

1 The foundational principles of EU law

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Introduction

Some of the most difficult and controversial questions in EU law concern the relationship between Union law and the law of the Member States. This chapter deals with the ways in which Union law is applied and enforced within the national courts, and the ways in which individual EU citizens can enforce their Union law rights. The ECJ has played a very important role in the development of the Community and the Union. In its judgments it often takes a 'teleological' or purposive approach.

Using the teleological approach, the ECJ looks at the preamble of the Treaty and to its aims and objectives as set out in Article 3 TEU and draws on these principles to determine the outcome of its cases. Two other principles underlie its case law: the requirement of effectiveness, and the requirement for the uniform application of Union law in all the Member States.

The Court may refer to the spirit of the Treaty or to principles inherent in the system of the Treaties to develop new doctrines. In this chapter we will be discussing how the Court has used the approach described above in its case law concerning the rights of individuals, giving the maximum possible effect to Union law. The most important cases in this respect will be discussed.

Core text

- Steiner & Woods, Chapter 4 'Principle of supremacy of EU law', Chapter 5 'Principles of direct applicability and direct effects', Chapter 6 'General principles of law', Chapter 8 'Remedies in national courts' and Chapter 9 'State liability'.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- u explain the impact of Union law on the national legal systems of Member States
- u explain how the basic principles governing the relationship between Union and national law (direct effect, indirect effect, supremacy and state liability for breach of Union law) have developed and critically evaluate the legal basis of those principles
- u evaluate the role of the Court of Justice in developing those principles through the concepts of effectiveness, integration and uniformity
- u compare the requirements for the enforcement of individual Union law rights under the doctrines of direct effect, indirect effect and state liability
- u apply these doctrines to problems, advising on the remedies available, and the limitations on those remedies
- u explain the obligations of the Member States' authorities (especially national courts) in enforcing Union law.

1.1 The doctrine of direct effect

Core text

- Steiner & Woods, Chapter 5 'Principles of direct applicability and direct effects'.

1.1.1 Direct effect

The principle of direct effect has been developed by the ECJ in a series of judgments. It has greatly increased the impact of European Union law within the Member States. Direct effect means that, subject to certain conditions, Union law creates rights and obligations which *individuals* may rely on and enforce in their *national courts*.

Arguably, the most important case in Union law is Case 26/62 *van Gend en Loos v Nederlandse*

Administratie der Belastingen [1963] ECR 1. In this case the Court decided that an individual could rely directly on a Treaty Article and enforce it in their own national court. This is called the principle of 'direct effect'. Normally the question of

the operation of an international treaty in the domestic legal system is determined by the constitutional law of the individual country concerned. It looked as if the only way that individuals could use EU law to enforce their rights was by leaving it to the Commission and the Member States to do so. However, in *van Gend en Loos* the Court addressed this problem and at one stroke transformed the legal status of the Treaty from a conventional, if far-reaching, Treaty governed apparently by the normal rules of international law, into the foundation of a *sui generis* 'new legal order' that would operate directly for the benefit of the citizens of the signatory states.

The facts of the case took place in the first stage of the establishment of the EEC.

There was a clear prohibition in Article 12 of the EEC Treaty (now Article 30 TFEU) of any increase in customs duties.

Van Gend en Loos was a company importing urea formaldehyde (a kind of glue) from Germany into the Netherlands, where a customs duty was imposed. The company, van Gend en Loos, forced to pay this duty, brought an action challenging its legality under Community law in the Netherlands Customs Court, the *Tariefcommissie*. The Dutch court made a preliminary reference to the Court of Justice.

The first question asked by the *Tariefcommissie* was whether Article 12 EEC had an effect within the territory of a Member State. On the basis of this Article, could citizens of the Member States enforce individual rights which courts of the Member States must protect? In other words: what was the effect of the EEC Treaty on national law and could an individual enforce the provisions of the Treaty directly in their national court? It was argued forcefully that this was a matter of national constitutional law.

The Court, however, in a ground-breaking judgment stated:

The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.

1.1.2 The need for direct effect

Direct effect, whereby an individual can enforce provisions of Union law, initially Treaty Articles, directly in their own national courts, was essential if the Union legal order was to be effective. In *van Gend en Loos* the Court held that an Article of the EEC Treaty could have direct effect if:

- u it was clear
- u it was unconditional
- u its operation did not require a legislative implementing measure on the part of the state.

If those conditions were fulfilled, individuals could enforce the Article directly in their national court. This was a right conferred on individuals 'in addition to the supervision entrusted by Articles 169 and 170 (now Articles 258 and 259 TFEU) to the diligence of the Commission and of the Member States'.

In *van Gend en Loos*, the Court also imposed a fourth condition – that the Article must lay down a negative prohibition rather than a positive obligation – but this condition was dropped in later cases: see Case 57/65 *Alfons Lütticke GmbH* [1966] ECR 205.

Even the remaining three conditions, which suggest that provisions with direct effect will be the exception rather than the rule, have been whittled away. Generally, only provisions which are conditional in the sense that they confer a discretionary power on a third party (e.g. on the Member States or the Commission) would be excluded from having direct effect – because the national court cannot usurp that discretion.

Similarly, the requirement that a measure must not be dependent on further action is not the obstacle that it, at first, appears. This is because, generally, whenever the Treaty (or other measure) includes a time limit within which such further action should take place, the Court has held that, once that time limit has expired, the measure has direct effect: see Case 43/75 *Defrenne v SABENA* [1976]

The central idea, then, is whether a provision is capable of being applied by a national court (whether it is 'justiciable'). As a result, direct effect of Treaty provisions has become the norm, rather than the exception. Below, we look at how the doctrine operates in relation to the various kinds of Union measures.

Activity 5.1

Read the judgment in *van Gend en Loos* and examine the Court's reasoning.

u List the reasons why the Court decided that Treaty Articles could have direct effect.

