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The protection of Community rights before national courts: a critique of the case law

by

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Abstract

This thesis seeks to contribute to the ongoing debate on the demarcation of powers between the European Community and its Member States in determining the remedies and procedural rules available at national level for the enforcement of EC rights. It seeks to examine in more detail the case law of the ECJ on the protection of Community rights in national courts. In particular, it examines a) the principle of direct effect, b) the remedies of judicial review, interim relief and restitution, c) the principle of Member State liability in damages, d) the principles of equivalence and effectiveness, e) the interplay between EC and ECHR law on remedies and procedures, f) the impact of EC law on the remedies before the Greek courts. The thesis underlines the tension between conflicting values and describes the balancing approach of the ECJ. It concludes that the goal of effective protection of Community rights is very much dependent on the degree of political integration sought by the Member States and may be compromised by various considerations, such as the diversity of the national legal systems, the doctrines of sovereignty and separation of powers, the weaknesses of judicial approximation and the resistance of national courts.

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Administrative Court, Athens 17670/96, (1999) 23 *Το Σύνταγμα* 99

Administrative Court, Athens 1339/96, (1997) *Διοικητική Δίκη* 100

Administrative Court, Thessaloniki 2260/97, 10 *Διοικητική Δίκη* 138

Administrative Court, Athens 6692/97, (1999) *Διοικητική Δίκη* 155

Administrative Court, Athens 15540/97 and 4210/97, (1998) *Ελληνική Δικαιοσύνη* 1166

Administrative Court, Rhodes 2/99, (1999) *Ελληνικό Δίκαιο Κοινωνικών Ασφαλίσεων* 465

Administrative Court, Thessaloniki 2707/99, (2000) *Διοικητική Δίκη* 178

Administrative Court, Athens 10798/99, (2001) *Διοικητική Δίκη* 257

Administrative Court, Athens 288/2000, (2000) *Ελληνικό Δίκαιο Κοινωνικών Ασφαλίσεων* 453

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B. Legislation

1. Regulations

Regulation 17/62 of 21 February 1962, **First Regulation implementing Articles 85 and 86 of the Treaty** (OJ 1962 P 13/204)

Regulation 805/68 of 27 June 1968 **on the common organization of the market in beef and veal** (OJ 1968 L 148/24)

Regulation 2777/75 of 29 October 1975 **on the common organisation of the market in poultrymeat** (OJ 1975 L 282/77)

Regulation 2641/84 of 17 September 1984 **on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices** (OJ 1984 L 252/1)

Regulation 1914/87 of 2 July 1987 **introducing a special elimination levy in the sugar sector for the 1986/87 marketing year** (OJ 1987 L 183/5)

Regulation 2423/88 of 11 July 1988 **on protection against dumped or subsidized imports from countries not members of the European Economic Community** (OJ 1988 L 209/1)

Regulation 615/92 of 10 March 1992 **laying down detailed rules for a support system for producers of soya beans, rape seed, colza seed and sunflower seed** (OJ L 67/11)

Regulation 1763/92 of 29 June 1992 **concerning financial cooperation in respect of all Mediterranean non-member countries** (OJ 1992 L 181/5).

Regulation 1922/92 of 13 July 1992 **determining the conditions for the reimbursement of the clawback** (OJ 1992 L195/10)

Regulation 2066/92 **amending Regulation (EEC) No 805/68 on the common organization of the market in beef and veal and repealing Regulation (EEC) No 468/87 laying down general rules applying to the special premium for beef producers and Regulation (EEC) No 1357/80 introducing a system of premiums for maintaining suckler cows** (OJ 1992 L 215/49)

Regulation 2913/92 **(Community Customs Code)** (OJ 1992 L 302/1)

Regulation 404/93 of 13 February 1993 **on the common organisation of the market in bananas** (OJ 1993 L 47/1)

Regulation 2362/98 of 28 October 1998 **laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community** (OJ 1998 L 93/32)

Regulation 1162/2001 of 14 June 2001 **establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d, e and associated conditions for the control of activities of fishing vessels** (OJ 2001 L 159/4)

Regulation 1/2003 of 16 December 2002 **on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty** (OJ 2003 L 1/1)

2. Directives

Directive 64/221/EEC of 25 February 1964 **on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health** (OJ, English Special Edition, Series I, Chapter 1963-1964, p. 117)

Directive 65/65/EEC of 26 January 1965 **on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products** (OJ 1986 L 229/63)

Directive 68/151/EEC of 9 March 1968 **on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community** (OJ 1968 L 65/8)

Directive 69/335/EEC of 17 July 1969 **concerning indirect taxes on the raising of capital** (OJ 1969 L 269/12)

Directive 71/305/EEC of 26 July 1971 **concerning the coordination of procedures for the award of public works contracts** (Official Journal, English Special Edition 1971 (II), p. 682)

Directive 74/577/EEC of 18 November 1974 **on stunning of animals before slaughter** (OJ 1974 L 316/10)

Directive 75/117/EEC of 10 February 1975 **on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women** (OJ 1975 L 45/19)

Directive 75/442/EEC of 15 July 1975 **on waste** (OJ 1975 L 194/39)

Directive 76/207/EEC of 9 February 1976 **on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions** (OJ 1976 L 39/40)

Directive 76/464/EEC of 4 May 1976 **on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community** (OJ 1976 L 24/55)

Directive 76/768/EEC of 27 July 1976 **on the approximation of the laws of the Member States relating to cosmetic products** (OJ 1976, L 262/169)

Directive 77/91/EEC of 13 December 1976 **on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent** (OJ 1977 L 26/1)

Directive 77/388/EEC of 17 May 1977 **on the harmonization of the laws of the Member States relating to turnover taxes-Common system of value added tax: uniform basis of assessment** (OJ 1977 L 262/44)

Directive 77/780/EEC of 12 December 1977 **on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions** (OJ 1977 L 322/30)

Directive 78/659/EEC of 18 July 1978 **on the quality of fresh waters needing protection or improvement in order to support fish life** (OJ 1978 L 222/1)

Directive 79/7/EEC **Social Security Directive** (OJ 1979 L 6/24)

Directive 79/32/EEC of 18 December 1978 **on taxes (other than turnover taxes) which affect the consumption of manufactured tobacco** (OJ 1979 L 10/8)

Directive 80/987/EEC of 20 October 1980 **on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer** (OJ 1980 L 283/23)

Directive 81/851/EEC of 28 September 1981 **on the approximation of the laws of the Member States relating to veterinary medicinal products** (OJ 1981 L 317/1)

Directive 81/852/EEC of 28 September 1981 **on the approximation of the laws of the Member States relating to analytical, pharmaco-toxicological and clinical standards and protocols in respect of the testing of veterinary medicinal products** (OJ 1981 L 317/16)

Directive 83/189/EEC of 28 March 1983 **laying down a procedure for the provision of information in the field of technical standards and regulations** (OJ 1983 L 109/8)

Directive 83/513/EEC of 26 September 1983 **on limit values and quality objectives for cadmium discharges** (OJ L 291/1).

Directive 84/5/EEC of 30 December 1983 **on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles** (OJ 1984 L 43/27)

Directive 85/337/EEC of 27 June 1985 **on the assessment of the effects of certain public and private projects on the environment** (1985 OJ L 175/40)

Directive 85/577/EEC of 20 December 1985 **to protect the consumer in respect of contracts negotiated away from business premises** (OJ 1985 L 372/31)

Directive 87/164/EEC of 2 March 1987 **amending, on account of the accession of Spain, Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer** (OJ 1987 L 66/11)

Directive 88/182/EEC of 22 March 1988 **amending Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations** (OJ 1988 L 81/75)

Directive 89/48/EEC of 21 December 1988 **on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration** (OJ 1989 L 19/16)

Directive 89/105/EEC of 21 December 1988 **relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems** (OJ 1989 L 40/8)

Directive 89/397/EEC of 14 June 1989 **on the official control of foodstuffs** (OJ 1989 L 186/23)

Directive 89/665/EEC of 21 December 1989 **on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts** (OJ 1989 L 395/33)

Directive 90/314/EEC of 13 June 1990 **on package travel, package holidays and package tours** (OJ 1990 L 158/59)

Directive 91/156/EEC **amending Directive 75/442/EEC on waste** (OJ 1991 L 78/31)

Directive 92/13 EEC of 18 June 1992 **coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors** (OJ 1992 L 76/14)

Directive 92/50/EEC of 18 June 1992 **relating to the coordination of procedures for the award of public service contracts** (OJ 1992 L 209/1)

Directive 92/80/EEC of 19 October 1992 **on the approximation of taxes on manufactured tobacco other than cigarettes** (OJ 1992 L 316/10)

Directive 93/35/EEC of 14 June 1993 OJ **amending for the sixth time Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products** (1993 L 151/32)

3. Decisions

Commission Decision 94/90/ESCS, EC, Euratom of 8 February 1994 **on public access of Commission documents** (OJ 1994 L 46/53)

Council Decision 94/800/EC of 22 December 1994 **concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994)** (OJ 1994 L 336/1)

Council Decision 96/386/EC of 26 February 1996 **concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products** (OJ 1996 L 153/47)

4. Other measures

Notice 93/C 39/05 **on cooperation between national courts and the Commission in applying Art. 85 and 86 of the EC Treaty** (OJ 1993 C 39/6)

Preface

This thesis examines the case law of the European Court of Justice (ECJ) on the protection of Community rights in national courts.[1] The aim of this thesis is to examine in more detail the following subject matters: a) the principle of direct effect, b) the principle of effective remedies, c) the principle of Member State liability in damages, d) the principles of equivalence and effectiveness, e) the interaction between EC law and the principle of effective judicial protection under the ECHR, and f) the impact of Community law on the remedies before the Greek courts. The preface explains the objectives of this research project, describes the structure of the analysis and presents the main conclusion of this thesis.

The Introduction gives an overview of the fundamental legal principles examined in this thesis. It discusses the jurisdiction of the national courts to protect EC rights, the distinction between "rights," "remedies" and "procedures" and the relation between the principles of national procedural autonomy and effective judicial protection. It, thus, sets the essential legal background and prepares the field for the ensuing analysis.

The second Chapter is dedicated to the analysis of the direct effect doctrine especially in relation to Directives. It describes the evolution of the direct effect doctrine from the beginning until the more controversial recent case law. It explores the weaknesses in the reasoning of the ECJ concerning the prohibition of horizontal direct effect of Directives and the denial of direct effect to the international agreements GATT/WTO. It concludes that direct effect is subject to limits which are imposed by national laws, as well as limits of a political nature.

The third Chapter presents the landmark cases, where the ECJ established common principles for the remedies of judicial review, interim relief and restitution before Member State courts. It presents the cases where the ECJ has followed an interventionist approach and the

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[1] See generally, A. Ward, *Judicial Review and the Rights of Private Parties in EC law* (2000) *Oxford University Press*; A. Arnull, *The European Union and its Court of Justice* (1999) *Oxford University Press*, ch. 5; T. Tridimas, *The General Principles of EC law* (1999) *Oxford University Press*, ch. 8 and 9; Brealey and Hoskins, *Remedies in EC law: law and practice in the English and EC courts* (2nd ed. 1998) *Sweet & Maxwell*; C. Lewis, *Remedies and the Enforcement of European Community Law* (1996) *Sweet & Maxwell*; J. Lonbay and A. Biondi (eds), *Remedies for Breach of EC Law* (1996) *New Wiley*; S. Prechal, *Directives in European Community Law* (1995) *Clarendon Press*, Chs 8, 9, 12 and 13; J. Steiner, *Enforcing EC Law* (1995).

consequences deriving from the additional obligations imposed on national courts. Further, it explores cases that mitigate the influence of the above case law or reveal inconcistencies and retreats. The conclusion is that the evolution of the law is gradual and all remedial rights are subject to exceptions and national variations.

The fourth Chapter examines thoroughly the remedy of Member State liability in damages. It examines the underlying theory of justice, the conditions of State liability, the extent of reparation, the relationship with the other remedies and the recent expansion to private parties and public bodies including the judiciary. It concludes that Member State liability in damages is the most expanding remedy, since it combines minimal intrusiveness and appreciable deterrence effect.

The principles of equality and effectiveness are examined separately in the fifth Chapter, but the analysis complements with Chapters 3 and 4. It makes an examination of the scope of the above principles, it describes the balancing approach adopted by the ECJ and draws a comparison with the case law in substantive law. It concludes that the ECJ is very pragmatic in its application of those principles and that individual rights are balanced against Member State interests. In principle, the ECJ defers balancing to national decisionmakers, unless national law violates the core of Community rights.

The provision of remedies before national courts is the main expression of the principle of effective judicial protection. The sixth Chapter examines the interaction between EC and ECHR law and describes a parallel expansion in the jurisdiction of the ECJ and the ECtHR. It describes the standard of effectiveness found in the case law of the ECtHR and concludes that the ECtHR is pragmatic and therefore, it is difficult to extract specific guidelines. The question of compatibility of the Community remedies and procedures with the ECHR leads to the conclusion that only the accession of the EU to the Convention would definitely solve problems of potential inconsistency.

The seventh Chapter examines how a national legal order has received the principles elaborated in the ECJ's case law. It is a case study on the impact of Community law of remedies and procedures on the Greek legislation and jurisprudence. The main objective sought by this Chapter is to examine the limits that Community law poses on the procedural

autonomy of the Greek State and the legislative amendments that have been brought. Greek courts tend to be conservative and it is examined how they have responded to the incoming tide of the EC law.

Chapter 8 draws the general conclusions. The present author suggests that the ECJ has drawn successfully the balance between the need for effective protection of Community rights and respect to national sovereignty, but has not established thresholds that are clear and easily applicable by national courts.[2] To be a principled adjudicator involves acknowledging the true ground of decision; it also requires being consistent within and across cases.[3] This is not the case with the ECJ. Enforcement of law and effectiveness are often highly political. Remedies are required as the result of unconstrained, *ad hoc* judicial policymaking. At the same time they make a necessary peace with recalcitrant reality. The remedies are merely the means of "making rights a living truth."[4] They are flexible enough to accommodate the practical difficulties thrown up by an imperfect legal system such as the one the EC Treaty has created. Claims to effective remedies must sometimes yield to concerns of sovereign necessity and convenience. The ECJ follows a pragmatic and balancing approach with great sensitivity to Member State interests.

Law is stated as of 15 January 2004.

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[2] This is an area where the art of casuistry prevails. See T. Tridimas, *Liability for Breach of Community Law: Growing Up and Mellowing Down?* (2001) *Common Market Law Review* 301, 304.

[3] R. Posner, *The Federal Courts: Challenge and Reform* (Harvard University Press, 1996) p. 312.

[4] P. Gewirtz, *Remedies and Resistence* (1983) 92 *Yale Law Journal* 585.

Chapter 1: Introduction

1.1 The jurisdiction of national courts to protect EC rights as founded on the principles of primacy, direct effect, effectiveness and effective judicial protection

Neither the EC Treaty nor Community legislation lays down a general scheme of substantive or procedural law governing remedies for the enforcement of EC law, although sectoral legislation exists in some fields[5] and there have been moves towards more ambitious harmonisation and co-ordination projects.[6] The EC Treaty does not establish a system of the enforcement of Community law rights, but provides only for remedies before the ECJ. As the judicial institution of the Union the ECJ ensures, pursuant to Article 220 EC, that the law is observed in the interpretation and application of the Treaties.[7] In order to perform this task, the ECJ has wide jurisdiction that it exercises in the context of various categories of proceedings: infringement proceedings,[8] proceedings for annulment,[9] proceeding for failure to act,[10] for the grant of interim relief[11] and damages for the non-contractual liability of the Community.[12]

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[5] The Council has passed measures designating remedies in only a small number of policy areas: e.g. Art. 2(1) of Directive 89/665 (OJ 1989 L 395/33) and Article 2(1) Directive 92/13 (OJ 1992 L 76/14) (public procurement directives); Regulation 2913/92 (Community Customs Code) (OJ 1992 L 302/1), see in particular at 235-246.

[6] Article 65 EC added by the Amsterdam Treaty governs the adoption of measures concerning "judicial co-operation in civil matters" and suggests promoting the compatibility of the rules on civil procedure in the various Member States "if necessary" for the good functioning of civil proceedings. More recently, in the field of private law, the Commission has issued a communication which asks "whether problems result from divergences in contract law berween Member States" and which raises the question of possible alternatives to "the existing approach of sectoral harmonization of contract law": COM (2001) 398.

[7] See also Article 28 para 1 of the Draft Treaty establishing a Constitution for Europe as submitted to the President of the European Council in Rome on 18 July 2003, CONV 850/03: "The Court of Justice shall include the ECJ, the High Court and specialised courts. It should ensure respect for the law in the interpretation and application of the Constitution."

[8] See Article 226 EC: "1. If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations; 2. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the ECJ."

Additionally, to ensure the effective application of Community legislation and avoid differences of interpretation between the national courts, the Treaties introduced the preliminary ruling procedure,[13] which without creating a hierarchy, institutionalised co-operation between the ECJ and the national courts. With regard to cases coming under Community law, national courts, if in doubt about the interpretation or validity of this law, may, and sometimes, must seek for advice from the ECJ.[14] The preliminary reference is a "quasi-federal" instrument for reviewing the compatibility of national laws with Community law.[15] It is the link between the ECJ and national courts and demonstrates clearly that national courts too are guarantors of Community law.

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[9] See Article 230 EC, para 1: "The ECJ shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties."

[10] See Article 232 EC, para 1:" Should the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the ECJ to have the infringement established."

[11] See Article 242 EC: "Actions brought before the ECJ shall not have suspensory effect. The ECJ may, however, if it considers that circumstances so require, order that application of the contested act be suspended." Also, Article 243 EC states:" The ECJ may in any cases before it prescribe any necessary interim measures."

[12] See Article 235 EC: "The ECJ shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288." Article 288(2) EC states as follows: "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of Member States, make good any damage caused by its institutions or by its servants in the performance of its duties."

[13] See Article 234 EC, para 1: "The ECJ shall have jurisdiction to give preliminary rulings concerning: a) the interpretation of the Treaty; b) the validity and interpretation of acts of the institutions of the Community and the ECB; c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide."

[14] See Article 234 EC, para 3: "Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the ECJ."

[15] See Mancini and Keeling, *Democracy and the European Court of Justice* (1994) 57 *Modern Law Review* 175, 184.

The jurisdiction of national courts in the enforcement of Community law has been activated by the recognition of the doctrine of direct effect. It is a truism to say that the Community legal order is distinguished from the other international legal orders because it confers rights on individuals.[16] Where Community law confers rights on an individual through the doctrine of direct effect, the availability in the national courts of remedies that provide for effective protection of those rights is an essential and integral aspect of the direct effect of Community law.[17] The ECJ has created a system of private enforcement of Community law, where the value of a right is measured by the consequences that will be brought to bear when the right is violated.[18] The legal maxim "*ubi ius, ibi remedium*" finds place in Community law. This principle is the greatest manifestation of the rule of law. It means that for the violation of every right, there must be a remedy.[19] It includes the element of enforceability in the definition of legal rights and requires full access to a court.

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[16] Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR p. 1.

[17] There may also be an obligation to provide protection even in cases where there is no direct effect. See Case C-106/89, *Marleasing SA v. La Comercial Internacionale di Alimentation SA* [1990] ECR I-4135. The duty of national courts to "read" national law in the "light" of Community law does not require the national judge to follow a *contra legem* interpretation of national law or to redraft the national legislation. See Case C-262/88, *Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, at 1937 per Van Gerven AG. See also the comments of Van Gerven AG in Case 271/91, *Marshall II*, op.cit., para 10 of the Opinion. See, finally, G. Betlem, *The Principle of Indirect Effect of Community Law* (1995) 3 *European Review of Public Law* 1.

[18] See K. Llewellyn, *The Bramble Bush* (1960) at 83, 84 (Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as the courts will do). See also D. Levynson, *Rights Essentialism and Remedial Equilibration* (1999) 99 *Columbia Law Review* 857.

[19] This common law principle was established for the first time in *Ashby v. White at Aliens*, 2 LD Raym 938 at 954 (1702): "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; For want of right and want of remedy are reciprocal." See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803): "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this appellation, if the laws furnish no remedy for the violation of a vested legal right."

In *Simmenthal*[20] it was decided that setting aside of national law that is in conflict with Community law is the automatic consequence of relying on a Community law provision and the combined result of the principles of primacy and direct effect. The case involved an apparent conflict between Community law and subsequent national legislation and concerned a national judge-made rule reserving to the Italian Constitutional Court the power to set aside national provisions which are contrary to Community law. The ECJ ruled that: "…[I]n accordance with the principle of precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures ... by their entry into force render automatically inapplicable any conflicting provision of ... national law..."[21]

It follows that every national court is first and foremost a Community law court, in the sense that its duty to apply Community law overrides its usual duty to apply national law. The effect of *Simmenthal* has been extended to administrative measures that are in conflict with Community law.[22] It should be noted that direct effect does not have the effect of annulment of national legislation or revocation of administrative measures. It is in all cases for the competent national authority, the legislature, or the executive or, in some constitutions, the constitutional court to annul or revoke the offending norm.[23]

Neither the principles of direct effect nor supremacy by themselves indicate what remedies should be available to enforce a Community right within the national legal system.[24] The ECJ continued the role it has assumed to create a system of enforcement of Community law rights and has meshed together rights and remedies in restitution cases. It has consistenly held that payments made by individuals to national authorities which are levied contrary to Community law must be reimbursed and that the obligation of the Member States in question to reimburse

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[20] Case 106/77, *Amministrazione Delle Finanze Dello Stato v. Simmenthal SpA* [1978] ECR 629.

[21] Ibid., para 17.

[22] See Case C-224/97, *Ciola v. Land Vorarlberg* [1999] ECR 2517.

[23] See Case 83/82, *Waterkeyn* [1982] ECR 4337.

[24] See C. Lewis, *The right to an effective remedy* in *English Public Law and the Common Law of Europe* ed. by Mads Andenas (Key Haven 1998) p. 131.

them follows from the direct effect of the Community provision which has been infringed recording to the established case law "entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence of, and adjunct to the rights conferred on individuals by the Community provisions."[25]

A complement of or corollary to the fundamental principle of direct effect is the general principle of effective judicial protection. In the establishment of this principle, the ECJ has been inspired by Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The ECJ derived from the principle of effective judicial protection and the "*effet utile*" of Community law the remedies of judicial review, interim relief and compensation for the protection of Community rights. *Johnston*,[26] *Factortame*[27] and *Francovich*[28] are fundamental cases where the ECJ created a positive obligation on Member States to provide effective remedies for the protection of Community rights.[29] In *Johnston*, the remedy of judicial review was not available for administrative acts offending the Community law principle of equality between men and women. In *Factortame* individuals were denied the remedy of interim relief when exercising Community law rights and in *Francovich* the lack of direct effect of Directive

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[25] Case 199/82, *Amministrazione delle Finanze dello Stato v. SpA San Giorgio* [1983] ECR 3595, para 12; See also Case 309/85, *Barra v. Belgium and Another* [1998] ECR 355, para 17; Case C-62/93, *BP Supergaz v. Greek State* [1995] ECR I-1883, para 40; Case C-188/95, *Fantask and Others* [1997] ECR I-6783, para 38; Joined Cases C-192/95 to C-218/95, *Comateb and Others v. Directeur General des Douanes et Droits Indirects* [1997] ECR I-165, para 20; Case C-343/96, *Dilexport v. Amministrazione delle Finanze dello Stato* [1999] ECR I-579, para 23.

[26] Case 222/84, *Johnston v. RUC* [1986] ECR 1651.

[27] Case C-213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433.

[28] Joined Cases 6/90 and 9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* [1991] ECR I-5357.

[29] See G. Van Gerven, *Bringing the gap between Community and national rules: Towards a principle of homogeneity in the field of legal remedies?* (1995) 32 *Common Market Law Review* 679; R. Caranta, *Judicial Protecion against Member States: A new ius commune takes shape*" (1995) 32 *Common Market Law Review* 703; A. Tash, *Remedies for European Community Law Claims in Member State Courts: Toward a European Standard* (1993) *Columbia Journal of Transnational Law* 377.

80/987[30] left individuals without compensation. In all cases there was a serious gap in the legal protection of individuals. The principle "*ubi ius, ibi remedium*" was seriously undermined.

It is concluded that the whole purpose of principles such as primacy, direct effect, effectiveness and effective judicial protection is to ensure that Community rules are enforced at the national level. This is obvious also from the reasoning of the ECJ. In *Brasserie* for example the right to reparation has been held to be the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.[31] The ECJ however, stressed also the principles of effectiveness and effective judicial protection.[32] Also, in *Factortame* the ECJ combined the "disapplication" terminology found in *Simmenthal* and the direct effect with the principle of effectiveness.[33] Therefore, the enforcement of EC law is accomplished through the combined application of the above constitutional principles.

1.2 The legal nature of the obligation of national courts to apply Community law

The distinction between substance, remedies and procedures is difficult to establish under Community law. The ECJ examines under the heading "remedies" rules that would not be considered as procedural topics in the continental law jurisdictions,[34] such as damages against public authorities and unlawful paid levies. Also, the term "procedure" encompasses not only rules of procedure in the narrow sense, but also the availability of remedies and rights of action.[35]

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[30] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283/23).

[31] Joined Cases C-46/93 and C-48/93, *Brasserie du Peucheur v. Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd* [1996] ECR I-1029.

[32] Ibid., paras 39, 52, 72, 95.

[33] *Factortame*, op.cit., paras 17-22.

[34] M. Ruffert, *Rights and Remedies in European Community Law: a Comparative View* (1997) *Common Market Law Review* 300, 335.

[35] See P. Oliver, *Enforcing Community Rights in the English* Courts, 50 *Modern Law Review* 883.

The interrelationship between substance, remedies and procedure is obvious in *Marshall II*.[36] Miss Marshall was dismissed from her employment on the ground that she had passed the retirement age applied by her employer to women. In *Marshall I*[37] the ECJ held that her dismissal constituted discrimination on grounds of sex contrary to the Equal Treatment Directive.[38] Under the Sex Discrimination Act 1975, where an Industrial Tribunal finds that a complaint of unlawful sex discrimination in relation to employment is well founded, it may order the defendant to pay the complainant compensation. However, the amount of the compensation may not exceed a specified limit. Article 6 of the Directive required Member States to take the necessary measures to enable all persons who consider themselves wronged by discrimination to pursue their claims by judicial process. The question was whether the Industrial Tribunal had power under national law to award interest in such circumstances above the specified limit. The ECJ emphasised the objectives of the Equal Treatment Directive. It held that the obligation arising under Article 6 "implies that the measures in question should be sufficiently effective to achieve the objective of the Directive"[39] and that "the objective is to arrive at real equality of opportunity."[40] Therefore, it found that a ceiling on damages and the lack of power to award interest were held to be incompatible with the Directive at issue. The ECJ, thus, established a rule that may be held equally as substantive, remedial and procedural.[41]

The fusion between substance, remedies and procedure is reminiscent of Roman law. Roman law very much like English law was case law. The main part of its substantial ideas was created not by a legislature as in modern Continental legal systems, but by the practice of

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[36] Case 271/91, *Marshall v. Southampton and South West Area Health Authority* [1993] ECR I-4367.

[37] Case 152/84, *Marshall v. Southampton and South West Area Health Authority* [1986] ECR 723.

[38] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39/40).

[39] *Marshall II*, op.cit., para 22.

[40] Op.cit., para 24.

[41] See C. Harlow, *A Common European Law of Remedies?* in the C. Kilpatrick, T. Novitz and P. Skidmore (eds) *The Future of Remedies in Europe* (2000) 70, 73.

giving opinions on individual cases.[42] Romans did not distinguish from the systematic point of view between private law and procedure. Private law and procedure represented an intrinsic entity in that certain fundamental concepts of Roman law, above all the central concept of *actio*,[43] together with the concept of *exceptio*,[44] were part of both these divisions of the law. Each of these concepts was regarded as an entity by the Romans, and the different meanings which we today attach to *actio* in the procedural and private law sense (as a "procedural act," "action" and "claim" or "cause of claim" respectively), represent later reflections which occurred to the Romans only in the shape of mere starting-points.[45]

The reason for the ECJ using flexibly the terms "rights," "remedies" and "procedures" should be the diversity of legal systems that co-exist in Europe. Another explanation is that the ECJ looks at the substance. All rules of national law, whether they are "substantive," "remedial" or "procedural", are capable of harming the realisation of Community rights. A consequence of the use of flexible language is that, in the absence of Community harmonisation, the exact classification of rights and remedies is left to Member States. For instance, so far as an effective remedy/procedure is provided the ECJ leaves to each national system to supply a name to this private right or to place it in the appropriate category under national law.[46]

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[42] See M. Käser, *Roman Private Law* (1968) *Butterworths*, p.14.

[43] The remedy which was at the disposal of the holder of a subjective right to realise and enforce such right, was the *actio*. Initially, it denoted the "legal act" by which he asserted his right in a lawsuit. However, from this act of instituting legal proceedings the meaning "to have an *actio* = to have a right which most probably can be enforced successfully in legal proceedings" is also derived. The meaning of *actio* vacillated somewhat between the procedural conception of bringing an action and the private law conception of claim (cause of action), that is, the (private) right which could be asserted in legal proceedings. See Käser, op.cit., at 30.

[44] *Exceptio* like *actio* was also originally an institution of the law of civil procedure, viz. an "exemption," in the interest of the defendant, to the requirements of a cause of action according to which he would have been condemned. This procedural defence gradually developed into a countervailing right at private law, the independent right to reject the plaintiff's demand. See Käser, op.cit., at 31.

[45] *Käser*, op.cit., p. 30-31.

[46] Case 13/68, *Salgoil v. Italy* [1968] ECR 453 (eng. ed.).

Member States, also, enjoy discretion as to the classification of remedies. In *Metallgesellschaft*[47] the question for remedies was whether Community law required that a remedy, either for restitutionary or compensatory damages, be available in national law. Difference in the tax treatment of certain corporate taxpayers was based on the place of residence of their parent companies, but the differential treatment resulted merely in the early payment of tax. The plaintiffs contended principally that their claim amounted to a restitutionary claim. They relied on the Court's well-established case law that Member States which have levied taxes in contravention of directly effective provisions of Community law, must repay them. If their claim could not be classified as a restitutionary claim, they asserted in the alternative, that they had a right to bring a compensatory claim for breach of Community law (violation of Article 43 of the Treaty).[48] The ECJ ruled that Article 43 required that these companies should have an effective legal remedy in order to obtain reimbursement of the financial loss which they had sustained and from which the UK authorities had benefited as a result of the Advance Corporation Tax paid by non qualifying subsidiaries. However, it ruled that it is not for the Court to assign a legal classification to the actions brought by the plaintiffs before the national court. It is for the plaintiffs to specify the nature and basis of their actions (whether they are actions for restitution or actions for compensation for damage), subject to the supervision of the national court.[49]

1.3 The notion of national procedural autonomy and its relation with the principle of effective judicial protection

In the absence of Community harmonization, Member States enjoy discretion to regulate also the procedures before national courts. From the very early case law, the ECJ ruled that national procedural rules could result in full or partial denial of a Community law claim. In

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[47] Joined Cases C-397/98 and C-410/98, *Metallgesellschaft Ltd and Others, Hoechst AG, Hoechst UK Ltd v. Commissioners of Inland Revenue, H.M. Attorney General* [2001] ECR I-1727.

[48] Ibid., paras 30-32.

[49] Ibid., para 81.

Rewe[50] and *Comet*,[51] traders had paid charges levied contrary to Community law and argued that their claims for restitution should not be blocked by the restrictive time limit laid down in national law. The question was whether national time limits for commencing actions could be set aside by domestic courts in cases involving Community law rights. The ECJ ruled: "...in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, it being understood that such rules cannot be less favourable than those relating to similar actions of a domestic nature ...The position would be different only if the conditions and time limits made it impossible in practice to exercise the rights which the national courts are obliged to protect."[52]

The above formula embodies the principle of "national procedural autonomy," [53] it is subject to the Community principles of equivalence and effectiveness or practical possibility and it has been settled case law since then.[54] The legal basis of national procedural autonomy is the principle of loyalty provided by Article 10.[55] The ECJ underlined that it is for the national courts,

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[50] Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

[51] Case 45/76, *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043.

[52] *Rewe*, op.cit., p. 1997; *Comet*, op.cit., p. 533.

[53] W. Van Gerven favours the term procedural competence instead of procedural autonomy. See *Of Rights, Remedies and Procedures* 37 (2000) *Common Market Law Review* 501, 502.

[54] See for the most recent confirmation, Case C-201/02, *The Queen* on the application of *Delena Wells* v. *Secretary of State for Transport, Local Government and the Regions* of 7 January 2004 (not yet published), para 67.

[55] This Article provides: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty." For the importance of Art. 10 in relation to the enforcement of rights in national courts see T. Tridimas, General Principles of EC Law, OUP 1999, at 277-278; See also J. Temple Lang, *The duties of co-operation of national authorities and courts under Art. 10 EC: two more reflections* (2001) *European Law Review* 84, 85-89.

in application of the principle of cooperation laid down in Article 10 of the EC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law.[56] This duty is equivalent with the duty of the ECJ to ensure that in the interpretation and application of the EC Treaty, the law is observed.[57] The importance of Article 10 as a legal basis is that it has passed on Member State courts the primary responsibility of enforcing the Treaty. The reference to the principle of co-operation underlines that the system of enforcement is under "dual vigilance." In the draft Constitution the duty of national courts to provide for rights of appeal is provided in the same Article I-28 that provides for the duty of Community courts to respect the law.[58]

In *van der Wal*[59] the Court of First Instance (CFI) derived national procedural autonomy from Article 6 of the ECHR. The facts have as follows: A lawyer, sought access to certain documentation prepared by the European Commission in response to questions posed by national courts concerning Notice 93/C39/05[60] dealing with the application of Articles 81 and 82 of the EC Treaty. The documentation comprised legal and economic analysis of information supplied by national courts regarding competition issues and the interpretation of Community law. The Commission refused access to the documents on the basis that they were concerned with current legal proceedings creating a requirement to protect the public interest, in conformity with specified grounds for refusal outlined in Decision 94/90.[61] It reasoned its decision as follows:[62] Public interest encompasses all cases in which the disclosure of the

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[56] See for example Case C-213/89, *Factortame*, op.cit., para 19.

[57] J. Temple Lang, *The principle of effective protection of Community law rights* in D. O'Keefe and A. Bavasso, *Judicial Review in European Union Law, Liber Amicorum Lord in Honour of Lord Slynn of Hadley* (Kluwer, 2000) 235, 236.

[58] Article 28, para 1, 2nd indent: "Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law."

[59] Joined Cases C-174/98 P and C-189/98 P, *Kingdom of the Netherlands v. Gerard van der Wal* [2000] ECR I-1.

[60] Notice 93/C39/05 on cooperation between national courts and the Commission in applying Art. 85 and 86 of the EC Treaty (OJ 1993 C 39/6).

[61] Decision 94/90/ECSC, Euratom on public access of Commisison documents (OJ 1994 L 46/53).

[62] *Van der Wal*, op.cit., paras 10-13.

documents in question is a matter for the national courts pursuant to their own rules of procedure. Within the framework of co-operation in applying Articles 81(1) and 82 of the EC Treaty the Commission's role is secondary. It is for the national court to decide, first, whether it is necessary to consult the Commission, secondly, what questions to put to it, and finally, what action should be taken in response to the answers obtained. It follows that it is solely for the national court to determine, on the basis of its procedural law, whether, at what time, and under what conditions, the Commission's reply may be disclosed to third parties.

That refusal was upheld by the CFI which found that the decision whether to grant public access to such documentation was retained by the national court on the basis of the principle of procedural autonomy, derived from Article 6 of the ECHR. The right of every person to a fair hearing by an independent tribunal means, *inter alia*, that both national and Community courts must be free to apply their own rules of procedure concerning the powers of the judge, the conduct of the proceedings in general and the confidentiality of the documents on the file in particular. The exception to the general principle of access to Commission documents based on the protection of the public interest is designed to ensure respect for that fundamental right. The scope of that exception is therefore not restricted solely to the protection of the interests of the parties in the context of specific court proceedings, but encompasses the procedural autonomy of national and Community courts.[63] Its scope, therefore, entitled the Commission to rely on that exception even when it is not itself party to the court proceedings which, in the particular case, justify the protection of the public interest.

On appeal, the ECJ held that access to Commission documents could not be refused purely on the basis that they were prepared in response to questions raised by national courts during proceedings, without any enquiry into whether disclosure infringed national law. Compliance with national procedural rules is safeguarded if the Commission ensures that disclosure of the documents does not constitute an infringement of national law. In the event of doubt, it must consult the national court and refuse access only if that court objects to disclosure of the documents. The right under Article 6 could not be construed as restricting the decision about disclosure of documents to the national court hearing the dispute. Often the information requested from the Commission by the national court on the application of Article 81 and Article 82, would be of a general nature and may not have been specifically prepared with particular

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[63] Case T-83/96, *Van der Wal v. Commission* [1998] ECR II-545, paras 47-49.

proceedings in mind or bear any relation to the information provided by the national court. Each piece of documentation must be assessed individually. The procedural rules relating to disclosure were to be applied in the usual way where the documentation had been prepared on the basis of specific data and the Commission was acting as a legal or economic adviser to the national court. It concluded that access to a whole category of documents could not be refused since the Decision 94/90 had to be strictly applied giving the public the widest possible access to Council and Commission documents. It was sound administration to allow general access to documentation with the proviso that the national court could object if disclosure infringed national rules.[64]

The case reveals that the procedural autonomy of Member States cannot be considered to derive from Article 6 ECHR, but it is subject to it. Also, national procedural autonomy and effective judicial protection are not conflicting but complementary notions. Procedural autonomy may promote the protection of Community rights and not only restrict it. As Jacobs A-G rightly suggested in *Van Schijndel*[65] procedural autonomy is compatible with the principle of primacy.[66] According to his Opinion, to expect more would unduly subvert established principles underlying the legal systems of the Member States; it could be regarded as infringing the principle of proportionality and in the broad sense the principle of subsidiarity. [67] A system based on subsidiarity such as that chosen by the ECJ is more sympathetic to concerns of sovereign necessity and convenience. Subsidiarity can be defended as "a federalist principle" in the general sense that it favours the building of a Union from the bottom upwards,

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[64] Op.cit., paras 24-30.

[65] Joined Cases C-430/93 and C-431/93, *Van Schijndel and Van Veen v. SPF* [1995] ECR I-4705, paras 27-30 of the Opinion."

[66] See also S. Prechal, *Community law in national courts: The lessons from Van Schinjdel, 35 Common Market Law Review* 681, 684. For a contrary view see J. Delicostopoulos, *Towards European Procedural Primacy in National Legal Systems* (2003) European Law Journal 599.

[67] See for a contrary view Mischo A-G in Case C-377/89, *Cotter and McDermott v. Minister for Social Welfare and Attorney General* [1991] ECR I-1155, para 34 of the Opinion: "In that connection I should point out first of all that a principle of national law may never be invoked by a Member State to prevent compliance with an obligation under Community law. That would run counter to the rule of the supremacy of Community law. Fulfilment of an obligation under Community law can thus be impeded only by the need to comply with another rule of Community law."

constructing tiers of authority without destroying the integrity of lower bodies.[68] In this context, it would be more accurate to argue that the *Rewe-Comet* formula provides not for national procedural autonomy but for a principle of "reciprocal autonomy," which is the essence of subsidiarity. This means that the ECJ has also an obligation not to intervene excessively and respect the rules of the Member States.

[68] M. Burgess, "*Federalism, Subsidiarity and the European Union*" in *The European Union at the Crosswards* edited by P. Furlong, Earlsgate Press (1995) at p. 32.

Chapter 2: The doctrine of direct effect

As we have already seen, remedies before national courts have been the natural development of the direct effect of Community law. This Chapter provides an analysis of the evolution of the direct effect doctrine. It explores potential limits to direct effect and the existence of a right-remedy gap in Community law. It concludes that direct effect is subject to limits which are imposed by national laws, as well as limits of a political nature.

2.1 The evolution of direct effect

The notion of rights is central to the reasoning of the Court in the field of remedies. The ECJ has never defined what constitutes a right under Community law. In the seminal *Van Gend en Loos* case, where the ECJ proclaimed the direct effect doctrine, it equated direct effect with the existence of private rights. It ruled: "The Treaty is more than an agreement which merely creates mutual obligations between contracting Member States... The conclusion to be drawn from this is that the Community constitutes a new legal order of international law... the subjects of which comprise not only Member States but also their nationals... Community law therefore not only imposes obligations on individuals but is also intended *to confer upon them rights* which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also *by reason of obligations* which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community... It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing *direct effects and creating rights* which national courts must protect." [69]

It is clear from the above extract that Community law may grant rights not *expressis verbis*.[70] Rights may derive from obligations imposed on individuals, Member States and the Community

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[69] Case 26/62, *Van Gend en Loos*, op.cit., p. 12.

[70] See S. Prechal, *Directives in European Community law: study of Directives and their enforcement in national courts*, op.cit., Chapter 8; J. Coppel, *Rights, Duties and the End of Marshall* (1994) 57 *Modern Law Review* 859; H. G. Schermers, *Indirect Obligations. Four questions in respect of EEC-obligations arising from rights or obligations of others* (1977) *Netherlands International Law Review* 260.

institutions, provided however that the obligation is clearly defined.[71] It also appears that the addressee of the relevant provision is irrelevant.[72] The obligation of one subject is correlative to the right of another. This reasoning is not new in legal philosophy. Hohfeld was the first one who characterised a right as a relation between two parties.[73] For every type of right he found a correlative term describing the position of the other party in the relation.[74] The questions for Community law are the following: first, whether every provision is liable to confer rights and second, to what extent individuals are able to control the performance of Community law duties. This issue is particularly acute in relation to Directives that are framework legislative instruments that leave wide discretion to Member States.[75] [76]

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[71] For the "classical" conditions of direct effect, see T.C. Hartley, *The Foundations of European Community Law* (1998) *Oxford University Press*, Ch. 7.

[72] This is subject to the prohibition of horizontal direct effect of Directives, see infra.

[73] See W. Hohfeld, *Fundamental Legal Conceptions*, ed. W. W. Cook (1919) *New Haven, Conn.*, 38ff. For an analysis of Community rights within a Hohfeldian analytical framework, see C. Hilson and T. Downes, *Making Sense of Rights: Community Rights in EC Law* (1999) 24 *European Law Review* 121.

[74] The duty-right relationship is also central in the benefit and will theories of rights. According to the founder of the benefit theory of rights every law imposes a duty, every duty is a duty to render a service or benefit to someone and that someone, as the beneficiary of the duty, possesses a right. Consequently there is no law whatsoever that does not confer on some person or other a right (J. Bentham, *Of Laws in General* ed. H. L. A. Hart (1970) *London: Athlone Press* at 220). On the contrary, according to the will theory of rights, a right is something at our disposal, something that gives us an option. The essential feature of a duty which yields a right is that the person to whom the duty is owed is able to control the perfomance of that duty (H. L. A. Hart, *Essays on Bentham: Studies on Jurisprudence and Political Theory* (1982) *Oxford:Clarendon Press* at 183).

[75] Article 249 EC Treaty provides: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

[76] On direct effect of Directives see P. Eleutheriades, *The Direct Effect of Directives: Conceptual Issues* (1996) 16 *Yearbook of European Law* 205; C. Timmermans, *Community Directives Revisited* (1997) 17 *Yearbook of European Law* 1; P. Craig, *Directives, Direct Effect, Indirect Effect and the Construction of National Legislation* (1997) 22 *European Law Review* 519; H. Schemers, *No Direct Effect of Directives* (1997) 3 *European Public Law* 527; K. Lackhoff and H. Nyssens, *Direct Effect of Directives in Triangular Situations* (1998) 23 *European Law Review* 397.

Some cases raise doubts as to the strict correlativity between rights and duties regarding Directives. For example in *Enichem Base*,[77] Article 3(2) of the Directive 75/442[78] obliged the Member States to inform the Commission of any measures taken to achieve the aim of the Directive. The applicants were companies of the Italian plastics industry claiming that a local ban of plastic bags was contrary to this provision, because the Commission had not been informed of it. The ECJ held that the said Article only concerned the relationship between the Commission and the Member States and that it did not create individual rights that could be affected if the Commission was not duly informed.[79] The same question was raised again after the amendment of the Directive 75/442.[80] The Directive 91/156 enhanced the transparency in the drafting of environmental measures by inflicting on the Commission the additional obligation to inform the other Member States and the committee provided for in Article 18 of the Directive of the draft measures that a Member State has notified. Nevertheless, the Court confirmed its reasoning in *Enichem Base*.[81]

Similarly, in *Commission v. Germany*[82] the ECJ indicated that Member State obligations are not always linked with individual rights. In this case the Commission brought an action against Germany under Article 169 EC (now 226) for not having complied with the obligations laid

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[77] Case C-380/87, *Enichem Base v. Commune di Cinisello Balsamo* [1989] ECR 2491. See also Case C-236/92, *Comitato di Coordinamento per la Difensa della Cava & others v. Regione Lombardia* [1994] ECR I-483.

[78] Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L194/39), now amended by Council Directive 91/156/EEC (OJ 1991 L 78/31).

[79] *Enichem*, op.cit., para 22 and 23: "Neither the wording nor the purposes of the provision (Article 3(2)) in question provides any support for the view that failure by the Member States to observe their obligation to give prior notice in itself renders unlawful the rules thus adopted" and that it "concerns relations between the Member States and the Commission and does not give rise to any right for individuals which might be infringed by a Member State's breach of its obligation to inform the Commission in advance of draft rules."

[80] Case C-159/00, *Sapod Audic* [2002] ECR I-5031.

[81] Op.cit., see paras 60-63.

[82] Case C-431/92, *Commission v. Germany* [1995] ECR I-218. See on this case P. Kunzlik, *Environmental Impact Assessment: Bund Naturschutz, Grosskrotzenburg and the Commission's Retreat on the "Pipe-line" Point* (1996) *European Environmental Law Review* 87.

down in Articles 2, 3 and 8 of Directive 85/337/EEC[83] imposing certain conditions relating to the carrying out of an environmental assessment. The ECJ, when ruling on several questions of admissibility raised by Germany, distinguished the question of obligation flowing directly from the Directive to assess the environmental impact of the project concerned from that of direct effect. It held that the question of direct effect of a provision should be considered independently of the possibility for individuals to rely on the provisions of the unimplemented Directive as against the State concerned.[84] The case has led to the assumption that the ECJ has created "objective direct effect" as a new form of direct effect which is taken to mean the binding effect of Directives upon administrative authorities, whereas the ordinary "subjective" direct effect should remain conditional upon the existence of an individual right.[85]

Following *Van Gend* in most cases direct effect has been defined as a right "to invoke" or "to rely on" a Community law provision.[86] Direct effect has been used synonymously with the right to judicial review which is perceived by most as a remedy.[87] There is no need to prove a

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[83] Directive 85/337/EEC of the Council of 27 June 1985, on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40 (Environmental Impact Assessment Directive).

[84] In para 26 the ECJ ruled: "The question which arises is thus whether the directive is to be construed as imposing that obligation. That question is quite separate from the question whether individuals may rely as against the State on provisions of an unimplemented directive which are unconditional and sufficiently clear and precise, a right which has been recognized by the ECJ."

[85] See Judge Edward, *Direct Effect, the Separation of Powers and the Judicial Enforcement of Obligations* in *Scritti in onore di Giuseppe Federico Mancini, II, Diritto dell'Unione Europea* (1998) 423, 442: "Direct effect has lost its inseparable link with the protection of individual rights, with the result that it is possible to distinguish between objective and subjective direct effect."

[86] See for example C-8/81, *Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53, para 25: "Thus, wherever the provisions of a Directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the Directive or insofar as the provisions define rights which individuals are able to assert against the State."

[87] D. Chalmers, *Judicial Preferences and the Community Legal Order* (1998) 60 *Modern Law Review* 164, 188 (footnote 116).

subjective right to review the compatibility of national legislation with Community law.[88] The shift of emphasis in the function of direct effect is clear from a range of cases concerning the reviewability of Member State discretion with the Environmental Impact Assessment Directive. In *Kraajeveld*,[89] *WWF*[90] and especially in *Linster*[91] it is evident that Directives can be relied upon to review national discretion even when they do not confer individual rights.

Linster arose by way of preliminary reference made by the *Tribunal d'Arondissement of Luxemburg*. The Luxembourg authorities had commenced proceedings to acquire compulsorily land belonging to the respondents, the acquisition being for the purposes of constructing a new motorway link to the German road network. The respondents argued that the measures approving the construction of the motorway and authorising the compulsory purchase of land had been adopted in breach of the Environmental Impact Assessment Directive. The Directive had not been fully transposed into Luxembourg law within the prescribed time limit and the Tribunal was uncertain whether it could verify compliance with its requirements irrespective of whether the Directive was directly effective or whether a finding of direct effect was a condition precedent to its application. The Luxembourg government argued that a national court could apply a Directive only if it was directly effective.[92] The respondents, by contrast, considered that the principle of primacy required a national court to display national legislation contrary to a Directive, even where it lacks direct effect. They argued that direct effect is required only in order for a Directive to have an effect by way of substitution for an existing legal norm.[93]

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[88] See C. Timmermans, *Directives: Their effect within the national legal systems* (1979) 16 *Common Market Law Review* 533, 538; M. Ruffert, op.cit., (1994) 37 *Common Market Law Review* 307, 320 with further references to German literature. See also S. Prechal, op.cit. at 274, 275.

[89] Case C-72/95, *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403.

[90] Case C-435/97, *World Wildlife Fund (WWF) and Others v. Autonome Provinz Bozen and Others* [1999] ECR I-5613.

[91] Case 287/98, *Grand Duchy of Luxemburg v. Berthe Linster, Aloyse Linster and Yvonne Linster* [2000] ECR I-6917.

[92] *Linster*, op. cit., para 26.

[93] *Linster*, op. cit., para 28.

The ECJ held that it would be incompatible with the binding effect conferred on Directives to exclude any possibility of those concerned to rely on obligations imposed by them. It then continued: "Where the Community authorities have, by Directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be diminished if individuals were prevented from taking it into consideration as a matter of Community law in determining whether the national legislature, in exercising its choice as to the form and methods of implementation, had kept within the limits of its discretion set by the Directive."[94] Turning specifically on Directive 85/337, the ECJ pointed out that Article 5 of the Directive requires the Member States to adopt the necessary measures to ensure that the developer supplies information, the minimum items of which are specified in Article 5(2). Under Article 6(2), they must ensure that there is public access to the request for consent to carry out the project and to the information supplied by the developer, and that members of the public have the opportunity to express an opinion before the project is initiated.[95] It is true that Article 5(1) of the Directive allows the Member States some discretion in implementing the Community provision at national level. The ECJ ruled, however, that the discretion which a Member State may exercise when transposing that provision into national law, does not preclude judicial review of the question whether the national authorities have exceeded it.[96]

In *Marks and Spencer*[97] the ECJ underlined that the right of individuals to rely on the Directives is independent from the process of implementation. In this case the UK had fully transposed the sixth taxation Directive.[98] The referring Court proceeded on the premise that if a Member State has correctly implemented the provisions of a Directive in domestic law, individuals are deprived of the possibility of relying before the courts of that Member State on the rights which they may derive from those provisions. The ECJ rejected that argument. It ruled that the adoption of national measures correctly implementing a Directive does not exhaust the effects

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[94] Ibid., para 32.

[95] Ibid., para 35.

[96] Ibid., para 36-38.

[97] Case C-62/00, *Marks & Spencer plc v. Commissioners of Customs and Excise* [2002] ECR I-6325.

[98] Sixth Council Directive 77/388/EC on the harmonisation of the laws of the Member States relating to turnover taxes-Common system of value added tax: uniform basis of assessment (OJ 1977 L 145/1).

of the Directive. Member States remain bound actually to ensure full application of the Directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts against the State, not only if the Directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the Directive are not being applied in such a way as to achieve the result sought by it.[99]

The cases prove that individuals are granted extensive power to rely on Directives and enforce Community law, even if it does not provide for subjective rights but for Member State obligations.[100] Although the ECJ does not expressly make a contrast between objective law and subjective rights as distinctly as the modern Continental theory does, A-G Lèger and A-G Saggio made an express distinction between the *effect d'exclusion* and the *effect de substitution* of Directives.[101] One could possibly argue that the inapplication of national rules contravening a Directive is assimilated to an "*a contrario*" application of the Directive itself. However, the *effect of exclusion* and the *effect of substitution* are not the two sides of the same coin. The position that the two do not coincide is obvious in *Brinkmann*.[102]

The case concerned Directive 92/80 on the approximation of taxes on manufactured tobacco other than cigarettes.[103] Article 3(1) of the Directive allowed Member States certain discretion by leaving them to choose between three different tax formulae, an *ad valorem* formula, a specific formula by quantity, and a mixed formula. The last formula combined an *ad valorem*

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[99] Op.cit., para 27.

[100] Direct effect, as used in Community law, brings in mind how Romans used the term *ius*. This was employed in more than one sense by the Romans. Sometimes it denoted, in the objective sense, the rules of law and the legal institutions, that is, the legal order and its component parts, and sometimes, in the subjective sense, it meant the right, that is the power conferred on the individual by the legal order to act in a certain legal situation. Somewhat ambiguously, however, the Romans also used the word *ius* to denote "legal position" or "legal situation." See M. Käser, *Roman Private Law* (1968) Butterworths at 21.

[101] A-G Lèger in *Linster*, op.cit, footnotes 43-64 and accompanying text and A-G Saggio in Joined Cases C-240/98 to C-244/98, *Océano Groupo Editorial SA and Salvat Editores SA v. Rocio Murciano Quintero and Others* [2000] ECR I-4941, paras 34 *et seq*.

[102] Case C-365/98, *Brinkmann Tabakfabriken GmbH v. Haupzollamt Bielefeld* [2000] ECR 4619.

[103] OJ [1992] L 316/10.

element and a specific element. Germany had chosen a tax formula that was calculated *ad valorem* without being able to be below a minimum amount. This mixed duty was clearly incompatible with the Directive. Brinkmann contended that Article 3(1) of the Directive was unconditional and sufficiently precise since it did not refer to any minimum levy in the *ad valorem* tax formula. It submitted, therefore, that the provision conferred on taxable persons the right to rely on it in order to avoid the application to them solely of the minimum levy. Since the German legislature had chosen a tax formula which was not laid down in the Directive, taxable persons could rely on that provision in order to avoid the application to them of the tax formula which went beyond the discretion left to the national legislature.[104]

The ECJ held that the provision could not be relied before a national court in order to avoid the application to them solely of the minimum specific duty and thus to have an *ad valorem* tax levied. It based its reasoning on the following grounds. First, it was not the minimum specific duty taken separately but the whole tax formula chosen by the German legislature that went beyond the discretion conferred by Article 39(1) of the Directive.[105] Second, to consider that taxable persons could rely on Article 3(1) of the Directive in order to avoid solely the application of the minimum specific duty would presuppose that Article 3(1) of the Directive gave rise to the right for taxable persons to be taxed according to the *ad valorem* formula.[106] However, the *ad valorem* formula was only one of the options provided by the Directive.[107] The substitution effect could be achieved only through the obligation of consistent interpretation of national law.[108]

Therefore, the notion of direct effect of Directives is mostly equated with an *effect of exclusion* of national legislation.[109] By leaving to Member States the power to legislate specific rights for

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[104] *Brinkmann*, op.cit., para 34.

[105] *Brinkmann*, op.cit., para 36.

[106] *Brinkmann*, op.cit., para 37.

[107] *Brinkmann*, op.cit., para 38.

[108] *Brinkmann*, op.cit., para 40.

[109] See also P. Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law* (1983) 8 *European Law Review* 155. See S. Prechal, op.cit. at 276. See of the same author, *Does direct effect still matter?*

their citizens the Community legislature favours more the negative integration as less intrusive into Member States sovereignty. The ECJ cannot create these rights. As the Court noticed in *Brinkmann*, it cannot take the place of the national legislature.[110] Therefore, while a provision may be "sufficiently operational in itself"[111] as a gauge for judicial review, if it is not precise and unconditional enough, it cannot substitute national legislation. Directives can be relied upon always as a shield, but they can be relied upon as a sword only under the strict "classical" conditions.

The right to exclude incompatible national legislation derives from the principle of primacy. It is a right to invoke the supremacy of Community law over national law. When the Community norm limits itself to exclude those inconsistent national provisions, individuals are better off not because of the direct application of the Directive to the matter, but because of the disappearance of the obligations that the excluded national rules imposed on them.[112] It is more connected with the obligations of Member States to transpose and conform fully to the Directives. It is only when the Directive substitutes inconsistent national legislation that individuals are granted a right on the very basis of the Directive.[113]

(2000) 37 *Common Market Law Review* 1047, where she argues that direct effect should fall as a concept altogether: "Direct effect is the obligation of a court or another authority to apply the relevant provision of Community law, either as a norm which governs the case or as a standard for legal review." See also B. de Witte, *Direct Effect, Supremacy and the Nature of Legal Order* in *The Evolution of EU Law* edited by P. Craig and G. de Burca (2000) *Oxford University Press* 177.

[110] *Brinkmann*, op.cit., para 38.

[111] This is the often-quoted expression used by Van Gerven AG in Case C-128/92, *Banks v. British Coal* [1994] ECR I-1209, para 27 of the Opinion.

[112] See, further, M. Dougan, *The "Disguised" Vertical Direct Effect of Directives* (2000) *Cambridge Law Journal* 586.

[113] See P. Regueiro, *Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Developments of the Case law of "Horizontal" Direct Effect of Directives* (2002) Harvard Jean Monnet paper available at: http:/www.jeanmonnetprogram.org/.

2.2 Limits to the right to "exclusion"

The above analysis highlights that State obligations, in principle, are enforced through the right to exclusion. This possibility, however, is not without caveat. The ECJ has acknowledged circumstances that may limit the right to exclusion. In *Lemmens*[114] the defendant was charged with a drink-driving offence. He sought to rely in his defence on the fact that the national technical regulation on breathanalyser apparatus had not been notified to the Commission as required by the technical standards Directive.[115] Fenelly A-G distinguished between interests that arise by virtue of Community law and interests that arise by virtue of national law. He argued that only the applicant whose interests arise from Community law and aim at the proper application of Community law deserve protection, because only this kind of interest is included in the useful effect of the provision in question. [116]

The ECJ did not make a distinction between rights and interests or various kinds of interests. It emphasised the purpose of the notification procedure, which was the effective community control of free movement of goods, and ruled that Mr Lemmens could not rely on the Directive, because his legal position not concerning the free movement was outside the scope of the Directive. *Lemmens* poses an obstacle to individuals that wish to abuse Community law,[117] when they do not enjoy a legal interest. The condition of "interest" is faced as an issue of substance rather than admissibility. It is notable that Article 230 EC, also, requires that the

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[114] Case C-226/97, *Criminal proceedings against Johannes Martinus Lemmens* [1998] ECR I-3711.

