THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION IN ACTIONS FOR BREACH OF COMMUNITY LAW BEFORE THE NATIONAL COURTS

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ABSTRACT

The main aim of the thesis has been to examine the development by the European Court of Justice (ECJ) of a principle referred to by Advocate General Van Gerven and various academic commentators as the principle of effective judicial protection. It explores the proposition that the Court has sought to secure an "effective" standard of justice for individuals seeking to enforce their Community rights before the national courts through the application of this principle. It analyses and evaluates the development of the principle of effective judicial protection from the Court's judgment in Humblet to the present, exploring, in particular, its origin, legal basis and key manifestations. It includes an examination of the principle of effective judicial protection in the context of four key areas of the Community system of enforcement, namely the concept of direct effect, the relationship between Community law and national procedural rules and remedies, the concept of indirect effect and the principle of State liability. It appears that where the ECJ is unable to secure full and complete protection by means of one of these concepts, it has explored another. The principle of effective judicial protection consists of a complex paradigm of Community obligations imposed on national courts which ensures that the latter provide a level of judicial protection which is "effective," but which is not always "full and complete." The principle of effective judicial protection underpins the jurisprudence of the ECJ in the four key areas of enforcement and explains how and why the extent of judicial protection they guarantee is limited in scope. This reflects the assertion made in the thesis that the principle of effective judicial protection is related to but nevertheless distinct from the principle of effectiveness (or "effet utile"). It is a self-standing principle based upon the rule of law. The thesis thus provides a valuable insight into the approach of the Court of Justice in the context of remedies in the national courts for breach of Community law.
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<tr>
<td>A.C.</td>
<td>Appeal Cases</td>
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<td>All E.R.</td>
<td>All England (Law) Reports</td>
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<td>All E.R. (EC)</td>
<td>All England (Law) Reports – European cases</td>
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<td>Bull. EC</td>
<td>Bulletin of the European Communities</td>
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<td>C.A.</td>
<td>Court of Appeal (England and Wales)</td>
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<td>C.D.E.</td>
<td>Cahiers de Droit Européen</td>
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<td>C.F.I.</td>
<td>Court of First Instance</td>
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<td>C.L.J.</td>
<td>Cambridge Law Journal</td>
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<td>C.L.P.</td>
<td>Current Legal Problems</td>
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<td>C.M.L.R.</td>
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<td>E.B.L.Rev.</td>
<td>European Business Law Review</td>
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<td>E.C.</td>
<td>European Community</td>
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<td>E.C.H.R.</td>
<td>European Convention on Human Rights</td>
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<td>E.C.J.</td>
<td>European Court of Justice</td>
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<td>E.C.L.R.</td>
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<td>E.C.R.</td>
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<td>E.C.S.C.</td>
<td>European Coal and Steel Community</td>
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<td>EC Treaty</td>
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<td>E.E.A.</td>
<td>European Economic Area</td>
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<td>E.E.C.</td>
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<td>E.F.T.A.</td>
<td>European Free Trade Area</td>
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<td>E.L.J.</td>
<td>European Law Journal</td>
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<td>E.L.Rev.</td>
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<td>E.M.U.</td>
<td>Economic and Monetary Union</td>
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<td>E.P.L.</td>
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<td>Euratom</td>
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<td>E.U.</td>
<td>European Union</td>
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<tr>
<td>F.I.D.E.</td>
<td>Federation Internationale pour le Droit Européen</td>
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<td>I.C.L.Q.</td>
<td>International &amp; Comparative Law Quarterly</td>
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<td>I.C.R.</td>
<td>Industrial Cases Reports</td>
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<td>I.G.C.</td>
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<td>L.Q.R.</td>
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<td>M.J.</td>
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<td>M.L.R.</td>
<td>Modern Law Review</td>
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<tr>
<td>N.L.J.</td>
<td>New Law Journal</td>
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<td>O.J.</td>
<td>Official Journal of the European Communities</td>
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<td></td>
<td>L = Legislation</td>
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<td>C = Communications</td>
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<tr>
<td>O.J.L.S.</td>
<td>Oxford Journal of Legal Studies</td>
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<td>P.L.</td>
<td>Public Law</td>
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<td>Q.B.</td>
<td>Queen's Bench Reports</td>
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<td>R.F.D.A.</td>
<td>Revue Française de Droit Administratif</td>
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<td>S.E.A.</td>
<td>Single European Act</td>
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<td>T.A.</td>
<td>Treaty of Amsterdam</td>
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<td>T.E.U.</td>
<td>Treaty on European Union</td>
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<td>W.L.R</td>
<td>Weekly Law Reports</td>
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<td>Y.E.L.</td>
<td>Yearbook of European Law</td>
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The writing of this thesis was largely undertaken prior to the entry into force of the Treaty of Amsterdam (TA) on 1 May 1999. In addition to making a number of substantive changes to the various Treaties, Article 12 of the Treaty of Amsterdam also renumbers all of the Articles of the Treaty on European Union (TEU) and European Community (EC) Treaty. Throughout the thesis, the old numbering will be adopted with the new numbering stated in brackets. For example, in the field of EC Competition Policy, the prohibition on restrictive practices will be referred to as Article 85 EC (now Article 81 EC).

The research for this thesis endeavours to take into account developments of the law to 1 July 1999.
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Finally, I would like to thank my family and friends in Wales, Europe and beyond, for their patience, encouragement and support.

Sara Caroline Drake,
Cardiff,
Wales, U.K.
January 2000.
DEDICATION

The thesis is dedicated to my late grandfather, Glyndwr Ashman.
Certificate of Research

This is to certify that, except where specific reference is made, the work described in this thesis is the result of the candidate. Neither this thesis, nor any part of it, has been presented, or is currently submitted, in candidature for any degree at any other University.

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Candidate

Signed ........................................ Director of Studies

Date  ........................................ 29th August 2000
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CHAPTER 1: ORIGIN OF THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION

1.1. Introduction

The economic objective of the EC Treaty\(^1\) is to create, *inter alia*, a common market.\(^2\) From a legal perspective, the Treaty has direct implications for individuals as well as for the signatory Member States. The Community constitutes a:

"...new legal order of international law for the benefit of which the Member States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the 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.*"\(^3\)

The ability of individuals to enforce their Community rights in the event of a breach is of fundamental importance to the Community legal order and therefore the success of European integration. Nevertheless, the EC Treaty fails to lay down a comprehensive system of enforcement. A limited number of actions may be brought by individuals directly before the European Court of Justice (ECJ),\(^4\)

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1 The original European Economic Community Treaty 1957 was renamed the European Community Treaty by the Treaty on European Union, Title II, Article G (now Article 8), [1992] O.J. C 191/1, [1992] 1 C.M.L.R. 719.
2 Article 2 EC (as amended by the Treaty on European Union and the Treaty of Amsterdam) states that: "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."
4 Article 173 EC (now Article 230) enables individuals to bring an action directly before the ECJ for judicial review of a Community measure; Article 175 EC (now Article 232) provides for an
but these are subject to strict conditions, particularly in relation to locus standi. The drawbacks of relying solely on actions at Community level for protecting individual rights were recognized early on by the Court and arguably provided the impetus for the development of the principle of effective judicial protection which is the subject of this thesis. It is thus the national courts which have been accorded the primary responsibility of enforcing the “vigilant individual’s” Community rights.

In the early stages of the development of the Community, the absence of primary or secondary legislation in this field indicated that the legal infrastructure of the Member States, governed by the rule of law, was to be relied upon in order to provide an adequate level of judicial protection. However, the margin of discretion conferred on the Member States, inexperienced in enforcing Community law, and the diversity of the remedies and procedures available in the national courts created a real danger that the enforcement of Community law would be ineffective thus undermining the Community legal order. In this thesis, a detailed examination of the way in which the ECJ has addressed this problem has been undertaken.

The Court has harnessed its powers as defined in Article 164 EC (now Article 220) and its ability to give (declaratory) preliminary rulings under Article 177 EC (now Article 234), to create a “judge-made jigsaw of protection” for individuals’ Community rights. However, vague references to “effective judicial individual to bring an action against a Community institution for failing to act; Articles 178 and 215 EC (now Articles 235 and 288 respectively) refer to an individual’s ability to instigate proceedings directly before the ECJ for the non-contractual liability of the Community institutions.

7 Article 164 EC (now Article 220) states that: “The Court of Justice shall ensure that in the implementation and application of this Treaty the law is observed.”
protection,”9 “effective protection”10 and “effectiveness”11 made by the ECJ, Advocates General and academic commentators in the field of enforcement of Community law before the national courts has led to uncertainty. As stated by Harding:

“...the general requirement for the effectiveness of Community law may be taken for granted: there is little practical point to a system of enforcement if it does not at least strive to be effective. The real question is what really counts as effective in a particular context and it is in this respect that judicial pronouncements at the European level tend to be vague and horatory rather than legally specific. The idea of effectiveness has been linked in the Court of Justice’s discussion with concepts of proportionality and dissuasion, but the analysis has been taken little further.”12

The main purpose of this research is to examine the proposition that the cumulative and incremental development of a coherent body of case-law by the ECJ is underpinned by a principle of Community law, namely the principle of effective judicial protection.13 This thesis traces and evaluates, through an analysis of the case-law of the ECJ and the Opinions of Advocates-General as well as academic literature, the development of the principle of effective judicial protection. The analysis of this principle and the identification of its characteristic features enables the academic debate on the relationship between

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11 See, for example, the ECJ’s decision in Case C-129/94, Criminal Proceedings against Rafael Ruiz Bernádez [1996] E.C.R. I-1829 at paragraph 19.


13 Deards, E., “‘Curiouser and Curiouser’? The Development of Member State Liability in the Court of Justice” (1997) 3 European Public Law 117.
the need for "effective" remedies and "effective judicial protection" to move forward.

The research is intended to provide an important insight into the ECJ's approach towards the enforcement of individuals' Community rights before the national courts which underpins all substantive areas of EC law. It is envisaged that in having determined the key factors of the principle of effective judicial protection and by identifying the internal and external factors which influence the decision-making of the ECJ, it may be possible to predict future developments in the reasoning of the Court in the field of enforcement.

1.2. Early characteristics of the principle of effective judicial protection

It is submitted that the principle of effective judicial protection made its first appearance in the ECJ's ruling in Case 6/60, *Humblet v. Belgian State*. The Court's decision arguably represents a preliminary step in the development of a system of enforcement under the ECSC Treaty, its aim being to ensure that the substantive rights of individuals conferred by Community law are effectively protected. Prior to *Humblet*, the ECJ had been required to rule on disputes arising between individuals or Member States and the Commission (then referred to as the High Authority) based upon the Article 88 ECSC procedure. Although in *Humblet*, the action between Mr. Humblet and the Belgian State was brought directly before the ECJ, it was the first judgment which would require the national courts to play a role in the enforcement of the ECSC Treaty. The ECJ therefore had the opportunity to lay down guiding principles (arguably

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15 The European Coal and Steel Community was established in 1951. Its main objective is to establish a common market for coal and steel.
16 Note that the Merger Treaty 1965 amalgamated the High Authority of the ECSC with the EEC and Euratom Commission to form the European Commission.
17 Article 88 ECSC Treaty provides that infringements must be investigated by the High Authority. A similar procedure is laid down in Article 169 EC (now Article 226).
characteristics of the principle of effective judicial protection) on the enforcement of Community law by the national courts and their relationship with the ECJ.

Mr. Humblet, a Belgian citizen, was an official of the European Coal and Steel Community (ECSC) and under the Protocol on the Privileges and Immunities of the ECSC was exempt from paying national tax on salaries and emoluments paid by the Community. He brought an action against the Belgian State directly before the ECJ on the grounds that the national tax authorities had incorrectly assessed his tax liability.

In its ruling, the ECJ first established the framework for the effective enforcement of Community law. Having determined that the dispute fell within its jurisdiction, the Court acknowledged that it was only able to deliver a declaratory ruling. It could not order the Member State concerned to annul the tax assessment, to repay the amounts illegally collected or to pay interest. However, it did not consider this system of enforcement to be "ineffective" since Member States are obliged:

"...by virtue of Article 86 ECSC, to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued. This obligation is evident from the Treaty and from the Protocol which have force of law in the Member States following their ratification and which take precedence over national law." 20

Thus, the ECJ confirmed that on the basis of the principle of co-operation embodied in Article 86 ECSC and the principle of supremacy, the Member States, including the national courts, have a duty to effectively protect individuals' rights conferred by Community law. The equivalent provision in the EC Treaty,

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18 Article 11(b) of the Protocol on Privileges and Immunities.
19 Article 16 of the Protocol states that: "...any dispute concerning the interpretation or application of the present Protocol shall be submitted to the Court."
namely Article 5 (now Article 10),\(^{21}\) has arguably been drawn upon in the same manner in order to develop an effective system of judicial protection.\(^{22}\)

The Court was also required to determine whether Mr. Humblet had a right to bring the case directly before the ECJ. The ECSC Treaty provides that infringements may only be enforced by the Commission/High Authority.\(^{23}\) The ECJ first examined the relevant provisions of the Protocol and held that although the privileges and immunities were granted "solely in the interests of the Community,"\(^{24}\) they confer rights directly on the officials of the ECSC, compliance with which is ensured by the right of recourse provided for in Article 16 of the Protocol.\(^{25}\) Furthermore, actions may be brought directly before the ECJ without having to exhaust national procedures.\(^{26}\)

The Court did not limit itself to a literal interpretation of the relevant provisions of the Protocol. It also employed a schematic interpretation of the system of enforcement of the ECSC Treaty and the rules of law accepted in the Member States. In doing so, it arguably recognized the importance of ensuring that there is an effective and complete system of enforcement of Community law and saw the need for the development of a right for an official of the ECSC to have recourse directly to the Court as part of the guarantees provided by such a system within the ECSC framework.

In this respect, the Court held that despite the absence of a procedure in the ECSC Treaty by which an individual could seek redress directly before the Court for breach of rights granted by the Protocol, the authors of the Treaty had not


\(^{22}\) See further discussion in Chapter 2.

\(^{23}\) The relevant procedure is laid down in Article 88 ECSC. A similar procedure is laid down in Article 169 EC (now Article 226).

\(^{24}\) Case 6/60, Humblet v. Belgium, op.cit., at p. 570

\(^{25}\) Ibid, at p. 571.

\(^{26}\) Ibid, at pp. 571 - 573.
overlooked the fact that disputes between parties could arise. Consequently, the Court held that where Community law confers rights on individuals:

"[I]t may generally be presumed that a substantive right has as its corollary that it provides the person in whose interest it operates with the means of enforcing it himself by proceedings before the courts rather than by the intervention of the third party." 28

The Court added that:

"In these circumstances it is proper to apply the principle whereby, in case of doubt, a provision establishing guarantees for the protection of rights cannot be interpreted in a restrictive manner to the detriment of the individual concerned." 29

The importance of the Court’s judgment in *Humblet* in relation to the development of the principle of effective judicial protection is twofold. First, the Court appears to have established a preliminary framework for the application of the principle of effective judicial protection and indicated how the principle is to operate. It has identified Article 86 ECSC as the legal basis for the ECSC system of enforcement and therefore, by analogy, the equivalent provision within the framework of the EEC Treaty (now EC Treaty), Article 5 (now Article 10), arguably plays the same role. 30 Second, it is submitted that the Court introduced two of the early characteristics of the principle of effective judicial protection. First, that where an individual derives a right under Community law, there must be a corollary right for the individual to enforce it directly. 31 Second, that the provisions guaranteeing such rights must not, in a case of doubt, be interpreted in a detrimental way vis-à-vis the individual concerned.

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27 The ECJ also acknowledged that disputes may arise between parties upon whom privileges and immunities are conferred and the Community institution to which the official belongs.
30 Discussed further in this chapter below.
31 Discussed further in this work in Chapter 2.
In examining the subsequent case-law, it is submitted that the subsequent key judgments of the ECJ aimed at creating a complete and effective system of judicial protection can in effect be traced back to early attempts at establishing the principle of effective judicial protection in *Humblet*. It is submitted that in these later cases, the Court of Justice has further developed the principle of effective judicial protection. It will emerge below that the characteristics laid down in *Humblet* are not confined to the enforcement of the ECSC Treaty and have been applied within the framework of the EC Treaty.

The ECJ has also introduced additional characteristics of the principle of effective judicial protection arguably aimed at widening and deepening its scope. Furthermore, the principle of effective judicial protection has been applied to directly effective rights as well as non-directly effective rights. Despite these developments, it is submitted that the rationale and Treaty basis for the principle have remained unchanged since the ECJ’s ruling in *Humblet*. These are the principle of Member State co-operation contained in Article 86 ECSC and Article 5 EC (now Article 10) and the protection of individuals’ rights in a Community based upon the rule of law. The above propositions are all examined in subsequent chapters.

### 1.3. Legal basis for the principle of effective judicial protection

The principle of effective judicial protection has been developed on an *ad hoc* basis by the Court in its case-law.\(^32\) Intermittent and inconsistent references to “effective judicial protection”\(^33\) together with “effective protection”\(^34\) and

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"effectiveness" by the ECJ and the Advocates General have made it difficult to determine the precise legal definition of the principle of effective judicial protection or to identify the specific legal basis upon which the principle has been built. This uncertainty has been compounded by the views of academic commentators. Van Gerven (former Advocate General of the ECJ) argues that the requirement of effective judicial protection is a general principle of Community law which applies to both directly effective and indirectly effective rights and, in essence, requires these rights to be judicially enforceable before the national courts. Caranta argues that the principle of effective judicial protection is a fundamental principle of Community law derived from Article 5 (now Article 10) of the Treaty and is independent, yet closely related to the principle of effectiveness. Indeed, in this respect, Caranta asserts that:

"Effective judicial protection can be seen as an independent ground upon which State liability is based, even if it remains linked to the requirement of the full effectiveness of Community law."  

However, he later adds that:

"Effective judicial protection seems ... to be no more than an implication of the principle of full effects of Community law...."  

It is submitted that the principle of effective judicial protection is distinct from the principle of effectiveness for reasons which are examined further below.

35 See, for example, the ECJ’s decision in Case C-129/94, Criminal Proceedings against Rafael Ruiz Bernáldez [1996] E.C.R. I-1829 at paragraph 19.
36 Van Gerven, W., “Non-contractual liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe” (1994) 1 Maastricht Journal of European and Comparative Law 6 at p. 11.
38 Ibid, at p. 710.
39 Ibid, at p. 725.
However, the relationship between “effective judicial protection” and “effective protection” is less clear. It is tentatively suggested that “effective judicial protection” may be narrower in scope in the sense that it relates to the degree of protection proffered by the national courts in enforcement proceedings. “Effective protection” arguably has a wider remit and includes the level of protection guaranteed by the Member State. However, this distinction is not yet evident in the jurisprudence of the ECJ or in the literature and the phrases are often used interchangeably. For the purpose of this thesis, however, it does not appear that the distinction is of substantive importance.

For those commentators who have not gone as far as to proclaim the existence of a “principle of effective judicial protection,” one constant has nevertheless been the reference to Article 5 (now Article 10) of the Treaty and the principle of effectiveness. Snyder asserts that by gradually “hardening” the duty of loyalty expressed in Article 5 (now Article 10) of the Treaty and by giving great emphasis to the principle of effet utile, explicitly or implicitly, in the development of its judicial liability system, the ECJ has ensured its main policy objective, namely the effectiveness of Community law.

