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European Union Law

Topic 3: EU Law and National Law

Lecture 1 (of 3):

Direct Effect of EU Law

Aim:
To review the decisions of the ECJ and the UK courts in ascribing the principle of direct effect to provisions of, or made under, the current Union and previous EC Treaties and the impact of this decision-making on English law.

Objectives:
After carefully reading the following notes and other prescribed readings for this lecture, you should be able to:

1. Discuss the meaning and origin of 'direct effect' and explain how the doctrine has become a part of English law;
2. Discuss how provisions of the now defunct EC Treaty and legislative enactments that were made under Art.249 EC [now 288 TFEU] have been held to be directly effective;
3. Discuss, in detail, the assertion that to give horizontal direct effect to Directives would be totally to blur the distinction between Regulations and Directives.

1. Direct Applicability and Direct Effect.

Application of the Principles of (i) Direct Applicability; and (ii) Direct Effect to Primary and Secondary Legislation.

(i) One meaning of *direct applicability* is that it enables a provision of EU law to become an integral part of national (or domestic or municipal) law of a Member State without the need for further legislative enactment within that Member State. This would account for ***Lord Denning's*** dictum in _*Bulmer v. Bollinger*_ (1974) that: "Any rights or obligations created by the [EC] Treaty are to be given legal effect in England without more ado." The only legislative measure specifically referred to in the old EC Treaty[1] as directly applicable

[1] In Article 249 EC – now ***Art.288 TFEU***.

is the *Regulation* and, as a general rule, once a Regulation has entered into force it may be enforced by or against the subject(s) of the Regulation.
(ii) An EU legislative provision, - a Treaty Article or a provision enacted under ***Art.249 EC***[2] [See now ***Art.288 TFEU***] - which creates rights which any natural or juristic person may enforce in his national courts, the enforcement being against the state (and/or sometimes against other natural or juristic persons), is known as a *directly effective* provision.

Whilst the totally different meanings ascribed to direct applicability and direct effect are those that are generally accepted in English law, it should be noted that the expression 'direct applicability' is used interchangeably with 'direct effect' in other Member States and in the case law of the ECJ as well as much of international law outside the EU Treaties. (This lecture will maintain the distinction in the terms as outlined in paragraphs (i) and (ii)).

Neither the EU Treaties nor the EC Treaty provided for a legislative measure to be directly effective[3]: the principle of direct effect was created by the ECJ. Moreover, once the right is established it must be upheld by national courts: *Case 26/62*[4], van Gend en Loos. Also, *van Gend* decided that if upholding a Community [now Union] right conflicted with a provision of national law, then Community / Union law prevails.

Two basic pre-requisites have to be satisfied before any legislative provision may begin to be recognised as directly effective. Whilst they require elaboration, they are:

(i) the provision must be recognised as being incorporated, or *deemed to be incorporated*, into the English legal system; and
(ii) the provision must be deemed appropriate to confer rights on natural or juristic persons [see p3, infra].

Direct effect may be considered in relation to:
(i) Treaty Articles under primary sources of EU law;
(ii) secondary legislation having binding force, i.e., Regulations, directives and Decisions;
(iii) Treaties concluded by the EC / EU with third countries (i.e., non-Member States of the EU).

(I). Treaty Articles (Primary Legislative Provisions).

Whereas no specific provision of the EU Treaties provides for a Treaty Article conferring direct effect, the ***ECJ Held*** in *Case 26/62*, *van Gend en Loos v. Nederlandse Administratie der Belastingen*, that:

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[2] i.e., a provision which was a secondary source of EC law.
[3] Thereby contrasting with the position under Public International Law – see fn.5, *infra*.
[4] [1963] CMLR 105; [1963] ECR 1; Art.189EEC [now Art.288 TFEU]; European Communities Act 1972, s.2(1).

> ... the Community [now Union] 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, [Union] 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 the Institutions of the [Union][5].