1.1.3 Direct effect of Treaty Articles

In *van Gend en Loos*, the parties were in a 'vertical' relationship: that is, the case was between an individual and a Member State. The question of whether an individual could rely on an Article of the EEC Treaty in an action against another individual (horizontal relationship between the parties) was dealt with in Case 43/75 *Defrenne v SABENA* [1976] ECR 445. It was held that Ms Defrenne could bring an action against her employer for breach of a Treaty Article requiring equal pay for men and women.

1.1.4 Direct effect of Regulations

Article 288 TFEU (ex Article 249 EC) defines the relationship between the various types of Union secondary legislation and national law. Article 288 TFEU states that a Regulation is 'directly applicable' in all the Member States. Regulations, therefore, become automatically part of national law and this will normally mean that they can be relied on by individuals in their national courts and thus also have direct effect.

The European Court has nonetheless recognised that in order to have direct effect, Regulations must satisfy the standard conditions to be enforced by a court: see Case 403/98 *Azienda Agricola Monte Arcosu v Regione Autonoma della Sardegna* [2001] ECR

I-103. Sometimes Regulations need further legislation. See Case 39/72 *Commission v Italy (Slaughtered Cows)* [1973] ECR I-01 and Case 128/78 *Commission v UK (Tachographs)* [1979] ECR 419.

1.1.5 Direct effect of international agreements

The position with regard to international agreements is more complex and controversial. In Cases 21–24/72 *International Fruit Company v Produktschap voor Groenten en Fruit (No.3)* [1972] ECR I-219 the question was posed whether the GATT (General Agreement on Tariffs and Trade) provisions could have direct effect. The Court concluded that 'the spirit, the general scheme and the terms' of the provisions were different from those in the EEC Treaty and that its provisions were not sufficiently precise and unconditional for direct effect to apply. Free trade agreements were also held not to be capable of creating direct effect as their aim was not to create a single market. See Case 270/80 *Polydor Ltd v Harlequin Record Shops Ltd* [1982] ECR 329. However, in Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641 another provision of the same agreement was found to have direct effect, as it did fulfil the conditions and fell within the purpose of the agreement. This concerned Portugal, which, although not a Member State at the time, did become one soon after. More recently, the Court ruled in Case C-280/93 *Germany v Council* [1994] ECR I-4973 that under very limited circumstances a GATT provision could prevail over an EC provision, but only if the relevant EC provision expressly referred to the GATT provision.

1.1.6 Direct effect of Decisions

Although Article 288 TFEU does not state that Decisions are directly applicable, they are 'binding in [their] entirety'. The Court of Justice has held that they can have direct effect. A national of a Member State to which a Decision had been addressed could invoke that Decision in the national

court: see Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825. In reaching this conclusion, the Court emphasised that this would increase the effectiveness (*'effet utile'*) of the Community measure.

1.1.7 Direct effect of Directives

More controversial was whether a Directive could have direct effect. Directives are meant to be implemented, that is brought into effect by national legislation within a certain time period. Article 288 TFEU provides:

A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed...

The plain interpretation of these words is that a Directive is addressed to the Member States. To say that it confers rights on individuals would be to blur the distinction between Directives, which require national implementing measures, and Regulations, which do not.

It was thought that Directives could never fulfil the *van Gend en Loos* conditions for direct effect because, by their nature, they require 'further implementing measures'.

However, in Case 41/74 *van Duyn v Home Office* [1974] ECR I-337, the Court held that an individual could rely on a clause in a Directive.

Activity 5.2

Read the judgment in *van Duyn* in relation to the issue of direct effect of Directives.

- a. Identify three reasons which the Court gave for its landmark decision that Directives could have direct effect.**
- b. Are the reasons convincing?**

1.1.8 Vertical but not horizontal direct effect

The Court later added to the reasoning used in *van Duyn*, basing the direct effect of Directives on the doctrine of estoppel. This principle, for our purposes, means that the state cannot rely on its own wrongdoing to frustrate the rights of individuals under Directives. Where the Member State is at fault (either because it has not transposed the Directive into national law at all, or because it has done so inaccurately) an individual can claim against that state the rights he or she should have had if the Directive had been correctly implemented. See: Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR I-629.

The logic of this reasoning is that a Directive can only be invoked vertically, by an individual against the state, and not horizontally, by one individual against another, because individuals are not to blame for the non-implementation of the Directive. This view was confirmed in Case 152/84 *Marshall v Southampton and South West Hampshire AHA* [1986] ECR 723.

This rule has been criticised because it can lead to inequality: an individual's ability to bring an action based on a Directive will depend on whether they are suing the state or a private person or company. See the Advocate General's Opinion in Case C-91/92 *Faccini Dori v Recreb srl* [1994] ECR I-3325 where he proposed that Directives should be given horizontal direct effect. The Court, however, did not follow the Advocate General but confirmed the original rule that Directives can only have vertical direct effect. However, in recent years the Court has increasingly resorted to other measures to give effect to Union law in what would, at first sight, be purely horizontal cases.

For example, in Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-7181 the Court in a judgment in a case between two individuals confined itself to dealing with the incompatibility of the national legislation with Community law where a general principle of Community law (non-discrimination) was concerned. It asserted that it was the responsibility of the national court to guarantee the full effectiveness of the general principle by setting aside the national legislation, even before the date of expiry of the implementation period. On the other hand, the Court has given a wide definition to 'the state' and thereby has extended the reach of the vertical direct effect of Directives. In Case C-188/89 *Foster v British Gas* [1990] ECR I-3313, the Court laid down several

- u Does it perform a public service?
- u Pursuant to a measure adopted by the state?
- u Under the control of the state?
- u Does it have special powers going beyond those of normal commercial undertakings?

The Court has recently clarified that, in *Foster*:

the Court was not attempting to formulate a general test designed to cover all situations in which a body might be one against which the provisions of a directive capable of having direct effect might be relied upon. (at [26])

and, consequently that

the conditions that the organisation concerned must, respectively, be subject to the authority or control of the State, and must possess special powers beyond those which result from the normal rules applicable to relations between individuals cannot be conjunctive (C-413/15 Farrell – ECLI:EU:C:2017:745).