Nevertheless, Prechal argues that the legal basis for the development of new duties and obligations for the national courts which arguably correspond to the characteristics of the “principle of effective judicial protection” is weak. In her view:

“In so far as such an empowerment [of the national courts] follows from a written provision of Community law [Article 5 (now Article 10) of the Treaty], even if the latter is broadly interpreted, one can be reconciled to it. However, where the

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40 See, for example, Advocate General Jacobs in Joined Cases C-430/93 and C-431/93, Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten [1995] E.C.R. I-4705 where he refers to both “effective protection” and “effective judicial protection.”
basis is an unwritten principle [principle of effective judicial protection] or the mere necessity of full effectiveness of Community law, the juristic construction seems at odds with the principle of legality."

She concludes that the development of the case-law in this manner requires:

"...a more solid theoretical and, preferably, a legislative basis."\(^{43}\)

In this section, the legal basis of the principle of effective judicial protection will be examined in detail. In addition, the relationship between the principle of effective judicial protection and Article 5 (now Article 10) of the EC Treaty and the principle of effectiveness will be examined and evaluated. It will be argued, in particular, that first, the principle of effective judicial protection is inherent in the system of the Treaty and thus based upon the rule of law, second, that Article 5 (now Article 10) of the Treaty, the principle of effectiveness and the general principles of law common to the constitutional traditions of the Member States have been introduced by the ECJ as additional legal bases for the principle of effective judicial protection.

1.3.1. Inherence of the principle of effective judicial protection in the scheme of the Treaties.

There are grounds, it is submitted, for asserting that the principle of effective judicial protection is a self-standing principle of law based upon the rule of law\(^{44}\) and is inherent, in particular, in the scheme of the EC Treaty. The ECJ has


\(^{43}\) Ibid.

consistently held that the Community is based upon the *rule of law*.\(^{45}\) Although open to a wide range of interpretations,\(^{46}\) the ECJ has expressly stated that:

"A genuine *rule of law* in the European context implies binding rules which apply uniformly and which protect individual rights."\(^{47}\)

The ECJ has further added that the "protection of individual rights" includes, *inter alia*, the protection of the individuals' right of action.\(^{48}\) Given the silence of the Treaty on a system of enforcement for individuals' Community rights before the national courts, the ECJ has arguably introduced the principle of effective judicial protection on the ground that an "effective" standard of justice must be ensured before the national courts. Indeed, Bebr argues that it is in accordance with the rule of law that the ECJ has:

"...sought to strengthen the system of judicial protection and, where necessary, close its gaps, not only in the Community legal order, but indirectly in the national legal orders of the Member States as well."\(^{49}\)

In his view, where national remedies fail to protect individuals' Community rights to the extent that such protection is *ineffective* and jeopardizes the integrative force of the Community legal order, the ECJ, in accordance with the *rule of law* has a responsibility to:


\(^{48}\) *Ibid*, at p. 18.

"...reshape or even supplement the national legal remedies where necessary so as to ensure that Community rights be fully and effectively protected."  

In Case 222/84, *Johnston v. Chief Constable of*,  the Court arguably sought to lay down a stronger and more tangible legal basis for the introduction of a new manifestation of the principle of effective judicial protection. The ECJ was required to rule on whether Mrs. Johnston could be deprived of her right of access to judicial review by virtue of a national rule relating to evidence. The Court first drew upon its interpretation of Article 6 of the Equal Treatment Directive  laid down in Case 14/83, *Von Colson*,  as the legislative basis for the obligation imposed upon Member States to:

"...take the necessary measures which are sufficiently effective to achieve the aim of the directive and... [to] ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned."  

Moreover, the Court went on to state that:

"The requirement of judicial control stipulated by the article reflects a *general principle of law which underlies the constitutional tradition common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950. As the European Parliament, Council and Commission recognized in their Joint Declaration of 5 April 1977 and as the Court has

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52 Article 6 of Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions provides that: “all persons who consider themselves wronged by failure to apply the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities,” [1976] O.J. L39/40  
recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law.\textsuperscript{55}

Thus, according to the ECJ, the right of access to justice which is embodied in Article 6 of Directive 76/207 is derived from two legal bases: first, it reflects a general principle of law common to the constitutional traditions of all the Member States and second, that it reflects the right of access to justice and the right to an effective national remedy as provided for in Articles 6 and 13 of the European Convention on Human Rights (E.C.H.R.).\textsuperscript{56}

The ECJ ruling in \textit{Johnston} was confirmed in Case 222/87, \textit{Heylens}\textsuperscript{57} when the Court relied upon the same dual legal basis in order to introduce the right for an individual to be given a statement of reasons for a decision taken by a national authority which was allegedly in breach of directly effective provisions of Community law. The latter is arguably constitutes an additional manifestation of the principle of effective judicial protection.

It is thus submitted that the ECJ's reasoning in both \textit{Johnston} and \textit{Heylens} indicate that the Court is willing to draw upon rights guaranteed under the E.C.H.R. to further develop the scope of the principle of effective judicial protection and to establish a strong legal basis for such rights which have already been accepted by the Member States.

In Joined Cases C-6/90 and C-9/90, \textit{Francovich},\textsuperscript{58} the ECJ introduced the principle of State liability which confers upon individuals the right to reparation

\textsuperscript{55}Ibid, at paragraph 18. Emphasis added.
for losses sustained as a result of a breach of Community law by a Member State. This arguably constitutes a fundamental development of the principle of effective judicial protection.\textsuperscript{59} It is submitted that in order to give the principle of State liability a sound legal basis, in addition to relying upon the principle of effectiveness and Article 5 (now Article 10) of the Treaty, the ECJ held that:

"It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty."\textsuperscript{60}

Ross\textsuperscript{61} argues that the ECJ's ability in \textit{Francovich} to rely on "inherence" rather than reasoned justification reveals the confidence and status of the Court and the progress of the Community as a \textit{sui generis} legal order. It also arguably supports the assertion that the principle of effective judicial protection is a self-standing principle based upon the rule of law.

In Joined Cases C-46/93 and C-48/93, \textit{Brasserie du Pêcheur and Factortame (No.3)},\textsuperscript{62} the ECJ arguably reinforced its ruling in \textit{Francovich} by confirming that the principles upon which the principle of State liability itself is based are inherent in the system of the Treaty. The ECJ stated that when determining the conditions of State liability it is necessary to take into account:

"...the principles inherent in the Community legal order which form the basis for State liability, namely, \textit{first}, the full effectiveness of Community rules and the effective protection of the rights which they confer and, \textit{second}, the obligation to

\textsuperscript{59} See further discussion in Chapter 3 and 5.
\textsuperscript{60} Joined Cases C-6/90 and C-9/90, \textit{Andrea Francovich and Others v. Italian Republic}, \textit{op.cit.}, paragraph 35.
cooperate imposed on Member States by Article 5 (now Article 10) of the Treaty."  

1.3.2. Relationship between the principle of effective judicial protection and Article 5 EC (now Article 10)

Having at first based the principle of effective protection upon inherence and the rule of law (as well as the principle of effectiveness which is discussed below), it is submitted that, in later cases, the ECJ has increasingly relied upon Article 5 EC (now Article 10) as an additional legal basis for the development of the principle of effective judicial protection. The Treaty provision was originally considered to be more of a statement of political intent than a binding legal obligation. However, it has been argued that by relying upon Article 5 (now Article 10) of the Treaty to introduce a legal basis for the principle of effective judicial protection which cannot be deduced from any other text in the Treaties, the ECJ has been "...clothing its inventiveness with constitutional legitimacy." Nevertheless, it is submitted that by deriving legal authority for such developments from the Treaty itself, the ECJ has developed the principle of effective judicial protection in compliance with the rule of law.

Article 5 (now Article 10) of the Treaty states 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 jeopardize the attainment of the objectives of this Treaty."

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63 Ibid, at paragraph 39.  
64 See Bebr, op. cit., p. 305.  
66 Ibid.
The duty of "co-operation" or "solidarity" imposed upon the national courts by Article 5 (now Article 10) of the Treaty is express, but not specific. The ECJ has held that the "freedom of decision" incumbent in ex-Article 5 of the Treaty means that it "...cannot confer on interested parties rights which the national courts would be bound to protect." However, this has not prevented the ECJ from exploiting the vague terms of the provision as the legal basis for the introduction of new characteristics of the principle of effective judicial protection. Indeed, it has been argued that:

"Its flexibility has allowed the creation of the very notion of effective protection..."

Article 5 (now Article 10) of the Treaty has been described as "...the cornerstone of the Court of Justice's judicial liability system." Indeed, Advocate General Van Gerven has asserted that it is on the basis of this Treaty provision that:

"...the Court has...clarified the role which the national court is required to play in the exercise of its jurisdiction so as to ensure that provisions of Community law produce their full effect. That role operates above all at the level of legal protection."

The first stage in the development of the principle of effective judicial protection in respect of the EC (then EEC) Treaty (as distinct from the ECSC Treaty which

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72 Ross, op.cit., p. 66.
73 Snyder, op.cit., p. 50.
75 Ibid, at p. 1245.
was at issue in *Humblet*\(^{76}\) arguably occurred in Case 26/62, *Van Gend en Loos* in 1962.\(^{77}\) In this case, the ECJ established that by virtue of the concept of direct effect, individuals are able to protect their directly effective rights before the *national courts which the latter are under a duty to protect*. However, it was not until its judgment in Case 33/76, *Rewe*\(^{78}\) and Case 45/76, *Comet* more than a decade later in 1976, that the ECJ made it clear for the first time that the national courts’ obligation to protect individuals’ Community directly effective rights was derived from Article 5 (now Article 10) of the Treaty. It is thus submitted that the ECJ’s rulings in *Rewe* and *Comet* marked the first step in the establishment of Article 5 (now Article 10) of the Treaty as an additional legal basis for the principle of effective judicial protection. In its judgment in *Comet*, the ECJ expressly stated that:

"...in application of the principle of co-operation laid down in Article 5 [now Article 10] of the Treaty, the national courts are entrusted with ensuring the legal protection conferred on individuals by the direct effect of the provisions of Community law."\(^{79}\)

The Court also relied upon Article 5 (now Article 10) of the Treaty in *Rewe* and *Comet* to introduce a minimum Community standard of “legal protection” to be guaranteed by the national courts. The Court held that in the absence of Community legislation harmonizing national procedural rules and remedies, first, national procedural rules may be applied provided they do not render the exercise of individuals’ Community rights “virtually impossible” (principle of sufficient enforceability) and second, such rules must not be less favourable to Community rights than to comparable domestic rights (principle of comparability). These

\(^{76}\) Discussed earlier in this chapter.


\(^{79}\) Case 45/76, *Comet* v. *Produktionschap voor Siergewassen*: op.cit., at paragraph 12. Similar wording was used by the ECJ in Case 33/76, *Rewe*, op.cit.
two conditions arguably constitute characteristics of the principle of effective judicial protection.  

It is argued that in subsequent case-law, the ECJ has adopted a bolder, more expansive approach in seeking to guarantee effective judicial protection of individuals' Community rights before the national courts. The Court has imposed specific duties upon the national courts in the field of enforcement which, it is submitted, were also based upon Article 5 (now Article 10) of the Treaty. In Case C-213/89, Factortame (No. 1), the ECJ held that the national courts are under a direct duty, by virtue of, inter alia, Article 5 (now Article 10) of the Treaty, to grant interim relief in order to secure the full effectiveness of Community law. On the same grounds, if national rules prevent the national courts from complying with this obligation, even temporarily, the latter are required to disapply the national rules of their “own motion.”

It is submitted that the principle of effective judicial protection has also been developed in order to protect individuals' Community rights where the concept of direct effect is insufficient in itself to ensure the effective judicial protection of individuals' Community rights. In Case 14/83, Von Colson, the ECJ introduced an alternative method of enforcing Community rights before the national courts in the absence of direct effect, namely the concept of indirect effect or "purposive interpretation." The ECJ imposed upon the national courts an obligation to interpret national law in conformity with Community law and

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80 See further discussion in Chapter 3 and 5.
82 See further discussion in Chapter 3.
83 See further discussion in Chapter 2.
85 Temple Lang argues that the distinction between directly effective and non-directly effective rights may be less important than it would appear since national courts are bound by Article 5 EC (now Article 10) to comply with all the obligations imposed on the Member States: Temple Lang, J., "Community Constitutional Law: Article 5 EEC Treaty" (1990) 27 C.M.L.Rev. 645 at p. 646.
86 See further discussion in Chapter 4.
The importance of Article 5 (now Article 10) of the EC Treaty as a legal basis for the principle of effective judicial protection was arguably enhanced further in Joined Cases C-6/90 & 9/90, Francovich. In this case, the ECJ expressly identified Article 5 EC as an additional legal basis for the principle of State liability. The principle of State liability constitutes a new Community remedy and arguably amounts to an innovative development of the principle of effective judicial protection. The ECJ held that:

“A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law

(see, in relation to the analogous provision of Article 86 of the ECSC Treaty, the judgment in Case 6/60, *Humblet v. Belgium*).

It has been widely argued that the uncertainty surrounding the Court’s inconsistent approach in the development of the principle of effective judicial protection and the (arguable) absence of a sound legal basis may be resolved by introducing Community secondary legislation to harmonize national procedural rules. However, although the Community has been relatively successful in harmonizing procedural rules in certain policy areas such as public procurement, it has been reluctant to adopt a more generalized approach. In a staff paper delivered for the 1991 Intergovernmental Conference, the Commission suggested that Article 5 (now Article 10) of the Treaty should be amplified to include specific rules to be enacted in the Member States in order to redress the consequences of breaches of Community law. The Commission proposed that the Community institutions should be empowered to introduce harmonization measures in the field of procedural rules and remedies in order to ensure a minimum standard of uniformity in the national legal systems. Furthermore, faced with an increasing number of Member States failing to implement directives in good time, the Commission also suggested in the same paper that, as a deterrent, the jurisdiction of the ECJ should be extended to allow it to declare a Member State liable in damages to individuals who have sustained

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93 Contribution by the Commission to the Intergovernmental Conference (1991) (Document drawn up on the basis of COM (90) 600 and SEC (91)500' published in 'Intergovernmental Conferences: Contributions by the Commission,' *EC Bulletin*, Supplement 2/91, pp. 151-154. Note that in the same paper, the Commission suggested introducing financial penalties for persistent breach of Article 169 EC (now Article 226) rulings by the Member States. This was introduced by the TEU and is now provided for in Article 171(2) EC (now Article 228 (2)).
damage as a result of a breach of Community law\textsuperscript{94} (which has been subsequently confirmed by the ECJ).\textsuperscript{95}

Provisions amending the jurisdiction of the ECJ were not, however, adopted by the Community in its revisions of the Treaty on European Union 1993 (or by the Treaty of Amsterdam in 1997). However, the lack of legislative action has not deterred the ECJ from introducing the Community remedy of State liability through its jurisprudence. Although the ECJ was accused of judicial law-making in \textit{Francovich}\textsuperscript{96} by relying, \textit{inter alia}, on Article 5 (now Article 10) of the Treaty as one of the legal bases for the principle of State liability, it is submitted that these criticisms were implicitly rebuffed by the ECJ in \textit{Brasserie du Pêcheur and Factortame (No.3)}. In this case, the ECJ confirmed that the principle of cooperation embodied in Article 5 EC (now Article 10) is \textit{inherent in the Treaty}. This arguably reflects the determination of the ECJ to sustain its development of the principle of effective judicial protection irrespective of the reticence shown by the Council (which represents the interests of the Member States) to adopt legislation designed to achieve effective judicial protection of individuals’ Community rights before the national courts in the event of a breach. It arguably indicates the extent to which the ECJ is prepared to interpret the vague provisions of Article 5 (now Article 10) of the Treaty to enhance the principle of effective judicial protection.

Nevertheless, Snyder\textsuperscript{97} argues that that there are limits to using Article 5 (now Article 10) of the Treaty as the legal basis for the “judicial liability system”\textsuperscript{98} and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{94}Ibid, at p. 154.
\item \textsuperscript{95} Joined Cases C-6/90 & C-9/90, Andrea Francovich and Others v. Italian Republic, \textit{op.cit.}
\item \textsuperscript{97} Snyder, F., “The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques” (1993) 56 M.L.R. 19 at pp. 52-53.
\item \textsuperscript{98} Snyder argues that the harmonization of national remedies is one of four branches of the ECJ’s judicial liability system (see Chapter 3). The three others are the direct effect of directives (see Chapter 2), the interpretation of national legislation (concept of indirect effect) (see Chapter 4)
\end{itemize}
\end{footnotesize}
asserts that the increasingly broad interpretation of Article 5 EC (now Article 10) constitutes a "double-edged sword." Despite the fact that it may be successfully used in the field of enforcement to elaborate legal doctrine (concepts of direct effect and indirect effect) and to stimulate change in specific cases, it may have reached its limits when used to harmonize national remedies. He warns that any further extension of the Treaty provision in this way may jeopardize the legitimacy of the Court of Justice without necessarily achieving greater effectiveness in the system of enforcement. Snyder warns that the:

"...Community system involves complex and delicate relations...between the Community and the Member States. Some room for manoeuvre for Member States is essential. It may be suggested that if one means of preserving such political space is denied, others will be found. Therein lies the difficulty of an increasingly extensive interpretation of Article 5 EEC [now Article 10 EC]."

It may be argued that the ECJ has pre-empted such negative action on the part of the Member States. This may explain the ECJ's apparent shift in its approach in the field of national remedies, particularly in relation to national procedural rules. It has been argued by various commentators that in its more recent case-law such as Joined Cases C-430/93 and C-431/93, van Schijndel,102 and Case C-312/93 Peterbroeck,103 the ECJ has adopted a more restrictive interpretation of Article 5 (now Article 10) of the Treaty and refused to interpret it expansively to further develop the principle of effective judicial protection. The ECJ has instead and the availability of compensation (the principle of State liability) (see Chapter 5); Ibid, at p. 41.

99 For discussion of other disadvantages of establishing a judicial liability system to ensure the effectiveness of Community law, see Snyder, ibid, pp. 50 - 53.
101 Snyder, op.cit., p. 52.
reverted to following a slightly modified version of the formula originally laid down in *Rewe* and *Comet* formula\textsuperscript{104} which does not encroach excessively upon the national courts' discretion in applying national procedural rules and remedies even in the event of a breach of an individual's directly effective Community right.

In general, however, the ECJ has arguably enhanced the legitimacy of the principle of effective protection by deriving legal authority from, *inter alia*, Article 5 (now Article 10) of the Treaty. It is submitted that the ECJ has made it clear that, in the absence of legislative measures on the part of the Community in the field of enforcement, the Court itself will see fit to derive authority from ex-Article 5 EC in order to develop further the principle of effective judicial protection, but will not necessarily do so in a way which excessively restricts the discretion of the national courts in relation to national procedural rules.\textsuperscript{105}

1.3.3. Relationship between the principle of effective judicial protection and the principle of effectiveness

Promoting European integration by, *inter alia*, ensuring the effectiveness\textsuperscript{106} of Community law has always been one of the main policy objectives of the ECJ.\textsuperscript{107}

It is submitted that the principle of effective judicial protection has been developed by the ECJ in order to secure the effective enforcement of individuals' Community rights before the national courts.