In *Van Gend*, a private firm of Dutch importers of a chemical (urea formaldehyde) from Germany had alleged that a customs duty in 1960 had been 5% more than in 1958 when the Treaty of Rome founding the EEC came into force and that this contravened ***Art.12 EEC*** [later, ***Art.25 EC*** now ***Art.28 TFEU***] which provided that: "Member States shall refrain from introducing between themselves any new customs duties on imports ... ." The Dutch court having final jurisdiction over revenue matters sought a preliminary ruling from the ECJ under ***Art.177*** [later, ***Art.234EC***; now ***Art.267 TFEU***]] on whether " ... nationals of [a Member State] can, on the basis of the Article in question ['old' Art.12EEC], lay claim to individual rights which the courts must protect." The Dutch Government, in its submissions to the ECJ, argued that actions could only be brought against the government of one Member State by the Commission [under 'old'Art.169EEC – later, Art.226EC; now ***Art.258 TFEU***] or by another Member State [under 'old' Art.170 – later Art.227EC; now ***Art.259 TFEU***]. The ECJ decided that a *negative obligation* was imposed on Member States requiring them to *refrain* from introducing any new customs duties on imports and exports. Moreover, the fact that the obligation was expressly imposed on *Member States* did not imply that their nationals could not benefit from such an obligation. Accordingly, the outcome was that van Gend did not have to pay the extra 5% duty *and this right could be enforced in the Dutch courts*.

Where an individual had a right to enforce a provision of EC law [now EU or 'Union' law] against a Member State, as in *van Gend*, the provision is said to have *vertical direct effect*. Such a right could be enforced by an English person (natural or legal) in the English courts, for example, as the EC Treaty had been given the force of law in the United Kingdom by the ***European Communities Act 1972,*** as amended.

Criteria for a provision of an EU Treaty being Directly Effective

In addition to *van Gend* affirming the existence of a 'new legal order' and establishing the concept of *vertical* direct effect, criteria were laid down in that case for when a particular

[5] Cf. the general rule in Public International Law which is that a Treaty does not confer rights on, or impose obligations on, individuals, unless it is expressly provided for in that Treaty: *Danzig Railway Officials Case* (1928).

provision could be invoked by individuals in their national courts. However, these criteria were more clearly summed up and expressed by ***Advocate General Mayras*** in *Reyners v. Belgian State*[6] where he noted that *three conditions were necessary for a provision of a Community Treaty to have direct effect*. They were:

(i) the provision in question must have been sufficiently clear and precise for judicial application;
(ii) it must have established an unconditional obligation; and
(iii) the obligation must not have been dependent on further action being taken by the Community or national authorities.

In general, these criteria applied to secondary sources of Community law as well as to Treaty provisions. However, that a provision of Community law must be '*unconditional and sufficiently precise*' before it can produce direct effect, requires further analysis.

Post-*van Gend* and later developments:

(1) Direct Effect applied also to positive obligations

Just as Member States were required to *refrain* from introducing any new customs duties on imports and exports in *Case 26/62*, *van Gend*, so, in a later case, *Case 57/65*, *Alfons Lutticke*, the ECJ implied that direct effect would apply to 'old' Art.95(3) which imposed a *positive* obligation on Member States to: 'repeal or amend [by a certain date] any provisions [that] exist[ed] when [the Treaty of Rome entered into force] which conflict[ed] with the preceding rules'.

(2) Interpreting 'unconditional' and 'sufficiently clear and precise'

Unconditional.

In *Case C-236/92*, it was stated that:

> A Community provision is *unconditional* where it is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the Member States.

However, the 'unconditional' requirement has been relaxed by the ECJ so as to include a provision whose application is ***conditional*** on the exercise of discretion by an independent body *providing* that discretion is subject to *judicial control*. This was the basis for declaring, in *Case 41/74, van Duyn v. Home Office*, that 'old' ***Art.48 EC*** [later ***Art.39EC,*** now

[6] *Case 2/74*, *Reyners v. Belgian State* [1974] ECR 631.

Art.45 TFEU] had direct effect notwithstanding that the first two paragraphs of this Article providing for the free movement of workers within the Community are '*subject to limitations* justified on grounds of *public policy*, *public security* or *public health*.'