1.1.9 Expiry of time limit

It also follows from the reasoning that direct effect is based on the Member State's fault, that a Directive can generally only be directly effective after the expiry of the time limit given for its implementation. This was confirmed in the Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR I-629.

However, the Court has held that, during the period prescribed for transposition of a directive, Member States must refrain from taking any measures liable to seriously compromise the attainment of the result prescribed by the directive (see Case C-129/96 *Inter Environnement Wallonie* [1997] ECR I-7411).

1.1.10 Summary

The doctrine of direct effect is an example of the ECJ developing principles which strengthen the impact of Union law within national legal systems. It enables Union law to be enforced, not just by the Commission under the Treaty rules for enforcement, but by individuals in their national courts – creating a system of 'dual vigilance'.

Perhaps most important in increasing the effectiveness of Union law within Member States was the ruling that a Directive can have direct effect provided the following conditions are fulfilled.

- u The Directive must be clear and precise.
- u The Directive must be unconditional.
- u The time limit for implementation of the Directive must have expired.
- u The action based on direct effect of the Directive can only be vertical – against an 'emanation of the state'.

The Court has been willing to give 'incidental' horizontal direct effect of Directives in triangular situations: see Case 194/94 *CIA Security International v Signalson* [1996] ECR I-2201. Other cases on the 'incidental' horizontal direct effect of Directives are: Case 441/93 *Panagis Pafitis* [1996] ECR I-1829; Case 443/98 *Unilever Italia v Central Food SpA* [2000] ECR I-7535. This only applies in a very few situations, and these seem mostly to be a 'one-off', where private parties were concerned on both sides, but where no particular obligation was put on the defendant.

Self-assessment questions

1. Define what is meant by 'direct effect'.
2. Which Treaty Article defines the different forms of Union secondary legislation?
3. What is the main difference between a Regulation and a Directive?

4. What is the difference between vertical and horizontal direct effect?
5. What is the test for an 'emanation of the state'?
6. What are the conditions for direct effect of Directives?

5.2 Indirect effect of Directives

Core text

- Steiner & Woods, Chapter 5 'Principles of direct applicability and direct effects'.

5.2.1 The duty of harmonious interpretation

Partly to deal with the problem for individuals who could not rely on Directives because the conditions for direct effect were not fulfilled, the Court developed the concept of indirect effect. The starting point for this doctrine is Case 14/83 *von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891.

Although this case concerned a vertical claim against the German prison service, the Directive in question did not have direct effect because the provision (concerning remedies for sex discrimination) was insufficiently precise to be enforced by a court. However, the ECJ held that the national court is under a duty to interpret existing national law, so far as possible, to achieve the result laid down by the Directive.

The doctrine is based on the idea that national courts are part of the state and, consequently, are bound by what is now Article 4(3) TEU (formerly Article 10 EC). That Article requires Member States 'pursuant to the principle of sincere cooperation'

to 'take any appropriate measure ... to ensure fulfilment of the obligations' under the Treaties. The effect of the ruling is to shift the responsibility for giving effect to Directives on to national courts in situations where their governments have failed to introduce adequate national implementing measures.

The principle means that national courts are under a duty to interpret national legislation 'in the light of the wording and the purpose' of Union law. In *von Colson*, there was some national legislation, which purported to implement the Community Directive but that appeared to do so inadequately (the amount of compensation available was very small). As a result, it was initially thought that the duty of harmonious interpretation (giving indirect effect to the Directive) only applied to national legislation which had been intended to implement the Directive in question. Whether the rule applied to the interpretation of national law more generally was unclear. The ECJ has since made clear that the duty applies in relation to all national legislation, whether passed before or after the relevant Union legislation, and whether intended to implement it or not; see Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135. Because it is a rule applicable to the court, rather than the parties, it applies irrespective of whether the action is 'vertical' or 'horizontal'.

5.2.2 Limits to the doctrine of indirect effect

There are limits to the usefulness of this doctrine from the point of view of the individual, however, since it presupposes the existence of some relevant national legislation that is capable of being interpreted to mean what the Directive requires. National courts are only required to carry out this duty 'so far as possible' – so if there is no relevant national law, or if the relevant national law is only capable of one interpretation, it may not be possible to use the doctrine.

The Court has also made clear that the application of the doctrine is subject to the general principles of law, such as legal certainty and non-retroactivity: see Case 80/86 *Kolpinghuis* [1987] ECR 3969.

The Court has held that the doctrine cannot be applied where it would give rise to, or aggravate,

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criminal liability: see Case 168/95 *Criminal Proceedings against Luciano Arcaro* [1996] ECR I-4705;
Case C-387/02 *Criminal Proceedings against Berlusconi* [2005] ECR I-3565.

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Yet such a limitation does not appear to exist in relation to the imposition of civil liabilities on individuals. In Case 456/98 *Centrosteeel v Adipol* [2000] ECR I-6007, the ECJ said that the duty to interpret national law in the light of the wording and purpose of Community law applied even when this would impose a civil liability on private parties. On this point see also Case C-185/97 *Coote v Granada Hospitality* [1998] ECR I-5199, and Cases C-240–244/98 *Oceano Grupo Editorial v Rocio Murciano Quintero* [2000] ECR I-4491.

Self-assessment questions

1. **What is the legal basis for the duty of harmonious interpretation imposed on national courts in the *von Colson* case?**
2. **For the doctrine of indirect effect to apply, is it relevant whether the action is horizontal or vertical?**
3. **To which kinds of national measure does the duty of harmonious interpretation apply?**
4. **Can the doctrine be used in circumstances where it would give rise to individual criminal liability – or to civil liability?**

The application of this rule of construction initially gave rise to difficulties in national courts as it appeared to require them to give effect to Union law that was not directly effective. The evolution of the UK courts' approach, and their eventual acceptance of the doctrine, can be traced in the following cases. These illustrate the tensions between the UK doctrines of Parliamentary sovereignty and the separation of powers on the one hand, and the Union doctrine of supremacy on the other (see Section 5.6 and the discussion in Chapter 2 on the withdrawal of the UK from the EU).