It is submitted (as discussed above) that in the early case-law of the ECJ, the Court applied the principle of effective judicial protection without making any express reference to its legal basis. It is submitted that in addition to relying on

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\textsuperscript{104} See further discussion in Chapter 3.

\textsuperscript{105} Discussed in more detail in Chapter 3.

\textsuperscript{106} For discussion of the effectiveness of Community law in its broadest sense, see Snyder, *op.cit.*

the fact that the requirement for the effective judicial protection of individuals’ Community rights before the national courts is inherent in the scheme of the Treaty which is based upon the rule of law, the ECJ also drew extensively upon the principle of effectiveness or effet utile (ut res magis valeat quam pereat).\(^{108}\)

Thus, the principle of effectiveness may arguably be seen as an additional legal basis for the principle of effective judicial protection.

This interpretative principle derived from International law has, in the context of Community law, been defined as requiring the ECJ to interpret legal rules reasonably, so as not to fail in their aim or objective.\(^{109}\) It has arguably played a fundamental role in the development of the principle of effective judicial protection and in defining the scope of its characteristics (which are discussed in later chapters). In Van Gend en Loos,\(^{110}\) the ECJ made no explicit reference to the principle of effectiveness in its judgment and preferred to rely on a teleological reasoning to introduce the concept of direct effect. However, it is argued that the principle of effectiveness is implicit in the Court’s ruling and is the underlying rationale for the concept of direct effect.\(^{111}\) Bredimas argues that the ECJ’s teleological reasoning went further than the classic legal doctrine of “effet utile” which is designed to secure substantive effectiveness of a Community rule. She asserts that the ECJ also took into account the general effectiveness of the Treaty. In other words:

“...it derived the fundamental tenets from the whole body of rules, from the philosophy of the Treaty. It searched for the purpose and only upheld the solutions which would attain it.”\(^{112}\)


\(^{111}\) The principle of effectiveness is often used by the Court interchangeably with the teleological method of interpretation; Bredimas, A., Methods of Interpretation and Community Law, Amsterdam: North Holland Publishing Company, 1978, at p. 77.

\(^{112}\) Ibid.
Thus, in the absence of specific Treaty provisions governing the enforcement of Community rights by individuals before the national courts, the ECJ introduced the concept of direct effect which allows individuals to invoke their Community rights directly before the national courts. In the event of a breach, the concept of direct effect is designed to ensure that the “effet utile” of a provision is restored.

It is argued that various commentators equate the principle of effectiveness with the principle of effective judicial protection. Although the two principles are closely linked (and may overlap), it is submitted that they are distinct concepts of Community law which are both inherent in the scheme of the Treaty. The principle of effective judicial protection is arguably a narrower concept. The distinction between the principle of effectiveness and the principle of effective judicial protection is illustrated by Case 91/92, Faccini Dori in which the ECJ was required to rule on whether directives should be granted horizontal direct effect. This would allow rights and obligations contained in directives to be relied upon by individuals, as against other individuals, in proceedings before the national courts. The Court confirmed its previous ruling in Case 152/84, Marshall (No. I) and held that directives cannot be enforced as between individuals inter se. The Court’s ruling is based upon a literal interpretation of Article 189(3) (now Article 249(3)) of the Treaty. It held that directives are addressed to the Member States only and as such are unable to impose rights or obligations on individuals. It follows that directives may only be relied upon by individuals as against the State in the event of a breach. This prevents the Member State from benefiting from its own default.

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However, it is arguable that the net effect of the ECJ's refusal to grant directives horizontal direct effect is clearly in conflict with the principle of effectiveness which requires individuals to derive the full effect of their Community rights. The ECJ's decision in *Faccini Dori* only permits individuals who are seeking to enforce their Community rights as against the State\(^{117}\) to benefit from the full legal effect of these provisions. An individual litigant who is seeking to rely on provisions of a directive as against another private individual will be unable to derive full effect of the Community provision by virtue of the concept of direct effect.\(^{118}\) It is submitted that the ECJ's decision in *Faccini Dori* illustrates that the principle of effectiveness is broader than the principle of effective judicial protection. Arguably, if the principle of effective judicial protection and the principle of effectiveness were one and the same, the ECJ would have granted directives horizontal direct effect.\(^{119}\) Indeed, in Case C-316/93, *Vaneetveld*, Advocate General Jacobs argued that:

"There are sound reasons of principle for assigning direct effect to directives without any distinction based on the status of the defendant. It would be consistent with the need to ensure the effectiveness of Community law and its uniform application in all the Member States."\(^{120}\)

Similarly, where individuals are deprived from benefiting from the full effectiveness of Community law rights as a result of national procedural rules, the principle of effectiveness (in conjunction with the principle of supremacy) would require those rules to be set aside by the national court. Indeed, in Case 106/77, *Simmenthal*,\(^ {121}\) the ECJ held that:

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\(^{117}\) The ECJ has interpreted the notion of the State broadly. See, for example, Case C-188/89, *Foster v. British Gas plc* [1990] E.C.R. I-3313.

\(^{118}\) The ECJ has introduced alternative jurisprudential means by which individuals may protect their Community rights in the absence of direct effect, namely the concept of indirect effect and the principle of State liability which are discussed in Chapters 4 and 5 respectively.

\(^{119}\) See further discussion in Chapter 2.

\(^{120}\) Case C-316/93, *Nicole Vaneetveld v. Le Foyer SA and Le Foyer SA v. Federation des Mutualites Socialistes et Syndicales de la Province de Liege (FMSS)* [1994] E.C.R.I-763 at p. 774. For further discussion, see Chapter 2.

"...any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law." 122

However, it is submitted that the principle of effective judicial protection developed by the ECJ is narrower in scope and as such, national procedural rules which restrict the exercise of individuals’ Community rights may be compatible with Community law. In Joined Cases C-430/93 and C-431/93, van Schijndel, 123 Advocate General Jacobs argued that the national procedural rules in question which restricted the full effectiveness of Community law complied with Community law. He argued that:

"...the proper application of the law does not necessarily mean that there cannot be any limits on its application. The interest in full application may need to be balanced against other considerations such as legal certainty, sound administration and the orderly and proper conduct of proceedings by the courts." 124

He emphasized that it is sufficient for the national courts to seek to provide adequate protection for Community rights 125 and that this can normally be satisfied by national remedies enforced through the national courts in accordance with national procedural rules. 126 He argued that:

122 Ibid, at paragraph 22.
123 Joined Cases C-430/93 and C-431/93, Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten, op.cit.
124 Ibid.
126 Ibid. Emphasis added.
"...if the view were taken that national procedural rules must always yield to Community law, that would, as will appear below, unduly subvert established principles underlying the legal systems of the Member States. It would go further than is necessary for effective judicial protection."\(^{127}\)

Thus, the principle of effective judicial protection has not been developed by the Court to secure full and complete protection for individuals’ Community rights before the national courts (which might be thought to be in compliance with the principle of effectiveness), but to ensure that a more limited form of protection is granted to individuals’ in the event of a breach of their Community rights. It follows that an analysis of the different manifestations of the principle of effective judicial protection (discussed later in the thesis)\(^ {128}\) reveals the Court’s approach to the proper ambit of the principle of effective judicial protection.

It is submitted that in *Francovich*,\(^ {129}\) the ECJ itself took the first step in making a distinction between the principle of effectiveness and the principle of effective judicial protection. It may be argued that although inextricably linked in the ECJ’s case-law, the Court has finally recognized that the “full effectiveness” and “effective judicial protection” of Community law are in fact separate principles which are both inherent in the system of the Treaty. In *Francovich*, the ECJ introduced the principle of State liability in actions for breaches of Community law as a general principle of Community law. The ECJ addressed the issue of the existence of the principle of State liability in the light of the “...general system of the Treaty and its fundamental principles.”\(^ {130}\) The Court reiterated the nature of


\(^{128}\) See further discussion in Chapters 2, 3, 4 and 5.


\(^{130}\) *Ibid.*, at paragraph 30.
the Community legal order which had been held to create rights for individuals\textsuperscript{131} and citing its judgments in \textit{Simmenthal}\textsuperscript{132} and \textit{Factortame (No. I)}\textsuperscript{133} held that:

"...the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals."\textsuperscript{134}

On this basis, the ECJ held that:

"The full effectiveness of Community rules would be impaired \textit{and} the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible."\textsuperscript{135}

It is submitted that the use of the word "\textit{and}" by the Court may be an indication that it is drawing a distinction between the full effectiveness of Community rules and the actual protection of rights derived from these rules. However, it is not possible to place too much emphasis on this use of language because of the general difficulty inherent in the translation of texts into the eleven official Community languages. In \textit{Brasserie du Pêcheur and Factortame (No.3)},\textsuperscript{136} the ECJ arguably developed this reasoning further and referred to the "...full effectiveness of Community rules \textit{and} the effective protection of the rights which they confer."\textsuperscript{137} It is submitted that the insertion by the Court of "effective" as a indicator of the degree of protection that must be guaranteed by the conditions of liability further supports the emerging distinction between the more general

\textsuperscript{131} Ibid, at paragraph 31.
\textsuperscript{132} Case 106/77, \textit{Amministrazione delle Finanze dello Stato v. Simmenthal}, op. cit.
\textsuperscript{133} Case C-213/89, \textit{R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others (Factortame (No. I))} [1990] E.C.R. I-2433.
\textsuperscript{134} Joined Cases C-6/90 & C-9/90, \textit{Francovich and Others v. Italian Republic}, op. cit., at paragraph 32.
\textsuperscript{135} Ibid, at paragraph 33.
\textsuperscript{137} Ibid, at paragraph 39. Emphasis added.
principle of effectiveness and the arguably narrower concept of effective judicial protection. However, in *Brasserie du Pêcheur and Factortame (No.3)*, the ECJ did refer to the principle of State liability as having a dual legal basis of:

"...first, the full effectiveness of Community rules and the effective protection of the rights which they confer and, second, the obligation to co-operate imposed on Member States by Article 5 [now Article 10] of the Treaty." 138

Thus, as Caranta 139 has argued, although the principle of effective judicial protection is emerging as a distinct concept to the principle of effectiveness, they are still inextricably linked.

It may be concluded that the ECJ has drawn upon the principle of effectiveness as one of the legal bases for the introduction of the principle of effective judicial protection. The latter is arguably narrower than the former in the sense that it does not always guarantee the full effectiveness of Community rights. Furthermore, the ECJ has itself begun to distinguish between the two concepts and it remains to be seen whether this distinction will be clarified further in subsequent case-law.

CHAPTER 2: DIRECT EFFECT REVISITED IN THE LIGHT OF THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION

2.1. Direct effect as a key development of the principle of effective judicial protection

It was submitted earlier in the thesis that in Case 6/60, *Humblet*, the Court laid down the rationale for the principle of effective judicial protection and introduced two of its early characteristics. First, that where an individual derives a right under Community law, there must be a corollary right for the individual to enforce it directly. Second, the provisions guaranteeing such rights must not be interpreted, in a case of doubt, in a detrimental way vis-à-vis the individual concerned. Despite the fact that the Court’s judgment in *Humblet* relates to the enforcement of a Protocol attached to the ECSC Treaty directly before the ECJ, it is submitted that the Court has subsequently expanded these early characteristics within the framework of the EEC/EC Treaty.

It is submitted that the first stage in the development of the principle of effective judicial protection in relation to the EC Treaty took place in Case 26/62, *Van Gend en Loos*. In this case, the ECJ introduced, for the first time, the concept of direct effect which enables individuals to rely directly on certain Community provisions before their national courts. This ability only extends to Community provisions which are sufficiently clear, unconditional and legally perfect. It is submitted that the Court’s judgment reflects an important development of the first characteristic of the principle of effective judicial protection referred to above.

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2 *Ibid*, at pp. 571-572
3 Protocol on Privileges and Immunities of the ECSC.
namely the notion that a right conferred on an individual by Community law has as its corollary, a right to a means of enforcement directly before a court.

The level of protection which a directly effective Community provision must receive was alluded to in Case 106/77, Simmenthal. The ECJ held that directly effective provisions must be applied in full and uniformly in all the Member States from their date of entry into force and for so long as they continue in force. They constitute a:

"...direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law." 

Moreover, it is the national courts which are under a duty to protect these rights by virtue of Article 5 EC (now Article 10). In Simmenthal, the ECJ explained that:

"...every national court must...apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule." 

The ECJ has consistently rejected the arguments of the Member States that the effective protection of individuals' Community rights would be guaranteed by the enforcement procedures laid down in Articles 169 (now Article 226) and 170

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8 Ibid, at paragraph 13. 
9 Ibid, at paragraph 14. 
12 Article 169 EC (now Article 226) provides for the Commission to instigate proceedings against a Member State which has failed to comply with its Community obligations.
(now Article 227)\(^{13}\) of the EC Treaty.\(^{14}\) In *Van Gend en Loos*, the Court held that relying solely on these procedures would:

"...remove all *direct* protection of the individual rights of their nationals. There is a 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 the individuals concerned to protect their rights amounts to an effective supervision *in addition* to the supervision entrusted by Articles 169 [now Article 226] and 170 [now Article 227] to the diligence of the Commission and of the Member States."

Thus, the principle of effective judicial protection is underpinned by the notion that individuals’ Community rights cannot be protected adequately through "public" enforcement procedures alone.\(^{16}\) In a recent White Paper on the modernisation of EC Competition rules,\(^{17}\) the Commission suggested that one option for reform would be to make the whole of Article 85 EC (now Article 81), including Article 85 (3) EC (now Article 81 (3)) directly applicable (i.e. directly effective) before national courts. At present, the Commission has exclusive jurisdiction under ex-Article 85 (3) EC to grant individual exemptions.\(^{18}\) Originally seen as the only means of promoting a uniform application of the EC competition rules, it has since been recognized that this centralized system of

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\(^{13}\) Article 170 EC (now Article 227) permits a Member State to bring proceedings against another Member State which it considers has acted in breach of its Community obligations.

\(^{14}\) The equivalent provision under the ECSC Treaty is Article 88 ECSC as discussed in Chapter 1.


\(^{17}\) Commission White Paper on Modernisation of the Rules Implementing Articles 85 (now Article 81) and 86 (now Article 82) of the EC Treaty of 28 April 1999, COM (1999) 101 final: see in particular paragraph 69. See further discussion in Chapter 5.

\(^{18}\) Regulation 17 laid down a system based on the direct effect of the prohibition contained in Article 85(1) EC (now Article 81 (1)) and prior notification of restrictive practices for exemption under Article 85 (3) EC (now Article 81 (3)). The Commission, national courts and national authorities may all apply Article 85 (1) EC (Article 81 (1)), but the power to grant individual exemptions under Article 85 (3) EC (now Article 9 (1)) is reserved for the Commission (Article 9 (1) of Regulation 17/62).
enforcement is no longer appropriate for a Community of 15 Member States.\(^{19}\) The aim of the new decentralized system proposed by the Commission is threefold. First, it will arguably reduce the bureaucracy and financial costs faced by companies which, under the current system, must notify the Commission of a restrictive practice in order to benefit from an individual exemption. It will also prevent such companies from using (or abusing) this notification procedure to prevent private actions from being brought against them before the national courts. Second, the Commission, having fulfilled its original objective, now seeks to concentrate its resources on investigating the most serious infringements of competition policy. Third, enforcement at national level will be increased and stimulated. The Commission’s view is that national courts and national authorities have acquired greater expertise in the field of competition since the Community’s inception and they are closer in proximity to the problems faced by individual companies.\(^{20}\) It is submitted that the proposition to render Article 85 (3) EC (now Article 81 (3)) directly effective would be one means of achieving these goals and it would further stimulate both compliance with and the development of the principle of effective judicial protection by widening the general scope of its application within the field of competition law.\(^{21}\)

The concept of direct effect provides individuals with a means of obtaining substantive enforcement of their Community provisions in an effective and efficient manner. The concept of direct effect is fundamental to the Community system of enforcement and has its basis in the principle of effective judicial protection. Nevertheless, in Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame (No.3), the ECJ emphasized that:

\(^{19}\) White Paper, *op.cit.*, at p. 4. It is envisaged that membership of the EU will expand further in the next 10 years with the accession of former Eastern bloc countries as well as Malta, Cyprus and Turkey.


\(^{21}\) The effectiveness of this solution may be undermined by the nature of the national remedies available in the event of a breach of the EC Competition rules. This issue is discussed further in Chapter 5.
"...the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty." \(^{22}\)

The deficiencies of the concept of direct effect as a means of securing full and complete judicial protection before the national courts will be examined below. \(^{23}\)

2.2. Vertical and horizontal direct effect

The initial aim of the ECJ to ensure the full and complete judicial protection of individuals' Community rights through the introduction of the concept of direct effect was severely limited by its decision in Case 152/84, *Marshall (No.1).* \(^{24}\) In this case, an employee sought to rely on the Equal Treatment Directive \(^{25}\) as against her employer, Southampton and South West Hampshire Area Health Authority.

Advocate General Slynn argued that individuals may not rely on directives *inter se* for three key reasons. First, since directives are addressed to Member States, \(^{26}\) it follows that a directive may only impose obligations upon the addressee and not upon individuals. Second, individuals are not automatically informed of the terms of a Community directive. Directives are published in the *Official Journal* for information purposes only. \(^{27}\) It would thus be unfair (and arguably contrary

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\(^{23}\) The concept of direct effect (and arguably the principle of effective judicial protection) is also undermined by the need to rely on national procedural rules and remedies which are examined in detail in Chapter 3.

\(^{24}\) *Case 152/84, Marshall (No.1). v, Southampton and South West Area Health Authority (Teaching)* [1986] E.C.R. 723.


\(^{26}\) Article 189 (3) EC (now Article 249 (3)) states 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."

\(^{27}\) The Treaty on European Union amended Article 191 EC (now Article 254) to the effect that all directives introduced post-TEU must be published in the *Official Journal.*
to the principle of legal certainty and legitimate expectations) to impose obligations upon individuals resulting from directives which could be enforced by other private parties against them if they were unaware of these obligations in the first place. Third, the Advocate General argued that if directives are granted horizontal direct effect, the distinction between regulations and directives as laid down in Article 189 (now Article 249) and 191 (now Article 254) of the Treaty would be blurred. However, Advocate General Slynn did concede that the term “State” should be construed widely by the national courts and should include all organs of the State, particularly in relation to employment matters. In this case, he concluded that since the Health Authority is considered to be a Crown body under UK legislation, Miss Marshall may invoke the directive before the national court.

The ECJ was also reluctant to grant horizontal direct effect to directives. It adopted a literal interpretation of Article 189 (now Article 249) of the Treaty and deduced that since directives are addressed solely to the Member States, they cannot confer rights and obligations upon individuals which may be relied upon inter se. The Court emphasized that the ability of individuals to invoke a directive as against the State is based on the principle of “estoppel” and is therefore “necessary to prevent the State from taking advantage of its failure to comply with Community law.”

There is no doubt that the Court’s decision in Marshall (No.1) reduces the degree of judicial protection available for individuals’ Community rights before the

28 Section 8 (1) A (b) National Health Service Act 1977 (as amended by the Health Services Act 1980 and other legislation) states that health authorities are Crown bodies and their employees are Crown servants irrespective of the fact that the administration of the NHS by health authorities is regarded as being separate from the Government's central administration and its employees are not considered to be civil servants.

