

MATERIALS ON THE LAW OF THE EUROPEAN UNION

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THE EFFECT OF EU LAW WITHIN NATIONAL LEGAL SYSTEMS

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SUPREMACY / PRIMACY OF EU LAW

In many cases, and over a period of many years, the Court of Justice has emphasized that EU law takes precedence over the laws of the Member States. In order to underline the significance of supremacy the Court of Justice has often invoked a provision of the Treaty which stated that “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 this Treaty.”² The obligation on the Member States now appears in **Art. 4 TEU**:

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.
2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including

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² This provision was in Art. 10 of the EC Treaty before the Lisbon Amendments.

ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Remember that **Art. 288 TFEU** addresses the legal effects of EU acts:

To exercise the Union's competences, the institutions shall adopt **regulations, directives, decisions, recommendations and opinions**.

A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

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**.

A **decision** shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.³

Recommendations and opinions shall have no binding force.

But the Treaty did not address the effect of provisions of the Treaty itself, so the Court of Justice was faced with the need to consider the relationship between the Treaty and domestic law of the Member States. In **Costa v ENEL** (Case 6/64) an Italian citizen challenged his electricity bill, arguing that Italy's nationalization of the electricity industry contravened Community law. Costa is an important case on the doctrine of **Direct Effect** (see below) as well as an important early statement of the doctrine of **Supremacy**.

The Court of Justice stated:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and

³ The provision previously stated: "A decision shall be binding in its entirety upon those to whom it is addressed."

themselves.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty...

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the Treaty grants the states the right to act unilaterally, it does this by clear and precise provisions... Applications, by Member States for authority to derogate from the Treaty are subject to a special authorization procedure... which would lose their purpose if the Member States could renounce their obligations by means of an ordinary law.

The precedence of community law is confirmed by Article [288], whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over community law.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the community cannot prevail. Consequently Article [267] is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.

The supremacy principle is important in the development of Community law. Supremacy means that the Member States must not take any action domestically which would interfere with the application of Community law. And, although **Costa** only discusses the way in which Community law limits the Member States' ability to introduce new rules which conflict with the Treaty, in fact all national rules which are inconsistent with the Treaty should be regarded as invalid. The national courts are required to give effect to Community law even where this might involve invalidating conflicting rules of national law, and even when these conflicting national rules have been in force for centuries.

But this does not necessarily mean that national courts have accepted this principle of supremacy without question. At different points different national courts have suggested that where Community law and the domestic constitutional rules conflict domestic constitutional rules should prevail. The German Constitutional Court effectively carried out a discussion with the Court of Justice over a number of years on this issue (in the **Solange** cases). Ultimately the German court accepted that

protections of fundamental rights in Community law were adequate so that the German courts would not need to insist that the German Constitution should prevail. More recently similar issues have arisen in Poland: the Polish Constitutional Tribunal suggested in 2005 that it was not inclined to accept the supremacy of Community law:

The accession of Poland to the European Union did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of the Republic of Poland. The norms of the Constitution, being the supreme act which is an expression of the Nation's will, would not lose their binding force or change their content by the mere fact of an irreconcilable inconsistency between these norms and any Community provision. In such a situation, the autonomous decision as regards the appropriate manner of resolving that inconsistency, including the expediency of a revision of the Constitution, belongs to the Polish constitutional legislator.⁴

This same Tribunal held that the European Arrest warrant conflicted with the Polish Constitution:

Article 607t § 1 of the Code of Penal Procedure, within the scope allowing the surrender of a Polish citizen to a Member State of the European Union on the basis of the European Arrest Warrant, is incompatible with Article 55 Paragraph 1 of the Constitution.

5. The judgment of the Constitutional Tribunal establishing the unconstitutionality of Article 607t § 1 of the Code of Penal Procedure causes the elimination of any binding force of that provision. In the present case under consideration, however, this direct effect of the judgment is not tantamount to assuring the conformity of the legal status with the Constitution and is not sufficient for this purpose. This objective can only be achieved through the intervention of the legislator. Notwithstanding, taking into the account Article 9 of the Constitution, which states that „The Republic of Poland shall observe international law binding it”, and given the obligations implied by membership of Poland in the European Union, it is indispensable to change the law in force in such manner, as to enable not only full implementation of the Council Framework Decision 2002/ 584/ JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, but also such as to assure its conformity with the Constitution. In order to enable the accomplishment of this task, therefore, one cannot rule out the appropriate amendment of Article 55 Paragraph 1 of the Constitution, so as to provide that this provision would foresee the exception from the prohibition of extradition of Polish citizens allowing for their surrender on the basis of the EAW to other Member States of the European Union. In the case of amendment of the Constitution, the bringing of national law to conformity with the requirements of the Union will also require the restitution by the legislator of the provisions concerning the EAW, which as a result of the judgment of the Constitutional Tribunal shall have been eliminated from the legal order.

5.1. Considering that the time limit for the enactment of the above indicated Framework Decision has lapsed on 31 December 2003 and that with regard to Poland the obligation to implement it exists since the date of its accession to EU membership, i.e. from 1 May 2004, the

⁴ *Poland's Membership in the European Union*, Judgment of 11th May 2005, K 18/04 available at http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf

Tribunal has deemed it necessary to consider the possibility of deferral of the cancelling of the binding force of Article 607t § 1 of the Code of Penal Procedure...over the period of deferral of entry into force of the present judgment the Polish state shall fulfil the obligation of implementing the Framework Decision.⁵

The Constitutional Treaty would have explicitly recognized the concept of the primacy of EU law. However, the Treaty of Lisbon formally abandons the idea of a “Constitution” for Europe and does not explicitly state the primacy of EU law. These changes are largely cosmetic. The EU treaties have always had constitutional implications for the Member States and function as the constitutional documents for the EU institutions. And, whether or not the treaty explicitly states that EU law has the characteristic of primacy or supremacy, in fact it does.⁶ For some of the implications of supremacy, see Francovich, Köbler and Traghetti del Mediterraneo at the end of this document.

DIRECT EFFECT

The Treaty states that regulations are directly applicable. When the institutions adopt a regulation it becomes part of the law that applies within the national legal systems without the need for any action by the Member States to implement it. The regulation would be a direct source of legal rights and obligations. The regulation specifies when it is to come into force. The Treaty does not say anything about the effect of other measures which the EU institutions may adopt except to distinguish between those measures which are binding (regulations, directives, decisions) and those which are not binding (recommendations and opinions).

The Court of Justice’s decisions establish that some rules of Community law set out in the Treaty (but not all) itself also create rights and obligations for individuals.

⁵ Judgment dated 27 April 2005, File reference No P 1/05, at http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_full_GB.pdf

⁶ See, e.g., The Law Society, A Guide to the Treaty of Lisbon, European Union Insight, 10 (Jan. 2008) available at http://www.lawsociety.org.uk/documents/downloads/guide_to_treaty_of_lisbon.pdf (“It is often said that EU-sourced laws take precedence over domestic laws. This means that once an EU-sourced law is applicable in the UK, it would be contrary to the EU treaties for the UK to keep or pass any laws that contradicted the EU-sourced law. The primacy of European law is not new. This well-established principle has applied in the EU since the Court of Justice developed it in the 1960s, before the UK joined the EU. While the Constitutional Treaty re-stated this principle in the text, the Treaty of Lisbon does not explicitly refer to it, but rather includes this in a declaration. However, this was a political move, and it is clear that the case law of the Court of Justice and the primacy of European law remain cornerstone principles.”)

Provisions which have this characteristic are **directly effective** or produce direct effects.⁷ The first case in which the Court of Justice established this principle was **Van Gend en Loos** in 1963. The case involved a preliminary reference from a tribunal (the Tariefcommissie) in the Netherlands to the Court of Justice. The Tribunal asked two questions:

1. Whether Article [30] of the Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a state can, on the basis of the Article in question, lay claim to individual rights which the courts must protect;
2. In the event of an affirmative reply, whether the application of an import duty of 8% to the import into the Netherlands by the applicant in the main action of ureaformaldehyde originating in the Federal Republic of Germany represented an unlawful increase within the meaning of Article [30]... or whether it was in this case a reasonable alteration of the duty applicable before 1 March 1960, an alteration which, although amounting to an increase from the arithmetical point of view, is nevertheless not to be regarded as prohibited under the terms of Article [30].