Case 41/74, van Duyn v. Home Office

Miss Yvonne van Duyn, a Dutch national had been offered employment by the Church of Scientology in East Grinstead, England. Whereas the United Kingdom government considered the Church of Scientology to be socially harmful it had no legal power to prohibit the practice of Scientology, nor did it place restrictions on United Kingdom nationals wishing to become members of, or take up employment with, the Church. Nevertheless, the government considered the Church to be so undesirable that it would refuse to grant work permits for foreign nationals to work at the East Grinstead establishment. Miss van Duyn contended, *inter alia*, that her right to enter and remain in the UK under Art.[45 TFEU] [ex.Art.39EC / 48EEC] was infringed because of the implementation of a general policy when the decision for her exclusion, if it was to be justified, should have been based exclusively, or at least in part, on her personal conduct [This was provided for in a Directive – ***64/221*** - made to clarify provisions of 'old' Art.48]. The ***ECJ*** *Held*: that of themselves, the limitations contained in Art.39(3)EC [ex. Art.48(3)EEC] do 'not prevent the provisions of Article 39EC [ex Art.48, paras.1 and 2], which enshrine the principles of freedom of movement for workers, from conferring on individuals *rights which are enforceable by them* and *which the national courts must protect*.'

Sufficiently Clear and Precise

A 'sufficiently precise' Community provision is one set out in 'unequivocal terms;' it is one which furnishes 'workable indications to the national court.' The public policy limitations in *van Duyn* did not prevent the provisions of Art.3(1) of the Directive made to clarify the free movement provisions under Art.39EC from being sufficiently precise to be directly effective. Moreover, in *Case 43/75*, *Defrenne v. SABENA*, (the 'equal pay for equal work' case involving a stewardess working for the Belgian airline) the ECJ distinguished direct and overt discrimination, which is prohibited, (and which applied here) from 'indirect and disguised discrimination,' which lacks sufficient precision to be directly effective.

(II). Secondary Legislation

The Direct Effect of Regulations

Whereas ***Art.288 TFEU*** [ex.***Art.249EC***] provides that regulations are 'directly applicable in all Member States,' it does not mean that all regulations have direct effect: they will ***not*** have this character if they are ***not*** unconditional or sufficiently precise. Indeed, this was established in *Case 93/71*, *Leonesio*, and implicit in *Case 41/74*, *van Duyn*, where it was

stated that whereas Regulations are directly applicable, they '*may* by their very nature have direct effects ... '. It may be recalled that the Tachograph Regulation, ***Regulation 1463/70***, was ***not*** unconditional in that it required national legislation to implement it. Accordingly, it did not fulfill the requirement of being 'unconditional.'

Nevertheless, Regulations can be invoked by one individual in an action against another (i.e., horizontal action) as well as an individual taking an action against the state (a vertical action). Accordingly, there appears to be less emphasis on the conditions of 'sufficiently precise' and 'unconditional' in respect of Regulations than is the case with Directives: *Case C-253/00*, *Antonio Munoz*.

Direct Effect of Decisions

The ECJ decided in *Case 9/70, Franz Grad v. Finanzamt Traunstein*, that ***Decisions*** could have direct effect. However, whether decisions can have horizontal direct effect as well as vertical direct effect appears uncertain.

The Direct Effect of Directives

That ***Regulations*** (which are directly applicable and binding in their entirety) and ***Decisions*** (which are binding in their entirety upon those to whom they are addressed) could each be directly effective is, perhaps, no more than a logical expansion of the principle of direct effect from primary to secondary legislation. However, there appeared to be a major conceptual problem in envisaging that this extension could also encompass Directives given that Directives are addressed to Member States. Clearly, some policy decisions needed to be developed and articulated for Directives to be accorded direct effect.

Indeed, **that a Directive could have vertical direct effect was decided in *Case 41/74, van Duyn***, [this was in relation to *Art.3* of ***Directive 64/221*** **–** see now ***Art.27*****(2)** ***of Directive 2004/38***] the ECJ repeating some of the reasoning it had adduced in *Case 9/70*, *Grad,* in support of giving direct effect to ***Decisions***, and citing three reasons for its conclusions.

Whereas none of the three reasons given by the ECJ giving direct effect to *Decisions* was wholly convincing, the first two reasons were reiterated in *Case 148/78*, *Pubblico Ministero v. Ratti*[7], with the ECJ substituting the third reason with the requirement relating to *Member States which had* ***not implemented the Directive within the time allowed for its implementation***. With reference to a 'defaulting Member State,' the ECJ stated that:

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[7][1979] ECR 1629.