29 Case 152/84, Marshall (No.1) v. Southampton and South West Area Health Authority (Teaching), op.cit., at paragraph 48.


31 Case 152/84, Marshall (No.1) v. Southampton and South West Area Health Authority (Teaching), op.cit., at paragraph 49.
national courts. The ability of individuals to enforce their directly effective rights is contingent upon the status of the defendant. In *Marshall (No.1)*, the plaintiff was able to effectively protect her right to equal treatment in the national court since it was held that her employer, the Health Authority, constituted an "emanation of the State". However, the rule that directives may only be invoked "vertically" discriminates against employees in the private sector. For instance, in *Duke v. GEC Reliance Ltd*,\(^{32}\) Mrs Duke, an employee in a private company was the victim of discriminatory dismissal in the same way as Ms Marshall. Yet, she was unable to enforce her directly effective rights derived from the Equal Treatment Directive as against her private employer for lack of horizontal direct effect of directives. This gap in the effective judicial protection of her Community rights before the national court was compounded by the fact that the House of Lords refused to adopt a purposive interpretation of national legislation in accordance with Directive 76/207.\(^{33}\)

It has been argued that in *Marshall (No.1)*, the Court had ample authority for ruling that directives produce horizontal direct effects and could therefore have avoided creating inequalities in the judicial protection of individuals' Community rights. It could have substituted a literal interpretation of the text for one based upon the principle of effectiveness.\(^{34}\) The ECJ had relied upon the principle of effectiveness in Case 41/74, *Van Duyn* to justify its decision to grant directives direct effect in the first place.\(^{35}\) Moreover, in Case 43/75, *Defrenne (No.2)*,\(^{36}\) the ECJ drew upon the principle of effectiveness in order to confer on Article 119 EC (now Article 141)\(^{37}\) the capacity to produce direct effects both vertically and

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\(^{33}\) The concept of indirect effect is discussed further in this work at Chapter 4.


\(^{37}\) Article 119 EC (now Article 141) provides for the principle of equal treatment between men and women in relation to pay.
horizontally. The Court was not deterred from granting this Treaty provision horizontal direct effect even though it was addressed to Member States. To allay fears of creating legal uncertainty for individuals and to avoid imposing huge financial repercussions on the Member States, the ECJ limited the retroactive effect of the Defrenne (No.2) ruling. It is submitted that the Court could have adopted the same approach in Marshall (No.1). However, some commentators argue that the ECJ’s decision in Defrenne (No.2) was heavily influenced by the fact that both the Member States and the Community institutions had failed to legislate in order to give effect to Article 119 EC (now Article 141) by means of secondary legislation. The concept of direct effect was employed in that case as a means of increasing the effectiveness of Community law. It is doubtful that the same policy considerations were applicable in Marshall (No.1).

The Court’s apparent unwillingness to grant directives horizontal direct effect suggests that its decision in Marshall (No.1) was nevertheless influenced by political considerations. Indeed, many commentators have argued that the restraint exercised by the Court was in response to the negative reaction of some of the national courts to its case-law recognizing the direct effect of directives. It is argued that in one sense the decision in Marshall (No.1) reflects the realization by the Court that it could not further European integration on its own. The ECJ would require the support of both the Member States (including the national courts) and the Community institutions in order to pursue its own

40 In the decision of the French Conseil d’Etat on 22 December 1978, Minister of the Interior v. Daniel Cohn-Bendit [1980] 1 C.M.L.R. 543, the direct effect of Directive 64/221 was denied thus preventing an individual from relying on its provisions as against the State before the national court. See also judgment of Bundesfinanzhof (German Federal Fiscal Court) on 16 July 1981 in Re Value Added Tax Directives (Case V B 51/80) [1982] 1 C.M.L.R. 527.
41 See further Koopmans, T., “The Role of Law in the Next Stage of European Integration” (1986) 35 I.C.L.Q. 925 at p. 930.
Indeed, if the national courts refused to comply with the principles evolving from its case-law when applying Community law, the Community legal order itself would be placed in jeopardy.

The call for the ECJ to recognize the horizontal direct effect of directives did not end with Marshall (No.1). Academic commentators as well as several Advocates General have suggested that the time has come for the ECJ to reverse its policy and grant directives horizontal direct effect. The issue was discussed in some depth by Advocate General Jacobs in Case C-316/93, Vaneetveld. He argued that the role of directives as a legislative instrument has evolved considerably since the original EEC Treaty making a literal interpretation of Article 189 EC (now Article 249) inappropriate. In recent years, the practice of the Council has been to adopt extremely detailed directives which severely limit the discretion of the Member States in relation to their “choice of form and methods” in the implementation of directives. In his view, this development makes directives ideally suited to have direct effect. Moreover, he argues that:

“[T]here are sound reasons of principle for assigning direct effect to directives without any distinction based on the status of the defendant. It would be consistent with the need to ensure the effectiveness of Community law and its uniform application in all the Member States. It would be consistent, in particular, with the recent emphasis in the Court’s case-law on the overriding duty of national courts to provide effective remedies for the protection of Community rights.”

44 Advocate General Jacobs in Case C-316/93, Nicole Vaneetveld v. Le Foyer SA and Le Foyer SA v. Federation des Mutualites Socialistes et Syndicales de la Province de Liege (FMSS) [1994] E.C.R. I-763 at p. 769 et seq. In this case, the date for implementation for the contested directive had not yet expired, thus obviating the need for the ECJ to consider the issue of horizontal direct effect of directives.
46 Ibid. Emphasis added.
Furthermore, Advocate General Jacobs maintained that allowing an individual to bring an action for damages against the State for the defective or non-implementation of a directive is no substitute for the direct enforcement of a directive itself. Indeed, an individual would often need to bring two different actions, either simultaneously or separately, one against a private defendant and the other against the national authorities in order to be certain of gaining redress for breach of his Community rights. He claims, therefore, that in practice, a *Francovich* claim conflicts with the requirement of an *effective remedy*. 49

He also argued that granting directives horizontal direct effect would reaffirm the principle of legal certainty in the national and Community legal orders. He claimed that this principle has been undermined by the ECJ’s case-law on the protection of individuals’ Community rights. He refers, in particular, to the ECJ’s decision to adopt a broad interpretation of the “State” in order to allow individuals to enforce directives “vertically” against commercial enterprises. 50 The uncertainty in the law arises from the fact that such undertakings are often not under the direct control of the State. They generally have no responsibility for implementing directives and may be competing in the private sector with undertakings against which the same directives are not unenforceable. 51

In addition, Advocate General Jacobs asserted that the principle of legal certainty has been further infringed by the concept of indirect effect. The adoption of a purposive interpretation by the national courts often means that the scope of...
national law is uncertain. Moreover, where a national court interprets national law in order to comply with the provisions of the directive, obligations may be imposed upon individuals (via national law) even in the absence of a correctly implemented directive.\textsuperscript{52} In this respect, he argued that to grant directives horizontal direct effect would not amount to a "...radical departure from the existing state of the law."\textsuperscript{53} Advocate General Jacobs proposed that fears of conflict with the principle of legal certainty or the imposition of severe financial repercussions upon individuals could be avoided by following the ECJ's approach in \textit{Defrenne (No.2)} and limiting the temporal effect of the ruling. The directive at issue would only produce horizontal direct effects from the date of the judgment only.\textsuperscript{54} He also suggested that the horizontal direct effect of directives should not be granted where it would give rise to criminal liability on the individual or would confer rights on the defaulting Member State.\textsuperscript{55} Advocate General Jacobs concluded that:

"...directives whose very object is that rights should be conferred on individuals, and that obligations should be imposed on individuals, should be enforceable at the suit of the plaintiff unless the legitimate expectations of the defendant would thereby be defeated."\textsuperscript{56}

The issue of horizontal direct effect has also been broached extra-judicially by (former) Advocate General Van Gerven.\textsuperscript{57} He argues that the ECJ's reliance upon the "estoppel" argument in \textit{Marshall (No.1)} is no longer valid. In his view:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{52} Ibid.
\item \textsuperscript{53} Ibid, at pp. 775-6.
\item \textsuperscript{54} The directive would produce horizontal direct effects in the case presently before the courts and for individuals who may have already instigated legal proceedings or made an equivalent claim.
\item \textsuperscript{55} Advocate General Jacobs in Case C-316/93, \textit{Nicole Vaneetveld v. Le Foyer SA and Le Foyer SA v. Federation des Mutualites Socialistes et Syndicales de la Province de Liege (FMSS)}, op.cit., at p. 776.
\item \textsuperscript{56} Ibid.
\end{itemize}
\end{footnotesize}
"The underlying thought can no longer be that somebody cannot raise his own negligence as a defence against somebody else’s entitlement to rights which the latter would have had, if the negligence had not occurred. The underlying thought is rather that someone, who would have been bound by an obligation imposed by a directive if that directive had been properly implemented by the Member State concerned, [cannot] take advantage of that Member State’s failure to do so, in order to deny a course of action brought against him by a person who would have obtained legal rights against him, if the Member State’s default had not occurred, and who was entitled to act in reliance thereupon."

In addition, Van Gerven argues that since directives may be invoked against bodies which fall within the broad definition of the “State” even though they have no constitutional responsibility for the domestic implementation of directives, they should likewise not be able to benefit from the Member State’s failure to implement directives. Furthermore, there is no reason why private individuals, who would have been bound by obligations imposed by the directive if it had been implemented correctly, should be able to:

‘...plead a Member State’s failure to extract themselves from such obligations as against other individuals who, had the directive been properly implemented, would have benefited from such obligations.’

He further argues that this reasoning does not conflict with Article 189 (now Article 249) of the Treaty or blur the distinction between regulations and directives. By granting directives horizontal direct effect after the date for implementation has expired, legal effects are not granted to the provisions as a whole, but in respect of the omission of a Member State to implement the directive in favour of individuals who should have derived rights from it which they are entitled to protect before the national courts. This is not only based on

58 Ibid, at p. 351.
59 Ibid, at p. 343.
Article 189 (now Article 249) of the Treaty, but also on general principles of law. He added that the horizontal direct effect of directives does not conflict with the principle of legal certainty, it simply requires citizens (and their lawyers) to be more vigilant, a burden which already exists in respect of regulations and national laws. In his view, the principle of legal certainty should be invoked to ensure that individuals who rely on rights conferred by Community law may rely on them even in the absence of implementation of a directive by a Member State.\(^{60}\)

Finally, he argues that the alternative means of developing the principle of effective judicial protection, for example, adopting a broad notion of the 'State', the concept of indirect effect and the principle of State liability are not sufficient to irradiate the inconsistencies, inequalities and distortions which exist in the Community system of enforcement following the *Marshall (No.1)* ruling.\(^{61}\) In his view, it would be preferable:

"...as a matter of judicial policy, to look for a more orderly way to achieve the final objective. That objective is to give individuals who derive rights from Community law, the *fullest, most efficient and therefore most coherent judicial protection* possible. Acknowledging the horizontal direct effect of some directive provisions may, it is submitted, offer an appropriate way of making the judicial protection which individuals deserve, *complete, coherent and equal for all.*"\(^{62}\)

It was not until Case C-91/92, *Faccini Dori*,\(^{63}\) that the issue of the horizontal direct effect of directives was addressed directly and fully by the ECJ for the first time. It was generally hoped that, in the light of recent developments made by the ECJ since its decision in *Marshall (No.1)*, the Court would grant directives horizontal direct effect. In this case, a private individual, Ms. Faccini Dori,
sought to rely on the provisions of Directive 85/577\textsuperscript{64} concerning the protection of the consumer in respect of contracts negotiated away from business premises as against another individual, Recreb Srl. At the material time, Italy had failed to implement the Directive by the prescribed date. The national court, uncertain as to whether the Directive could be relied upon by Ms Faccini Dori, referred the matter to the ECJ.

Both the Advocate General and the Court concluded that the relevant provisions of the directive were sufficiently precise and unconditional to produce direct effects and could be relied upon vertically. However, they reached different conclusions vis-à-vis the horizontal effects of the directive.

Advocate General Lenz, expressed his dissatisfaction with the existing case-law relating to the horizontal direct effect of directives. Adopting the same approach as Advocate General Jacobs in Case C-316/93, Vaneetveld, he dismissed the justification of the Court in Marshall (No.1), namely that directives are addressed to Member States only and therefore cannot create obligations for individuals. He argued that such obligations are imposed upon Member States during the implementation period only. Following its expiry, Member States cannot rely on such obligations to refute the horizontal direct effect of directives. In addition, Advocate General Lenz rejected the argument that by recognizing the horizontal direct effect of directives, the distinction between regulations and directives would be blurred. He argued that once the conditions for direct effect have been fulfilled regulations may produce direct effects immediately whilst directives only produce direct effects after the date for implementation has expired.\textsuperscript{65} He proposed that the Court should take the opportunity to depart from its decision in Marshall (No.1). In his view:


"Considerations favouring the horizontal effect of directives reflect a drive to do justice by the beneficiary of a provision which the Community legislator intended to be binding and not to abandon his situation for an indefinite period to the whim of a Member State in default of its obligations." 66

He emphasized that a change in the approach of the ECJ was all the more pressing in the light of the increased use of directives to complete the Internal Market, particularly where directives are being enacted to govern legal relations between private individuals, for example, in the field of consumer protection. Indeed, by granting directives horizontal direct effect, the inequalities created vis-à-vis individuals would be eliminated. First, individuals in the Member States would no longer find themselves at a competitive disadvantage within the Single Market from having complied with national implementing legislation which is not yet applicable in another Member State. Second, discrimination between individuals within the same Member State would no longer exist. In other words, the ability of individuals to effectively protect their rights before a national court by virtue of the concept of direct effect should not depend upon the status of the party against whom the action is brought. In his view, such disparities should only be permitted during the period for implementation. Once this date has passed, Community law should be uniformly applicable in all Member States and arguably enforceable against both Member States and individuals. If not, the Advocate General claimed that the aim to harmonize legislation would be compromised and the completion of the internal market undermined. He added that this "discrimination" argument has gained more ground since the entry into force of the Treaty on European Union, particularly with the reinforcement of the internal market, the Community’s aim to strengthen consumer protection and the introduction of the concept of citizenship. 67 He argued that, at the very least, the latter should entail equality before Community law for all citizens of the European Union.

66 Advocate General Lenz in Case 91/92, Paola Faccini Dori v. Recreb Srl, op.cit., at p. 3339.
67 Articles 8 - 8e (now Articles 17 - 22) EC introduced by the TEU.
Of particular relevance to this thesis, and in the context of effective judicial protection, the Advocate General Lenz drew upon the principle of effectiveness in support of his call for the ECJ to grant directives horizontal direct effect. He claimed that the lack of horizontal direct effect of directives deprives these Community acts (which were designed to confer rights on individuals) of their "effet utile." He argued that this was particularly the case where:

"...directives whose content is intended to have effects in relations between private persons and which embody provisions designed to protect the weaker party... the failure to transpose a directive deprives it of effet utile." 68

Thus, to avoid a breach of the principle of effectiveness, the Advocate General argued that once the date for implementation of a directive has passed, an individual should be able to gain substantive effect from a directly effective provision of Community law which the Community legislator intended to confer rights and duties upon individuals. A Member State should not be able to rely on its own default to impede the ability of individuals to enforce their Community right.

Aware that the argument based on the principle of effectiveness may be at variance with other principles such as the rule of law and the principle of legal certainty, he acknowledged that:

"[I]t is questionable whether a private person whose conduct is lawful under the national legal system may have burdens imposed upon him under an unimplemented directive not addressed to him for which, moreover, he will have scarcely any remedy against the Member State in default." 69

68 Advocate General Lenz in Case 91/92, Paola Faccini Dori v. Recreb Srl, op.cit., at p. 3340.
69 Ibid, at p. 3342.
However, he argues that the force of this argument has been diminished since the amendment of Article 191(2) EC (now Article 254 (2)) by the TEU which now requires directives (adopted after the entry into force of the TEU) to be published in the *Official Journal* of the Community.\(^70\) In his view, once a directive has been published and the period for transposition has expired, any burdens which may be imposed upon individuals as a result of allowing directives to be invoked horizontally are foreseeable.\(^71\)

Moreover, any remaining conflict between the principle of legal certainty and the horizontal direct effect of directives could be minimized by placing a temporal limit upon the effects of a judgment. In other words, individuals could invoke directives horizontally in the future only (i.e. from the date of the judgment).\(^72\) He added that any burdens placed on individuals as a result of the enforcement of an unimplemented directive would be reasonable and would not exceed the constraints which would have been applied to them if the Member State concerned had acted in conformity with Community law. He concluded that:

"For the future it appears necessary that the law based on the EC Treaty should develop in the interests of the uniform, effective application of Community law so as to recognize the general applicability of precise, unconditional provisions in directives in order to respond to the legitimate expectations nurtured by citizens of the Union following the achievement of the internal market and the entry into force of the Treaty on European Union."\(^73\)

However, the arguments presented by the Advocate General did not convince the Court to reverse its policy in favour of the horizontal direct effect of directives. In

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\(^70\) Unlike regulations, directives do not take legal effect from the date of publication in the *Official Journal* (O.J.).

\(^71\) Advocate General Lenz in *Case 91/92, Paola Faccini Dori v. Recreb Srl*, op.cit., at p. 3343.

\(^72\) Advocate General Lenz also proposed that, in the name of "legal protection," individuals should be able to invoke directives in actions for annulment under Article 173 EC (now Article 230); *Ibid*, at pp. 3344 -3345.

\(^73\) *Ibid*, at p. 3346.
its judgment, the ECJ chose to follow the approach laid down in its previous case-law. It recalled its ruling in Marshall (No.1) and stated that “a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual.” It reiterated that directives produce vertical direct effect in order to prevent the State from taking advantage of its own default. Addressing the issue of horizontal direct effect of directives, it held that the effect of such an extension of the case-law would be to:

“...recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.”

The Court acknowledged that, in the absence of measures transposing the directive within the prescribed time-limit, consumers are unable to enforce rights conferred by the directive as against traders with whom they have concluded a contract in a national court. However, the Court emphasized that, even in the absence of horizontal direct effect, Ms Faccini Dori would not be deprived of effective judicial protection. By virtue of the concept of indirect effect, the national court would, notwithstanding the absence of the horizontal direct effect of directives, be under an obligation to interpret national law in the light of the content of the latter. Moreover, the Court added that if the result prescribed by the directive cannot be achieved by way of interpretation, it may be possible for an individual to rely on the principle of State liability laid down in Joined Cases C-6/90 and C-9/90, Francovich and bring an action for damages against the State for failure to implement the directive (provided the conditions of liability are fulfilled).