The constraint on the Member States's ability to impose import duties is now contained in **Art. 30 TFEU**:

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.⁸

Here is the Court of Justice's decision on the two questions:

II - The First Question

A - Jurisdiction of the Court

The Government of the Netherlands and the Belgian Government challenge the jurisdiction of the court on the ground that the reference relates not to the interpretation but to the application of the Treaty in the context of the constitutional law of the Netherlands, and that in particular the Court has no jurisdiction to decide, should the occasion arise, whether the provisions of the EEC treaty prevail over Netherlands legislation or over other agreements entered into by the Netherlands and incorporated into Dutch national law. The solution of such a problem, it is claimed, falls within the exclusive jurisdiction of the national courts, subject to an application in accordance with the provisions laid down by Articles [258 and 259] of the Treaty.

However in this case the court is not asked to adjudicate upon the application of the Treaty according to the principles of the national law of the Netherlands, which remains the

⁷ This is the doctrine of direct effect.

⁸ The original provision in Article 12 of the EEC Treaty provided: Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.

concern of the national courts, but is asked, in conformity with subparagraph (a) of the first paragraph of Article [267] of the Treaty, only to interpret the scope of Article [30] of the said Treaty within the context of Community Law and with reference to its effect on individuals. This argument has therefore no legal foundation.

The Belgian Government further argues that the Court has no jurisdiction on the ground that no answer which the court could give to the first question of the Tariefcommissie would have any bearing on the result of the proceedings brought in that court.

However, in order to confer jurisdiction on the Court in the present case it is necessary only that the question raised should clearly be concerned with the interpretation of the treaty. the considerations which may have led a national court or tribunal to its choice of questions as well as the relevance which it attributes to such questions in the context of a case before it are excluded from review by the court of justice. it appears from the wording of the questions referred that they relate to the interpretation of the treaty. the court therefore has the jurisdiction to answer them.

This argument, too, is therefore unfounded.

B - On the Substance of the Case

The first question of the Tariefcommissie is whether Article [30] of the Treaty has direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which the national court must protect.

To ascertain whether the provisions of an international Treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In addition the task assigned to the Court of Justice under Article [267], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that 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. Independently of the legislation of Member States, 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.

With regard to the general scheme of the Treaty as it relates to customs duties and charges having equivalent effect it must be emphasized that Article [28], which bases the Community upon a customs union, includes as an essential provision the prohibition of these

customs duties and charges This provision is found at the beginning of the part of the Treaty which defines the 'foundations of the Community'. It is applied and explained by Article [30].

The wording of Article [30] contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of Article [30] does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.

In addition the argument based on Articles [258 and 259] of the Treaty put forward by the three governments which have submitted observations to the court in their statements of case is misconceived. The fact that these Articles of the Treaty enable the Commission and the Member States to bring before the Court a state which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court, any more than the fact that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, in actions between individuals before a national court, of pleading infringements of these obligations.

A restriction of the guarantees against an infringement of Article [30] by Member States to the procedures under Article [258 and 259] would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles [258 and 259] to the diligence of the Commission and of the Member States.

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article [30] must be interpreted as producing direct effects and creating individual rights which national courts must protect.

III - The Second Question

A - The Jurisdiction of the Court

According to the observations of the Belgian and Netherlands governments, the wording of this question appears to require, before it can be answered, an examination by the court of the tariff classification of ureaformaldehyde imported into the Netherlands, a classification on which Van Gend & Loos and the Inspector of Customs and Excise at Zaandam hold different opinions with regard to the 'Tariefbesluit' of 1947. The question clearly does not call for an interpretation of the Treaty but concerns the application of Netherlands customs legislation to the classification of aminoplasts, which is outside the jurisdiction conferred upon the Court of Justice of the European Communities by subparagraph (a) of the first paragraph of Article [267].

The court has therefore no jurisdiction to consider the reference made by the Tariefcommissie.

However, the real meaning of the question put by the Tariefcommissie is whether, in

law, an effective increase in customs duties charged on a given product as a result not of an increase in the rate but of a new classification of the product arising from a change of its tariff description contravenes the prohibition in Article [30] of the Treaty.

Viewed in this way the question put is concerned with an interpretation of this provision of the Treaty and more particularly of the meaning which should be given to the concept of duties applied before the Treaty entered into force.

Therefore the court has jurisdiction to give a ruling on this question.

B - On the Substance

It follows from the wording and the general scheme of Article [30] of the Treaty that, in order to ascertain whether customs duties or charges having equivalent effect have been increased contrary to the prohibition contained in the said Article, regard must be had to the customs duties and charges actually applied at the date of the entry into force of the Treaty.

Further, with regard to the prohibition in Article [30] of the Treaty, such an illegal increase may arise from a re-arrangement of the tariff resulting in the classification of the product under a more highly taxed heading and from an actual increase in the rate of customs duty.

It is of little importance how the increase in customs duties occurred when, after the Treaty entered into force, the same product in the same Member State was subjected to a higher rate of duty.

The application of Article [30], in accordance with the interpretation given above, comes within the jurisdiction of the national court which must enquire whether the dutiable product, in this case ureaformaldehyde originating in the Federal Republic of Germany, is charged under the customs measures brought into force in the Netherlands with an import duty higher than that with which it was charged on 1 January 1958.

The court has no jurisdiction to check the validity of the conflicting views on this subject which have been submitted to it during the proceedings but must leave them to be determined by the national courts.

Operative part

The court In answer to the questions referred to it for a preliminary ruling by the Tariefcommissie ... hereby rules :

1. Article [30] of the Treaty establishing the European Economic Community produces direct effects and creates individual rights which national courts must protect.
2. in order to ascertain whether customs duties or charges having equivalent effect have been increased contrary to the prohibition contained in Article [30] of the Treaty, regard must be had to the duties and charges actually applied by the Member State in question at the date of the entry into force of the Treaty.

Such an increase can arise both from a re-arrangement of the tariff resulting in the classification of the product under a more highly taxed heading and from an increase in the rate of customs duty applied....

Questions

How does the Court explain its recognition that some Treaty provisions may be able to be enforced by citizens? What is the test for the direct effect of a Treaty provision? Where does the test come from?

When we read a later decision in ***Defrenne v Sabena***, Case 43/75, which established that the Treaty's provision on equal pay, which is now found in Article 157, gave rise to rights which individuals could enforce before national courts and also gave rise to obligations which bound private firms (or non-state entities) we can see that the test for the existence of direct effect changed over time. The wording of Art 157 does not spell out in any detail why the provision should produce direct effects:

Art. 157

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
 2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
- Equal pay without discrimination based on sex means:
- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
 - (b) that pay for work at time rates shall be the same for the same job....

Note also that the language of Art. 157 suggests that the Member States have the obligation to ensure equal pay for equal work, not that employers have the obligation not to discriminate between employees on the basis of gender when deciding on employees' salaries.

Gabrielle Defrenne was an air hostess who claimed that she had been discriminated against in violation of what is now Art. 157 because male workers for the airline doing the same work were paid more than she had been. Here is what the Court of Justice said:

Defrenne v Sabena

- 7 The question of the direct effect of Article [157] must be considered in the light of the nature of the principle of equal pay, the aim of this provision and its place in the scheme of the Treaty.
- 8 Article [157] pursues a double aim.
- 9 First, in the light of the different stages of the development of social legislation in the various Member States, the aim of Article [157] is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay.
- 10 Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the preamble to the Treaty.
- 11 This aim is accentuated by the insertion of Article [157] into the body of a chapter devoted to social policy whose preliminary provision... marks ' the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained '.

12 This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community...

18 For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of Article [157] between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the Article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community or national character.

19 It is impossible not to recognize that the complete implementation of the aim pursued by Article [157], by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level.

20 This view is all the more essential in the light of the fact that the Community measures on this question... implement Article [157] from the point of view of extending the narrow criterion of 'equal work', in accordance in particular with the provisions of Convention no 100 on Equal Pay concluded by the International Labour Organization in 1951, Article 2 of which establishes the principle of equal pay for work 'of equal value'.

21 Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by Article [157] must be included in particular those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation.

22 This applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private.

23 As is shown by the very findings of the judgment making the reference, in such a situation the court is in a position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks.

24 In such situation, at least, Article [157] is directly applicable and may thus give rise to individual rights which the courts must protect.

25 Furthermore, as regards equal work, as a general rule, the national legislative provisions adopted for the implementation of the principle of equal pay as a rule merely reproduce the substance of the terms of Article [157] as regards the direct forms of discrimination.