> a Member State which has not adopted the implementing measures required by the Directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the Directive entails.

Accordingly, the three **policy reasons** for a Directive having direct effect became:

(i) "It would be incompatible with the binding effect attributed to a Directive by Article249 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned";
(ii) The 'useful effect' of a Directive would be 'weakened if individuals were prevented from relying on it before their national courts'; and
(iii) "A Member State which has not adopted the implementing measures required by the Directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails"

However, because a Directive is addressed to each ***Member State*** it does not permit one individual to invoke its provisions against another individual: that is, *the concept of horizontal direct effect does **not** apply to Directives*. This was confirmed in *Case 152/84, Marshall v. Southampton and South-West Hampshire Area Health Authority*.[8] (*Marshall* (No.1)).

Championing the Horizontal Direct Effect of a Directive

During the 1990s, three attempts by Advocates-General were made to get the ECJ to change its policy on denying horizontal direct effect to Directives but none succeeded. See cases; *C-271/91*, *Marshall II* (***A-G van Gerven***); *C-91/92*, *Faccini Dori* (***A-G Lenz***); and *Case C-316/93*, *Vaneetveld* (***A-G Jacobs***).

The ECJ in *Dori* responded by deciding that, unlike the cases that had established vertical direct effect, Directives would not have horizontal direct effect because:

> The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has the power to do so only where it is empowered to adopt regulations.

Note, also, that in *Dori*, in denying the horizontal direct effect of Directives, the ECJ said that remedies based on indirect effect and / or State liability might apply.

[8] [1986] ECR 723.

[‘Incidental’ or ‘Triangular’ Horizontal Effect

The type of problem encountered here is that one individual, X, bases a challenge to national law on an EU Directive or practice and directs it at the State, Z, but in doing so, the challenge adversely affects another individual, Y; i.e., the impact on Y is, in essence, that of horizontal direct effect. The principal case law under this heading began with a claimant in Wales successfully challenging a government decision to permit quarry owners to carry out mining operations without first carrying out an environmental impact assessment: *Case C-201/02*, *Wells*. See also, *Cases C-152-154/07*, *Arcor*; *Case C-194/94*, *CIA Security v. Signalson*; and *Case C-226/97*, *Lemmens*.]

Summarising the Criteria for Vertical Direct Effect of a Directive

The current state of the law, then, is that, essentially, an individual may rely on the direct effect of a Directive only against the defaulting ***State*** (vertical direct effect) *providing* the *time-limit* for the implementation for the Directive has expired. Overall, this means that *if an individual is to rely on the direct effect of a Directive*, *the three conditions that have to be satisfied are*:

(i) the relevant provisions of the Directive must be unconditional, sufficiently clear and precise and, of course, capable of creating rights for individuals;

(ii) the time-limit for implementing the Directive must have expired without the Directive, or the relevant part of it, having been correctly and completely implemented into the law of the Member State in question; and

(iii) the action must be against the State - or at least an organ or an emanation of the State.

The State and its Manifestations.

The methods of interpretation of EC law employed by the ECJ differ from those generally adopted by English courts.[9] This has led to contentious decisions in interpreting precisely what are emanations or organs of the State. In particular, there have been four U.K. cases involving the concept of the State, three of which have been decided by the ECJ. In chronological order, they are:

Case 152/84, *Marshall v. Southampton and South-West Area Health Authority*, where Mrs Marshall challenged the health authority's compulsory retirement age of 65 for men and 60 for women as discriminatory, contending that it was in breach of the ***Equal Treatment Directive, 76/207***. Mrs Marshall succeeded, the ECJ deciding, inter alia, that:

> ... where a person involved in legal proceedings is able to rely on a Directive as against the State [she] may do so regardless of the capacity in which the latter is acting, whether employer or public authority.

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[9] See the notes in Topic 2, Lecture 3.

Thus, in Marshall, the health authority as a public authority or public body was regarded as an agency of the State.