74 Case 91/92, Paola Faccini Dori v. Recreb Srl, op.cit., at paragraph 20.
75 Ibid, at paragraphs 22 - 23.
76 Ibid, at paragraph 24.
77 Ibid, at paragraph 25.
78 Ibid, at paragraph 26. See further discussion of the concept of indirect effect in Chapter 4.
80 Case 91/92, Paola Faccini Dori v. Recreb Srl, op.cit., at paragraph 27.
Thus, the ECJ declined in *Faccini Dori* to develop the principle of effective judicial protection further in an “orderly” manner and recognize the horizontal direct effect of directives. Coppel suggests that the jurisprudential developments in the field of judicial protection since *Marshall (No.1)* such as the introduction of the concept of indirect effect and the principle of State liability made it difficult for policy reasons for the Court to reverse its distinction between vertical and horizontal direct effect.\(^{81}\) Furthermore, the political climate was not particularly favourable for changing its policy. During the proceedings, 11 out of the 12 Member States as well as the Commission submitted arguments *against* recognizing the horizontal direct effect of directives.

It is submitted that the ECJ’s judgments in *Marshall (No.1)* and *Faccini Dori* broadly support the principle of effective judicial protection as discussed in an earlier chapter in this thesis.\(^{82}\) First, these decisions confirm that the principle of effective judicial protection is a self-standing principle firmly rooted in the rule of law. Granting directives horizontal direct effect would result in obligations being imposed on individuals which they may have been unaware of or where they had complied with conflicting national law. The rule of law requires no burden to be placed upon a private party without a proper basis.\(^{83}\) Second, they illustrate that the principle of effective judicial protection is distinct from the principle of effectiveness. Though often inextricably linked, the principle of effectiveness is much broader in scope. As argued earlier,\(^{84}\) if the principle of effective judicial protection and the principle of effectiveness were one and the same, the ECJ would have granted directives horizontal direct effect in both *Marshall (No.1)* and *Faccini Dori*. Evidently, a solution based upon the principle

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\(^{82}\) See further discussion in Chapter 1.


\(^{84}\) See further discussion in Chapter 1.
of effectiveness would conflict with the rule of law and, it is submitted, is not within the present scope of the principle of effective judicial protection.

Although the Court's approach may lead to a reduced level of judicial protection of individuals' Community rights before the national courts, it is arguable that the ECJ, on balance, would prefer to guarantee effective judicial protection through other means, namely purposive interpretation,85 State liability86 and a wide interpretation of the notion of the "State."87 The degree of protection is still considered to be "effective" whilst at the same time minimizing infringements of the principle of legal certainty and the legitimate expectations of third parties. The ECJ has arguably adopted the most politically acceptable solution for both Member States and the citizens of the European Union.

In Case C-192/94, El Corte Inglés,88 the ECJ had the opportunity to reconsider whether directives designed to enhance consumer protection could produce direct effects in horizontal relations in the light of a new provision on consumer protection introduced by the TEU, namely Article 129a EC (now Article 152a).

In this case, Mrs Blázquez Rivero sought to rely on a directly effective provision of a directive in proceedings before a national court as against another private party. However, the Directive in question had yet to be implemented into Spanish law even though the period of transposition had expired. Moreover, the result intended by that directive could not be achieved by interpreting national law in conformity with the latter. The national court considered that the facts of the case in Faccini Dori had arisen before the entry into force of the TEU which introduced a new Treaty provision on consumer protection, namely Article 129a

85 Discussed further in this work in Chapter 4.
86 Discussed further in this work in Chapter 5.
EC (now Article 152a). The national court requested that the ECJ reconsider the horizontal direct effect of Article 11(2) of Directive 87/102/EEC in the light of the new Article 129a EC (now Article 152a).

Advocate General Lenz considered whether the introduction of Article 129a EC (now Article 152a) had any effect upon the horizontal direct effect of consumer protection directives. First, he pointed out that Article 129a EC (now Article 152a) does not impose an obligation with regard to consumer protection on Member States or individuals which would be a prerequisite for granting consumer protection directives horizontal direct effect. It leaves relatively large margins of discretion as regards its implementation to the Member States. Consequently, it fails to satisfy the necessary conditions for direct effect and hence cannot be relied upon by individuals before the national courts. He also asserted that Article 189(3) EC (now Article 249 (3)) does not provide for differentiation between different types of directives, therefore, the introduction of Article 129a EC (now Article 152a) does not require consumer protection directives to be granted horizontal direct effect.

The ECJ reiterated its rulings in Marshall (No. I) and Faccini Dori in which it refused to grant directives horizontal direct effect. With regard to the effect of Article 129a EC (now Article 152a), the ECJ followed the approach of Advocate General Lenz and held that that provision:

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89 Article 129a (1) EC (now Article 152a (1)) states: “1. The Community shall contribute to the attainment of a high level of consumer protection through: (a) measures adopted pursuant to Article 100a [now Article 95] in the context of the completion of the internal market; (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.”


92 Ibid, at p. 1294.

93 Ibid, at p. 1295.
"...merely assigns an objective to the Community and confers powers on it to that end without also laying down any obligation on Member States or individuals. Article 129a [now Article 152a] cannot justify the possibility of clear, precise and unconditional provisions of directives on consumer protection which have not been transposed into Community law within the prescribed period being directly between individuals."  

The Court added that:

"Consequently, a consumer cannot base on the directive itself a right of action against a lender who is a private person following shortcomings in the supply of goods or the provision of services and assert that right before a national court."  

This continuing denial by the Court of Justice to recognize the horizontal direct effect of directives on the basis that directives cannot confer obligations on individuals has been subsequently confirmed in Case C-355/96, Silhouette  and Case C-185/97, Coote.

Nevertheless, in El Corte Ingles  as in Faccini Dori, the ECJ sought to ensure that the individual seeking to rely on the directive was able to effectively protect her Community rights before the national courts notwithstanding the Member State’s failure to implement the directive in good time. Since the national court was unable to adopt a purposive interpretation of Spanish law in compliance with the contested Directive, the Court held that it may be possible for Mrs Blázquez Rivero to protect her rights by virtue of the principle of State liability. This

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95 Ibid, at paragraph 21.
98 Case C-192/94, El Corte Ingles SA v. Cristina Balsquez Rivero, op.cit., at paragraph 22. For further discussion on the development of the test of liability for non-implementation of directives, see Chapter 5.
approach adopted by the Court of Justice to enhance the principle of effective judicial protection has been confirmed in subsequent cases. For instance, in Case C-54/96, Dorsch Consult" and Case C-131/97, Carbonari, the ECJ advocated the use of the concept of indirect effect and the principle of State liability as alternative means of effectively protecting individuals’ Community rights before the national courts in the absence of direct effect. However, as the thesis will indicate, these alternative routes of ensuring the effective judicial protection of individuals’ Community rights are not full substitutes for granting directives horizontal direct effect.

2.3. Redefining the parameters of the principle of effective judicial protection: “incidental” horizontal direct effect of directives.

The ECJ’s refusal to grant directives horizontal direct effect in Marshall (No. I) and Faccini Dori on the premise that directives cannot confer obligations directly on individuals must now be reviewed in the light of a number of later rulings delivered by the Court of Justice. In Case C-194/94, CIA, Case C-441/93, Pafitis and Case C-129/94, Berndldez, the provisions of directives were applied by the ECJ in such a way as to give rise to “distinct adverse effects on the legal position of private parties, in some cases amounting to what appeared to be the effective imposition of a legal obligation on them.” This development in the ECJ’s case-law has been referred to as “incidental” horizontal direct effect of

100 Case C-131/97, Annalisa Carbonari and Others v. Università degli Studi di Bologna and others, judgment of 25 February 1999, not yet reported, at paragraph 52.
101 See further discussion in Chapter 4 and 5.
105 Craig, P. and de Búrca, G., EU Law: Text, Cases and Materials, 2nd edition, Oxford: Oxford University Press, 1998 at p. 209. Strictly speaking, the individuals affected by the ECJ’s interpretation of the directive in Berndldez were not parties to the proceedings.
directives. Its implications for the principle of effective judicial protection are discussed below.

In Case C-194/94, CIA, a dispute arose between CIA, a private company, and two of its competitors, Signalson and Securitel, also private parties. In response to a claim made by Signalson and Securitel that it should cease marketing its Andromède alarm system on the ground that the latter had not been approved in accordance with national law, CIA argued that the national rules were invalid since, inter alia, they had not been communicated to the Commission as prescribed by Directive 83/189. The Directive lays down procedures for the provision of information about national technical standards and regulations in order to prevent them from hindering inter-state trade. Articles 8 and 9 of the Directive require Member States to inform the Commission of proposed national technical regulations, and to delay their implementation if either the Commission or other Member States object. The issue facing the ECJ was whether or not Articles 8 and 9 of the Directive produce direct effects and if so, whether a breach of Article 8 by a Member State renders the contested national technical regulation unenforceable as against individuals.

In its ruling, the Court held that:

"Article 8 and 9 of Directive 83/189 lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, unconditional and sufficiently precise in terms of

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their content, those articles may be relied on by individuals before national courts."\textsuperscript{109}

It followed that CIA’s failure to gain the requisite approval for the marketing of the Andromède alarm system in accordance with national law was not unlawful. The national legislation which CIA had allegedly breached was inapplicable because it had not been notified to the Commission, contrary to the relevant Directive.

However, it is the \textit{practical effect} of this decision which has implications for the scope of the principle of effective judicial protection. The ECJ’s judgment meant that CIA, a private company, was able to rely in its defence on the provisions of the Directive to render inapplicable contrary national rules to the detriment of Signalson and Securitel, who were also private companies. This outcome appears at first sight to conflict with the ECJ’s previous ruling in \textit{Faccini Dori}. However, it has been argued that this interpretation is doubtful since the Court would be unlikely to overrule its judgment in the latter without making any express reference to its earlier decision or to the concept of horizontal direct effect itself.\textsuperscript{110}

It is submitted that the ECJ’s judgment in CIA represents a development of the principle of effective judicial protection and may be distinguished from the prohibition against the horizontal direct effect of directives laid down in \textit{Faccini Dori}. In the context of effective judicial protection, it simply enables individuals to defend themselves properly by relying on the express wording of a Directive even in proceedings against other private parties. As noted by Advocate General Elmer:

"Substantial consideration as regards protecting the rights of individuals and ensuring that the Member States comply with the Directive militate in my view decisively in favour of the Directive having direct effect."\textsuperscript{111}

The Advocate General in his Opinion therefore acknowledged that in the circumstances of this case, individuals may have been able to contest the national regulations as infringing Article 30 EC (now Article 28) in a (vertical) action against the State, but that remedy would take effect \textit{ex post facto}.\textsuperscript{112} Further, there was no guarantee that the Commission would instigate proceedings for breach of Community law under Article 169 EC (now Article 226). Thus, the only other alternative once a national regulation has been introduced in breach of the Directive, would be for undertakings to comply with it until a judgment declaring it unlawful has been delivered. Damage incurred by the trader in this interim period would be difficult to recover.\textsuperscript{113}

It may be possible to differentiate between the decisions in \textit{Faccini Dori} and \textit{CIA} by examining whether there is a qualitative difference between the "obligations" which the Court refused to impose in \textit{Faccini Dori} and the legal consequences of the ruling in \textit{CIA}.\textsuperscript{114} Coppel asserts that in \textit{Faccini Dori}, the effect of permitting the horizontal effect of the non-implemented directive would have been to impose a \textit{positive contractual obligation} upon Recreb allowing Miss Faccini Dori to withdraw from the contract within the "cooling-off" period. Recreb would have been obliged to bear the financial consequences. In \textit{CIA}, on the other hand, the obligations at issue were not obligations directly between the private parties,

\begin{itemize}
\item \textsuperscript{112} Article 30 EC (now Article 28) was recognized as producing direct effects in Case 74/76, \textit{Iannelli and Volpi v. Meroni} [1977] E.C.R. 557 at paragraph 13.
\item \textsuperscript{114} Coppel, \textit{op.cit.}, at p.72.
\end{itemize}
but obligations between CIA and the Belgian state. In this respect, the basis of the obligations in the Directive were quite different in these two cases respectively.

As argued by Advocate General Elmer, although the notification procedure in the Directive imposes a number of obligations on the Member States, it does not aim to impose duties on individuals. Therefore, no question arises as to whether the Directive should have direct effect as far as individuals’ obligations are concerned. In CIA, the ruling had the effect of relieving CIA of its obligation to seek approval for the alarm system, but the directive did not go so far as to impose obligations upon Signalson SA and Securitel SPRL. It merely deprived them of a legal basis for their claims (the national law must be disapplied by the national court) and thus required them to refrain from conducting business in a particular manner.

The possibility of such “incidental” horizontal direct effect has been confirmed by the House of Lords in R v. Secretary of State for Employment, ex parte Seymour-Smith and another. In this case, the House of Lords distinguished the ECJ’s decision in CIA from those in Marshall (No.l) and Faccini Dori on similar grounds. It stated that there had been no hint in the CIA judgment that the ECJ intended to depart from its previous jurisprudence. Furthermore, it added that the Advocate General in CIA considered that the case did not concern the horizontal direct effect of directives since it did not lead to obligations being imposed on individuals.

It has been suggested by Hilson and Downes that the “no real obligation” explanation given by Advocate General Elmer and supported by Coppel does not

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116 Craig and de Burca, op.cit., at pp. 207-208.
however fully explain the ECJ’s judgments in Case C-441/93, *Pafitis* 119 and Case C-129/94, *Berndldez*. 120 They argue that in the latter cases, the effect of the ECJ’s judgments was indeed to impose certain obligations on individuals. 121 However, it is submitted that these latter cases do not in fact cast doubt on the (now established) prohibition on horizontal direct effect of directives at all. Instead, the relevant directives at issue were enforced by virtue of the concepts of vertical direct effect and indirect effect respectively.

In *Pafitis* an action was successfully brought by existing shareholders against Trapeza Kentrikis Ellados, a public limited liability company (hereinafter “TKE Bank”), and its new shareholders for increasing its capital without calling a general meeting of its shareholders. Although there was no obligation to hold a meeting under national law, the plaintiffs argued that Directive 77/91 122 (capital of public limited companies) required such a meeting to be held. As such, the plaintiffs claimed that they had a right to bring proceedings in the event of a breach on the basis of the Directive. The ECJ’s ruling supported their claim. The (vertical) direct effect of the contested provisions had already been confirmed by the ECJ in a previous ruling. 123 However, in *Pafitis*, the Court made no reference to their horizontal direct effect despite the fact that the practical effect of the Court’s ruling was to allow private individuals (existing shareholders) to invoke a Directive as against other private parties (the defendant Bank and new shareholders). 124 However, as suggested by Advocate General Tesauro in his

121 Hilson and Downes, *op. cit.*, at p. 126.
122 Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 (now Article 48) of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] O.J. L 26, p. 1.
124 Craig and de Búrca, *op. cit.*, at p. 209.
Opinion, it is arguable whether the issue the horizontal direct effect of the directive arose in this case at all. The decision at issue amounted to a national administrative measure. The increase in capital had been taken at the request of the Governor of the Bank of Greece who had placed the Bank under the control of a temporary administrator. The appointment and performance of duties undertaken by the latter was subject to legislative ratification. Indeed, in its ruling, the ECJ held that the aim of Directive 77/91, namely to guarantee shareholders in all Member States a minimum level of protection, would be seriously jeopardized if Member States were able to derogate from the main provisions of the directive by maintaining in force rules - even if categorized as special or exceptional - which made it possible by means of an administrative measure to effect an increase the capital of a Bank without holding a general meeting of the shareholders. Presumably, this could be contested by the plaintiffs by virtue of the concept of vertical direct effect and would provide a satisfactory explanation for the ruling.

It is arguable that the ECJ’s ruling in Bernáldez may also be reconciled with the Court’s decision in Faccini Dori. In this case, Mr. Bernáldez was prosecuted for causing an accident whilst driving under the influence of alcohol and ordered to pay for the damage caused to the property of a third party in the accident. Under Spanish law, his insurance company was absolved from all liability on the ground that the damage was caused to the property by an intoxicated driver. The issue referred to the ECJ was whether this exclusion of the liability of the insurance company under Spanish law was compatible with Community Directives 72/166, 84/5 and 90/232 on motor vehicle insurance. In

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125 Advocate General Tesauro in Case C-441/93, Panagis Pafitis and Others v. Trapeza Kentrikis Ellados A.E. and Others, op.cit., at p. 1358.
126 Case C-129/94, Criminal Proceedings Against Rafael Ruiz Bernáldez, op.cit., at paragraph 38.
essence, the Court was required to rule on whether the third party victim had a right to compensation under the Directives. If so, this would result in a corresponding obligation being imposed upon the insurance company (a private individual). The ECJ answered in the affirmative. It ruled that Article 3 (1) of the First Directive (as amended):

"...must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all damage to property and personal injuries sustained by them...."\(^{132}\)

It added that:

"Any other interpretation would have the effect of allowing Member States to limit payment of compensation to third-party victims of a road-traffic accident to certain types of damage, thus bringing about disparities in the treatment of victims depending on where the accident occurred, which is precisely what the directives are intended to avoid. Article 3 (1) of the First Directive would then be deprived of its effectiveness."\(^{133}\)

It follows that Article 3 (1):

"...precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle."\(^{134}\)


\(^{132}\) Case C-129/94, Criminal Proceedings Against Rafael Ruiz Bernádez, op.cit., at paragraph 18.

\(^{133}\) Ibid, at paragraph 19.

\(^{134}\) Ibid, at paragraph 20.
In essence, the Court ruled that the third-party victim was able to rely on the Directive which resulted in an obligation being imposed on the insurance company to comply with the latter. This therefore appears to be in conflict with the Court’s case-law on horizontal direct effect of directives since the practical effect of the decision is to place a positive obligation on the private party affected, namely the insurance company. However, a closer examination of the case reveals that the referring national court had initially considered that the directive could be enforced by virtue of the concept of indirect effect. It seems that the national court which referred the matter to the ECJ, namely the First Chamber of the Seville Provincial Court, had expressed the view that the relevant Spanish law in this case should be interpreted in accordance with the directives by virtue of the concept of indirect effect. This would mean that any exclusion of liability which was effective between the insurer and the insured should in any event be invalid as against the injured party. It also considered that the insurer was therefore liable to the victim, but may have a right to recourse against the person who caused the injury. Nevertheless, the referring court also pointed out that the Fourth Chamber of the Seville Provincial Court had already decided the relevant points of law differently. It concluded that there was doubt as to the correct interpretation of Community law and therefore, in the interests of uniformity, referred the matter to the ECJ. It may be presumed that on referral back to the national court, the latter would interpret national law in conformity with the interpretation of the Directive given by the ECJ in its preliminary ruling.