26 Belgian legislation provides a particularly apposite illustration of this point, since Article 14 of Royal Decree no 40 of 24 October 1967 on the employment of women merely sets out the right of any female worker to institute proceedings before the relevant court for the application of the principle of equal pay set out in Article [157] and simply refers to that Article.

27 The terms of Article [157] cannot be relied on to invalidate this conclusion.

28 First of all, it is impossible to put forward an argument against its direct effect based on the use in this Article of the word 'principle', since, in the language of the Treaty, this term is specifically used in order to indicate the fundamental nature of certain provisions, as is shown, for example, by the heading of the first part of the Treaty which is devoted to 'principles'...

29 If this concept were to be attenuated to the point of reducing it to the level of a vague declaration, the very foundations of the Community and the coherence of its external relations would be indirectly affected.

30 It is also impossible to put forward arguments based on the fact that Article [157] only refers expressly to 'Member States'.

31 Indeed, as the Court has already found in other contexts, the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.

32 The very wording of Article [157] shows that it imposes on states a duty to bring about a specific result to be mandatorily achieved within a fixed period.

33 The effectiveness of this provision cannot be affected by the fact that the duty imposed by the Treaty has not been discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this failure to act.

34 To accept the contrary view would be to risk raising the violation of the right to the status of a principle of interpretation, a position the adoption of which would not be consistent with the task assigned to the court by Article [220] of the Treaty.

35 Finally, in its reference to 'Member States', Article [157] is alluding to those states in the exercise of all those of their functions which may usefully contribute to the implementation of the principle of equal pay.

36 Thus, contrary to the statements made in the course of the proceedings this provision is far from merely referring the matter to the powers of the national legislative authorities.

37 Therefore, the reference to 'Member States' in Article [157] cannot be interpreted as excluding the intervention of the courts in direct application of the Treaty.

38 Furthermore it is not possible to sustain any objection that the application by national courts of the principle of equal pay would amount to modifying independent agreements concluded privately or in the sphere of industrial relations such as individual contracts and collective labour agreements.

39 In fact, since Article [157] is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.

40 The reply to the first question must therefore be that the principle of equal pay contained in Article [157] may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.

Note that although this case holds that Art. 157 produces direct effect with respect to direct discrimination, subsequent cases have developed the direct effect of this provision so that Art. 157 now produces direct effects with respect to indirect discrimination (such as where rules and procedures have a discriminatory effect). For example, pay scales under which part time workers are paid at lower rates than full time workers may be problematic if women are more likely to be part-time workers than men.

In **Jenkins v Kingsgate (Clothing Productions) Ltd** (Case 96/80)⁹ the Court of Justice said:

9 It appears. . . that the national court is principally concerned to know whether a difference in the level of pay for work carried out part-time and the same work carried out full-time may amount to discrimination of a kind prohibited by Article [157] of the Treaty when the category of part-time workers is exclusively or predominantly comprised of women.

10 The answer to the questions thus understood is that the purpose of Article [157] is to ensure the application of the principle of equal pay for men and women for the same work. The differences in pay prohibited by that provision are therefore exclusively those based on the difference of the sex of the workers. Consequently the fact that part-time work is paid at an hourly rate lower than pay for full-time work does not amount per se to discrimination prohibited by Article [157] provided that the hourly rates are applied to workers belonging to either category without distinction based on sex.

11 If there is no such distinction, therefore, the fact that work paid at time rates is remunerated at an hourly rate which varies according to the number of hours worked per week does not offend against the principle of equal pay laid down in Article [157] of the Treaty in so far as the difference in pay between part-time work and full-time work is attributable to factors which are objectively justified and are in no way related to any discrimination based on sex.

12 Such may be the case, in particular, when by giving hourly rates of pay which are lower for part-time work than those for full-time work the employer is endeavouring, on economic grounds which may be objectively justified, to encourage full-time work irrespective of the sex of the worker.

13 By contrast, if it is established that a considerably smaller percentage of women than of men perform the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay will be contrary to Article [157] of the Treaty where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex.

14 Where the hourly rate of pay differs according to whether the work is part-time or full-time it is for the national courts to decide in each individual case whether, regard being had to the facts of the case, its history and the employer' s intention, a pay policy such as that which is at issue in the main proceedings although represented as a difference based on weekly working hours is or is not in reality discrimination based on the sex of the worker.

15 The reply to the first three questions must therefore be that a difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article [157] of the Treaty unless it is in reality merely an indirect way of reducing the level of pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women.

⁹ <http://www.bailii.org/eu/cases/EUECJ/1981/R9680.html> .

Similarly, in **R v Secretary of State for Employment, ex parte Seymour-Smith** (Case C-167/97)¹⁰ the plaintiffs challenged a rule which required workers who claimed a remedy for unfair dismissal to have been continuously employed for two years, arguing that the rule was indirectly discriminatory because fewer women than men could fulfill the requirement. The Court of Justice said that compensation for unfair dismissal was pay within the meaning of the Treaty and that:

in order to establish whether a measure adopted by a Member State has disparate effect as between men and women to such a degree as to amount to indirect discrimination for the purposes of Article [157] of the Treaty, the national court must verify whether the statistics available indicate that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by that measure. If that is the case, there is indirect sex discrimination, unless that measure is justified by objective factors unrelated to any discrimination based on sex.

The disparate impact analysis which these cases illustrate was developed in the US and borrowed by the Court of Justice.¹¹ We can see this doctrinal analysis as an example of a legal transplant.

In **Defrenne v Sabena** the Court concluded that Art. 157 created rights that individuals could enforce not just against the Member States but also against non-state employers. This is described as **horizontal direct effect** (because the effects of the provision exist between individuals and firms which are operating at the same level below the level of the state). The Court of Justice decided that its decision should not have retrospective effect. Only employees who had already initiated proceedings in respect of past periods could rely on Art. 157.

Thus the impact of Defrenne was moderated by two of the Court's choices: the limitation of the direct effect of the provision to direct discrimination (a limitation of scope that subsequently disappeared) and a limitation with respect to time, that the effects would only apply prospectively. The Court of Justice has often developed doctrine incrementally as Defrenne and the later cases referred to above illustrate.

¹⁰ <http://www.bailii.org/eu/cases/EUECJ/1999/C16797.html> .

¹¹ See, e.g., Simon Forshaw & Marcus Pilgerstorfer, *Direct and Indirect Discrimination: Is There Something in Between?* 37 *Industrial Law Journal* 347, 350 (2008) ("The Advocate General, whose analysis was adopted by the ECJ, drew upon the decision of the US Supreme Court in Griggs' case" and noting that "The decision in Griggs v Duke Power was no doubt drawn to the attention of the Advocate General and the ECJ by Counsel for Mrs Jenkins, Anthony Lester QC." and "when the then Labour Government was considering the enactment of the Sex Discrimination Act 1975, the then Home Secretary, Roy Jenkins, visited the US with his special adviser Anthony Lester and discovered the decision in Griggs.")

The Court of Justice uses a teleological approach to interpret the Treaty in order to achieve the Treaty's objectives, rather than relying on the wording of the Treaty. In the early cases on direct effect the doctrine is justified by the Court of Justice on the basis of the need to ensure that Community law is effective (effectiveness). Is the Court overstepping its role here? Should the Court have investigated whether the State parties to the Treaty intended Art. 157 to operate as the Court says it does?

In many of the cases on direct effect the Court of Justice says that in order for a measure to produce direct effects it must:

- ◆ be precise
- ◆ be unconditional or if it is subject to conditions, those conditions must be subject to judicial control
- ◆ have no need for implementation by the Member States (or the Member States have no discretion as to implementation).

Thus very many provisions of Community law can produce direct effects. Some of these provisions, but not others, will produce horizontal direct effects. Treaty provisions such as Article 30, which regulates the imposition of customs duties, apply to governmental acts. Other Treaty provisions, such as the provisions on cartels and on the abuse of a dominant position, are designed to regulate the behavior of non-state actors and can produce horizontal direct effects.