[115] Council Directive 83/189 of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1989 L 43/56).

[116] See paras 22-33 of the Opinion.

[117] See L. Neville Brown, *Is there a General Principle of Abuse of Rights in European Community Law?* in Institutional Dynamics of European Integration, *Essays in Honour of Henry G. Schermers*, Vol II, Dordrecht/Boston/London 1994, 511; Karayannis, *L'abus des droits découlant de l'ordre juridique communautaire* (1999) *Cahiers de droit européen* 521; Soufleros I., *The general principle of prohibition of abuse of rights and the conditions of its application* (Η γενική αρχή της απαγόρευσης κατάχρησης δικαιώματος και οι προϋποθέσεις εφαρμογής της προς απόκρουση δικαιωμάτων που απορρέουν από το κοινοτικό δίκαιο) (1996) 12 *Δίκαιο των Εταιρειών και Επιχειρήσεων* 1133.

applicant must have an interest as adversely affected, which as a condition, it seems separate from direct and individual concern.[118]

Another example is provided by a series of Greek cases concerning the question whether a national principle of abuse of rights may restrict the protection of Community rights. In *Pafitis*[119] the provisions of the Second Company Directive[120] were raised by the old shareholders of the bank who considered themselves damaged by an administrative measure of a capital increase in the absence of any resolution of a general meeting. The ECJ stressed the objective of the Directive which was to ensure that members and third parties are safeguarded in the operations for setting up companies and increasing and reducing their capital. It found that the Directive precluded national legislation under which the capital of a bank constituted in the form of a public limited company and which was in a financial difficulty could be increased by an administrative measure, without a resolution of a general meeting.[121]

In *Kefalas*[122] and *Diamantis*[123] the Greek courts asked specifically whether, given the circumstances in the main action, Article 281 of the Greek Civil Code which penalises the abuse of a right, can validly be relied on in relation to an action for annulment of company measures brought by a shareholder for breach of a right conferred by the Directive. The ECJ decided that national courts are not precluded from applying a provision of national law which

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[118] See A. Arnull, *Private applicants and the action for annulment since Codorniou* (2001) *Common Market Law Review* 7.

[119] C-441/93, *Panagis Pafitis v. Trapeza Kentrikis Ellados AE* [1996] ECR I-1347.

[120] Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1976 L26/1).

[121] *Pafitis*, op.cit., paras 39-40.

[122] Case C-367/96, *Kefalas and Others v. Greek State and Others* [1998] ECR I-2843. See Triantafyllou, *Abuse of rights v. primacy* (1999) *Common Market Law Review* 157.

[123] Case C-373/97, *Dionisios Diamantis v. Elliniko Dimosio (Greek State), Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE)* [2000] ECR 1705. See D. Anagnostopoulou, *Do Francovich and the principle of proportionality weaken Simmenthal (II) and confirm abuse of rights?* (2001) *Common Market Law Review* 767.

enables them to determine whether a right deriving from Community law is being abused. However, the ECJ stressed that the application of a national rule such as Article 281 of the Civil Code must not detract from the full effect and uniform application of Community law in the Member States.[124] In particular, the ECJ held that it is not open to national courts, when assessing the exercise of a right arising from a provision of Community law, to alter the scope of that provision or to compromise the objectives pursued by it.[125]

The ECJ ruled that the Community law could not be relied on for abusive or fraudulent ends.[126] That would be the case if a shareholder, in reliance on Article 25(1) of the Second Directive, brought an action for the purpose of deriving, to the detriment of the company, an improper advantage, manifestly contrary to the objective of that provision.[127] In that connection, it was clear from the above judgment in *Pafitis* that a shareholder relying on Article 25(1) of the Second Directive could not be deemed to be abusing his rights merely because he was a minority shareholder of a company subject to reorganisation measures, or had benefited from the reorganisation of the company, or had not exercised his right of pre-emption.[128] Similarly, the fact that the plaintiff in the main proceedings asked that Plastika Kavalas be made subject to the scheme under Law No. 1386/1983 did not indicate an abuse of rights.[129] It observed that the fact of having instituted proceedings, even after a certain lapse of time, within the limitation period provided for under national law for such actions could not, as such, be described as sufficient telling evidence of abuse of rights.[130] The above cases show that individuals enjoy the right to rely on a Community right or to enforce a Member State obligation, unless they do not abuse Community law in order to seek fraudulent ends.

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[124] *Diamantis*, op.cit, para 34; *Pafitis*, op.cit., para 68; *Kefalas*, op.cit, para 22.

[125] *Kefalas*, op.cit, para 22; See also *Diamantis*, op.cit., para 43.

[126] *Kefalas*, op.cit., para 20; *Diamantis*, op.cit., para 33.

[127] *Kefalas*, op.cit., para 28; *Diamantis*., op.cit., para 33.

[128] *Pafitis*, op.cit., para 70.

[129] *Kefalas*, op.cit., para 29; *Diamantis*, op.cit., para 36.

[130] *Diamantis*, op.cit., para 39.

2.3 The right-remedy gap in Community law

This section examines cases where Community law does not provide a remedy for the enforcement of Community rights and obligations. The first example is provided by the prohibition of horizontal direct effect of Directives and the second by the denial of direct effect to the international agreements GATT[131] and WTO.[132]

2.3.1 The prohibition of horizontal direct effect of Directives

The prohibition of horizontal direct effect of Directives[133] was established in *Marshall I*.[134] It is recalled that the case concerned the dismissal of Marshall by a State Health Authority contrary to the Equal Treatment Directive. The ECJ employed the following reasoning: "..according to Article 189 of the EEC Treaty the binding nature of a Directive which constitutes the basis for the possibility of relying on the Directive before a national court, exists only in relation 'to each Member State to which it is addressed.' It follows that a Directive may not of itself impose obligations on an individual and that a provision of a Directive may not be relied upon as such against such a person."[135] The prohibition of horizontal direct effect of Directives was confirmed in *Faccini Dori*,[136] where the ECJ put emphasis on the alternative remedy of Member State liability in damages.

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[131] General Agreement on Tariffs and Trade (1947).

[132] World Trade Organisation (1994), formed as a successor of GATT.

[133] See, indicatively, on horizontal direct effect J. Coppel, *Horizontal Direct Effect of Directives* (1997) 28 *Industrial Law Journal* 69; R. Mastroianni, *On the Distinction between Vertical and Horizontal Direct Effects of Community Directives: What Role for the Principle of Equality?* (1999) 5 *European Public Law* 417. T. Tridimas, *Black, White and Shades of Grey: The Horizontality of Directives Revisited* (2002) 21 *Yearbook of European Law* 327.

[134] Case C-152/84, *Marshall I* [1986] op.cit, para 48.

[135] *Marshall*, op.cit., paras 48-49. This reasoning is reminiscent of the Hohfeldian duty-right correlativity found also in *Van Gend*, op.cit.

[136] Case C-91/92, *Faccini Dori v. Recreb* [1994] ECR I-3325. See T. Tridimas, *Horizontal Effect of Directives: A Missed Opportunity?* (1994) 19 *European Law Review* 621. The prohibition of horizontal direct effect of Directives has been reiterated in subsequent cases: Case C-472/93, *Luigi Spano and others v. Fiat Geotech SpA and Fiat*

In a Community governed by the rule of law the idea that the outcome of litigation is determined by the identity of the defendant is at least puzzling.[137] The injustice created is somewhat mitigated by three exceptions to the prohibition of horizontal direct effect: the broad definition of the State,[138] the doctrine of sympathetic interpretation[139] and the doctrine of "incidental" horizontal direct effect.[140]

In *Foster* the ECJ held that "a body, whatever its legal form which has been made responsible pursuant to a measure adopted by the State for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals, is one against which an individual can enforce a directive."[141] *Foster* offers a non-exhaustive definition of what is considered to be an emanation of the State for the purposes of direct effect. Decentralised authorities such as municipalities,[142] constitutionally independent authorities that are responsible for the maintenance of the public order,[143] public authorities that provide health services[144] and privatised industries[145] are all included in the concept of State.

Hitachi Excavators SpA [1995] ECR I-4321; Case C-192/94, *El Corte Inglés v. Blázquez Rivero* [1996] ECR I-1281; Case C-355/96, *Silhouette International Schmied v. Hartlauer Handelsgesellschaft* [1998] ECR I-4799; Case C-97/96, *Daihatsu Deutschland* [1997] ECR I-6843; Case C-185/97, *Coote v. Granada Hospitality Ltd* [1998] ECR I-5199. For views in favour of horizontal direct effect see Lenz A-G in *Dori*, op.cit. and Jacobs A-G in Case C-316/93, *Vaneetveld v. SA Le Foyer* [1994] ECR I-763.

[137] C. Boch, *The Iroquis at the Kirchberg; or some naïve remarks on the status and relevance of direct effect* (Harvard Jean Monnet Working Paper 6/99) available at: http:/www.jeanmonnetprogram.org/.

[138] Case C-188/89, *Foster and Others v. British Gas plc* [1990] ECR I-3313.

[139] See Case 14/83, *von Colson and Kamman v. Land Nordhein-Westfalen* [1984] ECR 1891.

[140] A. Arnull, *The Incidental Effect of Directives* (1999) 24 *European Law Review* 1.

[141] *Foster*, op.cit., para 20. See E. Szyszczac, *Foster v. British Gas* (1990) 27 *Common Market Law Review* 859, P. Craig, *Directives: Direct Effect, Indirect Effect and the Construction of National Legislation*, op.cit., 528.

[142] Case C-103/88, *Fratelli Costanzo SpA v. Commune di Milano* [1989] ECR I-1839.

[143] *Johnston v. Chief Constable of the RUC*, op.cit.

[144] *Marshall II*, op.cit.

Marleasing[146] enshrines the principle that non-implemented Directives can be relied on to inform the interpretation of national law in a case between individuals. It came before the ECJ by way of a reference for a preliminary ruling by a Spanish court. In the main action, the plaintiff was seeking a declaration that the contract by which the defendant company was established was void, as having being created for the sole purpose of evading creditors, including Marleasing. The plaintiff relied on provisions of the Spanish Civil Code on the validity of contracts, according to which contracts lacking cause or whose cause was unlawful had no legal effect. In its defence, the defendant invoked a provision of the Directive 68/151,[147] Article 11 of which contained an exhaustive list of the circumstances in which the nullity of a company could be declared. The list did not include lack of lawful cause which was the main ground relied on by the plaintiff. At the material time, however, Spain had not implemented the Directive, although it should have done so. The ECJ found that the national court was called upon to interpret national legislation in the light of the Directive, as far as possible, whether the provisions in question were adopted before or after the Directive. It is not clear from the case, however, if Directives can impose obligations on individuals, if not transposed.

In *Arcaro*[148] the ECJ put a limit to the effect that the duty of consistent interpretation may have on individuals. The question was the compatibility of the Italian legislation under which the defendant faced criminal charges for having discharged dangerous substances into the aquatic

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[145] *Foster v. British Gas*, op.cit.

[146] *Marleasing*, op.cit. See also Case C-215/97, *Barbara Bellone v. Yokohama SpA* [1998] ECR I-2191 and Case C-456/98, *Centrosteel Srl v. Adipol GmbH* [2000] ECR I-6007. One concludes from the latter case that "benevolent" interpretation of national legislation may result in introducing a civil penalty such as nullity in national law (contrary to what Van Gerven A-G argued in *Marleasing*, op.cit. para 8 of the Opinion).

[147] First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ 1968 L 65/8).

[148] Case C-168/95, *Criminal Proceedings Against Luciano Arcaro* [1996] ECR I-4705.

environment with Directives 76/464 and 83/513[149] that the legislation was designed to implement. It is notable that the application of the Directives would worsen the legal position of the defendant. The ECJ, after confirming the prohibition of horizontal direct effect, decided that the limit to the interpretative obligation is reached "where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions."[150] The requirement in *Arcaro* that interpretation should not lead to the imposition on an individual of an obligation laid down by a directive which has not been transposed could be explained by the criminal context of the case, where the need for legal certainty is particularly important. It is not resolved yet whether it also means that States cannot rely on Directives in general in order to impose obligations on individuals.

Reliance on the right to exclusion may affect adversely the legal position of private individuals.[151] This is illustrated in *Smith & Nephew*.[152] It involved the judicial review of a decision of the Medicines Control Agency granting a marketing authorization to a company in respect of a proprietary medicinal product. The judicial review was initiated by a competing undertaking which held an original marketing authorisation for a proprietary medicinal product bearing the same name, alleging that the authorisation was issued contrary to Directive

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[149] Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ L 24/55); Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges (OJ L 291/1).

[150] *Arcaro*, op.cit., para 42. For various possible interpretations of this case, see P. Craig, *Directives: Direct Effect, Indirect Effect and the Construction of National Legislation*, op.cit.

[151] For a case from English law see *Regina v. Durham County Council and Others, ex parte Huddleston* [2000] 1 WLR 1485.

[152] Case C-201/94, *The Queen v. The Medicines Control Agency, ex parte Smith & Nephew* [1996] ECR I-5819.

65/65/EEC.[153] Similarly, in *Costanzo*[154] an unsuccessful tenderer relied on Directive 71/305/EEC[155] to annul a decision of the Municipal Executive Board eliminating the tender submitted by Costanzo from a tendering procedure for a public works contract and awarding the contract in question to another company. The ECJ found that both Directives could be relied upon, although with the annulment of the marketing authorisation and the elimination of the tendering procedure respectively, the rights of the competing undertaking would be forfeited.

Cases that raise the question of incompatibility of national legislation with Directive 83/189/EEC on technical standards[156] also suggest that individuals may rely on a Directive against a private actor. Under Article 8 of the Directive technical regulations should be notified to the Commission prior to its introduction.[157] The objective of the notification obligation is to afford

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[153] Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ 1986 L 229/63).

[154] *Fratelli Costanzo*, op.cit.

[155] Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682).

[156] Directive 83/189/EEC of 28 March 1983 (OJ 1983 L 109/8), as amended by Directive 88/182/EEC (OJ 1988 L 81/75).

[157] Article 8(1) to (3) of Directive 83/189 provide:

1. Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft. ...

The Commission shall immediately notify the other Member States of the draft and all documents which have been forwarded to it; it may also refer this draft, for an opinion, to the Committee referred to in Article 5 and, where appropriate, to the committee responsible for the field in question. ...

2. The Commission and the Member States may make comments to the Member State which has forwarded a draft technical regulation; that Member State shall take such comments into account as far as possible in the subsequent preparation of the technical regulation.

the Commission and other Member States an opportunity to examine whether the draft regulations in question create obstacles to trade and to propose amendments of the national measures envisaged. In *CIA Security*[158] the ECJ found that non-notified national technical regulations could no longer be enforced against individuals. Consequently, selling security appliances that were not in conformity with such a regulation was not to be regarded as unlawful behaviour either. In *CIA Security* the ECJ effectively imposed a duty on private parties to monitor the Official Journal.[159]

CIA Security was confirmed in the landmark case *Unilever*.[160] The case involved a contractual dispute and more particularly the refusal by Central Food to pay for a consignment of olive oil supplied by Unilever. The case concerned the same Directive as in *CIA Security*, but the Member State at issue breached not the obligation of notification under Article 8, but the obligation of postponement of adoption under Article 9, which serves the same objective as the obligation of notification. The ECJ did not distinguish disputes concerning contractual rights and obligations from disputes relating to unfair competition. Contrary to the Opinion of Jacobs AG who thought that the extension of *CIA Security* in cases of contractual relationships would entail impermissible legal uncertainty,[161] the ECJ ruled that the labelling requirements adopted in breach of the obligation of postponement of adoption were inapplicable in relations between individuals. Therefore, Central Food was entitled to deny payment.

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3. Member States shall communicate the definitive text of a technical regulation to the Commission without delay.

Article 9(1) of Directive 83/189 provides: Member States shall postpone the adoption of a draft technical regulation for three months from the date of receipt by the Commission of the communication referred to in Article 8(1).

[158] Case C-194/94, *CIA Security International SA v. Signalson SA and Securitel SPRL* [1996] ECR I-2201. For a thorough analysis, see S. Weatherill, *A Case Study in Judicial Activism in the 1990's: The Status before National Courts of Measures Wrongfully un-notified to the Commission* in D. O'Keefe and A. Bavasso, *Judicial Review in European Union Law, Liber Amicorum Lord in Honour of Lord Slynn of Hadley* (Kluwer, 2000), 481-503. See similar Case C-77/97, *Unilever v. Smithkline Beecham* [1999] ECR I-431.

[159] See A. Ward, *Judicial Review and the Rights of Private Parties in EC law*, op.cit., p. 194.

[160] Case C-443/98, *Unilever Italia SpA v. Central Food SpA* [2000] ECR 7535. See annotation of M. Dougan, (2001) *Common Market Law Review* 1503.

[161] *Unilever*, op.cit., para 100 of the Opinion. As A-G Jacobs argues, the solution reached in *Unilever* increases legal uncertainty as to the remedies that should be made available for breach of contract.

Unilever brings a breakthrough to contractual relationships. Although the ECJ distinguished *Unilever* from *Dori*,[162] it is difficult to reconcile them. To say that a failure to comply with the obligation to notify renders the relevant domestic regulations unenforceable before the national courts is really the same as saying that Directive 83/189 is capable of having direct effect, and does not explain why it should be a qualitatively different sort of direct effect from that recognised in *Marshall* and *Dori*.[163] *Unilever* is not formally incompatible with the denial of horizontal direct effect to Directives, but it seriously weakens the validity of the distinction between horizontal direct effect and incidental direct effect. It is hard to find reasons of principle or of policy that provide support for the Court's willingness to allow the Directive to exert such a direct and decisive impact on a private contractual dispute while it persists in denying altogether "classic" horizontal direct effect.[164]

The distinction that the ECJ draws between the "exclusion" and "substitution" effect of Directives, is offered as a plausible criterion that explains the controvesial case law on incidental horizontal direct effect.[165] In *Unilever* the applicant sought to exclude, while in *Dori* sought to substitute incompatible national legislation. This distinction may be justified by the doctrine of separation of powers. As the ECJ ruled in *Dori*[166] the effect of extending its case law on the vertical direct effect of Directives "to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations."[167]

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[162] Op.cit., para 50.

[163] M. Dougan, *The "Disguised" Vertical Direct Effect of Directives* (2000) *Cambridge Law Journal* 586, 600.

[164] S. Weatherill, *Breach of directives and breach of contract* (2001) 26 *European Law Review* 177, 185.

[165] See M. Lenz, D. Sif Tynes and L. Young, *Horizontal What? Back to the Basics* (2000) 25 *European Law Review* 509.

[166] The case concerned the right of cancellation in the case of contracts negotiated away from business premises under Articles 1(1) and (2) and 5 of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372/31).

[167] *Dori*, op.cit., para 24.

However, from a judicial protection point of view the result is unfair. Central Food was allowed to rely on a Directive that does not entail any private rights but only procedural obligations, while Dori was not allowed to pursue her substantive rights laid down expressly in the Directive.[168] The subjective right, however, seems to have been balanced against considerations of policy that are not expressly stated in the case law.

Unilever may create huge uncertainties for market life.[169] Jacobs A-G underlined the difficulties that may arise as a result of *Unilever* in *Sapod v. Eco-Emballages*.[170] Sapod was a French company that marketed poultry products. French law obliged producers and importers of household goods to contribute to the disposal and recovery of package waste. Under those provisions, producers and importers should agree with an approved body to arrange for disposal either by establishing a deposit system or by organising collection points specifically for that person. In order to comply with the provisions of the French law Sapod entered a contract with Eco-Emballages, under which the latter granted the former a non-exlusive licence to affix to its products a logo. In return for the licence to use that logo, Sapod agreed to pay a fee. After some time Sapod ceased to pay the fee and Eco-Emballages instituted proseedings against it. Before the *Cour de Cassation* Sapod argued that the French law constituted a non-notified technical regulation that could not be enforced against private parties.

According to Jacobs AG the case illustrated that *Unilever* is difficult to apply in practice: "... a ruling in the present case to the effect that the French State violated its obligations under the Directive might affect the validity and enforceability in national courts of several thousand contracts which have been concluded, in reliance upon the rules laid down in the French law, between Eco–Emballages and producers of household goods since the Decree entered into force nearly 10 years ago."[171] The ECJ did not renounce *Unilever*, but entrusted its application to Member States courts. It ruled that in the event that the national provision in question were to be interpreted as requiring a mark or label to be applied, an individual may invoke the failure

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[168] *Unilever*, op.cit., para 51.

[169] S. Weatherill, *Breach of directives and breach of contract*, op.cit., at 181, 182.

[170] Case C-159/00, *Sapod v. Eco-Emballages* [2002] ECR I-5031.

[171] Op.cit., para 62 of the Opinion.

to make notification of that national provision in accordance with Article 8 of that Directive. It added, however, that the question of the conclusions to be drawn in the main proceedings from the inapplicability of the national provision as regards the severity of the sanction under the applicable national law, such as nullity or unenforceability of the contract between Sapod and Eco-Emballages, is a question governed by national law, in particular as regards the rules and principles of contract law which limit or adjust that sanction in order to render its severity proportionate to the particular defect found.[172] The ECJ forwarded the protection of legal certainty and legitimate expectations and reversed the difficulties caused by *Unilever* which have caused legitimate criticism. The case signifies that the ECJ has taken seriously into account the effect of its case law on the specific circumstances of the case. It also reveals that direct effect may be subject to national conditions.[173]

2.3.2 Denial of direct effect to GATT and WTO

It is settled case law that a provision of an agreement entered into by the Community with non-member countries must be regarded as being directly applicable when, in the words of the *Van Gend en Loos* formula, it may be concluded from the wording, purpose and nature of the agreement, that the provision contains a clear, precise and unconditional obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[174] The ECJ has held various agreements between the Community and third countries to be directly effective.[175] The ECJ has also found certain provisions of international agreements not to be

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[172] *Sapod*, op.cit., para 52.

[173] See, also, the principle of abuse of rights, supra, in 2.2.

[174] See, in that regard, Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 14, and Case C-162/96, *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655, para 31. See the formulation by A-G Van Gerven in Case C-18/90, *Kziber* [1991] ECR I-199, para 8 of the Opinion: "When it looks to the nature and purpose of an international agreement the Court considers whether that agreement does more than merely impose reciprocal obligations on the signatory States, in other words whether the agreement is of such a nature as or is intended to govern the legal situation of individuals." See generally, I. Cheyne, *International Agreements and the European Community Legal System* (1994) *European Law Review* 581. Also, K. Lenearts and E. de Smijter, *The EU as an Actor under International Law* (1999/2000) *Yearbook of European Law* 95.

[175] See *e.g.* Case 87/75, *Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze* [1976] ECR 129, paras 16-25 (on Art. 2 (1) of the 1963 Yaoundé Agreement); Case 17/81, *Pabst & Richarz KG v. Hauptzollamt*

capable of conferring rights on individuals which the latter could invoke in a court within the Community.[176] It has, however, been mostly criticised for denying direct effect to GATT and WTO.[177]

In *International Fruit Company*[178] the ECJ held that individuals could not enforce GATT 47 provisions before national courts, because the agreement lacked direct effect. The ECJ reached this conclusion based on a consideration of the "spirit, general scheme and the term as of the General Agreement."[179] The ECJ held that, because the GATT 47 "is based on

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Oldenburg [1982] ECR 1331, pars 25-27 (on Article 53(1) of the Agreement with Greece); Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.* [1982] ECR 3641, para 26 (on Article 21, first para. of the Agreement with Portugal); Case C-192/89, *Sevince v. Staatsecretaris van Justitie* [1990] ECR I-3461, paras 17-26 (on Arts 2(1), sub b, and 7 of Dec. 2/76 and Arts. 6(1) and 13 of Dec. 1/80 of the EEC-Turkey Association Council), etc.

[176] *e.g.* Case C-277/94, *Taflan-Met* [1996] ECR I-4085, paras 23-38 (on Arts. 12 and 13 of Dec. 3/80 of the EEC-Turkey Association Council).

[177] The literature on direct effect of WTO rules is legendary, yet unresolved. For a comprehensive analysis see V. P. Lee and B. Kennedy, *The Potential Direct Effect of GATT 1994 in European Community Law* (1996) 30 Journal of World Trade 67; F. Jacobs, *Judicial Review of Commercial Policy Measures after the Uruguay Round* in Emiliou and O'Keeffe, *The European Union and the World Trade Law* (Chichester, Wiley, 1996) p. 329. N. Neuwahl, *Individuals and the GATT: Direct Effect and Indirect Effects of the General Agreement on Tariffs and Trade in Community Law* in Emiliou and O' Keeffe, op.cit. p. 313; P. Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting legal Systems* (1997) 34 *Common Market Law Review* 11; Hilf, *The Role of National Courts in International Trade Relations* (1997) *Michigan Journal of Int'l Law* 18. See also E-U Petersmann, *From "negative" to "positive" integration in the WTO: Time for "mainstraiming human rights" into WTO?* (2000) *Common Market Law Review* 1363. J.H. Jackson, *Procedural Overview of the WTO EC-Banana Dispute* (2000) 3 *Journal of International Economic Law* 145; J.H. Jackson and P. Grane, *The Saga Continues: An Update On the Banana Dispute and its Procedural Offspring* (2001) 4 *Journal of International Economic Law* 581; J.P.Trachtman, *Bananas, Direct Effect and Compliance* (1999) 10 *European Journal of International Law* 655; S. Griller, *Judicial Enforceability of WTO Law in the EU* (2000) 3 *Irish Journal of European Law*; S. Peers, *Fundamental Rights or Political Whim? WTO Law and the ECJ* in G. de Burca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart 2001) 111; J. Klabbers, *International law in Community law: the law and politics of direct effect* (2002) *Yearbook of European Law* 263.

[178] Joined Cases 21-24/72, *International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.

[179] Ibid., para 20.

principles of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements," [and] is characterised by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties, and the settlement of conflicts between the contracting parties,"[180] it does not provide individuals with rights which could be invoked in national courts.

Although the ECJ denied direct effect to the GATT 47, it did allow some of the agreement's provisions to have legal significance within the Community. The ECJ held that GATT 47 provisions could be used to interpret the meaning of Community legislation which expressly referred to this principle. For example, in *FEDIOL III*[181] the ECJ held that the GATT 47 Article III prohibition against discriminatory taxes could be used to interpret the meaning of "illicit commercial practices" under the Community's New Commercial Policy Instrument Regulation,[182] because this regulation required the Community to comply with its international obligations. The ECJ distinguished its previous direct effect holdings by stating that "the GATT provisions have an independent meaning which, for the purpose of their application in specific cases, is to be determined by way of interpretation." In the end, however, the ECJ found that the contested measure did not constitute an illicit commercial practice.

The ECJ, also, held that GATT 47 provisions could be used to interpret Community legislation, when that legislation implemented a specific GATT 47 provision. For example, in *Nakajima*,[183] the Court held that the GATT 47 Anti-Dumping Code could be used as grounds for reviewing the legality of an anti-dumping margin determined under the Community's Basic Anti-Dumping Regulation.[184] In a manner similar to its decision in *FEDIOL III*, the Court held that this was

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[180] Ibid., para 21.

[181] Case 70/87, *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL III) v. EC Commission* [1989] ECR 1781.

[182] Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices (OJ 1984 L 252/1).

[183] Case 69/89, *Nakajima All Precision Co Ltd v. Council of the European Communities* [1991] ECR I-2069.

[184] Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209/1).

possible because the regulation "was adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement and from the Anti-Dumping Code."[185] Again, however, the ECJ found that the substantive provisions of the Anti-Dumping Code had not been violated.

Twenty-two years later the ECJ used *International Fruit Company* as a precedent, when it stated that Germany could not rely on the rules of GATT to challenge the lawfulness of the common market organization for bananas.[186] The ECJ added that Member States could not enforce the GATT provisions in annulment actions under Article 230(1) EC. It concluded: "those features of GATT, from which the Court concluded that an individual within the Community cannot invoke it in a court to challenge the lawfulness of a Community act, also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State."[187]

With regard to the possibility of invoking provisions of the agreement establishing the WTO to challenge the legality of secondary legislation, the ECJ came to a similar conclusion.[188] In 1996, Portugal asked the ECJ to annul the Council decision[189] concluding textile agreements between the EC on the one hand and Pakistan and India on the other. One of the arguments raised by the Portuguese government was that the decision violated certain World Trade Organisation rules and principles. In this connection, the ECJ held while it is true that the WTO Agreement and its annexes differ significantly from the provisions of GATT 1947, they nevertheless accord considerable importance to negotiation between the parties. As regards, more particularly, the application of the agreements contained in the annexes to the WTO

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[185] Op.cit., at 2178.

[186] Case 280/93, *Federal Republic of Germany v. Council of the European Union* [1994] ECR I-4973. See U. Everling, *Will Europe slip on Bananas? The Bananas judgment of the ECJ and the national courts* (1996) 33 *Common Market Law Review* 401.

[187] Op.cit., at 5073.

[188] Case C-149/96, *Portugal v. Council* [1999] ECR I-8395.

[189] Council Decision 96/386/EC of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products (OJ 1996 L 153/47).

Agreement in the Community legal order, the ECJ held that, according to its preamble, the WTO Agreement, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to entering into reciprocal and mutually advantageous arrangements and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain imbalance of obligations, or create special relations of integration with the Community.[190] The ECJ went on to observe that it is common ground that some of the contracting parties which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the agreements contained in the annexes to the WTO Agreement that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.[191] The ECJ concluded that the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the agreements contained in the annexes to the WTO Agreement which are based on reciprocal and mutually advantageous arrangements and which must *ipso facto* be distinguished from agreements concluded by the Community, may lead to disuniform application of the WTO rules.[192] To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community`s trading partners.[193] The ECJ concluded that, having regard to their nature and structure, the agreements in the annexes to the WTO Agreement are not in principle among the rules in the light of which the ECJ is to review the legality of measures adopted by the Community institutions.[194] Recalling *FEDIOL* and *Nakajima* it held that it is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it

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[190] Op.cit., para 42.

[191] Op.cit., para 43.

[192] Op.cit., para 45.

[193] Op.cit., para 46.

[194] Op.cit., para 47.

is for the ECJ to review the legality of the Community measure in question in the light of the WTO rules.[195]

Recently, the national courts asked whether, and to what extent, the procedural requirements of Article 50(6) of TRIPs on provisional measures[196] have entered the sphere of Community law so that, whether on application by the parties or of their own motion, the national courts are required to apply them. The ECJ reiterated that Article 50(6) is not capable of producing direct effect for the same reasons as those set out by the Court in paras 42 to 46 of the judgment in *Portugal v. Council*. It stated, however, that this is a procedural provision to be applied by Community and national courts in accordance with the obligations assumed by the Community and the Member States under international law. The ECJ drew the following distinction. In a field to which TRIPS applies and in respect of which the Community has already legislated (such as trademarks) the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering interim measures, to do so as far as possible in the light of the wording and purpose of the Article 50 of TRIPS. By contrast, in a field in respect of which the Community has not yet legislated and consequently falls within the competence of Member States, the protection of intellectual property rights does not fall within the scope of application of Community law. Member States are therefore free to accord to individuals the right to rely directly on Article 50(6) or require their courts to apply that Article on their own motion.[197]

Overall, the ECJ denied direct effect to GATT/WTO without drawing any distinction between, on the one hand, conditions governing the possibility for individuals to invoke an international agreement as a source of rights and, on the other hand, the conditions governing the possible review of the legality of a Community act on the ground that it infringed an international agreement which was binding on the Community. This means that private parties lack any remedy when WTO rules are infringed by domestic regulation, since they have no direct access

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[195] Op.cit., para 49.

[196] Joined Cases C-392/98 and C-300/98, *Parfums Christian Dior v. TUC Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v. Wilhelm Layher GmbH & Co KG and Layer BV* [2000] ECR I-11307. See also Case C-89/99, *Schieving-Nijstad vof and Others v. Groeneveld* [2001] ECR 5851.

[197] Op.cit., paras 41-49.

to any of the WTO bodies in Geneva to complain about governmental practices that infringe on a WTO rule.[198] What they have to do is to rely on their government to intervene and take action against WTO infringements in other countries.

It is questionable whether the GATT and WTO are agreements establishing mutual promises among states to respect the rules of GATT/WTO or whether they are agreements creating rights for individuals like the EC Treaty. One should engage into a thorough analysis of the actual nature of obligations. It is argued that granting unilaterally direct effect to the GATT/ WTO may indeed be beneficial and necessary because it would produce welfare benefits for individuals in the Community and help protect the individual rights of both Community consumers and traders. The GATT, however, ultimately is an agreement regulating the rights and obligations of its members, not individuals. For example, non-discrimination within the GATT means non-discrimination between members and not non-discrimination between individual traders in different members. Given these considerations, it is clear that one should be cautious about automatically assuming that the GATT is an agreement which should be viewed as a source of individual rights. However, if the ECJ wanted to be consistent with other case law on direct effect, it should allow the GATT at least to serve as a standard of judicial review.

This line of enquiry is more problematic in relation to WTO,[199] because it is a significant upgrade of the old GATT which provides for a dispute settlement mechanism.[200] Increasing numbers of adjudicated issues and precedents on the international level render the possibility of direct effect more feasible to the effect that national courts may find guidance in precedents

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[198] See M. Bronckers, *Private participation in the enforcement of WTO law: The new EC Trade Barriers Regulation* (1996) *Common Market Law Review* 299.

[199] In favour of direct effect of WTO is A-G Tesauro in Case C-53/96, *Hérmes International* [1998] ECR I-3603. See also J. Mortensen, *The Institutional Requirements of the WTO in an Era of Globalisation: Imperfections in the Global Economy Polity* (2000) *European Law Journal* 176.

[200] See E-U Petersmann, *The dispute settlement system of the World Trade Organisation and the evolution of the GATT dispute settlement system since 1948* (1994) 31 *Common Market Law Review* 1154.

and obtain assistance in applying the rules.[201] According to one view, the WTO possesses the characteristics that should make its provisions directly effective.[202] "Without enabling private citizens to defend their self-interest in liberal trade by invoking precise and unconditional WTO guarantees and rule of law in domestic courts, it seems unlikely that the WTO objective of open non-discriminatory competition can be fully achieved."[203]

The reasons for not granting direct effect-whether they are the agreement's flexibility, or the division of powers between the legislature and the judiciary, or the respect for the appropriate dispute settlement forum-cease to be valid where a violation is established.[204] Also, Article 300 EC makes all Community international agreements binding on the Community institutions and the Member States alike. Since the Member States are also WTO Members, they may find themselves in breach of their own obligations due to measures taken by the Community institutions. Therefore, at least the Member States should be able to invoke the WTO provisions. In the absence of a private enforcement system of WTO, the Commission shoulders the responsibility to ensure legality by making frequent use of the infringement procedure provided under Article 226 EC.[205]

So far as the TRIPS agreement is concerned the negotiators have devoted an unusually great deal of attention to questions of enforcement of private rights such as the right to legal assistance, on evidence, on damages and other remedies, on provisional measures, on

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[201] T. Cottier, *Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union* (1998) *Common Market Law Review* 325, 368.

[202] E-U. Petersmann, *The transformation of the world trading system through the 1994 Agreement establishing the World Trade Organisation* (1995) 6 *European Journal Int'l Law* 161.

[203] E.-U. Petersmann, *The GATT/WTO Dispute Settlement System-International law, International Organisations and Dispute Settlement*, op.cit., at 238.

[204] P. Eeckhout, op.cit., at 55.

[205] Thus far the Commission has made very little use of the Article 226 procedure with a view to enforcing international treaties of the Community (e.g. Case C-61/94, *Commission v. Germany* [1996] ECR I-3989). See C. Chantain, *The European Community and the Member States in the Dispute Settlement Understanding of the WTO: United or Divided?* (1999) *European Law Journal* 461, 476.

measures by customs authorities, and on penalties under criminal law.[206] The signatory governments have accepted these rules to ensure that private individuals may take effective action[207] against infringement of IP rights protected by the TRIPS agreement. It appears therefore that TRIPS should enjoy direct effect.[208] It is argued that the ECJ will have to make up its mind. Should it choose to comply fully with TRIPS, then regionalism will, by and large, have to be abondoned in favour of the Most-Favoured-Nation treatment. Should it choose to preserve its internal market, it is submitted that this can only be achieved at the price of compromising the new legal order created by the ECJ denying the citizens of the Community the very rights that have made the EC legal system unique, and denying the Community its claim to legitimacy.[209]

To understand why the ECJ declined direct effect to GATT and WTO, one should focus on the Court's central argument. This is based on the reciprocal nature of the GATT and WTO agreements. According to the ECJ the judiciaries of the most important WTO members do not consider the WTO rules to be norms incompatibility with which is a ground for the annulment of internal measures. This position may represent the common understanding of the GATT and WTO members about the nature of the agreement. Furthermore, Governments are still not very comfortable with the idea of private challenges in court based on WTO rules. For instance, the EC Council of Ministers declared at the time it ratified the WTO agreements: "Whereas, by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts."[210]

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[206] See Art. 41-61 TRIPS. See M. Bronckers, *The impact of TRIPS: intellectually property protection in developing countries*, 31 *Common Market Law Review* 1245, 1273.

[207] See Art. 41(1) TRIPS.

[208] For arguments against direct effect of TRIPS see Ulrich, *Technology Protection According to TRIPS: Principles and Problems* in Beier and Schricker (eds) From GATT to TRIPS (Weinheim: VCH 1996) 357 at 392-397.

[209] See T. Einhorn, *The Impact of the WTO Agreement on TRIPS (Trade-Related Aspects of Intellectual Property Rights) on EC Law: A Challenge to Regionalism* (1999) 35 *Common Market Law Review* 1069, 1069-1070.

[210] See Council Decision 94/800 of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336/1).

When WTO members have doubts about the compatibility of measures taken by another WTO member within the WTO rules, they must be withdrawn. However, the parties to the conflict can always come to a negotiated settlement. According to the ECJ, the EC would no longer be able to avail itself of this possibility under the WTO dispute settlement system following a judgment of the Community judiciary that an EC measure is incompatible with WTO rules and which consequently annuls this measure. If the ECJ were to allow such compatibility control with regard to EC measures, it would deprive EC of the possibility of negotiation enjoyed by WTO members. This would lead to an imbalanced application of the WTO rules which runs counter to the fundamental WTO principle of reciprocity. The notion of reciprocity, however, in connection with direct effect is a clear political element.[211] It seems that the primary motivation behind the Court's reluctance to apply GATT/WTO law directly was the fact that other GATT/WTO contracting parties did not accord it direct effect, and the ECJ considered that such a unilateral approach might fetter the Community institutions in exercising their discretion in matters of foreign commercial policy.[212]

The resistance of the Community Courts to accord effect to WTO is obvious in recent cases, where private parties invoked WTO law in the context of actions of damages.[213] Since the WTO rules are not in principle intended to confer rights on individuals, the Community cannot incur non-contractual liability as a result of infringing them. In particular in *Cordis v. Commission* there was an adverse panel report against the Community and the applicants relied on it.[214] A German company brought an action seeking compensation for the loss that it allegedly suffered

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[211] J. Klabbers, *International law in Community law: the law and politics of direct effect*, op.cit., p. 32.

[212] Hilf, *The role of national courts in international trade relations*, op.cit., p. 340.

[213] See related cases: Case T-30/99, *Bocchi Food Trade International GmbH v. Commission* [2001] ECR II-943; Case T-18/99, *Cordis und Gemüse Grosshandel GmbH v. Commission* [2001] ECR II-913; Case T-52/99, *T. Port GmbH & Co. KG v. Commission of the European Communities* [2001] ECR II-981; Case T-3/99, *Banatrading GmbH v. Council* [2001] ECR 2123. See A. Davies, *Bananas, Private Challenges, the Courts and the Legislature* (2002) *Yearbook of European Law* 299.

[214] Report from the WTO Standing Appellate Body of 9 September 1997 which was adopted by the WTO Dispute Settlement Body by decision of 25 September 1997.

as a result of a Commission Regulation[215] allocating quotas for the importation of bananas from third countries. The Commission regulation in issue was adopted following a decision of the WTO Dispute Settlement Body which had found that the previous Community regime governing banana imports was contrary to the rules of the WTO. Cordis argued that the regulation was unlawful because it infringed certain WTO rules. The CFI stated that, since the WTO rules are not in principle intended to confer rights on individuals, the Community could not incur non-contractual liability as a result of infringing them. It reiterated the two exceptions provided in *FEDIOL II* and *Nakajima*, but found that neither of them was applicable in the case in issue. The Reports of the WTO Panel and of the WTO Dispute Settlement Body which were adopted by the Dispute Settlement Body, did not include any special obligations which the Community intended to implement by adopting the regulation in issue. Nor did the Regulation make express reference to any such specific obligations arising out of the reports of the WTO Bodies or to specific provisions of the WTO Agreements. The CFI, thus, took a narrow view of the exceptions in *FEDIOL II* and *Nakajima*.[216]

However, one would expect a gradual reverse of this case law of the CFI. In *Biret International v. Council*[217] that concerned the compatibility of Directives enacted before accession of the Community to WTO prohibiting certain substances with the Agreement on the Application of Sanitary and Phytosanitary Measures,[218] the ECJ found that there is a claim for damages when the Community fails to implement a binding award of the WTO Dispute Settlement Body, but it is admissible after the prescribed period for compliance has expired.[219] This case law confirmed the denial of direct effect to WTO but it has enhanced the effect of the decisions of the WTO Dispute Settlement Body by offering an acceptable alternative to the absence of direct effect.

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[215] Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community (OJ 1998 L 93/32).

[216] Op.cit., paras 58-60.

[217] Case C-94/02, judgment of 30 Sepember 2003 (not yet published).

[218] The SPS Agreement entered into force on 1 January 1995 (OJ 1994 L 336, p. 40).

[219] Op.cit, paras 61-64.

Conclusion

The doctrine of direct effect has been the vehicle for creating a system of private enforcement of Community law. Private parties are entitled to rely on EC Directives not only when they provide for subjective rights, but also for Member State obligations. The right to rely on the primacy of Community law is now accomodated under the doctrine of direct effect. What is more, private parties are entitled to rely on Member State obligations even against individuals. This is a significant improvement of the system of judicial protection and strengthens the enforcement of Community law. However, national courts enjoy certain discretion to apply restrictive provisions of national law when direct effect of Community law conflicts with the principle of abuse of right, the protection of legal certainty or legitimate expectations. Overall, the Court has proceeded in boosting the role of private individuals in the enforcement of Community law, but it has also balanced the protection of Community rights against the separation of powers doctrine. The denial of direct effect of the WTO agreement and the prohibition of horizontal direct effect of Directives constitute an exception to this evolution, because they leave private individuals without a remedy when their rights are infringed. The fundamental right of "access to justice" is denied.

The underlying reason for this appears in both cases to be political in nature and is to be found in the doctrine of separation of powers. In federal systems the principle of separation of powers imposes additional limits on State remedies.[220] Both the prohibition of horizontal direct effect and the denial of edirect effect to WTO are owing to the doctrine of separation of competence. In the first case, the ECJ respected the discretion of Member States to arrange directly the relations between individuals. In the second case, it displayed a moderate degree of deference to the Community's executive organs, in the context of the implementation of WTO obligations. Otherwise, it would change the balance of power between executive and judiciary at both national and Community level. This proves that direct effect is controlled by the demarcation of competence between the Community and Member States.[221] The ECJ respected in both cases

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[220] See Nagel, *Separation of Powers and Federal Equitable Remedies*, 30(2) *Stanford Law Review* 661.

[221] See S. Weatherill, *Addressing Problems of Imbalanced Implementation in EC law: Remedies in an Institutional Perspective* in *The Future of Remedies in Europe*, op.cit., Ch. 4, p. 87.

the discretion of the relevant political authorities. A right to damages is suggested as a preferable alternative on constitutional grounds.

Chapter 3: The remedies of judicial review, interim relief and restitution

The provision of remedies before national courts is the main expression of the principle of effective judicial protection. The ECJ has recognised four specific remedies that should be provided by national laws. These are the remedies of judicial review, interim relief, restitution and damages. They serve two basic functions in the constitutional scheme of EU.[222] The first is to provide redress for the individual. The slogan "for every right, a remedy" reflects this purpose. The second function is to reinforce structural values, including those underlying the separation of powers and the rule of law. This Chapter examines the first three remedies, while Member State liability in damages is examined separately in the next Chapter.

3.1 Judicial review of national administrative measures

3.1.1 The right to judicial review

Judicial Review is by far the most constitutionally important means of ensuring that the government acts within the law. It is the foundation stone and the clearest manifestation of the rule of law. It is sometimes said that judicial review of legislation is inconsistent with democracy. This view ignores that democracy as it is understood today does not simply mean government by the majority. It implies also that government will exercise its powers in conformity with the rule of law and in ways which respect the fundamental rights of its citizens.[223] In *Les Verts* the ECJ reasoned that the Community is "a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether measures adopted by them are in conformity with the basic constitutional charter, the Treaty."[224]

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[222] See R. Fallon & D. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies* (1991) 104 *Harvard Law Review* 1731, 1782.

[223] A. Chaskalson, *Judging Human Rights in South-Africa* (1998) *European Human Rights Law Review* 181, 185. See also de Smith, Woolf and Jowell, *Principles of Judicial Review* (1999) Sweet & Maxwell, Chapter 1.

[224] Case 294/83, *Les Verts v. Parliament* [1986] ECR 1339, para 23.

In *Johnston*[225] the ECJ verified the commitment of the Community to the rule of law and established the right to judicial review before national courts. This right can be exercised also against a private party.[226] The ECJ held that the requirement of judicial control reflects "a general principle of law which underlies the constitutional tradition common to the Member States and which is laid down in Articles 6 and 13 of the ECHR."[227] That requirement must also be complied with regard to a measure which constitutes a necessary step in the procedure for adoption of a Community measure, where the Community institutions have only a limited or non-existent discretion with regard to that measure. It is therefore for the national courts to rule on the lawfulness of a preliminary measure on the same terms as those by which they review any definitive measure adopted by the same national authority which is capable of adversely affecting the rights of third parties under Community law, even if the domestic rules of procedures do not provide for this in such case.[228] The ECJ, thus, advanced the challenging of substantive defects related to composite administrative procedures occuring on the stage of national administrative conduct before national courts and not the EC Courts.[229] This approach shows the decentralisation sought by the ECJ in relation to remedies.

The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in last resort, because judicial control is perceived as offering the best guarantee of independence, impartiality and proper procedure.[230] In *Commission v. Austria*[231]

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[225] Case 222/84, *Johnston v. RUC* [1986] ECR 1651.

[226] See Case C-185/97, *Coote v. Granada Hospitality Ltd* [1998] ECR 5199 and Case C-167/97, *R v. Secretary of State for Employment, ex parte Seymour Smith and Perez* [1999] ECR 623.

[227] Op.cit., para 18. Also, Case C-97/91, *Oleificio Borelli v. Commission* [1992] ECR I-6313, para 14; Case C-1/99, *Kofisa Italia* [2001] ECR I-207, para 46 and Case C-226/99, *Siples* [2001] ECR I-277, para 17.

[228] Case C-269/99, *Carl Kühne* [2001] ECR 9517, para 57; *Oleificio Borelli*, op.cit., para 13.

[229] See G. de Enterria, *The Extension of the Jurisdiction of National Administrative Courts by Community Law: The judgment of the ECJ in Borelli and Art. 5 of the Treaty* (1993) *Yearbook of European Law* 19, 25: "The separation doctrine" as applied by the ECJ in *Borelli* amounts to an artificial splitting up of a unitary procedure solely for the purpose of judicial protection before the national courts.

[230] See *Klass and Others v. Germany* (1978) 2 EHRR 214, para 55.

Austrian legislation provided that if a pharmaceutical company does not accept the rejection of its proposal for the inclusion of a medicinal product on the register of medicinal products, it may within a period of six weeks lodge a written complaint with the Principal Federation of Austrian Social Security Institutions. That complaint comes before a small technical advisory board. If its recommendation is not in favour of the applicant, it must submit the complaint, accompanied by any new information and its observations, to the main technical advisory board. That board considers whether the recommendation of the small technical advisory board is reasonable and may alter it. The Commission claimed that the Austrian legislation did not provide for any genuine judicial protection, contrary to the requirements of Article 6(2) of the Directive 89/105.[232] In fact, in the Commission's view, neither the complaint against the first recommendation of the small technical advisory board, nor, where the opinion of that board is again negative, the application for inclusion which may be submitted to the main technical advisory board, can be described as appeals since that remedy lies not before the courts but before the administrative authorities. The Austrian Government contended that remedies did in fact exist inasmuch as both the small technical advisory board and the main technical advisory board comprise technicians and professionals who are independent of the social security institutions and are appointed, some for a limited period and others without limit of time.[233]

The ECJ stated that appeals to independent experts could not be equated with the remedies mentioned in the Directive. In fact, under Article 6(2) of the Directive "any decision not to include a medicinal product in the list of products covered by the health insurance system must contain a statement of reasons based upon objective and verifiable criteria, including, if appropriate, any expert opinions or recommendations on which the decision is based. In addition, the applicant must be informed of the remedies available to him under the laws in force and of the time limits allowed for applying for such remedies." It necessarily follows that the applicant concerned must be able to avail itself of remedies ensuring effective legal protection. On any test, the remedy provided for under national legislation, whether exercised

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[231]Case C-424/99, *Commission v. Austria* [2001] ECR I-9285.

[232] Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems (OJ 1989 L 40/8).

[233] Op.cit., paras 39-41.

before the small technical advisory board or the main one, lies before supervisory bodies made up of experts belonging to the Federation itself, and thus to an administrative authority and not to genuine judicial bodies. Moreover, since both the small technical advisory board and the main one can issue only recommendations they have no decision-making power, which rests with the Federation. Consequently, national legislation was found not to satisfy the procedural requirements provided by the Directive.[234]

The principle of effective judicial protection does not require the establishment of new review bodies. This conclusion derives from a raft of cases[235] concerning the interpretation of Directives on public procurement.[236] Directives 92/50 and 92/13 required the Member States to adopt the measures necessary to ensure effective review in public service contracts and in procurement procedures of entities operating in the water, energy, transport and telecommunications sectors respectively, but they did not indicate which national bodies were to be competent bodies for this purpose. The question was whether the bodies competent to hear appeals under the public work contract and public supply Directive (Directive 89/665) could also hear appeals for claims in the field of the other two Directives, in case of their non-transposition. The ECJ found that there was no requirement for the review bodies under the Directives 92/50 and 92/13 to be the same as those which the Member States have designated in the field of public work contracts and public supply contracts. The ECJ thus held that the Directives could not be relied upon directly before national courts, but the right for individuals to bring review proceedings might only be protected through the doctrine of "consistent" interpretation of national legislation. In the alternative, the persons concerned could, using the

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[234] Op.cit., paras 42-44.

[235] Case C-54/96, *Dorsch Consult v. Bundesbaugesellschaft Berlin* [1997] ECR I-4961; Case C-111/97, *Evobus Austria GmbH v. Növog* [1998] ECR I-5411; Case C-76/97, *Walter Tögel v. Niederösterreichische Gebietskrankenkasse* [1998] ECR I-5357; Case C-258/97, *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v. Landeskrankenanschalten- Betriebsgesellschaft* [1999] ECR I-1405.

[236] Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395/33); Directive 92/13 of 18 June 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76/14); Directive 92/50 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209/1).

appropriate domestic procedures, claim compensation for damage caused by failure to transpose the Directive in good time. These judgments reveal the limits of judicial decision-making. They may compromise effective judicial protection, but they reveal that the Court is not competent to interfere with the institutional autonomy of Member States. They also show that, inevitably, Member States are primarily responsible for the protection of Community rights. The ECJ is sometimes unable *de facto* to supplement the remedies before national courts.

3.1.2 The scope of judicial review

In judicial review proceedings the courts have to strike a fair balance between conflicting interests - that is to say, between protecting the individual and leaving sufficient freedom of action to the executive authorities. The ECJ stressed the obligation for national authorities to give reasons for decisions which affect adversely Community rights.[237] However, a Court to have full jurisdiction needs not only to control the objective legality of an act but also to review fully the facts upon which a decision is based.[238] Colomer A-G in *Shingara* considered that a judicial appeal which is limited to an examination of the legality of a decision, would not be compatible with the principle of effective judicial protection, if this means that the powers of the court to adjudicate on the substance are restricted. If the court is able only to establish whether the formal requirements for the governmental decision have been fulfilled and is not able to examine the merits of the dispute, the remedy available to a Community national would be virtually ineffective.[239] It appears that the ECJ follows the same view.

In *HL v. Stadt Wien*[240] the Mayor of the City of Vienna, acting on behalf of the contracting authority, published an invitation to tender for a contract. After the submission of tenders,

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[237] Case 222/86, *Heylens v. UNECTEF* [1987] ECR 4097, paras 14-17. See R. Thomas, *Reason giving in English and European Administrative law* (1997) *European Public Law 213*. The obligation to state reasons concerns only individual decisions adversely affecting individuals and not national measures of general scope which fall within the scope of Community law. See C-70/95, *Sodemare* [1997] ECR I-3395, paras 19-20.

[238] See *De Cubber v. Belgium* (1984) 7 EHRR 236.

[239] *Shingara*, op.cit., paras 81-90 of the Opinion.

[240] C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs- GmbH (HI) v. Stadt Wien* [2002] ECR I-5553.

including the tender by the applicant, the City of Vienna withdrew the invitation to tender within the period for awarding the contract. It informed the applicant, by letter, that it had decided to abandon the procedure for compelling reasons in accordance with national legislation. Following a request for information sent to it by the applicant, the City of Vienna explained the withdrawal of the invitation to tender. It was thus clear that the reasons in question would have excluded an award, if they had been known previously. If another project management were to be found necessary in the context of the provision of meals project, an invitation to tender with a different content would have to be carried out.[241]

In the order for reference the national court argued that, since detailed rules for withdrawing an invitation to tender do not appear in the Directives laying down substantive rules concerning public contracts, the decision to make such a withdrawal is not a decision covered by Article 2(1)(b) of Directive 89/665[242] and, therefore, is not a decision which, pursuant to that Directive, must be capable of being the subject-matter of review proceedings. Taking the view that the City of Vienna complied with the procedure laid down in Article 12(2) of Directive 92/50,[243] it was unsure whether, assuming Community law requires review of a decision withdrawing an invitation to tender, that review may concern solely the arbitrary or fictitious character of that decision.[244]

The ECJ ruled that Article 1(1) of the Directive 89/665 requires the decision of the contracting authority to withdraw the invitation to tender for a public service contract to be open to a review procedure, and to be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts or national rules implementing that law.[245] The Directive precludes national legislation from limiting review of the legality of the withdrawal of

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[241] Op.cit. para 14.

[242] Op.cit., n. 236.

[243] Op.cit., n. 236.

[244] Op.cit., paras 20-21.

[245] Op.cit., para 54.

an invitation to tender to mere examination of whether it was arbitrary.[246] Determination, however, of the time to be taken into consideration for assessing the legality of the decision by the contracting authority to withdraw an invitation to tender is a matter for national law, provided that the relevant national rules are compatible with the principles of equivalence and effectiveness.[247]

Therefore, under Community law the concept of «full» jurisdiction entails a tribunal which carries out a review of all the facts and submissions brought before it, but does not necessarily have jurisdiction to examine the «expediency» of a decision. There are certain areas where it is imperative that administrative courts should be in a position to leave sufficient freedom of manoeuvre to the executive authorities. These are areas where highly technical questions or important diplomatic-policy issues are decisive or where the authorities may legitimately maintain secrecy even towards the courts.[248] Such matters cannot properly be determined by litigation, but by the executive and the legislature. If, ever, judicial restraint is obligatory, it is in such areas.

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[246] Op.cit., para 63.

[247] Op.cit., para 68.

[248] See also the case law of the European Court of Human Rights under Art. 13 and 6. For example in *Klass*, op.cit., the ECtHR considered a German law which permitted state surveillance without prior or later notice compatible with Art. 13. It held that Article 13 requires only a remedy that is "as effective as can be" having regard to the restricted scope for legal recourse inherent in any system of secret surveillance. See also *Leander v. Sweden* (1987) 9 EHRR 433, paras 80-84. See *Tinnelli and Sons Ltd & Mc Elduff and others v. UK* (1998) 27 EHRR 249, where the ECtHR ruled that the public interest immunity certificates can operate as a restriction on access to a court and therefore must be both legitimate and proportionate. Note para 77 where the Court stated that the protection of national security is a legitimate basis for asserting public interest immunity, but any regulatory scheme that does not provide for independent judicial scrutiny of public interest immunity certificates is unlikely to be proportionate. See A. Sherlock, *Access to Court in Cases Involving National Security Considerations* (1999) *European Law Review* 106.

A case of tension between democracy and technocracy is found in *Upjohn*.[249] The case concerned a dispute between the pharmaceutical company Upjohn and the Licencing Authority. The Licencing Authority revoked the marketing authorisation of a drug against insomnia and Upjohn made an application for judicial review of this revocation. The question was whether Council Directive 65/65 EEC[250] and, more generally, Community law requires full (assessment of the merits) or limited (assessment of the legality) judicial review of the action of the Licencing Authority. The ECJ answered the question by drawing an analogy with the review that itself employs in similar situations. This is when it reviews an action of a Community authority that is called upon, in performance of its duties, to make complex assessments. Judicial review in this case includes only the review of procedural substance of the action and may not substitute its assessment of the facts for the assessment made by the authority concerned. It verifies that the action taken by the authority is not vitiated by a manifest error or misuse of powers and that it does not clearly exceed the boundaries of its discretion. The ECJ concluded that Community law does not require Member State to establish a procedure for judicial review more extensive than that carried out by itself in similar cases.[251] The adopted solution respects a well-established tradition in most Member States and leaves considerable discretion to Member States in the organisation of their system of judicial review. The judgment, however, is carefully worded and does not prohibit, also, a system of more extensive review subject to the principle of equivalence.

Conclusion

The ECJ has drawn a distinction between the availability and the scope of judicial review. It established, in principle, a right to judicial review before national courts, even when national legislation does not provide for it. The existence of competent review bodies is a necessary

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[249] Case C-120/97, *Upjohn v. Licencing Authority* [1999] ECR 223. For the various kinds of administrative discretion and the tension between democracy and technocracy see M. Shapiro, *Administrative Discretion: The Next Stage* (1983) *Yale Law Journal* 1487.