The practical effect of the decision may well have resulted in an obligation being imposed on the insurance company which it would not have been subject to under national law prior to the ruling. Even though the Court’s approach arguably infringes the principle of legal certainty and legitimate expectations, this consequence appears to have been accepted by the ECJ in its previous case-law on indirect effect\(^\text{135}\) and would be similar in effect to a judgment given by a

national court on the interpretation of national law. As emphasized by Lackhoff and Nyssens, the concept of indirect effect reflects an acceptable balance from the point of view of the Court between:

"...on the one hand, the legitimate expectations of the individual seeking to have purely national law applied, and, on the other hand, the need to ensure the widest enforcement possible of Community law, along with the protection of the rights of individuals originating in Community law." 136

Although the issue of indirect effect or horizontal direct effect of directives was not expressly referred to by the Court in Berndlez, it arguably reflects the more deferential approach adopted by the ECJ in recent times. 137

Alternatively, some commentators have argued that the rulings in Berndlez and Pafitis as well as CIA may be distinguished from Faccini Dori on the ground that they all reflect a "public" law factor. In other words, the area of law at issue was subject to public law regulation at the material time. In contrast, Faccini Dori and El Corte Inglés are private law cases 138 in the sense that there was no public regulation in the fields of law which were contested, only private law. 139 Indeed, in R v. Secretary of State for Employment, ex parte Seymour-Smith and another, 140 the House of Lords admitted that the CIA case was unusual due to the fact that the issue being litigated between the private parties was whether, as a matter of public law, the manufacturer was doing something unlawful. If the regulation alleged to have been infringed could not be enforced against CIA by the State, it could not be right for Signalson and Securitel to allege that CIA’s alarm system

137 See further discussion in Chapters 3, 4 and 5.
138 Craig and de Búrca, op.cit., at pp. 207 - 208; see also Hilson and Downes, op.cit., at p. 127; Coppel, op.cit., at p. 72 (on CIA and Faccini Dori) and Stuyck, op.cit., at pp. 1268 - 1270 (on Pafitis).
139 Hilson and Downes, op.cit., at p. 127.
140 R. v. Secretary of State for Employment, ex parte Seymour-Smith and another, op.cit.
did not comply with the law.\(^{141}\) Although the "public law" explanation seems to be the only one on which the academic commentators reach any consensus, this explanation has been criticized on the ground that distinctions between public and private law are not easy to draw. The resulting absence of consensus as to the correct legal reasoning for these judgments may inevitably lead to uncertainty in the enforcement of Community law before the national courts in the future.\(^{142}\)

It is therefore clear that the concept of "incidental" horizontal direct effect of directives needs further clarification. Given the strong objections to the horizontal effect of directives in the submissions of the Member States in \textit{Faccini Dori}, it is unlikely that these cases amount to a reversal of the ECJ's prohibition on the horizontal direct effect of directives in bilateral cases, namely those between two private individuals. This view has arguably been confirmed in Case C-355/96, \textit{Silhouette}\(^{143}\) and Case C-C185/97, \textit{Coote}.\(^{144}\) However, it may be argued that the ECJ has partially retreated on its original position in particular circumstances, such as those which arose in \textit{CLA}, thus redefining the scope of the horizontal direct effect of directives and therefore the scope of the principle of effective judicial protection. It follows that an individual may rely on a directive in proceedings against another individual provided this does not involve "positive legal obligations" being imposed upon the latter.\(^{145}\) This operates indirectly as an extension of the parameters of the concept of direct effect and increases the scope of application of the principle of effective judicial protection whilst still arguably complying with the requirements of the rule of law and the reasonable requirements of legal certainty.

\(^{141}\) \textit{Ibid}, at paragraph 12.
\(^{142}\) Hilson and Downes, \textit{op.cit.}, at p. 127; Coppel, \textit{op.cit.}, at pp. 72-73.
\(^{145}\) See earlier discussion.
CHAPTER 3: FURTHER DEVELOPMENT OF THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION

In the absence of a comprehensive system of enforcement laid down in the Treaty, the ECJ has drawn upon the principle of Member State co-operation laid down in Article 5 EC (now Article 10) and the principle of effectiveness\(^1\) to impose specific obligations upon the national courts which are designed to guarantee individuals effective judicial protection of their Community rights. These obligations imposed on the national courts and the corresponding rights conferred on individuals arguably represent characteristics of the principle of effective judicial protection which will be identified and examined in this chapter.

3.1. Application of the principle of effective judicial protection to national procedural rules.

In Case C-355/96, Silhouette,\(^2\) Advocate General Jacobs argued that:

"...the case-law of the Court of Justice recognizes as a general principle of law, that the national courts must provide effective remedies for the enforcement of Community rights."\(^3\)

He added that two principles had been established in the case-law of the ECJ in this regard, namely the principles of comparability and sufficient enforceability discussed in more detail below.\(^4\) These two requirements were first introduced by the ECJ in Case 33/76, Rewe\(^5\) and Case 45/76, Comet.\(^6\) They represent an attempt by the Court of Justice to ensure that a minimum standard of protection is

\(^1\) Discussed further in this work in Chapter 1.
\(^3\) Ibid., at p. 972.
\(^4\) Ibid.
guaranteed by the national courts in the enforcement of individuals' Community rights. As such, it is submitted, that they constitute characteristic elements of the principle of effective judicial protection.

In Rewe and Comet, the ECJ was required to rule on whether a directly effective provision of the Treaty could be relied upon by an individual before the national court where the time-limit laid down by national law for such an action has expired.

Advocate General Warner argued that the well-established principle of national procedural autonomy should be applied. The principle was first laid down in Case 6/60, Humblet and requires national courts to refer to national law when determining the relevant jurisdiction, appropriate procedural rules and the nature and extent of the remedies available under national law when giving effect to directly effective Community rights invoked before them. Advocate General Warner emphasized that:

"...Community law and national law operate in combination, the latter taking over where the former leaves off, and working out its consequences."

However, he qualified his argument to some extent stating that:

"Of course...I do not mean that it is open to the legislature of a Member State specifically to deprive of their remedies under such laws persons who have been the victims of a breach by that State of Community law."

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11 See, for example, Case 60/75, Russo v. AIMA [1976] E.C.R. 45.
Nevertheless, the Advocate General failed to specify what action should be taken if a Member State did act in this manner.

The issue was addressed by the Court of Justice in its ruling. It held that since the relevant Treaty provisions were directly effective, rights had been conferred on individuals which the national courts were under an obligation to protect. For the first time, the Court expressly stated that this duty stemmed from Article 5 (now Article 10) of the Treaty.\textsuperscript{14} In providing this protection, the Court added that:

\textquotedblleft...in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law provided that such rules are \textit{not less favourable} than those governing the same right of action on an internal matter.\textquotedblright

Articles 100 to 102 [now Articles 94 - 97]\textsuperscript{15} and 235 [now Article 308] of the Treaty enable the appropriate steps to be taken as necessary, to eliminate differences between the provisions laid down in such matters by law, regulation or administrative action in Member States if these differences are found to be such as to cause distortion or to affect the functioning of the common market.

In default of such harmonization measures, the rights conferred by Community law must be exercised before the national courts in accordance with the rules of procedure laid down by national law.

\textsuperscript{14}Case 45/76, \textit{Comet, op.cit.}, at paragraph 12. The relationship between the principle of effective judicial protection and Article 5 (now Article 10) of the Treaty is discussed further in Chapter 1.

\textsuperscript{15}Note that Articles 100b - d EC have been repealed by the Treaty of Amsterdam 1997.
The position would be different only if those rules and time-limits made it impossible in practice to exercise rights which the national courts have a duty to protect."\(^{16}\)

Thus, the Court reaffirmed the principle of national procedural autonomy as established in previous case-law. It also acknowledged that if harmonization measures are enacted,\(^{17}\) these will take priority by virtue of the principle of supremacy. However, the Court added two important provisos which govern the discretion exercised by the national courts when enforcing individuals' rights. They are arguably part of the emerging principle of effective judicial protection. These are first, that the national courts must ensure that individuals are not discriminated against when seeking to enforce directly effective rights derived from Community law, rather than national law. The Court held that national procedural rules must "not be less favourable" than those relating to similar actions of a domestic nature. In this thesis, this principle will be referred to as the principle of "comparability."\(^{18}\) However, it has occasionally been referred to as the principle of "non-discrimination"\(^{19}\) and more recently, as the principle of "equivalence."\(^{20}\)

The second proviso is that national courts must ensure that national procedural rules do not make it "impossible in practice" for an individual to exercise the directly effective rights which the national courts are under a duty to protect. In

\(^{16}\)Case 45/76, Comet, op.cit., at paragraphs 13 - 16. The ECJ adopted similar wording in its judgment in Case 33/76 Rewe, op.cit., at paragraph 5.


\(^{19}\)See, for example, the ECJ in Case 199/82, Amministrazione delle Finanze dello Stato v. San Giorgio [1983] E.C.R. 3595 at paragraph 17.

\(^{20}\)See, for example, the ECJ in Case C-231/96, Edilizia Industriale Siderurgica Srl (Edis) v. Ministero delle Finanze [1999] 2 C.M.L.R. 995 at paragraph 36; Joined Cases C-279/96, C-280/96 and C-281/96, Ansaldo Energia SpA v. Amministrazione delle Finanze dello Stato [1999] 2 C.M.L.R. 976 at paragraph 27 and 29.
subsequent cases, different formulations have been utilized by the ECJ such as "virtually impossible,"\(^{21}\) "excessively difficult"\(^{22}\) and "practically impossible."\(^{23}\) The phrase "unduly difficult" has been adopted by Advocate General Jacobs on several occasions.\(^{24}\) However, the phrase referred to more frequently is the principle of "effectiveness."\(^{25}\) In order to avoid confusion with the principle of effectiveness (discussed in Chapter 1) which arguably provides a legal basis for the principle of effective judicial protection, it will be referred to in this thesis as the principle of "sufficient enforceability."\(^{26}\)

The principles of comparability and sufficient enforceability laid down in *Rewe* and *Comet* have been used extensively by the ECJ in its case-law relating to national procedural rules and have recently been extended to the Court's case-law on State liability.\(^ {27}\)

### 3.1.1. A new "purposive test"

The success of the ECJ's formula laid down in *Rewe* and *Comet* lies in its simplicity and objectivity.\(^ {28}\) The compatibility of a national procedural rule with the requirements of comparability and sufficient enforceability depends upon the *practical effect* of the rule in question.\(^ {29}\) As emphasized by Advocate General Jacobs:

\(^{21}\) Ibid, at paragraph 14.
\(^{22}\) Ibid.
\(^{26}\) Geddes, *op.cit.*, at pp. 128-132.
\(^{27}\) Discussed further in this work in Chapter 5.
\(^{29}\) Ibid, at p. 373.
"Those requirements are intended to establish a balance between the need to respect the procedural autonomy of the legal systems of the Member States and the need to ensure the effective protection of Community rights in the national courts." 30

In Joined Cases C-430/93 and C-431/93, van Schijndel 31 and Case C-312/93, Peterbroeck, 32 the ECJ arguably expanded its Rewe and Comet formula and laid down a number of factors which the national courts are required to take into account when assessing the compatibility of national procedural rules with the principle of effective judicial protection. It has been argued by some commentators that the ECJ has modified its approach and introduced a new "purposive" test.

In both Van Schijndel and Peterbroeck, the ECJ was required to rule on whether Community law imposes an obligation upon a national court to raise a point of Community law of its own motion where the litigants have not raised the issue themselves, and if so, whether national procedural rules which prevent the national court from doing so must be set aside by the national court.

In van Schijndel, the two plaintiffs brought actions before the national court against the Dutch Pension Fund for Physiotherapists for breach of national law. 33 On appeal before the Hoge Raad (Dutch Supreme Court), the plaintiffs claimed that the lower court (Rechtbank) should have considered, "if necessary, of its own motion," the compatibility of the national provisions with Community law.

31 Ibid.
33 The Fund refused to exempt the plaintiffs from compulsory membership on the ground that the insurance arrangements made by the plaintiffs did not comply with the "collectivity requirement" (i.e. the same arrangements must be applied to all physiotherapists employed by the same employer).
irrespective of the fact that no such submissions had been introduced at first instance by the parties themselves.

As in many continental judicial systems, the *Hoge Raad* only has jurisdiction to quash a decision on a point of law ("cassation") and cannot reconsider any new facts which have not been previously raised before the *Rechtbank*. In this case, the *Hoge Raad* was of the view that the new submission could not be made because it required the consideration of facts and circumstances not established by the *Rechtbank* or by the parties themselves before the lower courts. Moreover, the plaintiffs were unable to rely on a national procedural rule which requires a judge to supplement, of his own motion, legal grounds not put forward by the parties. This is because the domestic principle of non-interference prohibits a judge from supplementing legal grounds which go beyond the limits of the dispute, or relying on facts or circumstances other than those relied on by the party whose pleas must be supplemented. If, in this case, the *Rechtbank* had considered the Community law points of its own motion, it would have gone beyond the limits of the dispute.\(^\text{34}\)

The *Hoge Raad* referred to the ECJ and asked, *inter alia*, whether a national civil court should be required to consider arguments based upon Community law, even where the party to the proceedings which has an interest in the application of those provisions has not relied upon them, and where to do so would require the national court to abandon its passive role by having to go beyond the ambit of the legal dispute and/or rely on facts and circumstances other than those which the party having an interest in the application of those provisions relies on, in order to substantiate its claim.

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\(^{34}\) Furthermore, before the *Kantonrechter*, the plaintiffs had not challenged the compulsory membership of the national pension scheme for physiotherapists, but the refusal to exempt them under Article 20 (1)(a) of the pension regulations. The *Hoge Raad* concluded that the plaintiffs had thereby accepted the binding nature of the Pensions Law and of the scheme.
Advocate General Jacobs argued that the national procedural rules at issue satisfied the principles of sufficient enforceability and comparability as laid down in *Rewe* and *Comet*. He argued that the national legal system gave the parties sufficient opportunity to enforce their Community rights before the national courts, but the plaintiffs had not availed themselves of this opportunity at the appropriate stage in the proceedings.

The Advocate General rejected calls for a more expansive approach to be adopted along the same lines as the ECJ’s ruling in Case 106/77, *Simmenthal*[^35] and Case C-213/89, *Factortame (No. I)*[^36] in which the Court had ruled that national courts were under a duty to give full effect to directly effective provisions of Community law and to set aside any conflicting national legislation, if necessary, acting of their own motion.[^37] He accepted that the Court had given greater prominence to “the need to ensure the effectiveness of Community law and proper judicial protection for individuals” in these cases, but argued that they were distinguishable from the present case.[^38] He argued that the Court’s intervention had been necessary in both *Simmenthal* and *Factortame (No. I)*:

“...to enable the national courts, before which claims based on Community law had been properly brought, to perform effectively the task conferred upon them under the system established by the Treaty.”[^39]

Advocate General Jacobs also refuted the arguments submitted by the Spanish Government, namely that on the basis of the principles of primacy and effectiveness and the requirement for uniform application of Community law in


[^38]: *Ibid*, at p. 4713.

all the Member States, national courts are under a Community law obligation to consider, if necessary of their own motion, points of Community law notwithstanding any national procedural rules to the contrary. It is submitted that the Advocate General’s arguments support, to a large extent, the proposition that the principle of effective judicial protection is a narrower and distinct concept to that of the full effectiveness of Community law. 40

With regard to the principle of supremacy, Advocate General Jacobs argued that unlike national substantive rules which conflict with Community law, the principle of primacy does not require all national procedural rules which prevent a question of Community law from being raised at a particular stage in proceedings to be set aside. Recalling the Court’s view in Rewe and Comet, he emphasized that it is only where such rules make it impossible or unduly difficult to assert Community rights that they must be disapplied. He maintained that:

"...if the view were taken that national procedural rules must always yield to Community law, that would, as will appear below, unduly subvert established principles underlying the legal systems of the Member States. It would go further than is necessary for effective judicial protection." 41

In his view, this would also be contrary to the principle of proportionality and the principle of subsidiarity, the latter having been a principal objective of the Court in this area for many years. 42 He also argued that this interpretation of the scope of the principle of primacy would create anomalies in the national legal systems by granting Community rights more favourable treatment than rights derived from national law. 43 He argued that:

40 See earlier discussion in Chapter 1.
42 Ibid.
43 Ibid, at p. 4716.
"The assumption underlying the system established by the Treaties, however, is that the need for effectiveness and proper judicial protection can normally be satisfied by national remedies enforced through the national courts in accordance with national procedural rules." 

In his view, it is only in exceptional circumstances where specific national rules frustrate Community rights that full effect will be given to Community law by virtue of the duty imposed on national courts by Article 5 (now Article 10) of the Treaty. He refers, in particular, to the Court’s rulings in Case 106/77, Simmenthal, Case C-213/89, Factortame (No.1), Case 222/84, Johnston, Case C-208/90, Emmott and Case C-271/91 Marshall (No.2) which are all discussed below.

Advocate General Jacobs also dismissed the argument that a national court should be obliged to consider, if necessary of its own motion, points of Community law in order to ensure the effectiveness of Community law. Advocate General Jacobs argued that:

"...the proper application of the law does not necessarily mean that there cannot be any limits on its application. The interest in full application may need to be balanced against other considerations such as legal certainty, sound administration and the orderly and proper conduct of proceedings by the courts."

44 Ibid. Emphasis added.
46 Case C-213/89, The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others (Factortame (No.1)), op.cit.
50 The relationship between the principle of effective judicial protection and the principle of effectiveness of discussed further in Chapter 1.
51 Ibid, at p. 4717.
He argued that it was legitimate for national legal systems to:

"...impose restrictions which, in the absence of a reasonable degree of diligence on the part of the individual will lead to full or partial denial of his claim. These include time-limits for commencing and completing steps in administrative and judicial proceedings, limits on retrospective claims, rules limiting the introduction of new claims and restrictions on grounds of appeal and on matters which courts may rise of their own motion." 52

Indeed, similar restrictions exist in respect of proceedings brought before the Court of Justice itself. 53 He further emphasized that the extent to which a national court may raise a question of law which has not been relied upon by the parties will depend upon the nature of the procedure governing the case. Differences may arise according to the context of proceedings. 54 It may depend, for example, on whether the proceedings have been brought before a continental court or a common law court, on the type of proceedings (civil, administrative, criminal), on the level of proceedings (first instance, appeal on law and fact, or appeal on law only), on the nature of the judicial body (court or tribunal), or whether a matter of public policy arises. Thus, a national court should only be obliged to apply of its own motion a provision of Community law where it would be required to do likewise in relation to a corresponding provision of national law. In his view:

"That might admittedly lead to the unequal application of Community law but such unequal application is, as we have seen, a consequence of the variety of the national legal systems themselves." 55

52 Ibid.
53 Ibid. Actions (or appeals from the Court of First Instance) brought directly before the ECJ are subject to time-limits, restrictions on the types of claims and pleas that may be put forward (and the stage of proceedings at which new pleas may be introduced) or which may broaden the scope of the action: Article 113 (2) and Article 116(2) of the Court’s own Rules of Procedure. The ECJ may only raise matters of its own motion in limited circumstances.
54 Ibid, at pp. 4717 - 4721.
55 Ibid, at p. 4719.
From the perspective of the individual, national limitations are commonly placed upon the ability of the appellant or respondent in appeal (or cassation) proceedings to raise new points where the effect would be to broaden the scope of proceedings and thus subvert the very nature of proceedings by transforming it into a re-hearing.\textsuperscript{56} Advocate General Jacobs argued that the plaintiffs had not, in this case, been deprived of their ability to effectively enforce their Community rights. The Dutch rules at issue in \textit{van Schijndel}:

\begin{quote}
"...merely seek to ensure the \textit{orderly and efficient conduct of proceedings} by preventing the plaintiff from subsequently broadening the subject matter of the dispute as defined in his application to the trial judge and from raising new issues on appeal in cassation which go beyond the subject matter of the dispute and which would require further investigation of the facts."\textsuperscript{57}
\end{quote}

He concluded that:

\begin{quote}
"Since the Netherlands rules appear to provide \textit{adequate protection} for Community rights, it is sufficient that the national courts, in applying those rules, should accord the same treatment to grounds based on Community law as they do to similar grounds based on national law."\textsuperscript{58}
\end{quote}