- u *Pickstone v Freemans plc* [1987] 3 WLR 811 (CA).
- u *Duke v GEC Reliance Ltd* [1988] AC 618 (HL).
- u *Foster v British Gas* [1988] ICR 584.
- u *Litster v Forth Dry Dock & Engineering Co Ltd* [1989] IRLR 161.
- u *Webb v EMO Air Cargo (UK) Ltd* [1992] 2 All ER 43.
- u C-32/93 *Webb v EMO Air Cargo (UK) Ltd* [1994] ECR I-3567.

5.3 Remedies for Union law rights

Core text

- **Steiner & Woods, Chapter 8 'Remedies in national courts' and Chapter 9 'State liability'.**

5.3.1 Basic principles

Individuals do not have extensive rights to enforce Union law directly in the Court of Justice of the European Union (see Chapter 4). Enforcement of Union law rights by individuals or legal persons (companies) therefore mainly takes place at the national level in the domestic court. The remedies obtainable in respect of Union law are those available under national law; generally there is no uniform set of Union law remedies. An exception to this is the remedy of state liability (see below).

In Case C158/80 *Rewe-Handelsgesellschaft Nord mbH v Hauptzollamt Kiel* [1981] ECR 1805 the Court reiterated:

Community law... was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law.

However, the Court has, from the beginning, stipulated that the remedy obtained must comply with two principles (see Case 33/76 *Rewe Zentralfinanz* [1976] ECR 1989 and Case 45/76 *Comet BV v Produktschap* [1976] ECR 2043).

The two principles are:

- u the principle of equivalence: the remedy for the Union law right should be no less favourable than those relating to similar domestic claims (non-discrimination)
- u the requirement of practical possibility: that the remedy should not be such as in practice to make it virtually impossible or excessively difficult (added in later case law) to obtain reparation.

5.3.2 Real effectiveness and deterrence

Subsequently the Court has also insisted that the remedies provided by national law must be effective, adequate, should act as a deterrent and guarantee real and effective protection.

You will recall Case C-14/83 *von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891, as the case which established the principle of indirect effect (see Section 5.2.1). It had been decided by the national court that the reason that the applicant was not appointed as a prison officer was unlawful sex discrimination, prohibited under the Equal Treatment Directive (Directive 76/207, later incorporated in 'recast' Directive 2006/54/ EC). The Article 234 EC (now 267 TFEU) reference to the Court was in regard to the remedy available for this Community law right. The Directive had been transposed into German law but the implementing of national law appeared merely to give her the right to recover her travel expenses incurred in applying for the job.

The Court stated that the national court must interpret the national law 'in the light of the wording and the purpose' of the relevant Community law in order to ensure an adequate and effective remedy, as required by Article 6 of the Directive, which said the remedy must also have a 'deterrent effect'. The compensation must, therefore, 'be adequate in relation to the damage sustained'.

In the subsequent *Factortame* case it became clear that the requirement that national remedies for breach of Community law rights should be adequate and effective was a universal requirement to be applied to such remedies.

In Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I-2433 the Court stated that interim relief must be granted to the fishing companies challenging the validity of the Merchant Shipping Act 1988, pending a judgment as to the compatibility of that Act with European Community law.

The House of Lords had held that it had no jurisdiction to suspend an Act of Parliament (which is what interim relief in this case required) and under the fundamental doctrine of English law, the sovereignty of Parliament, that was correct. But the Court stated that in order to ensure the full effectiveness of Community law:

a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must set aside that rule.

The principle of the requirement of effectiveness of even 'putative' Union law rights (the fishing companies' rights in the *Factortame* case had yet to be established) was now firmly entrenched.

Two examples of the application of the requirement for adequate and effective remedies are: Case 271/91 *Marshall (No.2)* [1993] 3 CMLR 293 and Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] 3 WLR 1038. The *Marshall (No.2)* case was a claim for damages arising from Case 152/84 *Marshall v Southampton and South West Hampshire AHA* [1986] ECR 723. The applicant's early retirement had been held to be unfair dismissal. Her compensation was subject to an upper limit which prevented her from receiving full compensation. The Court said the application of the upper limit would therefore not provide for an adequate remedy. The Directive required that the remedy chosen by the state must be adequate and effective (Article 6) and since the remedy chosen here was compensation it must have no ceiling and include interest.

In Case 222/84 *Johnston v Royal Ulster Constabulary (RUC)* [1986] ECR 1651 the Chief Constable for the Royal Ulster Constabulary (RUC) in Northern Ireland decided that men in the RUC would carry firearms on a daily basis. Women would not be equipped with or trained to bear firearms and would not be asked to perform general duties which might include the use of firearms. The applicant had been an unarmed member of the RUC and when her contract came up for renewal it was not renewed. She sought to challenge this on the grounds of sex discrimination under the Equal Treatment Directive (ETD) Directive 76/207 (later Directive 2006/54) (see Chapter 12 for further discussion of this case). It was argued that a certificate relating to national security and public safety signed by the Secretary of State for Northern Ireland prevented the national court from hearing her case; the certificate was said to be 'conclusive evidence' that the refusal to employ her 'was for the purpose of safeguarding national security or of protecting public safety or public order', and was not subject to review by a court. The ECJ, in its ruling, referred to the requirement for 'effective judicial control' under Article 6 of the ETD and stated that this was also a general principle common to the Member States and required by Articles 6 and 13 of the ECHR. All persons had the right to obtain an effective remedy in a court against measures which they considered to be contrary to the principle of equal treatment as laid down in the Directive, and the certificate, therefore, could not be held to be 'conclusive'.

Note also the requirement placed on national authorities to give reasons for their decisions in regard to Community law rights, Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097.