In _Case 222/84_, _Johnston v. Chief Constable of the Royal Ulster Constabulary_, another case involving the *Equal Treatment Directive, 76/207*, the Chief Constable of the RUC had refused to renew Mrs Johnston's contract because of his policy of neither equipping nor training women members of the RUC or the full-time reserve with firearms. When Mrs Johnston challenged this before an industrial tribunal, the Chief Constable produced a certificate issued by the Secretary of State for Northern Ireland in which the Secretary of State certified, inter alia, that "the act consisting of the refusal of the RUC to offer further full-time employment to [Mrs Johnston] in the RUC Reserve was done for the purpose of: (a) safeguarding national security; and (b) protecting public safety and public order." However, Mrs Johnston contended that this was contrary to Article 6 of the Directive which provided that: 'Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment [to] pursue their claims by judicial process after possible recourse to other competent authorities.' The ECJ agreed and ***Held*** that: " ... the principle of effective judicial control laid down in Article 6 [of Directive 76/207] does not allow a certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment for men and women for the purpose of protecting public safety are satisfied to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts." Moreover:

> As regards an authority like the Chief Constable, it must be observed that [the] Chief Constable is an official responsible for the direction of the police service. Whatever its relations may be with other organs of the state, such a public authority, charged by the state with the maintenance of public order and safety, does not act as a private individual. It may not take advantage of the state, of which it is an emanation, to comply with Community law.

At this juncture, ***Steiner & woods***[10] contended that:

> ... the concept of a public body, or an 'agency of the State,' against whom a Directive may be invoked, is unclear. … The area health authority in *Marshall* was deemed a 'public' body, as was the Royal Ulster Constabulary in [*Johnston*]. But what of the status of publicly-owned or publicly-run enterprises such as the former British Rail or British coal [prior to its privatisation]? Or semi-public bodies? Are universities 'public' bodies and what is the position of privatized utility companies?

Some of the above issues were clarified in _Case C-188/89_, _Foster v. British Gas_[11], which was another case involving different retirement ages for men and women and, again, it

[10] ***Steiner, J. and Woods, L.*** _Textbook on EC Law_, 8/e. Oxford: OUP, 2003, p98.
[11] See also: _*Case C-157/02*_, _*Asfinag*_.

was based on the Equal Treatment Directive, 76/207. The ECJ decided that there was no distinction between a nationalised undertaking and a State agency [i.e., a body responsible for a public service] and ruled that a Directive might be relied on against organisations or bodies which were 'subject to the authority or control of the State ***or*** had _special powers_ beyond those which result from the normal relations between individuals.' The court then applied this principle specifically to *Foster v. British Gas* and ruled that *a Directive might be invoked against* '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'.

The interpretation by the ECJ of emanation of the State in *Foster* contrasts with the interpretation given by the Court of Appeal in the later, much-criticised case of *Doughty v. Rolls-Royce*.[12] Here, it was decided that, *inter alia*, Rolls Royce had been neither 'made responsible pursuant to a measure adopted by the State for providing a public service' nor did the company possess or exercise any 'special powers' of the type enjoyed by British Gas. However, that this case is inconsistent with the approach adopted in other cases, because of its restrictive approach, was further demonstrated by the decision of the Court of Appeal in *N.U.T. v. Governing Body of St. Mary's Church of England (Aided) Junior School* [1997] 3 CMLR 630 where the Court 'suggested that the concept of an emanation of the state should be a "broad one": the definition provided in para.20 of Foster should not be regarded as a statutory definition: it was, in the words of para.20, simply "included among those bodies against which the provisions of a Directive can be applied".'[13]

EU Treaties With Third States

Case 104/81, Kupferberg is frequently cited as authority for the possibility of provisions of an international agreement being directly effective. As for treaty provisions and secondary legislation, before the provisions of an international treaty can be directly effective they must be unconditional and sufficiently precise.

Further Extending the *Concept of Effective Judicial Protection of Individuals' Interests* by Circumventing the Limitations of the Direct Effect of Directives:

2. Interpretive Obligation and the Concept of Horizontal Direct Effect by Indirect Methods (or Indirect Effect)

There are two principal limitations on the direct effect of Directives, viz;

[12] *Doughty v. Rolls Royce* [1992] IRLR 126.
[13] ***Steiner, J & Woods, L***. Textbook on EC Law, 8/e. Oxford: OUP, 2003, p99.