Advocate General Jacobs went on to consider the third argument of the Spanish government, namely that prohibiting a national court from raising, of its own motion if necessary, a point of Community law would jeopardize the uniform application of Community law in the Member States. In other words, the ability of an individual to be able to effectively protect his Community right before the national court despite his lack of diligence will depend on the strictness of the procedural rules in that Member State. He argued that:

\begin{footnotes}
\item \textsuperscript{56} \textit{Ibid}, at pp. 4719 - 4720.
\item \textsuperscript{57} \textit{Ibid}, at p. 4720.
\item \textsuperscript{58} \textit{Ibid}, at pp. 4720 - 4721. Emphasis added.
\end{footnotes}
"A degree of disparity in the application of Community law is...inevitable in the absence of harmonized rules on remedies, procedure and time-limits...It cannot be seriously suggested that, in the interests of uniformity, Community law requires that all time-limits for claims arising from it must be set aside. In the absence of harmonized rules, the sole requirement can be that national remedies and procedural rules provide adequate legal protection." 59

In its ruling, the ECJ first emphasized that, in accordance with the principle of comparability, if under domestic law the national courts were required to raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned. 60 Similarly, if domestic law granted national courts a discretion as to whether or not they could apply national law of their own motion, the same rules should apply in relation to binding rules of Community law. However, the ECJ added that national courts are under an obligation by virtue of Article 5 (now Article 10) of the Treaty to ensure the legal protection which individuals derive from the direct effect of provisions of Community law. 61

The Court also considered the issue of whether or not the national procedural rule at issue also applies where it would require the court to abandon its passive role, either by requiring it to go beyond the ambit of the dispute defined by the parties themselves, or by relying on facts and circumstances other than those on which the party to the proceedings with an interest in the application of the provisions of the Treaty based his/her claim. The ECJ recalled the principles of comparability and sufficient enforceability laid down in Rewe and Comet. 62

Based on its ruling in Case 166/73, Rheinmühlen, 63 the Court emphasized that:

60 Ibid, at paragraph 13.
61 Case C-213/89, The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others (Factortame (No.1)), op.cit., at paragraph 19.
62 Ibid, at paragraph 12.
"...a rule of national law preventing the procedure laid down in Article 177 [now Article 234] of the Treaty from being followed must be set aside." 64

However, the ECJ also added that in considering whether or not a national procedural rule is compatible with Community law and arguably the principle of effective judicial protection, the principles of comparability and sufficient enforceability must be assessed in the light of a new "purposive" test which takes into account the role and purpose of the national procedural rule in the domestic judicial system. It held that:

"For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration." 65

Applying the abovementioned test in *van Schijndel*, the Court held that:

"In the present case, the domestic law principle that in civil proceedings a court must or may raise points of its own motion is limited by its obligation to keep to the subject matter of the dispute and to base its decision on the facts put before it." 66

The ECJ added that:

65 Ibid, at paragraph 19.
66 Ibid, at paragraph 20.
"That limitation is justified by the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. That principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of defence; and it ensures the proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas." 67

Thus, according to the ECJ, it follows that:

"...Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim." 68

In Case C-312/93, Peterbroeck, 69 the ECJ was required to consider whether or not a national court was obliged to raise a point of Community law of its own motion where a national procedural rule which laid down a time-limit on the introduction of new pleas, had expired. The ECJ applied the same purposive test, but with a different result.

In this case, a Dutch company drew from Peterbroeck an active partner's income in the 1974 tax year and was charged non-resident tax in the 1975 tax assessment year. As the legal representative of the Dutch company, Peterbroeck lodged complaints with the Regional Director of Direct Contributions (hereinafter "the Director") on 22 July 1976 and 24 January 1978. Most of these complaints were rejected by the Director in a decision issued on 23 August 1979. Peterbroeck subsequently brought proceedings before the Belgian Cour d'Appel on 8 October

67 Ibid, at paragraph 21.
68 Ibid, at paragraph 22.
69 Case C-312/93, Peterbroeck, Van Campenhout & Cie SCS v. Belgian State, op.cit.
1979 and Peterbroeck argued for the first time that the rate of taxation applicable to non-resident companies by the Belgian tax authorities was in breach of Article 52 (now Article 43) of the Treaty. However, in the proceedings before the Director, Peterbroeck had relied exclusively on national law.

The national procedural rules at issue in this case prevented new pleas which had not been raised in the complaint, or considered by the Director of his own motion, from being raised by the appellant taxpayer. This restriction applied to both the appeal document and to the giving of notice in writing by the appellant to the Registry of the Cour d'Appel after the expiry of a limitation period of 60 days. The latter took effect from the date that the Director lodged a certified true copy of the contested decision together with all the documents relating to the taxpayer's objection. Thus, new pleas could only be raised before the expiry of the 60 day limit. Under Belgian case-law, a plea was “new” for the purposes of the abovementioned provisions if it raised for the first time an issue which in its object, nature or legal basis differed from those already before the Director.

The Cour d'Appel considered that the argument based on Article 52 EC (now Article 43) constituted a new plea within the meaning of national law and was therefore inadmissible once the time-limit has expired. The national rule also had the effect of preventing the Cour d'Appel from considering the compatibility of national law with Community law and from requesting a preliminary reference from the ECJ by virtue of Article 177 EC (now Article 234). The Cour d'Appel also observed that although the national rules applied to most pleas based on domestic law, Belgian case-law permitted certain exceptions for pleas alleging breach of principles of national law such as a time-bar of the right to charge tax and the force of res judicata, breach of which can be raised irrespective of the expiry of any time-limits. In view of the foregoing, the Belgian Cour d'Appel referred to the matter to the ECJ.

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70 Article 52 (now Article 43) of the Treaty grants self-employed professionals the right to establish themselves in another Member State subject to the same conditions that are applicable to the nationals of the host State.
In his Opinion, Advocate General Jacobs confirmed that the approach of the ECJ laid down in *Rewe* and *Comet* should be applied. First, he argued that in accordance with the principle of comparability, although the exceptions available under domestic law should also be applied to actions based on Community law, the exceptions available were inapplicable in this case. He then went on to consider whether or not the national time-limit in question satisfied the principle of sufficient enforceability. He recalled that the ECJ has accepted that "reasonable" time-limits are permissible in the interests of legal certainty. He considered that the 60 day time-limit at issue in *Peterbroeck* was reasonable given that Article 173 EC (now Article 230) itself lays down a two-month limitation period for bringing an action for annulment directly before the ECJ (or CFI). Furthermore, the limitation period of 60 days takes effect from the submission by the director of his decision together with the case file to the *Cour d'Appel* (and not from the day when the taxable person appeals to the *Cour d'Appel* against the decision of the director), thus giving individuals additional time in which to introduce a new plea.

The Advocate General went on to consider whether the expiry of the national time-limit, which had the effect of prohibiting the *Cour d'Appel* from dealing with issues of Community law of its own motion, is compatible with Community law in view of the ECJ's rulings in *Simmenthal* and *Factortame*. The *Cour d'Appel* questioned whether such rules, which not only precluded national courts from examining the compatibility of national law with Community law, but also precluded them from referring to the ECJ for a preliminary ruling under Article 177 (now Article 234) of the Treaty, must be set aside where they prevented

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71 Case 33/76, *Rewe*, op.cit., at paragraph 5.
72 Advocate General Jacobs also points out that the procedure under Article 42 of the ECJ's Rules of Procedure prohibits new pleas in law from being raised during the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. In exceptional circumstances (*res judicata*), certain issues may be raised at any stage in the proceedings: Opinion of Advocate General Jacobs in Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*, op.cit., at pp. 4607-4608.
national courts from ensuring the full effect of a directly effective provision of Community law.

Advocate General Jacobs argued that the issue of whether or not national courts are able to raise issues of Community law of their own motion is the corollary of the ability of individuals to raise new pleas before the Court. He further argued that Community law does not require national courts to be free to raise issues of their own motion in all circumstances and at all stages of proceedings irrespective of time-limits imposed by national law. Although both national law and Community law may, in certain circumstances, allow a court to raise an issue of its own motion, he concluded that:

“Given the variety of situations which have to be considered, it would be anomalous...and would create difficulties in practice, if it were held that national courts must in all circumstances and at any stage in the proceedings be free to raise issues of Community law. It might also result in unnecessary incursions into the procedural autonomy of the legal systems of the Member States.”

He distinguished the Court’s rulings in Simmenthal and Factortame from the present case arguing that:

“...it will be noted that in both cases the effect of Community law was to exclude a national rule which would have made the judicial protection of Community rights by the court seized wholly impossible. Those cases show, therefore, that it must always be possible for an individual to bring a claim before a national court to protect his Community rights. They do not suggest that it must in all circumstances be open to the national court, as a matter of Community law, to raise of its own motion issues which the parties have failed to raise.”

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74 Ibid, at p. 4610.
75 Opinion of Advocate General Jacobs in Case C-312/93, Peterbroeck, Van Campenhout & Cie SCS v. Belgian State, op.cit., at pp. 4611-4612. Emphasis added. de Búrca argues that the main difference between the two sets of cases is the lack of diligence on the part of the parties in Van Schijndel and Peterbroeck whereas in Simmenthal, the applicant was unable to influence the restrictions on the jurisdiction of the Court: de Búrca, G., “National Procedural Rules and
He concluded that the national procedural rule in question did not infringe the principles of comparability and sufficient enforceability and was therefore in compliance with Community law.

The ECJ reached a different conclusion to that of the Advocate General. It rephrased the question posed by the referring court. First, it considered it necessary to establish whether Community law precluded application of a domestic procedural rule whose effect, in procedural circumstances such as those in question in the main proceedings, was to prevent the national courts seized of a matter falling within its jurisdiction from considering of its own motion the compatibility of a domestic measure with a provision of Community law when the latter provision had not been invoked by the litigant within a certain period. Second, it needed to establish whether Community law precluded the application of such a rule where it allowed exceptions for certain claims founded on principles of domestic law, but not on principles of Community law.76

The Court assessed the compatibility of the national procedural rule at issue with the principles of comparability and sufficient enforceability. It took into account the new “purposive” test which requires the role and purpose of the national procedural rule in the domestic judicial system to be considered.77 The ECJ also recalled its judgment in Rheinmulen. Referring to the new purposive test, the ECJ held that:

“Whilst a period of 60 days so imposed on a litigant is not objectionable per se, the special features of the procedure in question must be emphasized.”78

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76 Ibid, at paragraph 11.
78 Case C-312/93, Peterbroeck, Van Campenhout & Cie SCS v. Belgian State, op.cit., at paragraph 16.
Departing from view of the Advocate General and in contrast to its decision in *van Schijndel*, the ECJ applied the modified formula and held that the national procedural rule at issue was in breach of Community law.\(^79\)

The ECJ appears to have been influenced by four features of the Belgian procedure at issue. First, it held that in this case the *Cour d’Appel* was the first court which could make a reference to the ECJ during the proceedings since the Director, as a member of the fiscal authorities, did not fall within the meaning of "court or tribunal"\(^80\) referred to in Article 177 (now Article 234) of the Treaty.\(^81\) Second, the ECJ held that the expiry of the limitation period which prevented the *Cour d’Appel* from examining of its own motion the compatibility of a measure of domestic law with Community law started to run from the time when the Director lodged a certified true copy of the contested decision. In this case, that meant that the period during which new pleas could be raised by the appellant had expired by the time the *Cour d’Appel* held its hearing thus denying it the possibility of considering the question of compatibility.\(^82\) Third, the ECJ stated that in this particular case, no other court or tribunal in subsequent proceedings could of its own motion consider the question of the compatibility of a national measure with Community law.\(^83\) Finally, the ECJ held that the national court’s inability in this case to raise points of Community law of its own motion could not be reasonably justified on the grounds of legal certainty or the proper conduct of procedure.\(^84\) Thus, in *Peterbroeck*, the national procedural rule made it virtually impossible for the parties to exercise their Community rights before a national court given the particular circumstances of the case and therefore infringed the principle of effective judicial protection.

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\(^79\) *Ibid*, at paragraph 21.

\(^80\) See, for example, Case C-24/92, *Corbiau* [1993] E.C.R. I-1277.


\(^82\) *Ibid*, at paragraph 18.

\(^83\) *Ibid*, at paragraph 19.

\(^84\) *Ibid*, at paragraph 20.
The ECJ’s rulings in *van Schijndel* and *Peterbroeck* have led some academic commentators to argue that there has been a shift in the ECJ’s approach to balancing the need for effectiveness of Community law with respect for national procedural autonomy.\(^{85}\) According to Craig and de Búrca, the ECJ’s decisions reflect a new “balancing” approach or “proportionality” test in which the national courts are required to weigh the *restrictive impact* of a national rule upon a Community right against the *legitimate aim* served by that rule. Determining the compatibility of a national procedural rule which restricts the exercise of a Community right with Community law, and arguably the principle of effective judicial protection, will no longer depend on the intrinsic nature of the rule and its aims or its effect, but on these factors in the light of the particular circumstances of the case.\(^{86}\)

It has been argued by Hoskins that this “new” approach will create legal uncertainty. He asserts that, by definition, *all* national procedural rules may be justified on the grounds of the need for legal certainty or proper conduct of proceedings. The ECJ has given no indication of what is acceptable and not acceptable (which will undoubtedly give rise to an increase in the number of preliminary references).\(^{87}\) Indeed, he argues that it is difficult to establish how the ECJ reached a different decision in *Peterbroeck* to that in *van Schijndel*. On the facts of both cases, the national courts were unable to raise a point of Community law of their own motion. However, in *van Schijndel*, the national procedural rule was held to be compatible with Community law whereas in *Peterbroeck*, the national procedural law was found to be invalid.\(^{88}\) Hoskins argues that the only practical distinction between the two cases is the fact that in *Peterbroeck*, no court of tribunal within the meaning of Article 177 (now Article 234) of the Treaty was able, at any stage in the proceedings, to raise a point of

\(^{85}\) de Búrca, *op.cit.*


\(^{88}\) For further discussion, see de Búrca, *op.cit.*
Community law of its own motion. In contrast, in van Schijndel, the lower courts may have been entitled to raise an issue of Community law of its own motion, but failed to do so. According to Hoskins, if this is the reason, then it is regrettable that the ECJ:

"...did not make it more obvious, rather than simply referring to general notions of legal certainty and procedural efficiency."\(^{89}\)

Moreover, Hoskins argues that:

"From the perspective of the need to ensure the effective protection of an applicant's Community law rights, it is difficult to justify the result in Peterbroeck as proceedings before the director had lasted for three years, during which time either the plaintiff or the director apparently could have raised points of Community law."\(^{90}\)

Writing extra-judicially, Advocate General Jacobs (whose Opinion was not followed by the ECJ in Peterbroeck on this point) suggests that the ECJ may have been influenced by the fact that in Peterbroeck, the Belgian rule was more restrictive than similar rules in the other Member States whereas the Dutch rule in van Schijndel was not. He adds that the ECJ was clearly more concerned in this case with the orderly conduct of proceedings than legal certainty.\(^{91}\) Given the uncertainty created by the ECJ's decision in Peterbroeck, it remains to be seen whether or not the ECJ's decision (as in Case C-208/90, Emmott\(^{92}\)) will be distinguished in the future on the particular circumstances of the case.\(^{93}\)

\(^{89}\) Hoskins, *op.cit.*, p. 375.


\(^{93}\) Jacobs, *op.cit.*
Thus, it is submitted that the ECJ’s decisions in *van Schijndel* and *Peterbroeck* mark an important development of the principle of effective judicial protection. The cases give a clearer indication of the factors that national courts must be taken into account when applying the principles of sufficient enforceability and comparability. This arguably amounts to a more subtle approach on the part of the Court to increase the uniformity of application of these Community requirements, whilst refraining from interfering in the national legal systems of the Member States. The ECJ has arguably laid down the groundwork for a more deferential approach which has been adopted in subsequent case-law.

The decisions also indicate the extent to which the Court is prepared to develop the principle of effective judicial protection and, as a result, supports the assertion that the latter is a narrower principle than the principle of effectiveness.\(^94\) Indeed, as argued by the Spanish Government, the principle of effectiveness (together with the principle of supremacy) would entail an obligation being imposed upon the national courts requiring them to raise a point of Community law of their own motion, irrespective of national procedural rules to the contrary which may legitimately restrict this right.\(^95\)

It is submitted, as suggested by Craig and de Búrca that the ECJ’s approach in respect of national procedural rules may be summarized as follows:

"The Court’s emphasis appears to have shifted gradually over the course of its case-law on national remedies for the enforcement of Community rights from an early position in which the primacy of the national legal system in the absence of Community harmonization was uppermost, to a subsequent and strong position in which its focus was principally on the effectiveness of Community law. More recently an intermediate balancing approach has emerged, which appears to

\(^{94}\) Discussed further in Chapter 1.

\(^{95}\) The arguments submitted by the Spanish (and Greek) governments arguably suggest that the ECJ’s perceived hostility of the Member States towards the encroachment of their autonomy in the area of procedural rules and remedies is not as pronounced as it may have been originally thought, especially where the application of the manifestations of the principle of effective judicial protection poses no serious financial risk. See further discussion in Chapter 1.
concede that there are limits to the possible uniformity of Community remedies, given the existence of distinct national systems, and which leaves the task of balancing the importance of the Community right as against the scope and purpose of the restrictive national rule primarily to the national courts and authorities. 96

This arguably illustrates that the Court's approach to the development of the principle of effective judicial protection has fluctuated and that the most noticeable shift has occurred in the field of the application of national procedural rules. Given the diversity of the national procedural rules which exist in the Member States and the enormity of the corresponding case-law, an analysis of the application of the principle of effective judicial protection relating to such rules will be restricted in this thesis to an examination of cases involving national time-limits 97 and the issue of State liability. 98

3.2. Application of the principle of effective judicial protection to national time limits

It is submitted that an individual may be deprived of the effective judicial protection of his Community right where, in the event of a breach, the opposing party can rely on a national time-limit to prevent the right from being invoked before the national court. Yet, national time-limits are a necessary component of national legal systems and satisfy the need for legal certainty and sound administration, particularly in tax and social security matters. In this section, the application of the principle of effective judicial protection in relation to national time-limits will be analysed. It is submitted that the principle of effective judicial protection may not always guarantee the "full" effectiveness of a Community right, but nevertheless seeks to ensure that the level of protection granted to individuals' Community rights is "effective." Thus, the scope of the principle of

97 Discussed further below.
98 Discussed in Chapter 5.
effective judicial protection will be examined where, in its case-law, the Court has sought to strike a balance between on the one hand the need for full and complete judicial protection and on the other the requirements of legal certainty and sound administration.

The Court's approach to the application of the principle of effective judicial protection to national time-limits was laid down in *Rewe* and *Comet* referred to above. In both cases, the parties were seeking restitution of charges illegally paid as a result of national provisions, which were subsequently found to infringe directly effective Treaty provisions of Community law. The limitation periods laid down by national procedural rules in both cases had expired. The question which arose before the Court was whether a directly effective provision of the Treaty could be relied upon by an individual before the national court where national procedural law states that the prescribed time-limit for such an action has expired. In other words, can national procedural law prevent an individual from relying on a directly effective right before the national court? In its ruling, the Court laid down the principles of comparability and sufficient enforceability. Thus, an individual who seeks to bring an action before the national court for breach of a directly effective right derived from a Treaty provision may be legitimately defeated if the relevant national limitation period has expired provided it is not discriminatory and does not make it virtually impossible in practice to exercise the right. In addition, the Court stated that the principles of comparability and sufficient enforceability are not infringed where the Member States lays down "reasonable" periods of limitation. In its view:

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"The laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the tax-payer and the administration concerned."  