[250] Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation and administrative action relating to proprietary medicinal products (OJ, English Special Edition 1965-1966, p. 20).

[251] Op.cit., para 34-35.

prerequisite. The ECJ, also, arranged the scope of judicial review according to the standards before itself. This analogy came late probably because the ECJ decided recently to apply the same standard of proportionality when reviewing either Member State or Community measures.[252] In practice, the scope of judicial review of national measures will be decided *ad hoc* by the ECJ and is bound to differ in the various jurisdisdictions.

3.2 Interim Relief

3.2.1 The right to interim relief

Interim relief in judicial review proceeding before national courts may arise where an applicant is seeking to disapply national legislation that is allegedly incompatible with Community law or which gives effect to a Community measure which is alleged to be unlawful. In *Factortame*[253] the ECJ established the general principle that effective judicial protection includes the right to interim relief.[254] There can be little doubt that the fact that all types of Community legislation may be, and not infrequently, are suspended pursuant to Article 242 must have weight by the ECJ.[255] [256]

The facts of the *Factortame* litigation are well-known. The Merchant Shipping Act had established a new register of British fishing vessels. The intention was to ensure that fishing

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[252] See, infra, Chapter 5.

[253] Op.cit., n. 27.

[254] See A. Barav, *Enforcement of Community rights in the national courts: the case for jurisdiction to grant interim relief* (1989) *Common Market Law Review* 369.

[255] P. Oliver, *Interim Measures: Some Recent Developments* (1992) *Common Market Law Review* 7, 17.

[256] See Case C-280/93 R, *Commission v. Germany* [1993] ECR I-3667; Case C-149/95 P(R), *Commission v. Atlantic Containers Line* [1995] ECR I-2165; Case C-57/89 R, *Commission v. Germany* [1989] ECR 2849; Case C-195/90 R, *Commission v. Germany* [1990] ECR I-2715; T-132/01 R, *Euroalliages* [2001] ECR II-2307; Case T-86/96 R, *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag Lloyd Fluggesellschaft mbH v. Commission* [1998] ECR II-641; Case C-87/94 R, *Commission v. Belgium* [1994] ECR I-1395; Case C-481/01 P (R), *NDC Health GmbH & Co. KG and NDC Health Corporation v. Commission* [2002] ECR I-3401; Case T-191/98 R II, *Cho Yang Shipping Co. Ltd v Commission* [2000] ECR II-2551.

quotas allocated to the United Kingdom under the EEC Common Fisheries Policy were exploited only by vessels with a real economic link with the United Kingdom. Thus, only a certain category of vessel owners could be registered, those with British nationality and residence and domicile in the United Kingdom. As a result, a number of vessels previously registered under the previous Shipping Act could not be registered under the 1988 Act, because they were owned by Spanish-owned British companies. The applicants sought a declaration that the 1988 Act was incompatible with the principle of non-discrimination on grounds of nationality and the right of establishment. The Divisional Court requested a preliminary ruling from the ECJ in order to determine the compatibility of the 1988 Act with the EC Treaty provisions. In the meantime the applicants would suffer serious and irreparable loss if they were unable to operate their vessels. Therefore, they sought interim relief, which the Divisional Court granted in the form of an order that, pending the final determination of the case, the relevant parts of the 1988 Act should be disapplied in relation to the applicants and the registration of their vessels should continue. The Court of Appeal allowed the appeal of the Secretary of State and the House of Lords agreed that English courts do not have the jurisdiction to disapply temporarily an Act of Parliament. That conclusion was based, first, on the presumption that an Act of Parliament is compatible with Community law until it is declared to be incompatible and secondly, on the old common rule that an interim injunction may not be granted against the Crown. However, the House of Lords referred to the ECJ the question of compatibility of the English law prohibition of interim measures with Community law. In brief, the question was whether a right claimed under Community law should be given interim protection as against conflicting national legislation.

The ECJ recalled the obligation of national courts under Article 5 (now 10) to ensure the effective legal protection of individual rights under Community law[257] and the principle of supremacy as enunciated in *Simmenthal*.[258] It then went on: "the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under

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[257] *Factortame*, op.cit., para 19.

[258] *Factortame*, op.cit., para 20.

Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule."[259]

The exact scope of the right to interim relief was discussed in later cases. In *Zuckerfabrick*[260] a Council Regulation[261] required sugar manufacturers to pay a special levy. The applicant undertaking challenged the demand for payment in the Finance Court of Hamburg claiming that the Regulation is void. The question was whether a national court may suspend by way of interim relief the application of national measures implementing Community rules. In *Foto-Frost*[262] the ECJ had held that national courts do not have the power to declare an act invalid, but it did not rule on whether the national courts could order the temporary suspension of a Community measure by way of interim relief. The Court found that interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law in view of the fact that the dispute in both cases is based on Community law itself. The power of national courts to order interim relief corresponds to the jurisdiction reserved by the ECJ by Article 186 (now 243) in the context of actions brought under Article 173 (now 230) of the Treaty. The facility for those national courts to grant such relief in cases under Article 177 (now 234) must be made only on the same conditions as apply when the ECJ is dealing with an application of interim measures. The ECJ held that the suspension of enforcement of administrative measures based on a Community regulation, whilst it is governed by national procedural law, in particular as regards the making and examination of the application, must in all Member States be subject to uniform conditions. In cases where national authorities are responsible for the administrative implementation of Community regulations, the legal protection guaranteed by Community law includes the right of individuals to challenge the legality of such regulations before national courts and to induce those courts to refer questions to the ECJ for a preliminary ruling. The

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[259] *Factortame*, op.cit., para 21.

[260] Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Suderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn* [1991] ECR I-415.

[261] Council Regulation (EEC) No 1914/87 of 2 July 1987 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year (OJ 1987 L 183/5).

[262] Case C-314/85, *Firma Foto-Frost v. Hauptzollamt Lubeck-Ost* [1987] ECR 4199.

ECJ found that the coherence of the system of interim legal protection requires that national courts should also be able to order suspension of enforcement of a national administrative measure based on a Community Regulation, the legality of which is contested.[263]

Whereas in *Zuckerfabrik* the question was the power of national courts that made a reference on the validity of a Regulation to order suspension of enforcement of a national administrative measure based on that Regulation, in *Atlanta*[264] it was the power of a national court in such circumstances to order interim measures that may create a new legal position for the benefit of the person seeking protection.[265] The applicants were importers of bananas from third countries who challenged the validity of the Bananas Regulation[266] in proceedings before a German court and by way of interim relief requested import licences in addition to those which they had been granted pursuant to that regulation. The difference between *Zuckerfabrik* and *Atlanta* was that while in *Zuckerfabrik* interim protection was sought to protect the *status quo*, in *Atlanta* it was sought to establish a new situation. The grant of interim relief was based on the consideration that a refusal of interim relief would be contrary to the guarantee of legal protection enshrined in Article 19(4) of the *Grundgesetz*. If the *Verwaltungsgericht* did not have jurisdiction to grant interim protection against administrative measures of the national authorities which were based on Community law, it would have to refer to the Federal Constitutional law the question of compatibility with Article 19(4) of the *Grundgesetz* of the national law approving EEC Treaty.

The ECJ found that in an action for the annulment of a Community regulation, Article 189 (now 249 EC) does not preclude national courts granting interim relief, as the interim legal protection which national courts should afford individuals has to be the same as that afforded by the ECJ

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[263] *Zuckerfabrik*, op.cit., paras 14-20.

[264] Case C-465/93, *Atlanta Fruchthandelsgesellschaft mbH and others v. Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761. For an annotation see G. Berb, (1996) *Common Market Law Review* 795.

[265] *Atlanta*, op.cit., para 26: "In the present proceedings...the national court asks...for a ruling not on the question of suspension of enforcement of a national measure adopted on the basis of a Community regulation, but on the making of a positive order provisionally disapplying that regulation."

[266] Council Regulation 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47/1).

which, by Article 185 (now 242 EC) and Article 186 (now 243 EC), has the power to suspend the application of the contested act and prescribe any necessary interim measures. The German court's injunction to the Bundesamt-to issue licenses for a certain quantity above-quota-was positive in form, but in substance it interfered less with the new Community regime than would have been the case under a negative injunction which simply told the *Bundesamt* to do nothing to implement the Regulation. Therefore, Atlanta was not placed in a more favourable position than before.[267] In any event the ECJ avoided a possible serious conflict with the German Constitutional Court.

Finally, in *Port*[268] the applicant in the national proceedings was a German importer of third country bananas who had imported unusually low quantities of bananas during the reference years prescribed by the Regulation 404/93[269] and claimed that additional import licences should be allocated to it over and above those resulting from Article 19(2) of the Regulation. The same Regulation was also obliging the Commission to act in cases of individual hardship. The ECJ went on to distinguish the situation at *Port* from the ones at issue in *Zuckerfabrick* and *Atlanta*. In those cases national courts were given the power to grant interim relief pending the ruling of the ECJ on the validity of Community regulation, in order to ensure the coherence in the system of interim legal protection, given that the legality of a Community act cannot only be tested by means of an action for annulment in connection with which interim relief could be possible, but also in the context of Article 177 (now 234) proceedings. On the contrary, in *Port* the issue was not the validity of a Regulation but whether the Commission was obliged to lay down rules pursuant to a provision of a Regulation.[270]

A-G Elmer held that the fact the Commission's action or inaction may be reviewed by the Court does not mean that the Court can substitute itself for the Commission and by final judgment

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[267] In *Zuckerfabrik*, op.cit. at para 24 the Court had found that the grant of relief must retain the character of an interim measure.

[268] Case C-68/95, *T. Port GmbH & Co. KG v. Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065.

[269] Op.cit., n. 215.

[270] *Port.*, op.cit., paras 52-62.

issue transitional measures.[271] Nor can the Court, in an action for failure to act, order the Commission to adopt the provisions referred to in Article 30 of the Regulation. As Articles 185 and 186 (now 242 and 243) have *inter alia* the aim of ensuring that the Court's final judgment takes full effect and as the Court cannot by its final judgment adopt such provisions, it must follow that the Court will likewise be unable by way of interim relief, to lay down or to order to lay down such provisions. A national court must under Article 189 (now 249) of the Treaty still more certainly be precluded from doing so.

The ECJ held that national courts have no jurisdiction to order interim measures pending action on the part of a Community institution, because the Treaty does not provide for a reference for a preliminary ruling by which a national court asks the ECJ to rule that an institution has failed to act. Only the Community judicature can exercise judicial review of alleged failure to act. Since national courts are not entitled under the Treaty to ask the ECJ to rule that an institution has failed to act, it followed that national courts have no jurisdiction to order interim relief in that situation. The ECJ proposed several alternatives to the aggrieved trader: Bringing an action for a failure to act before the Court of First instance, approaching the Commission or urging the relevant Member State to take action. The strength of the first alternative diminishes, however, in the light of the well-known difficulties of private parties in successfully bringing an action before the Court of First Instance.[272]

Finally, it seems plain that the principles enunciated in *Factortame* and *Zuckerfabrick* apply equally to actions between private parties where the lawfulness of a national or Community measure respectively is in issue. Neither the questions posed by the national courts in these cases nor the judgments of the ECJ are expressly confined to cases where the defendant is a public authority. Also, it does not appear to be open to the ECJ to set aside interim measures wrongfully granted by the referring court or that the ECJ might have jurisdiction to suspend the application of a Community measure, when the validity of that measure is the subject of a

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[271] The Court has in the past declined to suspend decisions by which the Commission refused to adopt particular measures (see Case 50/69, R, *Germany v. Commission* [1969] ECR 449 and 109/75 R, *National Carbonising Co v. Commission* [1975] ECR 1193). In each case the reason was that it could not substitute itself for the Commission and take the decision in its stead.

[272] A. Albors-Llorenz, *Annotation on Port* (1998) *Common Market Law Review* 227, 244.

reference for a preliminary ruling, if the national court does not have the power to revoke the suspension.[273]

3.2.2 The conditions for granting interim relief

In *Zuckerfabrick* the ECJ stated that national courts may grant such relief only on the same conditions as apply when the ECJ is dealing with an application for interim measures.[274] In *Krüger*[275] the ECJ codified the conditions for granting interim relief before national courts. A national court may suspend implementation of a national administrative decision based on a Community action only if: a) that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the ECJ, itself refers the question to the ECJ; b) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage from being caused to the party seeking the relief; c) the national court takes due account of the Community interest; d) in its assessment of all those conditions, the national court respects any decisions of the ECJ or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level.[276]

Only the possibility of a finding of invalidity can justify the granting of suspensory measures. The obligation to refer is founded on the necessity to ensure that Community law is applied uniformly and to safeguard the Court's exclusive jurisdiction to rule on the validity of an act of Community law. If national courts were able to grant interim relief in respect of a national measure based on a Community regulation without referring the matter to the ECJ that would amount to allowing it to set aside measures of Community law without the ECJ being able to give a definitive ruling on the validity of the Community measure in question.[277] The national court would be able to assume the role of the Community legislature. In *Atlanta* the ECJ made

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[273] Oliver, op.cit., at 26.

[274] See *Zuckerfabrik*, op.cit., para 27.

[275] Case C-334/95, *Krüger GmbH & Co.KG v. Hauptzollamt Hamburg-Jonas* [1997] ECR I-4517.

[276] Op.cit., para 44.

[277] *Zuckerfabrick*, op.cit., para 23.

this requirement more rigorous stressing that the national court cannot restrict itself to referring only the question of validity but has to set out the reasons for which it thinks that the Court should find the regulation invalid.[278] To this extent the national court must take into account the extent of the discretion which the Community institutions must be allowed in the sectors concerned.[279] For Title IV matters on visa, asylum and immigration policies national courts seem to be precluded from granting interim relief against secondary Community legislation, since a preliminary ruling is explicitly excluded in Article 68(1) for lower courts.[280]

In *Krüger* it was held that the national court which has suspended the application of national measures based on a community act and has made a reference for a preliminary ruling is not precluded from granting leave to appeal against its decision to grant interim relief. The ECJ held that the need to comply with those overriding considerations is not affected by the fact that an appeal can be lodged against the decision of the national court. If that decision were to be set aside or reversed on appeal, the preliminary ruling procedure would have no further purpose and Community law would again be fully applicable. Moreover, a national procedural rule which makes provision for this possibility, does not prevent implementation of the preliminary ruling procedure by the court at last instance which is obliged under the third paragraph of Article 177 (now 234) of the Treaty to make a reference, if it has doubts about the interpretation or validity of Community law. In both cases the only forum is the Court of Justice.[281]

In relation to the requirement of urgency, the ECJ has held that the damage invoked by the applicant must be liable to materialize before the ECJ has been able to rule on the contested Community measure, while in relation to the nature of the damage it held that purely financial damage cannot be regarded in principle as irreparable. However, it is for the national court to examine the circumstances particular to the case before it. It must in this connection consider

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[278] See *Atlanta*, op.cit., para 36. The A-G in para 29 argued that to make the requirement for a statement of the reasons more rigorous would constitute an inappropriate interference with the Member State's procedural rules.

[279] See *Atlanta*, op.cit., para 37.

[280] See S. Peers, *Who is Judging the Watchmen? The Judicial System of the "Area of Freedom, Security and Justice"* (1998) *Yearbook of European Law* 337, 354.

[281] Op.cit., paras 48-54.

whether immediate enforcement of the measure which is the subject of application for interim relief, would be likely to result in irreversible damage to the applicant which could not be made good if the Community act were to be declared invalid.[282] If the doubt as to the validity relates only to procedural rules, neglect of which cannot be regarded as having affected the content of the Community legal measure, it should not be possible to prescribe interim measures.

The national courts should, also, take due account of the Community interest. A national court seized of an application for suspension must first examine whether the Community measure in question would be deprived of all effectiveness if not immediately implemented.[283] In this respect the national court must take account of the damage which the interim measure may cause to the legal regime established by the contested Regulation for the Community as a whole.[284] If suspension of enforcement is liable to involve a financial risk for the Community, the national court must also be in a position to require the applicant to provide adequate guarantees, such as deposit of money or other security.[285] It must consider, on the one hand the cumulative effect which would arise if a large number of courts were also to adopt interim measures for similar reasons and, on the other, those special features of the applicant's situation which distinguish him from the other operators concerned.[286] If an applicant is unable to show a specific situation which distinguishes him from other operators in the relevant sector, the national court must accept any findings already made by the ECJ concerning the serious and irreparable nature of the damage.[287]

The Commission argued in *Krüger* that, in taking due account of the Community interest, the national court must where it is minded to grant interim relief, give the Community institution

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[282] See *Zuckerfabrik*, op.cit., paras 28-29.

[283] See *Zuckerfabrik*, op.cit, para 31.

[284] See *Atlanta*, op.cit., para 44.

[285] See *Zuckerfabrik*, op.cit., para 32. AG Lenz at paras 76-78 of his Opinion criticised the *Finanzgericht* which had suspended the application of the Regulation without requiring a guarantee to be lodged.

[286] See *Atlanta*, op.cit., para 44.

[287] See *Atlanta*, op.cit., para 49.

which adopted the act whose validity is in doubt an opportunity to express its views.[288] Both the Court and the Advocate General held that nationals courts should be left free to decide what means are appropriate to obtain the relevant information on the Community act and preferred not to intrude into the tasks of national courts.[289] The condition of obtaining the view of the Commission is time-consuming and would probably prove to work against the applicant in the context of an accelerated procedure, such as interim measures.

Finally, in its assessment of those conditions, the national court should respect any decisions of the ECJ and the CFI ruling on the lawfulness of the Community act or an application for interim measures seeking interim relief at Community level. If the ECJ dismisses on the merits an action for annulment of the Regulation in issue, the national court can no longer order interim measures, or should invoke existing ones, unless the grounds of illegality submitted to it differ from those rejected by the Court in its judgment. The same applies if the CFI dismisses on the merits an action for annulment of the regulation by a final judgment.[290]

Conclusion

The case law on interim relief proves that the protection of Community rights can be achieved only through the effective and mutual co-operation between the national courts and the ECJ. The Court has set uniform principles formulated on the model of interim relief before itself. Therefore, national courts are required to assess the balance of interests as interpreted in Articles 185, 186. In fact, there are few cases on interim measures and therefore it is difficult to draw full comparison on the basis of insufficient samples. The ECJ expanded the right to interim relief in cases of suspension of national acts (*Zuckerfabrik* and *Atlanta*), but it is notable that this tendency is without further progress.

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[288] See *Krüger*, op.cit., para 45.

[289] See *Krüger*, op.cit., para 46 of the Judgment and para 44 of the Opinion.

[290] See *Atlanta*, op.cit., para 46.

3.3 Restitution

3.3.1 The right to repayment

The ECJ has consistenly held that payments made by individuals to national authorities which are levied contrary to Community law must be reimbursed and that the obligation of the Member States in question to reimburse them follows from the direct effect of the Community provision which has been infringed.[291]

In *Fantask*[292] the Danish Court referred to the ECJ for a preliminary ruling the questions whether the recovery of charges levied on the registration of companies could be resisted on grounds of excusable error or limitation if the Directive 69/335[293] gave rights which could be relied on before national courts. The essence of the Danish law on "excusable error" seems to have been that, over a long period of time, neither the national authorities nor the taxpayers knew the levy was unlawful. The ECJ held that the Directive gave rights which could be relied on before national courts, but excusable error was not available as a defence. The application of the Danish rule at issue would make it excessively difficult to obtain recovery of prohibited national charges. In addition to this argument based on securing the rights of the individual, the ECJ, also, noted that to apply Danish law could have the effect of encouraging long-running breaches of Community law.[294] The result of *Fantask* is, therefore, to impose on national authorities what is in effect a strict liability to refund, regardless of the reasonabless of the error which led to the imposition or continuation of the domestic charge.[295]

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[291] See M. Dougan, *Cutting your losses in the enforcement deficit: a Community right to the recovery of unlawfully-levied charges* (1999) *Cambridge Yearbook of European Legal Studies* 233.

[292] Op.cit., n. 25. Noted by A. Ward, *Indirect Taxes and National Remedies* (1999) 58 *Cambridge Law Journal* 36 and N. Notaro, 35 (1998) *Common Market Law Review* 1385.

[293] Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Ed.1969 (II), p. 412).

[294] Op.cit., paras 38-40.

[295] See also Case C-212/94, *FMC plc, FMC (Meat) Ltd v. Intervention Board for Agricultural Produce and Ministry of Agriculture, Fisheries and Food* [1996] ECR I-389.

There are, however, some available defences for the Member States.[296] The first concerns the prohibition of reimbursement when the unduly levied taxes may have been passed on to third parties. In *Hans Just*[297] the Court ruled that Community law does not prevent national courts from taking into account in accordance with national law the fact that the unduly levied taxes may have been incorporated in the price of goods and thus passed on to other traders or to consumers. This decision has been criticised harshly as compromising the right of individuals to repayment.[298] The main objections can be summarised as following: Although the doctrine is said to prevent unjust enrichment, it results in the Member State being unjustly enriched since it is able to profit from its own wrong; It is impossible to establish whether a charge has indeed been passed on; The doctrine of passing-on, whatever rules of evidence being applicable, is a measure having an effect equivalent to quantitative restrictions prohibited by Article 30 to 36 of the EC Treaty; it does not reflect economic reality and it creates uncertainty. These consequences, however, have been mitigated in *San Giorgio* and subsequent case law.

In *San Giorgio* the ECJ still adhered, in principle, to the passing-on doctrine. It was called upon to consider the compatibility of an evidential rule, which imposed a presumption that the sums had been passed on, unless the taxpayer provided documentary proof to the contrary. The ECJ held that a Member State cannot make the repayment of national charges levied contrary to Community law conditional upon the production of proof that those charges have not been passed on to other persons, if the repayment is subject to rules of evidence which render the exercise of that right virtually impossible, even where the repayment of other taxes, charges or duties levied in breach of national law is subject to the same restrictive conditions. The evidential rule made excessively difficult the repayment of charges levied contrary to Community law. A party should not be required to prove the negative. "In a market economy based on freedom of competition, the question whether, and if so to what extent, a fiscal

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[296] See A. Biondi and L. Johnson, *The Right to Recovery of Charges levied in Breach of Community Law: No Small Matter* (1998) *European Public Law* 313, who defend the position that the protection of individual rights should not allow for exceptions to the right of repayment since such right is a corrolary of the doctrine of direct effect.

[297] Case 68/79 [1980] ECR 501. For a recent affirmation see *Dilexport*, op.cit. and Case C-441/98, *Kapniki Michailides v. IKA* [2000] ECR I-7145.

[298] See the Opinion of A-G Mancini in *San Giorgio*, op.cit., para 8 and A-G Tesauro in *Comateb*, op.cit., paras 19-22.

charge imposed on a importer has actually been passed on in subsequent transactions involves a degree of uncertainty for which the person obliged to pay a charge contrary to Community law cannot be systematically held responsible."[299] The rule established in *San Giorgio* favours extremely the taxpayer. It may be difficult for the taxpayer to provide the negative proof that the undue charges have not been passed on to his purchasers, but it is even more difficult for the national administration to prove the contrary.

In *Comateb*[300] the ECJ reaffirmed *San Giorgio*. It concerned the issue of repayment of charges on imports levied in breach of Community law. The national provision denied reimbursement, if it could be established that the charge has been passed on in its entirety and that repayment could unjustly enrich the trader. The peculiarity was that the national legislation required the traders to pass on the cost of the charges to purchasers of their goods. The ECJ ruled that the fact that there is an obligation under national law to incorporate the charge in the cost price of goods does not mean that there is a presumption that the entire charge has been passed on, even where failure to comply with that obligation carries a penalty. Accordingly, a Member State may resist repayment to the trader concerned only where it is established that the charge has been borne in its entirety by someone other than the trader and the reimbursement would constitute unjust enrichment. Also, if the burden of the charge has been charged on only in part, the national authorities must repay the amount not passed on. Repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment. In the circumstances of the case the increase in the price of the product brought about by passing-on the charge led to a decrease in sales. The levying of dock dues could make the price of products from other parts exempt from those dues, with the result that importers would suffer damage, regardless of whether the charge has been passed on. In such circumstances, damage may exclude, in whole or in part, any unjust enrichment which would otherwise be caused by reimbursement. It follows that where domestic law permits the trader to plead such damage, it is for the national court to give such effect to the claim.[301]

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[299] *San Giorgio*, op.cit., para 15.

[300] Case C-192 to C-218/95, *Comateb and Others v. Directeur General des Douanes et Droits Indirects*, [1997] ECR I-165. See also Joined Cases C-441/98 and C-442/98, *Kapniki Mikhailidis AE v. IKA*, op.cit.

[301] See, op.cit., para 35.

In a recent case,[302] concerning self-assessed taxes,[303] Jacobs A-G elaborated the above principles. He found that, even where the burden of the charge has been passed on in whole or in part, repayment to the trader of the relevant amount does not necessarily entail his unjust enrichment. For example, the trader may choose to curtail any increase in his retail prices and maintain his volume of sales by limiting his profit margin to absorb all or part of the tax. He may also increase his prices by the exact amount of the tax, but he may find that his profits drop because he is making fewer sales. Sometimes, he may choose to absorb himself part of the tax, but still find a drop in sales. On the one hand, there must be no obligation on the claimant to prove that he has not passed the burden of the tax on to a third party and no presumption that he has done so simply because his retail price was necessarily deemed to be inclusive of tax, regardless of any other circumstances. On the other hand, where a self-assessed tax is concerned, the tax authorities cannot be expected to prove that the burden has been passed on without the taxable persons cooperation and access to such relevant records as he may have kept. Community law does not preclude the possibility of drawing reasonable inferences from existing evidence. Without such a possibility, the balance might be tilted so far in favour of the claimant as to render the justified aim of preventing unjust enrichment in practice impossible to achieve.

A-G Geelhoed expressed similar views on this issue.[304] He found that the financial burden to be borne by the trader is always greater than the amount of the levy itself. The trader's loss is not represented merely by a reduction in turnover and profit, but also for example by a restriction in the commercial margin of manoeuvre whereby the trader's ability to adjust his marketing strategy is restricted. The national tax authorities must show that the financial burden on the trader has been neutralised in order to be able to resist payment. In any event, a thorough economic analysis of the market is necessary and a mere accounting investigation by the national authorities is not sufficient. He, also, stressed the duty of the trader to co-operate

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[302] Case C-147/01 *Weber's Wine World and Others v. Abgabenberufungskommission Wien* of 2 October 2003 (not yet published). See the Opinion of A-G of 20 March 2003, paras 45-52 (not yet published).

[303] Traders calculated the amount as a percentage of their taxable sales and declared it to the authorities.

[304] See the Opinion of A-G Geelhoed of 3 June 2003 in C-129/00, *Commission v. Italy* of 9 December 2003 (not yet published), paras 68-101.

with the administration that bears the burden to prove whether and to what extent the levy has been passed on.

The ECJ in determining the relationship between unjust enrichment and the passing-on doctrine made clear that passing on a charge to the consumer does not necessarily neutralise the economic effects of the tax on the taxable person.[305] The existence and degree of unjust enrischment can be established only following an economic analysis in which all the relevant circumstances are taken into account.[306] It therefore concluded that a presumption of unjust enrichment on the sole ground that the duty was passed on to third parties is precluded by Community law. The judgment is welcome, because it clarifies the meaning of passing-on and follows an economic approach. Passing-on does not necessarily mean unjust enrichment of the trader and the latter should be assessed on the basis of market criteria.

The second defence available to Member States is the set-off mechanism. The ECJ has held in the case of an insolvent trader to whom funds had been wrongly paid that set-off may in fact constitute the only practicable way open to the authorities to recover such sums.[307] In *Continental Irish Meat*[308] the ECJ established the principle that it is for each Member State to define the conditions under which its national authorities may resort to set-off. This ruling was confirmed in *Bent Jensen*,[309] where the ECJ applied the mechanism of setting-off obligations under two different legal orders. After the reform of the Common Agricultural Policy, Article 30a of Regulation 805/68[310] as inserted by Regulation No 2066/92,[311] provides that the amounts to

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[305] Case C-147/01, op. cit., para 95.

[306] Op.cit., para 100.

[307] Case 250/78, *DEKA v. EEC* [1983] ECR 421, para 14.

[306] Case 125/84, *Continental Irish Meat Ltd v. Minister of Agriculture* [1985] ECR 3441.

[309] Case C-132/95, *Bent Jensen and Korn-og Foderstofkompagniet A/S v. Landbrugsministeriet* [1998] ECR I-2975.

[310] Council Regulation 805/68 on the common organization of the market in beef and veal (OJ 1968 L 148/24).

[311] Council Regulation (EEC) No 2066/92 amending Regulation (EEC) No 805/68 on the common organization of the market in beef and veal and repealing Regulation (EEC) No 468/87 laying down general rules applying to the

be paid pursuant to this Regulation shall be paid in full to the beneficiaries.[312] The ECJ held that a Member State is entitled under EC law to set off an amount of aid due to a beneficiary in accordance with Community legislation, with an outstanding debt owed to that Member State. The only caveat would be where such a set-off interferes with the proper functioning of the common organisation of the agricultural markets. The precise nature of the set-off is unimportant provided that it does not undermine the effectiveness of EC law and that the economic operators involved enjoy equal treatment. The ECJ ruled that it is for the national court to determine whether this is the case.[313]

In *CEMR v. Commission*[314] the Court of First Instance annulled a Commission decision effecting set-off against the sums payable to the Council of European Municipalities and Regions by way of Community contributions relating to certain activities. The Commission stated that the budgets relating to the contracts concluded under the regional cooperation programme[315] had not been respected, since expenditure beyond the budget limits had been incurred without the Commission's prior written authorisation. Under Article 8 of those contracts, Belgian law governed them and a clause that conferred jurisdiction on the civil courts of Brussels was also included in case of failure to reach an out-of-court settlement in a dispute arising between the parties.

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special premium for beef producers and Regulation (EEC) No 1357/80 introducing a system of premiums for maintaining suckler cows (OJ 1992 L 215/49).

[312] Under Article 15(3), the payments referred to in the Regulation are to be paid over to the beneficiaries in their entirety. See also Article 20(2) of Commission Regulation 615/92 laying down detailed rules for a support system for producers of soya beans, rape seed, colza seed and sunflower seed (OJ 1992 L 67/11) which provides that the payment concerned shall be made to producers without any deductions except as otherwise provided for in the Regulation in question.

[313] Op.cit., para 54. See also para 67.

[314] Case T-105/99, *Council of European Municipalities and Regions (CEMR) v. Commission of the European Communities* [2000] ECR II-4099.

[315] Adopted on the basis of Council Regulation (EEC) No 1763/92 of 29 June 1992 concerning financial cooperation in respect of all Mediterranean non-member countries (OJ 1992 L 181/5).

The CFI ruled that the set-off was incompatible with the principle of effectiveness and sound financial administration. The principle of the effectiveness of Community law implies that the funds of the Community must be made available and used in accordance with their purpose.[316] Before effecting set-off, the Commission was required to assess whether, in spite of that operation, the use of the funds in question for the purposes prescribed and the completion of the activities which had justified the granting of the contested sums remained assured.[317] In the absence of the actual payment of the sums intended for the fulfilment of that obligation, those sums would not be used for their purpose and that accordingly the activities at issue were in danger of not being carried out which is contrary to the effectiveness of Community law and, more specifically, to the effectiveness of the decisions granting the contested sums.[318] The contested sums were not intended to pay the CEMR's debts, but for carrying out activities for which those sums had been allocated. As regards the recovery of the debt which the applicant had *vis-à-vis* the Commission, it should be pointed out that, since the CEMR was not insolvent, that institution could have sought payment from it before the Belgian court with jurisdiction.[319] Finally, the principle of sound financial management must not be reduced to a purely accounting definition which considers as essential the mere possibility of regarding a debt as formally paid. On the contrary, a correct interpretation of that principle must include a concern for the practical consequences of the acts of financial management, using as a reference point, in particular, the principle of the effectiveness of Community law.[320]

As a general principle, the effect of set-off against entities to which Community funds are owed but which also owe sums of Community origin appears to be reasonable. An exception should be recognised in case the aim achieved by the Community finance programmes is in danger. Only if set-off interfered with the proper functioning of financial co-operation in respect of all Mediterranean non-member countries should be held incompatible with the principle of effectiveness. The CFI focused on the fact that some activities would not be carried out. It

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[316] Op.cit., para 60.

[317] Op.cit., para 61.

[318] Op.cit., para 63.

[319] Op.cit., para 70.

[320] Op.cit., para 73.

should have considered in more detail the exact effect that the termination of the contributed activities would have. It was not proved that the effectiveness of the whole program would be endangered. It is notable that the CFI regretted the absence of harmonisation on the issue.[321] The ECJ set aside the judgment of the CFI on the application of the principles of effectiveness and sound financial management, but found that set-off in disregard of the rules of national law governing one of the claims concerned is illegal. [322]

3.3.2 The claim for default interest

A delay in payment adversely affects the value of the amount of money due, occasioning a loss for which the creditor will be compensated. The award of interest should guarantee that the victim's assets are restored as closely as possible to the condition in which they would have been if the harmful act had not taken place.[323] In national legal systems interest is considered an essential part of the damages owed for an injury. The ECJ in a number of cases has underlined that the principles of integral compensation and repayment should comprise the award of interest.[324]

It is standard case law that national rules are to settle all ancillary questions relating to the reimbursement, such as the authority's liabilty to pay interest, by applying domestic rules

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[321] It ruled in para 58: "it would be preferable for the issues set by set-off to be dealt with under general provisions laid down by the legislature and not by individual decisions adopted by the Community judicature in the context of disputes which come before it."

[322] Case C-87/01 P, *Commission v. CEMR* [2003] ECR I-7617.

[323] The European Court of Human Rights began as of 1 January 1996 awarding default interest when the respondent state does not pay the judgment within three months. In addition it may award interest on pre-judgment losses under Article 41.

[324] See Cases 64, 113/76, 167, 239/78 and 27, 28,45/79, *P. Dumortier Frères SA v. Council* [1979] ECR 3091; Case 238/78, *Ireks-Arkady GmBH v. Council and Commission* [1979] ECR 2955 at 2975; Case C-152/88, *Sofrimport v. Commision* [1990] ECR I-2477 at 2512; Joined Cases C-104/89 and C-37/90 *Mulder and others v. Council and Commision* [1992] ECR I-3061 at 3135-37; See van Casteren, "Article 215(2) and the Question of Interest" in Ton Heukels and Alison MacDonnell, *The Action for Damages in Community Law* (Kluwer 1997) 199. See also Case 54/81, *Firma Wilhem Fromme v. Bundesastalt für Landwirtschaftliche Martkordnung* [1982] ECR 1449 and Case T-459/93, *Siemens SA v. Commission* [1995] ECR II 1675 on the repayment of State aids.

regarding the rate of interest and the date from which interest had to be calculated.[325] We have already seen that in *Marshall II* it was established that interest is a necessary component of compensation that is destined to make good the damage suffered by a breach of equal treatment. The ECJ ruled that full compensation for the loss and damage sustained cannot leave out of account factors, such as the effluxion of time which may in fact reduce its value, and that the award of interest is an essential component of compensation for the purposes of restoring real equality of treatment.[326]

In *Sutton*,[327] however, although there were serious similarities with *Marshall*, the ECJ ruled against the necessity of the interest requirement. The applicant had been denied an invalid care allowance under national law for reasons which discriminated against her on grounds of sex. She relied then on Directive 79/7[328] concerning equal treatment in social security and was awarded arrears of the allowance, but she was refused interest on these arrears, on the ground that national law did not provide for the payment of interest on social security benefits. The ECJ held that the right provided by Article 6 of the Directive for victims of such discrimination was "to obtain the benefits to which they would have been entitled in the absence of discrimination, but that the payment of interest on arrears did not constitute an essential component of the rights so defined."[329] The difference in the outcome of the case is inexplicable. After all, Article 6 in both Directives 76/207 and 79/7 was identical and pursued the same objective, namely real equality of treatment for men and women.

Sutton was eluminated in *Metallgesellshaft*.[330] The principal question referred to the ECJ for a preliminary ruling was whether a system whereby resident UK companies could avoid liability to

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[325] Case 130/79, *Express Dairy Food Ltd v. Intervention Board for Agricultural Produce* [1980] ECR 1887, paras 16 and 17; Case 26/74, *Roquette Frères v. Commission* [1976] ECR 677, para 11 and 12.

[326] *Marshall*, op.cit., paras 24-32.

[327] Case C-66/95, *R v. Secretary of State for Social Security, ex parte Eunice Sutton* [1997] ECR I-2163. See A. Ward, *New Frontiers in Private Enforcement of E.C. Directives* (1998) 23 *European Law Review* 65.

[328] Directive 79/7/EEC, *Social Security Directive* (OJ 1979 L 6/24).

[329] Op.cit., para 25.

[330] Op.cit., n. 47.

advance corporation tax, ACT, on dividends paid to its UK resident parent company by making a group income election, was contrary to Community law. The system operated by the UK was challenged by a number of other UK companies whose parent companies were established in another Member State. It was contended that the system infringed the principle of freedom of establishment since these companies were being discriminated against on the basis of nationality because they were not entitled to elect group income and thus had to pay ACT.

The ECJ underlined that what is contrary to Community law is not the levying of a tax in the United Kingdom on the payment of dividends by a subsidiary to its parent company but the fact that subsidiaries, resident in the United Kingdom, of parent companies having their seat in another Member State were required to pay that tax in advance whereas resident subsidiaries of resident parent companies were able to avoid that requirement. The ECJ found that the claim for payment of interest covering the cost of loss of the use of the sums paid by way of ACT was not ancillary, but the very objective sought by the plaintiffs' actions in the main proceedings. It distinguished the case from *Sutton*, where the Directive at issue conferred only the right to obtain the benefits to which the person concerned would have been entitled in the absence of discrimination and the payment of interest on arrears of benefits could not be regarded as an essential component of the right as so defined. In the present case, it was precisely the interest itself which represented what would have been available to the plaintiffs, had it not been for the inequality of treatment, and which constituted the essential component of the right conferred on them.[331] This reasoning is not totally convincing. Sometimes the claim for interest may be higher than the capital itself.

More convincing is the argument of the Advocate General. Fennelly A-G argued that the Court in *Sutton* adopted a pragmatic approach. It followed the advice of Léger A-G, who noting that the benefit claimed had been paid to Ms Sutton, observed that the discrimination had already been removed in conformity with the rules of national law and the national system could be regarded as having ensured the effectiveness of the principle in practice.[332] In *Metalgesellschaft*, where the breach of Community law arised, not from the payment of the tax itself but from its being levied prematurely, the award of interest represented the

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[331] Op.cit., para 93.

[332] Op.cit., para 62 of the Opinion.

reimbursement of that which was improperly paid and would appear to be essential in restoring the equal treatment guaranteed by Article 52 of the Treaty. Apart from the pragmatic concerns, *Metallgesselschaft* may be seen as an attempt to ease off the reaction against *Sutton*.[333]

3.3.3 Recovery of state aids

It is useful to compare the system of restitution before national courts with the one designed especially for Community and state aids. In *Kohlegesetz*[334] the ECJ confirmed that the Commission was competent to insist that a national authority recover illegally granted state aids. The ECJ elaborated separate rules on the one hand for the recovery of subsidies which have been paid in breach of the enabling Community regulation and on the other hand for the recovery of aids paid by Member States in breach of the prohibition contained in Articles 90 and 91 of the Treaty.[335]

In *Deutsche Milchcontor*[336] the ECJ ruled that Community law did not prevent national law from having regard, in excluding the recovery of unduly paid aids, to considerations such as the protection of legitimate interests, the loss of unjustified enrichment or the passing of a time limit. The ECJ held that a national court could deny the recovery of the wrongly paid denaturing premiums where the administration knew or was unaware, as a result of its gross negligence, that it was wrong to grant the aid. In particular, in *Oelmühle Hamburg*[337] the ECJ accepted that the recipient of the Community subsidy can plead as a defence that, at the time when it was granted, he lost the unjust enrichment by passing on the pecuniary advantage by paying the producer the target price prescribed by Community law on the condition that the recipient has good faith that any right or recourse against his suppliers is worthless and that the conditions prescribed are the same as those which apply with respect to the recovery of purely national

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[333] See, also, Case C-63/01, *Evans v. MIB* of 4 December 2003, not yet published, paras 65-70.

[334] Case 70/72, *Commission v. Germany* [1973] ECR 813.

[335] See A. Ward, op.cit., p. 79.

[336] Cases 205-215/82, *Deutsche Milchcontor GmbH v. Germany* [1983] ECR 2633.

[337] Case 298/96, *Oelmühle Hamburg AG, Jb. Schmidt Söhne GmbH & Co. KG v. Bundesanstalt für Landwirtschaft und Ernährung* [1998] ECR I-4767.

financial benefits. It held that the effectiveness of Community law is not impaired, since the sums can be recovered where the person required to make repayment is aware of the circumstances rendering the act illegal or is unaware as a result of gross negligence. Also, in *Landbrugsministeriet-EF-Direktoratet*[338] the ECJ held that national courts, *in principle*, could apply a national rule of equity which gave discretion to refuse recovery of aid paid but not due where a considerable period of time had elapsed since the payments had been made.

Subsequently, the ECJ changed this case law on the recovery of aids granted contrary to Art. 87-89 (ex 92-94) EC. In *Land Rheinland-Pfalz*[339] the ECJ held, contrary to *Deutsche Milchcontor*, that the German authorities were obliged to recover unlawfully paid state aid even though they had not revoked the unlawful measure within the one-year period prescribed by the national rules. If the principle of legal certainty and the national time limit precluded recovery in such cases, recovery of unduly paid sums would be rendered practically impossible and the Community provisions concerning state aid deprived of all practical effect.[340] The ECJ dealt also with the argument that recovery should be denied where the national authority itself was responsible for the illegallity and that recovery would cause that authority to be in breach of the principle of good faith owed to the recipient. The ECJ repeated that a recipient is taken to expect that state aid will be recoverable where the procedure set out in Article 93 has not been followed. The recipient's obligation to ensure that the aid had been paid in accordance with that procedure could not depend on the conduct of the state authorities. The recipient may not legitimate expect that a state aid is lawful unless made in conformity with the Community rules even if encouraged to believe that the payment is lawful by the authorities. Failure to revoke a decision granting the aid and to seek its recovery in circumstances such as these would, therefore, adversely affect the Community interest and render practically impossible the recovery required by Community law.[341]

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[338] C-366/95, *Landbrugsministeriet - EF-Direktoratet v. Steff-Houlberg Export I/S* [1998] 2661.

[339] Case C-24/95, *Land Rheinland-Pfalz v. Alcan Deutchland GmbH* [1997] ECR I-1591.

[340] Op.cit., para 37.

[341] Op.cit., paras 41-43.

The ECJ, finally, found, contrary to the judgment in *Oelmühle*, that the national authorities were obliged to revoke a decision granting unlawful aid and to recover the aid even where the gain no longer existed. Alcan had claimed that it had used the aid in such a way that, for the purposes of national law, its gain was one which no longer existed. The ECJ ruled that the purpose of the rule was to protect the legitimate expectation as to the lawfulness of the aid unless it had been granted in compliance with the relevant Community procedures.[342] It seems clear that negligence or fault on the part of the paying authorities will not constitute a good defence to a claim to recover illegally paid state aid. In virtually all such cases the administration will, or should, know that the aid has been paid in breach of the Community rules and the applicant is also expected to know of the state aid rules and to enquire whether or not the state aid rules have been complied with.

The conclusion is that only in exceptional circumstances has the ECJ accepted that a national court may apply defences within the sphere of state aids. Exceptional circumstances were found to exist in *RSE Maschinefabrieken*.[343] In that case aid had been granted over a long period of time and the Commission had waited 26 months before ruling that subsequent aid was incompatible with the common market. It was therefore the Commission's delay in acting which enabled the applicant to establish a legitimate expectation. In contrast, there will be no infringement of the principle of protection of legitimate expectations where the delay in the Commission's examination procedure is caused by the government that had illegally granted the aid.[344] Recently, the Court found that Community law does not preclude the application of the principles of the protection of legitimate expectations and legal certainty in order to prevent the recovery of aid financed by the Community which has been wrongly paid, provided that the interest of the Community is also taken into account. The application of the principle of the protection of legitimate expectations assumes that the good faith of the beneficiary of the aid in question is established. [345]

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[342] Op.cit., para 49.

[343] Case 223/85, *Rijn-Schelde-Verolme (RSV) Maschinefabrieken en Scheepswerven NV v. Commission* [1987] ECR 4617.

[344] Case C-303/88, *Italy v. Commission* [1991] ECR I-1433.

[345] Case C-336/00, *Austria v. Huber* [2002] ECR I-7699.

State aids is an area of cardinal importance of internal market and one can understand the reason why the ECJ decided to formulate itself specific rules for the recovery. One cannot, however, easily explain the inconsistencies in the case law and the distinction it draws between recovery of State aids deriving from the common organisation of a market on the basis of Regulations and recovery of State aids in breach of the Treaty. One could assume either that there should be no elasticity in the enforcement of the Treaty or that the Member States are discouraged from granting State aids that are not authorised by the Community secondary legislation.

Conclusion

In conclusion, the ECJ has made strict the obligation to return the illegally received taxes or levies. The obligation of Member States to reparation towards individuals has, in principle, minor exceptions that do not prejudice substantially the right to reparation. This is an area where one finds plenty of inconsistencies in the case law in relation to the requirement of interest, the passing-on doctrine, set-off and the recovery of state aids. The incosistencies reveal, also, the gradual evolution of the law. They could probably be explained by the fact that the ECJ tests several solutions until it reaches a commonly acceptable result. The unclear relations between the Community bodies and the Member States could explain the case law on state aids. Within an evolving legal and political environment, the ECJ advances its own perceptions and ideas.

Chapter 4: Member State liability in damages

The establishment of Member State liability in damages is the most important development in the Community field of remedies. Contrary to international law where State responsibility is marginalised or avoided,[346] the ECJ established the principle that Member States are liable in damages when they infringe Community law. *Francovich*[347] came like a bolt from the blue to all those that engaged with European law. In the eyes of the ECJ, however, a principle of State liability for loss and damage caused to individuals as a result of breaches of Community law was "inherent" in the system of the Treaty.[348]

4.1 The establishment of a "new" remedy

In *Francovich* the ECJ devised State liability as a sanction to those Member States that do not implement the Directives. At the time that *Francovich* was decided no sanctions had specifically been made available to the ECJ.[349] The Commission's lack of genuine autonomy and sufficient resources suggested that State liability would be a much more effective deterrent, as the Commission itself has conceded.[350] The deterrence objective "is to be found in article 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether

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[346] See M. Evans, *Remedies in International Law: The Institutional Dilemma*, Hart Publishing 1998. In general terms, there is no clear pattern of applicable remedies before the International ECJ. See M. Shaw, *A Practical Look at the International ECJ*, in M. Evans, op.cit., p. 26.

[347] Op.cit. Precursors of the *Francovich* decision have been the judgments in Case 6/60, *Jean-E. Humblet v. Belgian State* [1960] ECR 559 and Case 60/75, *Russo v. Aima* [1976] ECR 45, but note that the latter left the issue entirely on Member States. See N. Green and A. Barav, *Damages in the national courts for breach of Community law* (1986) 6 *Yearbook of European Law* 55.

[348] *Francovich*, op.cit., para 35; *Brasserie*, op.cit., para 31.

[349] C. Harlow, *Francovich and the Problem of the Disobedient State* (1996) *European Law Journal* 199, 225. The TEU, amending Article 171 EC, empowers the ECJ to impose a "lump sum or penalty payment."

[350] See T. Swaine, *Subsidiarity and Self-Interest: Federalism and the ECJ* (2000) *Harvard International Law Journal* 1, 105. See also C.-D. Ehlermann: "centralised control alone will never ensure that Community law is observed in all Member States, whatever form is made to strengthen [it]" Opening Speech at the IVth Erenstain Colloquium, in making European Policies Work at 147.

general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law."[351]

The ECJ stressed equally the protection of individual rights: "the full effectiveness of Community rules would be impaired and the protection of rights which they grant would be weakened, if individuals were unable to obtain redress, when their rights are infringed by a breach of Community law for which a Member State may be held responsible."[352] When EC law confers rights on individuals, it follows that Member States are under a duty towards their citizens as regards these rights. The duties of Member States would be groundless, if Member States were not liable for breaching them.[353] By discerning rights and remedies "inherent in the system of the Treaty" the ECJ engaged in classic judicial activism.[354]

The reasoning of the ECJ in *Francovich* was general and implied the universality of Member State liability in damages. In *Brasserie du Pêcheur and Factortame III*[355] the ECJ enunciated that State liability covers violations of any category of Community norm. *Factortame* involved the positive enactment of legislation which denied to the applicants the Community law right of non-discrimination. *Brasserie du Pêcheur* involved the failure to amend existing legislation which denied the applicants the right to import goods in accordance with the principle of free movement of goods. The important questions dealt with by the ECJ were (1) whether the principle of Member State liability developed in *Francovich* applied to national legislative acts, and (2) the conditions of liability.

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[351] *Francovich*, op.cit., para 36.

[352] *Francovich*, op.cit., para 33.

[353] See Markesinis & Deakin, Tort law, 4th ed (1999), 72: "The issue of duty is...essentially concerned with whether the law recognises in principle the possibility of liability in a given type of situation."

[354] D. O'Keefe, *Judicial Protection of the Individual by the European ECJ* (1996) *Fordham International Law Journal* 901, 913.

[355] Joined Cases C-46/93 and C-48/93, *Brasserie du Peucheur v. Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd* [1996] ECR I-1029.

The German government argued that a general right of reparation for individuals could be created only by legislation and that for such a right to be recognised by judicial decision would be incompatible with the allocation of powers between the Community institutions and Member States.[356] The ECJ rejected this argument. It stated that the existence and extent of State liability for breaches of Community law are questions of interpretation which fall within its jurisdiction. It held that it is for the Court in pursuance of the task conferred on it by Article 164 (now 220) of the Treaty[357] to rule on such a question in accordance with general rules of interpretation, in particular by reference to the fundamental principles of Community legal system and, where necessary, general principles common to the legal systems of the Member States.[358]

The ECJ drew simultaneously an analogy between Member State liability and two different legal phenomena- non-contractual liability of the institutions of the Community and State liability in international law. It referred to the general principles common to the laws of the Member States under Article 288(2) of the Treaty that appear to be also the basis of the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties.[359] The ECJ held that national courts must hold the State liable in damages at least in the circumstances in which the Community is also liable. The reason for connecting Member State liability with the non-contractual liability of the Community is that the protection which individuals derive from Community law cannot, in the absence of some

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[356] Op.cit., para 24.

[357] Article 220 provides: "The ECJ shall ensure that in the interpretation and application of this Treaty the law is observed."

[358] *Brasserie*, op.cit., para 27. The reference to common principles is quite hypothetical, as there are no principles common to Member States See A-G Léger in Case C-5/94, *The Queen v. The Ministry of Agriculture, Fisheries and Food: ex parte Hedley Lomas* [1996] ECR I-2553, para 100. See also Van Gerven, *Taking Article 215(2) Seriously* in Beatson and Tridimas, *New Directions in Public Law*, Hart Publishing 1998, p. 35 and *Bridging the unbridgeable: Community and national tort laws after Francovich and Brasserie* (1996) 45 *International Comparative Law Quarterly* 507.

[359] *Brasserie*, op.cit., paras 28-29.

particular justification, vary depending upon whether a national authority or a Community institution is responsible for the breach.[360]

The ECJ adopted the perspective of State under public international law where the State as a whole is responsible.[361] It decided that a Member State breaches Community law, whatever be the organ of the State whose act or ommission is responsible for that breach.[362] It stated: [In] international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judicature or the executive. This must apply *a fortiori* in the Community legal order since all State authorities including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.[363]

As a matter of principle, the reference to international law is quite appropriate. In its judgment concerning the *Chorzow Factory (Idemnity) Case*, the Permanent Court of International Justice called the obligation to make reparation for breach of an engagement "a general principle of international law" and "a general conception of law."[364] However, one must not overlook the fact that State responsibility under international law does not regard individuals as its subjects and, as a result, it provides a remedy not for individuals but for States.[365] It concerns the State taken

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[360] *Brasserie*, op.cit., para 42. The judgment, however, does not emphasize sufficiently the differences between Community liability and State liability for breach of Community law. See T. Tridimas, *The General Principles*, op.cit., at 334. See, also, A-G Léger for example in the *Hedley Lomas* case, op.cit., para 143 of the Opinion, where he argued that "the two types of liability [national and Community] do not have the same foundation" given that "Member States are subject to a hierarchy of legal norms which does not exist in the Community." See also Berb, *Case commentary on Francovich* (1992) 29 *Common Market Law Review* 557, 582.

[361] See Opinion of A-G Tesauro in *Brasserie*, op.cit., para 38. Also, P. Craig, *Once more unto the breach: the Community, the State and damages liability* (1997) 113 *Law Quarterly Review* 67.

[362] *Brasserie*, op.cit., para 32.

[363] *Brasserie*, op.cit., para 34.

[364] *Factory at Chorzów* (Germany v. Poland) 1928 P.C.I.J. (ser. A) No. 17 at 29. See also the *ICJ opinion in Reparation for Injuries Suffered in the Service of the United Nations* [1949] I.C.J. 184.

[365] See I. Lee, *In Search of a Theory of State Liability in the European Union* (No. 9/99 Working Paper), p. 20.

as a whole towards other States, and it is settled by international courts and arbitration tribunals external to those States; in contrast, the liability of Member States for violations of Community law is ruled upon by national courts which are themselves part of the State and the action is brought by private parties. [366]

Many authors are content to describe EU Member State liability as an extension of administrative tort liability.[367] The most frequently cited explanation is that a damages remedy was needed because Member States were neglecting to implement directives on time. In this account of *Francovich*, the damages remedy, filled a gap in the enforcement system of Community norms. Provisions of the Treaties and regulations were in some cases capable of being relied upon in domestic proceedings against a Member State or between private parties, even in the absence of national implementing legislation. By contrast, the ECJ had unequivocally held that Directives were not capable of producing direct effects in litigation between private parties. Moreover, in the absence of national implementing legislation, it was often impossible to invoke the Directives in domestic proceedings even against the Member States themselves, because Directives were usually worded so as to leave choices to the national implementing authorities and therefore did not produce direct effects against the State. This could effectively deprive their citizens of the rights which Community law intended to confer upon them.

Those authors who argue that EU Member State liability is a form of administrative tort liability tend to characterise the acts of national legislatures as being the equivalent of administrative acts, for the purposes of Community law.[368] For example, Green and Barav write: "the Community may be characterised as a complex legislative machinery the executive branch of

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[366] Van Gerven, *Torts: Scope of Protection (ius commune casebooks for the common law of Europe)* Oxford: Hart (1998), p. 460.

[367] See C. Harlow, *Francovich and the Problem of the Disobedient State*, op.cit., at 206. See J. Steiner, *From Direct Effects to Francovich: Shifting Means of Enforcement of Community Law* (1993) 18 *European Law Review* 3, 6. See along the same lines D. Curtin, *Directives: The Effectiveness of Judicial Protection of Individual Rights*, 27 *Common Market Law Review* 709, at pp. 709-711.

[368] See J. Steiner, *The Limits of State Liability for Breach of European Community law* (1998) *European Public Law* 69, 107: "Member state's breaches of Community law, unlike breaches by Community institutions, do not normally involve the exercise of a wide discretion."

which are the Member States."[369] What these authors are getting at, of course, is the important role that national authorities play in implementing Community law, particularly through the transposition of Directives into national law and the application of directly effective Community law by national courts. The fact that the Community legal system depends on the cooperation of national authorities does not reduce Member States to the equivalent of an executive branch. Although Member States have accepted limitations of their sovereignty, this does not transform all of their acts into administrative acts. Therefore, it remains a distinction between EU Member State liability and administrative tort liability that the potential wrongdoers include not only the administrative organs of the State but also the legislative and the judiciary.[370]

Member State liability in damages could be held similar to constitutional tort liability. Since the legal basis for State liability is to be found in the constitutional principles of direct effect and primacy and Community law like a constitution binds all state organs, including the legislature and the judiciary, and grants rights to individuals against the State, it is not difficult to imagine a system of liability in which the violation of constitutional rights would result in State liability for the harm caused. In fact, there are few legal systems in which constitutional torts of this kind are recognised. While all of the Member States of the EU recognise liability for unconstitutional administrative action, none of them recognise liability for unconstitutional legislative or judicial conduct.[371]

In France, the country that comes closest to recognising liability for legislative acts, the ability to obtain compensation for legislative harm, under the doctrine of *égalité devant les charges publiques*, is subject to the will of the legislator. The right of compensation under the *égalité* doctrine does not involve showing that the State's conduct was wrongful or that it violated rights protected by a superior rule of law, but rather demonstrating that compensation is required to avoid the imposition of a special and onerous burden for the plaintiff.[372] There will be no

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[369] N. Green and A. Barav, op.cit., at 55.

[370] See I. Lee, op.cit., p. 20.

[371] See Schockweiler et al., *Le régime de la responsabilité extracontractulle du fait d'actes juridiques dans la Communauté européenne* (1990) *Revue Trimistrielle de Droit Européen* 27.

[372] See Long, Weil et al., *Les grands arrêts de la jurisprudence administrative* (1993) at p. 310.

compensation if the law or its *travaux préparatoires* suggest a legislative intent to preclude compensation.

A comparison with US law is, also, worth making. The case law of the ECJ expressing an expansive interpretation of its jurisdiction under the treaties, rigorously examining member state procedural rules for their consistency with Community law, and requiring that Community institutions assist national courts in applying Community law, rests on the emerging view that the ECJ together with the national courts exercise certain essential functions in an increasingly federalised Common Market.[373] Although the system of enforcement of Community law is not like the one in US, where there is a demarcation of competence between federal and state courts, the ECJ is a "Supreme Court" in the sense that it decides on the legality of national acts.

Under US law constitutional tort is very limited.[374] US law distinguishes between "absolute" immunity and "qualified" immunity. The former permits no inquiry into the merits of the underlying action being challenged, while the latter is available only if the official has acted in "good faith"-that is to say without "malice" or "reckless disregard" of the plaintifs rights. In addition US law allocates the two kinds of immunity depending upon how the official act being challenged is characterized. Generally, absolute immunity applies to legislative, prosecutorial

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[373] P. Dubinsky, *The Essential Function of Federal Courts: The EU and the United States compared* (1994) *American Journal of Comparative Law* 295.