5.3.3 The application of national procedural rules

The European Court has also considered the legality of the application of national procedural rules which affect the exercise of Union law rights.

Case 208/90 *Emmott v Minister of Social Welfare* [1991] ECR I-4269 is considered to be the high water mark of the Court's willingness to intervene and later cases have generally manifested a retreat from this position.

The case concerned Directive 79/7 prohibiting discrimination on the grounds of sex in regard to social security measures. When the applicant sought to bring an action relying on the Directive, she was told her action was time barred. On a reference as to whether it was contrary to Community law to rely on the time limits, the Court held that time limits do not start to run until after the proper transposition of the Directive. Although time limits are reasonable in principle, a national government cannot rely on its own default in implementing the Directive.

However, in Case 338/91 *Steenhorst-Neerings* [1993] ECR I-5475 the Court held that a national rule restricting the retroactive effect of a claim for benefits for incapacity for work was in accordance with Community law. The Court considered this with reference to the two principles (equivalence and practical possibility) and held that the national rule in question satisfied those conditions.

5.3.4 Procedural protection after the Lisbon Treaty

The Court of Justice's ability to contest the legality of national procedural rules affecting the exercise of Union law rights has been considerably strengthened by legislative change as a result of the Treaty of Lisbon. Under Article 19(1) TEU, the Court is obliged to 'ensure that in the interpretation and application of the Treaties the law is observed', whilst at the same time Member States (also under Article 19(1)) are obliged to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. In addition, under Article 51 of the Charter of Fundamental Rights, the Court, as an EU institution, is

obliged to 'respect the rights, observe the principles and promote the application' of the Charter as part of its interpretive obligation. This includes Article 47, entitled a 'Right to an effective remedy and to a fair trial' which contains an entitlement to 'an effective remedy before a tribunal' if a Union law right is infringed, and a right to legal assistance for 'those who lack sufficient resources' (see Chapter 12 for a detailed analysis of the application of the Charter).

Case C-279/09 DEB v Germany [2010] ECR I-13849

In *DEB v Germany* Article 47 was applied by the Court in circumstances where the applicant was denied legal aid. A commercial company applied for legal aid in order to bring an action to establish whether the German state had incurred state liability under Union law. The company wished to bring an action for damages against the German state in order to obtain compensation for the damage allegedly caused to it by Germany's delay in transposing Directive 98/30/EC concerning common rules for the internal market in natural gas. The company was refused legal aid on the ground that the conditions laid down under the German law for granting such aid to legal persons were not satisfied.

Applying the Charter, in the light of Article 6 ECHR, the Court held that it is not impossible for legal persons to rely on the provisions of Article 47 of the Charter and that it was for the national court to ascertain whether the relevant provision in relation to legal aid constituted a denial of effective access to justice.

5.4 Action for damages against a Member State for breach of Union law

Core text

- Steiner & Woods, Chapter 9 'State liability'.

5.4.1 Legal basis for state liability in damages

Member States' liability to pay damages to individuals in respect of their breaches of Union law is not laid down in the Treaty and is yet another example of the Court promoting the rights of individuals and the effective enforcement of Union law. We have seen above what the problems were concerning the application of the principle of direct effect of Union law. The Court considered a different way of giving maximum possible effect to Community law by introducing a uniform remedy for breach of Community law, irrespective of whether legislation had direct effect or not.

The existence of this liability was first established in Joined Cases C-6/90 and C-9/90 *Franco v. Bonifazi v Italy* [1991] ECR I-5357.

The case concerned the failure of the Italian authorities to transpose a Directive into Italian law. The Court declared that the principle of state liability was 'inherent in the system of the Treaty', basing these observations on Article 5 of the Treaty (now Article 4(3) TEU) and the principle of effectiveness of Union law.

5.4.2 Conditions for liability for non-implementation of a Directive

The Court laid down three conditions for state liability where there has been a failure to transpose a Directive.

- u The Directive must be intended to confer rights on individuals.
- u The content of those rights must be ascertainable from the terms of the Directive.
- u There must be a causal link between the loss suffered and the Member State's breach. In other words, there must be a link between the **cause** of the loss suffered and the breach of EU law by the Member State.

5.4.3 Liability for other breaches of Union law

In *Franco v. Bonifazi*, the judgment was limited to Member States' failure to implement Directives. Whether

a Member State could be liable in damages for breaches of other Community law obligations, such as under Treaty Articles, was the issue in Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur v Germany* and *R v Secretary of Transport ex parte Factortame* [1996] ECR I-1029.

The Court affirmed that the principle of Member State liability was available for all Community law provisions, whether or not they had direct effect. It also stated that ‘in the absence of particular justification’, the conditions for the liability of the state would be the same as for the Community institutions under Article 215 of the Treaty (now Article 340 TFEU).

A Member State will be liable to an individual for breach of its Union law obligations where:

- u the rule of law breached is intended to confer rights on individuals
- u the breach is sufficiently serious
- u there is a direct causal link between the breach of the obligation resting on the state and the damage sustained by the parties.

As to whether the breach of Union law is sufficiently serious, the decisive point is whether the Member State has ‘manifestly and gravely disregarded the limits on its discretion’.

It is for the national courts to decide whether this is the case, but the Court listed a number of factors to be taken into account by the national court. These included:

- u the clarity and precision of the rule breached
- u the measure of discretion left by that rule to the national or Union authorities
- u whether the infringement and the damage caused was intentional or involuntary
- u whether any error of law was excusable or inexcusable
- u the fact that the position adopted by a Union institution may have contributed towards the omission
- u the adoption or retention of national measures or practices contrary to Union law. Furthermore,

the Court held:

on any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case law of the Court on the matter, from which it is clear that the conduct in question constituted an infringement.
(para. 57)

Activity 5.3

Read the ECJ’s judgment in *Brasserie du Pecheur/Factortame*. Summarise the reasons the Court gave for finding that liability in damages existed for Member States’ breaches of Union law.

No feedback provided: the answer can be found in reading the judgment.