(i) they do not have horizontal direct effect; and
(ii) they do not have direct effect before the time limit for the implementation of the Directive, or the relevant part of it, has expired.

From an individual's perspective, the limitations frustrate the effectiveness of Directives. However, the limitations have, to a certain extent, been circumvented by the ECJ establishing the principle that the courts of Member States should interpret their national law 'in the light of the wording and purpose' of a Directive that was not directly effective. The origin of this obligation was in *Case 14/83*, *Von Colson and Kamann v. Land Nordrhein-Westfalen*. Here, two female social workers who had applied for a job in a German prison were discriminated against by the appointment of less well qualified males. The compensation for this sex discrimination that could be awarded by the local Labour Court was insignificant, basically no more than reimbursement of the cost of making the application. However, on reference to the ECJ, it was ***Held*** that whereas ***Directive 76/207*** required Member States to provide for victims of discrimination to 'pursue their claims by judicial process,' the Directive did not actually 'prescribe a specific sanction; [instead] it leaves Member States free to choose between the different solutions suitable for achieving the objective.' Accordingly, the lack of an unconditional and sufficiently precise obligation meant that Directive 76/207 could not confer directly effective sanctions or remedies for discrimination. This was circumvented by the ECJ stating that ***Art.10 EC***, [see now ***Art.4(3) TEU***] which required Member States to take all appropriate measures to ensure fulfilment of the obligations arising out of' the EC Treaty, was an obligation addressed to *all* national authorities, *including national courts*, which were to 'interpret their national law in the light of the wording and purpose of the Directive in order to achieve the result referred to in the third paragraph of [***Art.288 TFEU***] [*ex.Article 249EC / Art.189EEC*]'[14]

Whereas 'a national court is not required to override the clear wording and intent of national law in order to make it comply with a non-directly effective directive,'[15] the existence of the obligation to give national law a Community interpretation so far as possible was reiterated in *Case 80/86*, *Kolpinghuis v. Nijmegen BV*. In this case, however, the ECJ stated that the interpretive obligation was subject to the general principles of legal certainty and non-retroactivity.

Moreover, the ECJ has reaffirmed that it requires the courts of Member States to construe their national laws consistently with non-directly effective Directives 'as far as possible.' Thus, the extent to which this is or can be done becomes a matter of Union, rather than national, law: *Cases C-106/89*, *Marleasing* and *C-53/96*, *Hermės International*.

[14]This provides that: '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.'
[15]***Weatherill & Beaumont***, 2/e, 1995, p357.

Guidelines for the interpretive obligation have now been considerably extended as a result of the decision in _Case C-106/89_, _Marleasing SA v. La Comercial Internacional de Alimentacion_. Here, the plaintiff, *Marleasing*, sought to set aside the memorandum and articles of association of *La Commercial* contending that it had been set up for the purpose of putting certain assets beyond the reach of creditors – i.e., M asserted that there was no lawful cause for the defendant, L. The ***First Company Directive, 68/151,*** which exhaustively sets out the grounds on which a company can be declared void, does not list lack of cause as one of the grounds. However, Spain had not transposed the Directive into its law. That its own Civil Code had been enacted prior to the Directive meant that it could not possibly have been enacted with the intention of implementing the legislation. Nevertheless, the ECJ in a preliminary reference said that the interpretive obligation extended to the Civil Code even though it had been enacted prior to the Directive.

An effect of the ruling was that _the defendant, L_, was able to rely on the Directive against the plaintiff, M. This was so, even though Directives do not have horizontal direct effect: the result was achieved by indirect methods. It is noteworthy that the ECJ specifically stated that *Marshall* (*No.1*) was good law and that directives do not have horizontal direct effect. Again the ECJ added a qualification to the obligation when they stated that it only existed '_as far as possible_'. A further difficulty was the ECJ did not state the extent to which the obligation is limited by the general principles of legitimate expectation and non-retroactivity. They had previously stated that these general principles did limit the obligation in relation to ***criminal*** cases in *Kolpinghuis Nijmegen* but the situation is unclear in civil cases.