[374] See R. Clark, A. Cox, J. Greenberg, P. Heymann, A. Kaufman, M. Marshall, P. Meltzer, *In memoriam: James Vorenberg, Leading Cases, Constitutional structure, Harvard law review* 2000-01, p. 179; Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations* 69 *California Law Review* 189; A. R. Amar, *Of Sovereignty and Federalism* (1987) 96 *Yale Law Journal* 1425; P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation* (1989) 102 *Harvard Law Review* 1372; A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction* (1983) 33 *Stanford Law Review* 1033; J. Gibbons, *The Eleventh Amendment and the State Sovereign Immunity: A Reintepretation* (1983) 83 *Columbia Law Review* 1889.

and judicial acts, while only a qualified immunity is available for administrative acts.[375] The absolute immunity of legislative acts is grounded in the text of the United States Constitution.

The Eleventh Amendment speaks of suits instigated by citizens of another state or of a foreign state,[376] but this does not mean that the Constitution provides for federal jurisdiction over a citizen's case against his own state without the state's consent. In *Hans v. Louisiana*[377] the US Court interpreted the Amendment to protect states from being sued even by their own citizens, though the Amendment does not so provide. The US Court reasoned that the Amendment was adopted to overrule the decision in *Chrisholm v. Georgia*,[378] in which the Supreme Court had held that states had given up their sovereign immunity when they adopted the Constitution. In subsequent cases the US Court held that the Amendment also protects states from suits brought by foreign states[379] and Indian tribes,[380] even though neither category of plaintiff is mentioned in the Amendment. For such jurisdiction to exist, Congress must clearly express its intent to abrogate state sovereign immunity and must act pursuant to a valid grant of constitutional power.

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[375] The US system of liability is more an officer liability regime than a governmental liability regime. Under the Federal Tort Claims Act, until 1974, the United States was vicariously liable only for the negligent acts of its agents. In 1974, the FTCA was amended to waive immunity for intentional torts. However, the United States remains immune from liability for unconstitutional legislative or judicial acts. See P. H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven, YUP 1983).

[376] It reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

[377] 134 US 1, 15 (1890). See also *Ex Parte New York*, 256 US 490, 497 (1921) (That a State may not be sued without its consent is a fundamental principle of jurisprudence...of which the Amendment is but an exemplification).

[378] 2 US (2 Dall.) 419 (1793).

[379] See *Monaco v. Mississippi*, 292 US 313, 330 (1930).

[380] See *Blatchford v. Native Village of Noatack*, 501 US 775, 779-82 (1991).

In *Pensylvannia v. Union Gas Co.*[381] the US Court interpreted the Eleventh Amendment in a way that virtually closed the remaining remedial gap, at least with respect to federal statutory rights. A majority of the US Court in that case held that the states' Eleventh Amendment immunity could be abrogated by Congress pursuant to the Interstate Commerce Clause,[382] a decision that was widely understood to establish that Congress could do so under any of its legislative powers. The Supreme Court overruled *Union Gas* in *Seminole Tribe*,[383] where it held that Congress might not abrogate the state's Eleventh Amendment immunity when legislating under pre-Eleventh Amendment Constitutional powers, such as the Commerce Clause.

In *Seminole Tribe* Justice Stevens dissented in part. He maintained that "Congress" power to authorize federal remedies against state agencies that violate federal statutory obligations is coextensive with its power to impose those obligations on the States in the first place.[384] In Justice Steven's view, the power to create a federal right necessarily entails the power to grant federal courts jurisdiction over non-consenting state defendants to remedy violations of that right; the *Seminole Tribe* line of cases, holding otherwise, was "profoundly misguided."[385] Justice Stevens' view is very much reminiscent of the reasoning of the ECJ in *Francovich*. However, in the perception of the US Supreme Court, the cost to the federal structure of abrogating state sovereign immunity was held to be too large.

In *Alden Maine* the US Court identified substantive concerns underlying the constitutional preservation of state sovereign immunity as including the states' control of their own finances and public policy.[386] In the same case the US Court underlined that the principle of sovereign

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[381] 491 US 1 (1989).

[382] See id. at 23.

[383] *Seminole Tribe v. Florida*, 517 US 44, 54 (1996).

[384] Op.cit., at 651.

[385] Op.cit., at 653.

[386] Alden Maine, 527 US 706 at 750 (1999). See C. M. Vázquez, *Sovereign Immunity, Due Process and the Alden Trilogy* (2000) *Yale Law Journal* 1927.

immunity accords to the States the respect owed to them as members of the federation.[387] In *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.* the US Court repeated that the constitutional limitation on Congress's power to abrogate state sovereign immunity is both desirable and consistent with the Framer's theory of federalism which asserts that disposal of governmental power is important to maintaining liberty.[388]

Although the US case law on this issue is difficult and inconsistent the conclusion is that although there is no jurisdiction of suits against States, States may consent to suit. The comparison with the US evokes a different perception of democracy than that followed by the ECJ. The reason is found in the political structure of the EU that is not a mature federal system but a *sui generis* system. The ECJ promoted diversity and difference as well as consensus, fragmentation as well as unity and cohesion, disruption of national norms as well as uniformity, and illegitimacy.[389]

The Convention is a place where one finds something resembling EU Member State liability in damages. The Convention is clearly designed to confer rights on individuals, and, since the international law considers itself superior to the domestic legal order, those rights emanate from a superior order of law. By the same token, liability can attach to the acts of any organ of government, including the legislative and judicial branches.[390] Moreover, the ECtHR grants "just satisfaction," including monetary compensation, directly to the injured party.[391] Extracting the principles applied by the ECtHR is a difficult task.[392] Article 41 provides that the ECtHR

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[387] Id., at 748-749, quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 US 139, 140 (1993).

[388] 527 US 666, 690 (1999).

[389] W.Mattli & A.-M. Slaughter, *Constructing the European Community legal system from the ground up: The role of individual litigants and national courts*, Jean Monnet Paper 1996.

[390] *Lingens v. Austria* (1986) 8 EHRR 407.

[391] Art. 41 of the ECHR reads: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

[392] See generally, A. R. Mowbray, *"The European Court of Human Rights" Approach to Just Justifaction* (1997) *Public Law* 647; D. J. Harris, M. O' Boyle and C. Warbrick, *Law of the European Convention on Human Rights*

should allow reparation "if necessary." These words give it a large discretion in the exercise of its powers under this provision, in respect not only of the conditions for the award, but also of the amount of compensation. The award of compensation depends mostly on the particular circumstance of each case and is awarded on an equitable basis.

Some principles are clear: a) No claim for compensation can be admitted without a previous finding of a violation by the Court. Also, under Community law, previous case law clarifying the issue is of cardinal importance in the enquiry of the sufficiently serious breach; b) The Court shall afford just satisfaction to the injured party solely if the internal law of the respondent state allows only partial reparation to be made for the consequences of a violation. This requirement seems to give to the award of compensation by the Court a subsidiary character in respect of the relevant proceedings in the State concerned, resembling the function of *Francovich* as a meta-remedy; c) The applicant must demonstrate a causal link between the violation complained of and the alleged pecuniary damage.[393] One common principle is that a breach of procedural rights (for example under Article 6) will not give rise to damages because the Court is reluctant to speculate as to what the substantive outcome of proceedings would have been if the procedures had been fair. It is strange, therefore, that the ECJ did not refer to the Convention as a source of inspiration, when it established Member State liability in Community law.

4.2 The justification for Member State liability

Three theories are offered as conceptualizing constitutional tort liability: corrective justice, the externalities theory and distributive justice. [394] Corrective justice focuses on fairness to the

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(London:Butterworths, 1995), p. 682-688; M. E. Amos, *Damages for Human Rights Act 1998* (1999) 2 *European Human Rights Law Review* 178; M. E. Mas, *Right to Compensation under Article 50*, in MacDonald, op.cit., 775.

[393] See *Vacher v. France* (1997) 24 EHRR 482.

[394] See J. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective* (1992) 49 *Wash. & Lee Law Review* 69, 79; R. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 *Journal of Legal Studies* 187; J. Coleman, *Corrective Justice and Wrongful Gain* (1982) 11 *Journal of Legal Studies* 421; J. Neyers, *The Inconsistencies of Aristotle's Theory of Corrective Justice*, 11 *Canadian Jaw Lournal of Law & Jurisprudence* 311, 320-27 describing Aristotle's view of correlative gain and loss; S. Nahmod, *Constitutional Damages and Corrective Justice: A Different View* (1990) 76 *Virginia Law Review* 997;

victim, while economic justice focuses on incentives to the wrongdoer. It is obvious that the first two lend themselves for discussion, since the ECJ has emphasised both oblectives of compensating individual violations and offering incentives to Members States to comply, but made no mention about distribution of wealth.[395]

The original account of corrective justice comes from Aristotle, in Book V, Chapter 4 of the "*Nicomachean Ethics*." Corrective justice is a moral theory, distinct from relative need or merit: the right of the victim to compensation and the corresponding obligation of the wrongdoer to make good the loss are independent of the relative wealth or merit of the wrongdoer and injured party. Member State liability in damages cannot be justified by the theory of corrective justice, because it cannot replace the fulfillment of the obligation. According to Aristotle's remedial justice ideal, remedies are designed to place an aggrieved party in the same position, as he or she would have been, had no injury occurred.[396]

Corrective justice theorists differ on main points, but the least common denominator of their views is that the duty to rectify or compensate is triggered when one person wrongfully causes harm to, or benefits at the expense of another. By distinguishing losses caused by

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J. J. Jeffries, *Compensation for Constitutinal Torts: Reflections on the Significance of Fault*; 88 *Michigan Law Review* 82; R. H. Fallon and D. J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies* 104 (1991) *Harvard Law Review* 1731; E. Weinrib, *Causation and Wrongdoing* (1987) 63 *Chicago Kent Law Review* 407; J. Rawls, *A theory of Justice* (Belknap 1971). On the distinction between corrective and distributive justice see also J. L. Coleman, Risks *and Wrongs* (Cambridge 1992) at 304-305; E. Anderson, *Value in Ethics and Economics* Harvard 1993, 55-59; J. Raz, *Morality and Freedom* 321-366 (Clarendon 1986); J. Radin, *Compensation and Commensurability* (1993) *Duke Law Journal* 43.

[396] Distributive justice is concerned with the global distribution of wealth. It is hard to imagine why, on any plausible theory of distributive justice, the victims of constitutional violations would be singled out as uniquely entitled to government wealth transfers.

[396] In particular, he argues:*"What the judge aims at doing is to make the parties equal by the penalty he imposes, whereby he takes from the aggressor any gain he may have secured. The equal, then, is a mean between the more and the less. But gain and loss are each of them more or less in opposite ways, more good and less evil being gain, the more evil and the less good being loss. The equal which we hold to be just, is now seen to be intermediate between them. Hence we conclude that corrective justice must be the mean between loss and gain. This explains why the disputants have recourse to a judge; for to go to a judge is to do justice... What the judge does is to restore equality."* Aristotle, *The Ethics* (J.A.K Thompson trans. 1955 at 148-49).

"wrongdoing" from other losses and focusing solely on the bilateral interaction between wrongdoer and victim, corrective justice theories potentially offer a justification for transferring wealth based solely on the fact of a constitutional violation. It is obvious that this is not the case in Community law where one has to establish a sufficiently serious breach, a condition that makes the Member States liable only in case of "abusive" governmental conduct.

Aristotle's theory refers to acts between individuals. It is not clear whether a collective entity like the government can qualify as a moral agent for purposes of corrective justice.[397] Corrective justice theories ground the duty to rectify in the causation of wrongful harms. Since the wrong is by the State, in the sense of the entire community, it is consonant with corrective justice that the obligation to repair the resulting injury should be born by the community, through the State. This view is not correct. The recognition that constitutional tort compensation ultimately comes from the pockets of the taxpayers attenuates the connection between moral responsibility and the burden of rectification.[398] Taxpayers do not "cause" Member State violations in any intuitive sense of causation, nor are they morally responsible for them.

If corrective justice is handicapped to explain EU Member State liability in damages is the rival theory of economics of law able to do so? According to the economic approach, since economic forces have shaped law, the legal system is best understood as an effort to promote efficient allocation of resources. "Justice" is translated to "efficiency."[399] At the heart of the neo-classical economic analysis lie the rationality of economic self-interest and the goal of wealth maximization. Economists view individual profit as a good proxy for societal value and believe that the purpose of law is to maximise the value of conflicting activities. The economic ideal of justice considers the impact of violations on the society as a whole, aiming to deter violations through the adjustment of damage awards. A particular course of action should be undertaken, if only it increases aggregate welfare, that is, if the benefits society obtains ("social benefits") as a result of the activity exceed the costs the activity imposes on society ("social costs"). The

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[397] See C. P. Wells, *Corrective Justice and Corporate Tort Liability* (1996) 69 *Southern California Law Review* 1769, 1775-76.

[398] See D. Levynson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs* (2000) *University of Chicago Law Review* 345, 408.

[399] R. Posner, *Economic Analysis of Law* (1986) 3rd ed., Chapters 1, 2.

primary tool of the economic approach is the cost-benefit analysis.[400] The costs of a remedy are dispersed among taxpayers and it could be argued that they should bear the costs of an official's breach of Community law, just as they bear the cost of an official's mistakes about other matters. From the perspective of efficiency a rule of no compensation seems at least as plausible as a rule of full or partial government compensation.[401]

The economic approach to law holds that the wrongdoer should be made to internalise the costs of causing harm in order to have the optimum incentive to avoid injuring others. An externalities theory of EU Member State liability suggests that the purpose of liability is to ensure that public decision-makers in each Member State internalize the costs which their decisions may impose on interests located in other Member States. In this way, the temptation of national authorities to make decisions which benefit their own national economies at the expense of other Member States, will be kept in check, and only those measures which are, on balance, beneficial for the Union as a whole will be undertaken.

States often fail to consider adequately harms that their activities impose on those outside their boundaries,[402] thus inflicting costs that the affected states find hard to recover. Member States, likewise, may fail to consider adequately costs that non-implementation of Community law imposes on other Member States or may design liability rules or compensation schemes that fail to take account of costs imposed on the others. Such negative externalities are inevitable features of any polity, but a federal system has the opportunity to address centrally those externalities among its members. A Community standard for liability will diminish externalities and improve uniformity, just as any federal standard would.[403]

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[400] For a recent account on cost-benefit analysis, see M. Adler and E. Posner, *Rethinking Cost-Benefit Analysis* (1999) *Yale Law Journal* 165.

[401] Levynson, op.cit., at 393.

[402] J. Bednar & W. Eskridge, *Steading the Court's "Unsteading Path": A Theory of Judicial Enforcement of Federalism* (1995) 68 *Southern California Law Review* 1447, 1474.

[403] See in favour of a separate Community system of liability M. Hoskins, *Rebirth of the Innominate Tort*? in Beatson and Tridimas, op.cit.; Markesinis and Deakin, op.cit., at 382-383, R. Chapus, *Droit administratif général*, Vol 1, 9th ed., Paris: Montchrestien, 1995 at 108-109 and 1207-9, para 138 and 139c).

This is how an externalities theory for Member State liability would look like.[404] The argument would begin with the observation that the interests of people located outside a particular Member State, like the interests of discrete and insular minorities within the State, are likely to be overlooked by national governments. EU Member State liability internalizes the costs of domestic policies for people in other Member States. It treats the European Union as a single entity for the purpose of wealth maximization. Liability promotes decisions that maximise the aggregate welfare of the entire Union, and prevents decisions that increase the welfare of one country while imposing greater costs on another.

According to the economic rationale, when the compensation exceeds the social losses, under a regime of negligence the immediate result is overdeterrence.[405] This means that Member States would be excessively hindered in performing their legislative and executive functions by the prospect of actions for damages. Confronted with damages liability for all constitutional violations, Member States will take excessive precautions and incur extremely high compliance costs in order to avoid violations that would actually be socially optimal.

The ECJ has implicitly accepted the over-deterrence principle against too broad a scope of State liability in 215(2).[406] In *HNL* the Court ruled that the Community could not incur liability unless a Community institution had manifestly and gravely disregarded the limits on the exercise of its powers (the *Schöppenstedt* formula).[407] The ECJ ruled that Article 288(2) took account of the wide discretion possessed by the Community institutions in implementing Community policies. This was particularly so in relation to liability for legislative measures. The relatively strict approach to the Community's own liability under Article 288(2) in the exercise of its legislative activities was justified by the following consideration: the exercise of legislative functions should not be hindered by the possibility of actions for damages whenever the

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[404] See Lee, *In Search of a Theory for State Liability*, op.cit.

[405] See P. Schuck, op.cit.

[406] The Court's concern "to ensure that the legislative function is not hindered by the prospect of actions for damages whenever the general interest requires the institutions...to adopt measures which may adversely affect individual interests" is found in Case 5/71, *Aktien Zuckerfabrick Schöppenstedt v. Council* [1971] ECR 975.

[407] Joined Cases 83 and 94/76, 4, 15 and 40/77, *Bayerische HNL v. Council and Commission* [1978] ECR 1209, 1224.

general interest of the Community required legislative measures that might adversely affect individual interests.

In applying the *Schöppenstedt* formula, the ECJ considers the nature of the breach, whether the damage exceeds the normal risks of the plaintiff's business and the number of potential claimants. The latter two factors in particular reflect the special nature of legislative measures: individuals are expected simply to accept a certain risk of harmful effects from legislative activity and the smaller the affected group, the more inequitable it is for them alone to bear the burden of legislation. The requirement of a sufficiently serious breach has in practice been a difficult hurdle,[408] with the standard misconduct being fixed at a relatively high level by the ECJ in deference to the inherently discretionary nature of legislative measures reflecting the Court's pragmatic concern for the financial consequences of incurring liability to a large number of claimants.[409] The test encapsulates an appropriate balance between the need to render governement financially liable for its actions and the equally important necessity of not imposing on the government a too onerous regime of liability which could hinder it in the discharge of its responsibilities. [410]

It is argued that the ECJ introduced the condition of sufficiently serious breach to restrict the scope of liability in cases that the social losses exceed the private losses. Even though the ECJ does not refer to efficiency criteria, its restrictive approach towards State liability in *Brasserie* may be explained by the Court's will to maximise economic welfare in the Community. To reach economically efficient outcomes, only obvious infringements should lead to liability if two conditions are met: a) the private losses of those who suffer must be larger than the social losses, b) standards of care must be certain. If the standard of care is precise and efficient, the imposition of liability and full compensation for pure economic losses will not result in over-deterrence, since the Member State will comply with the efficient standard. An obvious violation

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[408] J. Shaw, *Law of the European Union*, 2nd ed. (1993) MacMillan at 357.

[409] C. Lewis, *Remedies and the Enforcement of EC law* (1996) Sweet & Maxwell at 266-267.

[410] See P. Craig, *The Domestic Liability of Public Authorities in Damages*, in Beatson and Tridimas, Ch 6, p. 89.

means that the legal system announces in advance to the legal Community that less than due care is required to escape liability.[411]

Despite its theoretical attractiveness a more practical objection may be raised against the application of externalities theory to governmental conduct, namely that governments are not actually influenced by liability rules. Governments cannot be equated with private undertakings. When they adopt policies, they do not consider social costs. This argument however loses its value, if one considers that exactly because some costs are systematically disregarded or undervalued by government, then a liability rule targeted at these overlooked costs might serve a useful purpose. To date national application of *Francovich* has generally been reassuring as to its deterrence potential. The most obvious example is the change of policy of the UK and Germany following the joined judgments in *Brasserie du Pecheur* and *Factortame III*.

4.3 The conditions of Member State liability in damages

In *Brasserie* the ECJ modelled the conditions of State liability on the liability of the Community institutions.[412] At the time *Brasserie* was decided, liability of the Community arising as a result of legislative acts was subject to stringent conditions:[413] a) there should be a violation of a superior rule of law for the protection of the individual, and b) such violation should be sufficiently serious. The ECJ ruled that the conditions of Member State liability in damages are comparable to that of the Community institutions when implementing Community policies: the rule infringed must be intended to confer rights on individuals; the breach must be sufficiently

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[411] See R. Van den Bergh and H.-B. Schäfer, *State liability for Infringement of the EC Treaty: Economic Arguments in Support of a Rule of "Obvious Negligence"* (1998) *European Law Review* 552, 554-560.

[412] P. Craig, *Once more unto the breach: the Community, the State and damages liability*, 113 *The Law Quarterly Law Review* 67; N. Emiliou, *State Liability Under Community Law: Shedding More Light on the Francovich Principle?* (1996) 21 *European Law Review* 399; N. Gravells, *State liability in damages for breach of European Community law* (1996) *Public Law* 567; J. Convery, *State liability in the UK after Brasserie du Pêcheur* (1997) 34 *Common Market Law Review* 603.

[413] See Case 5/71, *Zuckerfabrik Schöppenstedt v. Council* [1971] ECR 975, 984.

serious and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.[414]

A breach of Community law is sufficiently serious where a Member State, in the exercise of its legislative powers, has manifestly and gravely disregarded the limits on its powers[415] and, secondly, that where, at the time when it committed the infringement, the Member State in question had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.[416] The less the margin of discretion left to the national authorities by the Community rules, the easier it would be to establish that a breach is serious.[417] The margin of discretion is assessed by Community law criteria.[418]

Additionally, the ECJ was not content simply to reiterate that national restrictions must not be such as to "make it impossible or extremely difficult to obtain effective reparation for loss or

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[414] *Brasserie du Peucheur and Factortame III*, op.cit., para 51. See also Case C-392/93, *The Queen v. H. M. Treasury, ex parte British Telecommunications plc* [1996] ECR I-1631, para 39; Case C-5/94, *The Queen v. The Ministry of Agriculture, Fisheries and Food: ex parte Hedley Lomas* [1996] ECR I-2553, para 25; Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer and Others v. Germany* [1996] ECR I-4845, para 24; Case C-127/95, *Norbrook Laboratories*, [1998] ECR I-1531, para 107; Joined Cases C-283, C-291 and C-292/94, *Denkavit Internationaal BV and Others v. Bundesamt fur Finanzen* [1996] ECR I-5063, para 48; Case C-365/98, *Brinkmann Tabakfabriken v. Hauptzollamt Bielefeld* [2000] ECR I-4619, para 25; Case C-140/97, *Rechberger and Others v. Austria* [1999] ECR I-3499, para 21; and Case C-424/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5148, para 36; Case C-118/00, *Larsy v. Inasti* [2001] ECR I-2731, para 36; Case C-150/99, *Stockholm Lindöpark* [2001] ECR I-493, para 37.

[415] *Brasserie du Pêcheur and Factortame*, op.cit., para 55. See also *British Telecommunications*, op.cit., para 42 and *Dillenkofer and Others*, op.cit., para 25.

[416] See Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, para 28; *Norbrook Laboratories*, op.cit., para 109, and *Haim*, op.cit., para 38.

[417] T. Tridimas, *Liability for Breach of Community Law: Growing Up and Mellowing Down* (2001) 38 *Common Market Law Review* 301, 311.

[418] In *Haim*, op.cit, para 40 the Court ruled: "Its existence and its scope are determined by reference to Community law and not by reference to national law. The discretion which may be conferred by national law on the official or the institution responsible for the breach of Community law is therefore irrelevant in this respect."

damage resulting from a breach of Community law."[419] For greater certainty, the ECJ gave examples of unacceptable restrictions. Member States could not, for instance, make reparation dependent upon the infringing law being addressed to an individual situation (a condition found in German law) or on showing of misfeasance in public office (as in English law). Even the introduction of "fault" as an additional condition (again, a requirement of German law), would be "tantamount to calling in question the right to reparation founded on the Community legal order."[420] However, if national laws provided for less stringent conditions, liability could arise under less stringent conditions.[421] It is, in principle, for the national courts to apply the criteria to establish the liability of Member States for damage caused to individuals by breaches of Community law.[422]

In *Bergaderm*[423] the ECJ made real what it enunciated in *Brasserie*. It introduced a single standard whereby Member States and Community institutions are treated equally in case of violations of Community law. Bergaderm SA brought an action against the Commission seeking to recover compensation for the loss it had allegedly suffered by the adoption of the Cosmetics Directive[424] restricting the use of a chemical substance used by Bergaderm in the manufacture of a sun oil named Bergasol. The Directive in issue was an Adaptation Directive adopted by the Commission following the recommendation of the Adaptation Committee. Bergaderm claimed that the Adaptation Directive concerned exclusively Bergasol and therefore was to be regarded

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[419] *Brasserie*, op.cit., para 67.

[420] *Brasserie*, op.cit., para 79.

[421] *Brasserie*, op.cit., para 66.

[422] *Brasserie*, op.cit., para 58.

[423] Case C-352/98, *P Bergaderm and Goupil v. Commission* [2000] ECR I-5291; See also T-1/99, *T. Port v. Commission* [2001] ECR II-465; T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99, *Comafrica SpA and Dole v. Commission* [2001] ECR II-1975; T-155/99, *Dieckmann & Hansen GmbH v. Commission* [2001] ECR II-3143; T-171/99, *Corus UK Ltd v. Commission* [2001] ECR II-2967; T-196/99, *Area Cova and Others v. Commission and Council* [2001] ECR II-3597; T-210/00 *Biret International v. Council* [2002] ECR II-47; T-174/00 *Etablissements Biret & Cie v Council* [2002] ECR II-17.

[424] Directive 76/768 of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products (OJ 1976, L 262/169). The Directive has been amended, *inter alia*, by Council Directive 93/35/EEC of 14 June 1993, L 151/32.

as an administrative act. It claimed that the Commission had adopted the Directive in breach of the procedural requirements laid down in Article 10 of the Cosmetics Directive and also Bergaderm's rights of defence. Further it argued that the Commission had committed a manifest error of assessment and a breach of the principle of proportionality in considering that Bergasol posed a risk to public health, and also had misused its powers.

The ECJ began by referring to *Brasserie* as an authority on the interpretation of Article 288(2).[425] It then reiterated the conditions under Member State liability in damages giving particular emphasis on the extent of the discretion which was available to the Commission when it adopted the contested regulations.[426] In that regard, it ruled that the general or individual nature of an act of an institution is not a decisive test for identifying the limits of the discretion enjoyed by that institution.[427] Also, there is no longer reference to breach of a "superior" breach of law. The ECJ replaced the previous formula that there must be violation of a superior rule of law for the protection of the individual with the condition that the defendant institution must have infringed "a rule of law intended to confer rights on individuals."[428] It thus made the conditions for Community and Member State liability fully comparable. The ECJ abolished the distinction between legislative and administrative acts and the *Schutznorm* condition and replaced them with the conditions under *Brasserie*.[429] There follows an analysis of each condition separately.

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[425] *Bergaderm*, op.cit., para 40.

[426] Ibid., paras 43-44.

[427] Ibid., para 46. According to previous case law where a legislative act did not entail any element of discretionary choice then it would normally suffice to show the existence of illegality, causation and damage. See cases 44-51/77, *Union Malt v. Commission* [1978] ECR 57; Cases T-481 and 484/93, *Vereniging van Exporteurs in Levende Varkens v. Commission (Live Pigs)* [1995] ECR II-421; Case C-146/91, *KYDEP v. Council and Commission* [1994] ECR I-4199; Cases C-258 and 259/90, *Pesquerias de Bermeo SA and Naviera Laida SA v. Commission* [1992] ECR I-2901. This test of illegality, causation and damage would also be that which normally applied to administrative acts. There was no firm answer on the question whether the *Schöppenstedt* formula could also apply to an administrative act that contained a significant element of discretion. See Craig and de Burca, *EU law: Text, Cases and Materials*, 1998 OUP (2nd ed.), p. 529.

[428] Ibid., para 62.

[429] See T. Tridimas, *Liability for breach of Community law*, op.cit., at 321 *et seq*.

4.3.1 The protective character of the rule

This condition requires that the Community provision in violation should confer rights on individuals. It has been argued that this condition is not clear enough and leaves room for national courts to give divergent decisions.[430] In *Brasserie* both the Court and the Advocate General held that directly effective provisions confer rights on individuals.[431] Whether Community law confers rights or not is an issue to be decided by the ECJ. National courts should make a preliminary reference to the ECJ when they are unsure about the protective character of the rule in question.

In *Norbrook*[432] the Ministry of Agriculture, Fisheries and Food refused to issue Norbrook with an authorization for marketing a veterinary medicinal product before being supplied with further information concerning the supply, manufacturing process and testing methods of a substance used by Norbrook for its manufacture. Norbrook argued that, under the terms of Directives 81/851 and 81/852,[433] the Ministry did not have the power to require the information requested. When examining the issue of possible State liability in damages arising as a result of the refusal to issue authorization, it held that the Directives granted a right to obtain authorisation if certain conditions were fulfilled.[434] The ECJ gave an answer only on the first condition of liability. Since those conditions were laid down precisely and exhaustively in their provisions, the scope of the right conferred on applicants was sufficiently identified. As regards the other

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[430] See A. Siciliano, *State Liability for Breaches of Community Law and its Appiication within the Italian Legal System* (1999) *European Public Law*, Vo 5, p. 405. The author is driven by the distinction between protected interests and rights in the Italian legal system and argues that the Court should give a uniform definition of the rights that would give rise to liability.

[431] *Brasserie*, op.cit., para 54 of the Judgment and para 56 of the Opinion.

[432] See Case C-127/95, *Norbrook Laboratoires Limited v. Ministry of Agriculture, Fisheries and Food* [1998] ECR I-1531.

[433] Council Directive 81/851/EEC on the approximation of the laws of the Member States relating to veterinary medicinal products (OJ 1981 L 317/1) and Council Directive 81/852/EEC of 28 September 1981 on the approximation of the laws of the Member States relating to analytical, pharmaco-toxicological and clinical standards and protocols in respect of the testing of veterinary medicinal products (OJ 1981 L317/16).

[434] *Norbrook*, op.cit., para 108.

two conditions of liability, it simply referred to its previous case law and left it to the national court to determine whether they were fulfilled.

In *Three Rivers District Council v. Bank of England (No.3)*[435] the UK House of Lords held that it was *acte clair* that the First Council Banking Coordination Directive[436] was not intended to result in the grant of depositors of rights enforceable against the banking supervisory authorities, to compensation if, as a result of a supervisory failure, a bank became insolvent and was unable to discharge its liabilities to depositors. The Directive in Article 13 grants rights for credit institutions to challenge a refusal of an authorization (Article 3) or a withdrawal (Article 8) by the supervisory authorities. For the House of Lords, however, its provisions were not sufficiently clear, to generate individual rights for depositors.

The ECJ in *Dillenkofer*[437] ruled: "The fact that the Directive is intended to assure other objectives cannot preclude its provisions from also having the aim of protecting the consumer." This means that the fact that some provisions are occasionally or often designed to protect other general interests cannot be regarded in itself as preventing them from being for the protection of the individual. This runs counter the German *Schutznormtheorie*, according to which the State is liable only where it breaches a legal norm which protects a subjective public right of the injured party.[438] In the light of this ruling it appears that the House of Lords should have submitted a reference. The resistance of national courts to refer issues that fall within the jurisdiction of the ECJ could prove indeed one of the most dangerous hindrances in the effective protection of Community rights.

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[435] [2000] 2 WLR 1220.

[436] First Council Directive 77/780/EEC on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ 1977 L 322/30).

[437] Op.cit., para 39.

[438] See A. Arnull, *Liability for legislative acts under Article 215(2) EC* in Heukels and Mc Donell (Eds), *The action for damages in Community law*, op.cit., p. 129-151 at 136.

Gallagher provides another example.[439] An exclusion order was issued by the Secretary of State against him on the ground that he was or had been concerned in the commission, preparation or instigation of acts of terrorism. The applicant was not informed of the grounds on which the decision to exclude him had been taken. Gallagher contended that his exclusion, before being granted an interview with a competent authority who could adjudicate, as referred to in Article 9(1) of Directive 64/221,[440] and the manner of that authority's appointment by the Secretary of State, were both contrary to the provisions of Article 9. He also had an additonal claim for damages. Despite the explicitness of the language of the provision in question and the undermining of the rights of defence of the migrant, the Court of Appeal ruled that State liability could not be established. The Court of Appeal found that the breach was not sufficiently serious to merit an award of compensation, as there was no evidence to suggest that the Secretary of State would have reached a different conclusion had he received Gallaguer's representations at an earlier stage. The failure to get a prior opinion was a legislative choice which "although wrong, was not obviously wrong in substance."

It is not clear whether an infringement of a procedural as distinguished from a substantive right under Community law is sufficient to create liability. The ECJ has also held that breach of the duty to state reasons may not give rise to liability in damages.[441] Similarly, under the Convention in most cases involving procedural violations, Article 41 awards are refused because the applicant understandably fails in the burden of proof, there being no way to

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[439] Case C-175/94, *R. v. Secretary of State for the Home Department, ex parte Gallagher* [1995] ECR I- 4253.

[440] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJB 1964 L56/850). Art 9(1) provides: "Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for. This authority shall not be the same as that empowered to take the decision refusing renewal of the residence permit orordering expulsion."

[441] Case 106/81, *Kind v. EEC* [1982] ECR 2885, para 14; T-167/94, *Nölle v. Council and Commission* [1994] ECR II-2589, para 57; T-390/94, *Aloys Schröder v. Commission* [1997] ECR II-501, para 66.

demonstrate what result the domestic court would have reached in the absence of the violation.[442] The fact, however, that it is difficult to prove a causal connection between the violation of a procedural rule and the alleged damage, should not mean that the claim should be dismissed *a priori*. As the ECJ has not yet decided on this issue, the Court of Appeal should have submitted a reference to the ECJ.

4.3.2 The sufficiently serious breach

The pivotal condition of liability is the requirement of a sufficiently serious breach. The enquiry of sufficiently serious breach is context based. In *Brasserie* the ECJ laid down a number of guidelines to be taken into account by the national court with a view to determining whether the threshold of seriousness has been reached. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law. In any event, a breach of Community law will be sufficiently serious if it has persisted despite a judgment of the Court that establishes the infringement in question.[443]

The condition of a sufficiently serious breach is presented as an objective concept in line with the liability of the Community institutions and also in line with State responsibility under public international law.[444] The ECJ held that although certain factors connected with the concept of

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[442] See *Neumeister v. Austria* (1979-80) EHRR 91; *Bricmont v. Belgium* (1990) 12 EHRR 217; *Skarby v. Sweden* (1991) 13 EHRR 90; *Hakkansson and Sturesson v. Sweden* (1991) 13 EHRR 1; *Philis v. Greece* (1991) 13 EHRR 741; *Ruiz Mateos v. Spain* (1993) 16 EHRR 505; *Saunders v. United Kingdom* (1997) 23 EHRR 313; *cf. McMichael v. United Kingdom* (1995) 20 EHRR 205.

[443] *Brasserie*, op.cit., para 56-57.

[444] See ICJ, 9 April 1949, *UK v. Albania* (Corfu Channel) [1949] ICJ Rep.3. See P. Larouche, *The Brasserie du Pêcheur Puzzle* in Wouters and Stuyck (Eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune, Essays in Honour of Walter van Gerven* (Antwerpen/Groningen/Oxford, 2001).

fault under a national legal system may be relevant for the purpose of determining whether or not a given breach of Community law is serious,[445] liability cannot depend on any concept of fault going beyond the finding of a serious breach of Community law.[446] Fault is a serious obstacle to the establishment of liability.[447] As a subjective element of unlawful conduct, requiring an intention to commit or knowledge of the breach, fault is connected more easily to the public officer that acts on behalf of the State and therefore cannot be relevant for the purposes of establishing liability on the part of the Member State concerned.[448] However, it is not straightforward if a Member State should be liable in damages to a private person for breach of EC law when it has acted neither intentionally nor negligently. This element in Community law is connected with whether the breach is manifest.

It appears that incompatibility with the Treaty is considered by the Court to be manifest. Failure of a Member State to implement a Directive within the prescribed period is characterised as a *per se* serious breach and, consequently, it gives rise to a right of reparation for individuals subject to the conditions of liability provided for in *Francovich*.[449] No other condition need be

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[445] *Brasserie*, op.cit., para 78.

[446] Op.cit., para 80.

[447] The right-remedy gap in Constitutional tort law is chiefly a function of the requirement of fault. See J. Jeffries, op.cit., at 109.

[448] Under US law fault in constitutional tort is the defence of qualified immunity. It shields government officers, and indirectly shields governments themselves, from damages liability for a substantial range of constitutional conduct. The question is whether a reasonable officer could have believed the act to be lawful (*Scheuer v. Rhodes*, 416 US 232, 247-48 (1974); *Anderson v. Creighton*, 483 US 635, 639 (1987); *Hunter v. Bryan*, 502 US 224, 228 (1991)). In *Crawford –El v. Britton*, 523 US 574, 588 (1998) the defendant's subjective intent was held to be "simply irrelevant" to the defence of qualified immunity. The reasonabless of a mistake as to the unconstitutionality depends on the factual circumstances, the clarity and specificity of the constitutional rule and the knowledge that the defendant could reasonably be expected to have. The interaction of these factors has produced a defence of qualified immunity that is significantly context-dependent. See Jeffries, *The Right-Remedy Gap in Constitutional Law* (1999) *Yale Law Journal* 87, 102.

[449] *Francovich*, op.cit., para 30: "The result prescribed by the Directive should entail the grant of rights to individuals; it must be possible to identify the content of those rights on the basis of the provisions of the Directive; there must be a causal link between the breach of the state's obligation and the loss and damage suffered by the injured parties."

taken into consideration.[450] In particular, liability does not depend on the prior finding by the ECJ an infringement of Community law attributable to the State or on the existence of intentional fault or negligence on the part of the State.[451] This is because the obligation of implementation derives directly from Article 249 EC.

The breach of Community law in *Brasserie du Pecheur* case could not be excusable, since the ECJ prior case law[452] made it clear that the German laws on beer purity were incompatible with Article 28 of the Treaty. The ECJ was equally clear in its guidance to the national courts in *Factortame III*. It drew a distinction between the nationality condition and the conditions concerning residence and domicile for vessel owners which were contained in the Merchant Shipping Act 1988. The former constituted direct discrimination that was contrary to EC law. The latter has been held contrary to Article 43 in a previous case.[453] The prohibition of direct discrimination is so fundamental in Community law that national courts could not hold the error of the national authorities excusable.[454]

Liability may spur legislative reform by providing an incentive not only for implementation but also for careful drafting. Misimplementation of Directives does not entail a sufficiently serious breach, if the national legislation does not clearly contravene the wording of a Directive or the findings of a previous judgment of the Court. In *British Telecom*[455] BT sought the annulment, in the English Divisional Court, of part of the domestic regulations implementing Directive 90/351 on procurement procedures of entities in certain utilities sectors.[456] An annex to the domestic measure had excluded BT from an exemption provided in Article 8 of the Directive, and BT

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[450] *Dillenkofer*, op.cit., para 27.

[451] *Francovich*, op.cit., para 28.

[452] Case C-178/84, *Commission v. Germany* [1987] ECR I-1227.

[453] Case C-221/89, *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I-3905.

[454] [1998] 1 All E.R. 736 (Note).

[455] Case C-392/93, *The Queen v. H. M. Treasury, ex parte British Telecommunications plc.*, op.cit.

[456] OJ 1990 L 297/1.

argued that this was a misimplementation which had caused it loss and which entitled it to compensation. The ECJ stated that Article 8(1) was imprecisely worded and was reasonably capable of bearing the interpretation given to it by the United Kingdom in good faith. Other Member States shared that interpretation that was not manifestly contrary to the wording of the Directive and the objectives pursued by it. Also, no guidance was available to the United Kingdom from the case law of the Court with regard to the interpretation of Article 8. Finally, the Commission did not raise the matter when the implementing legislation was adopted.

Similarly, in *Denkavit*[457] the ECJ found that the incorrect transposition by Germany of the Directive 90/435 on the taxation of parent companies and subsidiaries of different Member States[458] did not amount to a serious breach. First, it noted that the interpretation given to the Directive by Germany which proved to be incorrect, had been adopted by almost all other Member States which had exercised the option to derogate given by Article 3(2) of the Directive. Secondly, those Member States had taken the view that they were entitled to adopt such an interpretation, following discussions within the Council. Thirdly, the incorrect interpretation furthered the objective of preventing tax fraud which was compatible with the Directive. Fourthly, the case law did not provide any indication as to how the contested provision was to be interpreted.

On the contrary, in *Svenska*[459] the passing of a general exemption of the Sixth Council Directive 77/388[460] on the harmonization of the laws of the Member States relating to turnover taxes was held to be a sufficiently serious breach, as the exemption therein was restricted to non-profit making operations. The Swedish State contended that, even assuming a breach of Community law, it was in any event excusable since the ECJ had not yet clarified the relevant provisions of the Sixth Directive and the Commission had not initiated any infringement proceedings which left it with no reliable guidance as to the effect of the relevant Community

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[457] Joined Cases C-283, C-291 and C-292/94, *Denkavit Internationaal BV and Others v. Bundesamt fur Finanzen* [1996] ECR I-5063.

[458] OJ 1990 L 225/6.

[459] Case C-150/99, *Svenska Staten (Swedish State) v. Stockholm Lindpark AB* [2001] ECR I-493.

[460] Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977 L 262/44).

law. That contention was rejected. The ECJ found, supported by the Advocate General,[461] that there could be no reasonable doubt, capable of extenuating the alleged breach, as to the import of the provisions in question. It was evident from the provisions of the VAT Law at issue in the main proceedings that the general exemption enacted by the Swedish legislature had no basis in the Sixth Directive and therefore became clearly incompatible with the directive as from the date of the Kingdom of Sweden's accession to the European Union. Given the clear wording of the Sixth Directive, the Member State concerned was not in a position to make any legislative choices and had only a considerably reduced, or even no, discretion. In those circumstances, the mere infringement of Community law was sufficient to establish the existence of a sufficiently serious breach. Furthermore, the fact that the national legislation at issue in the main proceedings was repealed with effect from 1 January 1997, two years after Sweden's accession, indicates that the Swedish legislature had become aware that it was incompatible with Community law. The ECJ emphasised the fact that the Swedish legislature had become aware of the incompatibility.[462]

Also, in *Larsy*[463] the ECJ found a sufficiently serious breach. Article 95a(4)(5) and (6) of Regulation No 1408/71[464] on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community does not apply to an application for review of a retirement pension, the amount of which has been limited under an anti-overlapping rule applicable in a Member State, on the ground that the person receiving that pension has also been awarded a retirement pension paid by the competent institution of another Member State, where the application for review is based on provisions other than those in Regulation No 1248/92. The Court decided that the application by the competent institution of a Member State of Article 95a(4)(5) and (6) of Regulation No 1408/71 to a request for review of a retirement pension, thus limiting the retroactivity of the

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[461] See paras 73 and 74 of the AG Opinion.

[462] Op.cit., para 40.

[463] Case C-118/00, *Larsy v. INASTI* [2001] ECR I-5063.

[464] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230/6), as amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136/7).

review to the detriment of the person concerned, constitutes a serious breach of Community law if those provisions are not applicable to the application in question and if it follows from a judgment delivered by the ECJ[465] before the decision by the competent institution that the institution wrongly applied an anti-overlapping rule of that Member State, and where it cannot be inferred from that judgment that the retroactive effect of such a review could be limited.

It is concluded from the above cases that the sufficiently serious breach condition could be equated with a condition of objective negligence. This means that negligence is taken into account as an objective concept. There is no requirement of fault, but the breach alone is not enough to establish liability. The most effective defence for national authorities is the ambiguity of the applicable provision of Community law and the absence of case law that would probably clarify the obligation deriving from it. The obligations that derive from the Treaty are presumed to be clear. One could argue that the nature of the breach does not necessarily mean that the breach is manifest. There is no reason why a breach of the Treaty should enjoy different treatment from a breach of secondary Community legislation.

4.3.3 The causal link

In *Brasserie* the ECJ held that it is for the national court to verify whether there is a direct causal link between the Member State's breach of its obligation and the damage suffered by the individual.[466] This should not be interpreted as precluding the ECJ from determining rules on causation. Otherwise, one could have thought that the Member States would be able to undermine the principle of effectiveness by determining the rules on causation.[467] In a couple of cases the ECJ pronounced significant rules on causation with no apparent attempt to borrow from its case law on Community liability.

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[465] This was in Case C-31/92, *Larsy* [1993] ECR I-4543.

[466] Op.cit., para 65.

[467] See for English law F. Smith and L. Woods, *Causation in Francovich; the neglected problem* (1997) 46 *International Comparative Law Quarterly* 925.

Brinkmann[468] concerned the failure of Denmark to transpose Directive 79/32 on taxes (other than turnover taxes) that affect the consumption of manufactured tobacco.[469] The ECJ ruled that, although Directive 79/32 was not implemented, this did not amount to a sufficiently serious breach. The reasoning was that despite the non-transposition of the Directive, the Danish authorities gave immediate effect to the relevant provisions and thus there was no direct link between the breach of Community law and damage allegedly suffered by *Brinkmann*.[470] Namely, the chain of causation between the failure of implementation and the damage sustained was broken by the action of the national administration. The ECJ proceeded to examine whether the Danish authorities had committed a sufficiently serious breach of the Directive and found that they had not. It came to that conclusion on the following ground. Westpoint did not correspond exactly to either of the definition of the Directive, being a new product that did not exist at the time when the Directive was adopted. In view of the nature of Westpoint, the classification made by the Danish authorities was not manifestly contrary to the wording or the aim of the Directive. Also, the Commission and the Finnish Government had supported the same classification. So, the erroneous decision of the authority could be justified.[471]

Brinkmann is the first judgment where the ECJ used causation to restrict State liability in damages. It recognises to the Member States a valid defence, namely that despite the lack of implementing measures, their administration complied *bona fide* with the requirements of the Directive or at least endeavoured to do so.[472] This solution encourages administration to act lawfully and serves the deterrence objective of Member State liability in damages, as it targets the actor sufficiently closely. *Brinkmann* created the background for expanding liability to public bodies.

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[468] Case C- 319/96, *Brinkmann Tabakfabriken GmbH v. Skatteministeriet* [1997] ECR I-7231.

[469] OJ 1979 L 10/8.

[470] Op.cit., para 29.

[471] Op.cit., paras 30-33.

[472] T. Tridimas, *Liability for Breach of Community Law*, op.cit.

The second case on causation is *Rechberger*.[473] Directive 90/314[474] provided in Article 7 for the reimbursement of holidaymakers in the event of the insolvency of the holiday company. An Austrian Regulation provided for the implementation of Article 7 of the Directive in relation to packages booked after January 1, 1995 with a departure date of May 1, 1995 or later. Rechberger accepted a package holiday, advertised as a gift in a newspaper, under which only airport taxes and single supplements were payable. The trips were booked between November 1994 and April 1995 and were due to take place between April and July 1995 but, on the bankruptcy of the travel organiser, the trips were cancelled. In the meantime the scheme had been declared unlawful under Austrian competition law. Rechberger brought an action against Austria for its failure to transpose correctly the Directive and claimed reimbursement from the State of the amounts paid. The ECJ held that neither Article 7 nor any other provision of the Directive granted Member States a right to limit protection to trips taken on a date later than the time limit prescribed for transposition. Since Article 7 was clear and precise and the Directive conferred no margin of discretion on Member States, the temporal limitation of protection amounted to a serious breach.[475] It took into account the findings of the national court that found that there was such direct link. It stated that Article 7 imposes an obligation of result. It requires a guarantee specifically aimed at arming consumers against the consequences of bankruptcy may be. State liability for breach of Article 7 cannot be precluded by imprudent conduct on the part of the travel organiser or by the occurrence of exceptional and unforseeable events.[476]

The judgment should be considered as correct. In some cases, however, the imprudent conduct of the person on whom the obligation is imposed may expose that person to other types of proceedings. The issue then could be raised whether the injured party should pursue first an available form of action against that person, rather than against the State for compensation, if the first form of action provides an effective alternative. The issue did not

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[473] Case C-140/97, *Walter Rechberger v. Republic of Austria* [1999] ECR I-3499.

[474] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158/59).

[475] *Rechberger*, op.cit., para 51.

[476] *Rechberger*, op.cit., paras 73-76.

appear to be relevant in *Rechberger* and, more generally, it has not appeared in the case law. Note however that, in *Brasserie*, the ECJ held that, in order to determine the right to reparation, the national court may inquire whether the injured party showed reasonable diligence in order to avoid or limit the loss and whether, in particular, he availed himself in time of all the legal remedies available to him.[477] Conduct exhibiting fault on the part of the injured party or a failure to make use of available legal remedies might operate to break the chain of causation and Member States could not be debarred from making an action for damages dependent on a previous action against third parties.[478]

4.4 The extent of reparation

The ECJ itself has adopted a restrictive approach to economic loss in its Article 288(2) EC case law: only certain and specific losses are recoverable; losses which are speculative or within the bounds of risk inherent in the economic activity in question are not.[479] Yet, the ECJ ruled: "the amount of compensation payable by the Community should correspond to the damage which it caused."[480] The equivalent for State liability would be that the recoverable loss would include the financial consequences for the claimant of the non-conferment on the claimant of the right referred by Community law.

In *Brasserie* the ECJ found that reparation for loss or damage caused to individuals as a result of breach of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection of their rights.[481] However, the commensurability between

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[477] *Brasserie*, op.cit., para 84.

[478] This indeed is the case for claims against the Community institutions before the ECJ: see Case T-178/98, *Fresh Marine Company v. Commission* [2000] ECR II-3321, para 121.

[479] E.g. Cases 83/76 and 94/76, *Bayerische* [1978] ECR 1209. AG Léger in *Lomas*, op.cit., proposed same test for State liability at paras 178 and 183.

[480] Joined Cases C-104/89 and C-37/90, *Mulder v. Council and Commission (Mulder II)* [1992] ECR I-3061.

[481] *Brasserie*, op.cit., para 82. Also, see paras 87-89: "total exclusion of loss of profit as a head of damage for which reparation may be awarded in the case of a breach of Community law cannot be accepted and an award of exemplary damages pursuant to a claim or an action founded on Community law cannot be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law."

losses and violation is much more difficult in constitutional tort.[482] The term "commensurate" does not make clear whether the compensation required is "full" or "adequate." The various Member States deal with the recovery of economic loss in different ways, some being comfortable with the concept, others struggling under fears of imposing a liability indefinite in scope and extent.[483]

In *Maso*[484] and *Bonifaci*[485] the ECJ suggested that the principle of effectiveness does not require "full" compensation. The question referred was whether a Member State is entitled to set a ceiling on the amount of compensation and thus limit the extent of reparation. In particular, following the *Francovich* ruling, legislation was passed to implement the Directive 80/987,[486] and also to establish a compensation scheme for those who had suffered loss as a result of the earlier failure to implement. The scheme provided that the guarantee of protection for employees' wages would cover only certain wage claims relating to a particular period prior to the employer being declared insolvent. The ECJ ruled that such a national rule does not run counter to the principle of effectiveness. Retroactive application in full of the measures implementing the Directive to employees who have suffered as a result of belated transposition enables in principle the harmful consequences of the breach of Community law to be remedied, provided that the Directive has been properly transposed. Additional loss sustained by the

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[482] C. Sunstein, *Incommensurability and Valuation in Law* (1994) 92 *Michigan Law Review* 779; E. Anderson, *Value in Ethics and Economics* 55-59, op.cit.; J. Raz, *The Morality of Freedom*, op.cit., 321-66.

[483] C. Harlow, *Francovich and the Problem of the Disobedient State*, op.cit., 220.

[484] Case C-373/95, *Maso, Graziana and Others v. Istituto Nazionale della Previdenza Sociale (INPS) and Italian Republic* [1997] ECR I-4051. See also Case C-261/95, *Palmisani v. Instituto Nazionale della Providenza Sociale (INPS)* [1997] ECR I-4025, para 34.

[485] Joined Cases C-94 and C-95/95, *Bonifaci, Berto and Others v. Instituto Nazionale della Previdenza Sociale (INPS)* [1997] ECR I-4051. See N. Odman, (1999) *Common Market Law Review* 1395.

[486] Council Directive 80/987 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1908 L 283/23). It has been amended by Directive 87/164 (OJ 1987 L 66/11).

employees through their inability to benefit at the appropriate time from the guarantees of the Directive should also be made good.[487]

The ruling is compatible with the *Brasserie du Pêcheur* case, since the latter does not actually state that no restrictions on the extent of damages are permissible, but rather that any limits or restrictions must satisfy the conditions of equivalence and effectiveness.[488] Van Gerven notes that full and comprehensive compensation was not explicitly required by *Francovich*, only "that the right to reparation must be such that the result prescribed by the Directive is fully achieved."[489] One notes a contrast here between the effectiveness of Community law and the effective judicial protection. Effective judicial protection requires full compensation. The ECJ guarantees this result indirectly by ruling that additional loss sustained by the employees should also be made good. By leaving to Member States the discretion to arrange the regime of compensation the ECJ shows the necessary respect to Member States' legislature without compromising the rights of individuals. It also gives effect to what was decided in *Brasserie*, namely that Member States may take into account the requirements of the principle of legal certainty.[490]

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[487] *Maso*, op.cit., 39-41; *Bonifaci*, op.cit., 51-53.

[488] P. Craig and G. de Burca, Texts, Cases and Materials, op.cit., at p. 247.

[489] V. Gerven, *Non-contractual liability of Member States, Community institutions and individuals for breaches of Community law with a view to a common law of Europe* (1994) *Maastricht Journal of European and Comparative Law* 1, 17.

[490] *Brasserie*, op.cit., para 98.

It is notable that in US law the Supreme Court cabined the *Young* fiction[491] to suits for prospective relief.[492] Federal courts enjoin state officials in their official capacity to pay money out of the state treasury for future obligations, but may not order them to charge the public fisc to make whole victims of past constitutional wrongdoing. In *Edelman* the US Court "declined to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States."[493] To Akhil Amar, the prospective – retrospective distinction reflects an "obvious lack of principle" and creates "an ad hoc mishmash of *Young* and *Edelman*, of full remedy and state sovereignty, law and lawlessness."[494] The *Edelman* Court pointed on the impact on state treasuries, but this cannot be the only explanation. Some prospective damages are very costly. However, if cost itself were the only concern, it might make more sense to bar very expensive remedies, of whatever sort, than to allow prospective and to prohibit retrospective remedies of whatever magnitude.[495]

The ECJ did not go so far as the US counterpart, since it recognised that the existence of a prior judgment of the Court finding an infringement will certainly be determinative, but it is not essential in order for liability to arise. Were the obligation of the Member State concerned to make reparation to be confined to loss or damage sustained after delivery of a judgment of the Court finding the infringement in question, that would amount to calling in question the right to

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[491] The US Court itself has recognised the problems of following general sovereign immunity through various doctrinal gymnastics and legal fictions. The most famous, the fiction *ex parte Young* (209 US 123 (1908)). allows citizens to sue for injunctive relief against a state violating the federal Constitution or federal statutes by pretending to sue a state official. The *Young* fiction covers suits against officers to pay money out of the state treasury rather than their own pockets (*Milliken v. Bradley*, 433 US 267 (1977)). In cases like *Young* involving violations of constitutional rights, the cause of action itself typically requires the plaintiff to prove that the defendant is a state actor wielding state power. In the result, officials can be found liable in some situations. For example, 42 U.S.C. 1983 makes state and local officials liable for constitutional violations in some circumstances, while the liability of federal officials is based on the Due Process Clause of the Fifth Amendment: *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[492] *Edelman v. Jordan* 415 US 651, 678 (1974).

[493] *Pennhurst State School & Hosp. v. Haldermann*, 465 US 89, 105 (1984).

[494] Amar, op.cit., at 1480. See also Jackson C., *The Supreme Court, the Eleventh Amendment and State Sovereign Immunity 98* (1988) *Yale Law Journal* 1, 88.

[495] Jeffries, op.cit., at 107.

reparation conferred by the Community legal order.[496] The ECJ is equally interested in preventing the breach in the future and providing compensation for past breaches.

[496] *Brasserie*, op.cit., paras 93 and 94.

4.5 The relationship with other national remedies

We have already seen in a number of cases that State liability fulfils a complementary role in the Community system of remedies.[497] It is considered to be an alternative remedy to direct effect,[498] restitution,[499] and judicial review.[500] This does not mean that the damages remedy has an ancillary character. Although it may appear compatible with Community law if a Member State decides to make damages an ancillary remedy,[501] State liability offers a wholly independent claim for damages.[502] Individuals may choose the remedy that is most favourable in terms of time limits, the extent of reparation and also the period for retrospective relief. This is clear from *Metalgesellschaft*, where the ECJ left to the applicants to decide what remedy was the most appropriate to reimburse their loss which could be covered either from a restitution remedy or compensation.[503]

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[497] Compare A-G Jacobs in Case 2/94, *Denkavit*, para 80, op.cit with A-G Tesauro in *Brasserie du Pecheur*, paras 100-104 and *British Telecom*, paras 34 and 30 respectively. See also Advocate General Leger, in *Hedley Lomas*, op.cit., para 201. See further P. Oliver, *"State liability in damages following Factortame III: A remedy seen in context"* and P. Eeckhout, *"Liability of member states in damages and the Community system of damages"* in Beatson and Tridimas, *New Directions in Public Law*, Hart Publishing 1998.

[498] See for example *Faccini Dori*, op.cit and *Francovich*, op.cit. See also Case C-90/96, *Petrie v. Universita degli Studi di Verona* [1997] ECR I-6527.

[499] *Maso*, op.cit., *Bonifaci*, op.cit., *Palmisani*, op.cit., *Comateb*, op.cit., *Sutton*, op.cit.

[500] *Dorsch Consult*, op.cit.; *Evobus Austria*, op.cit.; *Walter Tögel*, op.cit.; *Hospital Ingenieure Krankenhaustechnik*, op.cit.

[501] *Brasserie*, op.cit., para 84.

[502] See C-150/99, *Svenska*, op.cit., para 35; AG in *Fantask*, op.cit., para 83. See, contrary, M. Dougan, *The Francovich Right to Reparation: Reshaping the Contours of Community Remedial Competence* (2000) *European Public Law* 103.

[503] See F. Berrod and N. Notaro, *L'arrêt Comateb: Chronique d' un appauvrissement sans cause* (1998) *Revue Trimistrielle de Droit European* 141, 150, where they argue that the action for damages and the refund action envisage different objectives and they can be even cumulated. The different nature of damages and restitution is also supported by Jacobs AG in *Fantask*, op.cit., para 81.

