of compensation recoverable by way of reparation<sup>136</sup>.

#### 5.4.2 Injunction

In *Griffin*, one of the reliefs sought was an injunction restraining South West Water from proceeding with further staff redundancy unless and until proper consultation had taken place. The High Court considered that where a directive leaves Member States the choice of remedy for breach of the directive, it cannot be interpreted so as to require the Member State to select one mode of sanction for breach of the directive in preference to another, at any rate where the sanction selected is capable of guaranteeing real and effective judicial protection and a real deterrent effect. The sanction selected by Parliament was a complaint to the industrial tribunal, empowered, if it finds the complaint well founded, to make a declaration to that effect and make a protective award.

Blackburne J. held that :

*"whilst, therefore, there may be a question, as there was in case C-383/92, as to the adequacy of the award which the industrial tribunal is empowered to make having regard to some feature of the legislation which provides for the sanction, I DO NOT CONSIDER THAT IT IS OPEN TO ME TO DISREGARD THE EXCLUSIVE SANCTION WHICH PARLIAMENT HAS SELECTED FOR GIVING EFFECT TO THE DUTY TO CONSULT, where it arises, and to grant to the plaintiffs a form of relief for which the 1992 Act makes no provision. Even if it were open to me in appropriate circumstances to disregard the exclusive sanction which Parliament has provided and grant injunctive relief of the kind sought, I am not persuaded that I would have any sufficient grounds for doing so. It seems to me that an order restraining an employer from effecting any redundancies unless he has 'consulted with' his employees' representatives 'with a view to reaching an agreement', which is what the plaintiffs seek, is one which is fraught with practical difficulties... I can well see, therefore, why Parliament has chosen to provide for breaches of the duty to consult and inform under s 188, by leaving it to an industrial tribunal which is particularly well equipped to consider such matters".*

In *R v. Secretary of State for Health and Others, ex parte Imperial Tobacco Ltd and Others*<sup>137</sup>, tobacco companies sought an injunction from the High Court restraining the government from adopting provisions transposing Directive 98/43 relating to the advertising and sponsorship of tobacco products pending a ruling of the Court of Justice on the validity of the Directive. The House of Lords held that, when a domestic court is asked to grant an injunction to restrain the Government of a Member State, during the implementation period, from making regulations pursuant to a directive, the question whether the applicable law is domestic law or Community law cannot be answered without a reference for a preliminary ruling to the Court of Justice. It would appear that the courts in the UK consider that, whenever a directive is implemented in national law before the prescribed final date, any application for interim relief to suspend the operation of the directive would be a matter for Community law.

### 5.4.3 Title and interest

In *EOC*<sup>138</sup>, the House of Lords decided that the Equal Opportunities Commission had a "sufficient interest in the matter" within the meaning of R.S.C., Ord. 53, r. 3(7) to have *locus standi* to apply for a declaration that UK legislation on the threshold conditions for redundancy pay was incompatible with the Equal Treatment Directive. By contrast, individuals who assert that they are directly affected by failure to implement a directive have no *locus standi* to apply for a similar declaration.

In the UK context, the situation is further complicated by the fact that rules governing title and interest are construed differently in England and Scotland. Lord Hope, in his article on the *Mike Tyson* case<sup>139</sup>, showed some irritation at what he regarded as the unjustified divergence between Scots and English Law on matters of *locus standi*. "No one", he said, "can now question the fact that it is unsatisfactory that there should be a difference of view as to standing between England and Scotland in public law cases".<sup>140</sup> Lord Hope suggested that the courts should attend to this problem by reviewing the Scottish approach to standing as soon as possible<sup>141</sup>. On the other hand, still in the context of remedies against ministers in judicial review, the fact that the present rules in Scotland and England are different and the recognition that there might be a case for removing the differences was not thought to be sufficient to empower the courts. On the contrary, the view from the judiciary in that case was that the removal of these differences should be undertaken by one or other Parliament rather than by the courts themselves<sup>142</sup>.