If a Member State has a choice about how it applies EU law within its territory, the EU rule will not produce direct effects. So, in **Francovich v Republic of Italy**¹² the Court of Justice, considering the effect of a requirement in a directive (as to direct effect and directives see below) that the Member States guarantee employees a minimum level of protection if their employer became insolvent, but which did not specify how the Member States should provide this protection, said:

25....It follows from the terms of the directive that the Member State is required to organize an appropriate institutional guarantee system. Under Article 5, the Member State has a broad discretion with regard to the organization, operation and financing of the guarantee institutions. The fact, referred to by the Commission, that the directive envisages as one possibility among others that such a system may be financed entirely by the public authorities cannot mean that the State can be identified as the person liable for unpaid claims. The payment obligation lies with the guarantee institutions, and it is only in exercising its power to organize the guarantee system that the State may provide that the guarantee institutions are to be financed entirely by the public authorities. In those circumstances the State takes on an obligation which in principle is not its own.

26 Accordingly, even though the provisions of the directive in question are sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as

¹² Cases C-6/90 & C-9/90 at <http://www.bailii.org/eu/cases/EUECJ/1991/C690.html> .

regards the content of that guarantee, those elements are not sufficient to enable individuals to rely on those provisions before the national courts. Those provisions do not identify the person liable to provide the guarantee, and the State cannot be considered liable on the sole ground that it has failed to take transposition measures within the prescribed period.

27 The answer to the first part of the first question must therefore be that the provisions of Directive 80/987 which determine the rights of employees must be interpreted as meaning that the persons concerned cannot enforce those rights against the State before the national courts where no implementing measures are adopted within the prescribed period.

Like Art. 157, directives are addressed to the Member States and impose obligations on the Member States. And Article 288 does not seem to suggest by its wording that directives would constitute a source of rights that individuals could enforce in national courts (note the contrasting descriptions of regulations and directives in Art. 288). However, directives are the type of instrument which has traditionally been used for internal market measures and harmonization measures generally. The consumer protection measures we noted in the first materials packet are designed to improve the position of consumers by giving rights to the consumers: rights not to have unfair contract terms imposed on them; rights to cancel contracts under certain circumstances. The Court of Justice has held that directives **can** produce direct effects subject to two limitations that do not apply to Treaty provisions (or to regulations):

◆ **Directives only produce direct effects after the date for implementation** has passed (*Pubblico Ministero v Ratti*, Case 148/78)

When Directives are adopted they specify a date by which they must be implemented - they do not produce direct effects before that date, although the Member States may be constrained in their freedom to introduce provisions which would conflict with the Directive during the implementation period.

◆ **Directives do not produce direct effects as against non-state entities** (directives do not produce horizontal direct effects (*Marshall v Southampton and South-West Hampshire Area Health Authority*, Case 152/84))

The diagram below illustrates this terminology. Directives can produce vertical direct effects - a consumer could invoke (precise, unconditional etc.) provisions of a consumer protection directive against the state or a state entity if she entered into a consumer contract with the state or state entity. However, as directives do not produce horizontal direct effects, a consumer cannot invoke provisions of the unfair contract terms directive against a non-state entity. We will see later that the Court of Justice has developed an idea that where a directive gives effect to general principles in the Treaties it is possible to recognize horizontal direct effect of the general principle as spelled out in the directive.¹³

¹³ Seda Küçükdeveci v Swedex GmbH & Co. KG Case Case C-555/07, Jan 19, 2010.

MEMBER STATE

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CONSUMER

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NON-STATE ENTITY

Although directives have guaranteed equal treatment to employees, employees have not able to invoke those rights to equal treatment against a private sector employer, although they can invoke rights to equal pay under Art. 157 against a private sector employer. A broad interpretation of what constitutes pay under Art. 157 (Seymour-Smith above) has limited the impact of the lack of horizontal direct effect of directives in this area.

Because of this horizontal/vertical distinction in direct effect it is important to be able to tell whether an entity should be identified with the State or not. In **Foster v British Gas**, Case C-188/89,¹⁴ the Court of Justice defined a state entity (an emanation of the State) as “A body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a Directive capable of having direct effect may be relied upon.”

In **Marshall v Southampton and South-West Hampshire Area Health Authority**, Ms. Marshall tried to invoke provisions of the Equal Treatment Directive against her employer, a health authority which was part of the UK’s National Health Service (NHS) (the UK Court which referred questions of interpretation of EU law to the Court of Justice decided that the health authority was an emanation of the state). Ms Marshall claimed that when she was required to retire at age 60 whereas men were allowed to work until they were 65 she was discriminated against in contravention of the directive.

Here is an excerpt from the Court of Justice’s judgment:

41 In support of that view, the appellant points out that Directives are capable of conferring rights on individuals which may be relied upon directly before the courts of the Member States; national courts are obliged by virtue of the binding nature of a Directive, in conjunction with [Art. 4 TEU] to give effect to the provisions of Directives where possible, in particular when

¹⁴ <http://www.bailii.org/eu/cases/EUECJ/1990/C18889.html> .

construing or applying relevant provisions of national law (Judgment of 10 April 1984 in Case 14/83 von Colson and Kamann V Land Nordrhein-Westfalen.... Where there is any inconsistency between national law and community law which cannot be removed by means of such a construction, the appellant submits that a national court is obliged to declare that the provision of national law which is inconsistent with the Directive is inapplicable.

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

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

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

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

46 It is necessary to recall that, according to a long line of decisions of the court... wherever the provisions of a Directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the state where that state fails to implement the Directive in national law by the end of the period prescribed or where it fails to implement the Directive correctly.

47 that view is based on the consideration that it would be incompatible with the binding nature which Article [288] confers on the Directive to hold as a matter of principle that the obligation imposed thereby cannot be relied on by those concerned. from that the court deduced that a Member State which has not adopted the implementing measures required by the Directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the Directive entails.

48 With regard to the argument that a Directive may not be relied upon against an individual, it must be emphasized that according to Article [288] of the..Treaty the binding nature of a Directive, which constitutes the basis for the possibility of relying on the Directive before a national court, exists only in relation to ' each Member State to which it is addressed '. It follows

that a Directive may not of itself impose obligations on an individual and that a provision of a Directive may not be relied upon as such against such a person. it must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual.

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

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

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

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

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

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

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

Marshall illustrates how the Court applies the test for direct effect (paras 52 and 53).

The rationale for direct effect here is an estoppel rationale (see para. 49). Allowing Ms Marshall to enforce her rights under the directive against a state entity prevents the Member State from taking advantage of its own wrong.

The UK argued that there would be a problem if employees of state entities could enforce rights under the directive and employees of non-state entities could not. The Court of Justice dismisses this argument on the basis that the UK could easily solve this problem (see para 51). But should we worry about this?

There is another doctrine of Community law, sometimes called the doctrine of **indirect effects**, or the interpretative obligation of the national courts, which helps people who would like to bring claims based on directives against non-state entities. The Court of Justice has said in a number of cases that national courts are required to interpret national law in accordance with Community law as far as they can. In some cases the national courts are required to use this power/obligation of interpretation to disapply provisions of national law which are inconsistent with Community law. For example:

... the principle of supremacy entails different types of obligations. One of them, perhaps the most important, is the obligation for the national courts to set aside conflicting national law. In *Simmenthal*, the Court established obligations for both the member states (legislature) and the national courts, which are justified by the need to ensure the effectiveness of Community law. As to the former, the Court established the pre-emptive effect of Community law, which precludes the adoption of national legislative measures that would be incompatible with Community provisions. Arguably, pre-emption precedes supremacy. As to the latter, the Court considered that the principle of precedence (supremacy) renders automatically inapplicable any provision of national law conflicting with Community law. In other words, the national courts, which must apply Community law in its entirety and protect rights conferred on individuals, are under an obligation to set aside the domestic legislation (prior or subsequent to the Community rule) contrary to Community law. It is not only for the constitutional courts to set aside, but also the ordinary courts must fulfil this obligation resulting from the principle of supremacy.¹⁵

DAMAGES ACTIONS

We have seen that in some cases a person who claims a right under Community law may be able to enforce that right using the doctrines of direct effect and indirect effect. Sometimes, however, it may not be possible for a person or firm to be able to enforce their rights effectively using these doctrines. In **Francovich v Republic of Italy** the ECJ held that where a Member State failed to implement a directive the Member State could be liable in damages as a result:

40 The first of those conditions is that the result prescribed by the directive should entail the

¹⁵ Xavier Groussot & Timo Minssen, *Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?* 3 *European Constitutional Law Review* 385–417, 391 (2007).

grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

41 Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.