Damages may not be an ancillary remedy, but it is not always a sufficient alternative. Normally, if a person has a claim against the State and the conditions for the operation of the doctrine of direct effect are satisfied, he will base his claim on that doctrine and will not assume what will be the additional burden of proving that the Member State has committed a sufficiently serious breach of Community law.[504] There is truly the view that compensation is inevitably a second-best response that should come into play when full rectification is impossible.[505] Valuation of loss is nearly always imperfect and may omit significant wrongs that deserve legal protection. The assessment or calculation of damages is complex. In this regard, damages may not be of equal effectiveness to restitution.[506]

Damages cannot also be considered a sufficient alternative to the action for annulment. The action for damages as financial remedy aims only at the compensation of the person harmed by an unlawful decision. It does not have any effect on the contested decision itself. Thus, the action for damages should not be put on equal footing with the annulment action, or be considered, in cases of financial prejudice, as a good reason for refusing the grant of interim relief. The CFI correctly noted that such an action could not result in the removal from the Community legal order of a measure which is nevertheless necessarily held to be illegal.[507]

From the point of view of the relationship between the Community and Member States, State liability has important advantages, including the minimal intrusiveness of damages remedies and the diminished prospect for conflict between the political and judicial authorities. A damages regime avoids setting aside national law, thus providing Member States with the option of preserving their entire domestic schemes. It is thus preferable on constitutional

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[504] L. Guselen, *Comment from the ponit of view of EU Competition law* in Wouters and Stuyck (Eds), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune*, Essays in Honour of Walter van Gerven (Antwerpen/Groningen/Oxford 2001).

[505] L. Lomasky, *Persons, Rights and the Moral Community* (1967) 143.

[506] Fenelly A-G opined that restitution should take priority over damages in *Metalgesselschaft*, op.cit., para 47 of the Opinion.

[507] Case T-177/01, *Jégo-Quéré et Cie v. Commission* [2002] ECR I-5137.

grounds.[508] It provides comprehensive protection of individual rights and draws a proper balance between individual rights and the collective interest in legal certainty.[509]

In *Kühne and Heitz*,[510] the Dutch Court referred the question whether the principle of cooperation under Article 10 requires re-examination and possibly withdrawal of a national administrative decision which has become definitive where it appears to be contrary to a subsequent judgment by the ECJ. Regulation 2777/75[511] on the common organisation of the markets in the poultrymeat sector established a system of payments in favour of producers exporting to non-Member States, known as "refunds." Their amount varies depending on the customs tariff classification of the exported products and offsets the difference between the generally high price within the EC and the lower price on the world market. The decision of the Dutch Customs Authority made an erroneous classification of the product that the Dutch company exported and imposed the wrong duty on the applicant company. The Supreme Court declined to make a reference on the basis of the "*acte claire*" doctrine. In its *Voogd* judgment[512] the ECJ gave an interpretation of the customs nomenclature in line with that advocated by Kühne and Heitz.

All the interveners argued in favour of the principle of legal certainty and *res judicata*. In his Opinion the Advocate General stated that the principles of direct applicability and primacy of Community law, as well as Article 10 of the EC Treaty, require the administrative authorities, as well as the national courts, to disapply any national rule, even of a constitutional nature, where it impedes the actual implementation of Community law. That applies to a national rule such as that concerning the observance of the finality of judgments. The Advocate General emphasised that for the administrative authorities to uphold such a claim does not necessarily entail the

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[508] See H. Schermers, *No Direct Effect for Directives* (1997) 3 *European Public Law* 527, 537-540.

[509] Jacobs A-G in Case C-188/95, *Fantask*, op.cit., para 84.

[510] Case C-453/00, *Kühne and Heitz N.V. v. Productschap voor Pluimvee en Eieren* of 13 January 2004 (not yet published).

[511] Regulation 2777/75 of 29 October 1975 on the common organisation of the market in poultrymeat (OJ 1975 L 282/77).

[512] Case C-151/93, *Criminal proceedings against M. Voogd Vleesimport en -export BV* [1994] ECR I-4915.

withdrawal of the prior administrative decision or revision of the judicial decision at issue. This is something, however, that national courts are mostly suitable to assess.[513] The case raises issues of tension beween legality and legal certainty but also national procedural autonomy and the "effect utile" of Community law. In cases like this, e.g. that involve a tension between fundamental values and principles, Member State liability in damages appears to be the most suitable remedy.

The ECJ pointed out that legal certainty is one of a number of legal principles recognised by Community law. It ruled that Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen administrative decisions which have become final upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies. The principle of co-operation imposes on an administrative body such an obligation under strict conditions: under national law, the administration must have the power to reopen that decision; the administrative decision in question must have become final as a result of a judgment of a national court against whose decisions there is no legal remedy; that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under Article 234(3) EC; and the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.[514] The most important condition is the one related to the principle of equivalence. It is not likely that the ECJ would reach the same conclusion, if the law of Netherlands did not provide for such revision.

4.6 The expansion of Member State liability

4.6.1 The liability of public bodies

In *Brasserie* the ECJ did not have the opportunity to define what bodies exactly constitute the executive for State liability in damages and it was questionable whether the broad definition of

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[513] See paras 46-75 of the Opinion.

[514] See paras 25-28 of the Judgment.

State under *Foster*[515] was equally applicable. The independent liability of public bodies has major advantages for the enforcement of Community law. The ECJ accorded the discretion to Member States to expand the liability to public bodies in *Klaus Konle*[516] and in *Haim.*[517]

Klaus Konle concerned the compatibility with Community law of a general requirement of authorization for the acquirement of land contained in the Tyrolean Law on the Transfer of Land 1993. The question for State liability in damages was whether the claim could be directed against a subdivision and not the central organ of a Member State with a federal structure. The ECJ repeated that the principle of State liability requires a State to ensure that the individual obtains reparation for the damage caused whichever public authority is liable for the breach under national law. It ruled that a Member State could not plead the distribution of powers and responsibilities between national legal bodies in order to escape its responsibility under Community law.[518] Community law does not require Member States to make any change in the distribution of powers and responsibilities between the public bodies which exist on the territory, so long as the procedural arrangements in the domestic system enable the rights which individuals derive from Community law to be effectively protected.[519] Consequently, in Member States with a federal structure, reparation for damages caused to individuals by national measures taken in breach of Community law need not necessarily be provided by the federal State in order for the obligations of the Member States concerned under Community law to be fulfilled.[520]

The ECJ in *Haim* applied the findings in *Konle* also to the public bodies of non-federal States. It concerned the refusal, in contravention of Article 43 of the Treaty, to authorize a dentist to offer services under a Social Security Scheme. The ECJ repeated that a Member State may not

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[515] Case C-188/89, *Foster and Others v. British Gas plc* [1990] ECR I-3313.

[516] Case C-302/97, *Klaus Konle v. Republik Österreich* [1999] ECR I-3099. A. Lengauer, (2000) 37 *Common Market Law Review* 181.

[517] Case C-424/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123.

[518] *Konle*, op.cit., para 62.

[519] Ibid., para 63. See also *Brasserie*, op.cit., para 33.

[520] Ibid., para 64.

escape liability by pleading the distribution of powers and responsibilities as between the bodies which exist within the national legal order or by claiming that the public authority responsible for the breach of Community law does not have "the necessary power, knowledge, means or resources."[521] It ruled that liability may arise in Member States, whether or not they have a federal structure, in which certain legislative or administrative tasks are devolved to territorial bodies with a certain degree of autonomy or to any other public-law body legally distinct from the State.[522] In those Member States, that body, in addition to the State, may therefore make reparation for loss and damage caused to individuals by national measures taken in breach of Community law by a public-law body.[523]

The principle of effective remedies requires that the remedy should be available against the person or authority responsible for the violation. It is important that Community law remedies discourage violations as far as possible. Dual responsibility by passing on the costs diminishes a state's purely internal incentives to implement directives, but it presumably increases the interests of interest groups in encouraging the implementation. In practice, the judgments may be crucial in relation to independent public bodies which enjoy budgetary autonomy.[524] After the expansion of liability serious problems may arise. In some cases, it may not be easy to determine which body should be sued and failure to identify the proper defendant may cost the success of the action.[525] This problem may become more acute if a Member State delegates functions to a private law body.

In *Dublin Bus v. The Motor Insurance Bureau of Ireland* (MIBI)[526] the Irish Court found that a private law body with delegated functions could be held liable for damages. Directive

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[521] *Haim*, op.cit., para 28.

[522] Ibid., para 31.

[523] Ibid., para 32.

[524] T. Tridimas, *Liability for Breach of Community Law*, op.cit. at 318.

[525] T. Tridimas, op.cit., at 320. See Anagnostaras G., The allocation of responsibility in State liability actions for breach of Community law: a modern gordian knot? (2001) European Law Review 139.

[526] Circuit Court (1999/199DCA;1999/120 DCA) of 29 October 1999.

84/5/EEC[527] provided in Article 1(4): "Each Member State shall set up or authorise a body with the task of providing compensation ...for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in para 1 has not been satisfied..." An Agreement dated 21 December 1988 between the Minister for the Environment and the Motor Insurer's Bureau of Ireland was drafted to give effect to the Directive. The Motor Insurance Bureau of Ireland (MIB) participated fully in drafting the Agreement and appears as a signatory to the Agreement. Since an individual affected adversely by an improper implementation can sue the State, so also, in the circumstances of this case, the individual can claim against the State's partner in the implementation process. Furthermore, under the general scheme the MIB is the managing partner which is responsible for the administration and the processing of all claims under the scheme, and as such is the party which carries all litigation contemplated by the scheme. Unlike, ordinary contracts, the 1988 Agreement is also unusual in that not only does it contemplate, but it specifically provides for third parties to have rights under the agreement and for such third parties to take actions against the MIB. Insofar as the Bureau knew of the State's failure in this transforming process for several years and failed to remedy the matter, the Irish judge had no hesitation in awarding damages against it. [528] This case brings us naturally to the next section.

4.6.2 The liability of private parties

Unlike US antitrust law, where civil suits for damages have played a dominant role, Articles 81 and 82 EC do not include an express provision on the question of damages that the victims of anti-competitive practices are entitled to. The 1993 Co-operation Notice, although it admits "companies are more likely to avoid infringements of the Community competition rules if they risk having to pay damages or interest in such an event,"[529] it does not create remedies deriving from Community law, but all references on remedies are seen in the light of national law. A-G Van Gerven in his Opinion in *Banks* argued extensively in favour of recognising a

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[527] Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1984 L 8/17).

[528] See, contrary, the Court of Appeal in *Mighell and Others v. MIB* [1999] *Common Market Law Reports* 1251.

[529] Commission Notice on Co-operation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty, OJ 1993, C 39/5, para 16.

Community right to obtain reparation in respect of loss and damage sustained as a result of undertaking's infringement of Community competition law.[530] The ECJ advanced the private enforcement of competition law provisions in *Crehan*.[531]

The defendant in the main proceedings was a publican who had concluded two 20-year leases with Inntrepreneur Estates Ltd. The lease agreements contained an exclusive purchase obligation under which the tenant had to purchase a fixed minimum quantity of beer from Courage, a brewery which in 1990 held a 19% share of the UK market in the sale of beer. The defendant argued that the exclusive distribution agreement caused the price differential and thus the injury. He brought his damages action on the ground that Courage beared tort liability for breach of a statutory duty (i.e. Article 81). It is not clear whether this was a claim in tort (breach of statutory duty) or in restitution. This uncertainty might be accentuated by the fact that the recovery that Mr Crehan sought was of limited extent. He basically asked the national court to put him in the condition he would have been, had he not entered into the agreement. He did not therefore claim damages for consequent losses or loss profits. In any case, the Court of Appeal made it clear that national legal rules precluded the claim of Mr Crehan both in damages and in restitution.

The ECJ held that Article 81(2) provides for automatic nullity of agreements that infringe Article 81(1), and that a principle of automatic nullity could be relied on by anyone. Courts are bound by it once the conditions for the application of Article 81(1) are met and so long as no exemption under Article 81(3) has been granted. Since the nullity is absolute, an agreement which is null and void by virtue of Article 81(2), has no effect as between the contracting parties and could not be set up against third parties. It also follows from the direct effect of Article 81(1) and (2) that any individual could rely on a breach of Article 81(1) before a national court even

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[530] Opinion of A-G Van Gerven in C-128/92, *Banks v. British Coal* [1994] ECR I-1209, paras 37 et seq. For the first attempts to deduce a Community principle of individual civil liability in competition law cases see Smith, *The Francovich case: State liability and the individual's right to damages* 13 (1992) *European Competition Law Review* 129, 132. M. Hoskins, *Garden Cottage revisited: The availability of damages in the national courts for breaches of the EEC Competition rules* (1992) 13 *European Competition Law Review* 257, 259.

[531] Case C-453/99, *Courage Ltd v. Bernard Crehan* [2001] ECR I-6297. See A. Komninos, *New prospects for private enforcement of EC competition law: Courage v. Crehan and the Community right to damages* (2002) *Common Market Law Review* 447.

where he was a party to a contract that was liable to restrict or distort competition within the meaning of that provision. The full effectiveness of Article 81, would be put at risk if it were not open to any individual to claim damages for such loss or for such conduct. The existence of such a right strengthens the working of the EC competition rules and discourages agreements which are liable to restrict or distort competition. There should therefore be no absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.[532]

However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law do not entail the unjust enrichment of those who enjoy them. Similarly, provided that the principles of equivalence and effectiveness are respected, Community law does not preclude national law from denying a party who was found to bear significant responsibility for the distortion of competition, the right to obtain damages from the other party. When examining the degree of responsibility of each co-contractor, the national court can take into account a series of parameters: the economic and legal context of each case, the respective bargaining power and conduct of each of the co-contractors, whether a party is in such a substantially weak position that it cannot negotiate the contractual terms freely, and the cumulative effects on competition of any other similar contracts, if parts of a network.[533]

As a matter of doctrine, there does not seem to be direct support for imposing obligations, such as those that *Courage* requires, in Article 81 or in the Court's case law. There are, however, some indications for the principle established in *Courage*. It seems to be a principle of Community law that private parties must not be allowed to interfere seriously with the rights and freedoms of other parties guaranteed by Community law, and that the agreements by which they try to do so are void and unenforceable.[534] Articles 81(1) and 82 enjoy direct effect and

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[532] Op.cit., paras 19-28.

[533] Op.cit., paras 29-35.

[534] See Case C-265/95, *Commission v. France* [1997] ECR I-6959, paras 30, 32. See G.R. Milner-Moore, *The Accountability of Private Parties under the Free Movement of Goods Principle*, Harvard Jean Monnet paper (1995), available at: http:/www.jeanmonnetprogram.org/.

grant actionable rights to individuals that national courts must protect.[535] One can invoke Article 81(2) EC claiming that the contract is automatically void absolving them from any further contractual obligations.[536] Finally, the level of fines is dependent of the economic pressure or the duress under which a contract is concluded.[537]

The reasoning of the Court is, mainly, policy oriented. It focuses on the effectiveness of the enforcement of the Treaty competition rules, as a result of damages claims and of private enforcement in general, in view of the fact that resources available to competition authorities are limited.[538] Damages in such situations are considered an appropriate deterrent. In a leading US antitrust case dealing with treble damages, Justice Black observed for the Supreme Court that "[past decisions] were premised on a recognition that the purposes of the antitrust laws are best served by ensuring that the private action will be an ever-present threat to deter any one contemplating business behaviour in violation of the antitrust laws" and that "the plaintiff who reaps the reward of treble damages may not be less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favour of competition."[539]

The conditions for liability are left to the autonomy of Member States. One can assume that the conditions for liability of private parties may be less strict than those of governmental liability. It is rightly observed that there can be no perfect parallels between State and individual liability for Community law violations, since there are inherent features in the former (e.g. those necessitating the requirement of a "sufficiently serious breach") that cannot be transposed to

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[535] Case 127/73, *BRT v. SABAM (I)* [1974] ECR 51, para 16.

[536] Among the many notable cases, see Case C-234/89, *Delimitis v. Henninger Bräu* [1991] ECR I-935; Case 161/84, *Pronuptia de Paris GmbH v. Schillgallis* [1986] ECR 353; Case C-126/97, *Eco Swiss v. Benetton* [1999] ECR I-3055.

[537] *Sperry New Holland* [1985] OJ L376/21, para 62; *Quaker Oats Ltd* [1988] OJ L49/19, paras 19 and 26; *Tipp-Ex* [1987] OJ L222/1, paras 76-79. Economic pressure may not even be necessary. See *Sandoz* [1987] OJ L75/57, para 33; *Toshiba* [1991] OJ 287/39, para 26.

[538] See, however, Monti G., *Anticompetitive agreements: the innocent party's right to damages* (2002) 27 *European Law Review* 282, who attacks the policy arguments of the Court.

[539] See *Perma Life Mufflers Inc. v. International Parts Corp* (392 US 134, at 138).

the latter.[540] State liability is a much more sensitive issue, appertaining also to constitutional principles in the Member States. It is normal that the conditions for private liability are delegated to national laws, subject to the Community limits of equivalence and effectiveness. The ECJ indicated that national law could prevent a party from seeking damages if he bore significant responsibility for the distortion of competition. This principle is present in most legal systems of the Member States.[541] Courage leaves, however, many unexplored issues. Questions of definition of fault, problems of causation, standing calculation of damages and many other fine problems are due to arise.

The judgment is welcome in that it establishes in real terms the private accountability of private actors. It is the first step towards acknowledgement of the damages remedy in all the cases that Treaty Articles have been held to be directly effective,[542] such as Article 141 for liability for discrimination in pay on the ground of the sex of the employee[543] and Article 39 for liability for discrimination against EU citizens on the ground of their nationality in the field of employment and the provision of services.[544] In this way, it is hoped that the inequalities created by the public/private law division will be further diminished.

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[540] Saggio, *La responsabilità dello stato per violazione del diritto comunitario* (2001) 6 *Danno e Responsabilità* 223, 242.

[541] For example, the Greek Civil Code (Art. 917(2) excludes the restitution of the enrichment only in case of immoral transactions).

[542] See Lever, *Mutual permeation of Community and national tort rules* in Wouters and Stuyck (Eds), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune*, Essays in Honour of Walter van Gerven (Antwerpen/Groningen/Oxford 2001), p. 107.

[543] See Case 43/75, *Defrenne v. Sabena* [1976] ECR 455.

[544] See Case 167/73, *Commission v. France* [1974] ECR 359; Case 36/74, *Walrave and Koch v. AUCI* [1974] ECR 1405; Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA* [2000] ECR 4139.

4.6.3 The liability of judicial bodies

The liability of judicial bodies is a sensitive issue and should be examined in the light of the relationship between the ECJ and national courts.[545] In *Köbler*[546] the ECJ had to decide on the issue whether State liability covers breaches of the judiciaries and in particular the reluctance of national Supreme Courts to make a reference to the ECJ. Mr Köbler brought an action for damages against the Republic of Austria before the Regional Court. He submitted that the judgment of the supreme administrative court infringed directly applicable provisions of Community law. As a consequence, he sought compensation for the loss he has unlawfully sustained as a result of the judicial decision in question which refused to grant the special length of service increment to be taken into account in the calculation of his retirement pension. Under the Austrian law the grant of that increment is conditional, in particular, on completion of 15 years service as a professor at Austrian universities. He applied for the special length-of-service increment for university professors. In support of his application, he relied on completion of 15 years' service as an ordinary professor at universities in various Member States, in particular Austria.

The Republic of Austria opposed that application for compensation on the ground that the judgment of the supreme administrative court is not contrary to Community law and that, in any event, a decision of a Supreme Court cannot give rise to State liability. Such liability is expressly excluded under Austrian law. The justification is that the liability would entail the reopening of proceedings that have been closed definitely. All the intervening Member States and the Commission argued against such a liability.

A-G Lèger in its Opinion delivered on 8 April 2003 concluded that the obligation to make reparation for breach of Community law by a Supreme Court follows from the scope of the principle of State liability, the role of the national courts and the state of domestic law of the Member States. The Advocate General stressed the decisive role of national courts and

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[545] See H. Toner, *Thinking the Unthinkable? State Liability for Judicial Acts after Factortame III*, (1999) *Yearbook of European Law* 165; Anagnostaras G., *The Principle of State liability for Judicial Breaches: The Impact of the European Community* (2001) *European Public Law* 281.

[546] Case C-224/01, *Köbler* of 30 September 2003 (not yet published).

specifically of Supreme Courts in the application of Community law.[547] In relation to the principle of independence of the judiciary, this should be irrelevant in Community law, as in international law. This argument has not, in a fair number of Member States, prevented the establishment of such rules governing State liability.[548] For the principle of *res judicata* he stressed that this is subject to the principles of equivalence and effectiveness. It follows that, by reason of the principle of equivalence, the Member States are not entitled to rely on the principle of *res judicata* to oppose *prima facie* an action for damages against the State. That is all the more true in the light of the principles of effectiveness and that conclusion is all the more necessary in the light of the principle of the primacy of Community law.[549] Neither the presumption of impartiality of national courts is able to preclude the establishment of Member State liability for breach of Community law by a Supreme Court.[550]

Concerning the conditions for this kind of State liability the Advocate General held that it is not necessary to determine whether, in the exercise of the judicial function, the State has a broad discretion or not. The decisive factor is whether the error of law at issue is excusable or inexcusable. That characterisation can depend either on the clarity and precision of the legal rule infringed or on the existence or the state of the Court's case law on the matter. The Advocate General gives certain examples: The State can be rendered liable, where a Supreme Court gives a decision contrary to provisions of Community law although their meaning and scope are clear in every respect, so that it ultimately leaves no room for interpretation, but only straightforward application. Another example is where a Supreme Court gives a decision which manifestly infringes the Court's case law. Preliminary rulings, for example, are binding on national courts as regards interpretation of Community law provisions. Another example is when the Supreme Court disregards manifestly its obligation to make a reference ruling, when there is no case law of the Court on the point of law at issue at the time when the national court gives its decision. A manifest breach by a Supreme Court of an obligation to make a reference

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[547] Op.cit., paras 53-87.

[548] Op.cit., paras 88-91.

[549] Op.cit., paras 95-106.

[550] Op.cit., paras 107-114.

for a preliminary ruling is, in itself, capable of giving rise to State liability.[551] As regards the Court that is competent to hear an action for damages brought against the State, this should subject to the institutional autonomy of Member States subject to the principle of effective judicial protection.[552] The Advocate General found that the error made by the *Verwaltungsgerichtshof* as to the meaning and scope of Art. 39 EC was inexcusable and thus capable of giving rise to liability.[553]

The ECJ found that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as res judicata (para 39). Also, as to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State (para 42). Application of that principle cannot be compromised by the absence of a competent court (para 45). It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.[554] This may be interpreted not only as transferring to national courts the responsibility to judge whether the breach was manifest but also as allowing for considerable discretion in this assessment. The competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. According to the ECJ and contrary to the Opinion of the Advocate General, Community law did not expressly cover the issue at question. The *Verwaltungsgerichtshof* had decided to withdraw the request for a preliminary ruling, on the view that the question had already been resolved in a previous case. Thus, it was owing to its incorrect reading of this judgment that the *Verwaltungsgerichtshof* no longer considered it necessary to refer that question of interpretation to the Court.[555]

The resistance of national courts to refer can be a serious obstacle to the judicial protection of individuals, because this is based on the judicial cooperation between national courts and the

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[551] Op. cit., para 138-144.

[552] Op. cit., para 160-162.

[553] Op. cit., para 165-174.

[554] Op. cit., para 46.

[555] Op.cit., paras 122-123.

ECJ.[556] Although the reference procedure is not a remedy, formally speaking, is one of the most important aspects of judicial protection. In case of sufficiently serious breaches, liability should be established. The judgement should been seen as an attempt to ameliorate the co-operation between national and Community Courts and not to establish hierarchy among them. The liability of the judiciary will prove useful, for example, in case the national courts do not comply with a judgment of the ECJ and there is no right to appeal against this judgment under national law.[557] In relation to the conditions, the German government argued that the liability for breach of judicial bodies should be arranged under stricter conditions (only for malicious conduct). Main justification for this is the protection of judicial independence. It is well known from the national experience that the action for maladministration of Justice is seldom resorted to by the parties. With such a minor intrusion the liability system for breaches of the judiciary would end up to be ineffective. The judgment of the ECJ, however, appears reluctant to interfere to Member State autonomy on this issue. Although it establishes State liablity for breaches of the judiciary on the basis of *Brasserie*, it leaves to national courts to decide on whether the breach is manifest. This means that it will be very difficult in practice for the applicants to succeed, taking into account that they have also the burden to prove causation and the assessment of damages.

Conclusion

State liability has revolutionized European law. As the most explicit manifestation of the rule of law it has as an objective to keep the government within the bounds of law. It goes to the very heart of the Community political system and affects the allocation of power between the Community and Member States. The Court has unified the conditions between Member State liability and non-contractual liability of the Community. There is no good reason to bind Member States to higher standards of liability than those which are required for Community institutions. The ECJ assessed the financial burden that a right to damages would impose on Member

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[556] A flagrant example is the resistance on the part of the Greek Council of State to refer questions of interpretation of national legislation clearly falling under the scope of Community law. See E. Manganaris, *The Principle of Supremacy in Greece-from direct challenge to non-application* (1999) *European Law Review* 426.

[557] Art. 559.18 of the Greek Code of the Civil Procedure provides for a right of appeal only in case of non compliance with a judgment of Areios Pagos. This provision is interpreted as not including non compliance with a judgment of the ECJ. See Areios Pagos 23/98 (full bench) 1998 *Ελληνική Δικαιοσύνη 793.*

States and made it available only for serious infringements of Community law. The ECJ continues to develop this right, which is *par excellence* the most expanding remedy with a substantial deterrent effect. However, it allows for various restrictions and variations imposed by national rules.

Chapter 5: The principles of equivalence and effectiveness

The principles of equivalence and effectiveness are the Community limits to national procedural autonomy. The Court struggles to balance the principles of equivalence and effectiveness with the doctrine of sovereignty. This Chapter describes the conflict between diversity and uniformity and explores whether the ECJ has drawn the balance successfully. A comparison with substative law gives a better insight to the discussion.

5.1 The principle of equivalence

5.1.1 The examination of similarity of claims

The principle of procedural equivalence is a specific application of the general principle of non-discrimination.[558] In the *Butterboats* case the ECJ decided that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring of Community law provisions having direct effect, on the same conditions concerning the admissibility and procedure as would apply were it a question of ensuring observance of national law.[559] If one compared the case law on Article 12 concerning discrimination in procedural rules[560] with that on *Rewe* and *Comet*, s/he should conclude that the requirement of

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[558] Article 12 para 1 states as follows: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." See also similar US rule that States cannot discriminate procedurally against federal claims in *Testa v. Katt*, 330 US 386 (1947).

[559] Op.cit. para 44.

[560] See for direct discrimination Case C-20/92, *Anthony Hubbard (Testamentvollstrecker) v. Peter Hamburger* [1993] ECR 3777; Case 323/95, *David Charles Hayes v. Kronenberger GmbH* [1997] ECR I-1711; Case 43/95, *Data Delecta Aktiebolag and Ronny Forsberg v. MLS Dynamics Ltd* [1996] ECR I-4661; Case 122/96, *Stephen Austin Saidanha and MTS Securities Corporation v. Hiross Holding AG* [1997] ECR I-5325 (all included a provision obliging only foreign nationals acting as plaintiffs to give security for costs and lawyers fees). See on these cases, T. Ackermann, (1998) *Common Market Law Review* 783. See for indirect discrimination Case C-398/92, *Mund & Fester v. Hatrex International Transport* [1994] ECR I-467 (the rule authorised seizure when it was to be feared that enforcement of that judgment would be made impossible or substantially more difficult. There was also a presumption of foreseeable difficulties in the event of a judgment being enforced abroad). See also Case C-

the principle of equivalence prohibits not only direct but also indirect discrimination against claims based on Community law. The legal protection should not vary on whether one relies on the principle of equivalence or the principle of non-discrimination enshrined in Article 12. Where a procedural rule applies to certain categories of claim most of which are claims based on Community law and a more favourable rule applies to other categories of claims based on national law, the first rule may run counter to the requirement of equivalence.[561] Further, after establishing the incompatibility of the national procedural rules with the principle of equivalence the courts should proceed to examine any possible justifications for rules creating indirect discrimination.[562]

Identifying the criteria of comparability between Community and national law claims is not easy. The exercise of seeking a comparable claim under national law is difficult and somewhat artificial,[563] because the litigation systems in the various Member States were not designed specifically to deal with the enforcement of Community rights.[564] The ECJ established the general rule that the principle of equivalence finds application, where the purpose, cause of action and essential characteristics of actions are similar.[565] Since national courts are more familiar with national legislation, the ECJ ruled that, in principle, it is for the national courts to

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412/97, *Italo Fenochio* [1999] ECR I-3845 (the rule concerned that a summary payment order may not be made if service to the defendant must be effected abroad).

[561] T. Tridimas, *Enforcing Community Rights in National Courts: Some Recent Developments* in *Liber Amicorum for Lord Slynn* (ed. D. O'Keeffe) (2000) Kluwer 35, 39.

[562] See Cosmas A-G in Case C-412/97, *ED Srl v. Italo Fenocchio*, op.cit., para 52.

[563] Case C-62/93, *BP Supergas v. Greek State* [1995] ECR I-1883, para 58 of the Advocate's General Opinion. The case concerned overpaid VAT contrary to the Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes-Common system of value added tax: uniform basis of assessment (OJ 1977 L 145/1).

[564] See e.g. Rideau, *Le contentieux de l'application du droit communautaire par les pouvoirs publics nationaux* (1974) Dalloz-Sirey, Chronique XIX, 147, 156.

[565] Case C-326/96, *Levez v. Jennings (Harlow Pools) Ltd* [1998] ECR I-7835, paras 41 and 43.

ascertain whether the national procedural rules comply with the principle of equivalence.[566] The scope of the principle has been determined in the following case law.

In *Singh Singhara and Radiom*[567] two migrant Community nationals have been refused the opportunity of an appeal against decisions denying them entry to the United Kingdom for the purposes of work. The question for remedies was whether denial of appeal rights conflicted with Article 8 of Directive 64/221,[568] under which Member States have an obligation to make available to the Community nationals seeking to exercise free movement rights the "same legal remedies" as those available to nationals of the host state in respect of decisions concerning entry, renewal of residence permits or expulsion. The ECJ ruled that the obligation in Article 8 is satisfied if the migrant national has access to the general remedies against acts of the administration provided by the national law of that Member State in relation to decisions concerning the entry of its own nationals. The ECJ rejected the applicants' contention that the guarantee should extend to cover specific remedies established by the Member State in respect of entry refusals.[569] The justification for this was that while Member States may derogate from their obligations under Articles 39 and 46 of the Treaty on the grounds specified in those provisions, in particular grounds justified by the requirement of public policy, they cannot apply such measures to their own nationals, inasmuch they do not have authority to expel them from the national territory or to deny them access thereto.[570] In the case of home

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[566] See Case C-261/95, *Palmisani v. INPS* [1997] ECR I-4025, para 33; Case C-326/96, *Levez*, op.cit., para 39.

[567] Joined Cases C-65/95 and C-111/95, *The Queen v. Secretary of State for the Home Department, ex parte Mann Singh Shingara and Radiom* [1997] ECR I-3343. For an annotation on this case see T. Connor, *Migrant Community Nationals: Remedies for Refusal of Entry by Member States* (1998) 23 *European Law Review* 157.

[568] Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117).

[569] For example, an appeal to an adjudicator against a refusal of "leave to enter the United Kingdom": Immigration Act 1971, s.13(1).

[570] *Shingara*, op.cit., para 28. See Article 3 of the Fourth Additional Protocol to the European Human Rights Convention that provides that a State may not expel its nationals from its own territory. Also, see Case C-370/90, *The Queen v. Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265, para 22.

nationals the right of entry is a consequence of the status of national, so there can be no margin of discretion, while in case of nationals of other Member States the national authorities should have a margin of discretion in the application of the public policy exception.[571] Consequently, the two situations were not comparable.[572]

The connotation of the case about community citizenship enshrined in Article 18 EC[573] is somewhat disappointing. The notion of citizenship of the Union implies a commonality of rights and obligations uniting Union citizens by a common bond transcending Member State nationality.[574] It might be thought consistent with the notion of citizenship of the Union for any national of a Member State to be denied the right to enter and reside in another Member State, where matters of public policy or public security are in issue, but it is paradoxical to deny appeal rights against this refusal. The reasoning of the ECJ does not favour the development of the European Demos. The ECJ shares the responsibility with the other Community institutions and each national community for building the European national identity.[575] The development of law enforcement is a high priority for the citizens' rights in a political union.[576] Instead of encouraging Member States to expel all nationals of other Member States who cannot claim an

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[571] *Shingara*, op.cit., para 30.

[572] Colomer A-G stated that it would not be very logical for Article 8 of the Directive to refer to specific remedies, available to nationals which nationals do not need to use. *Shingara*, op.cit., para 48 of the Advocate's General Opinion.

[573] Article 18 para 1 EC states as follows: "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."

[574] Jacobs A-G in C-274/96, *Bickel and Franz* [1998] ECR I-7637, para 23 of the Opinion. See Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, where the ECJ has ruled that the status of citizen of the European Union is destined to be the fundamental status of nationals of all the Member States, conferring on them, in the fields covered by Community law, equality under the law, irrespective of their nationality.

[575] See L.C.Backer, *The Euro and the European Demos: A Reconstitution* (2002) *Yearbook European Law* (forthcoming).

[576] E. Szyszczak, *Making Europe More Relevant To Its Citizens: Effective Judicial Process* (1996) 21 *European Law Review* 351, 364.

entitlement under Community law to be there, the host State might find itself required by the principle of equivalence to extend to such nationals certain advantages enjoyed by its own nationals.

In *Palmisani*[577] the Italian Republic had failed to implement the Directive 80/987 for the protection of employees in the event of insolvency of their employer.[578] Following the judgment in *Francovich*[579] a scheme was set up to compensate those who had suffered loss due to the non-implementation of the Directive. The applicant had been refused compensation under this scheme, because she brought her claim for compensation after the time limit set in the Italian legislation which was one year from the date of entry into force. The applicant suggested that the time limit was less favourable than the time limit available for similar actions under national law. She suggested a comparison with the one-year prescription period under the basic system of the Legislative Decree governing the payment of the benefits provided for in the Directive and the general prescription period of five years, in matters of non-contractual liability, under the Italian Civil Code.

Cosmas A-G proposed[580] a three-step examination for the comparison between procedural rules: first, the claims must be similar; secondly the procedural rules on which the comparison is based must not be considered in isolation but in their procedural context; and thirdly those procedures must not be chosen at random but must be of a similar kind. Accordingly, a claim must be compared with a claim of a similar kind, a procedural rule with a procedural rule of a similar kind, and court procedure with court procedure of a similar kind. Comparison must not be made between disparate claims, or between rules disassociated from the corresponding procedure or which are subject to different procedures, for example administrative procedures on the one hand and judicial procedures on the other. He rejected the comparability between the basic system for the payment of the guarantee and that of reparation for the past, because

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[577] *Palmisani*, op.cit.

[578] Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283/23).

[579] *Francovich*, op.cit.

[580] *Palmisani*, op.cit., para 26-27 of the Advocate's General Opinion.

of the different objectives of the schemes and the different nature of the procedures: the first was an administrative procedure while the second was judicial.

The ECJ used as a yardstick the objectives of the schemes under which actions were provided. The ECJ held that applications for payments provided by the Directive and those made under the compensation scheme for its belated transposition differed as to their objectives. The former aimed to provide employees with specific guarantees of payment of unpaid remuneration in the event of the insolvency of their employer. The latter, by contrast, sought to make good the loss sustained by the beneficiaries of the Directive as a result of its belated transposition. As far as the ordinary system of non-contractual liability was concerned, the ECJ held that in order to establish the comparability of the two systems, the essential characteristics of the domestic systems should be examined. Because of the lack of the necessary information, it fell to the national court to undertake that examination. Since the principle of equivalence depends upon there being an appropriate comparator, the ECJ accepted that if no appropriate comparator exists it could not be said that the measure infringes the principle of equivalence.[581]

The ECJ provided national courts with additional guidance in *Levez*.[582] The case concerned a female manager of a betting shop, who was falsely told that she received the same salary as her male predecessor. When she found out, she sought to recover arrears of equal pay, but her claim to full recovery was obstructed by s. 2(5) of the Equal Pay Act 1970. That provision limited a woman's entitlement to arrears of remuneration or damages for breach of the principle of equal pay to a period of two years prior to the date the proceedings are instituted. The question was whether Community law precluded the application of the rule at issue when rules more favourable to claimants were applied to other fields of Community law. Other national measures proposed as adequate comparators were rules linked to breach of contract of employment, to pay discrimination on grounds of race, to unlawful deductions from wages, or to sex discrimination in matters other than pay.

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[581] *Palmisani*, op.cit, paras 34-39.

[582] Op.cit. See T. Conor, *Community discrimination law: temporal limitations and unlawful conditions of application imposed by a Member State* (1999) *European Law Review* 300.

The ECJ explained that the comparison should be made in relation to "pure" domestic law. Where the domestic law in question reflects EC law, the principle of equivalence has no application. The fact that the same procedural rules applied to two comparable claims, one relying on a right conferred by Community law, the other on a right acquired under domestic law, was not enough to ensure compliance with the principle of equivalence, since one and the same form of action was involved.[583] Therefore, the limitation period provided under s. 2(5) of the Equal Pay Act laid down to give effect to the Community principle of non-discrimination on grounds of sex in relation to pay, pursuant to Article 119 EC (now 141) and the Directive 75/117[584] could not be held comparable.

Levez raised, also, the issue of inter-relationship of domestic remedies. The UK Government argued that Mrs Levez could have recovered full compensation by bringing proceedings against her employer based on the tort of deceit before the county court.[585] If she had relied both on the Equal Pay Act and on the deceit of her employer, s. 2(5) of the Equal Pay Act would not have applied. The ECJ accepted that, where an employee can rely on the rights derived from Article 119 EC (now 141) and the Equal Pay Directive before another court, s. 2(5) does not compromise the principle of effectiveness. The ECJ left the determination of whether any of those forms of action could be considered similar to a claim under the Equal Pay Act to the national court.[586] It concluded that Community law precludes the application of a rule of national law which limits an employee's entitlement to arrears of remuneration or damages for breach of the principle of equal pay to a period of two years prior to the date on which the proceedings were instituted, even when another remedy is available, only if the latter is likely to entail procedural rules or other conditions which are less favourable than those applicable to similar domestic actions.[587] When the case returned to the Employment Appeal

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[583] *Levez*, op.cit., paras 47-48; See also Case C-78/98, *Shirley Preston and Others v. Wolverhampton Healthcare NHS Trust and Others* [2000] ECR 3201, para 51.

[584] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45/19).

[585] *Levez*, op.cit., para 35.

[586] *Levez*, op.cit., para 38.

[587] Ibid., para 53.

Tribunal, it concluded that the principle of equivalence had indeed been breached. In its view, the absolute limit on arrears in equal pay claims was more restrictive than the rules governing claims for breach of contract, unlawful deductions from wages and discrimination on grounds of race and disability which permitted up to six years' arrears to be claimed in each case.[588]

Further, the ECJ found that the principle of equivalence does not prohibit differentiation in procedural rules between public and private law claims. In a string of Italian cases, *Edis*,[589] *Spac*,[590] *Ansaldo*,[591] *Aprile*[592] and *Dilexport*,[593] the question was whether Community law precluded the legislation of a Member State from laying down, alongside a limitation period applicable under ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules which are less favourable. The first three cases concerned the imposition by the Italian authorities of corporate registration charges on the raising of capital found to be incompatible with Directive 69/335[594] in its previous judgment *Ponente Carni*.[595] The fourth and fifth concerned the restitution of charges found to be incompatible with Article 25 and 90 of the Treaty respectively.

The ECJ ruled that the principle of equivalence cannot be interpreted as obliging Member States to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law. The position is different

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[588] *Levez v. T.H. Jennings (Harlow Pools) Ltd (No. 2)*, EAT [2000] ICR 58.

[589] Case C-231/96, *Edilizia Industriale Siderurgica Srl (Edis) v. Ministero delle Finanze* [1988] ECR I-4951.

[590] Case C-260/96, *Ministero delle Finanze v. SPAC SpA* [1998] ECR I-4997.

[591] Joined Cases C-279/96, C-280/96 and C-281/96 *Ansaldo Energia SpA and Others v. Amministrazione delle Finanze dello Stato* [1998] ECR I-5025.

[592] Case C-228/96, *Aprile Srl, in liquidation v. Amministrazione delle Finanze dello Stato* [1998] ECR I-7141.

[593] Case 343/96, *Dilexport Srl v. Amministrazione delle Finanze dello Stato* [1999] ECR I-579.

[594] Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Ed.1969 (II), p. 412).

[595] Joined Cases C-71/91 and 178/91, *Ponente Carni and Cispadana Construzioni v. Amministrazione delle Finanze dello Stato* [1993] ECR I-1915.

only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies.[596] In the "registration charge" cases, *Edis*, *Spac* and *Ansaldo,* the ECJ ascertained that the time limit applied not only to repayment of the contested registration charge, but also to that of all governmental charges of that kind. A similar time limit applied also to actions for repayment of certain indirect taxes. In addition, it was clear from the case law of the Italian court that time limits relating to taxes applied also to actions for repayment of charges or dues levied under laws that have been declared incompatible with the Italian Constitution.[597] Similarly, in *Aprile* and *Dilexport*, the ECJ found that the limitation period of three years which applied to all actions for reimbursement of sums paid in respect of customs operations, was the same as that which under Italian legislation applied to actions for repayment of numerous indirect taxes with subject, if not identical, at least as closely comparable to that of the actions in the main proceedings.[598]

The reasoning of the ECJ seems persuasive and is consistenly followed.[599] It is based on a private-public law distinction, which is fundamental in every system of law. The dividing line between private and public law belongs to the procedural autonomy of each Member State and can be determined differently in various Member States.[600] A claim against the national authorities to recover a sum levied contrary to Community law can better be equated to a claim

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[596] *Edis*, op.cit., para 36; *SPAC,* op.cit., para 20; *Aprile*, op.cit., para 20; *Dilexport*, op.cit., para 27; *Ansaldo*, op.cit., para 29.

[597] *Edis*, op.cit., para 38; *SPAC*, op.cit., para 22.

[598] *Aprile*, op.cit., para 29; *Dilexport*, op.cit., para 31.

[599] See Case C-88/99, *Roquette Frères SA v. Direction des Services Fiscaux du Pas-de-Calais* [2000] ECR I-10465, Joined Cases C-216/99 and C-222/99, *Riccardo Prisco Srl and CASER SpA* [2002] ECR I- 6761. In the latter case the ECJ found, though, that the rules for calculating interest laid down in Article 11(3) of Law No 448/98 which relate specifically to the administrative charges for registration in the register of companies and the annual payment for its maintenance in subsequent years which were declared contrary to Community law following *Ponente Carni* are less favourable than the rules applicable to repayment of other tax debts, including repayment of other administrative charges of the same kind.

[600] V. Skouris, *The impact of European Community Law on the division between private and public law especially in relation to the public contracts and the privatization of public authorities* (Η επίδραση του Ευρωπαϊκού Κοινοτικού Δικαίου στη διάκριση μεταξύ ιδιωτικού και δημοσίου δικαίου ιδιαίτερα στις δημόσιες συμβάσεις και στις ιδιωτικοποιήσεις) (1999) *Ελληνική Επιθεώρηση Ευρωπαϊκού Δικαίου* 268, 271.

to recover a sum levied contrary to a superior rule of national law, such as national constitution, rather than to claims of recovery against other individuals.[601] The principle of equivalence as interpreted by the ECJ entails a narrow range of inquiry, which favours national procedural autonomy.

5.1.2 The comparison between similar claims

After national courts establish the comparability of claims, they have to examine whether the national rule for the claim based on national law is more favourable. The ECJ ruled that whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts.[602] In that comparison, national courts should examine whether a person relying on a right conferred by Community law is forced to incur additional costs and delay by comparison with a claimant whose action is based solely on domestic law, namely whether the procedure before the national court is simpler and less costly.[603]

In *Preston*[604] the claimants, part time workers, commenced proceedings under the Equal Pay Act 1970 claiming retroactive membership of their occupational pension schemes for service prior to amendments to the schemes giving part time workers equal rights to membership in line with their full time colleagues. Following the issue of 60,000 claims before the UK courts, in three test cases the claimants sought the right to join their schemes in situations where respectively, (1) the scheme had been amended more than two years before the proceedings had begun, (2) the claimants had ceased to be employed more than six months before commencement of proceedings, and (3) the claimants had worked on a series of intermittent short term contracts with the same employer. The procedural obstacles were the following:

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[601] T. Tridimas, *Enforcing Community Rights in National Courts*, op.cit., 40.

[602] *Levez*, op.cit., para 44.

[603] *Levez*, op.cit., para 51.

[604] Case C-78/98, *Shirley Preston and Others v. Wolverhampton Healthcare NHS Trust and Others*, op.cit.

First, under s. 2(4) of the Equal Pay Act, workers were required to bring such equality actions within six months following their cessation of employment and thus the claims of those applicants were time-barred having been deprived of any remedy whereby their earlier periods of part-time employment could be recognised for the purpose of calculating their pension rights. Second, under Regulation 12 of the Occupational Pension Regulations, those claims were excluded because the retroactive effect of any membership was limited to the two years preceding the date on which the claim was brought.

The case disclosed two types of problem: First, the rules governing the domestic action contained procedural requirements were both more favourable and stricter than those applicable to the main proceedings. Indeed, the period for bringing the domestic action was shorter than that set by s. 2(4) of the Equal Pay Act. On the other hand, in the event of a successful outcome, the claimant could secure retroactive membership of an occupational scheme for a longer period than the two years provided for by Regulation 12 of the Occupational Pension Regulations. In such circumstances, it is appropriate to determine whether the comparison should focus on each of the procedural requirements (an individual comparison) or, on the contrary, should encompass all the procedural rules at issue (a comprehensive comparison). The ECJ replied that the various aspects of the procedural rules cannot be examined in isolation but must be placed in their general context.[605] Therefore, in order to determine whether the procedural rules laid down by s. 2(4) of the Equal Pay Act and Regulation 12 of the Occupational Pension Regulations were less favourable than those governing the domestic action, the House of Lords should undertake a comprehensive comparison of the various aspects of the applicable procedural requirements.

The second problem arose by reason of the number of cases brought before the national court. In fact, the "more favourable" nature of requirements governing domestic actions may vary according to the facts of the main actions. The procedural requirements governing the domestic action may be regarded as being more favourable than the requirement applicable to the main actions as regards certain claimants but less favourable than the requirements applicable to the main actions as regards other claimants. Léger A-G held that if the comparison was to be made subjectively, according to the factual circumstances of the various claimants in the main proceedings that would be irreconcilable with the principle of legal certainty. The national courts

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[605] *Preston,* op.cit., para 62.

would be called on to adjudicate on the main actions in accordance with divergent rules of law. Moreover, both the competent authorities and the litigants-whether as claimants or defendants-would no longer be in a position to ascertain precisely which rules of national law applied to the proceedings.[606] The ECJ upheld the Opinion of the Advocate General. It found that, in order to decide whether procedural rules are equivalent, the national court must verify objectively, in the abstract, whether the rules at issue are similar taking into account the role played by those rules in the procedure as a whole, as well the operation of that procedure and any special features of those rules.[607] It is questionable though if an objective assessment would be compatible with the requirement of effective judicial protection. This view does not seriously take into account the need for effective individual remediation. How can this rectification be made in the abstract?

The House of Lords decided[608] that since the Equal Pay Act 1970 was adopted to give effect to the Community principle of non-discrimination on grounds of sex in relation to pay, an action alleging a breach of the Act was not a domestic action "similar" to a claim for infringement of Article 119 EC (now 141). As a result, the limitation under s. 2 of the Equal Pay Act 1970 need not be as favourable as actions under Article 119 EC. It was possible for no similar action to exist under national law. However, the eventual benefit to an employee of a claim under Article 119 for full retroactive access to the scheme, so that the necessary contributions to obtain pension rights would have to be paid, and a claim in contract for damages for the failure to pay those sums to the pension trustees leading to a loss of pension rights were found to be similar. A claim in contract could therefore provide a comparison for a claim under Article 119 (now 141) as limited by s. 2 of the Equal Pay Act 1970. The House of Lords examined the procedural rules objectively in the context of the procedure as a whole. First, the six-year time limit for contract claims ran from each specific breach, whereas the six-month time limit under s. 2 of the Equal Pay Act 1970 ran from the date of termination of employment. Secondly, a claim in contract could go back only six years from the date of claim, whereas a claim under s. 2(4) could go back to the beginning of employment or 8 April 1976 whichever was the later. Thirdly, a claim under s. 2(4) could be brought after the ending of the employment whereas a claim in

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[606] *Preston,* op.cit., paras 117-118 of the Opinion.

[607] *Preston,* op.cit., para 63.

[608] *Preston (No. 2)* of 8 February 2001 (2001) 1 *Common Market Law Reports* 46.

contract would require proceedings to be brought while still in employment, leading to friction with the employer. Fourthly, a claim before an Employment Tribunal involved lower costs and less formality than a claim before the courts. The rules of procedure for a claim under s. 2(4) were therefore no less favourable than those for a claim in contract. The case reveals that the enquiry of equivalence is a complex assessment for which national courts are more suitable.

5.2 The principle of effectiveness or practical possibility

The principle of effectiveness is a broad principle that includes implementation, enforcement, impact and compliance with Community law.[609] Procedural effectiveness requires that the national procedural rules do not render impossible in practice the exercise of Community claims. The ECJ has used various formulations to express the minimum protection that national courts should afford to Community law claims. In addition to the term "impossible in practice" used in *Rewe* and *Comet*, in subsequent cases, the ECJ has used phrases such as "virtually impossible," "practically impossible" and "excessively difficult." Jacobs A-G has suggested the formulation "unduly difficult."[610] The linguistic divergence has not meant any change to the force of the principle of effectiveness, which is to empower national courts to disapply or reform national rules in case they do not protect the "core" of a Community right. The remedy in this case is more favourable than otherwise provided by national law. As it entails a superior form of protection for Community rights, the principle of effectiveness may lead to reverse discrimination.[611]

Any refusal by any Member State court to enforce a Community right obviously restricts the right to some degree. It is a decision that the Member State interest in its procedure takes

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[609] F. Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques* (1993) 56 *Modern Law Review* 19 at 19.

[610] See Case C-2/94, *Denkavit International BV v. Kamer van Koophandel en Fabrieken voor Midden-Gelderland*, op.cit., para 75 of the Opinion. The various formulations employed by the ECJ are noted by M. Hoskins, *Tilting the Balance: Supremacy and National Procedural Rules* (1996) 21 *European Law Review* 365, 366.

[611] See Jacobs A-G in *Van Schijndel*, op.cit., and Léger A-G in *Sutton*, op.cit. See also M. P. Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination* in *The Future of Remedies of Europe*, op.cit., 117.

priority over the Community interest in enforcement of the Community claim.[612] The ECJ exemplified the balance of interests in *Van Schinjdel* and *Peterbroeck*: "a 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 legal system, such as protection of the rights of defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration."[613]

The "balancing" exercise translates rights into interests. Balance views each controversy as raising a unique cluster of competitive interests. To invoke a balance is to recognise that the goal of judicial decision-making is to find the center between legitimate and justiciable interests that are in tension. Its aim is to accommodate qualitatively incommensurate interests. Each new configuration of interests presents an occasion for the formulation of a new rule. The proliferation of new rules may, in turn, cause a reconsideration of the earlier rules. The Court faces an endless series of variations; in each of these, it must reassess the competitive interests and reconsider the adequacy of the old rule. Sometimes one interest would be held to "outweigh" the other and that interest alone would be given force and effect. The ECJ does not invoke a balance of interests in every judgment. The Court distinguishes but does not justify.[614]

The "balancing" exercise is included in the proportionality test.[615] It is well-known that national remedies and procedures are governed by the requirement of proportionality as a general

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[612] See Hill, *The inadequate state ground* (1969) 65 *Columbia Law Review* 943, 959.

[613] Joined Cases C-430/93 and C-431/93, *Van Schijndel and Van Veen v. SPF* [1995] ECR I-4705, para 19; Case 312/93, *S.C.S Peterbroeck, Van Campenhout & Cie v. Belgian State* [1995] ECR I-4599, para 14.

[614] For hazards involved in the interest-balancing approach, see Aleinikoff, *Constitutional Law in the Age of Balancing*, (1987) 96 *Yale Law Journal* 943 at 972-975; P. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell* (1987) 97 *Yale Law Journal* 1; Coffin, *Judicial Balancing: The protein scales of Justice* (1988) 63 *New York University Law Review* 16 at 19-25. See also, L. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms* (1978) 91 *Harvard Law Review* 1212.

[615] See S. Prechal, op.cit., p. 690, who calls this approach a "procedural rule of reason." See also Jacobs, *Enforcing Community Rights and Obligations in National Courts: Striking the Balance* in Lonbay and Biondi (Eds.), *Remedies for Breach of EC Law* (1997) p. 25.

principle of Community law, where the Member State imposes sanctions to enforce Community law against individuals[616] or where the Member State imposes sanctions to enforce domestic law which derogates from the individual's Treaty rights.[617] The principle of effectiveness also poses a duty on national courts to consider the national procedural rule in relation to its context and its underlying rationale.[618] The existence of a Member State policy is not enough to justify a procedural restriction. One has to examine the nature and degree of interference with the right in relation to the policy pursued. A limitation would not be compatible with Community law if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved. [619]

Proportionality may be a highly intensive standard of judicial review, or it may be as deferential as the *Wednesbury* test, depending upon the extent to which the courts defer to the decision-maker's view of proportionality in any particular case. Judicial deference or not, as the case may be, is accordingly the key ingredient for a complete picture of a proportionality test.[620] For example, the US Supreme Court on a limited number of occasions has allowed review where a litigant has failed to comply with state procedural rules. *Henry v. Mississippi*[621] embodies the most expansive application of this principle-and represents the Supreme Court's most ambitious and its most tentative confrontation with the problem of state procedural grounds in general. The US Supreme Court has advanced the general proposition that, in balancing federal and state interests, the state may not place any undue procedural burden on the assertion of federal rights: "a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural

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[616] Case C-68/88, *Commission v. Greece* [1989] ECR 2965; Case C-7/90, *Vandevenne* [1991] ECR I-4371; Case C-186/98, *Nunes and De Matos* [1999] ECR I-4883.

[617] Case C-48/75, *Royer* [1976] ECR 497 and Case C-348/96, *Calfa* [1999] ECR I-11.

[618] See S. Prechal, op.cit., at 692.

[619] See M. Hoskins, *Tilting the balance*, op.cit., who prefers the *Rewe* formula as more precise than the purposive approach found in *Peterbroeck*.

[620] M. Supperstone Q.C. and J. Coppel, *Judicial Review after the Human Rights Act* (1999) *European Human Rights Law Review* 301, 315.

[621] *Henry v. Mississippi* 379 U.S. (1965) 443.

rule serves a legitimate state interest."[622] However, by increasing the pressure on state courts to abandon procedures, *Henry* reduced state autonomy and thus increased state resistance.[623]

The "balancing" exercise provides no legal certainty in political instability.[624] In Community law three periods are discerned in the evolution of the law of remedies and procedures.[625] During a first period the ECJ deferred extensively to national autonomy. This position is usually exemplified by a consideration of cases such as *Rewe/Comet*, *Butter Bying Cruises*, *Russo*, *Amministrazione delle Finanze dello Stato v. Mireco* and *Roquette Frères*. In *Butter Buying Cruises*[626] the ECJ held that the Treaty is not intended to create any new forms of relief not already available under national law. In *Russo*[627] it was decided that the availability of compensatory damages in respect of losses suffered through a breach of Community law for which the Member State could be held responsible is a matter to be determined by national rules. In *Amministrazione delle Finanze dello Stato v. Mireco*[628] the ECJ supported a national rule prohibiting "unjust enrichment" of traders who sought the repayment of charges levied by national governments in breach of Community law. It was held that reimbursement of sums paid would not be required if the trader had recouped the loss sustained from consumers or others. In *Roquette Frères*[629] it was decided that the Member States were entitled to apply their

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[622] Op.cit., at 447.

[623] See L.Tribe, *American Constitutional Law* (1988) Foundation Press (2nd ed.) 172.

[624] Stability would imply that that the underlying process of political and social change has ceased.

[625] T. Tridimas, *Enforcing Community Rights in National Courts: Some Recent Developments*, op.cit., A. Arnull, *The European Union and its ECJ*, op.cit., Chapter 5, A. Ward, *Judicial Review and the Rights of Private Parties in EC law*, op.cit., Ch. 2, 3.

[626] Case 158/80, *Rewe-Handelsgesellschaft Nord v. Hauptzollamt Kiel* [1981] ECR 1805.

[627] Case 60/75, *Russo* [1976] ECR 45. See also Case 101/78, *Granaria* [1979] ECR 623.

[628] Case 826/79, *Amministrazione delle Finanze dello Stato v. Mireco* [1980] ECR 2559 confirmed in Case 68/79, *Hans Just I/S v. Danish Ministry for Fiscal Affairs* [1980] ECR 501 and Case 61/79, *Denkavit No 1* [1980] ECR 1205. See similarly Case 177/78, *Pigs and Bacon Commission v. McCarren* [1979] ECR 2161, confirmed in Case 125/84, *Continental Irish Meat Ltd v. Minister of Agriculture* [1985] ECR p. 3441, where it was decided that the applicability of the defence of set-off was a matter for national law.

[629] Case 26/74, *Société Roquette Frères* [1976] ECR 677.

own rules regarding the payment of interest, its rate and the date from which it should be calculated.

This early hands-off policy was accompanied by an invitation from the ECJ to the political institutions of the Community to deal with the national remedies in issue.[630] In *Express Dairy Foods*[631] the ECJ expressed its belief that legislation was necessary: "In the regrettable absence of Community provisions harmonising procedure and time limits the Court finds that this situation entails differences of treatment on a Community scale. It is not for the Court to issue general rules of substance or procedural provisions which only the competent institutions may adopt."[632] Since the Community legislature did not take any initiative, the ECJ decided to play a more active role in the field.

San Giorgio[633] marked an important turning point in the Court's scrutiny of national procedural rules. The ECJ set aside an onerous rule of evidence which required elaborate documentary evidence from a trader to prove that a burden imposed by illegally levied charges had not been passed on to the consumers. This case ushered a second period during which the ECJ established the fundamental doctrine of effective judicial protection. The ECJ freed national courts from the restraint of statutory and constitutional restrictions imposed by their internal legal orders and refashioned the powers of national courts in its own image. As a result, the ECJ increased its stream of preliminary references. Cases like *von Colson*,[634] *Dorit Harz*,[635]

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[630] A. Ward, op.cit., p. 20. See also J. Bridge, *Procedural Aspects of the Enforcement of European Community Law through the Legal Systems of the Member States* (1984) 9 *European Law Review* 28.

[631] Case 130/79, *Express Dairy Foods* [1980] ECR 1887.

[632] See also the Opinion of A-G Capotorti, op.cit., at p. 1910.

[633] Case 199/82, [1983] ECR 3595. For an analysis of this case, see Ch. 3.3.1.