## 5.5 Conclusion

In the absence of uniform Community rules, it is for the Member States to provide *remedies* and *procedures* for the protection of Community *rights*. Nevertheless, in order to ensure effective and uniform judicial protection, the ECJ has influenced the procedures governing the exercise of various classes of action. The UK courts have adopted an inconsistent approach to the remedies issue. At times, they were prepared to grant the remedy sought even though it involved a radical departure from established pattern. In other cases they decided they could not disregard the exclusive sanction Parliament had provided.

The next chapter discusses a Community remedy State liability for breach of Community law and its application by the UK courts.

## Endnotes

- <sup>1</sup> K. Lenaerts, "Interaction between judges and politicians" (1992) 12 YEL 1 at 6.
- <sup>2</sup> Case 179/84 *Bozetti* [1985] ECR 2301, para. 17.
- <sup>3</sup> These are discussed in Chapter 8.
- <sup>4</sup> T. Daintith, "The indirect administration of Community law" in T. Daintith (ed) *Implementing EC law in the UK* (Wiley 1995).
- <sup>5</sup> A consideration of how access to justice in the field of commercial law can be severely impeded by the costs of litigation see C. Winder, "The cost of commercial litigation in England – A European perspective, and a look at the future" (1996) 4 *European Review of Private Law* p. 339.
- <sup>6</sup> L. Fletcher, "Enforcement of Community sex equality law" in Hervey & O'Keeffe (ed) *Sex Equality law in the European Union* (Wiley, 1996) pp. 173-178.
- <sup>7</sup> J. Lonbay, "Basic competence in European Community law for all lawyers" (1993) 18 ELR 408 at 410.
- <sup>8</sup> Bingham, "The National Judge's View" in Andenas (ed), *Article 177 References to the European Court*. Chapter 5. This is also true of Immigration Appeals.
- <sup>9</sup> Sunkin, "Trends in Judicial Review", 1993 *Public Law* 443.
- <sup>10</sup> COM (97) 596 final.
- <sup>11</sup> COM (97) 596 final Amended proposal, Recital 5.
- <sup>12</sup> COM (2001) 428.
- <sup>13</sup> Bingham *op. cit.* fn 5.
- <sup>14</sup> *Maxim's Ltd v. Dye* [1977] 2 CMLR 410.
- <sup>15</sup> *Maxim's Ltd v. Dye op. cit.*
- <sup>16</sup> J. Usher in Vaughan (ed) *Law of the European Community Services* at 581.
- <sup>17</sup> [1993] SLT 147.
- <sup>18</sup> See C-152/79 *Lee v. Minister for Agriculture* [1980] ECR 1495.
- <sup>19</sup> Rules of procedure of the European Court of Justice, Article 76. See *European Courts Practice and Precedents*, R. Plender (ed) (Sweet & Maxwell 1997), paras. 16.01-16.27.
- <sup>20</sup> Case 96/80 *Jenkins v. Kingsgate Ltd* [1981] ECR 911 at 932.
- <sup>21</sup> *Amies v. Inner London Education Authority* (1977) ICR 308.
- <sup>22</sup> *Snoxell v. Vauxhall Motors Ltd.* (1977) ICR 700.
- <sup>23</sup> *Secretary of State for Scotland and Greater Glasgow Health Board v. Wright & Hannah* [1993] 2 CMLR 257.
- <sup>24</sup> Law Commission No. 226: *Administrative Law: Judicial review and Statutory Appeals*.
- <sup>25</sup> *Ibid* at 3.3.
- <sup>26</sup> *Ibid* at 3.7.
- <sup>27</sup> J. Steiner, *Enforcing EC Law* at 66, 67, 98, Advocate General Jacobs in Case 312/93 paras. 20-27.
- <sup>28</sup> *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130.
- <sup>29</sup> *Millar & Bryce v. Keeper of the Registers of Scotland* [1997] SLT 1000 annotated at [1997] SLT 165, and see also *West v. Secretary of State for Scotland* [1992] SLT 636.
- <sup>30</sup> Case C-253/00 [2002] ECR I-7289.
- <sup>31</sup> *Equal Opportunities Commission v. Secretary of State for Employment* [1994] 1 WLR 409.
- <sup>32</sup> Law Commission paper *op. cit.* 8.5 p. 73.
- <sup>33</sup> G. Tickle & Tyler, "Community Competition Law, Recovering Damages in the English Courts. New Era? False Dawn!" in Lonbay & Biondi (eds) *Remedies for breach of EC law*, pp. 133-143 at 136, also D. Caruso, "The missing view of the Cathedral: The private law paradigm of European legal integration" (1997) 3 ELJ 4.