42 Subject to that reservation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law..

43 Further, the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation...

Where a person's inability to enforce their rights results from a national Court's failure to act to protect their rights, the national court's failing may constitute grounds for a remedy in damages against the State. In **Köbler v Austria** (Case C-224/01)¹⁶ a University Professor in Austria had tried to apply for a length-of-service increment on the basis of service as a University Professor in Austria and in other Member States, and he claimed that the denial of the increment constituted indirect discrimination. After an Austrian Court denied his claim, characterizing the increment as a loyalty bonus to give an "incentive to academics in a very mobile labour market to spend their career in Austrian universities", Köbler sued the Austrian State for damages. The Court of Justice said:

30 First, as the Court has repeatedly held, the principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of Community law for which the State is responsible is inherent in the system of the Treaty ...

31 The Court has also held that that principle applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach...

32 In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle 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 which directly govern the situation of individuals....

33 In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded

¹⁶ <http://www.bailii.org/eu/cases/EUECJ/2003/C22401.html> .

from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.

34 It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights.

35 Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article [267] EC a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.

36 Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance....

37 Certain of the governments which submitted observations in these proceedings claimed that the principle of State liability for damage caused to individuals by infringements of Community law could not be applied to decisions of a national court adjudicating at last instance. In that connection arguments were put forward based, in particular, on the principle of legal certainty and, more specifically, the principle of *res judicata*, the independence and authority of the judiciary and the absence of a court competent to determine disputes relating to State liability for such decisions.

38 In that regard the importance of the principle of *res judicata* cannot be disputed ... In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question.

39 However, it should be borne in mind 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*. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage.

40 It follows that the principle of *res judicata* does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance.

41 Nor can the arguments based on the independence and authority of the judiciary be upheld.

42 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. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.

43 As to the argument based on the risk of a diminution of the authority of a court adjudicating

at last instance owing to the fact that its final decisions could by implication be called in question in proceedings in which the State may be rendered liable for such decisions, the existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary.

44 Several governments also argued that application of the principle of State liability to decisions of a national court adjudicating at last instance was precluded by the difficulty of designating a court competent to determine disputes concerning the reparation of damage resulting from such decisions.

45 In that connection, given that, for reasons essentially connected with the need to secure for individuals protection of the rights conferred on them by Community rules, the principle of State liability inherent in the Community legal order must apply in regard to decisions of a national court adjudicating at last instance, it is for the Member States to enable those affected to rely on that principle by affording them an appropriate right of action. Application of that principle cannot be compromised by the absence of a competent court.

46 According to settled case-law, in the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law ...

47 Subject to the reservation that it is for the Member States to ensure in each case that those rights are effectively protected, it is not for the Court to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system....

48 It should be added that, although considerations to do with observance of the principle of res judicata or the independence of the judiciary have caused national legal systems to impose restrictions, which may sometimes be stringent, on the possibility of rendering the State liable for damage caused by mistaken judicial decisions, such considerations have not been such as absolutely to exclude that possibility. Indeed, application of the principle of State liability to judicial decisions has been accepted in one form or another by most of the Member States, as the Advocate General pointed out ... even if subject only to restrictive and varying conditions.

49 It may also be noted that, in the same connection, the ECHR and, more particularly, Article 41 thereof enables the European Court of Human Rights to order a State which has infringed a fundamental right to provide reparation of the damage resulting from that conduct for the injured party. The case-law of that court shows that such reparation may also be granted when the infringement stems from a decision of a national court adjudicating at last instance

50 It follows from the foregoing that the principle according to which the Member States are liable to afford reparation of damage caused to individuals as a result of infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance. It is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation...

51 As to the conditions to be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible, the Court has held that these are threefold: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties..

52 State liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringes a rule of Community law is governed by the same conditions.

53 With regard more particularly to the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the Member States which submitted observations in this case have also contended. State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.

54 In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it.

55 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 non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article [267]

56 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 ...

57 The three conditions mentioned at paragraph 51 hereof are necessary and sufficient to found a right in favour of individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law...

58 Subject to the existence of a right to obtain reparation which is founded directly on Community law where the conditions mentioned above are met, it is on the basis of rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused, with the proviso that the conditions for reparation of loss and damage laid down by the national legislation must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation...

59 In the light of all the foregoing, the reply to the first and second questions must be that the principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation....

70 The special length-of-service increment granted by the Austrian State qua employer to university professors ... secures a financial benefit in addition to basic salary the amount of which is already dependent on length of service. A university professor receives that increment if he has carried on that profession for at least 15 years with an Austrian university and if, furthermore, he has been in receipt for at least four years of the normal length-of-service increment.

71 Accordingly, Article 50a of the GG precludes, for the purpose of the grant of the special length-of-service increment for which it provides, any possibility of taking into account periods of

activity completed by a university professor in a Member State other than the Republic of Austria.

72 Such a regime is clearly likely to impede freedom of movement for workers in two respects.

73 First, that regime operates to the detriment of migrant workers who are nationals of Member States other than the Republic of Austria where those workers are refused recognition of periods of service completed by them in those States in the capacity of university professor on the sole ground that those periods were not completed in an Austrian university ...

74 Secondly, that absolute refusal to recognise periods served as a university professor in a Member State other than the Republic of Austria impedes freedom of movement for workers established in Austria inasmuch as it is such as to deter the latter from leaving the country to exercise that freedom. In fact, on their return to Austria, their years of experience in the capacity of university professor in another Member State, that is to say in the pursuit of comparable activities, are not taken into account for the purposes of the special length-of-service increment ...

75 Those considerations are not altered by the fact relied on by the Republic of Austria that, owing to the possibility ... to grant migrant university professors a higher basic salary in order to promote the recruitment of foreign university professors, their remuneration is often more than that received by professors of Austrian universities, even after account is taken of the special length-of-service increment.

76 In fact, on the one hand, ... the GG offers merely a possibility and does not guarantee that a professor from a foreign university will receive as from his appointment as a professor of an Austrian university a higher remuneration than that received by professors of Austrian universities with the same experience. Secondly, the additional remuneration available ... upon appointment is quite different from the special length-of-service increment. Thus, that provision does not prevent .. the GG from having the effect of occasioning unequal treatment in regard to migrant university professors as opposed to professors of Austrian universities and thus creates an impediment to the freedom of movement of workers secured by Article [54] of the Treaty.

77 Consequently, a measure such as the grant of a special length-of-service increment ... is likely to constitute an obstacle to freedom of movement for workers prohibited in principle by Article [54] of the Treaty and Article 7(1) of Regulation No 1612/68. Such a measure could be accepted only if it pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of that measure would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose...

78 In its judgment of 24 June 1998 the Verwaltungsgerichtshof held that the special length-of-service increment provided for in Article 50a of the GG constituted under national law a bonus seeking to reward the loyalty of professors of Austrian universities to their sole employer, namely the Austrian State.

79 Accordingly, it is necessary to examine whether the fact that under national law that benefit constitutes a loyalty bonus may be deemed under Community law to indicate that it is dictated by a pressing public-interest reason capable of justifying the obstacle to freedom of movement that the bonus involves. ...

83 Although it cannot be excluded that an objective of rewarding workers' loyalty to their employers in the context of policy concerning research or university education constitutes a pressing public-interest reason, given the particular characteristics of the measure at issue in the main proceedings, the obstacle which it entails clearly cannot be justified in the light of such an objective.

84 First, although all the professors of Austrian public universities are the employees of a single employer, namely the Austrian State, they are assigned to different universities. However, on the employment market for university professors, the various Austrian universities are in competition not only with the universities of other Member States and those of non-Member States but also amongst themselves. As to that second kind of competition the measure at issue in the main proceedings does nothing to promote the loyalty of a professor to the Austrian university where he performs his duties.

85 Second, although the special length-of-service increment seeks to reward workers' loyalty to their employer, it also has the effect of rewarding the professors of Austrian universities who continue to exercise their profession on Austrian territory. The benefit in question is therefore likely to have consequences in regard to the choice made by those professors between a post in an Austrian university and a post in the university of another Member State.

86 Accordingly, the special length-of-service increment at issue in the main proceedings does not solely have the effect of rewarding the employee's loyalty to his employer. It also leads to a partitioning of the market for the employment of university professors in Austria and runs counter to the very principle of freedom of movement for workers.

87 It follows from the foregoing that a measure such as the special length-of-service increment provided for in ...the GG results in an obstacle to freedom of movement for workers which cannot be justified by a pressing public-interest reason.