[634] Case 14/83, *von Colson and Kamman v. Land Nordhein-Westfalen* [1984] ECR 1891, para 23.

[635] Case 79/83, *Dorit Harz v. Deutsche Tradax GmbH* [1984] ECR 1921, para 28. In *von Colson*, op.cit. and *Dorit Harz* the ECJ required that national remedies applied to protect Community measures must provide a "real and deterrent" effect against breach.

Dekker,[636] *Cotter and McDermott*,[637] *Marshall*,[638] *Heylens*,[639] *Emmott*,[640] *Johnston*,[641] *Factortame*[642] and *Francovich*[643] are characteristic of the "second generation" of cases, to use a classic expression.[644] This case law led a former judge of the ECJ to argue that there is no principle of "procedural autonomy" recognised to the Member States and that national procedural law is an ancillary body of law that applies only insofar as it ensures the effective application of substantive Community law.[645]

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[636] Case C-177/88, *Dekker v. Stichting voor Jong Volwasssenen (VJV) Plus* [1990] ECR I-3941. It was held that the practical effect of the principle of equal treatment would be weakened considerably, if the employer's liability for infringement of the principle of equal treatment were made subject to proof of a fault attributable to him. Recently, in Case C-381/99, *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG* [2001] 4961 the ECJ put on the employees who consider themselves to be the victims of discrimination the burden to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value, comparable to that performed by the chosen comparator.

[637] Case C-377/89, *Cotter and Mc Dermott v. Minister for Social Welfare* [1991] ECR I-1155. The ECJ held that national rules on unjust enrichment could not restrict the entitlement to payment of arrears of social security benefits to married women without actual dependants even if in some circumstances that would result in double payment of increases.

[638] Case C-271/91, op.cit.

[639] Case 222/86, *Heylens v. UNECTEF* [1987] ECR 4097.

[640] Case 208/90, *Emmott* [1991] ECR I-4269.

[641] Case 222/84, op.cit.

[642] Case 231/89, op.cit.

[643] Joined cases 6/90 and 9/90, op.cit.

[644] See Curtin and Mortelmans, *Application and enforcement of Community law by the Member States: Actors in search of a third generation script* in Curtin and Heukels (Eds.) *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers, Vol. II* (Dordrecht/Boston/London, 1994).

[645] C. N. Kakouris, *Do the Member States possess judicial procedural 'autonomy'?* (1997) 34 *Common Market Law Review* 1389, 1405-1406.

During a third period the ECJ has been more cautious in its intervention into the procedural autonomy of Member States.[646] The academics that explain the case law by reference to the variant degree of scrutiny during three periods do not suggest that there has been a wholesale retreat by the ECJ, but that the ECJ has become much more selective in its intervention. First, deference may be appropriate because judicial intervention in legislative or administrative policy may in itself entail costs. Second, deference may be appropriate because the courts are no better and perhaps worse at assessing costs and benefits than the bureaucracy. The recent tendency of the Court to leave more discretion to Member State authorities increases litigation at national level. There is no escape from the fact that the Community is supported by a decentralised system of justice. The tendency to withdraw and transfer decision-making to national courts is a quasi-filtering mechanism. Withdrawal is the result of both centrapetal and centrifugal forces: increase in the Court's case law; expansion of Community competence and membership; denial by national courts to make preliminary references even in cases where they have a duty to refer. It is a method more politically acceptable. It is an expedient through which it introduces a new idea of European polity.

Others offer a sectoral analysis of the case law.[647] A Member State court's enforcement of its procedural rules in order to bar assertion of a Community includes a substantive consideration. The remedy is merely the means of carrying into effect a substantive principle or policy.[648] Therefore, intrusive rulings in some of the above cases could be explained by the subject matter of these judgments. For example, the ECJ has been traditionally very strict with national provisions liable to compromise the equality between men and women and it seems that sex

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[646] A. Ward, *Effective Sanctions in EC law: A Moving Boundary in the Division of Competence* (1995) *European Law Journal* 205; T. Tridimas, *Enforcing Community rights before national courts*, op.cit. See also A. Arnull, *The European Union and its ECJ*, op.cit., chapter 5.

[647] C. Kilpatrick, *Turning Remedies Around: A Sectoral Analysis of the ECJ in de Búrca and Weiler, The European Court of Justice* (OUP 2001); M. Dougan, *Redefining the Community's Enforcement Deficit: The Judicial Harmonization of National Remedies and Procedural Rules in a Differentiated Europe*, Ph.D thesis.

[648] See D. B. Dobbs, *Handbook on the Law of Remedies* (1973), Introduction.

discrimination is an area where the ECJ will continue to be very critical. This theory, also, includes obvious elements of "politics" in the balancing approach of the Court.

Trying to sort out the problem of uniformity of enforcement Professor Van Gerven has proposed an interesting approach based on the distinction between rights, remedies and procedures.[649] According to his theory the rights Community law confers upon individuals must have a uniform content throughout the Community. The conditions that must be satisfied in order to give rise to the remedy (what he calls constitutive conditions) are the same as those, which give rise to the right. The legal basis for this is to be found in the general principle of "access to court" as embodied in national constitutional rules or traditions and in Articles 6 and 13 ECHR. In other terms, in relation to the constitutive conditions there must be uniformity and thus articulated at the Community level. The rules that implement the remedy (what he calls executive or remedial rules; these concern active and passive legitimation, the form and extent of the remedy, standard of proof, burden of proof, time limits, etc) are for the Member States. Procedural rules *stricto sensu* should be distinguished from remedial rules. These are rules of a technical nature according to which the remedy is to be pursued in a course of law. They are closely related to jurisdictional rules. Those are rules establishing the courts of law and delineating their competence.

Although the distinction between rights, remedies and procedures is not found clearly in the case law, it is true that the ECJ has set consistent principles to secure access to remedies, but it has resisted interfering with the more detailed aspects of the remedies. As shown in Chapter 3, the ECJ has opted for a system of harmonised remedies, but left also room for considerable diversity. The following analysis proves that the balancing exercise leads to unprincipled judgments that pose *ad hoc* rules with no past and an uncertain future. The lack of articulate principle will always be an easy object of attack. For example, it has been argued that the principle of effectiveness is a flexible test that provides a vague standard of protection and considerable uncertainty in the law.[650] Others attack the reasoning behind the difference in the

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[650] C. Himsworth, *Things Fall Apart: The Harmonization of Community Judicial Protection Revisited* (1997) 22 *European Law Review* 291, 310. See S. Weatheril, *The Future of Remedies in Europe*, op.cit., who finds the standard of effective enforcement disturbingly imprecise.

outcome of the cases.[651] It, also, shows that the ECJ makes inroads into the procedural autonomy of Member States only when the restriction of judicial protection of Community rights is substantial and violates the core of Community rights. The cases offered as examples concern national time limits and the duty of the national judge to examine Community law on its own motion.

5.2.1 Rules prohibiting "access to justice"

The ECJ has recognised that it is compatible with Community law for national rules to prescribe, in the interests of legal certainty, reasonable limitation periods for bringing proceedings. It cannot be said that this makes the exercise of rights conferred by Community law either virtually impossible or excessively difficult, even though the expiry of such limitation periods entails by definition the rejection, wholly or in part, of the action brought.[652] In order to serve their purpose of ensuring legal certainty limitation periods must be fixed in advance.[653]

Emmott made a breakthrough in relation to limitation periods. Emmott had received disability benefit at a reduced rate in breach of the Directive 79/7 prohibiting all discrimination on grounds of sex in matters of social security. She sought retrospective payment for the period of time during which the Directive had remained unimplemented, but the authorities informed her that no decision could be made until the outcome in *Cotter* and *Dermott*. When she finally applied for judicial review of the decision of the authorities in relation to her social security payments, the respondent pleaded that her delay in initiating the proceedings constituted a bar to her claim. The ECJ ruled that, until such time as a Directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred on him by the provisions of a Directive and that a period

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[651] S. Prechal, *The lessons from Van Schijndel*, op.cit., p. 689.

[652] See, in particular, *Palmisani*, para 28; Case C-188/95 *Fantask and Others* [1997] ECR I-6783, para 48 and Joined Cases C-279/96, C-280/96 and C-281/96 *Ansaldo Energia SpA and Others v. Amministrazione delle Finanze dello Stato* [1998] ECR I-5025, paras 17 and 18; Case C-125/01, *Pflücke v. Bundesanstalt für Arbeit* of 18 September 2003 (not yet published), para 36.

[653] Case 41/69, *ACF Chemiefarma v. Commission* [1970] ECR 661, para 19.

laid down by national law within which proceedings must be initiated cannot begin to run before that time.[654]

However, the ECJ later made an impressive "retreat" from its intrusive approach in *Emmott*.[655] In *Steenhorst-Neerings* the national rule restricting the retroactive effect of benefits for incapacity for work to one year before the date of the claim was held to be compatible with the principle of effectiveness. The *Steenhorst-Neerings* ruling was confirmed in *Johnson II*, where a similar one-year limit on the retroactive effect of a claim for social security benefits was held to be compatible with the principle of effectiveness. Especially, in *Fantask* the ECJ stated that the solution adopted in *Emmott* was justified by the particular circumstances of that case where the time bar had "the result of depriving the applicant of any opportunity whatever" to rely on her right arising from the Directive in issue.[656] These cases could be explained by the need to maintain a relationship with national governments, in particular with regard to budgetary expenditure. Levels of spending on social security are a sensitive issue at national level and social welfare, linked to a taxing power, is a strongly national competence.[657]

However, in *Levez*[658] the ECJ came to a comparable solution with that in *Emmott* in the context of a private law dispute. It is recalled that the national rule was limiting an employee's entitlement to arrears of remuneration or damages for breach of the principle of equal pay to a period of two years prior to the institution of the proceedings. However, the national rule did not provide for an extension of that period in cases that the victim of discrimination was precluded

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[654] Op.cit., para 23.

[655] See Case C-338/91, *Steenhorst-Neerings* [1993] ECR I-5475; Case C-410/92, *Johnson v. Chief Adjudication Officer* [1994] ECRI-5483; Case C-188/95, *Fantask and Others*, op.cit. See also Case C-394/93, *Gabriel Alonso-Pérez v. Bundesanstalt für Arbeit* [1995] ECR I-4101.

[656] *Fantask*, op.cit., para 51. See also See Case C-90/94, *Haahr Petroleum Ltd v. Abenra Havn* [1997] ECR I-4085, para 52; Joined Cases C-114 and C-115/95, *Texaco and Olieselwskabet Danmark* [1997] ECR I-4263, para 48.

[657] C. Kilpatrick, *Turning Remedies Around: A Sectoral Analysis of the Court of Justice* 143, 157.

[658] Op.cit. For the relationship between *Emmott* and *Levez*, see A. Biondi, *The European Court of Justice and Certain National Procedural Limitations: Not Such A Tough Relationship* (1999) 36 *Common Market Law Review* 1271.

from bringing the action because of the deceit of the employer who provided inaccurate information as to the level of remuneration received by employees of the opposite sex performing like work. The ECJ after repeating the standard view that the principle of effectiveness does not preclude reasonable limitation periods, it found that in such a case the national time limit ran counter the principle of effectiveness, since the application of the rule at issue could not reasonably be justified by principles such as legal certainty or the proper conduct of proceedings.[659]

Emmott and *Levez* contrast with the ordinary time limit cases, because the applicants did not have an effective opportunity to exercise the remedies afforded by national law.[660] On the one hand, Miss Emmot did not have the opportunity to rely on her Community law rights because of the unlawful conduct on the part the Irish public authorities, on the other hand, Miss Levez did not have the opportunity to rely on her Community law rights because of the deceit of the employer. Their right of *access to justice* was foreclosed and thus the relevant national time limits should be disapplied. The ECJ supports an *estoppel* kind of reasoning. Given that *Levez* focuses on rights derived from a Directive, it would not have been impossible to invoke *Emmott*, although it would have gone against the view expressed by Van Gerven A-G in *Vroege*[661] that *Emmott* was not pertinent to legal relations between individuals.[662] The material facts of *Levez* and *Emmott* are very similar and it is not easy to explain why the ECJ did not connect the two cases.

5.2.2 Rules striking at the essence of rights

In *Magorrian* the applicants were women employed as mental health nurses. They were refused additional pension benefits payable under a voluntary contracted-out pension scheme

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[659] *Levez*, op.cit., para 33.

[660] See the way that the Court of Justice distinguished from *Emmott*, *Steenhorst-Neerings*, op.cit., at para 30: "Neither rule constitutes a bar to proceedings; they merely limit the period prior to the bringing of the claim in respect of which arrears of benefit are payable." See, also, *Levez*, op.cit., para 31.

[661] Case C-57/93, op.cit., para 31.

[662] See L. Flynn, *Whatever Happened to Emmott? The Perfecting of Community Rules on National Time limits?* in C. Kilpatrck, *The Future of Remedies in Europe*, op.cit., 51, 66.

on the ground that they did not have the status of full-time workers at the time of their retirement. It was concluded by the national referring court that exclusion of part-time psychiatric nurses from this pension scheme constituted indirect discrimination on grounds of sex, since a considerably smaller proportion of women than men were able to attain it. More problematic was from which date their periods of service as part-time workers should be taken into account for the purpose of calculating the additional benefits to which they were entitled. Irish law (Regulation 12 of the Occupational Pension Regulations) provided that, in proceedings concerning access to membership of occupational schemes, the right to be admitted to the scheme is to have effect from a date no earlier than two years before the institution of proceedings. The question was the compatibility of Regulation 12 with the principle of effectiveness.

The ECJ first ruled that the case at hand was not concerned with benefits payable under a pension, but with the right to join an occupational pension scheme.[663] That being so, the temporal limitation laid down in the *Barber* case[664] and reflected in Protocol No 2 of the Treaty of the European Union (which restricted periods of employment which could be counted in equal treatment pensions disputes to employment undertaken after 17 May 1990) was not relevant to the applicants' claim.[665] Having reached the conclusion that the dispute at hand was "not for the retroactive award of certain additional benefits but for recognition of entitlement to full membership of an occupational scheme through acquisition of MHO status which confers entitlement to additional benefits," the ECJ distinguished the case from *Steenhorst-Neerings* and *Johnson II*. The rules in those cases could be justified by national policy objectives, such as legal certainty, financial balance and administrative convenience. By contrast, Regulation 12 prevented the entire record of service completed by those concerned after the date in judgment

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[663] Op.cit., para 30 of the judgment. See Case C-57/93, *Vroege v. NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1994] ECR I-4541; Case C-128/93, *Fischer v. Voohuis Hengelo BV and Stichting Bedriifspensionenfonds voor de Detailhandel* [1994] ECR I-4583; Case C-170/84, *Bilka-Kaufhaus v. Weber von Hartz* [1986] ECR 1607; Case C-435/93, *Dietz* [1996] ECR I-5223.

[664] Case C-262/88, *Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR I-1889. In that case the Court held that the Treaty's guarantee of equal pay (Article 141 EC) applied with direct effect to pensions paid under the "contracted out" pension schemes, i.e., schemes recognised in the United Kingdom in substitution for the earnings-related part of the State pension.

[665] See *Magorrian*, op.cit., paras 20-35.

in *Defrenne* until 1990 from being taken into account for the purposes of calculating the additional benefits which would be payable even after the date of the claim. The effect of the Regulation 12 was to limit in time the direct effect of Article 119 of the Treaty in cases where no such limitation has been laid down either in the Court's case law or in Protocol No 2 annexed to the Treaty on European Union. The ECJ thus concluded that Community law precludes the application to a claim for recognition of entitlement to join an occupational pension scheme of a national rule under which such entitlement, in the event of a successful claim, is limited to a period which starts to run from a point in time two years prior to commencement of proceedings in connection with the claim.[666]

In *Preston* the national court asked whether *Magorrian* had application in the circumstances of the case. The difference between *Magorrian* and *Preston* was that in the former the persons concerned sought recognition of their right to retroactive membership of a pension scheme with the view to receiving additional benefits whereas in the latter the aim of the proceedings was to obtain basic retirement pensions. It ruled that even though the procedural rule at issue did not totally deprive the claimants of access to membership, the fact nevertheless remained that a procedural rule like that prevented the entire record of service completed by those concerned before the two years preceding the date on which they commenced their proceedings from being taken into account for the purposes of calculating the benefits which would be payable even after the date of the claim.[667] This conclusion was reinforced by the fact that the claimants were going for basic retirement pensions not only for additional benefits.[668] The ECJ also held that a six-month limitation period for initiating equal pay actions based on Article 141 should run from the end of the parties' overall employment rather than against each in a continuous series of short fixed-terms contracts.[669] In both cases the ECJ striked down limitation periods that violated at the essence-substance of the rights.[670]

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[666] See *Magorrian*, op.cit., paras 36-47.

[667] Ibid., para 43.

[668] Ibid., para 44.

[669] See *Preston*, op.cit., paras 64-72.

[670] Case 246/96, *Magorrian and Cunningham v. Eastern Health and Social Services Board* [1997] ECR I-7153, para 44; *Preston*, op.cit., para 41.

5.2.3 Rules specifically introduced to restrict Community claims

In *Edis*,[671] *April*[672] and *Dilexport*[673] the question raised was whether Community law prohibits a Member State to impose, following judgments of the Court declaring duties or charges to be contrary to Community law, a time limit under national law within which, on penalty of being barred, proceedings for repayment of charges levied in breach of that provision must be commenced.

In *Edis* the national rule in question was Article 13 of Decree Law No 641/72, according to which "the taxpayer may request repayment of charges wrongly paid within a period of three years reckoned from the date of payment, failing which his action shall be barred." Traditionally, the case law of Italian courts interpreted that provision as applying only in cases where a sum had been unduly paid owing to an error in the calculation in the tax. Claims for the recovery of unduly paid corporate charges were subject to the ten-year limitation period provided for in the Italian Civil Code. In 1996, however, after the judgment in *Ponente Carni* was delivered, the *Corte Suprema di Cassazione* departed from its previous case law, holding that repayment of the registration charge was subject to the three-year time limit provided for in Decree No 641/72.

In *April* and *Dilexport*, the national rule was Article 29(1) of Law No 428/1990 that introduced new rules on repayment of taxes recognised to be incompatible with the Community rules. It provided: "The five-year time-bar laid down in Article 91 of the Consolidated version of the provisions relating to customs duties...shall be deemed to apply to all claims and actions which may be brought for refund of sums paid in connection with customs operations. That period... shall be reduced to three years as from the 90th day following the entry into force of this law." The Decree Law prompted the *Corte Suprema di Cassazione* to change its case law in 1992 and accept that the special time limit of three years would be applied for all actions for

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[671] Op.cit., n. 586.

[672] Op.cit., n. 589.

[673] Op.cit., n. 590.

reimbursement of customs charges, instead of the ordinary ten year limitation period laid down for actions for the recovery of sums paid but not due provided for in the Italian Civil Code.

In *Barra*[674] and in *Deville*[675] the Court ruled that a Member State is not allowed to adopt a procedural rule, subsequent to a judgment establishing incompatibility of certain national legislation with the Treaty which specifically reduces the possibilities of bringing proceedings for exercising Community law rights. It was the intention of the Member States to circumscribe specific judgments of the ECJ that was striked down. The Court distinguished *Edis*, *April* and *Dilexport* from the *ratio* in *Barra* and *Deville*. In *Edis*, the ECJ ruled that the interpretation given by the *Corte Suprema di Cassazione* was related to a national rule which had been in force in several years before judgment was delivered in *Ponente Carni* and secondly, that provision concerned not only repayment of the charge at issue but also that of all registration charges levied by the Italian Government.[676] Therefore, a "new" interpretation was not held as harmful as a legislative amendment. In *April* and *Dilexport*, the ECJ employed similar reasoning. It ruled that the contested provision applied to all sums paid in relation to customs operations that were the same for a whole range of internal charges and taxes.[677] The provision could not be regarded as having retroactive effect.[678] It pointed out that the adoption of the contested law preceded its judgment in *April I* (the case that established the incompatibility).[679] The ECJ thus distinguished these cases from *Barra* and *Deville* on two grounds: First, because they involved laws that preceded the judgments of the Court establishing the incompatibility; Second, because the national procedural rules applied equally to comparable national law claims.

One sees once more the interrelationship between the principles of equivalence and effectiveness. It is noteworthy that the effectiveness of a national rule is assessed in these

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[674] Case 309/85, *Barra v. Belgium and Another* [1988] ECR 355.

[675] Case 240/87, *Deville v. Administration des Impots* [1988] ECR 3513.

[676] *Edis*, op.cit., para 25.

[677] *Dilexport*, op.cit., para 40; *April*, op.cit., para 29.

[678] *Dilexport*, para 42; *April* op.cit., para 28.

[679] *April*, op.cit., para 30. However, the incompatibility of the charge has been made obvious by previous rulings. See 340/87, *Commission v. Italy* [1989] ECR 1483 and Case C-209/89, *Commission v. Italy* [1991] ECR I-1575.

cases on the basis of its compatibility with the principle of equivalence. However, the compatibility with the principle of equivalence should not be considered as a ground to exonerate the States from the breach of the principle of effectiveness, as the two principles operate cumulatively, not alternatively.[680] It is also notable that in the above mentioned cases the ECJ did not leave the issues to be decided by the national court, but approved the national practice without leaving any room to national courts for the contrary. The national court would be in a better position to examine the national rule in its legislative context and decide upon its compatibility.[681]

In *Grundig Italiana*[682] an Italian court referred again a question on the compatibility of Law No. 428/90 with the principle of effectiveness although it was aware of the judgments in *April* and *Dilexport*. The Italian judge took the view that application of Italian law leads to an outcome different from that taken as a premiss by the ECJ in the judgments mentioned in so far as it concerns actions brought from 27 April onwards, that is to say, after the entry into force of the three-year time limit, an event determined as taking place 90 days after the entry into force of Law No. 428/90. The ECJ found that whilst national legislation reducing the period within which repayment of sums collected in breach of Community law may be sought is not incompatible with the principle of effectiveness, this is subject to the condition not only that the new limitation period is reasonable but also that the new legislation includes transitional arrangements allowing an adequate period after the enactment of the legislation for lodging claims for repayment which persons were entitled to submit under the original legislation. Such transitional arrangements are necessary where the immediate application to those claims of a limitation period shorter than that which was previously in force would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right. Where a period of ten or five years for initiating proceedings is reduced to three years, the minimum transitional period required to ensure that rights conferred by Community law can be effectively exercised and that normally diligent taxpayers can familiarise themselves with the new regime and prepare and commence proceedings in

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[680] T. Tridimas, *The General Principles of EC Law*, op.cit, at 280.

[681] See A. Biondi, *The European Court of Justice and Certain National Procedural Limitations: Not Such A Tough Relationship* (1999) 36 *Common Market Law Review* 1271, 1275.

[682] See C-255/00, *Grundig v. Italiana* [2002] ECR I-8003.

circumstances which do not compromise their chances of success can be reasonably assessed at six months. A transitional period of 90 days prior to the retroactive application of a period of three years for initiating proceedings in place of a ten –or five –year period is clearly insufficient. In this case the ECJ has been, probably, unduly prescriptive, but the emphasis that is placed on the need for transitional measures is correct.[683] A confirmation of *Grundig* is found in *Marks and Spencer.*[684]

5.2.4 Rules obstructing the preliminary reference procedure

Early case law established as very wide the power of the national judge to refer to the ECJ either of his own motion or at the request of the parties questions relating to the interpretation or the validity of provisions of Community law in a pending action.[685] Where provisions of national law are incompatible with Community law, the national court is under a duty to give full effect to Community law by disapplying on its own initiative conflicting provisions of national law.[686] A first issue is whether the principle of effectiveness requires the setting aside of a national rule that precludes the applicants from pleading Community law.[687] A second issue is whether the Community public interest imposes such a duty on the national judge in case the applicants have not raised Community law. *Van Schijndel* and *Peterbroeck* created

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[683] See *Grundig Italiana*, op.cit., paras 33-42.

[684] Case C-62/00, *Marks & Spencer plc v. Commissioners of Customs and Excise* [2002] ECR I-6325.

[685] Case 166/73, *Firma Rheinmühlen-Dusseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33. It concerned a national rule, whereby a judge was bound on points of law by the rulings of superior courts.

[686] See *Simmenthal*, op.cit., and C-358/95, *Moratello* [1997] ECR I-1431, para 18.

[687] See E. Szyszczak and J. Delicostopoulos, *Intrusions into National Procedural Autonomy: The French Paradigm* (1997) *European Law Review* 519; J. Temple Lang, *The Duties of National Courts under Community Constitutional Court* (1997) *European Law Review* 3, 5. Koukouli-Spiliotopoulou, *Δέσμευση Δικαστηρίων και Αυτεπάγγελτος Δικαστικός Έλεγχος* 26 *Δίκη* 999.

uncertainties on the issue of whether national courts have a duty to raise of their own motion the existence of a Community rule.[688]

In *Van Schijndel* the plaintiffs challenged a national law imposing compulsory membership of an occupational pension scheme. They lost at first instance where their arguments were based solely on national law. They appealed to the *Hoge Raad* and sought to raise arguments based on Community law.[689] The relevant national procedural rules provided that, before the *Hoge Raad*, parties could only raise new arguments which were limited to pure points of law and the power of the court to raise points of its own motion was limited as it could not go beyond the facts of circumstances on which the claim was based. The ECJ underlined the civil nature of proceedings and held that the national procedural rule (i.e. judicial passivity in civil proceedings) was justified as it reflected basic conceptions "prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the right of defence; and it ensures proper conduct of proceedings..."[690]

Peterbroeck[691] raised issues that were very similar to those before the ECJ in *Van Schijndel*. The case concerned a tax dispute. Under the relevant Belgian procedural law, pleas not raised in the complaint nor considered by the director of his own motion could be raised by the appellant either in the appeal document or by notice in writing to the *Cour d'Appel*, subject to a limitation period of 60 days with effect from the lodging by the director of a certified true copy of the contested decision together with all the relevant documents. The plaintiff had failed to raise his new arguments based on Community law[692] within these time limits. The ECJ concluded that the Belgian rule was contrary to Community law. It stated that, whilst the period of 60 days

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[688] See A-G Darmon takes in his Opinion in Joined Cases C-87/90, 88/90 and 89/90, *Verholen and Others* [1997] ECR I-3757.

[689] Article 3(f), Article 5 para 2, Articles 85 and 86 and Article 90, as well as Articles 52 to 58 and 59 to 66 of the EEC Treaty.

[690] *Van Schijndel*, op.cit., para 21.

[691] Case 312/93, *S.C.S Peterbroeck, Van Campenhout & Cie v. Belgian State* [1995] ECR I-4599.

[692] Article 52 EC Treaty (now art. 43 EC).

imposed on the litigant was not objectionable *per se*, the special features of the procedure in question had to be considered.[693]

The "anomaly" created by *Peterbroeck* has been interpreted as protecting the integrity of the preliminary reference procedure.[694] This is a plausible explanation since the ECJ has consistenly disapproved of national measures disrupting the effectiveness of Article 234. One could also explain *Peterbroeck* by the subject matter of the proceedings, which were of a public law character, in contrast to the civil law proceedings in *Van Schijndel*. It is notable, though, that in *Van Schijndel* it was ruled that, where, by virtue of domestic law, courts or tribunals must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation, also, exists where binding Community rules are concerned.[695] An application of this principle is found in *Eco Swiss*.[696]

In *Eco Swiss* a Dutch company entered into a licensing agreement with Hong Kong and New York based retailers for the production and sale of watches and clocks under Dutch law. The Dutch company terminated the agreement in time and arbitration was commenced.[697] The Dutch company contended that the arbitral award was contrary to Article 81 EC. The *Hoge Raad* submitted a series of questions aimed at ascertaining the power of arbitrators to raise a

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[693] See paras 18-20: a) The *Cour d'Appel* was the first court which could make a reference to the Court of Justice; b) on the facts of the case, the 60 day period had expired by the time the *Cour d'Appel* could not examine the question of Community law in subsequent proceedings; and c) the impossibility for national courts or tribunals to raise points of their own motion did not appear to be reasonably justifiable by principles such as the requirement of legal certainty or the proper conduct of the procedure.

[694] See W. Van Gerven, op.cit., at 532; See R. Craufurd Smith, *Remedies for breaches of EC law in national Courts: Legal variation and selection* in Evolution in EU Law P. Craig and G. de Búrca (2000) Oxford University Press 287, 316. See de Búrca, *National procedural rules and remedies: the changing approach of the Court of Justice* in Lonbay and Biondi, op.cit., Ch. 4 and Jacobs, *Enforcing Community rights and obligations in national courts: striking the balance* in Lonbay and Biondi, op.cit, Ch. 3, p. 32.

[695] Op.cit., para 13.

[696] Case C-126/97, *Eco Swiss v. Benetton* [1999] ECR I-3055.

[697] In Case C-102/81, *Nordsee v. Reederei Mond* [1982] ECR 1095, the Court gave a restrictive interpretation of the national courts who can make a reference under Article 234 excluding arbitrators.

point of EC law of their own motion and on the compatibility of Dutch procedural law with the principles of equivalence and effectiveness. Under Dutch procedural law, a court may annul an arbitration award only on the ground that the award is contrary to public policy. The national court referred the question whether this rule should have been interpreted as barring the national court from allowing an annulment claim based on the breach of Article 81 EC. The issue arose whether or not a mandatory rule of public policy was involved such that the arbitral award could be set aside. The ECJ found that Article 81 was a provision vital to the operation of the internal market. Therefore, the provisions of that article could be deemed to be a matter of public policy within the terms of the New York Convention.[698] Further, Community law requires that questions surrounding Article 81 be open to examination by national courts in considering an arbitral award. It was held that when annulment may be granted, under national law, for breach of public policy, then it must also be available for failure to comply with Article 81(1), given that it is "a fundamental provision which is essential for accomplishment entrusted to the Community."[699] This is so, even though either party in the arbitral proceedings has not raised breach of Article 81 and domestic law restricts under domestic law the national court reviewing the award, *inter alia*, to assessing whether there has been a failure to observe national rules of public policy.

It appears from the account of the national background that none of the courts that had dealt with the case could under national law have raised the Community law point of their own motion. The ECJ avoided altogether the question whether the national procedural law that restricted the annulment of an award to grounds of public policy had to be considered as making the exercise of Community law excessively difficult.[700] It simply held that, due to the importance of the principle expressed in Article 81 EC, the national court must grant an application for annulment founded on failure to observe national rules of public policy when it considers that the award in question is in fact contrary to Article 81 EC. *Eco Swiss* states that an arbitral award contrary to Article 81 EC must be annulled by a national court "where its domestic rules of procedure require" the latter to safeguard national rules of public order. Therefore, the ECJ looks like advancing the *ex officio* application of Community law, probably

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[698] New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

[699] Op.cit., paras 36, 37.

[700] See A. Biondi, *The European Court of Justice and Certain National Procedural Limitations*, op.cit., 1285.

because the arbitral court could not make a reference or because of the importance of the subject matter. However, this possibility must be accommodated in national law notions.[701] The conclusion is that national courts must raise points of Community law on their own initiative only where the public interest requires this, just as they would do with comparable points of national law, but need not alter their normal role or go outside the facts alleged by the parties and the dispute as defined by the pleadings. Therefore, it is not clear whether the obligation of courts to examine of their own motion Community law derives from the principle of effectiveness, equivalence or is dependant on the subject matter of the case. [702]

5.3 Comparison with substantive law

This section tries to give a brief summary of the evolution of substantive Community law and to search in the case law common elements and trends with those found in remedial/procedural law. It refers mainly to the law of internal market excluding competition.

The original Treaty of Rome laid the essential legal foundations for a common market. These Treaty provisions mainly took the form of negative integration: they prohibited discrimination based on nationality. In a first generation of cases, the ECJ had to struggle against Member State protectionism. It struck down discriminatory measures unless justified under a ground of justification provided by the Treaty. The basic *Dassonville* formula[703] primarily found application when a measure had discriminatory effects, although it did not exclude in principle non-discriminatory measures from its ambit. However, one understands why during the very early years, the Court addressed most often cases of flagrant violations.

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[701] Also, at the level of national administration, it is easier to apply and enforce a rule which exists in a "national version." See P. Van den Bossche, *In Search of Remedies for Non-Compliance: The Experience of the European Community* 3(1996) *Maastricht Journal* 371, 380.

[702] See also Joined Cases C-240/98 to C-244/98, *Océano Groupo Editorial SA and Salvat Editores SA v. Rocio Murciano Quintero and Others* [2000] ECR I-4941; Case C-446/98, *Fazenda Publica v. Camara Municipal do Porto* [2000] ECR I-11435, para 48; Case C-473/00, *Cofidis SA v. Jean-Louis Fredout* [2002] ECR-10875.

[703] Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837. The formula provided: all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions and thus prohibited by Article 30 of the Treaty (para 5).

Based on the general phrasing of the *Dassonville* formula the ECJ expanded considerably the ambit of restriction beyond discrimination. In the landmark *Cassis* case[704] it introduced the concept of "indistinctly applicable" measures. The Court held that Article 28 EC could apply to national rules which do not discriminate against imported products as such, but which inhibit trade nonetheless merely because they are different from the trade rules which apply in the country of origin. As a necessary corollary it created a list of mandatory requirements as additional to the list of grounds of justification provided by the Treaty under Art. 30.

The next revolutionary step in the evolution of the law of the internal market was the case in *Keck & Mithouard*.[705] In this case the Court tried to refine the broadly drawn definitions of neutral restrictions on free movement under *Dassonville* and *Cassis*. The Court made a distinction between selling arrangements and product-related rules. It ruled that selling arrangements that do not discriminate in law or in fact do not come within the scope of Article 28.[706] As a result, the Court removed from the scope of Article 28 of the Treaty measures which are not liable to prevent the access of imported products to the national market or to impede their access any more than they impede the access of domestic products.[707] The distinction between selling arrangements and product-related rules was harshly criticised.[708]

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[704] Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

[705] Cases 267-268/91, *Criminal proceedings against Keck & Mithouard* [1993] ECR I-6097. See N. Reich, *The November revolution of the ECJ: Keck, Meng and and Audi revisited*, 31 *Common Market Law Review* 459; S. Weatherill, *After Keck: Some Thoughts on how to clarify the clarification* 33 *Common Market Law Review* 885; L. Gormley, *"Two Years After Keck"* (1996) 19 *Fordham International Law Journal*; J. Mattera, De l'arrêt *"Dassonville" a l' arrêt Keck: l'obscure charté d'une jurisprudence riche en principes novateurs et en contradictions* [1994] RMUE 117; D. Chalmers, *Repackaging the Internal Market-The Ramifications of the Keck judgment* (1994) 19 *European Law Review* 385; J. Higgins, *The Free Movement of Goods since Keck* (1997) 6 *Irish Journal of European Law*; M.Poiares Maduro, *Keck: The End? The Beginning of the End? Or Just the End of the Beginning?* (1994) 1 *Irish Journal of European Law* 30.

[706] Op.cit., para 16.

[707] Op.cit., para 17.

[708] See Jacobs AG in Case C-412/93, *Leclerc-Siplec v. TFI Publicité* [1995] ECR I-179.

As a consequence, in a third generation of cases, the Court clearly set the principle that the free movement provisions require the abolition of all restrictive or hindering measures. The Court has brought the freedoms verbally together. It striked down measures liable to hinder or make less attractive (or advantageous) the exercise of fundamental freedoms guaranteed by the Treaty. In *Kraus*,[709] for example, the Court stated: "Articles 48 and 52 preclude any national measure governing the conditions under which an academic title obtained in another Member State may be used, where that measure, even though it is applicable without discrimination on grounds of nationality is liable to *hamper or to render less attractive* the exercise by Community nationals...of fundamental freedoms guaranteed by the Treaty."[710] Similarly, in *Gebhard*,[711] the Court dealt with "national measures liable to *hinder or make less attractive* the exercise of fundamental freedoms guaranteed by the Treaty" and in *Bosman*[712] it discussed of "provisions which *preclude or deter* a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement."

The post-*Keck* case law has moved recent academic writing towards an increasing consensus that the case law of the Court is heading towards one regulatory principle, a global test of market access.[713] As A-G said in *Leclerc*,[714] a test of discrimination seems inappropriate. The

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[709] Case C-19/92, *Kraus v. Land-Baden-Wurttemberg* [1993] ECR I-1663.

[710] Op.cit., para 32.

[711] Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37.

[712] Case C-415/93, *Union Royal Belge des Sociétés de Football Association ASBL v. Jean Marc-Bosman* [1995] ECR I-4921.

[713] See, inter alia, C. Barnard, *Discrimination and Free Movement in EC law* (1996) *International Comparative Law Quarterly* 82; id., *La libre circulation des marchandises, des personnes et des services dans le traité CE sous l'angle de la compétence* (1998) *Cahiers de Droit Européen* 11; id., *Fitting the remaining pieces into the goods and persons jigsaw* (2001) 26 *European Law Review* 35; R. Greaves, *Advertising Restrictions and the free movement of goods and services* (1998) *European Law Review* 305; Denroe and Wouters, *Liberté d' établissement et libre prestation de services*, 1e Janvier 1999-31 Décembre 1995 (1996) *Journal des Tribuneaux-Droit Européen* 56, S. Weatherill, *After Keck: some thoughts on how to clarify the clarification* 33 *Common Market Law Review* 885. Daniele, *Non-Discriminatory Restrictions to the Free Movement of Persons* (1997) *European Law Review* 191.

central concern of the Treaty provisions on the free movement of goods is to prevent unjustified obstacles to trade between Member States. If an obstacle to inter-state exists, it cannot cease to exist simply because an identical obstacle affects domestic trade." However, within the *Keck* formula, especially paragraph 17, the tests of discrimination and market access co-exist and interrelate. Not all selling arrangements escape the prohibition but only those that do not discriminate in law or in fact. Therefore, it appears that there is role for both principles to play.[715]

The market access test comes closer to a more economic based analysis of what a restriction is. The Court has started to include economic considerations in its reasoning.[716] For example, in *Decker*[717] in the context of free movement of goods and in *Kohll*[718] in the context of services the Court held, in form of *obiter dicta*, that it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind. According to a right view, *Keck* reflects the Court's unwillingness to exercise a power of review over local regulatory choices that do not damage the realisation of economies of scale and wider consumer choice in an integrating market.[719]

This evolution has led to a reinforcement of the rule of remoteness. Even before *Keck* the Court had found that when the restrictive effects which a national rule might have on the free movement of goods, are too uncertain and indirect, they cannot be held liable to hinder

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[714] Op.cit., para 39.

[715] For a discussion of the notion of discrimination, indistincly applicable measures, objective justification etc see C. Hilson, *Discrimination in Community Free Movement Law* (1999) 24 *European Law Review* 445.

[716] In some cases the ECJ assessed the financial burden that procedural requirements would impose on Member States. See e.g. *Steenhorst-Neerings,* op.cit., *Johnson II,* op.cit,.

[717] Case C-120/95, *Nicolas Decker v. Caisse de Maladie des Employes Privés* [1998] ECR I-1831, para 39.

[718] Case C-158/96, *Raymond Kohll v. Union des Caisses de Maladie* [1998] ECR I-1931.

[719] S. Weatherill, "*After Keck: Some thoughts on how to clarify the principle*" (1996) 33 *Common Market Law Review* 885, 895.

trade.[720] This approach is found in *Graf*.[721] The Court was asked whether the Austrian legislation which excluded the payment of compensation where the employee himself terminates his contract of employment, did infringe the Community principle of freedom of movement for workers. The Court replied that provisions must not only deter or preclude a national of a Member State from leaving his country of origin in order to exercise his right of free movement, but also affect access of workers to the labour market in order to be capable of constituting an obstacle. The legislation of the kind at issue was not such as to preclude or deter a worker from ending his contract of employment in order to take up a job with another employer in another Member State. Such an event was *too uncertain and indirect* a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers.[722]

The rule of remoteness requires something akin to a "direct causal link" between the restriction and the freedom of movement. It is a question if this requirement could be held opposite to the *Dassonville* formula that includes even indirect and potential effects in the definition of the prohibited restriction or if it refers to merely speculative effects. However, the rule of remoteness does not run counter the *Dassonville* formula, but it rather clarifies its meaning posing limits to its scope. It makes clear that although indirect restrictions come within the prohibition of Article 28 EC, those that are too indirect are permitted. At first sight such a test is confusing, because one cannot easily distinguish the indirect from the too indirect restrictions. However, what this test truly says is that it is a matter of degree if the restriction imposed is

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[720] See Case C-69/88, *Kranzt* [1990] ECR I-583, para 11. See also Case C-379/92, *Peralta* [1994] ECR I-3453; Case C-134/94, *Esso Española v. Communidad Autónoma de Canarias* [1995] ECR I-4223 and Case C-266/96, *Corsica Ferries* [1998] ECR I-3949, Case C-44/98, *BASF AG v. Prasident des Deutschen Patentamts*. Also, in Case C-169/91, *Council of the City of Stoke-on-Trent and Another v. B&Q* [1992] ECR I-6635, para 15, where the Court ruled that, in determining whether a national rule satisfied the principle of proportionality, (that) it was necessary to consider whether any restrictive effects it produced on the free movement of goods "are direct, indirect or purely speculative."

[721] Case C-190/98, *Volker Graf v. Filzmoser Maschinenbau GmbH* [2000] ECR I-493.

[722] Op.cit., paras 23-25.

permitted or not.[723] The Court examines how far the restriction goes into the fundamental freedoms trying to introduce an objective quantitative criterion in the balancing process.

This is verified by cases that indicate that limitation of access, when the restriction does not prohibit entirely access does not seem contrary to Community law. This can be inferred from *Christelle Deliege*.[724] This case concerned sports rules providing for national quotas and selection rules applied by national federations for participation in international tournements. The Court contrasted *Bosman*, where the rules applicable *prohibited access* to the national market and declared: "although selection rules like those at issue in the main proceedings inevitably have the effect of limiting the number of participants in a tournament, such a limitation is inherent in the conduct of an international high-level sports event which necesssarily involves certain selection rules or criteria being adopted. Such rules may not therefore in themselves be regarded as constituting a restriction on the freedom to provide services prohibited by Article 59 of the Treaty."[725]

Once the requirement of discrimination is abolished, the focus shifts on justification. This view is reinforced by a set of cases[726] that indicate that the realisation of all the fundamental freedoms of the Treaty might rely upon a single "justificatory theory" that abolishes the distinction between the express derogations and mandatory requirements.[727] The Court favours a "soft proportionality" test when judging the legitimacy of Member State restrictions.[728] In

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[723] See C. Barnard, op.cit., p. 52. For a contrary view see Oliver, *Some Further Reflections on the Scope of Art. 28-30 (ex 30-36) EC*, 36 *Common Market Law Review* 783, 788-789, who argues that the remoteness test is quite distinct from the "*de minimis*" test, for it is a legal, not a statistical and thus unworkable criterion.

[724] Joined Cases C-51/96 and C-191/97, *Christelle Deliege v. Asbl Ligue Francophone de judo et disciplines associees etc* [2000] ECR 2549.

[725] Op.cit., para 64.

[726] Case C-2/90, *Commission v. Belgium (Walloon Waste)* [1992] ECR-I 4431.

[727] See V. Hatzopoulos, *Exigences essentielles, impératives ou impérieuses: une théorie, des théories ou pas de théorie du tout?* (1998) *Revue Trimistrielle de Droit Européen* 191.

[728] See T. Tridimas, *General Principles*, op.cit., p. 124; A. Biondi, *In and Out of the Internal Market: Recent Developments on the Principle of Free Movement* (1999/2000) *Yearbook of European Law* 469, 470 *et seq.*

general, proportionality requires that any State interference should be kept to *a minimum* and involves a balancing exercise between means and ends. It states that the measure should be suitable, necessary and the less restrictive available. Although in the past the Court employed in its examination of Member State measures a more intensive review than when examining Community measures,[729] during this period the Court has been more tolerant with Member State action. When the restriction on free movement does not seem very serious,[730] the Court either does not examine whether there is a less restrictive alternative[731] or it finds that the alternative suggested is less effective.[732] Finally, the Court emphasised the wide margin of discretion that national authorities should enjoy[733] and in several cases it left the issue of justification to national courts.[734]

A case that epitomizes the Court's attitude is found in *Zenatti*.[735] Italian rules prohibited the organisation of betting. Only two sporting organisations were allowed to organise betting in order to fund their public interest activities, but there were no restrictions on private individuals resident in Italy placing bets directly with bookmakers established in Italy. The question was whether Treaty provisions on the provision of services precluded rules such as the Italian

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[729] See T. Tridimas, General Principles of Law (OUP 1999), p. 124.

[730] "The more tenuous the restriction, the more lax the standard of proportionality" in T. Tridimas, *General Principles* at p. 141.

[731] For example, Case C-255/97, *Pfeiffer Grosshandel GmbH v. Lowa Warenhandel GmbH* [1999] ECR I-2835; Case C-67/98, *Questore di Verona v. Diego Zenatti* [1999] ECR I-7289.

[732] Case C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd, Oy Transatlantic Software Ltd v. Kihlakunnansyyttäjä (Jyväskylä), Suomen Valtio (Finnish State)* [1999] ECR 6067; Case C-394/97, *Sami-Heinonen* [1999] ECR 3599.

[733] See *Zenatti*, op.cit., *Läära*, op.cit. See also for the decentralisation of competition A. Klimisch and B. Krueger, *Decentralised application of E.C. competition law: current practice and future prospectives* (1999) 24 *European Law Review* 463 and A. Sarold, *Concurrent Application, the April 1999 White Paper and the Future of National Laws* (2000) *European Competition Law Review* 128.

[734] See e.g. Case C-67/98, *Questore di Verona v. Diego Zenatti*, op.cit.; Case C-176/96, *Jyri Lehtonen, Castors Canada Dry Namur-Braine ASBL v. Fédération Royale Belge des Sociétés de Basket-ball ASBL (FRBSB)* [2000] ECR 2681.

[735] Case C-67/98, *Questore di Verona v. Diego Zenatti*, op.cit.

betting legislation. The Court found that the Italian legislation by directly affecting access to the Italian betting market was in breach of Article 49 EC. According to the arguments of the Italian government the restriction was justified by the public interest aim of preventing crime and protecting consumers against fraud. The Court underlined that it is for the national authorities to assess whether it is necessary to prohibit or restrict activities of that kind. The mere fact that a Member State has opted for another system does not affect the assessment for the need and proportionality of the measures enacted. Those measures must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide. The Court found that the fact that the games in issue were not totally prohibited was considered not to be sufficient to show that the national legislation was not in reality intended to achieve the public interest objectives. The Court did not consider sufficiently whether there was a less restrictive alternative or why, for example, the legislation allowed Italians to make bets with other bookmakers outside Italy. It ruled that it is for the national court to verify whether the national legislation is genuinely directed to realising the objectives which are capable of justifying it and whether the restrictions that it imposes do not appear disproportionate in the light of those objectives.[736]

The recent tendency of the Court to tolerate national policy considerations and leave ample discretion to national courts does not mean that the Court has become completely deferential. Some interests should be accorded great weight because society generally recognises their importance, others because they are located in the Treaty or because of the size of the problem and the frequency of infringement.

In *Centros*,[737] a company registered in UK and Wales was refused by the Danish authorities the authorization to register a branch in Denmark. The refusal was based on the grounds that Centros was formed in the UK for the purpose of circumventing Danish rules which required the paying-up of minimum capital. In fact, Centros was trying to establish in Denmark not a branch, but a principal establishment. The Court held that the fact that a national of a Member State who wished to set up a company chose to form it in the Member States whose rules of

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[736] See *Zenatti*, op.cit., paras 33-37.

[737] C-212/97, *Centros Ltd v. Erhvervs-og Selskabsstyreslen* [1999] ECR 1459. See W. Roth, 37 *Common Market Law Review* 147.

company law seems to him the less restrictive and to set up branches in other Member States could not in itself constitute an abuse of the right of establishment. The right to form a company in accordance with a law of a Member State and to set up branches in other Member States is inherent in the exercise in a single market of the freedom of establishment guaranteed by the Treaty. Combating fraud could not justify a practice of refusing registration.[738]

Also, in *Calfa*[739] an Italian national was convicted of possessing and using prohibited drugs and was sentenced to three months' imprisonment and a life ban from Greek territory. Calfa appealed against the expulsion order, contending that Greek legislation providing for expulsion for life of foreign nationals convicted of certain drug offences, expulsion being automatic except where certain family reasons applied, was in breach of EC law, including Directive 64/221 Article 3 which required measures taken on public policy grounds to be based exclusively on the personal conduct of the individual concerned. The ECJ held, that national legislation which restricted the fundamental freedoms guaranteed by EC law, including the freedom to provide services, of which tourists had to be regarded as recipients within Article 59, could only be justified on grounds of public policy. Although the use of drugs might be considered a special danger justifying a public policy exception, Directive 64/221 allowed an expulsion order to be made only if an individual's personal conduct had created a genuine and serious threat affecting a fundamental interest of society. That condition was not fulfilled where a national law ordered automatic expulsion for life in the case of nationals of other Member States convicted of being in possession of drugs for their own use. The Court emphasised that the expulsion for life clearly amounted to a restriction on free movement of services amounting to the very negation of that freedom.[740]

One could have initially difficulty in explaining the difference in the level of scrutiny. One wonders the reason why the Court is more intrusive in some cases and less intrusive in others. However, one could explain the *rationale* of the Court under *Centros* and *Calfa*. The Court found that the right to set up branches is inherent in the freedom of establishment. Also, the

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[738] See *Centros*, op.cit., paras 24-38.

[739] Case C-348/96, *Criminal Proceedings against Donatella Calfa* [1999] ECR I-11. See C. Costello, 2000 *Common Market Law Review* 817.

[740] See *Calfa*, op.cit., paras 21-29.

expulsion for life was striking at the heart of the freedom to receive services. In other words, there was no reasonable relationship of proportionality between the safety benefits and the burden on free movement.[741]

After *Keck* and with US economic constitutional law in mind the understanding of the free movement of goods seems closer to some sort of dormant commerce clause aimed at preventing protectionism. The reasoning of the ECJ reveals striking similarities with the approach that the US Supreme Court uses to examine the constitutionality of neutral statutes. When examining the compatibility of State Statutes with the "commerce clause"[742] it uses a cost-benefit analysis. State regulation affecting interstate commerce will be upheld if a) the regulation is rationally related to a legitimate state end, and b) the regulatory burden imposed on interstate commerce and any discrimination against it are outweighed by the state interest in enforcing the regulation.[743] In the *Pike* case the Supreme Court held: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[744] Similarly, in the *Minnesota* "container" case the Supreme Court ruled: "...the burden imposed on interstate commerce is relatively minor.... we find this burden is not clearly excessive in the light of the substantial interest in promoting conservation of energy and other natural resources and easing solid waste disposal problem...Moreover, we find no approach with a "lesser impact on interstate activities" is available. Respondents have suggested several alternative statutory schemes, but these alternatives are either more burdensome on commerce than the Act (as,

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[741] Compare with *Preston*, op.cit. and *Magorrian*, op.cit.

[742] Article I, paragraph 8, clause 3 of the US Constitution states: "The Congress shall have the power...to regulate commerce...among the several States."

[743] L.Tribe, *American Constitutional Law* (second edition), at p. 408.

[744] *Pike v. Bruce Church, Inc.* 397 US 137, 1970.

for example, banning all non-returnables) or less likely to be effective (as, for example, providing incentives for recycling)."[745]

Conclusion

In relation to the principles of equivalence and effectiveness, the ECJ follows a case-by-case approach entrusting the enforcement of a vague standard to national courts. In each case a balance of competing interests takes place and the degree of scrutiny reflects "political" considerations concerning the degree of integration sought in each period. It considers the importance of the individual interest and the strength of the state's justifications for its regulations. Some deference is a consequence of the maturity of the system in general. The rules that emerge are of uncertain weight and scope. The comparison with substantive law reinforces these conclusions, because one notices similar methodology of adjudication. The case law of the ECJ in both substantive and procedural law is not "rule-based" but "effects-based." Since this is not easily applied by national courts, it favours legal uncertainty and runs counter the objective of effective enforcement and effective judicial protection. The ECJ respects sufficiently the procedural autonomy of Member States and does not affect the balance more than the case law in other areas.

[745] *Minnesota v. CloverLeaf Creament Co.*, 449 US 456, 1981.

Chapter 6: The interaction between EC and ECHR law on remedies and procedures

In the formulation of the Community system of remedies and procedures Articles 6 and 13 of the ECHR have been an eminent source of inspiration and reference for the ECJ.[746] In recent years both the ECJ and the ECtHR have expanded their jurisdiction.[747] The ECJ has put under its auspices the protection of human rights and the ECtHR has expanded the direct applicability of the ECHR. As the two jurisdictions have begun to merge, there is a serious danger to overlap[748] and the national judge may find himself before controversial case law. This Chapter describes the interplay between Community law and the ECHR, explores the standard of effectiveness of national remedies found in the case law of the ECtHR and poses the question of compatibility of Community Courts' procedures with the ECHR.

6.1 The expanding protection of Human Rights under Community law

The role of human rights in the reasoning of the ECJ is expanding during the last years[749] especially after the adoption of the Charter of Fundamental Rights.[750] This tendency is

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[746] See, especially, Chapter 3.1, above.

[747] See I. Canor, *Primus inter pares. Who is the ultimate guardian of fundamental rights in Europe?* (2000) *European Law Review* 2.

[748] H. Schermers, *European Remedies in the Field of Human Rights* in the *The Future of Remedies in Europe*, op.cit., 205, 211.

[749] Fundamental rights form an integral part of the general principles whose observance the Court of Justice ensures. See Case C-260/89, *ERT v. Dimotiki Etairia* [1991] ECR I-2925, para 41; Opinion 2/94 [1996] ECR I-1759. See also Case 4/73, *Nold v. Commission* [1974] ECR 491; Case C-29/69, *Stauder v. Ulm* [1969] ECR 419; Case C-168/91, *Konstandinidis* [1993] ECR I-2591. See A. Von Bogdandy, *The European Union as a human rights organisation? Human Rights and the Core of the European Union* (2000) *Common Market Law Review* 1320; Coppel and Neil, *The European Court of Justice: Taking Rights Seriously?* 29 (1992) *Common Market Law Review* 669; B. de Witte, *The Role of ECJ in Human Rights* in Alston, *The EU and Human Rights* (1999) *Oxford University Press* 859.

[750] Charter of Fundamental Rights of the European Union promulgated at the Nice European Council in December 2000 (2000 OJ C 364/01). The Court of First Instance has gone closely to treating the Charter as binding: See T-

crystallised in the Draft Constitution of Europe. Article I-2 of the "Draft Treaty Establishing a Constitution for Europe"[751] reiterates Article 6(1) of TEU that respect for human rights is one of the values on which the Union is founded. In addition, Article I-7(1) of the draft Constitution provides: "The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II of the Constitution." Most importantly, the Charter is the centrepiece of the current constitutionalisation process.[752] It bears comparison with the ECHR and the catalogues of rights contained in many national constitutions.

Article II-47 of the Charter titled a "Right to an effective remedy and to a fair trial" provides: "1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to a remedy before a tribunal in compliance with the conditions laid down in this Article; 2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised defended and represented; 3. Legal aid shall be made available to those who lack sufficient sources in so far as such aid is necessary to ensure effective access to justice." The first paragraph is based on Article 13 of the ECHR.[753] However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The second

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54/99, *Telekommunikation Service GmbH v. Commission* [2002] ECR II-313, para 48; T-177/01, *Jégo-Quéré*, op.cit., para. 42. See also the A-G Opinion in Case C-173/99, *BECTU v. Secretary of State for Trade and Industry* [2001] ECR I-4881, para 28; C-377/98, *Royaume des Pays-Bas v. Parliament* [2001] ECR I-7079, paras 197, 210, 211 and C-353/99 P, *Council v. Hautala* [2001] ECR I-9565, para 83. See A. von Bogdandy, *The European Union as a human rights organisation? Human rights and the core of the EU* (2000) *Common Market Law Review* 1307; Lenaerts and de Smitjer, *A bill of rights* (2000) *Common Market Law Review* 273; D. Triantafyllou, *The European Charter of Fundamental Rights and the "rule of law": Restricting Fundamental Rights by Reference* (2002) 39 *Common Market Law Review* 53.

[751] See CONV 850/03.

[752] P. Eeckhout, *The EU Charter of fundamental rights and the federal question* (2002) *Common Market Law Review* 945, 945.

[753] Article 13 that is headed "Right to an effective remedy" and provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

paragraph corresponds to Article 6(1) of the ECHR.[754] In Community law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the EU is a community based on the rule of law. Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union. The requirement for legal aid, also, derives from Article 6 ECHR.[755] Article II-47 applies to the institutions of the Union and of Member States when they are implementing Union law pursuant to Article 51 and does so for all rights guaranteed by Community law.[756]

The aim of Article II-51 is to determine the scope of the Charter. It seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity. The Charter is primarily addressed to the EU institutions and to the Member States only when they are implementing Union law.[757] Article II-51(2) of the Charter itself states that it does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.[758] It thereby confirms the principle of limited powers, and clearly seeks to establish that the Charter is not intended to effect a transfer of general power over human rights matters to the EU. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it by the Constitution.[759] Therefore, this Article makes

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[754] Article 6(1) provides: "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal."

[755] See *Airey v. Ireland* (1979-1980) 2 EHRR 305.

[756] See, further, explanations to the Charter (CONV 828/1/03 REV 1, 18 July 2003).

[757] Para 1: "The provisions of this Charter are addressed to the Institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution."

[758] Para 2: "This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution."

[759] See, further, explanations to the Charter.

the effect of the Charter more limited than that of the general principle of respect for fundamental rights recognised by the Court of Justice.[760]

It is apparent from the ECJ's case law that, where national legislation falls within the scope of Community law, the ECJ, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights - as laid down in particular in the Convention - whose observance the ECJ ensures.[761] However, the ECJ has no such jurisdiction with regard to national legislation lying outside the scope of Community law. Within this jurisdiction, the ECJ reads the fundamental freedoms under the light of the Convention[762] and refers to the Articles of the ECtHR as of equal constitutional ranking.[763] Under the ECJ case law, a restriction on the freedom of the fundamental freedoms cannot be justified unless it complies with Human Rights, but national courts should take into account the wide margin of discretion enjoyed by the competent authorities.[764] In the light of the above case law, the term "implementation" should not be interpreted restrictively and the Charter should find application every time there is a material link with Community law.[765]

Since the national judge has a right to refer to the ECJ, but there is no such direct co-operation between national courts and the ECtHR, the ECJ may be called to issue more rulings on

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[760] Arnull A., *Protecting fundamental rights in Europe's new consttutional order* in W.G. Hart Workshop Proceedings, Tridimas (Ed.) European Constitutionalism in the 21st century (Hart Publishing, forthcoming).