5.4.4 Application of state liability

In Cases 178–190/94 *Dillenkofer v Germany* [1996] ECR I-4845, the Court held that the non-implementation of a Directive is always a sufficiently serious breach, so only the *Francovich* conditions need to be fulfilled.

The procedure for bringing an action for damages against the state will be governed by national rules. Case 392/93 *R v HM Treasury ex parte British Telecommunications plc* [1996] ECR I-1631 is an interesting case concerning the incorrect transposition of a Directive. The breach was held not to be sufficiently serious because the wording of the Directive was unclear, and several other Member States had also unintentionally misinterpreted it.

In Case C-424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, a public law body separate from the state could be held liable under the principle of state liability.

In Case 224/01 *Köbler v Republik Österreich* [2003] ECR I-10239, the ECJ ruled for the first time that it was possible for the principle of state liability to apply where the

alleged infringement stemmed from a decision of a national court of last instance. The question of liability would depend on the established criteria for state liability.

Whether the infringement of Community law was sufficiently serious depended on consideration of the same factors cited in the *Factortame* case: whether the national court had manifestly infringed the applicable law, that is, whether the 'infringement was manifest'. In deciding what this meant, regard had to be given to the specific nature of the judicial function and to the legitimate requirements of legal certainty. In order to decide whether the infringement was 'manifest', the national court hearing a claim for damages must take account of 'all the factors which characterise the situation put before it'.

The Court continued that:

... those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and noncompliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case law of the Court in the matter.

However, on the facts presented in the particular case, there was not a 'manifest infringement' of EC law.

Summary

The doctrine of state liability forms part of the package of doctrines (direct effect, indirect effect and state liability) developed by the European Court with the dual objectives of ensuring that Union law prevails and is enforced within the Member States, and on the other hand that individuals can obtain their rights under Union law. The availability of damages from the state applies to any individual who has suffered loss as a result of a sufficiently serious breach of Union law. Thus it overcomes the problems inherent in the direct effect doctrine where the conditions are not fulfilled and where direct and indirect effect cannot apply.

5.5 The supremacy of EU law

Core text

■ Steiner & Woods, Chapter 4 'Principle of supremacy of EU law'.

The principle of supremacy or primacy of Union law has been developed by the ECJ. It is implicit in Case 26/62 *van Gend en Loos* [1963] ECR I which founded the doctrine of direct effect. It was stated explicitly in Case 6/64 *Costa v ENEL* [1964] ECR 585 where the Court said that, by entering into the Treaty, Member States had limited their sovereign rights and that Community law 'could not... be overridden by domestic legal provisions'.

In a further step, in Case 11/70 *Internationale Handelsgesellschaft GmbH* [1970] ECR I-125, the Court held that Community law took precedence even over a fundamental rule in the German national constitution.

The clearest statement of the implications of the supremacy of Community law came in Case 106/77 *Simmenthal SpA (No.2)* [1978] ECR 629 where the Court held that national courts have a duty to set aside provisions of national law which are incompatible with EC law. There was no need to wait for the national law to be amended in line with national constitutional procedures: the national rule had to be set aside immediately if it conflicted with a Community provision.

Nor does the obligation to set aside conflicting national rules only apply to national courts: even an administrative agency dealing with a national social insurance scheme was held to be required to do

Although the national measure is rendered 'inapplicable', this does not absolve the Member State from the need formally to repeal it. In the interests of legal certainty, the Court said that Member States must also repeal the offending national rule: see Case 167/73 *Commission v France (French Merchant Seamen)* [1974] ECR 359.

Even if it is not yet clear whether a person actually has a right which they claim under Union law (i.e. it is a 'putative' right, not a definite one), the doctrine of supremacy requires a national court to set aside any national procedural rules which might prevent them from getting the full benefit of the Union right if it *ultimately* eventually found that they have it!

This was laid down in Case C-213/89 *Factortame* [1990] ECR I-2433. A number of fishing companies claimed that the UK's Merchant Shipping Act breached certain EC Treaty articles and wrongly prevented them from fishing in British waters. They asked for interim relief (an injunction setting aside the offending clauses of the Act pending the full hearing of the case). The problem was that under English law, courts could not grant an injunction 'against the Crown', that is, they could not order the suspension of an Act of Parliament.

On the other hand, if the Act continued to be applied, the fishermen could be driven out of business and any subsequent judgment in their favour in the main proceedings would be undermined – their Community law right would be rendered 'ineffective'.

The Court ruled that, in order to ensure the 'full effectiveness' of Community law, the English rule preventing suspension of the Act must be set aside.

The supremacy of Union law over national law is now stated in a Declaration attached to the Treaty of Lisbon. This reiterates the doctrine as stated by the Court as follows:

The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

There is also attached the Opinion of the Council Legal Service of 22 June 2007 which states:

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.

5.6 EU law from the Member States' perspective

Core text

- Steiner & Woods, Chapter 4 'Principle of supremacy of EU law'.

5.6.1 Supremacy of Union law in the UK

The concepts of direct effect and supremacy, as developed by the Court of Justice, have sometimes provoked a strong reaction from national courts. The way in which Union law enters into the legal systems of the Member States depends, from a constitutional point of view, on whether the Member State is monist or dualist in its approach

to international law. In monist states, the constitution provides for international law to enter into domestic law without the need for further national measures of incorporation or transposition.

France is an example of a monist state. In dualist states, such as the UK, international law does not become part of domestic law until

it is incorporated by a domestic statute. So when the UK joined the EEC, the European Communities Act 1972 had to be adopted to give effect to provisions of Community law within the UK. It has been amended, following the adoption of the SEA and all the subsequent treaties by the relevant European Communities (Union) (Amendment)

Acts (but see further the discussion in Chapter 2 on the UK withdrawal from the EU).

The cases on the application of the principle of indirect effect in the UK courts show how the English judiciary has traditionally based its application of Union law on the rules laid down in this English statute, expressing the will of Parliament, rather than on any abstract notion of supremacy stemming from the Union Treaties. For the ways in which English courts have dealt with the interpretation of national law in accordance with Community law, see the following cases.