For a while, the academic argument as to the significance of *Marleasing* was polarised. Writers such as ***Smith, de Burca, Mercer*** and ***Prechal*** advanced arguments that the obligation was extremely wide and that, as a result of the case, virtually all conflicting national provisions would have to be interpreted in accordance with Directives. On the other hand, ***Maltby*** said that as the obligation only exists 'so far as is possible:' it is far narrower than the other writers suggested and only exists where there are quite genuinely two possible ways in which to interpret the national legislation, one which accords with the Directive and one which does not. In that situation there is an obligation on the national court to give a Community interpretation.

In fact, the ECJ has now confirmed that the apparent strictness of *Marleasing* has been tempered by its decision in _Case C-334/92_, _Wagner Miret_. In essence, as national courts are to *presume* that the State intended to comply with Union law. They must strive 'as far as is possible' to interpret their domestic law to achieve the result aimed for by the Directive. If the provision cannot be construed to comply, however, then the State faces compensating the claimant on the principle of State Liability (see infra).

3. Damages against the State for non-implementation of EU law[16]: The principle of State Liability

In *Cases C-6/90* and *C-9/90*, *Francovich and Bonifaci v. Italy*, a group of employees had sought payment from a guarantee fund that the Italian State should have implemented under ***Directive 80/987*** to compensate them for losing their wages when their employers became insolvent. However, the Directive had not been implemented[17]. Accordingly, no guarantee scheme existed. Moreover, the ECJ decided that the Directive wasn't sufficiently clear, precise and unconditional to warrant being directly effective. However, the ECJ went on to rule that the State would be liable to compensate the employees who had suffered because of the failure to implement Community law -the Directive - if three conditions are met:

1. The result laid down by the directive involves the conferring of rights on individuals.
2. The content of those rights must be capable of being identified from the provisions of the directive [a condition later modified by *Factortame* (No.3) to a breach of Community law having to be '***sufficiently serious***'].
3. There must be a causal link between the failure by the member state to fulfil its obligations and the damage suffered by individuals.

The decision in *Francovich* has provided an incentive to all Member States to implement Directives within the given time. The ECJ based its decision on three lines of reasoning. *First*, ***Article 10 EC*** [see now ***Art.4(3) TEU***] which provided that:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty.

Secondly, to this, they added principles from the Court's jurisprudence that in *Cases 26/62*, *van Gend* and *6/64*, *Costa*, certain provisions of EC law gave rise to rights that individuals could rely on; and, *thirdly*, they added that from *Cases 106/77*, *Simmenthal* and *213/89*, *Factortame*, the requirement that national courts were to provide effective protection for those rights. The ECJ concluded that 'a principle of State liability for damage to individuals caused by a breach of Community law for which it is responsible is inherent in the scheme of the Treaty'.

Accordingly, an individual's redress against the State may now take either of two forms, viz; (i) a claim that a Directive is directly effective; or (ii) in the alternative, the State is responsible for the individual's loss caused by the non-implementation of the directive.

[16] The liability isn't confined to the non-implementation of Directives: it is much wider.
[17] Italy had already been found liable for the non-implementation: *Case 22/87*, *Commission v. Italy*.

National courts decide whether the alleged breach is sufficiently serious and, if so, ultimately, the extent of the liability.

References

Chalmers, et al. European Union Law, 2nd edn., 2010. Cambridge: CUP, Ch.7;
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Workshop / Potential Examination Questions

1. In *Case 152/84*, *Marshall v. Southampton and South West Hampshire area Health Authority* [1986] ECR 723, ***Advocate General Slynn*** said that:

   "To give what is called 'horizontal effect' to Directives would totally blur the distinction between Regulations and Directives which the [EC] Treaty establishes in Articles 249 [ex. Art.189] and 254 [ex. Art.191]."

   Critically evaluate the current authority of this opinion in the light of the more recent jurisprudence of the Court of Justice of the European Communities.

2. Critically evaluate the assertion that: 'As horizontal direct effect of some Directives is now a reality, it is now time to revisit the arguments put forward by the three Advocate-Generals in the early 1990s who argued in favour of extending the scope of direct effect of Directives'.