[761] See, in particular, Case C-299/95, *Kremzow v. Austrian State* [1997] ECR I-2629, para 15. See also C-309/96, *Daniele Annibaldi et Sindaco del Commune du Guidonia presidente Regione Lazio* [1997] ECR 7493, paras 21-25.

[762] C-60/00, *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279; C-109/01, *Secretary of State for the Home Department v. Hacene Akrich* of 23 September 2003 (not yet published).

[763] See T. Tridimas, *The European Court of Justice and the draft Constitution: A Supreme Court for the Union?* in W.G. Hart Workshop Proceedings, Tridimas (Ed.) European Constitutionalism in the 21st century, Hart Publishing (forthcoming).

[764] C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* of 12 June 2003 (not yet published). See T.Tridimas, op.cit.

[765] See P. Eeckhout, op.cit., p. 993.

human rights than the ECtHR itself. According to Article II-52[766] the Charter ensures the necessary consistency between the Charter and the ECHR by establishing the rule that, insofar as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union. The meaning and the scope of the guaranteed rights are determined not only by the text of the ECHR and its Protocols, but also by the case law of the European Court of Human Rights and by the European Court of Justice. The last sentence of the second paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.[767]

In principle, there is no danger of incosistency, if the national court refers a question to the ECJ. In *Roquette*[768] the ECJ has proved that it ensures to fundamental rights the protection afforded by the ECtHR. The referring court was asked, in essence, whether, under Community law, it is open to a national court having jurisdiction under domestic law to authorise entry upon and seizures at the premises of undertakings suspected of having infringed the competition rules, when confronted with a request by the Commission for assistance based on Article 14(6) of Regulation No 17.[769] For the purposes of determining the scope of that principle in relation to the protection of business premises, the ECJ based its decision on the case law of the ECtHR

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[766] Article 52 is titled "Scope and interpretation of rights and principles" and provides in para 3: "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

[767] See, further, explanations to the Charter.

[768] Case C-94/00, *Roquette* [2002] ECR I-9011.

[769] Regulation 17/62, First Regulation implementing Articles 85 and 86 of the Treaty (OJ 1962 P 13/ 204), now replaced by Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1/1).

subsequent to the judgment in *Hoechst*.[770] According to that case law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises[771] and, second, the right of interference established by Article 8(2) of the ECHR "might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case."[772]

In particular in relation to procedural law the ECJ decided that if national procedural rules fall within the scope of Community law, those rules must comply with the requirements arising from the fundamental rights.[773] It ruled that national courts, after examining compatibility with the principles of equivalence and effectiveness, must consider whether national rules must be excluded in order to avoid measures incompatible with compliance with fundamental rights. The case at issue concerned rules on evidence and their compatibility with the right to a fair hearing before a tribunal as laid down Article 6(1) of ECHR in a technical field such as official control of foodstuffs. The question was whether a manufacturer had a right under Article 7(1) of Directive 89/397[774] to a second opinion and, if so, whether infringement of that right means that the results of the analyses ordered by the competent authorities may not be used. The ECJ underlined the case law of the ECtHR on evidence and left the issue to be decided by the national court.[775]

The case is very important because it places on national courts the duty to examine compatibility of national procedural rules with Article 6 as a requirement of Community law. The concept of a fair trial contains many elements. At the core is the right to a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Also, contained in Article 6 is the principle of the presumption of innocence until guilt has been

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[770] Cases 46/87 and 227/88, *Hoechst v. Commission* [1989] ECR 2859. See para 29 of the judgment in *Roquette.*

[771] See, in particular, the judgment of *Colas Est and Others v. France* of 16 April 2002, not yet published in the *Reports of Judgments and Decisions*, para 41.

[772] *Niemietz v. Germany* (1993) 16 EHRR 97, para 31.

[773] C-276/01, *Joachim Steffensen* of 10 April 2003 (not yet published).

[774] Council Directive 89/397/EEC of 14 June 1989 on the official control of foodstuffs (OJ 1989 L 186/23).

[775] See op.cit., paras 73-79.

proven, the right of the accused to have adequate time and facilities to prepare a defence, the right to defend oneself in person or through legal assistance, the right to call witnesses and the right to have the free assistance of an interpreter where necessary.[776] As stated above, in Article II-47 of the Charter the principle of fair trial acquires constitutional value in the Community. A consequence of this recognition is that Community courts should, also, review the compatibility of the procedures before themselves with the principle of fair trial.

6.2 The direct applicability of the ECHR

Unlike European Community law the Convention cannot, in principle, be invoked directly in domestic proceedings. The link between the Convention and the national legal systems is Article 13. The principle "wrongs should be remedied" is embodied in Article 13.[777] It is under Article 13 that the applicants' right to a remedy should be examined, and if appropriate, vindicated. Moreover, Article 13 contains only minimum procedural safeguards. The rest of the Convention sometimes imposes higher standards.[778] States may also provide their own high level of procedural protection and, where they do, an applicant must exhaust the additional procedures under Article 35. The right to a remedy is closely linked with the requirement that domestic remedies must be exhausted before an individual has recourse to the ECHR. In this sense, Article 13 together with the principle of exhaustion of domestic remedies under Article 35 (formerly 27) enshrines a principle of subsidiarity.[779]

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[776] See P. van Dijk, *Access to Court* in R. St. J. Macdonald (eds), *The European System for the Protection of Human Rights* (1993) Kluwer 345. See also A. W. Bradley, *Administrative Justice: A Developing Human Right?* (1995) *European Public Law* 347.

[777] See, *inter alia*, *Kudla v. Poland* (1998) 5 EHRR 630.

[778] See in particular Articles 5 and 6.

[779] In *Powell and Rayner v. United Kingdom* the ECtHR regarded the coherence of the dual system of the Convention's enforcement through Articles 13 and 35 as: "at risk of being undermined if article 13 is interpreted as requiring a national law to make available an "effective remedy" for a grievance classified under article 27(2) as so weak as not to warrant examination on its merits at the international level" (1990) 12 EHRR 355, para 33.

In principle, the Convention does not require any specific remedies, but requires a "remedial" result: the judicial protection of the rights enshrined in it.[780] In *Aksoy v. Turkey*[781] the ECtHR declared that: "Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order." Also, neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention - for example, by incorporating the Convention into domestic law.[782] The effect of this Article is, thus, to require the provision of a remedy for the relevant Convention complaint and to grant appropriate relief, although contracting states are afforded some discretion as to the manner in which they conform to their obligations under this provision.[783] The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention.[784]

It is notable that the ECtHR has been less activist than the ECJ. The ECJ established the principle of direct effect, although the EC Treaty includes no provision similar with Article 13 ECHR and the obligation included in Article 10 EC is very general.[785] The ECtHR did not single out the national courts as instruments on which it could rely to pursue European human rights standards. It merely concerned itself with whether the State conformed to the Convention and eschewed the notion that the status of Convention rights in the Contracting States would be a matter for the Court. The most direct way to improve the effectiveness of national remedies

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[780] Compare with Community law S. Prechal, *EC requirements for an effective remedy in Lonbay and Biondi (Eds), Remedies for Breach of EC Law* (Chichester 1997), p. 4, who speaks of "remedial outcomes."

[781] (1996) 23 EHRR 553.

[782] See the Swedish Engine Drivers' Union (1976) 1 EHRR 671.

[783] The ECtHR has regularly declared that it is limited to ordering financial compensation and is not empowered to order other remedial measures because "it is for the State to choose the means to be used in its domestic legal system to redress the situation that has given rise to the violation of the Convention." See *Zanghi v. Italy* (1991) 194 EurCtHR series A at 48.

[784] See *Leander v. Sweden* (1987) 9 EHRR 433.

[785] See D. Nicol, *Lessons from Luxembourg: Federalisation and the Court of Human Rights* (2001) *European Law Review*-Human Rights Survey 4, 13.

would be to interpret Article 13 to require the incorporation of the Convention into domestic law but the ECtHR has declined to go so far. Since Article 13 is not designed to give direct effect to the Convention by guaranteeing that the content of national laws and the decisions of national decision-makers conform with it, Article 13 cannot, in principle, be used to test the compatibility of primary legislation with the Convention.[786]

Similarly, Article 6 para. 1 extends only to "contestations" (disputes) over (civil) "rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law; it does not in itself guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States.[787] Thus, access to the domestic courts under Article 6 is available to any person who considers that he has a cause of action under national law.[788] For example, in *Kefalas*[789] the applicants alleged that they have been denied access to a court with full jurisdiction contrary to Article 6. It is recalled that they were shareholders of a Greek company. At the request of a creditor and by ministerial decree, the management of the company was entrusted to a board of creditors, appointed by the Minister of Economic Affairs. The ECtHR held that the merits of the case could not be dealt with, as Greece had not recognised the right of individual petition under Article 25 at the relevant time.

The discretion of the Contracting States is reduced, however, by the fact that the ECtHR does not distinguish always between procedure and substance. In some cases conformity with the spirit of the Convention requires that the word "contestation" (dispute) should not be construed too technically and should be given a substantive rather than a formal meaning. The "contestation" (dispute) may relate not only to the actual existence of a right but also to its scope or the manner in which it may be exercised.[790] Recently, the ECtHR has widened the

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[786] *Soering v. UK* (1989) 11 EHRR 439, para 121. See also *Costello-Roberts v. UK* (1993) 19 EHRR 112, where the ECtHR made reference only to the technical availability of a remedy and none to whether the applicant would have been able to put forward arguments based on his Convention rights.

[787] See *James and Others* (1986) 8 EHRR 123, para. 81.

[788] See *Powell and Rayner*, op.cit.

[789] *Kefalas v. Greece* (1995) 20 EHRR 484.

[790] See *Benthem v. Netherlands* (1985) 8 EHRR 1.

reach of Article 6(1).[791] In some cases the ECtHR has applied the principle of proportionality in a way that it requires specific remedies before national courts.

In *Osman v. UK*,[792] Osman brought an action for negligence against the police in respect of their conduct of the investigation, but the Court of Appeal ordered the action to be struck out as disclosing no reasonable cause of action on the ground that, following the House of Lords' ruling in *Hill*[793] for reasons of public policy, no action in negligence could lie against the police in respect of the investigation and suppression of crime.[794] Osman applied to the ECtHR, contending that the state had failed to protect the right to live and to protect the family from harassment contrary to Articles 2 and 8 of the ECHR, and that they had been denied access to a court in respect of that failure, contrary to Article 6(1).

The ECtHR found no violation of Articles 2 and 8. The State was not in breach of its positive obligation to take preventive measures to protect an individual whose life was at risk from another, as the requirement that the police knew or ought to have known that there was a real and immediate threat to Osmans from Police was not met.[795] The fact that the Court of Appeal, in applying the exclusionary rule in *Hill*, dismissed Osmans' claim as disclosing no cause of action did not preclude the application of Article 6(1). The rule in *Hill* which appeared to act as an absolute defence to an action in negligence and thereby prevented a court considering the competing public interests in a case before it, constituted a disproportionate interference with a person's right to have a determination on the merits of an action against the police in a deserving case in breach of Article 6(1). The ECtHR considered a series of factors in combination such as the blanket nature of the rule which excluded the determination of the

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[791] See C. Harlow, *A Common European Law of Remedies?* in the C. Kilpatrick, T. Novitz and P. Skidmore (eds) *The Future of Remedies in Europe* (2000) 70, 74.

[792] (2000) 29 EHRR 245. C. Gearty, *Unravelling Osman* (2001) *Modern Law Review* 159. See also M. Kloth, *Immunities and the right of access to court under the European Convention of Human Rights* (2002) 27 *European Law Review* 33.

[793] *Hill v. Chief Constable of West Yorkshire* (see paragraphs 90–92 below) (1989) 1 AC 53.

[794] *Osman v. Ferguson* [1993] 4 All.E.R. 344.

[795] Since none of the incidents prior to the shootings were life-threatening, there was no proof that Police was responsible for those acts and there was no evidence that Police was mentally ill or prone to violence.

applicants' claims irrespective of the seriousness of the harm suffered, the nature and extent of negligence involved and the fundamental rights which were at stake. *Osman* proves that the Convention imposes positive obligations on Member States for effective protection of Human Rights and signifies a strong intrusion into national procedural autonomy in an area with possible political repercussions.[796]

An intrusive exercise of the test of proportionality is also found in *Smith and Grady*.[797] The ECtHR found that the applicants' right to respect for their private lives was violated by the investigations conducted and by the discharge of the applicants pursuant to the policy of the Ministry of Defence against homosexuals in the armed forces. As was made clear by the High Court and the Court of Appeal in the judicial review proceedings, since the Convention did not form part of English law, questions as to whether the application of the policy violated the applicants' rights under Article 8 and, in particular, as to whether the policy had been shown by the authorities to respond to a pressing social need or to be proportionate to any legitimate aim served, were not questions to which answers could properly be offered. The sole issue before the domestic courts was whether the policy could be said to be "irrational."

The ECtHR found that, even assuming that the essential complaints of the applicants were before and considered by the domestic courts, the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the European Court's analysis of complaints under Article 8 of the Convention. Therefore, the standard of judicial review before national courts was not compatible with the Convention.

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[796] See for example RT Hon Lord Hoffman, *Human Rights and the House of Lords* (1999) 62 *Modern Law Review* 159, 164: "...this decision fills me with apprehension. Under the cover of an Article which says that everyone is entitled to have his civil rights and obligations determined by a tribunal, the European Court of Human Rights is taking upon itself to decide what the content of those civil rights should be. In so doing, it is challenging the autonomy of the Courts and indeed the Parliament of the United Kingdom to deal with what are essentially social welfare questions involving budgetary limits and efficient public administration."

[797] *Smith and Grady v. UK* (2001) 1 EHRR 100. See, also, *X and Y v. the Netherlands* (1985) 8 EHRR 235.

Finally, in *Hatton*[798] the residents of properties surrounding Heathrow airport complained to the ECtHR alleging that the introduction in October 1993 of a noise quota system as a means of controlling night time flying at the airport infringed their right to respect for private and family life conferred by Article 8 of the Convention and their right to an effective remedy under Article 13.[799] Until October 1993 the noise caused by nighttime flying had been controlled by restrictions placed on the number of take offs and landings at the airport. However, the authorities had introduced a new system whereby aircraft operators could select fewer noisier aircraft or a greater number of quieter aircraft as long as neither exceeded the quota. The residents contended that the new system had resulted in an increase in the level of noise at their homes caused by the aircraft using the Heathrow flight path.

The ECtHR held that although the United Kingdom could not be deemed to have interfered in the residents' right to respect for private and family life because neither the airport or aircraft were owned or controlled by the government, the state did have a duty to take reasonable and appropriate steps to uphold the residents' rights. A balance had to be struck between the interests of the residents and the interests of the community in general, and notwithstanding concerns for the economic well-being of the country, the state had to take measures to try and protect an applicant's right.[800] In the instant case, the UK Government had failed to strike a balance between the competing interests, and had done little to research the contribution night time flying made to the economy, or the impact the increase in night flights had had on the applicants, and as such had violated their rights under Article 8 of the Convention. Moreover, it was clear that the scope of review by the domestic courts was limited to the classic English public law concepts, such as irrationality, unlawfulness and patent unreasonableness, and did not allow consideration of whether the increase in night flights under the scheme represented a justifiable limitation on the right to respect for the private and family lives of those living near to Heathrow airport. It followed that such review had not complied with Article 13.

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[798] *Hatton v. Heathrow Airport* (2002) 34 EHRR 1.

[799] In previous cases the Court found that there was no "right" in domestic law and Article 6 could not have application in relation to the statutory exclusion of liability in trespass and nuisance for aircraft under Civil Aviation Act 1982. See *Powell and Rayner*, op.cit. para 36. See also *Baggs v. UK* (1985) 9 EHRR 235.

[800] See *Lopez Ostra v. Spain* (1995) 20 EHRR 277.

The above cases impose on the States a positive obligation to provide for effective remedies, coming very close to requiring direct effect for the Convention.[801] This evolution could be explained as a reply to the expanding protection of Human Rights under Community law and the adoption of the Charter. Every national court becomes a human rights court. This case law may be combined with the judgment in *Matthews*, [802] where the ECtHR sought to establish supremacy over national courts. The ECtHR made clear that when the Contracting Parties to the Convention establish international organisations and transfer certain competences to them, they remain responsible for ensuring compliance with the Convention even after the transfer of powers. Since the ECJ is not competent to review the legality of primary Community law[803] the ECtHR highlighted a gap in legal protection against acts of primary EC law. It, thus, expanded its jurisdiction in parallel to the ECJ.

Matthews opens the way for the ECtHR to examine complaints concerning all acts adopted under the Treaty on European Union which could not be reviewed by the ECJ. Under Article 35(5) TEU, for example, the Court of Justice has no power to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. Also, Article 68(2) EC provides that the Court of Justice does not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) EC relating to the maintenance of law and order and the safeguarding of internal security.[804] It should be noted that the special preliminary

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[801] See D. Nicol, *Lessons from Luxembourg: Federalisation and the Court of Human Rights* (2001) *European Law Review-Human Rights Survey* 4.

[802] See *Matthews v. UK* (1999) 28 EHRR 361. See H. *Schermers*, 36 *Common Market Law Review* 673.

[803] See Joined Cases 31-35/86, *Levantina Agricola Industrial SA (LAISA) and CPC España SA v. Council of the European Communities* [1988] ECR 2285, para 12.

[804] On these issues see S. Peers, *Who is Judging the Watchmen? The Judicial System of the "Area of Freedom, Security and Justice"* (1998) *Yearbook of European Law* 337, 354; P. J. Kuijper, *Some legal problems associated with the communitarization of policy on visas, asylum and immigration under the Amsterdam Treaty and incorporation of the Schengen acquis* (2001) *Common Market Law Review* 1029; T. Tridimas, *The European Court of Justice in Reforming the European Union from Maastricht to Amsterdam* ed. by R. Lynch, N. Neuwahl and W. Rees (Longman 2000) Chapter 4; N. Neuwahl, *The Treaty of Amsterdam: Towards a More Effective Enforcement of International Obligations? in Remedies in international law: the institutional dilemma* edited by M.

reference procedures provided for by Article 68 EC for matters falling into Title IV and by Article 35 TEU for the Third Pillar are abolished in the draft Constitution, and the jurisdiction of the Court becomes unified.[805]

6.3 The standard of effectiveness of national remedies and procedures under the ECHR

The basic requirement of Article 13 is that the remedy afforded must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by acts or omissions of the authorities of the respondent state.[806] The ECtHR held that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.[807] This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.[808] In *Ashingdane* the ECtHR found that the right of access is not an absolute right: restrictions on the right of access to a court are permitted, but only in so far as they pursue a legitimate aim and are proportionate.[809]

Evans (1998) at 205; A. Albors-Llorens, *Changes in the jurisdiction of the European Court of Justice under the Treaty of Amsterdam* (1998) 35 *Common Market Law Review* 1273; A. Arnull, *Taming the Beast? The Treaty of Amsterdam and the Court of Justice* 109; A. Biondi, *The Flexible Citizen: Individual Protection After the Treaty of Amsterdam* (1999) *European Public Law* 245.

[805] See T. Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure* (2003) 40 *Common Market Law Review* 9 at 14 et seq.

[806] See *Akzoy*, op.cit. Similarly, *Chahal v. UK* (1996) 23 EHRR 413, paras 145-155.

[807] *Airey v. Ireland* (1979-1980) 2 EHRR 305.

[808] See *Waite and Kennedy v. Germany* (1999) 30 EHRR 261, para 67.

[809] *Ashingdane v. UK* (1985) 7 EHRR 528: "..by its very nature [the right of access to a court] calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals...[but such a regulation must not]...restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired."

For example, statutory time limits or prescription periods are considered a legitimate means of ensuring the effectiveness of any legal system,[810] but they must not be so short-or so stricly applied-as unduly to hinder access to justice.[811] One case against France[812] illustrates the point that the ECJ made in *Emmott* and in *Levez*. A French decree declaring certain land to be subject to restrictions on use could not be challenged because the landowners were not notified of the decree. The decree had been published in the French *Official Journal*, but by the time the owners were aware of it the three-months time limit for challenging it had expired. The ECtHR held that they were entitled to infer, from their participation in the proceedings, that the outcome would be communicated to each of them "without their having to pursue the *Official Journal* for months or years on end."[813]

In relation to the length of proceedings, the ECtHR so far has ruled only delays imputable to the relevant judicial authorities could be taken into account in determining whether a reasonable time had been exceeded for the purposes of Art. 6(1). The two and a half year delay caused by the reference to the ECJ could not be taken into consideration since to do so would adversely affect the system of justice instituted by the EC Treaty Art. 177 (now 234 EC).[814] An issue, nevertheless, about the length of proceedings before the CFI is liable to arise.

In its examination of the compatibility of the national rules with the Convention the ECtHR is very pragmatic. Under the standard case law of the ECtHR that national courts should provide

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[810] *Stubbings and Others v. the United Kingdom* (1996) 23 EHRR 213, para 49; Also, *Dobbie v. UK* (1997) EHRR 166: "...limitation periods in personal injury cases are a common feature of the domestic legal systems of the Contracting States. They serve important purposes, namely to ensure legal certainty and finality, to protect potential defendants for stale claims which might be difficult to counter, and to prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time."

[811] *Pérez de Rada Canavilles v. Spain* (1998) 29 EHRR 245; *Stedman v. UK* (1997) 23 EHRR 168; *Bellet v. France* (1995) Series A, No. 333-B.

[812] *De Geouffre de la Pradelle* v. *France*, judgment of December 16, 1992, Series A, no. 252.

[813] See F. Jacobs, *The Right to a Fair Trial in European Law* (1999) *European Human Rights Law Review* (Issue 2) 141, 144.

[814] *Pafitis v. Greece* (1999) 27 EHRR 566.

for the right of judicial review,[815] it does not consider it appropriate to examine in the abstract whether the scope of judicial review, i.e. as applied by the English courts, would be capable of satisfying Article 6(1).[816] In *Soering v. UK* and *Vilvarajah v. UK* the ECtHR found that the courts' lack of jurisdiction to grant interim injunctions against the Crown does not detract from the effectiveness of judicial review in extradition and asylum cases respectively, if stay of proceedings can be ordered by the Administration.[817] It found: "The English courts' lack of jurisdiction to grant interim injunctions against the Crown does not, in the Court's opinion, detract from the effectiveness of judicial review in the present connection, since there is no suggestion that in practice a fugitive would ever be surrendered before his application to the Divisional Court and any eventual appeal therefrom had been determined."[818]

The ECtHR somewhat retreated from the standards posed in *Osman*. In subsequent cases concerning child abuse,[819] the ECtHR made clear that *Osman* did not open up the liability of public authorities in English law for negligence generally. The ECtHR considered that its reasoning in the *Osman* judgment was based on an understanding of the law of negligence which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and notably the House of Lords. The ECtHR was satisfied that the law of negligence as developed in the domestic courts since the case of *Caparo*[820] and as recently analysed in the case of *Barrett v. Enfield LBC*[821] includes the fair, just and reasonable criterion as an intrinsic element of the duty of care and that the ruling of law concerning that element in this case does not disclose the operation of an immunity.

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[815] See *Benthem*, op.cit.; *Pudas* (1987) 10 EHRR 380; *Tre Traktörer Aktiebolag* (1989) 13 EHRR 309.

[816] *Air Canada v. United Kingdom* (1995) 20 EHRR 150 (para 62).

[817] See further H. Garry, *When Procedure Involves Matters of Life and Death: Interim Measures and the European Convention of Human Rights* (2001) *European Law Review* 339.

[818] Op.cit., para 123. Compare with *Shingara and Radiom*, op.cit.

[819] *T.P. and K.M. v. UK* (2002) 34 EHRR 2; *Z. v. UK* (2002) 34 EHRR 3.

[820] *Caparo Industries Plc v. Dickman* [1990] 2 A.C. 605, para 58.

[821] [2001] 2 A.C. 550.

Further, in *Bensaid v. UK*,[822] the ECtHR made clear that *Smith and Grady* does not mean that the "reasonableness" system of judicial review is in every case contrary to the Convention. The applicant, an Algerian national, was a schizophrenic suffering from a psychotic illness. He had arrived in the United Kingdom as a visitor in 1989 and married a UK citizen in 1993. Since 1994-95 he had been receiving treatment for his medical condition. On the basis that the marriage had been one of convenience, however, the Home Secretary decided to remove him. Relying on Articles 3 and 8 of the Convention, the applicant claimed that his proposed expulsion to Algeria placed him at risk of inhuman and degrading treatment and would violate his right to respect for his private life. He also claimed that he had no effective remedy against the proposed expulsion, contrary to Article 13.

While the applicant argued that the courts in judicial review applications would not reach findings of fact for themselves on disputed issues, the Court was satisfied that the domestic courts gave careful and detailed scrutiny to claims that an expulsion would expose an applicant to the risk of inhuman and degrading treatment. The judgment delivered by the Court of Appeal did so in the applicant's case. The Court was not convinced therefore that the fact that this scrutiny took place against the background of the criteria applied in judicial review of administrative decisions, namely, rationality and perverseness, deprived the procedure of its effectiveness. The Court of Appeal examined the substance of the applicant's complaint, and it had the power to afford him the relief he sought. The fact that it did not do so was not found to be a material consideration since the effectiveness of a remedy for the purposes of Article 13 does not depend on the certainty of a favourable outcome for an applicant. The ECtHR carefully distinguished this case from *Smith and Grady*. In that case, the domestic courts were concerned with the general policy applied by the Ministry of Defence in excluding homosexuals from the army, in which security context there was a wide area of discretion afforded to the authorities. The Court concluded, therefore, that there has been no breach of Article 13.

Another characteristic is that the ECtHR shows appreciable respect to decisions taken by administrative authorities on grounds of expedience.[823] The *Bryan* case[824] decided under

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[822] (2001) 33 EHRR 10.

[823] *Zumtobel v. Austria* (1994) 17 EHRR 116 *Fischer v. Austria* (1995) 20 EHRR 349; *Jane Smith v. UK* (2001) 33 EHRR 30; *Ortenberg v. Austria* (1995) 19 EHRR 524.

Article 6(1) of the Convention shows that in a relatively specialised and technical context such as town and country planning no more than a limited power to review by the High Court could reasonably be expected. The right of appeal "on a point of law" under s. 289 of the Town and Country Planning Act 1990 against the decision of the Inspector appointed by the Secretary of State was sufficient to satisfy Article 6 para 1, notwithstanding the fact that such an appeal would have only limited jurisdiction to determine the relevant facts and the High Court would not be able to substitute its own decision on the merits of the case for the decision of the Inspector.

In *Fayed v. United Kingdom*[825] that concerned the publication by the Department of Trade and Industry of the report of their inspectors that allegedly damaged their civil right to honour and reputation, the ECtHR pointed out that judicial review would not provide complete protection against the possibility of errors by the inspectors, but it would provide guarantee that every effort had been made by the inspectors to ensure that the procedure was fair and that their findings of the fact were reliable and that the Fayeds had had every reasonable opportunity to respond to the allegations against them. That decision concerned only one aspect of the exercise of local authorities' powers and duties and could not be regarded as an arbitrary removal of the courts' jurisdiction to determine a whole range of civil claims.

In relation to pecuniary damage, the ECtHR will endeavour to put the applicant *as far as possible* in a situation equivalent to the one in which he or she would have been if there had not been a breach of the Convention.[826] With respect to non-pecuniary damage, it is not unusual for the ECtHR to decide that its finding of violation is sufficient reparation.[827] The ECtHR held that the Convention does not guarantee a right to "full" compensation because

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[824] *Bryan v. United Kingdom* (1996) 21 EHRR 342. Compare with *Upjohn*, op.cit. See Sir R. Walker, *Opinion: The Impact of European Standards on the Right to a Fair Trial in Civil Proceedings in United Kingdom Domestic Law* [1999] *European Human Rights Law Review* 4.

[825] *Fayed v. United Kingdom* (1994) 18 EHRR 393. See C. Graham and C. Riley, *Inquiries, Company Investigations and Fayed v. UK* (1996) *European Public Law* 47.

[826] See *Papamichalopoulos v. Greece* (1996) 21 EHRR 439, para 38.

[827] See *Saunders v. UK* (1997) 23 EHRR 313; *Chalal v. UK* (1997) 23 EHRR 413; *Bowman v. UK* (1998) 26 EHRR 1.

legitimate objectives of public interest, such as those pursued in measures of economic reform or measures designed to achieve greater social justice, could call for less than reimbursement of the full market value.[828] In some cases the ECtHR explicitly has denied the applicability of the international standard of "prompt, adequate and effective compensation" for expropriated property, deciding that it traditionally applied only to the taking of property of non-nationals.

In *James v. United Kingdom*[829] the ECtHR accepted the Commission's proposed standard of compensation for a taking, agreeing it should be the payment of an amount "reasonably" related to the value of the property. Legitimate objectives of "public interest," such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.[830] Where a State has chosen a method of compensation, the ECtHR has said that its power of review is limited to ascertaining whether the choice of compensation terms falls outside the state's wide margin of appreciation.[831]

None of the principles of the ECtHR provides much concrete guidance on what constitutes an effective remedy. On the one hand the States enjoy a considerable margin of appreciation in the determination of effective remedies, one the other the ECtHR examines *ad hoc* whether and to what degree the restrictions pursue a legitimate aim. This approach very much resembles the approach of the ECJ. In principle, both Courts are very pragmatic. The review of proportionality is the decisive criterion in order to strike down national restrictions. The result has been a case-by-case consideration of the nature of remedies and their relationship to the substantive provisions of the Convention. One finds no objective criteria of balancing in the judgments of the ECtHR. However, the impression is that the two Courts, in principle, safeguard the same standard of effectiveness.

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[828] Compare with the "commensurate" compensation under Member State liability in Chapter 4.4.

[829] (1986) 8 EHRR 123.

[830] Op.cit., para 54.

[831] In *Lithgow* (1986) 8 EHRR 329, the ECtHR has stated that the taking of property in the public interest without any compensation was justifiable only in exceptional circumstances. A fair balance had to be struck between the demands of the general interest of the community and the protection of the individual's fundamental rights. A disproportionate burden should not be imposed on individual owners.

In *Dangeville v. France*[832] the ECtHR has reached a solution which would be the outcome of the principle of effectiveness if the case was decided by the ECJ.[833] The applicant, S.A. Dangeville, was a company of insurance brokers whose business activity was subject to value added tax (VAT). It paid 292,816 French francs in VAT on the business it had conducted in 1978. The provisions of the Sixth Directive of the Council of the European Communities, which were applicable from 1 January 1978, exempted from VAT "insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents". On 30 June 1978 the French State was notified of the Ninth Directive of the Council of the European Communities, which gave France extra time in which to implement the provisions of Article 13 B (a) of the Sixth Directive of 1977. Nonetheless, as it was not of retrospective effect, the Sixth Directive was applicable from 1 January to 30 June 1978. The applicant, relying on the Sixth Directive, sought a refund of the VAT paid for the year 1978. The Administrative Court and subsequently the Conseil d' Etat dismissed its claim on the ground, among other things, that a Directive could not be directly invoked against a provision of national law. An administrative direction of 1986 annulled the supplementary tax assessments levied against insurance brokers who had not paid VAT for that period. The applicant lodged a second application, which was ultimately dismissed by a further judgment of the Conseil d'Etat of 30 October 1996 holding that the applicant could not seek to obtain by way of an action for damages satisfaction which had been refused to it in the tax proceedings in a decision which had become *res judicata*. However, in a judgment of the same date concerning an application brought by another company, whose business activity and claims were initially identical to those of the applicant, the Conseil d'Etat departed from its earlier decision and upheld that company's claim for a refund by the State of sums wrongly paid.

The applicant alleged a breach of Article 1 of Protocol No. 1 (protection of property) of the ECHR, arguing that it was a creditor of the State but had been definitively deprived of the possibility of enforcing its debt by the decisions of the Conseil d'Etat dismissing its claims. It also complained of a breach of Article 14 (prohibition of discrimination) of the Convention, combined with Article 1 of Protocol No. 1, on the ground that companies which had not paid VAT had been in an advantageous position compared to taxpayers who had spontaneously filed their VAT returns and that another company had benefited from a departure from the

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[832] *SA Dangeville v. France*, (Appl. 36677/97), Judgment of 16 April 2002.

[833] Compare with Case C-228/98, *Dounias*, *infra*, Chapter 7.4.

earlier decision and obtained a VAT refund despite the fact that their situations were identical. The ECtHR noted that on both its applications the applicant was a creditor of the State on account of the VAT wrongly paid for the period 1 January to 30 June 1978 and that in any event it had at least a legitimate expectation of being able to obtain a refund.[834] The applicant company's claim was based on a Community norm that was perfectly clear, precise and directly applicable. The national procedural rule regarding the "classification of proceedings" cannot therefore cause a substantive right created by the Sixth Directive to disappear.[835] In the view of ECtHR the applicant company cannot be required to suffer the consequences of the difficulties that were encountered in assimilating Community law or of the divergences between the various national authorities.[836] The ECtHR found that the interference with the applicant's possessions did not satisfy the requirements of the general interest and that the interference with the applicant company's enjoyment of its property was disproportionate because its inability to enforce its debt against the State and the lack of domestic proceedings providing a sufficient remedy to protect its right to respect for enjoyment of its possessions upset the fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[837] It concluded unanimously that there had been a breach of Article 1 of Protocol No. 1, held that it was unnecessary to examine separately the complaint based on Article 14 combined with Article 1 of Protocol No. 1 and awarded the applicant company pecuniary damage.

6.4 The compatibility of the Community Courts' procedures with the ECHR

The mutual penetration between the two jurisdictions has led applicants to plead Articles 6 and 13 of the Convention complaining for incompatibility of the procedural rules before the Community Courts, although the Community is not yet a contracting party. Examples are offered by the cases that concern the right to reply to the Opinion of the Advocate General and the *locus standi* before Community Courts. The analysis below shows that, under certain

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[834] Op.cit., para 44.

[835] Op.cit., para 47.

[836] Op.cit., para 57.

[837] Op.cit., para 61.

circumstances, the two Courts may produce divergent case law on the effectiveness of procedures.

6.4.1 The right to reply to the Opinion of the Advocate General

The procedure before the Community judicature does not confer on the parties any absolute right to challenge the Opinion of the Advocate General. The question is whether this complies adequately with the requirements of the ECHR as interpreted by the ECtHR. In *Emesa Sugar*[838] the applicant sought leave to submit written observations after the Advocate General had delivered his Opinion. Although the EC Statute of the ECJ and the rules of procedure of the Court make no provision for the parties to submit observations to the Advocate's General Opinion, Emesa relied on the case law of the ECtHR concerning the scope of Article 6(1) of the Convention and in particular, the judgment in *Vermeulen v. Belgium.*[839]

In the latter case the ECtHR had found, by fifteen votes to four, that the participation of the *Procureur General* of the Belgian Court of Cassation in the adjudication of a civil case infringed Article 6(1) of the Convention.[840] The ECtHR examined the role of the *Procureur General* in the procedure and found that this was to assist the Court of Cassation with the strictest objectivity and to help ensure that its case law is consistent. His submissions contain an opinion which derives its authority from that of the *Procureur General's* department. Although it is objective and reasoned in law, the opinion is nevertheless intended to advise and accordingly influence the Court of Cassation. The ECtHR concluded that the fact that it was impossible for Mr Vermeulen to reply to the submissions of the *Procureur General* before the end of the hearing infringed his right to adversarial proceedings.

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[838] Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, French Edition [2000] ECR I-665. See R. Lawson, (2000) *Common Market Law Review* 983.

[839] (2001) 32 EHRR 15.

[840] A similar finding had been made in relation to the participation of the Advocates-General or similar officers at the Court of Cassation or Supreme Court in Belgium, Portugal, the Netherlands and France: *Borgers v. Belgium* (1991) 15 EHRR 92; *J.J. v. the Netherlands* (1999) 28 EHRR 168; *Reinhardt and Slimane-Kaïd v. France* (1999) 28 EHRR 59; *Lobo Machado v. Portugal* (1997) 23 EHRR 79; *Van Orshoven v. Belgium* (1998) 26 EHRR 55.

The ECJ distinguished the role of the Advocate General from that of the *Procureur General*. It based its reasoning on the organic and functional link between the Advocate General and the Court. The Advocates General are not comparable to public prosecutors. They are not subordinate to any other, nor are they subject to any authority and they are not entrusted with the defence of any particular interest. Their duty is to make reasoned opinions, acting with complete impartiality and independence, in order to assist the Court. The Opinion of the Advocate General brings the oral proceedings to an end and opens the stage of deliberation by the Court. It is not an opinion addressed to the judges or to the parties which stems from an authority outside the Court but it constitutes the individual reasoned opinion, expressed in open court, of a Member of the ECJ itself.[841]

The ECtHR expressed a different view in *Kress*.[842] In assessing, *inter alia*, whether the inability of the parties to respond to the submissions of the *Commissaire du Gouvernement* was compatible with Article 6(1) ECHR, it stated that no one has ever cast doubt on the independence or impartiality of the *Commissaire du Gouvernement*, and the Court considers that his existence and institutional status are not in question under the Convention. However, the Court was of the view that the Commissaire's independence and the fact that he is not responsible to any hierarchical superior which is not disputed, are not in themselves sufficient to justify the assertion that the non-disclosure of his submissions to the parties and the fact that it is impossible for the parties to reply to them are not capable of offending against the principle of a fair trial. This enabled the Strasbourg Court to reiterate its case law, according to which "the concept of a fair trial also means in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision."

In *Kaba*[843] Colomer A-G issued an Opinion explaining in length why private parties should not be entitled to submit observations to the Opinion of the A-G. He repeated that there is no need

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[841] See, op.cit., paras 11-18.

[842] *Kress v. France* (2002) 23 *Human Rights Law Journal* 123.

[843] Case C-466/00, *Arben Kaba v. Secretary of State for the Home Department*, Opinion delivered on 11 July 2002 (not yet published).

to submit to an adversarial process statements made by a judge, whose impartiality and independence is beyond doubt, in the exercise of his judicial function.[844] He stressed also that, before the ECJ, litigants enjoy the benefit of not inconsiderable guarantees for the protection of similar rights of defence. In the interests of the very objective of the adversarial process, namely to prevent the ECJ from being influenced by arguments on which the parties have not had an opportunity to comment, the Court may on its own motion, on a proposal from the Advocate General or at the request of the parties, reopen the oral procedure, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties.[845] According to his view, to confer on the parties the right to submit observations in response to the Opinion of the Advocate General, with a corresponding right for the other parties, be they principal parties or interveners, to reply to those observations would cause serious difficulties and considerably extend the length of the procedure. Were the parties to be allowed the last word in the procedure, this would run counter the duty of impartiality and independence, because the Advocate General, knowing that his Opinion would be the subject of a response from the parties, would inevitably take their reactions into account when drafting it.[846] Ultimately, the Advocate General would be transformed into something which he has never been, namely a party to the proceedings which would irremediably distort his role in the proceedings and thus the usefulness of his office and of his existence.[847]

A potential divergence between the case law of the two Courts on the same issue is a prospect that would run against legal certainty. We have seen so far that both Courts are pragmatic and it is difficult to extract objective criteria to determine the effectiveness of remedies and procedures. The national courts that will be in front of a dilemma have a right to refer the question to the ECJ that will probably refer in its judgment to the case law of the ECtHR. Before accession, however, to the ECHR, the ECJ and the CFI are not obliged to comply with the

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[844] Op.cit., para 94.

[845] Op.cit., para 108. See Case C-50/96, *Deutsche Telekom AG v. Lilli Schröder* [2000] ECR I-743 and Joined Cases 270 and 271/97, *Deutsche Post AG v. Sievers and Schrage* [2000] ECR I-929, where, however, the Court of Justice refused to reopen the oral procedure.

[846] Op.cit., see paras 109-110.

[847] Op.cit., see para 113.

judgments of the ECtHR. This means that they are placed in a favourable position in relation to Member State courts. This is a peculiar result, because the ECJ has arranged a system of remedies before national courts very similar to the one before itself. One would expect after the adoption of the draft Constitution and the Charter that the Community courts will take into account seriously the case law of the ECtHR on the effectiveness of procedures, if it imposes on national courts standards that are higher than those provided under their Statutes.

6.4.2 *Locus standi* before the Community courts

Access to justice is a *sine qua non* element of effective judicial protection. A standard condition of admissibility for access to justice is *locus standi*. The Treaty provides that private parties can bring an action for annulment before the ECJ only if they are directly and individually concerned.[848] It is well known that the ECJ has interpreted these terms very restrictively.[849] Only in specific fields (competition, state aids, anti-dumping) it has allowed individuals to bring actions for annulment.[850] There have been many voices in favour of relaxing the system.[851] The

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[848] Article 230(4) reads:" Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."

[849] Case 25/62, *Plaumann & Co. v. Commission* [1963] ECR 95.

[850] See M. Hedemann-Robinson, *Article 173 EC, General Community Measures and Locus Standi for Private Persons: Still a Cause for Individual Concern?* (1996) *European Public Law* 81.

[851] See F. Schockweiler, *L`access à la justice dans l`ordre juridique communautaire* (1996) 25 *Journal des Tribunaux, Droit européen* 1; J. Moitinho de Almeinda, *Le recours en annulation des particuliers (article 173, deuxième alinéa, du traité CE): nouvelles réflexions sur l`expression la concernant…individuellement*, Festschrift für Ulrich Everling, Vol. I, (1995) p. 849; G. Mancini, *The role of the supreme courts at the national and international level: a case study of the Court of Justice of the European Communities*, *The Role of the Supreme Courts at the National and International Level: a case study of the Court of Justice of the European Communities* in P. Yessiou-Faltsi (ed.) (1998), p. 421; K. Lenearts, *The legal protection of private parties under the EC Treaty: a coherent and complete system of judicial review?* Scritti in onore di Giuseppe Federico Mancini, Vol. II (1998), p. 591; A. Albors-Llorens, *Private Parties in European Community Law: Challenging Community Measures* (OUP 1996); A. Arnull, *Private applicants and the action for annulment under Article 173 of the Treaty* (1995) *Common Market Law Review* 7; *The action for annulment: a case of double standards?* in *O'Keeffe and Bavasso (eds.), Judicial Review in European Law (Liber Amicorum in Honour of Lord Slynn of Hadley)* (2000), pp.177-190; D.

basic arguments put forward are the constitutional principle of effective judicial protection and the right of access to justice. The applicants who wanted to challenge restrictive *locus standi* before the ECJ and the CFI raised articles 6 and 13 of the Convention.[852] Jacobs A-G delivered an Opinion in *UPA*[853] criticising the current system of access to Community courts.

UPA was a trade association that represented and acted in the interests of small Spanish agricultural businesses. It sought the annulment of Regulation 1638/98,[854] which amended substantially the common organisation of the olive oil market on a number of grounds.[855] Although standing for public interest bodies is found in various forms in many national legal systems, in *Stichting Greenpeace*[856] the ECJ has shown itself unwelcoming to the public interest action.[857] In *UPA* Jacobs A-G suggested a new interpretation of the notion of individual concern. He proposed that a person should be regarded as individually concerned by a

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Walbroeck and A.-M. Verheyden, *Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires: à la lumière du droit comparé et de la Convention des droits de l` homme*, (1995) *Cahiers de droit européen* 399; G. Vandersanden, *Pour un élargissement du droit des particuliers d`agir en annulation contre des actes autres que les décisions qui leur sont adresséees* (1995) *Cahiers de droit européen* 535.

[852] See Joined Cases T-172/98 and T-175/98 to T-177/98, *Salamander v. Parliament and Council* [2000] ECR II-2487.

[853] Case C-50/00 P, *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677. T-177/01, *Jégo-Quéré et Cie v. Commission* [2002] ECR II-2365. See also Case T-13/99 *Pfizer v. Council* of 11 September 2002 (not yet published) and Case T-70/99 *Alpharama v. Council* of 11 September 2002 (not yet published).

[854] Council Regulation 1638/98 amending Regulation No 136/66/EEC on the establishment of a common organisation of the market in oils and fats (OJ 1998 L 210/32).

[855] It submitted that the contested regulation did not fulfil the requirement to give reasons laid down in Article 190 of the Treaty (now Article 253 EC), that it did not contribute to the goals of the common agricultural policy set out in Article 39 of the Treaty (now Article 33 EC), and that it violated the principle of equal treatment of producers and consumers set out in Article 40 para 3 EC (now Article 34 para 3 EC) as well as the principle of proportionality, the right to exercise a profession and the right to property.

[856] Case T-585/93, *Greenpeace and Others v. Commission* [1995] ECR II-2205.

[857] L. Gormley, *Public Interest Litigation in Community law* (2001) *European Public Law* 51, 57. Also, B. de Witte, *The Past and Future Role of the European Court of Justice in Human Rights* in Alston, *The EU and Human Rights* (OUP 1999) 859.

Community measure where, by reason of his particular circumstances, the measure has, or is liable to have substantial adverse effects on his interests.

His main arguments are the following. Under the preliminary ruling procedure the applicant has no right to decide whether a reference is made which measures are referred for review or what grounds of invalidity are raised and thus no right of access to the ECJ;[858] on the other hand, the national court cannot itself grant the desired remedy to declare the general measure in issue invalid; there may be a denial of justice in cases where it is difficult or impossible for an applicant to challenge a general measure indirectly (e.g. where there are no challengeable implementing measures or where the applicant would have to break the law in order to be able to challenge ensuing sanctions);[859] legal certainty pleads in favour of allowing a general measure to be reviewed as soon as possible and not only after implementing measures have been adopted;[860] indirect challenges to general measures through references on validity under Article 234 EC present a number of procedural disadvantages in comparison to direct challenges under Article 230 EC before the CFI as regards for example the participation of the institution(s) which adopted the measure, the delays and costs involved, the award of interim measures or the possibility of third party intervention.[861] A final argument is that the case law on standing for individual applicants is out of line with the administrative laws of Member States.[862]

The CFI has had its own intellectual input on the issue in *Jégo-Quéré*.[863] The applicant was a French company owning four fishing boats which were accustomed to fish using nets having a mesh of 80mm in the waters south of Ireland. The use of such nets in that part of the

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[858] Op.cit., para 42.

[859] Op.cit., para 43.

[860] Op.cit., para 48.

[861] Op.cit., para 56.

[862] Op.cit., para 85.

[863] T-177/01, *Jégo-Quéré et Cie v. Commission* [2002] ECR II-2365. See also Case T-13/99 *Pfizer v. Council* of 11 September 2002 (not yet published) and Case T-70/99 *Alpharama v. Council* of 11 September 2002 (not yet published).

Community fishery has been banned by a new Community regulation[864] and the applicant was seeking to challenge those rules. The CFI recognized that, under the existing case law of the Community Courts, the applicant's action would have to be dismissed. However, the CFI found that the current situation is unsatisfactory because it prevents many individuals and businesses, in situations similar to that of the applicant, from challenging measures of general application which directly affect their legal position. It pointed out that none of the other procedural routes available for challenging Community measures is an adequate substitute for a direct action seeking annulment. In particular, it drawed attention to the fact that, in situations where no implementing measures need to be taken at national level, an individual may only be able to obtain a ruling on the legality of a Community measure by knowingly breaking the law[865] and asking the national court before which he is prosecuted to refer that legal question to the ECJ. Similarly, the CFI ruled that the action for damages is not an appropriate procedure for challenging an illegal measure of Community law because of the particular legal conditions that need to be satisfied for such an action to succeed. The CFI referred also to the fact that the ECtHR and the Charter of Fundamental Rights of the European Union both affirm the right of individuals to an effective remedy before a court of law. It concluded that the concept of individual concern under Article 230(4) of the EC Treaty should no longer be interpreted in a way that limits the right of individuals to challenge Community regulations to exceptional cases. In order to ensure effective legal protection, the concept must be redefined as follows: a person is to regarded as individually concerned by a Community measure of general application that concerns him directly, if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him.[866] The number and the position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard. The provisions of the regulation at issue imposed obligations on the applicant company in that they required it to use only nets of a particular mesh size. It followed that the applicant was both individually and directly concerned by the

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[864] Regulation (EC) No 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d, e and associated conditions for the control of activities of fishing vessels (OJ 2001 L 159/4).

[865] See, also, *Posti and Rahko v. Finland* of 24 September 2002, para 64.

[866] This test is stricter than the one proposed by AG Jacobs. The person must be affected and not likely to be affected.

regulation which it sought to challenge and the CFI therefore dismissed the Commission's claim of inadmissibility. [867]

The ECJ did not follow the Advocate General in *UPA*. It dismissed the idea of transforming the condition of individual concern. It confirmed the long standing case law on the matter repeating the argument that the Treaty does not allow a less restrictive reading of the conditions for *locus standi* and underlining that it is for the Member States decide to amend the Treaty on this issue.[868] The ECJ respected the sovereignty of Member States on the issue. Without the creation of an hierarchy of norms in the European Community, where the legislative acts would be clearly distinguished from the administrative or regulatory acts, it would be difficult to change the current system of *locus standi*.[869] The Court has made the system of remedies before itself subsidiary and the national courts, primarily, responsible for the protection of Community rights. The view that the Advocate General takes towards the protection of Community rights before national courts reveals scepticism and mistrust to decentralisation. It is standard case law that if there is no remedy provided before national courts, Member States are obliged to create a remedy.

The draft Constitution signals an attempt to redress some of the inequities of the case law. Article III-270(4) amends Article 230(4) as follows: "Any natural or legal person may...institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures." It is not clear, however, in the light of the hierarchy of norms created in Articles I-32 *et seq* what is considered to be a regulatory act. One assumes that this term includes the non-legislative acts under Article I-34[870] and Article I-32(1) fourth

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[867] Op.cit., paras 41-54.

[868] Op.cit., para 45.

[869] See M. Vilaras, *Protection juridictionelle effective: une justice ouverte et rapide?* in *L´avenir du système jurisdictionnel de l´Union européenne* (2002) Editions de l´Université de Bruxelles.

[870] "1. The Council of Ministers and the Commission shall adopt European regulations or European decisions in the cases referred to in Articles 35 and 36 and in the cases specifically provided for in the Constitution. The European Council shall adopt European decisions in the cases specifically provided for in the Constitution. The European Central Bank shall adopt European regulations and European decisions when authorised to do so by

indent,[871] because legislative acts issued by national Parliaments cannot be annulled in national courts. The ECJ has to clarify the meaning of the regulatory act. According to the drafted relaxation of *locus standi* an individual may challenge both legislative (European laws,[872] European framework laws[873]) and regulatory acts if he is able to prove direct and individual concern and regulatory acts, which require no further implementation, if he is able to prove direct concern. It follows that, in relation to legislative acts, the applicant has to overcome the high hurdle of proving individual concern. Therefore, individual concern is no longer required where the contested measure is a regulatory act, it is of direct concern to the applicant and it does not entail implementing measures. In this way, the Constitution finds the balance between the protection of the fundamental principle of access to justice and the support of the currect system of decentralisation of justice, which is indispensable in the light of the enlargement of the EU.

Conclusion

Although there are common principles in the case law of the ECJ and the ECtHR on the effectiveness of remedies and procedures, one cannot exclude the prospect of conflicting case law in the elaboration of these principles. Since it is more and more difficult to speak of two systems of protection of human rights, it would be better if only one Court was authorised to decide, especially from the point of view of legal certainty. This must be the Strasbourg Court, because it has the expertise, the experience and the mandate to protect fundamental rights in

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the Constitution. 2. The Council of Ministers and the Commission, and the European Central Bank when so authorised in the Constitution, adopt recommendations."

[871] " A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain specific provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as regards the result to be achieved, on all Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving the result."

[872] "A European law shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States."

[873] " A European framework law shall be a legislative act binding, as to the result to be achieved, on the Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result."

Europe. In this respect, the accession of the EU to the Convention would preserve the unity of law. Given its constitutional significance, accession would require an amendment of the Treaty.[874] The Member States have not manifested their wish to effect that amendment in the Amsterdam and Nice treaties, but the draft Constitution in Article I-7 provides that the EU shall seek accession to the ECHR.

[874] Opinion 2/94 of 28 March 1996 [1996] ECR I-1759, para 35.

Chapter 7: The protection of Community rights in Greek courts

This Chapter covers the impact of Community law of remedies and procedures on the Greek jurisdiction.[875] This is interesting from two points of view. First, it examines the influence of Community law on a civil law jurisdiction. Second, the influence of Community law on the Greek jurisdiction is less well known and assessed. It examines, in particular, whether the Greek legislation affords adequate remedies for the protection of Community rights.[876] The Chapter discusses the action for annulment, interim relief, restitution, State liability and preliminary references. To place the discussion in context, the Chapter commences by examining the review of constitutionality of laws in Greece.

7.1 The review of the constitutionality of laws

Constitutional review can be defined simply as the process by which a court sets aside legislation, directly or indirectly, because it conflicts with a higher constitutional norm.[877] At the top of the Greek legal system lies the Constitution. This includes an obligation on the courts to deny the applicability of a law that runs counter the Constitution. This obligation has a dual legal basis: Article 93, s. 4 provides that the courts shall be bound not to apply laws, the contents of which are contrary to the Constitution. Moreover, Article 87, s. 2 provides: "In the

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[875] See S. Koukouli-Spiliotopoulou, *Issues arising under the influence of Community law in Greece* (Ζητήματα από την επίδραση του κοινοτικού δικαίου στην Ελλάδα) (1992) *Νομικό Βήμα* 53; G. Papadimitriou, *The internationalization and communitarization of judicial protection* (Η διεθνοποίηση και κοινοτικοποίηση της δικαστικής προστασίας) 44 (1996) *Νομικό Βήμα* 38. Ioannou K., *National remedies and breach of Community law* (1994) *Ελληνική Επιθεώρηση Ευρωπαϊκού Δικαίου*, p. 1 et seq.

[876] See on direct effect Council of State 815/84, *Νομικό Βήμα* 32 (1984), 925; Council of State 2152/86 (full bench) 35 (1987) *Νομικό Βήμα* 239 and 3312/89, not published; Administrative Court of Lamia 44/86 (1988) *Επιθεώρηση Ευρωπαϊκού Δικαίου* 161; *Areios Pagos* 10/2000, 48 (2000) *Νομικό Βήμα*, 1246. See also K. Kerameus and G. Kremlis, *The application of Community law in Greece 1981-1987* (1987) *Common Market Law Review* 141.

[877] See A. Kaltsa, *The Review of Constitutionality of Laws in Greece* (1998) *European Public Law* 292. See V. Skouris and E. Venizelos, *The judicial review of constitutionality of laws* (Ο δικαστικός έλεγχος της συνταγματικότητας των νόμων, Sakkoulas 1985).

exercise of their duties, judges shall be subject only to the Constitution and the laws; in no case shall they be obliged to comply with provisions enacted in contravention of the Constitution." The Greek Constitution also provides for a Special Supreme Court empowered under certain circumstances to declare a clause of a statute unconstitutional and invalid (Article 100, s. 4).

The judicial review of the constitutionality of laws covers both formal and substantive constitutionality. The former means that Acts of Parliament and delegated legislation must have been issued by the competent bodies, according to the Constitution. The latter means that the contents of the provisions of a statute must not contradict the substantive provisions of the Constitution. To be legally precise, the judge actually investigates whether there is a disagreement between the law and the Constitution and not whether the law is in accordance with the Constitution.[878] In all these cases, judicial competence is limited in that the court does not apply the unconstitutional provision; the power of the court does not extend to declaring the provision null and void.

The review of constitutionality is diffuse, incidental and specific: "Diffused" review means that every court of law, of every instance and branch of law, has jurisdiction to review the constitutionality of laws (in contrast to "concentrated" review that is exercised by a Supreme Court, usually a constitutional court).[879] "Incidental" review means that the unconstitutionality is not the subject matter of a trial, but arises incidentally within an already existing trial. For the same reason and with the exception of the Supreme Special Court, the relevant argument is never mentioned in the operative part of the judgment, but remains only in its reasoning. "Specific" review, finally, means that the judge sticks to the examination of the constitutionality of the provision in question, without considering the totality of the law.

The allegation that a provision is incompatible to the Constitution is called "objection of unconstitutionality." It is examined by the courts on their own motion but can also be proposed in any instance or stage of the proceedings, even originally during the appeal or cassation. Thus, each party or the public prosecutor can present the objection at any stage of civil,

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[878] Council of State 1400/48, not published.

[879] The "diffused" character of review is compatible with the requirement under *Simmenthal* that entrusts the enforcement of Community law to all national courts, irrespective of their position in the national hierarchy.

criminal and administrative proceedings. If one takes into account that under the Greek Constitution national courts are obliged to examine on their own motion the constitutionality of laws (Article 93(4)), the application of a certain provision by a court implies that it complies with the Constitution.[880] An allegation that the crucial provision of law is unconstitutional can form the sole reason for the annulment of a regulatory or an individual administrative act, which on these grounds can be nullified.

The question arises whether the principle of equivalence requires the application of the same rules for the review of compatibility of Greek laws with the Community norms and if yes, which Community norms are held to be comparable. It is submitted that the Treaty should enjoy the legal status of the Greek Constitution.[881] This is because both the Greek Constitution and the EC Treaty enjoy primacy over secondary Greek legislation. According to Article 28(1) of the Greek Constitution, international conventions have to be ratified by the national parliament and prevail over any other law conflicting with them. Therefore, the system of review of constitutionality should be applicable for the control of compatibility of the Greek legislation with the Treaty as well. The basic consequence of the above premise is that all courts (civil, criminal, administrative) should "filter" the national laws through the Constitution and the Treaty. Also, according to *Areios Pagos* (Greek Court of Cassation) the issue of compatibility of national legislation with the Constitution concerns public policy and thus it is examined *ex propriu motu*.[882] The same applies for the issue of compatibility of national legislation with the Treaty. So far as the secondary Community legislation is concerned this cannot be considered to have a "constitutional" status or a "public policy" character within the Member States. If national judges were obliged to apply of their own motion secondary Community legislation, they would face a huge burden. Whether the subject matter of a Regulation or a Directive is included in the public policy of a Member State is a matter to be decided by the ECJ.[883]

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[880] Council of State 4186/88, not published.

[881] The legal foundation of primacy in the Greek jurisdiction is not uncontroversial. See E. Sachpekidou, The application of Community law before Greek Courts (Η εφαρμογή του κοινοτικού δικαίου από τα ελληνικά δικαστήρια), Paper in the conference "Greek law and Civil Provedure" (Ελληνικό Δίκαιο και Πολιτική Δικονομία) Alexandroupoli, 3-6 June 1999.

[882] Areios Pagos 1949, (1949) *Επιθεώρηση Εμπορικής Νομοθεσίας* 732.