- <sup>34</sup> *R v. Secretary of State for the Environment, ex parte Royal Society for the protection of Birds*; (1995) 7 Admin LR 434.
- <sup>35</sup> *Kirklees Metropolitan Borough Council v. Wickes Building Supplies Ltd* [1993] AC 227.
- <sup>36</sup> M. Fordham, "Interim relief and the Cross-Undertaking" [1997] JR 136.
- <sup>37</sup> Chapter 7.
- <sup>38</sup> *Case 45/76 Comet v. Produktschap voor Siergewassen* [1976] ECR 2053.
- <sup>39</sup> *Case 33/76 Rewe v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, *Case 199/82, Amministrazione delle Finanze dello Stato v. San Giorgio* [1983] ECR 3595.
- <sup>40</sup> Such is the result of *Factortame*.
- <sup>41</sup> *Case C-87/90A. Verholen e.a. v. Sociale Verzekeringsbank* [1991] ECR I-3757.
- <sup>42</sup> *Joined Cases C-6/90 and C-9/90 Francovich* [1991] ECR I-5357, para. 42, *Case C-312/93 Peterbroeck v. Belgian State* [1995] ECR I-4599, para. 12 and *Joined Cases C-430/93 and C-431/93 Van Schijndel and Van Veen v. SPF* [1995] ECR I-4705, para. 17.
- <sup>43</sup> *Case C-180/95 Draehmpaehl v. Urania Immobilienservice OHG* [1997] ECR I-2195.
- <sup>44</sup> *Case C-231/96 Edilizia Industriale Siderurgica Srl (Edis) v. Ministero delle Finanze* [1998] ECR I-5025, para. 36.
- <sup>45</sup> *Case C-326/96* [1998] ECR I-7835.
- <sup>46</sup> *Case C-62/93 BP v. Supergas* [1995] ECR I-1883.
- <sup>47</sup> T. Tridimas, "Enforcing Community rights in National courts: Some recent Developments" in *Future of Remedies in Europe*, Kilpatrick, Novitz and Skidmore eds, (Hart, Oxford, 2000).
- <sup>48</sup> *Case 34/67* [1968] ECR 254.
- <sup>49</sup> *Case 50/76* [1977] ECR 137.
- <sup>50</sup> *Compare Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* [1997] 2 WLR 898; *Retail Parks Investments Ltd v. the Royal Bank of Scotland plc* [1996] SLT 669.
- <sup>51</sup> *Equal Opportunities Commission v. Secretary of State for Employment (the EOC case)* [1994] 1 WLR 409 R v. *Secretary of State for the Environment, ex parte Royal Society for the protection of Birds*; (1995) 7 Admin LR 434.
- <sup>52</sup> In the *EOC case*, The House of Lords expressly recognised that an association acting in the public interest may seek a declaration that a particular Act of parliament is in breach of Community law, but did not make an order compelling Parliament to amend it.
- <sup>53</sup> S. Prechal, "EC requirements for an effective remedy" in Lonbay & Biondi (eds) *op. cit.* at 7; C. Boch & R. Lane, "Remedies before national courts, a continuing contradiction" (1992) LJIL 173.
- <sup>54</sup> *Case C-177/88 Dekker v. Stichting Vormingscentrum voor Jong Volwassenen Plus* [1990] ECR I-3941.
- <sup>55</sup> *Case C-213/89 R. v. Secretary of State for Transport ex parte Factortame Ltd (No2)* [1990] ECR I-2433.
- <sup>56</sup> *Case 68/88 Commission v. Greece* [1989] ECR 2965, paras 23-24, in *Case C-7/90 Vandevenne* [1991] ECR I-4371, para. 11. *Case C-326/88 Hansen* [1990] ECR I-2911, para. 17.
- <sup>57</sup> C. Harding, "Member State Enforcement of European Community Measures: The Chimera of Effective Enforcement" in MJEC vol. 4 1997 pp. 5-24. S. Prechal in Lonbay & Biondi (eds) *op. cit.* Curtin & Mortelmans in Curtin & Heukels (eds), *The Institutional Dynamics of European Integration* (The Hague, 1994).
- <sup>58</sup> *Case C-326/88 Anklagemyndigheden v. Hansen* [1990] ECR I-2911.
- <sup>59</sup> Paras. 18 and 19.
- <sup>60</sup> Advocate General van Gerven's opinion, point 15.
- <sup>61</sup> *Joined cases C-430/93 & C-431/93 van Schijndel* [1995] ECR I-4705, para. 19.