- u *Pickstone v Freemans plc* [1989] AC 66 HL.
- u *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546 HL.
- u *Duke v GEC Reliance Ltd* [1988] AC 618 HL.
- u Case C-32/93 *Webb v EMO Cargo (UK) Ltd* [1994] ECR I-3567.

However, the House of Lords accepted the Court's ruling in the landmark case of *Factortame* (see Section 5.5 above).

This case had far-reaching constitutional implications in the UK. It made it clear that any Act of Parliament had to be read as subject to directly enforceable rights under Union law.

See also Case C-221/89 *Factortame* [1991] ECR I-3905, and *Factortame (No.2)* [1994] 1 AC 603.

The cases in *Thoburn* [2003] QB 151 are also interesting on this issue. They concerned the so-called 'metric martyrs' who refused to use metric weights as well as imperial weights as required under EC law. The case was heard by Sir John Laws. He reiterated the traditional view about the basis of the supremacy of EC law in the UK, basing it on UK constitutional law rather than on principles of EU law. He stated that the European Communities Act 1972 is a constitutional statute which means that it cannot be impliedly repealed by a later inconsistent statute. Hence it would prevail over later statutes which were inconsistent. However, he went on to comment that:

In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the ECA were sufficient to incorporate the measure and give it overriding effect in domestic law.

See also Case C-32/93 *Webb v EMO Cargo (UK) Ltd* [1994] ECR I-3567.

It is instructive to compare the attitude towards Union law in other Member States. See further the discussion in Chapter 2 on the UK withdrawal from the EU.

5.6.2 Germany

In Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, the ECJ had stated that the validity of Community measures could only be judged according to Community criteria, not according to principles enshrined in the German constitution. This ruling was not accepted by the German Federal Constitutional Court (FCC), however. It noted that the Community did not have a codified catalogue of human rights, and held that Community measures would, therefore, be subject to the fundamental human rights contained in the German constitution: see *Internationale Handelsgesellschaft* [1974] 2 CMLR 540.

In *Wünsche Handelsgesellschaft* [1987] 3 CMLR 225, however, the Federal Constitutional Court acknowledged that Community law now had its own equivalent standard of human rights protection.

Nonetheless, in *Brunner v The European Union Treaty* [1994] 1 CMLR 57, when considering whether the Maastricht Treaty on European Union unduly extended the competences of the European Community and made too many inroads on German sovereignty, the Federal Constitutional Court again re-affirmed German constitutional sovereignty and its right to review the scope of Community

In its judgment after various constitutional complaints had been brought before it by private citizens as well as by a political party in respect of the ratification of the Lisbon Treaty, the FCC ruled in June 2009 that the Treaty was in accordance with the German Basic Law and simply objected to the domestic law which implemented the Treaty and annulled the law. As regards the Lisbon Treaty itself, it spelt out in a lengthy judgment the limits to which integration could go and emphasised the safeguards under the German Basic law which must be respected. It did not, however, consider that the Treaty as such exceeded the boundaries of what was acceptable under the Basic Law. A new implementing law was then passed in September 2009 and ratification duly followed.

5.6.3 France

France's legal order has two court systems: the judicial and the administrative courts. The Cour de Cassation (highest civil court) accepted the primacy of directly effective EC law, on the basis of Article 55 of the French constitution, see *Vabre and Weigel (Cour de Cassation)* [1975] 2 CMLR 336.

The Conseil d'Etat, the supreme administrative court, has shown reluctance to accept the primacy of Union law, and in particular has refused to accept that Directives can have direct effect (in the French Court's view, only a French implementing measure can give effect to a Directive according to Article 249 EC (now Article 288 TFEU): see *Minister of the Interior v Cohn-Bendit* [1980] 1 CMLR 543.

However, in *Boisdet* [1991] 1 CMLR 3, it held that an EC Regulation took precedence over subsequent French regulations which conflicted with it, on the basis of the Court's case law. In *Rothmans and Arizona Tobacco* [1993] 1 CMLR 253, it awarded damages under the *Factortame* principle, for loss caused by a Ministerial order which conflicted with an EC Directive.

While, in practice, therefore, the French courts accept the primacy of directly effective Union law, their reasoning is frequently based on the French constitution, rather than on the European Court's doctrine of supremacy. This is a similar view to that expressed in UK and German courts that it is the national constitution which is at the head of the legal order and that Union law supremacy exists only in so far as it is provided for under national law.

5.6.4 Italy

The Italian Constitutional Court has accepted the supremacy of Union law, based on Article 11 of the Italian constitution, see *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372. However, it reserved the right to ensure that the fundamental principles of the Italian constitution were not infringed by Union law. It reaffirmed this position in *SpA Fragn*, stating that if it found that a Community measure infringed those fundamental rights, it would declare it inapplicable – thereby giving precedence to the Italian constitution.

Summary

The supremacy of Union law over national laws of the Member States was not explicitly stated in the Union Treaties but the Court has held that it is implicit in Articles 10 and 249 EC (now Articles 4(3) TEU and 288 TFEU) and, on this basis, has developed the principle through a line of cases. National courts have generally accorded supremacy to directly effective Union law, and have accepted and followed the obligation to interpret national law as far as possible in the light of Union law (even if not directly effective) but frequently basing that supremacy on provisions of national law rather than on the Court's rulings. They have expressed particular reservations in relation to fundamental rights recognised in national constitutions, and pledged to uphold these in the face of conflicting Union provisions. Reservations have also been expressed by national courts that they would not give precedence to a Union measure that went beyond the scope of Union competence.