[883] See, for example, Case C-126/97, *Eco Swiss*, op.cit.

The fact that the Treaty can be equated with the Greek Constitution does not mean that the incompatibility to the Treaty can be equated in every respect with incompatibility to the Constitution. For example, Article 563 para 2 of the Code of Civil Procedure provides that when a Chamber of Areios Pagos refuses to apply a law as unconstitutional obliges the Chamber to refer the issue to the full bench of Areios Pagos. This provision is unsuitable for cases of incompatibility of Greek law with Community law. If this provision applied in relation to Community law, it would run counter *Simmenthal* which provides for an unrestricted right and duty of the national judge to make a preliminary reference.

7.2 The action for annulment

The Supreme Administrative Court's review of administrative decisions is a review of lawfulness modelled on that carried out by the French *Conseil d'Etat* on applications for judicial review. The requirement in *Heylens*[884] is satisfied in that the Supreme Court examines the reasons for the contested decision, in particular whether it is based on substantive provisions or an interpretation of them, the substantive assessment of the circumstances of fact and their possible legal classification and the administrative body's criteria and conclusions in respect of the exercise of its discretion. The reasoning must be derived from the case file; it must be precise and adequate and contain the essential circumstances of the case in order that it may be determined whether the administrative body's application of the legal rules was justified.[885]

The action for annulment is dependent on the exhaustion of a parallel judicial or administrative remedy.[886] If there is a parallel judicial remedy or a right to an administrative appeal either before the organ that has issued the act or a superior organ that is competent to re-examine the merits of the case, the action for annulment is inadmissible. So far as the judicial remedy is concerned, it must afford same or equivalent legal protection with the one afforded by the action for annulment. Accordingly, there is no problem with the Council of State finding that the

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[884] Case 222/86 *Heylens v. UNECTEF* [1987] ECR 4097.

[885] E. Spiliotopoulos, *Manual of administrative law* (Εγχειρίδιο Διοικητικού Δικαίου) (2002 Sakkoulas) p. 475-482.

[886] See Art. 45(2) of Presidential Decree 18/1989 and art. 1-4 of Law No. 702/77, Official Gazette (ΦΕΚ) 268 A/19.9.77.

contest of administrative measures that are issued according to national legislation implementing Community rules is subject to an action for annulment (Article 95 (1) subpara a of the Constitution) unless there is another judicial remedy affording equivalent protection.[887] With regard to the administrative remedy, this must be provided expressly by a piece of national legislation and the interested parties must be informed of the availability of this remedy, the time limit and the organ before which it must be lodged. The action for annulment can be instituted only against the reply of the administration and if there is no reply against this refusal to reply. This condition is also compatible with Community law. In *Kofisa*[888] the Court of Justice interpreted Article 243 of the Customs Code as meaning that it is for national law to determine whether a trader must initially bring an appeal before the customs authority or whether he can appeal directly to the judicial authority. Also, in staff cases a standard condition of admissibility is, according to Articles 90 and 91 of the Staff Regulations, the lodging of a prior administrative complaint brought within the prescribed time limit to permit the amicable settlement of disputes which have arisen between officials and the administration.[889]

Recently the full bench of the Greek Council of State[890] dealt with the right to annul the failure of the Greek State to implement a Directive. Under the Greek Constitution the Parliament is primarily competent to enact legislation, while Law No. 1338/83 (articles 1-3) on "application of Community law"[891] as modified later by Article 6 para 4 of law 1440/84[892] includes a general legislative authorization to the Administration for the incorporation of secondary Community legislation in the form of Presidential Decree. In particular, the applicant tried to annul the

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[887] Council of State 745/95 (full bench) confirmed in Administrative Court of Athens 6692/97, *Διοικητική Δίκη* 1999, 155.

[888] Case C-1/99, *Kofisa Srl and Ministero delle Finanze, Servizio della Riscossione dei Tributi-Concessione Provincia di Genova-San Paolo Riscossioni Genova SpA* [2001] ECR I-207.

[889] See, indicatively, Case 126/87, *Sergio del Plato v. Commission* [1989] ECR II-643.

[890] Council of State 2079/99, (2000) *Επιθεώρηση Δημοσίου και Διοικητικού Δικαίου* 98.

[891] Official Gazette (ΦΕΚ) Α΄ 34.

[892] Official Gazette (ΦΕΚ) Α΄ 70.

failure of the Administration to implement the Directive 89/48[893] concerning recognition of higher-education degrees. In a previous ruling, the Court of Justice had found that Greece failed to transpose it within the prescribed time limit.[894] Since the failure of the Parliament to pass the relevant legislation is not subject to an action for annulment,[895] the applicant sought to review the failure of the administration to issue the relevant acts that would implement the Directive.

The Sixth Chamber of the Council of State in its judgment 4753/97[896] (with which it referred the case to the full bench of the Council of State) decided that the Administration was obliged to transpose the Directive, because the Parliament did not enact the implementing legislation within the 2 year prescribed period by the Directive. A standard condition under Article 45 para 4 of the Presidential Decree 18/1989 is that a failure to act can be annulled only in case the administration is obliged to act. The Council of State has consistenly accepted that, when the Administration has discretion to act, there can be no annulment of regulatory acts or ommissions, because the discretion of the Administration whether and when to issue a regulatory act is not subject to judicial review.[897] An example where the Administration has no discretion is the case where there is a law requiring the issue of a regulatory act within a deadline.[898] The obligation for the implementation of the Directive derives from Articles 5, 169, 171 and 189 of the Treaty and thus the failure to issue a Presidential Decree for this purpose should be subject to an action for annulment. However, according to the Sixth Chamber of the Council of State the application failed as inadmissible, because it was not brought within the necessary time limit.

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[893] Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L19/16).

[894] Case C-365/93, *Commission v. Greece* [1995] ECR I-499.

[895] Council of State 2068/87, not published.

[896] Council of State 4753/97 (1998) *Επιθεώρηση Δημοσίου και Διοικητικού Δικαίου* 130.

[897] Council of State 1391/1990, 32 (1991) *Ελληνική Δικαιοσύνη* 864; Committe of Suspensions 265/1993, (1993) *Ελληνικό Δίκαιο Κοινωνικών Ασφαλίσεων* 447.

[898] Council of State 3255/96 (1996) *Ελληνικό Δίκαιο Κοινωνικών Ασφαλίσεων* 733.

The full bench of the Council of State based its reasoning on the principle of co-operation under Article 10 EC and on the definition of Directives under Article 249, mainly the discretion enjoyed by Member States as to the method of transposing a Directive. It noted that Law No. 1338/1983 delegates to the administration the implementation of the Community law provisions but does not foreclose the legislature to adopt the implementing legislation. Therefore, on the basis of the joined jurisdiction between the legislature and the executive it concluded that an action for annulment could not substitute the full implementation of Community law. A plausible explanation for this reasoning is that the Council of State did not want to interfere with the legislative authority and respected the separation of powers between legislature, judiciary and administration prescribed by Article 26 of the Greek Constitution. The minority argued that because of the major delay Greece lost its discretion to choose how to transfer the Directive into the Greek legal order (either by an Act of the Parliament or the issue of a Presidential Decree) and that it should implement the Directive only by the fastest way which was the issue of the Presidential Decree. The question for the minority was not whether the Parliament still had the right to implement it but why the Administration failed to do so. Further, the minority applied *Emmott* and found that the action should not be found inadmissible, because the time limit could not start before the full implementation of the Directive.[899]

The reasoning of the majority is not convincing. The rule that the Greek Council of State formulates is that one cannot annul the failure of the administration to implement a Directive. The judgment of the Council of State compromises the direct effect of Community law.[900] The Council of State did not refer to the direct effect of the relevant Directive.[901] In effect it denied

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[899] The reference to *Emmott* is an example of how national courts can be confused by the inconsistent case law of the Court of Justice.

[900] In principle, Greek courts accept the doctrine of direct effect. See for example Council of State 815/84, *Νομικό Βήμα* 32 (1984), 925; Council of State 2152/86 (full bench) 35 (1987) *Νομικό Βήμα* 239 and 3312/89; Administrative Court of Lamia 44/86 (1988) *Επιθεώρηση Ευρωπαϊκού Δικαίου* 161; *Areios Pagos* 10/2000, 48 (2000) *Νομικό Βήμα*, 1246. See also K. Kerameus and G. Kremlis, *The application of Community law in Greece 1981-1987* (1987) *Common Market Law Review* 141.

[901] The Council of State denied the direct effect of the relevant Directive in 2064/94 (not published) while it has avoided since to refer this question to the Court of Justice (see for example Council of State, 3457/1998, *Nomiko Vima* 47). On the direct effect of this Directive see N. Fragakis, 47 *Νομικό Βήμα* 1032-1033 and E. Mouameletzi, 47 *Νομικό Βήμα* 1056.

the direct effect of the Community Directive, which applies independently of whether the legislature or the administration is responsible for the transposition. It is standard case law that the Administration is obliged to give full effect to the Directives.[902] Damages in this case is clearly not a sufficient alternative to the action for annulment. The fact that the Parliament has a continuous obligation to transfer the Directive does not relieve the Administration from its own obligation. This is obvious from *Brinkmann* where the Court of Justice found that the effort of the Administration to give effect to the Directive broke the chain of the causation between the damage of the applicant and the failure of the legislature to transfer the Directive. Therefore, the Administration´s failure to give effect to a directly effective Directive should be subject to an action for annulment.

7.3 Interim relief

The most significant influence that Community law has exerted on the Greek remedies is in relation to interim relief. [903] One of the main issues that troubled the jurisprudence and the doctrine for a significant period of time was the question of whether interim relief is implicitly included in the right to judicial protection provided under the Greek Constitution in Article 20(1) section (a).[904] Traditionally, the Council of State considered interim relief as an extraordinary procedure and upheld laws restricting or even prohibiting the right of stay of proceedings.[905] This case law was the object of constant criticism. In some cases, inferior courts interpreted Article 20 as including interim measures.[906] Eventually, the Committee of Suspensions of the plenary session of the Council of State accepted that interim measures are covered by the

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[902] *Fratelli Costanzo*, op.cit., paras 29-33.

[903] P. Giesiou-Faltsi, *Interim measures in a united Europe*, Paper in the Conference "The impact of Community law in private law of Greece," Thessaloniki, October 1992.

[904] It reads: "Every person shall be entitled to receive legal protection by the courts."

[905] For example Committee of Suspension of the Council of State 160/74 and 271/84, not published.

[906] Administrative Court of Appeal of Piraeus 11/92, not published. Administrative Court of Appeal of Athens 228/92, 2 (1992) *Το Σύνταγμα* 307. The latter judgment referred expressly to the judgment in *Factortame*.

protection of Article 20(1)C.[907] Although the Council of State avoided referring to the *Factortame* judgment, there is a general impression that the change in the case law was advanced by the Community law standards of judicial protection.[908] The practical consequence of this recognition is that any statutory provision or administrative normative act which provides for the abolition of, or otherwise hinders the provision of, interim relief in the administrative jurisdiction should remain inapplicable by the competent court, as being contrary to the Greek Constitution.[909]

Under Greek law the request for suspension may be lodged in principle against a positive individual act which has not been fully executed.[910] This principle leads to the following consequences. Suspension of execution cannot be granted against a negative act.[911] The prohibition of suspension of execution against negative acts appears compatible with Community law in the light of the judgment in *Port*. The opposite hypothesis would lead to conflict of powers, since the granting of a suspension of an ommission to act would be equivalent to taking action.[912] The judiciary would *de facto* substitute its decision for that of the administration. This would be unacceptable pursuant to Article 26 of the Greek Constitution that encapsulates the doctrine of separation of powers.

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[907] Committee of Suspension of the Council of State 718/93, 6 (1994) *Διοικητική Δίκη* 81.

[908] P. Pavlopoulos, *Definite and Interim Protection in Community law* (Οριστική και προσωρινή δικαστική προστασία στο πλαίσιο του κοινοτικού δικαίου) (1994) 3 *Το Σύνταγμα* 521.

[909] The case was confirmed in Administrative Court of First Instance of Athens 94/1994, *Δίκη* 26, 267; Administartive Court, Athens 1339/96, (1997) *Διοικητική Δίκη* 100; (1996) *Δελτίο Φορολογικής Νομοθεσίας,* 1571; Administrative Court, Rhodes 2/99, (1999) *Ελληνικό Δίκαιο Κοινωνικών Ασφαλίσεων* 465.

[910] An administrative act is considered fully executed, when its course of action has been completed, so that the reversal of the situation created is no longer feasible. However, the grant of suspension is possible when the execution consists in a continuous situation, the interruption of which may restore the *status quo*. Exceptionally if the negative act inhibits the maintenace of a certain situation, then the grant of a suspension is possible. In this case the Committee does not substitute for the administration because it maintains a situation following a course of action already taken by the administration.

[911] Article 31 para 6 of the Ministerial Decree 341/78.

[912] Committee of Suspension of the Council of State 207/90, 34 *Ελληνική Δικαιοσύνη* 914; Committee of Suspension of the Council of State 396/90, 34 *Ελληνική Δικαιοσύνη* 915; Administrative Court of Athens 288/2000, (2000) *Ελληνικό Δίκαιο Κοινωνικών Ασφαλίσεων* 453.

In Greek law, the criteria for suspension of administrative measures are provided by Article 52 of the Ministerial Decree 18/1989:[913] It is entitled "Suspension of execution" and it is the general provision for the right of interim relief before the Administrative Courts.

-The first condition is that the execution of the contested act must create a factual situation that may cause irreparable (or difficult to repair) harm. According to the Committee of Suspensions this harm should be direct and concrete (that is the harm should not directly concern a third person and merely indirectly the plaintiff), personal (that is that it concerns the plaintiff individuallly, not as a member of a group) and fully proved. Harm that is merely financial is not considered as irreparable, since it may be redressed by an action for damages.

-The second condition is that there should be no reason of public interest that necessitates the execution of the act. A balance of competing interests, of the applicants, third parties and the public takes place. In practice interim relief is obtained with great difficulty, especially in relation to regulatory acts,[914] because the public interest is generally considered to outweigh the plaintiff's private interest.

-The third condition is that the application for judicial review should be manifestly legal in substance.[915] The latter condition enjoys special weight. The requirement that the application for judicial review should be manifestly substantive appears stronger than the one set by the Court of Justice that national courts should enjoy serious doubts for the validity of the act.

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[913] Official Gazette (ΦΕΚ) Α΄ 8.

[914] Committee of Suspension of the Council of State 5/99, (1999) *Ελληνικό Δίκαιο Κοινωνικών Ασφαλίσεων* 688.

[915] Many specialised laws also include this requirement: Article 2 of Law 820/78, Article 73 para 3 of the Legislative Decree 356/74 "Περί Κώδικος Εισπράξεως Δημοσίων Εσόδων" (Official Gazette (ΦΕΚ) A 90), Article 3 para 5 of Law 2522/97 and Article 75a of the Legislative Decree 136/96.

Directive 89/665 EC[916] on review procedures to the award of public supply and public works contracts obliged Member States to introduce a regime of interim measures. The ECJ did not approve the practice of the Committee of Suspensions of the Council of State in relation to administrative decisions that excluded an interested party from the procedure for award of public supply and public award contracts. The Committee of Suspensions of the Council of State used to dismiss the applications of stay of execution on the ground that these were administrative measures with a negative content whose execution was prohibited and also, on the ground that the harm as financial could be repaired.[917] The Court of Justice found that Article 52 of Presidential Decree No 18/89 constitutes a general provision on the procedure for the suspension of operation of an administrative measure against which an action for annulment has been brought, and could not suffice to secure the correct transposition of the Directive.[918] The suspension procedure provided for by Article 52 of Presidential Decree No 18/89 expressly covers only applications for annulment brought by legal persons governed by public law, whereas, under Article 1 of the Directive, the review procedures introduced by the Member States must be "available ... at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement." Article 52 of the Decree in question relates only to procedures for suspension of operation of measures and presupposes the existence of a main action seeking to have the contested administrative measure annulled, whereas, under Article 2 of the Directive, the Member States are under a general duty to empower their review bodies to take, independently of any prior action, any interim measures "including measures to suspend or to ensure the suspension of the procedure for the award of a public contract." Moreover, the national legislation referred to contains no provision on damages, as provided for in Article 2(1)(c) of the Directive, for persons harmed in the event of an infringement of

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[916] Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1990 L 34/30). E. Koutoupa-Regakou, *Interim relief in the procedure of public contracts award after Law no. 2522/97l* (Η προσωρινή προστασία κατά τη διαδικασία ανάθεσης δημοσίων συμβάσεων μετά το ν. 2522/97) 47 (1999) *Νομικό Βήμα* 35; Ch. Synodinou, *Lack of homogeinity in the interim relief for the award of public contracts* (Ανομοιογένεια προσωρινής προστασίας κατά τη σύναψη συμβάσεων της διοίκησης) 12 (2000) *Διοικητική Δίκη* 273.

[917] Committee of Suspensions 26/92, not published.

[918] Case C-236/95, *Commission v. Greece* [1996] ECR 4459.

Community law in the field of public procurement or national rules implementing that law. Neither does the national legislation mentioned transpose Article 3 of the Directive, which organizes the procedure for the intervention of the Commission in the procedure of award of the public contract. Admittedly, the Council of State interprets Article 52 of the Presidential Decree in conformity with the Directive and holds that any interested party has the capacity to seek suspension of operation of measures of contracting authorities. However, the Court of Justice has consistently held that it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts. Having regard, however, to the wording of Article 52 of the Presidential Decree, which seems to confine the capacity to bring proceedings to legal persons governed by public law, case law such as that of the Council of State cannot, in any event, satisfy those requirements of legal certainty.

As a consequence of the Court of Justice's jurisprudence, the Council of State changed its case law on the criteria of granting stay of execution of administrative measures which concerned the exclusion of interested parties from the procedure of award of public supply and public works contracts.[919] In its judgment 355/95, known also as *Intrasoft*, the Committee of Suspensions ruled that stay of execution of administrative measures concerning the exclusion of an interested party from the procedure of award might be granted. It recognized on the one hand that these acts are positive in nature and create a new legal and factual situation for the one that is excluded and on the other hand that the harm threatened despite its non financial nature justifies the stay of execution. The principle of good administration requires also the stay of execution of the disputed act until the judgment of the Committee of Suspensions is published. *Intrasoft* was confirmed in subsequent case law.[920] Under the pressure of the Commission, the Court of Justice and the Greek Council of State, the Greek Parliament enacted Law No. 2522/97 ("Judicial protection during the stage that precedes conclusion of public works, supplies and services contracts") in order to comply fully with Directive 89/665.

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[919] See I. Petroglou, *The new conditions for interim relief by the Committee of Suspensions of the Council of State* (Τα νέα κριτήρια χορήγησης αναστολής εκτέλεσης από την Επιτροπή Αναστολών του Συμβουλίου της Επικρατείας) (1996) *Ελληνικό Δίκαιο Κοινωνικών Ασφαλίσεων* 593.

[920] Committee of Suspensions 355/95, (1996) *Ελληνικό Δίκαιο Κοινωνικών Ασφαλίσεων* 603. See, also, Committee of Suspensions 470/1995, 474/95, 475/95, 557/95, 559/95, 72/96, 119/96, 172/96 etc.

Subsequent decisions applied the new Law No. 2522/97 even to procedures of award that were regulated purely by internal law in order to avoid reverse discrimination.[921]

[921] Committee of Suspensions 6, 114/98, 54/98 and 224/98, not published.

7.4 Restitution

It is a general principle of Community law that payments made by individuals to national authorities which are levied contrary to Community law must be reimbursed. We have already seen that the Court of Justice established the remedy of restitution, in principle, as a strict liability to repay. Under Greek law the right of repayment of unlawful paid levies, in principle, is not subject to additional positive or negative conditions. It is irrelevant whether the applicant paid in good faith, protested before paying, abused his right or knew that he did not owe.[922] Also, in principle there is no passing–on doctrine under Greek law.

However, there are some exceptional cases where the right to repayment is prohibited contrary to Community law. Article 8 of the Law No 1223/81[923] provides that import or export taxes that were paid without a legal basis cannot be returned if passed on the consumers.[924] In para 3 there is a rule of evidence intended to shift to the trader concerned the burden of proving that the charges unduly paid have not been passed on to other persons. The same provision is included in Article 19 of the Law No. 2873/2000[925] regarding indirect taxes.

In two sets of proceedings between Kapniki Mikhailidis AE and IKA,[926] a tobacco trader, brought an action in the administrative court for the annulment of two decisions refusing

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[922] See for example Article 30 para 1 of the Customs Code and 91 para 2 of the Code of Public Accounting. Council of State 1553/80, (1982) *Δελτίο Φορολογικής Νομοθεσίας* 362; See also Council of State 2427/93, (1994) *Διοικητική Δίκη* 970; Council of State 832-33/84 and Council of State 146/84, not published. I. Anastopoulou, *The primacy of Community law and the right of repayment of unlawful paid levies* (Η υπεροχή του κοινοτικού δικαίου έναντι του εθνικού και η επιστροφή από το δημόσιο παρανόμως καταβληθέντος δασμού) 28 (1987) *Ελληνική Δικαιοσύνη* 543.

[923] Official Gazette (ΦΕΚ Α΄ 340).

[924] This rule does not apply when the financial burden is imposed by a provision that has been held to be unconstitutional and thus invalid (Council of State 1081-2/97, (1999) *Διοικητική Δίκη* 1231; (1999) *Δελτίο Φορολογικής Νομοθεσίας* 1101).

[925] Official Gazette (ΦΕΚ Α' 285).

[926] Cases C-441/98 and C-442/98, *Kapniki Mikhailidis AE v. Idrima Kinonikon Asphaliseon (IKA)* [2000] ECR I-7145.

recovery of certain charges paid to a tobacco workers´ insurance fund and the general social security fund on tobacco exports. The administrative court referred the question to the ECJ for a preliminary ruling as to whether a Greek tax levied on tobacco exports was a charge with an effect equivalent to a customs duty contrary to the EC Treaty Article 9, Article 12 (now, after amendment, Article 23 and Article 25 EC) and Article 16 (repealed by the Treaty of Amsterdam) and, if so, whether reimbursement of the improperly levied tax could be refused on the ground of unjust enrichment.

The Court of Justice ruled that the charge was equivalent to a customs duty in breach of the Treaty. It repeated its standard position that a Member State could refuse to repay a charge that breached Community law only if it was shown that the charge has been borne entirely by a party other than the trader, so that reimbursement would unjustly enrich the trader. However, partial repayment could be made if the burden had not passed entirely to the third party, and the burden of proving that the charge had been passed to a third party did not shift to the trader under Community law, so that Kapniki could adduce evidence to refute allegations that the charge had been passed on.[927]

More interesting is the Opinion of Fenelly A-G who argued that if the defence of unjust enrichment invoked by the IKA to defend the reimbursement claim brought in the main proceedings does not apply in respect of a similar claim for reimbursement of taxes based purely on national law, then it should fail.[928] The right of review available and rules applicable to its exercise must satisfy both the requirements of non-discrimination and effectiveness vis-à-vis comparable claims based solely on national law. It is for the national court to determine whether a fiscal reimbursement claim based purely on national law would be subject to satisfying a comparable condition to the effect that the person subjected to the charge did not actually pass on its financial burden.[929] His view suggests that Member States may not invoke the defence of unjust enrichment to defeat a claim based on EU law if that defence is not available to defeat a claim based on national law.

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[927] Op. cit., 27-42.

[928] Kapniki forcefully submitted at the hearing that both Greek legislation and Council of State case law precludes reliance on purported unjust enrichment to defeat claims by taxpayers for repayment of unlawfully levied charges.

[929] Op. cit., para 35.

Finally, in *Charalambos Dounias*[930] the question concerned the compatibility with Articles 28 and 90 of the Treaty of national legislation determining the method of calculating the taxable value of imported goods for the purposes of certain indirect taxes and laying down rules for settling customs disputes in relation to such goods. The applicant, who had imported second-hand photocopiers from Germany into Greece, disputed the basis on which certain taxes were levied on those imported goods. His complaint led to legal proceedings in which he was seeking to establish the liability of Greek State in respect of damage allegedly suffered by him as a result of acts of the public authorities in charging the taxes. The Greek legislation provided three procedural restrictions to his claim: a) retention of imported products until payment of taxes in full;[931] b) resolution of customs disputes by administrative procedures;[932] c) restriction of witness evidence.[933]

In relation to the first rule, Jacobs A-G found that such national legislation may make it impossible in practice for a small-scale importer to dispute the validity of charges levied contrary to Community law. A rule such as that at issue may well have that effect on a small-scale importer, who will be required to pay the entire amount of tax claimed before his goods are released to him and who will receive no interest on any part of the tax found to be unlawful and subsequently-possibly some years later repaid.[934] The Court of Justice however, repeated the principles of equivalence and effectiveness and left their application to the national court.[935]

The Court of Justice found that the second rule providing for the resolution of customs disputes by administrative procedures compatible with the principle of effectiveness. It was clear from

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[930] Case C-228/98, *Charalambos Dounias v. Ypourgou Oikonomikon* [2000] ECR I-577.

[931] Article 16 of the Code of Legislation relating to the Customs Tariff (Codifying Decree of 25/30 July 1920), as replaced by Article 1 of Law No 428/1943.

[932] Article 10 of the abovementioned Code of Legislation relating to the Customs Tariff and Article 136 of Presidential Decree No 636/1977.

[933] Article 50 of Presidential Decree No 341/1978, in conjunction with Article 152 of the Code of Fiscal Procedure and Article 4 of Law No 1406/1983.

[934] Op.cit., paras 59-60.

[935] Op.cit., paras 44-46.

the order for reference that a judicial remedy was available insofar as Mr Dounias could have contested the administrative measure, had he so desired, before the administrative courts. In particular, according to the order for reference, at the time the applicant's dispute was referred to the Higher Commission for Disputes concerning Customs Duties there was provision for appeal to an administrative court.[936]

Finally, the Court of Justice found that Community law does not preclude a provision of national law under which, in judicial proceedings in which it is sought to establish State liability with a view to obtaining compensation for damage caused by a breach of Community law, witness evidence is admissible only in exceptional cases.[937] Jacobs A-G took the view that national legislation restricting the calling of witnesses could, if their evidence was critical to a claimant's case, render impossible the exercise of its Community-law-derived rights. The Court of Justice ruled that the legislation in question would be incompatible with Community law only if the claimant could not benefit from the exceptions and if adducing written evidence would not permit him to establish his case.[938]

7.5 Member State liability in damages

In the absence of a specific legal basis for Member State liability as a Community remedy, the legal basis is found in the provisions for the liability of the Greek State. This is found in the Constitution itself[939] in Article 20 para 1,[940] and is provided by Articles 105 and 106 of the Introductory Act to the Civil Code.[941] Claims for damages are classified according to Article 1(2)

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[936] Op.cit., paras 65-67.

[937] Op.cit., paras 70-71.

[938] Op.cit., paras 59-50.

[939] See E. Spiliotopoulos, *Manual of Administrative Law*, Sakkoulas (2000), 226.

[940] Article 20 para 1: "Every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests."

[941] P. Pavlopoulos, *The Civil Liability of the State* (Η αστική ευθύνη του κράτους), Sakkoulas 1980.

of the Statute 1406/83 as administrative disputes of a "substantive character"[942] and as such they are heard by the ordinary administrative courts. The above Articles provide also the most appropriate framework for the liability of the Greek State for violations of Community law.

Article 105 was designed to cover administrative tort liability. Greek case law interpreted Article 105 as not including liability for the breach by the legislature.[943] Recently the case law has evolved and it generally acknowledges that Article 105 covers also the liability of the legislature, when the general measure is incompatible with a higher-ranking piece of law (such as the Constitution, Community law and ECHR) that seeks to protect an individual right.[944] This is correct, because the administrative bodies issue also regulatory acts, and thus no distinction should be made between the legislative and administrative bodies that enact laws.[945]

Greek law recognises the independent responsibility of public bodies. Legal persons of public law may incur liability under Article 105, where State duties and functions are delegated to them by legislation. The Greek Council of State found that the Bank of Greece was liable under Article 105 in combination with Article 106 for not complying with the provisions of the First Directive for the implementation of Article 67 of the Treaty.[946] The national legislation[947] assigned the relevant task on the Bank and its director. In the exercise of these duties they were held to be public bodies and thus they were held liable themselves instead of the State.[948]

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[942] The legal control also includes the examination of the substance of the case as well as the legality.

[943] See Areios Pagos 37/57, not published. See (1992) *Ελληνικό Δίκαιο Κοινωνικών Ασφαλίσεων* 8. See also Areios Pagos 711/95, 45 *Νομικό Βήμα* 764: It is upon the legislature that controls the conditions of liability in general to determine whether liability arises from the exercise or not of the legislative action.

[944] Administrative Court of Appeal, Athens 2174/91 (1992) *Διοικητική Δίκη* 426; Areios Pagos 13/92, (1992) *Ελληνική Δικαιοσύνη* 1432; Council of State 3587/97, 41 *Επιθεώρηση Δημοσίου και Διοικητικού Δικαίου* 543.

[945] Administrative Court of Athens 2685/94, 38 *Ελληνικό Δίκαιο Κοινωνικών Ασφαλίσεων* 131.

[946] Official Journal English Special Edition 1960, p. 49.

[947] Law 1266/1982, Art. 1.

[948] Court of Appeal, Athens 4172/2001 (2001) *Νομικό Βήμα* 1627.

The Administrative Court of Appeal of Athens decided that there can be no liability under Article 106 of the Introductory Part of the Civil Code for legal persons of public law if their organs apply legislation contrary to the Greek Constitution, reasoning that they have no duty to examine the compatibility with the Constitution, which is entrusted solely to the courts.[949] This rule cannot find application in relation to Community law, because under Community law the administration and the legislature seem to share the same duty to apply Community law, which would be meaningless without a liability facility.

Article 105, however, does not cover the liability of the judiciary.[950] Greek law provides only for an action of maladministration of justice. This is regulated by Article 99 of the Constitution and Law No 693/77. The basic characteristic is that it is personal and exceptional.[951] Since State liability for breaches of the judiciary is not personal, the action for maladministration of justice does not appear to be a comparable remedy. The ECJ in *Köbler* decided to leave the *arrangement of the conditions to Member State autonomy and it is anticipated anxiously to see* how Greek courts will apply *Köbler* in practice.

Based on articles 105 to 106 of the Introductory Law of the Civil Code the doctrine and the jurisprudence have developed the following conditions of State liability: First, there must be an unlawful act or an omission to act or a physical action. Second, the aforementioned behaviour is attributable to an organ of the administration or of a body governed by public law. Third, this behaviour must be part of the exercise of a public duty. Fourth, damage must be caused to a material or non-material right or a simple interest.[952] Fifth, a plaintiff cannot found a claim for damages when the legal provision infringed is enacted for the exclusive protection of public

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[949] Administrative Court of Appeal of Athens 2685/94, 38 *Επιθεώρηση Δικαίου Κοινωνικών Ασφαλίσεων* 131.

[950] See Areios Pagos 256/96, (1996) *Διοικητική Δίκη* 962.

[951] Special Court of Maladministration of Justice (Ειδικό Δικαστήριο Αγωγών Κακοδικίας) 22/97, *Αρμενόπουλος* 1998, 1387. See Kasimatis, *Of civil liability of judges in Greece* (Περί του ισχύοντος εν Ελλάδι συστήματος αστικής ευθύνης εκ κακοδικίας), *Ξένιον Ζέπου III*, p. 93 et seq, 102 et seq.

[952] Simple interests are also protected. See Areios Pagos 711/95, op.cit.; Administrative Court of Athens 17670/96 23 (1999) *Το Σύνταγμα* 99.

interest. Sixth, a direct causal link must be established between the administrative act and the damage.[953]

The principle of equivalence requires that the same conditions apply to national and Community law claims. It appears that the conditions under Greek law are more favourable than those established by the Court of Justice. Firstly, the Greek system of non-contractual liability is objective. Not only there is no requirement of proof of fault,[954] but also the ambiguity of the rule does not exclude the liabllity.[955] Secondly, in principle, the illegality must be substantive. The act must foreclose a substantive right provided by the law,[956] but also a simple interest. The issue of an act without adequate reasoning does not entail liability of the State even if this act is annulled for procedural impropriety.[957] In relation to the public interest exception provided by Article 105,[958] it is suggested that it is not compatible with Community law and should be ignored by Greek judges when deciding on cases related to Community law.[959] The first impression is that it makes liability more difficult to establish. However, the true meaning of the provision is the following: The State escapes liability, when the provision is laid

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[953] Administrative Court of Appeal, Athens 4072/91, (1993) *Διοικητική Δίκη*, 371; Administrative Court Thessaloniki 2707/99, (2000) *Διοικητική Δίκη* 178.

[954] Areios Pagos 466/69, 18 *Νομικό Βήμα*, 50.

[955]Areios Pagos 449/72, 20 *Νομικό Βήμα*, 1183; Areios Pagos 853/78, 27 *Νομικό Βήμα* 747.

[956] Administrative Court of First Instance of Athens 11605/95, *Δελτίο Φορολογικής Νομοθεσίας* 51, 370; Administrative Court of Thessaloniki 2260/97 *Διοικητική Δίκη* 10, 138.

[957] Areios Pagos (full bench) 39/88, *Διοικητική Δίκη* 1989, 1150; Administrative Court of Athens 941/92, 1993 *Διοικητική Δίκη* 147; Administrative Court of Athens 1237/92, Διοκητική Δίκη 1993, 384; Administrative Court of Athens 11605/95, 51 *Δελτίο Φορολογικής Νομοθεσίας*, 1370; Administrative Court of Athens 10798/99, (2001) *Διοικητική Δίκη* 257.

[958] Administrative Court of Athens 600/96, 51*Δελτίο Φορολογικής Νομοθεσίας*, 982.

[959] See Koukouli-Spiliotopoulou, *Judicial protection and sanctions for breach of Community law* (1997) Ελληνική Δικαιοσύνη 351.

exclusively in the common interest and does not confer rights on individuals.[960] If the relevant provisions are laid down in principle in the common interest but also include the protection of individuals, then liability may arise.[961] With such an interpretation the public law exception is compatible with the findings in *Dillenkofer*.

Finally, the right to compensation under Greek law is concurrent with the other remedies. Where the unlawful situation arises from an administrative act, prior annulment of that act is not required. The court may consider the validity of the administrative act in the course of the proceedings and a specific prior ruling on its validity is not necessary. The Greek Council of State has decided that the remedy of Articles 105 and 106 is independent from other remedies such as the action for annulment and the remedy of compensation.[962] The liability of the State has been held independent also from the liability that other private parties may have under the law.[963]

Following the judgment in *Pafitis*,[964] Greek Courts appeared reluctant to accept the solution adopted by the Court of Justice and rejected the actions on the following ground.[965] They found that the case concerned the relationship between private parties and thus direct effect of Community law could not be relied upon. The temporary administrator could not be held to be an organ within the *Foster* formula. In the meantime a law had been passed[966] providing in

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[960] See Areios Pagos 210/71, 19 *Νομικό Βήμα* 735; Administrative Court of Athens 3922/95, 8 *Διοκητική Δίκη* 965; Administrative Court of Athens 17670/96, op.cit. See also Mathioudakis, *The Community law action of State liability* (Η κοινοτικού δικαίου αξίωση αστικής ευθύνης του δημοσίου) (1998) *Διοκητική Δίκη* 314, 326.

[961] Council of State 1920/93, 347/99, 28 and 979/2000. Contrary: Areios Pagos 711/95 *Νομικό Βήμα* 45, 76.

[962] Council of State 2312/95, *Ελληνική Δικαιοσύνη* 37, 776; Council of State 2079/99, op.cit. Council of State 745/95, op.cit; Administrative Court of Appeal Athens 2719/97 *Δελτίο Φορολογικής Νομοθεσίας* 52, 1284.

[963] Council of State 347/97, 39 *Ελληνικό Δίκαιο Κοινωνικών Ασφαλίσεων* 205; *Δελτίο Φορολογικής Νομοθεσίας* 51, 1027.

[964] See Chapter 2.2, above.

[965] Court of First Instance, Athens 1500/97 (1997) *Επιθεώρηση Εμπορικού Δικαίου* 281 and Court of First Instance, Athens 1499/97 (1999) *Δίκαιο Επιχειρήσεων και Εταιρειών* 1017.

[966] Law 2685 of 18.2.99 ΦΕΚ Α΄ 35.

Article 28 that the new shareholders were not affected in any way by capital increases made according to law N. 1386/83[967] and, thus, the old shareholders were not entitled to an action for annulment but only to a damages remedy against the Greek State. According to one view the solution adopted was best suited for the situation under question.[968] The Court of Justice in *Diamantis* impliedly approved of such discretion.[969] It ruled that the uniform application and full effect of Community law would not be compromised on the ground that, of the remedies available for a situation that has arisen in breach of Article 25(1) of the Second Company Directive,[970] the shareholders have chosen a remedy that will cause such serious damage to the legitimate interests of others that it appears manifestly disproportionate. Such a determination would not alter the scope of that provision and would not compromise its objectives. This means that Member States may legislate an alternative remedial scheme which it considers equally effective in enforcing the Community provisions and which the Court of Justice, in the process of judicial review, deems an adequate substitute for the displaced remedy.[971] However, the principle of equivalence should not be violated by such alternative scheme.

Overall, the liability regime described above is suitable to incorporate Member State liability in damages arising under Community law. As the above analysis shows, its scope is broad enough to cover liability for breaches of the executive, the legislature and the judiciary. Also, the conditions of liability are less stringent than the minimum threshold provided for in

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[967] Law No 1386/1983 as amended by Law No 1472/1984 (ΦΕΚ Α, 112) provides that the competent Minister may decide to transfer to the OAE the administration of an undertaking subject to the scheme established by that law, to reschedule its debts in such a way as to ensure its viability or to take steps to place it in liquidation.

[968] See I. Soufleros, *Perspectives of vertical and horizontal direct effect of Directives and relative issues* (*Όψεις του κάθετου και του οριζοντίου αποτελέσματος των κοινοτικών οδηγιών και συναφή ζητήματα*) (1998) *Επιθεώρηση Εμπορικού Δικαίου* 429.

[969] *Diamantis*, op.cit., para 41-43.

[970] Op.cit., n. 120.

[971] See *Dellinger E., Of Rights and Remedies: The Constitution as a sword* 85 (1972) *Harvard Law Review* 1532, 1552-3.

Brasserie. Therefore, according to the principle of equivalence these less stringent conditions should also apply to claims based on EC law.

7.6 The refusal to make a preliminary reference

It is well known that the preliminary reference procedure is not a right for the litigants but a power or duty for the national judge.[972] However, the effective co-operation between Community and national courts is an important aspect for the judicial protection of private parties. In case the court refuses to refer, the litigant may find himself in a difficult situation. Two examples of unjustified refusals to refer are found in the Greek jurisprudence.

The Plenary of the Greek Council of State has decided, in a case referred to it by its Fourth Chamber that the Community provisions on free movement are irrelevant in a situation where a Greek citizen is prohibited from leaving the country for being a debtor of the Greek State.[973] The Greek court reached this conclusion despite the fact that the circumstances of the case under examination brought it within the scope of application of Community law. Law 395/1976 was enacted to regulate situations where Greek citizens owed money to the Greek State. It allowed for the issuing of a restriction order relating to the right to leave the country of any Greek citizen that owed to the Greek State money that exceeded a specific amount. This prohibition on leaving the country was not to be issued as a result of a decision by a court, but took the form of an administrative measure that was sought by the State and was enforced by the Police. That administrative decision was held to be compatible with Article 5 of the Greek Constitution, according to which everyone has the right to liberty. The prohibition on exit from the country covers also situations where money is owed to the Greek State by legal persons and can be sought against the directors of these companies according to Law 1882/1990 which was also found compatible with Article 5 of the Greek Constitution. In August 1994, an order of

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[972] See on the preliminary reference Barnard C. and Sharpston E., *The changing face of Art. 177 references* (1997) 34 *Common Market Law Review* 1113; *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure* (2003) 40 *Common Market Law Review* 9.

[973] Council of State 4674/98, 1999 *Το Σύνταγμα* 106. See E. Manganaris, *The Greek Council of State-Europhobic or simply overprotective?* (2001) *European Law Review* 200.

prohibition on leaving the country was issued in regard to Mr Diamantopoulos, a Greek citizen, who was managing director and chairman of the board od directors called "Transantlantic plc." The order was sought by IKA, pursuant to Law 1902/1990. This law is similar to Law 1882/1990 and provides for the power to issue a prohibition on leaving the country against natural persons which are directly connected to legal persons that owe money that exceeds a specified amount, to a public body called IKA. The main but not the only function of the latter is to operate as the social security fund for certain categories of workers.

The majority of the judges of the Plenary held that the provisions did not run contrary to the Constitutional provision, because their adoption was dictated by reasons of public and social interest. The judges of the Plenary then proceeded to discuss the question of the influence of European legislation on the matter under examination. They acknowledged that the right to freedom of movement within the EU, as provided for in Articles 18, 39, 43 and 49 is a paramount principle of Community law. They argued, though, that as was established by the case law of the ECJ[974] their application cannot be justified in matters that are wholly internal to the Member States as such, unconnected with Community law. The judges of the Plenary went on to dismiss the argument relating to the influence of the ECHR (Art. 5) and the First Additional Protocol (protection of personal possessions). Article 5 of the ECHR was not pertinent to the matter because it only refers to situations where the right to freedom is restricted by means of detention or arrest. Finally, on the basis of the lack of ratification of the Protocol by the Hellenic Republic the provisions of the First Additional Protocol were deemed irrelevant.

This conclusion appears to be wrong in the light of *Carpenter*.[975] Mrs Carpenter was a third country national that had not exercised her right to free movement, but was the spouse of Mr Carpenter, also a third country national, that exercised this freedom. The Secretary of State decided to make a deportation order against Mrs Carpeneter removing her from the United Kingdom. Mrs Carpenter appealed against the decision to make a deportation order to an Immigration Adjudicator, arguing that the Secretary of State was not entitled to deport her

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[974] Joined Cases 35-36/82, *Morson and Jhanjan* [1982] ECR 3723; Case 180/83, *Moser* [1984] ECR 2539; Case C-299/95, *Kremzow*, op.cit.

[975] Op.cit., n. 762.

because she was entitled to a right to remain in the UK under Community law. She maintained that since her husband's business required him to travel around in other Member States, providing and receiving services, he would do so more easily as she was looking after his children from his first marriage, so that her deportation would restrict her husband's right to provide and receive services. For the Immigration Adjudicator, however, Mr Carpenter could not be considered to be exercising any freedom of movement within the meaning of Community law, because he was resident in the UK. The ECJ dismissed the idea that it was a wholly internal situation and continued to interpret Article 49 EC in the light of Article 8 of the ECHR establishing the right to family life. It ruled that a removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life, unless it is motivated by one or more legitimate aims "necessary in a democratic society," as intepreted by the case law of the ECtHR.[976]

Another example is found in the field of recognition of university diplomas.[977] The Plenary of the Greek Council of State, in a case referred to it by its Sixth Chamber, has decided that the organisation of education in Greece in not subject to any requirement imposed by EC legislation. Mrs Katsarou was a Greek citizen who submitted an application to DI.KATSA seeking recognition of the equivalence of the law degree as well as the postgraduate degree that she obtained from the University of Lille in France. The application for recognition of the equivalence of the said degrees with the relevant Greek law degree was unsuccessful. The recognising body argued that since the first two years of her basic law degree were completed in Greece at the premises of what was effectively a private school with no university status, it could not recognise the qualifications obtained as equivalent to a Greek law degree. Mrs Katsarou went before the Sixth Chamber of the Council of State and sought to have this decision of the recognising body annulled, arguing that it was in breach of Community law provisions, namely Art. 39 EC (free movement of workers) and Art. 43 EC (freedom of establishment) and Directive 89/48 (mutual recognition of qualifications in regard to the legal profession). The judges of the Sixth Chamber considering the importance of the circumstances

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[976] See, op.cit, paras 28-46.

[977] Council of State 3458/98, 1999 *Νομικό Βήμα* 1019. See E. Manganaris, *The Principle of Supremacy in Greece-from direct challenge to non-application* (2001) *European Law Review* 200.

emerging from this case concluded that the matter should be decided at a plenary meeting of the Council of State and it referred the case to it accordingly.

The Plenary of the Council emphasised Article 16 of the Greek Constitution, which restricts the provision of higher education in Greece to state universities. Following that, the attention of the courts was focused on Article 126 EC. They stressed the first paragraph of Article 126, that the Community fully respects "the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity." They also stressed the fourth paragraph of the same Article, where it is stated that the Council "shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States." The Court interpreted these provisions as meaning that the organisation of the educational systems of the Member States, higher education included, as well as the content of teaching, fall outside the sphere of Community legislation and remain within the exclusive regulatory control of the Member States. Restrictions such as this at issue could be justified by the need to protect the "cultural and linguistic diversity " of the Member States. Therefore, as this was a national issue, outside the scope of Community law, a reference to the ECJ for a preliminary ruling under Article 177 EC (now 234 EC) was deemed unnecessary.

The reluctance of the Council of State to refer in the above cases has been harshly criticised. The Council of State appears to follow a "nationalistic" approach of what is considered to be an internal matter. A right to damages against the State may prove useful in cases where the damage can be assessed. The applicants, however, of the above cases will not be in a situation to benefit of such a right, if established, because of the nature of the claim that can not be assessed in money. A right of appeal against the decision of the national court before the ECJ would be a possible answer to this problem, although this is not compatible with the current system of judicial architecture, since it would establish an express hierarchy between Community and national courts.

Conclusion

It appears that the Greek legal system does not involve particularly unfavourable procedural or remedial rules for the protection of Community rights. It secures the action for annulment, the right to interim relief, restitution and State liability. The conditions for State liability prescribed by Greek law are less strict than those required by the ECJ. In the case of interim relief the

legislature and the Courts have taken all the necessary corrective measures in order to comply with the requirements of Community law. Also, it appears that the Greek courts are entitled under the national provisions to examine *ex officio* Community law. Therefore, Greek law provides effective tools for the protection of Community rights. The case law on the obligation to implement Directives and the refusal to make references is inconsistent with the case law on remedies where the Greek Council of State followed a pro-Community approach and could be explained by the potential conflict between Community norms and the Greek Constitution. The pro-State approach in these areas could possibly be connected with the fact that Greece is very poor in both implementing Directives within the prescribed period and Greek courts in making preliminary references. The repercussions of pro-Community judgments would probably have adverse "political" results, but they would substantially improve the enforcement of Community rights in Greece.

Chapter 8: Final remarks-Conclusions

Introduction

In the absence of Community legislation, the ECJ has assumed the task of ensuring effective enforcement of the Treaty and secondary Community legislation under Article 220 EC. This was mostly an initiative based on policy considerations rather than observance of the rule of law. Given that the EC Treaty has not created a genuine federal system, the ECJ has sought to advance a "*sui generis*" system of enforcement based on mutual integration and inter linkage of the various traditions in Europe. It has combined principles from the judicial system established by the founding Treaties themselves, the ECHR, and Member State practices, and established a system of private enforcement before national courts on the basis of Article 10 EC. The case law determining the appropriate rights, remedies and procedures before national courts is the outcome of the judicial dialogue between the ECJ and national courts *via* the preliminary reference procedure.

Since rights are not unconditional, the ideal level of effective judicial protection of Community rights before national courts is subject to limitations posed by the following interacting factors: 1) the diversity of the national systems, 2) the doctrines of sovereignty and separation of powers, 3) the weaknesses of judicial approximation, 4) the resistance of national courts. Notably, the draft Constitution does not affect substantially the judicial system of enforcement created by the ECJ.

This final section reviews to what extent each of the above factors has undermined the effective protection of Community rights before national courts.

8.1 How well does the Court cope with the diversity of national systems of remedies?

The ECJ in its case law has attempted to strike a balance between diversity and uniformity. It has established autonomous rights, remedies and procedures before national courts, but it has respected sufficiently the diversity of national legal orders as to their definition and

classification.[978] It has, also, made clear that these principles are not absolute but subject to national conditions and variations. The ECJ has respected the expediency of Member State authorities[979] and the institutional autonomy of Member States.[980] It provided for a number of exceptions of the right to restitution[981] and although it has continued to expand the ambit of Member State liability in damages, it has considered sufficiently the financial consequences for the Member States.[982]

The ECJ, thus, has struck a workable balance between uniformity and diversity and its judgments contain the appropriate level of generality. The requirements set by the ECJ seek more to secure Community interests in general and less to regulate the remedies before national courts. Because the ECJ's case law serves the collective interests of Member States, the principles laid down by the ECJ in relation to remedies are sufficiently flexible and abstract so as to have general application to the laws of all Member States. The case law on remedies signifies the minimum threshold that national laws must satisfy.

8.2 Do the doctrines of sovereignty and separation of powers pose limits to effective judicial protection?

The ECJ has created a body of case law seeking both to ensure effective judicial protection of Community rights and preserve the subsidiary nature of Community law in this field. The principle of "reciprocal" autonomy is the cornerstone principle in the relationship between Community and national remedial law. In a legal system where the rules governing the division of competence between the supranational authority and the national authorities are not well determined, the ECJ has assessed very carefully the impact of its case law on the relations between the Community institutions and the Member States. It has sought to strike the balance

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[978] See Chapter 1.2, above.

[979] See *Upjohn*, op.cit., in Chapter 3.1.1.

[980] See the "public procurement" cases in Chapter 3.1.1.

[981] See Chapter 3.3.1, above.

[982] See Chapter 4.3.2, above.

between Member State and Community powers in relation to each remedial and procedural principle that it has established.

The ECJ has recognised new rights but has been careful not to impose stringent or specific new burdens on Member States. Plenty of room is left for the Member States to present reasonable arguments for placing restrictions.[983] The ECJ frequently avoids reaching outcomes by deferring to a national decision maker's evaluation of the competing interests.[984] Further, it has been reluctant to interfere when there is a need for Community institutions to take positive measures.[985] The denial of direct effect to WTO and the prohibition of horizontal direct effect of Directives are the consequence of separation of powers between Member States and the Community.[986] The ECJ has also declined to relax *locus standi* before the CFI without an express amendment of the Treaty.[987] This case law reveals that, after a period of judicial activism, the ECJ has passed to self-restraint either as a necessary policy to stabilise progress or as a result of crisis of legitimacy. In any case, the ECJ appears to be very much policy-oriented. Its goal is not to attribute corrective justice or individual remediation, but to preserve the "political" balance in the Community.

8.3 What are the problems of judicial approximation?

The main advantage of judicial approximation of remedies and procedures is that it brought progress that would probably not have been achieved, if the enforcement of the Treaty was entrusted to the EU legislature due to the difference of views among Member States. The main weakness inherent in judicial approximation is that it may produce inconsistencies, inequalities and, mainly, legal uncertainty. Every judgment contains a balancing exercise that suggests a specific, case-by-case approach, which accommodates gradual change and rejects absolutes. A balancing decision is so fact-specific that it often offers no guidance for future cases and

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[983] See the analysis on judicial review, interim relief, restitution, op.cit., Chapter 3.

[984] See Chapter 5.2, above.

[985] See *Port*, op.cit., Chapter 3.2.1, above.

[986] See Chapter 2.3.1, above.

[987] See Chapter 6.4.2, above.

provides little guidance to national courts. Further, the ECJ has promoted a step-by-step evolution of the case law of remedies and procedures commensurate with the degree of political integration sought by Member States. This is obvious in the evolution of the law of remedies and also in the evolution of the principles of equivalence and effectiveness.

One should bear in mind, however, that legal certainty is one principle among many that have to be taken into consideration.[988] To enhance consistency of enforcement and legitimacy, the ECJ should elaborate more the general principles and basic concepts of Community law. Balancing should take place openly and the ECJ should issue more extensively reasoned judgments to guide the national courts.

A common remedy that would be suitable to enhance minimum uniformity and legal certainty without seriously undermining diversity is an action for a declaratory judgment that a national rule is incompatible to Community law.[989] An action for a declaratory judgment is the broadest form of non-coercive remedy for resolving uncertainty in legal relations. It merely pronounces particular practices or conditions to be illegal leaving officials free to choose whether and how to remedy the situation. As such, it is normally used as an anticipatory advice to obtain a judgment before harm has occurred, where it is imminently threatened. A binding judgment that the state is in breach of its legal obligations could even be viewed as morally equivalent to an injunction, requiring a change in law or in practice.

Such a right, which is not present in all national legal systems, [990] would enhance uniformity and legal certainty in Community law, especially if it would not be subject to a time limit. Such a right has not been established so far because no case appeared before the ECJ involving such question. This does not mean that such a right or other rights and remedies will not be created in the future. The list of rights, remedies and procedures created by the ECJ is an open list. This reveals the weakness inherent in judicial

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[988] See Case C-453/00, *Kühne and Heitz*, op. cit., para 24.

[989] D. Waelbroeck, *Vers une harmonisation minimale des règles procédurales nationales?* in L`avenir du système juridictionnel de l`Union européenne ed. by M. Dony and E. Bribosia 2002.

[990] For example there is no right to a declaratory judgment for public law relationships under the Greek legislation as a separate action: See Three-Member Administrative Court of Athens 15540/97 and 4210/97, (1998) *Ελληνική Δικαιοσύνη*, 1166.

approximation, which is legal uncertainty, but at the same time its greatest advantage: flexibility and adaptability.

8.4 How well do the national orders cope with the centralising tendencies of the ECJ?

As shown in this thesis, the system of enforcement formulated by the ECJ is based on the co-operation between Community and national courts. The role of national courts is equal to, and perhaps in some respects even more crucial than, that of the ECJ. National courts are empowered not only to uphold Community law claims but also to initiate the dialogue with the ECJ that will produce new rules in the common law of remedies and procedures. The resistance of national courts to apply the case law of the ECJ or to refer questions to the ECJ could seriously undermine the effective protection of EC rights before national courts.

So far national courts have accepted and applied authoritative judgments on remedies, such as *Factortame*, *Zuckerfabrik* and *Francovich*. In a small number of cases, they have appeared reluctant to comply with certain decisions of the ECJ and made further references on the same issue.[991] In these cases the ECJ has taken into account their reaction seriously and elaborated previous case law. The ECJ has, also, assessed the potential reaction of national courts even before issuing a judgment.[992] The mutual understanding and co-operation between the two tiers of the judicial system is the most important achievement. It proves that the ECJ has been successful in its task to approximate remedies in Europe via the principle of co-operation.

The Greek jurisdiction, in particular, seems to have incorporated the general principles on remedies and procedures without serious objections. The remedies and procedures available under Greek law appear compatible with the case law of the ECJ. For example, the Greek Council of State has retreated from previous case law on interim relief, and the Greek legislature has introduced legislative changes.[993] The refusal of the Greek Council of State to

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[991] See the *"Edis"* series of cases, op.cit., in Chapter 5.2.3, above, and the *"Diamantis"* series of cases, op.cit., in Chapter 2.2, above.

[992] See *Atlanta*, op.cit., in Chapter 3.2.1, above.

[993] See Chapter 7.3.

refer questions that may create constitutional problems reveals the conflict between the sovereignty of Member States and the enforcement of Community law.[994] The adoption of the draft Constitution would probably stabilise the relations between the Community and the Member States and, therefore, lessen possible conflicts of national Constitutions with Community law.

8.5 Constitutionalisation of the Treaties

The draft Constitution does not appear to regulate the relationship of the ECJ with national courts. It focuses mainly on the political institutions, not the Community courts. The reason for the absence of any reference to the Court is that the European Council has since Nice focused on the demarcation of EU and national competences. The Laeken declaration[995] identified themes and challenges which were *par excellence* political in nature and, consequently, focused on the political institutions of the EU. Also, the workings of the ECJ and the future of the judicial architecture had received extensive consideration in the inter-governmental conference leading to the Treaty of Nice. It might have been thought, therefore, that it was not necessary to revisit issues of judicial architecture.[996]

There is no attempt by the draft Constitution to change the judicial architecture. Article 28(1)[997] formalises the pattern of decentralised judicial review favoured by the ECJ. It can be seen as a vindication for the case law but should not be interpreted as an invitation to the ECJ to make further inroads into national procedural autonomy, since the draft Constitution places particular emphasis on subsidiarity. The English text of the draft Constitution could here be improved. It refers to "rights of appeal" before national courts, while the French and the Greek texts refer to

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[994] See Chapter 7.6.

[995] Laeken Declaration on the Future of the European Union, available at european-convention.eu.int/pdf/LKNEN.pdf.

[996] T. Tridimas, *The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?* in W.G. Hart Workshop Proceedings, Tridimas (Ed.) European Constitutionalism in the 21st century (Hart Publishing).

[997] It provides: (1) The Court of Justice shall include the European Court of Justice, the High Court and specialised courts. It shall ensure respect for the law in the interpretation and application of the Constitution; (2) Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law.

judicial means of protection. An express reference to the doctrine of direct effect and to "remedies suitable to ensure effective legal protection before national courts" would reflect better the substance of the case law and would probably enhance protection.

One of the most important developments in the draft Constitution, apart from determining a better demarcation of competences[998] and creating a more cogent hierarchy of norms,[999] is that it incorporates the Charter of Fundamental Rights. Thus the Charter acquires constitutional status and becomes legally binding. The Constitution also enables the Union to accede to the ECHR[1000] and thus, it makes progress towards better protection of Human Rights in Europe. The protection of fundamental rights as a constitutional feature of the Union is an important reinforcement of the case law of the ECJ and proves that the majority of policy choices of the ECJ have acquired constitutional expression, which underlines the successful role of the ECJ as Europe's "Supreme Court."

Epilogue

The case law is dominated by the effort of the ECJ to strike a balance between uniformity and diversity, the protection of individual rights and Member State interests, and respect for Community institutions and national courts. Overall, in the view of this author, protection of Community rights at national level and preservation of procedural autonomy has been accomplished successfully by the ECJ.

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[998] See Title III, Articles I-11 to 13.

[999] See Title V, Articles I-32 to 36.

[1000] See Title I, Article I-7.

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Abbreviations

AC: Appeal Cases (The Law Reports)

All ER: All England Law Reports

CFI: Court of First Instance

CMLRs: Common Market Law Reports

EC: European Community/European Community Treaty

EEC: European Economic Community/European Economic Community Treaty

ECJ: European Court of Justice

ECHR: European Convention of Human Rights and Fundamental Freedoms

ECtHR: European Court of Human Rights

ECR: European Court Reports

EHRR: European Human Rights Reports

EHRLR: European Human Rights Law Review

EU: European Union

HRLJ: Human Rights Law Journal

OJ L: Official Journal of the European Communities (Legislation)

WLR: Weekly Law Reports