- <sup>62</sup> C. Harlow, "A Common European Law of Remedies" in Kilpatrick, Novitz & Skidmore (eds.) *The Future of Remedies in Europe* (Oxford, Hart Publishing, 2000) at pp78-81, in particular draws out the constitutional consequences of such an empowering of the national courts, their disruptive effect on the national legal systems and the fact that it leads to new divergences between national legal systems.
- <sup>63</sup> S. Prechal (1998) 35 CMLRev 681.
- <sup>64</sup> An issue explored in Chapter 1.
- <sup>65</sup> Case 222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR I-651.
- <sup>66</sup> Case 222/86 *UNECTEF v. Heylens* [1987] ECR 4097, paras. 14 and 15.
- <sup>67</sup> A conclusion one might be inclined to draw from combining *Heylens* with Case C-97/91 *Oleificio Borelli s.p. a. v. Commission* [1993] ECR I-6313.
- <sup>68</sup> Case C-58/89 *Commission v. Germany* [1991] ECR I-4983.
- <sup>69</sup> Case 222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR I-651 para 21.
- <sup>70</sup> Such an ouster clause is included in the Data Protection Act 1999 which implements Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
- <sup>71</sup> Case C-97/91 *Oleificio Borelli s.p. a. v. Commission* [1993] ECR I-6313.
- <sup>72</sup> Case C-340/89 *Vlassopoulou* [1991] ECR I-2357.
- <sup>73</sup> Case 222/86 *UNECTEF v. Heylens* [1987] ECR 4097. para. 16.
- <sup>74</sup> Case 43/75 *Defrenne v. Sabena* [1976] ECR 455, para. 31.
- <sup>75</sup> Case C-87/90 *A. Verholen e.a. v. Sociale Verzekeringsbank* [1991] ECR I-3757.
- <sup>76</sup> *Ibid.* at para. 25.
- <sup>77</sup> S. Prechal (1995) *op. cit.* at 167.
- <sup>78</sup> H.-W. Micklitz, "The interest in Public Interest Litigation in Public Interests Litigation in European Courts" Micklitz & Reich (eds) (Nomos Verl. Baden Baden 1996).
- <sup>79</sup> In para. 6. of his opinion in Case 158/80 *Rewe Handelsgesellschaft Nord v. Hauptzollamt Kiel (Butter-Buying cruises)* [1981] ECR I-805.
- <sup>80</sup> And see the case note on the case by J. Usher in (1981) 6 ELR 451.
- <sup>81</sup> At para. 40.
- <sup>82</sup> This is the case of the Directive on unfair terms in consumer contracts, Directive 93/13 OJ 1993, L95/29. Article 7 of the Directive, paragraph 1 requires Member States to implement adequate and effective means to prevent the continued use of unfair terms and specifies in paragraph 2 that those means are to include allowing authorised consumer associations to take action in order to obtain a decision as to whether contractual terms drawn up for general use are unfair and, if need be, to have them prohibited, even if they have not been used in specific contracts.
- <sup>83</sup> Case 109/88 *Danfoss* [1989] ECR 3199; paras.13 and 14; 16 Case C-127/92 *Enderby* [1993] ECR I-5535. paras. 13, 14 & 164, and now Directive 97/80 on the Burden of Proof in cases of discrimination based on sex OJ 1998, L14/6.
- <sup>84</sup> Case 174/82 *Sandoz* [1983] ECR 2445; para. 22.
- <sup>85</sup> Case 199/82 *San Giorgio v. Amministrazione delle Finanze dello Stato* [1983] ECR 3595.
- <sup>86</sup> Case C-2/88 *Imm Zwartveld*. [1990] ECR I-4405.
- <sup>87</sup> For example in Article 236 (2) of Regulation 2913/92 OJ 1992, L302/1, or in Article 10 (1) of Directive 85/37 OJ 1985, L210/29.
- <sup>88</sup> Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 48.
- <sup>89</sup> Case 45/76 *Comet* [1976] ECR 2043.