88 Accordingly, the reply to the third question referred for a preliminary ruling must be that Articles [54] of the Treaty and 7(1) of Regulation No 1612/68 are to be interpreted as meaning that they preclude the grant, under conditions such as those laid down in Article 50a of the GG, of a special length-of-service increment which, according to the interpretation of the Verwaltungsgerichtshof in its judgment of 24 June 1998, constitutes a loyalty bonus.

The Court of Justice dealt with the issue of state liability and courts again in **Traghetti del Mediterraneo SpA v Italy** (Case C-173/03)¹⁷

7. TDM and Tirrenia di Navigazione (Tirrenia) are two maritime transport undertakings which, in the 1970s, ran regular ferry services between mainland Italy and the islands of Sardinia and Sicily. In 1981, when it had entered into an arrangement with its creditors, TDM brought proceedings against Tirrenia before the Tribunale di Napoli (Naples District Court) seeking compensation for the damage that it claimed to have suffered during the preceding years as a result of the low-fare policy operated by Tirrenia.

8. In that regard, TDM also submitted that its competitor had failed to comply with ... the Italian Civil Code relating to acts of unfair competition and had infringed ... the EEC Treaty... since, in its view, Tirrenia had infringed the basic rules of that Treaty and, in particular, abused its dominant position on the market in question by operating with fares well below cost owing to its having obtained public subsidies, the legality of which was doubtful under Community law.

9. By decision of 26 May 1993, upheld on appeal by the Corte d'Appello di Napoli (Naples Court of Appeal) of 13 December 1996, registered on 7 January 1997, the action for compensation was, however, dismissed by the Italian courts on the ground that the subsidies granted by the

¹⁷ <http://www.bailii.org/eu/cases/EUECJ/2006/C17303.html> .

authorities of that state were legal, since they reflected public interest objectives in connection, in particular, with the development of the Mezzogiorno and, in any event, did not adversely affect the operation of sea links other than and competing with those objected to by TDM. Thus it could not be held that Tirrenia was responsible for acts of unfair competition.

10. Taking the view, for his part, that those two decisions were vitiated by errors of law since, inter alia, they were based on an incorrect interpretation of the Treaty rules on state aid, the administrator of TDM lodged an appeal against the judgment of the Corte d'Appello, requesting the Corte Suprema di Cassazione to submit the relevant questions of interpretation of Community law to the Court of Justice pursuant to the third paragraph of art [267]...

11. ... the Corte Suprema di Cassazione refused to accede to that request on the ground that the approach adopted by the court ruling on the substance followed the letter of the relevant provisions of the Treaty and was, moreover, perfectly consistent with the court's case law...

12. In reaching that conclusion, the Corte Suprema di Cassazione noted, firstly ... that [the Treaty...allows] on certain conditions, an exception to the general prohibition of state aid, in order to promote the economic development of underprivileged regions or to meet demands for goods or services which cannot be fully satisfied by the operation of free competition. According to that court, those conditions were met exactly in the present case since, during the period under consideration (between 1976 and 1980), bulk transport between mainland Italy and its main islands could not be operated by sea owing to the costs involved, so that it was necessary to meet the ever more pressing demand for that type of service by entrusting the running of such transport to a public concessionary applying a set schedule of charges.

13. According to that court, the distortion of competition ensuing from the existence of that concession did not, however, imply that the aid granted was automatically unlawful. The grant of such a public service concession always, by implication, had the effect of distorting competition and TDM had not succeeded in demonstrating that Tirrenia had taken advantage of the aid granted by the state to make profits from activities other than those for which the subsidies were actually granted.

14. With regard, secondly, to the plea alleging infringement of .. the Treaty [provisions on cartels and abuse of a dominant position] this was dismissed by the Corte Suprema di Cassazione as unfounded, on the ground that the activity of maritime cabotage had not been liberalised at the material time and that the restricted nature and geographical extent of that activity did not allow for clear identification of the relevant market ... In that context that court held, however, that although it was difficult to identify the market, there could none the less be real competition in the sector in question since the aid granted in this case affected only one activity amongst the numerous activities traditionally carried out by a maritime transport undertaking and that, furthermore, it was confined to a single member state.

15. Consequently, in those circumstances, the Corte Suprema di Cassazione dismissed the appeal before it, having also rejected the complaints raised by TDM alleging infringement of the national provisions on acts of unfair competition and complaining that the Corte d'Appello had failed to rule on TDM's request that the relevant questions be referred to the court. The proceedings before the referring court arise from that decision to dismiss the appeal.

16. Taking the view that the judgment of 19 April 2000 was based on an incorrect interpretation of the Treaty rules on competition and state aid and on the erroneous premise that there was settled case law of the court on the matter, the administrator of TDM, which had in the meantime been put into liquidation, instituted proceedings against the Italian Republic before the Tribunale di Genova (Genoa District Court) for compensation for the damage suffered by that undertaking as a result of the errors of interpretation committed by the Corte Suprema di

Cassazione and of the breach of its obligation to make a reference for a preliminary ruling pursuant to the third paragraph of art [267]

17. ... TDM submits that, had that court made a reference to the court, the outcome of the appeal would have been entirely different.... the court would have laid emphasis on the Community dimension of the maritime cabotage and the difficulties inherent in assessing the compatibility of public subsidies with the rules of the Treaty on state aid, which would have led the Corte Suprema di Cassazione to declare that the aid granted to Tirrenia was unlawful.

18. The Italian Republic disputes even the admissibility of that action for damages, basing its arguments on the provisions of Law No 117/88 and, in particular, on art 2(2) thereof, pursuant to which the interpretation of provisions of law in the context of the exercise of judicial functions cannot give rise to state liability. If, however, the action should be held admissible by the referring court, it submits, in the alternative, that the action must in any event be dismissed since the conditions governing references for a preliminary ruling are not met and the judgment of 19 April 2000, being *res judicata*, may no longer be challenged.

19. In reply to those arguments, TDM raises the question of the compatibility of Law No 117/88 in the light of the requirements of Community law. In particular, it submits that the conditions governing the admissibility of actions laid down by that Law and the practice of the national courts (including the Corte Suprema di Cassazione) in that connection are so restrictive that they make it excessively difficult, indeed virtually impossible, to obtain compensation from the state for damage caused by judicial decisions. Consequently, that legislation disregards the principles laid down by the court ...

20. In those circumstances, since it was unsure how to decide the dispute before it and whether it was possible to extend to the judiciary the principles laid down by the court in the judgments, cited in the preceding paragraph, concerning infringements of Community law committed in the exercise of legislative activity, the Tribunale di Genova decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a Member State liable on the basis of non-contractual liability to individual citizens for errors by its own courts in the application of Community law or the failure to apply it correctly and in particular the failure by a court of last instance to discharge the obligation to make a reference to the Court of Justice under the third paragraph of Article [267]?

(2) Where a Member State is deemed liable for the errors by its own courts in the application of Community law and in particular for failure by a court of last instance to make a reference to the Court of Justice under the third paragraph of Article [267] is affirmation of that liability impeded in a manner incompatible with the principles of Community law by national legislation on State liability for judicial errors which:

-- precludes liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial functions,
-- limits State liability solely to cases of intentional fault and serious misconduct on the part of the court?'

21. Following delivery of the judgment in *Kobler v Austria* ... the Registrar of the Court of Justice sent a copy of that judgment to the referring court asking it whether, in the light of the content thereof, it considered it necessary to continue its reference for a preliminary ruling.

22. By letter of 13 January 2004, received by the Court Registry on 29 January 2004, the Tribunale di Genova, having heard the parties to the main proceedings, took the view that the *Kobler* judgment gave a comprehensive answer to the first of the two questions which it had referred, so that it was no longer necessary for the court to give a ruling on that question.

23. However, it considered it necessary to continue with its second question, in order that the

court give a ruling 'also in the light of the principles set out . . . in the Kobler judgment' on the question whether-

'national legislation on State liability for judicial errors impedes affirmation of that liability where it precludes liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial functions and limits State liability solely to cases of intentional fault and serious misconduct on the part of the court.'