5.6.5 Poland

Despite the problems concerning the rule of law arising due to the interference of the political sphere with judicial independence (see the discussion in Chapter 12), the Polish Constitutional Court has, in the past, accepted the Supremacy of EU law over national law. This has been justified on the basis of Article 90(1) of the Constitution (see Case K 32/09) which provides that the 'Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters'. However, the Constitutional Court made sure to assert that, by virtue of Article 8(1), the Polish Constitution remains the supreme authority and the courts will not allow EU law to conflict with it (see the decision in Polish Membership of the European Union (Accession Treaty) K 18/04, 11 May 2005). Subsequent cases have affirmed such assertions, but also a willingness to alter Polish law to align with EU law nonetheless (see, for example, the Decision of the Polish Constitutional Tribunal (PCT) concerning the European Arrest Warrant (EAW): 27 Apr 2005, No P 1/05).

Contrastingly, in a more recent decision of the PCT, in October of 2021, the Polish Constitutional Court held that Articles 1, 2 and 19 of the Treaty on European Union (TEU) were incompatible with the constitution (see Case K 3/21) even though those provisions had previously been held to be compatible (Case K 18/04). This judgement was not accompanied by the same willingness to alter Polish Law seen in earlier cases (EAW, as above), and has thus led to speculations around 'Polexit', despite there being no indication of an intent on behalf of the Polish government to leave the EU.

The decision has been the subject of much criticism, most strikingly by previous judges of the Constitutional Tribunal, who echo the sentiments of one of the dissenting judges from the 2021 case, that the decision of the Tribunal went beyond what was asked of them in the current circumstances, which was simply to interpret the TEU, and thus had overstepped their competencies. As of now it is unclear what the impact of this judgement will be on the relationship between Poland and the EU and, indeed, the EU as a whole, but it suffices to say that it marks a significant movement in the area of EU law supremacy.

For the criticism by the previous Tribunal judges see,

<https://republikaeofasa.wordpress.com/2021/10/11/zostajemy-w-ue/>

5.7 General principles of EU law

Core text

- **Stein and Woods, Chapter 5 'Principles of direct applicability and direct effects'.**

General principles such as proportionality, equality, non-discrimination and subsidiarity are derived from principles enshrined in the Treaty itself. Fundamental rights are derived from the constitutional traditions of the Member States and international Treaties on human rights, in particular the ECHR.

The general principles, including fundamental rights, apply within the scope of application of EU law and bind the EU institutions and their acts; acts of the institutions and EU legislation of the European Union which are not in accordance with these principles may be annulled. The Court of Justice has also held that the general principles and fundamental rights of EU law bind the Member States when giving effect to, or derogating from, provisions of EU law. The application of the rights enshrined in these principles has, however, to be balanced against the European Union interest and may be outweighed.

5.8 Proportionality, legal certainty and equality

Case C-36/02 *Omega Spielhallen v Bonn* [2004] ECR I-9609 concerned a company which franchised a laserdrome game from a company in the UK. The Bonn authorities (in Germany), issued a prohibition order, on the basis that by simulating murder, the game infringed the right to human dignity, protected by para.1(1) of the German Basic Code (the German constitution).

The Court of Justice held that although this was a restriction of the right to provide services, it could be justified under the public policy exception as 'the Community legal order undeniably strives to ensure respect for human dignity', as long as the measures taken were proportionate. It was not necessary that all the Member States should take the same view as to the precise way that a fundamental right, such as the protection of human dignity, should be protected. As the contested order only prohibited the variant of the laser game in which the object is to fire on human targets and thus 'play at killing' people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.

See also Case C-60/00 *Carpenter* [2002] ECR I-9607 (discussed in Chapter 12) and Case C-413/99 *Baumbast v Secretary of State for the Home Department* [2002] ECR I-709 on the right to family life; both these cases concern the scrutiny of actions of a Member State (the UK in both cases) within the scope of application of the Treaty.

Proportionality is also addressed in: Case 114/76 *Bela-Mühle* [1977] ECR 1211 and Case 181/84 *R v Intervention Board ex p Man Sugar (Ltd)* [1985] ECR 2889.

Legal certainty is also addressed in: Case 63/83 *R v Kirk* [1984] ECR 2689 (non-retroactivity) and Case 112/77 *Topfer v Commission* [1978] ECR 1019 (legitimate expectations).

5.8.1 Equality

The principle of equality means, in its broadest sense, that persons in similar situations may not be treated differently, unless the difference in treatment is objectively justified.

There are particular provisions in the Treaty prohibiting discrimination:

- u Article 18 TFEU (ex Article 12 EC): on the grounds of nationality

- u Article 157 TFEU (ex Article 141 EC): on the grounds of sex with reference to pay

- u Article 40(2) TFEU (ex Article 34(2) EC): between producers or consumers within the Union.

A general principle of equality, which is wider in scope than these provisions, has also been developed by the Court. See: Case 103 and 145/77 *Royal Scholten Honig v*

Intervention Board [1878] ECR 2037 and Case 13/94 *P v S and Cornwall County Council* [1996] ECR I-2143. Article 19 TFEU gives a legal base for the European Union to take action to combat discrimination.

A highly significant case in regard to discrimination on the grounds of age is Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-7181. Although the case concerned a challenge to German law allegedly in contravention of Directive 2000/78/EC (prohibition on discrimination in employment in regard, *inter alia*, to age) which had not yet passed its date for implementation the Court of Justice stated that the principle of non-discrimination on grounds of age was to be regarded as a general principle of EU law.

5.8.2 Procedural rights

Procedural rights are covered in: Case 155/79 *AM&S Europe Ltd v Commission* [1982] ECR 1575 (this case illustrates that a right does not have to be recognised in all, or even a majority of, Member States for it to be included as one of the fundamental rights by the Court of Justice); Case 17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063; Case 73/74 *Groupement des Fabricants des Papiers Peints de Belgique v Commission* [1975] ECR 1491 (duty to give reasons); Case 374/87 *ORKEM v Commission* [1989] ECR 3283.

The general principles of law as developed by the Court of Justice can be used as grounds for judicial review to challenge EU legal acts under Article 263 TFEU (ex Article 230 EC). They are often used as a basis to challenge the Commission's decisions under the competition law procedures.