- <sup>90</sup> Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989.
- <sup>91</sup> Case 240/87 *Déville* [1988] ECR 3513.
- <sup>92</sup> It was somewhat puzzling that the question needed to be asked at all since the Irish Rules left flexibility to the national courts in deciding from what moment the period within which an application for leave to apply for judicial review may start to run.
- <sup>93</sup> Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475.
- <sup>94</sup> Case C-410/92 *E.R. Johnson II* [1994] ECR I-5438.
- <sup>95</sup> Case 43/75 *Defrenne v. SABENA* [1976] ECR 455; Case C-415/93 *URBSFA v. Bosman* [1995] ECR I-4921.
- <sup>96</sup> Case 309/85 *Barra* [1988] ECR 355 para. 19.
- <sup>97</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629.
- <sup>98</sup> See *contra* Clive Lewis, *Remedies in Community law* (Sweet and Maxwell, 1997), p. 72.
- <sup>99</sup> Discussed in Chapter 7.
- <sup>100</sup> (2000) IRLR 565.
- <sup>101</sup> Case C-24/95 *Land Rheinland Pfalz v. Alcan Deutschland* [1997] ECR I-1591 para. 25 emphasis added.
- <sup>102</sup> Regulation 2913/92 OJ 1992, L 302/1.
- <sup>103</sup> Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989; Case 68/79 *Hans Just I/Sl v. Danish Ministry for Fiscal Affairs* [1980] ECR 501; Case 61/79 *Amministrazione delle Finanze dello Stato v. Denkavit Italiana* [1980] ECR 1205; Case 199/82 *San Giorgio v. Amministrazione delle Finanze dello Stato* [1983] ECR 3595; Case 177/78 *Pigs & Bacon Commission v. McCarren & Co. Ltd.* [1979] ECR 2161; Case 378/85 *Bianco and Girard v. Directeur Général des Douanes et Droits Indirects* [1988] ECR 1099; Case C-62/93, *BP Supergas* [1995] ECR I-1883. For a summary of the case law in the area see C-192/95 to C-218/95 *Société Comateb v. Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165.
- <sup>104</sup> For time limits see above.
- <sup>105</sup> Case C-192/95 to C-218/95 *Société Comateb v. Directeur Général des Douanes et Droits Indirects* [1997] I-165.
- <sup>106</sup> See Chapter 6.
- <sup>107</sup> Case 222/82 *Apple and Pear Development Council v. K.J. Lewis Ltd and others* [1983] ECR 4083, para. 39.
- <sup>108</sup> Case 146 & 166/73 *Rheinmühlen* [1974] ECR 33, para. 3.
- <sup>109</sup> Case C-87/90 *Verholen* [1991] ECR I-3757.
- <sup>110</sup> Case C-312/93 *Peterbroeck van Campenhout & Cie v. Belgium* [1995] ECR I-4599.
- <sup>111</sup> Case C-430-431/93 *van Schijndel* [1995] ECR I-4705.
- <sup>112</sup> Case C-72/95 *Kraaijeveld BV & Others and Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403 and C. Boch, "The enforcement of the EIA Directive: A breach in the Dyke?" (1997) 9 JEL 129.
- <sup>113</sup> Para. 83.
- <sup>114</sup> Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial SA and Rocio Murciano Quintero C-240/98 and between Salvat Editores SA and José M. Sánchez Alcón Prades (C-241/98)*, [2000] ECR I-4941.
- <sup>115</sup> Bingham, "The National Judge's View" in Andenas Article 177 References to the European Court.
- <sup>116</sup> Case C-421/92 [1994] ECR I-1657.
- <sup>117</sup> Case C-177/88 *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen Plus* [1990] ECR I-3941.
- <sup>118</sup> Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.