The question referred for a preliminary ruling

24. A preliminary point to note is that the aim of the proceedings pending before the referring court is to have the state held liable in respect of a decision of a supreme court that is not subject to appeal. The question which the referring court wished to maintain must therefore be understood as concerning, in essence, the question whether Community law and, in particular, the principles laid down by the court in the Kobler judgment preclude national legislation such as that at issue in the main proceedings which, firstly, excludes all state liability for damage caused to individuals by an infringement of Community law committed by a national court adjudicating at last instance, where that infringement is the result of an interpretation of provisions of law or of an assessment of the facts and evidence carried out by that court, and, secondly, also limits such liability solely to cases of intentional fault and serious misconduct on the part of the court.

25. In the view of TDM and the Commission, that question calls clearly for an affirmative answer. Since assessment of facts and evidence and interpretation of provisions of law are inherent in the judicial function, the exclusion, in such cases, of state liability for damage caused to individuals by reason of the exercise of that function amounts, in practice, to exonerating the state from all liability for infringements of Community law attributable to the judiciary.

26. Furthermore, with regard to the limitation of that liability solely to cases of intentional fault or serious misconduct on the part of the court, that is also likely to lead to de facto exclusion of all state liability since, firstly, the court called upon to rule on an action for compensation for damage caused by a judicial decision is not left free to construe the actual concept of 'serious misconduct' itself but is bound by the strict definition laid down by the national legislature which sets out in advance-and exhaustively-what constitutes serious misconduct.

27. According to TDM, it follows, secondly, from experience gained in Italy in the implementation of Law No 117/88, that that state's courts and, in particular, the Corte Suprema di Cassazione adopt a very narrow reading of that law and of the concepts of 'serious misconduct' and 'inexcusable negligence'. Those concepts are interpreted by that court as 'manifest, gross and large-scale infringement of the law' or as containing a construction of the law 'in terms contrary to all logical criteria', which leads in practice to the virtually systematic dismissal of complaints brought against the Italian state.

28. However, according to the Italian government, supported on this point by Ireland and the United Kingdom government, national legislation such as that at issue in the main proceedings is perfectly compatible with the very principles of Community law since it creates a fair balance between the need to preserve the independence of the judiciary and the essential requirements of legal certainty, on the one hand, and the provision of effective judicial protection of individuals in the most flagrant cases of infringement of Community law attributable to the judiciary, on the other.

29. On that view, if it were to be accepted, member states' liability for damage resulting from such infringements ought therefore to be restricted solely to those cases in which there is a

sufficiently serious infringement of Community law. However, liability could not be incurred where a national court has ruled on a dispute on the basis of an interpretation of articles of the Treaty which is adequately reflected in the reasons given by that court.

30. In that regard, it should be noted that, in the *Kobler* judgment, delivered after the date on which the national court made the reference to the court, the court held that the principle that a member state is obliged to make good damage caused to individuals as a result of breaches of Community law for which it is responsible applies to any case in which a member state breaches Community law, whichever is the authority of the member state whose act or omission was responsible for the breach ...

31. Basing its reasoning in that respect, *inter alia*, on the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules and on the fact that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law, the court infers that the protection of those rights would be weakened-and the full effectiveness of the Community rules conferring such rights would be brought into question-if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a member state adjudicating at last instance ...

32. It is true that, having regard to the specific nature of the judicial function and to the legitimate requirements of legal certainty, state liability in such a case is not unlimited. As the court has held, state liability can be incurred only in the exceptional case where the national court adjudicating at last instance has manifestly infringed the applicable law. In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it, which 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 non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of art [267]...

33. Analogous considerations linked to the need to guarantee effective judicial protection to individuals of the rights conferred on them by Community law similarly preclude state liability not being incurred solely because an infringement of Community law attributable to a national court adjudicating at last instance arises from the interpretation of provisions of law made by that court.

34. On the one hand, interpretation of provisions of law forms part of the very essence of judicial activity since, whatever the sphere of activity considered, a court faced with divergent or conflicting arguments must normally interpret the relevant legal rules-of national and/or Community law-in order to resolve the dispute brought before it.

35. On the other hand, it is not inconceivable that a manifest infringement of Community law might be committed precisely in the exercise of such work of interpretation if, for example, the court gives a substantive or procedural rule of Community law a manifestly incorrect meaning, particularly in the light of the relevant case law of the court on the subject ... or where it interprets national law in such a way that in practice it leads to an infringement of the applicable Community law.

36. As Advocate General Leger observed ... to exclude all state liability in such circumstances on the ground that the infringement of Community law arises from an interpretation of provisions of law made by a court would be tantamount to rendering meaningless the principle

laid down by the court in the Kobler judgment. That remark is even more apposite in the case of courts adjudicating at last instance, which are responsible, at national level, for ensuring that rules of law are given a uniform interpretation.

37. An analogous conclusion must be drawn with regard to legislation which in a general manner excludes all state liability where the infringement attributable to a court of that state arises from its assessment of the facts and evidence.

38. On the one hand, such an assessment constitutes, like the interpretation of provisions of law, another essential aspect of the judicial function since, regardless of the interpretation adopted by the national court seised of a particular case, the application of those provisions to that case will often depend on the assessment which the court has made of the facts and the value and relevance of the evidence adduced for that purpose by the parties to the dispute.

39. On the other hand, such an assessment-which sometimes requires complex analysis-may also lead, in certain cases, to a manifest infringement of the applicable law, whether that assessment is made in the context of the application of specific provisions relating to the burden of proof or the weight or admissibility of the evidence, or in the context of the application of provisions which require a legal characterisation of the facts.

40. To exclude, in such circumstances, any possibility that state liability might be incurred where the infringement allegedly committed by the national court relates to the assessment which it made of facts or evidence would also amount to depriving the principle set out in the Kobler judgment of all practical effect with regard to manifest infringements of Community law for which courts adjudicating at last instance were responsible.

41. As Advocate General Leger observed ... that is especially the case in the state aid sector. To exclude, in that sector, all state liability on the ground that an infringement of Community law committed by a national court is the result of an assessment of the facts is likely to lead to a weakening of the procedural guarantees available to individuals, in that the protection of the rights which they derive from the relevant provisions of the Treaty depends, to a great extent, on successive operations of legal classification of the facts. Were state liability to be wholly excluded by reason of the assessments of facts carried out by a court, those individuals would have no judicial protection if a national court adjudicating at last instance committed a manifest error in its review of the above operations of legal classification of facts.

42. With regard, finally, to the limitation of state liability to cases of intentional fault and serious misconduct on the part of the court, it should be recalled, as was pointed out in para 32 of this judgment, that the court held, in the Kobler judgment, that state liability for damage caused to individuals by reason of an infringement of Community law attributable to a national court adjudicating at last instance could be incurred in the exceptional case where that court manifestly infringed the applicable law.

43. Such manifest infringement is to be assessed, inter alia, in the light of a number of criteria, such as the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, and the non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of art [267]; it is in any event presumed where the decision involved is made in manifest disregard of the case law of the court on the subject ...

44. Accordingly, although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before state liability can be incurred for an infringement of Community law attributable to a national court adjudicating at last instance, under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law ...

45. A right to obtain redress will therefore arise, if that latter condition is met, where it has been established that the rule of law infringed is intended to confer rights on individuals and there is a direct causal link between the breach of the obligation incumbent on the state and the loss or damage sustained by the injured parties ... As is clear ... those three conditions are necessary and sufficient to found a right in favour of individuals to obtain redress, although this does not mean that the state cannot incur liability under less strict conditions pursuant to national law.

46. In the light of the foregoing considerations, the answer to the question referred by the national court for a preliminary ruling, as reformulated in its letter of 13 January 2004, must be that Community law precludes national legislation which excludes state liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the member state concerned in other cases where a manifest infringement of the applicable law was committed ...