- <sup>119</sup> Council Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment between men and women as regards access to employment, vocational training and promotion and working conditions, OJ 1976, L39/40.
- <sup>120</sup> Miss Marshall succeeded in front of the Industrial Tribunal; the Health Authority appealed and the EAT allowed the appeal; leave was given to appeal to the Court of Appeal which, in 1984, referred questions to the ECJ; in 1986, the ECJ gave its judgment, following this judgment the Court of Appeal allowed Miss Marshall's appeal.
- <sup>121</sup> [1988] 3 CMLR 389.
- <sup>122</sup> Section 66 (2): "The amount of compensation awarded to a person under subsection (1) (b) shall not exceed the limit for the time being imposed by section 75 of the Employment Protection (Consolidation) Act 1978."
- <sup>123</sup> Case 14/83 *von Colson & Kamman v. Land Nordrhein-Westfalen* [1984] ECR 1891; Case 79/83 *Hartz v. Deutsche Tradax* [1984] ECR 1921.
- <sup>124</sup> Following the preliminary ruling in Case 14/83, the Arbeitsgericht Hamm Urteil vom 06/09/84 – 4 CA 1076/82, Der Betrieb 1984 p. 2700 and 2701.
- <sup>125</sup> D. Curtin, "Effective Sanctions and the Equal Treatment Directive: the von Colson and Harz Cases", in (1985) 22 CMLRev 533.
- <sup>126</sup> [1988] 3 CMLR 389 at p. 402.
- <sup>127</sup> April 1980 to 1988.
- <sup>128</sup> [1989] 3 CMLR 771.
- <sup>129</sup> [1989] 3 CMLR at 774.
- <sup>130</sup> Wood J. at paragraph 12.
- <sup>131</sup> [1990] 3 CMLR 425.
- <sup>132</sup> Dillon LJ para. 16, Butler-Sloss LJ para 37; Staughton LJ at para 53.
- <sup>133</sup> Dillon LJ paras. 25 and 26, Butler-Sloss LJ para. 43, Staughton LJ para. 53.
- <sup>134</sup> A reasoning used again in *Webb v. EMO Air Cargo (UK) Ltd* [1993] 1 CMLR 259 at 271.
- <sup>135</sup> Case 222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR 1651.
- <sup>136</sup> Contrast with the ECJ interpretation of the similarly worded Article 6 of the Equal Treatment Directive in Social Security Directive 79/7.
- <sup>137</sup> Case C-74/99 [2000] ECR I-8599.
- <sup>138</sup> *R v. Secretary of State for Employment*, Ex parte *Equal Opportunities Commission* [1995] 1 A.C. 1.
- <sup>139</sup> Lord Hope, "Mike Tyson comes to Glasgow – a question of standing" [2001] PL 294.
- <sup>140</sup> [2001] PL 294 at 306.
- <sup>141</sup> [2001] PL 294 at 307.
- <sup>142</sup> See Lord Weir in *Davidson v. Scottish Ministers*, (IH) unreported, 18 December 2001.