In an article in the Cambridge Law Journal, Albertina Albors-Llorens comments on this case:

On the basis of the Traghetti judgment, it is now evident that member states can be made liable in damages when their supreme courts give or endorse a manifestly incorrect interpretation of EC Law. It is therefore to be expected that this very real threat will increase the willingness of these courts to refer unless there is an unmistakably clear precedent in the case law, something likely to be a rare occurrence given the generally complex factual and legal backgrounds of competition cases. Once more, the Court has construed the principle of State liability not only as a vehicle to protect individual rights but also as the ultimate indirect mechanism to secure Member States' compliance with their Community obligations.¹⁸

THE RELATIONSHIP BETWEEN DIRECT EFFECT, INDIRECT EFFECT AND DAMAGES ACTIONS

Maribel Dominguez v Centre Informatique du Centre Ouest Atlantique, Case C-282/10,¹⁹ decided by the Court of Justice on January 24, 2012 involved a claim to 22.5 days' paid leave or payment in lieu of the leave after Ms Dominguez had an

¹⁸Albertina Albors-Llorens, *The Principle of State Liability in EC Law and the Supreme Courts of The Member States*, 66 CAMBRIDGE L J 270, 273 (2007)

¹⁹ <http://www.bailii.org/eu/cases/EUECJ/2012/C28210.html> . In this excerpt from the decision I have included the citations to other cases so you can see how the Court of Justice invokes prior decisions. Often in the course materials I edit these out because they tend to interrupt the flow.

accident between home and work and missed work from 3 November 2005 until 7 January 2007. She claimed the accident was a work related accident. The French Cour de Cassation was uncertain whether French law conformed to the requirements of the EU's Working Time Directive which guarantees employees the right to a period of paid annual leave. French law conditioned the entitlement to paid annual leave on a minimum period of ten days' or one month's actual work during the relevant period. The Court of Justice responded to the Court's reference for a preliminary ruling:

16 ... it should be noted that, according to settled case-law, the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by [the Working Time Directive] itself .. (see Case C-173/99 BECTU [2001] ECR I-4881, paragraph 43; Joined Cases C-350/06 and C-520/06 Schultz-Hoff and Others [2009] ECR I-179, paragraph 22; and Case C-214/10 KHS [2011] ECR I-0000, paragraph 23).

17 Thus, [the Working Time Directive] must be interpreted as precluding Member States from unilaterally limiting the entitlement to paid annual leave conferred on all workers by applying a precondition for such entitlement which has the effect of preventing certain workers from benefiting from it...

18 Although Member States are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, they are not entitled to make the very existence of that right subject to any preconditions whatsoever ...

23 It should be stated at the outset that the question whether a national provision must be disapplied in as much as it conflicts with European Union law arises only if no compatible interpretation of that provision proves possible.

24 In that regard, the Court has consistently held that when national courts apply domestic law they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them (see, inter alia, Joined Cases C-397/01 to C-403/01 Pfeiffer and Others [2004] ECR I-8835, paragraph 114; Joined Cases C-378/07 to C-380/07 Angelidaki and Others [2009] ECR I-3071, paragraphs 197 and 198; and Case C-555/07 Küçükdeveci [2010] ECR I-365, paragraph 48).

25 It is true that this principle of interpreting national law in conformity with European Union law has certain limitations. Thus the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law contra legem (see Case C-268/06 Impact [2008] ECR I-2483, paragraph 100, and Angelidaki and Others, paragraph 199).

26 In the dispute in the main proceedings, the national court states that it has encountered such a limitation. According to that court, the first paragraph of Article L. 223-2 of the Code du travail, which makes entitlement to paid annual leave conditional on a minimum of one month's actual work during the reference period, is not amenable to an interpretation that is compatible with

Article 7 of [the Working Time Directive].

27 In that regard, it should be noted that the principle that national law must be interpreted in conformity with European Union law also requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it (see Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 111, and *Angelidaki and Others*, paragraph 200).

28 In the dispute in the main proceedings, Article L. 223-4 of the Code du travail, which provides an exemption from the requirement of actual work during the reference period in respect of certain periods of absence from work, is an integral part of the domestic law to be taken into consideration by the French courts.

29 If Article L. 223-4 of the Code du travail were to be interpreted by the national court as meaning that a period of absence due to an accident on the journey to or from work must be treated as being equivalent to a period of absence due to an accident at work in order to give full effect to Article 7 of [the Working Time Directive] that court would not encounter the limitation, referred to in paragraph 26 above, as regards interpreting Article L. 223-2 of the Code du travail in accordance with European Union law.

30 In that regard, it should be pointed out that Article 7 of [the Working Time Directive] does not make any distinction between workers who are absent on sick leave during the reference period and those who have actually worked in the course of that period (see paragraph 20 above). It follows that the right to paid annual leave of a worker who is absent from work on health grounds during the reference period cannot be made subject by a Member State to a condition concerning the obligation actually to have worked during that period. Thus, according to Article 7 of Directive 2003/88, any worker, whether he be on sick leave during the reference period as a result of an accident at his place of work or elsewhere, or as the result of sickness of whatever nature or origin, cannot have his entitlement to at least four weeks' paid annual leave affected.

31 It is clear from the foregoing that it is for the national court to determine, taking the whole body of domestic law into consideration, in particular Article L. 223-4 of the Code du travail, and applying the interpretative methods recognised by domestic law with a view to ensuring that [the Working Time Directive] is fully effective and achieving an outcome consistent with the objective pursued by it, whether it can find an interpretation of that law that allows the absence of the worker due to an accident on the journey to or from work to be treated as being equivalent to one of the situations covered by that article of the Code du travail.

32 In the event that such an interpretation is not possible, it is necessary to consider whether Article 7(1) of Directive 2003/88 has a direct effect and, if so, whether Ms Dominguez may rely on that direct effect against the respondents in the main proceedings, in particular her employer, the CICOA, in view of their legal nature.

33 In that regard, it is clear from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, *inter alia*, *Pfeiffer and Others*, paragraph 103 and the case-law cited).

34 Article 7 of [the Working Time Directive] fulfils those criteria as it imposes on Member States, in unequivocal terms, a precise obligation as to the result to be achieved that is not

coupled with any condition regarding application of the rule laid down by it, which gives every worker entitlement to at least four weeks' paid annual leave.

35 Even though Article 7 of Directive 2003/88 leaves the Member States a degree of latitude when they adopt the conditions for entitlement to, and granting of, the paid annual leave which it provides for, that does not alter the precise and unconditional nature of the obligation laid down in that article. It is appropriate to note in that regard that Article 7 of [the Working Time Directive] is not one of the provisions of that directive from which Article 17 thereof permits derogation. It is therefore possible to determine the minimum protection which must be provided in any event by the Member States pursuant to that Article 7 (see, *mutatis mutandis*, Pfeiffer and Others, paragraph 105).

36 Since Article 7(1) of [the Working Time Directive] fulfils the conditions required to produce a direct effect, it should also be noted that the CICOA, one of the two respondents in the main proceedings and Ms Dominguez's employer, is a body operating in the field of social security.

37 It is true that the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see, *inter alia*, Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 20; Case C-192/94 El Corte Inglés [1996] ECR I-1281, paragraph 15; Pfeiffer and Others, paragraph 108; and Küçükdeveci, paragraph 46).

38 It should also be recalled however that, where a person is able to rely on a directive not as against an individual but as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with European Union law (see, *inter alia*, Case 152/84 Marshall [1986] ECR 723, paragraph 49; Case C-188/89 Foster and Others [1990] ECR I-3313, paragraph 17; and Case C-343/98 Collino and Chiappero [2000] ECR I-6659, paragraph 22).

39 Thus the entities against which the provisions of a directive that are capable of having direct effect may be relied upon include 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 (see, *inter alia*, Foster and Others, paragraph 20; Collino and Chiappero, paragraph 23; and Case C-356/05 Farrell [2007] ECR I-3067, paragraph 40).

40 It is therefore for the national court to determine whether Article 7(1) of [the Working Time Directive] may be relied upon against the CICOA.

41 If that is the case, as Article 7 of Directive 2003/88 fulfils the conditions required to produce a direct effect, the consequence would be that the national court would have to disregard any conflicting national provision.

42 If that is not the case, it should be borne in mind that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties (see Pfeiffer and Others, paragraph 109).

43 In such a situation, the party injured as a result of domestic law not being in conformity with European Union law can none the less rely on the judgment in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357 in order to obtain, if appropriate, compensation for the loss sustained....

48 As appears expressly from ... [the] ..Directive.., the purpose of the directive is merely to lay

down minimum safety and health requirements for the organisation of working time and it does not affect Member States' right to apply national provisions more favourable to the protection of workers.

49 Thus it is permissible for Member States to provide that entitlement to paid annual leave under national law may vary according to the reason for the worker's absence on health grounds, provided that the entitlement is always equal to or exceeds the minimum period of four weeks laid down in Article 7 of that directive.

50 It follows from the foregoing that Article 7(1) of [the Working Time Directive] must be interpreted as not precluding a national provision which, depending on the reason for the worker's absence on sick leave, provides for a period of paid annual leave equal to or exceeding the minimum period of four weeks laid down in that directive.