As argued above, it may be deduced from the Court's ruling in these two cases that Member States are entitled to lay down reasonable time-limits in the interests of legal certainty and sound administration without infringing the principle of effective judicial protection. However, the Court has yet to rule on what it considers to be a reasonable time-limit and has not criticized relatively short limitation periods such as the 30 day time-limit in Comet.

3.2.1. National time-limits and directives: the Emmott principle

The ECJ decision in Case C-208/90, Emmott\(^{104}\) arguably amounted to a fundamental development of the principle of effective judicial protection in relation to national time-limits in actions where individuals are seeking to enforce directly effective rights derived from a directive. In this case, the Republic of Ireland sought to rely on a national time-limit to prevent an individual from relying on directly effective rights conferred by Directive 79/7/EEC\(^ {105}\) which it had failed to implement into national law by the prescribed date, namely the 23 December 1984. The Member State belatedly transposed the directive, but made no provision for the retrospective payments of benefits to the implementation date.

Mrs. Emmott, a married woman with two dependant children, had been in receipt of disability benefit in accordance with national legislation since December 1983. Between December 1983 and 18 May 1986, Mrs. Emmott received benefit at the reduced rate applicable to all married women. As a result of the directive, the

\(^{103}\) Ibid.
existing discriminatory legislation within the social welfare system was to be abolished and married women were granted the same status a married men and automatic dependency removed. Consequently, the rate of benefit applicable to Mrs. Emmott was adjusted on three separate occasions to take into account the changes made to national implementing legislation in accordance with Directive 79/7/EEC.

Mrs. Emmott was unaware of the existence of the said directive until she read press reports about its pending implementation into national law. It was not until she learnt of the ECJ’s ruling in Case 286/85, McDermott and Cotter (No.1) of 24 March 1987,106 that Mrs. Emmott realized that the directive gave her the right to equal treatment in relation to social security benefits and that she had been entitled to these rights since the 23 December 1984. Having contacted the Minister for Social Welfare to obtain the benefit to which she had been entitled since December 1984, Mrs. Emmott was informed by the Irish authorities by a letter dated 26 June 1987 that her case would be dealt with as soon as the High Court had settled the question of retroactivity of the benefits to 23 December 1984 which had arisen in Case C-377/89, McDermott and Cotter (No.2) and which was currently the subject of a preliminary reference before the ECJ.107 In the interim, Mrs. Emmott instructed her solicitors and in July 1988, obtained leave to bring an action before the High Court subject to the respondent’s right to plead failure to observe the national time-limit which requires an application for leave to apply for judicial review to be made “...promptly and in any event within three months from the date when grounds for the application arose, or six months

106Case 286/85, McDermott and Cotter v. Ministry for Social Welfare [1987] E.C.R. 1453 where the ECJ held that Article 4 (1) of Directive 79/7 was directly effective and must be interpreted as meaning that in the absence of national implementing legislation, women had the right to be treated in the same manner as men and have the same social security system applied to them.
107In its ruling, the ECJ refused to apply the principle of unjust enrichment and held that if, after the date for implementation of Directive 79/7 had expired, married men automatically received increases in social security benefits in respect of a spouse and children deemed to be dependants without having to prove actual dependency, married women without actual dependants should be entitled to those increases even if in some circumstances this would result in double payment of the increases; Case C-377/89, Cotter and McDermott v. Minister for Social Welfare and the Attorney General [1991] E.C.R. I-1155 at paragraph 22. Contrast to the ECJ’s ruling in Case 68/79, Hans Just v. Danish Ministry for Fiscal Affairs [1980] E.C.R. 501 discussed below.
where the relief sought is *certiorari*, unless the court considers that there is good reason for extending the period within which the application shall be made."^{108}

The High Court referred the matter to the ECJ for a preliminary ruling and asked whether, in light of its ruling in *McDermott and Cotter (No.1)*, a Member State could rely on national limitation periods to prevent a claim being brought for breach of Article 4(1) of the Equal Treatment Directive^{109} and for compensatory payments without infringing Community law.

In its judgment, the ECJ recalled the principles of comparability and sufficient enforceability laid down in *Rewe* and *Comet*.^{110} However, it added that:

"Whilst the laying down of reasonable time-limits which, if unobserved, bar proceedings, in principle satisfies the two conditions mentioned above, *account must nevertheless be taken of the particular nature of directives.*"^{111}

The Court reiterated its ruling in *Von Colson*^{112} and held that in accordance with Article 189(3) (now Article 249 (3)) of the Treaty, a Member State must ensure that when implementing a directive, it adopts, within the framework of its national legal system:

"...all the measures necessary to ensure that the directive is *fully effective*, in accordance with the objective which it pursues."^{113}

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108 Order 84, Rule 21(1) of the Rules of the Superior Court 1986 which governs the practice and procedure of the Irish High Court and Supreme Court.
109 Article 4 (1) provides that: "the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status, in particular as concerns: the scope of the schemes and the conditions of access thereto, the obligation to contribute and the calculation of contributions, the calculation of benefits including increases due in respect of the spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits."
Citing Case 363/85, *Commission v. Italy*, the Court added that:

"In this regard it must be borne in mind that the Member States are required to ensure the full application of directives in a sufficiently clear and precise manner so that, where directives are intended to create rights for individuals, they can ascertain the full extent of those rights and, where necessary, rely on them before the national courts."  

Furthermore, the Court added that:

"Only in specific circumstances, in particular where a Member State has failed to take the implementing measures required or has adopted measures which are not in conformity with a directive, has the Court recognized the rights of persons affected thereby to rely, in judicial proceedings, on a directive as against a defaulting Member State. This minimum guarantee, arising from the binding nature of the obligation imposed on the Member State absolving itself from taking in due time implementing measures appropriate to the purpose of each directive."  

The Court concluded that:

"So long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights. That state of uncertainty for individuals subsists even after the Court has delivered a judgment finding that the Member State in question has not fulfilled its obligations under the directive and even if the Court has held that a particular provision or provisions of the directive are sufficiently precise and unconditional to be relied upon."  

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upon before a national court. Only the proper transposition of the directive will bring that state of uncertainty to an end and it is only upon that transposition that the legal certainty which must exist if individuals are to be required to assert their rights is created. *It follows that, until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time.*\(^{117}\)

The Court’s judgment in *Emmott* marks an important qualification in its development of the principle of effective judicial protection relating to national time-limits. Although the Court recalled the principles of comparability and sufficient enforceability laid down in *Rewe* and *Comet* which permit Member States to uphold reasonable time limits on Community claims, the ECJ took the opportunity to lay down an exception to the general rule. The Court reiterated that, in the context of *directives*, Member States are under an obligation by virtue of Article 189(3) (now Article 249(3)) of the Treaty, and arguably the principle of effective judicial protection, to ensure that the full effect of the directive is achieved.

Furthermore, the Court also emphasized the need for legal certainty on the part of individuals in relation to their Community rights. Individuals are unable to ascertain and hence assert their rights until a directive is properly transposed into national law and it is from this date only that a national time-limit can begin to run. In other words, individuals cannot be deprived of the effective judicial protection of their directly effective Community rights derived from a directive by a national time-limit where the latter has yet to be properly implemented into national law.\(^{118}\) It is submitted that the ruling in *Emmott* represented an extension of the principle of effective judicial protection. The ruling arguably indicates that

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\(^{118}\) The Court's ruling in *Emmott* was followed by the French *Cour de Cassation* in *Société Groupe André v. Directeur General des Impôts* [1997] 2 C.M.L.R. 117.
individuals seeking to rely on directly effective rights derived from directives, should not be deprived of the effective judicial protection of such rights by a national time-limit where the Member States has failed to properly implement a directive into national law.

According to Szyszczak, the Court was “walking a precarious tightrope” in Emmott. On the one hand, it was seeking to stay within the parameters of Article 189 (now Article 249) of the Treaty which confers a discretion on the Member States with regard to the implementation of directives whilst, on the other, trying to expand the obligations imposed on the Member States in order to “increase the availability of securing Community rights in the national legal systems.” In her view, “Emmott represents yet another inroad into questioning the effectiveness of the implementation of directives in the national sphere.”

It has also been argued that the Court’s ruling in Emmott reflects a certain adherence to the so-called principle of “estoppel.” In essence, the Emmott principle prevents a Member State from relying on its own default to deprive an individual from relying on rights derived from Community law. Indeed, many commentators have argued that the Court’s judgment in Emmott represents a policy decision designed to encourage Member States to implement directives on time and subject them to harsh sanctions where they fail to do so. The problem of the non-implementation of directives by the Member States was particularly acute in the late 1980s. The Court was arguably seeking to play a role in ensuring the enforcement of directives in view of the fact that over 300 directives had to be implemented to ensure the completion of the Internal Market by the end

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of 1992. Thus, it may be argued that the aim of the Court’s decision in *Emmott* was threefold. It reflects:

"...the need to secure compliance with Community obligations by the Member States and to secure the maximum effect of directives within national legal systems while at the same time maintaining a certain adherence to the wording of Article 189 EEC [now Article 249 EC]."\(^{123}\)

It is submitted that the *Emmott* ruling complies with the principle of effective judicial protection. Mrs. Emmott was able to fully enforce her directly effective Community rights before the national courts irrespective of the expiry of a national time-limit since she had been unable to ascertain her rights whilst the directive had not been properly transposed into national law and the national authorities themselves had advised her to wait for the outcome of another case before commencing an action. However, the ECJ itself did not make any reference to the fact that the national authorities themselves had advised Mrs. Emmott to delay her claim pending the outcome of a preliminary ruling. This led to a broad interpretation of the judgment, namely that a national time-limits cannot be invoked to prevent an individual from relying on his/her directly effective rights where the Member State has failed to transpose the directive correctly.

Many commentators predicted (correctly) that the *Emmott* ruling would have far-reaching implications for the Member States.\(^{124}\) Indeed, it has subjected Member States to almost limitless retroactive claims where individuals have sought to rely on directly effective rights derived from Community law directives. Individuals have been able to commence proceedings irrespective of the length of time they have waited before bringing their claims. For instance, following a decision of

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\(^{123}\) Szyszczak, *op.cit.*, at. p. 611.

the ECJ in late 1990 which rendered the policy of the U.K. Ministry of Defence of dismissing pregnant servicewomen in breach of Directive 76/207, the Emmott principle enabled applicants to lodge claims dating back to 9 August 1978, the date on which the Directive at issue became directly effective. Furthermore, combined with the Court’s ruling in Case C-271/91, Marshall (No.2), in which statutory limits on claims for compensation resulting from discriminatory dismissal in breach of Directive 76/207 were prohibited, these rulings had huge financial repercussions for the U.K. Government.

The situation for the Member States may be further exacerbated where the Emmott principle is read in conjunction with the principle of State liability laid down in Francovich. Thus, where an individual seeks to bring an action for damages against a Member State for failure to implement a Community directive, national time-limits cannot run until the directive in question has been “properly transposed.” The Court’s failure in Emmott to indicate clearly what it meant by “properly transposed” into national law has resulted in Member States being unable to rely on national time-limits against actions brought by individuals even where they have implemented a directive within the time-limit, but have committed minor breaches of its provisions.

It is submitted that although the Emmott principle ensures that the effective judicial protection and the full effectiveness of directly effective Community

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128 Steiner, op.cit., at p. 55.
rights may be guaranteed by the national court, the practical repercussions of the ruling have subsequently led the Court to adopt a more cautious approach.

In Case C-338/91, Steenhorst-Neerings, the Court was asked to rule on whether a national time-limit which restricted the payment of arrears in benefits resulting from a Member State’s failure to “properly transpose” Directive 79/7 into national law to one year from the date of the claim was compatible with Community law and, in particular, the Emmott principle. The latter would have enabled Mrs. Steenhorst-Neerings to claim payment of benefits backdated to the date on which the Directive was due to be implemented.

Advocate General Darmon based his Opinion on the Emmott principle. He argued that the latter applies to all national time-limits irrespective of their legal classification. In support of his argument, the Advocate General drew upon the observation made by Szyszczak, namely that the decision in Emmott was based on the principle that a Member State cannot avoid fulfilling its Community obligations by default. He added that, on this basis, any time-limits laid down by national law should be suspended and Mrs. Steenhorst-Neerings should be entitled to claim benefits from the date on which Directive 79/7 should have been implemented by the Member State.

Advocate General Darmon refused to distinguish the Court’s ruling in Emmott on its facts. He contended that the only difference between Emmott and the present case was that in the former, Mrs. Emmott was barred from relying on all of the Community right derived from the Directive whereas in the latter, Mrs. Steenhorst-Neerings was only barred from claiming part of the right. Furthermore, the Advocate General dismissed the argument that the absence of a national time-limit would create legal uncertainty and give rise to claims for

131 Szyszczak, op. cit., at p. 612.
many years after the entitlement arose. He argued that such a situation could be eliminated simply by implementing the directive.

In a similar manner, the Advocate General dismissed the arguments of the Netherlands Government which claimed that the time-limit in Steenhorst-Neerings was of a different type from that contested in Emmott. He maintained that it is the effects of such a time-limit which should be considered rather than the form. He acknowledged that in Emmott, the ECJ did not rule specifically on the effects of the time-limit, but he was of the view that:

"...where a directive creates a right for individuals, Community law does not permit that right to be refused or restricted by reason of a procedural time-limit of any kind whatever in domestic law if the directive has not been implemented in national law at the date when the individual submits a claim availing himself of that right."\textsuperscript{132}

The ECJ did not, however, follow the approach adopted by the Advocate General, but rather upheld most of the arguments of the defendant and the Netherlands Government. The Court reiterated the principles of comparability and sufficient enforceability citing Emmott as an authority. The Court made no reference to the fact that the nature of the directive at issue had to be taken into account as it had in Emmott.

The Court also expressly dismissed the arguments of the Commission which claimed that in accordance with the Emmott principle, any time-limits for proceedings brought by individuals seeking to rely on a right derived from a directive may only be applied once the directive has been properly transposed into national law. The Court held that its judgment in Emmott could be

\textsuperscript{132}Opinion of Advocate General Darmon in Case C-338/91, Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen, op.cit., at p. 5496.
distinguished on the facts. It stated that in contrast, the domestic rule contested in Steenhorst-Neerings:

"...does not affect the right of an individual to rely on Directive 79/7 in proceedings before the national courts against a defaulting Member State. It merely limits the retroactive effect of claims made for the purpose of obtaining the relevant benefits."  

In support of this distinction, the ECJ argued that the time-limits in Emmott and Steenhorst-Neerings fulfilled two different aims:

"The time-bar resulting from the expiry of the time-limit for bringing proceedings serves to ensure that the legality of administrative decisions cannot be challenged indefinitely. The judgment in Emmott indicates that that requirement cannot prevail over the need to protect the rights conferred on individuals by the direct effect of provisions in a directive so long as the defaulting Member State responsible for those decisions has not properly transposed the provisions into national law." 

The Court added that:

"On the other hand, the aim of the rule restricting the retroactive effect of claims for benefits for incapacity for work is quite different from that of a rule imposing mandatory time-limits for bringing proceedings." 

In its view, the purpose of the national rule in Steenhorst-Neerings was twofold. It not only:

133 Case C-338/91, Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen, op.cit., at paragraph 19.
135 Ibid, at paragraph 22.
136 Ibid, at paragraph 23.
"...serves to ensure sound administration...so that it may be ascertained whether the claimant satisfied the conditions for eligibility and...that the degree of incapacity, which may well vary over time, may be fixed. It also reflects the need to preserve financial balance in a scheme in which claims submitted by insured persons in the course of a year must in principle be covered by the contributions collected during the same year."\textsuperscript{137}

The ECJ concluded that Community law does not prevent a Member State from relying on a national time-limit which restricts the benefits for incapacity for work payable as a result of a directly effective provision of a directive to one year before the date of claim where, on the date the claim for benefit was made, the Member State concerned had not properly transposed that provision into national law.

The ECJ's judgment in Steenhorst-Neerings illustrates a different approach from its application of the principle of effective judicial protection in its judgment in Emmott. The Court, whilst continuing to rely on the principles of comparability and sufficient enforceability laid down in Rewe and Comet in relation to national limitation periods, appears to have reverted to guaranteeing only a \textit{minimum} level of protection for individuals who wish to rely on directly effective rights before the national courts.

The ECJ distinguished its ruling in Steenhorst-Neerings from that in Emmott on the basis that the national time-limits at issue were not identical and served different purposes. Many commentators have found this unconvincing.\textsuperscript{138} Steiner argues that although the national time-limits in each case served different purposes, the \textit{effect} of their application in both cases was the same. The national time-limits prevented the individual concerned from relying on the directive

\textsuperscript{137} Ibid. Emphasis added.
which the respective Member States had failed to implement and thus deprived the individuals from the full effect of their Community right. 139

It is submitted that the Court's decision serves to illustrate the proposition advanced earlier in this thesis in Chapter 1, namely that the principle of effective judicial protection and the principle of effectiveness though closely linked, are separate principles of Community law. Indeed, if the Court had wanted to ensure the full effectiveness of Community law in Steenhorst-Neerings, it would have followed its ruling in Emmott and back-dated the claim to the date on which the directive should have been transposed into national law. This would have ensured that Mrs. Steenhorst-Neerings would have received the same benefits as a married man in the same position. However, the Court's acceptance of a national procedural rule limiting the claim to payment of arrears from one year before the claim was submitted indicates that the Court is seeking to ensure "effective" judicial protection and not "full and complete" protection of Community rights. The national rule does not deprive Mrs. Steenhorst-Neerings of her Community right entirely, but simply limits her claim. This illustrates the scope of the principle of effective judicial protection in relation to national time-limits and confirms that the need for full and complete judicial protection has been balanced by the Court against the need for legal certainty and sound administration as well as avoiding serious financial implications for the Member States. In retrospect, the ECJ's decision in Steenhorst-Neerings marked a turning point in the approach of the Court in its application of the principle of effective judicial protection in relation to national time-limits and to national procedural rules in general. 140

139 Steiner, op.cit., at p. 55. See also, Opinion of Advocate General Darmon in Case C-338/91, Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen, op.cit., at p. 5492.

140 See further discussion in this Chapter.
The Court's ruling in *Steenhorst-Neerings* was confirmed and extended in C-410/92, *Johnson (No.2).*\(^{141}\) This case related to a claim brought by Mrs. Johnson for non-contributory disability allowance following an earlier ruling by the ECJ stating that U.K. legislation was in breach of Directive 79/7.\(^{142}\) Mrs. Johnson was granted her benefits with effect from one year before her claim in compliance with national procedural law. Mrs. Johnson appealed against the decision claiming that in accordance with the *Emmott* principle she was entitled to arrears in benefits from the date for implementation of the directive. The ECJ’s judgment in *Steenhorst-Neerings* was delivered shortly after the start of oral proceedings.

The Court’s judgment in *Steenhorst-Neerings* served as the basis for the Opinion of Advocate General Gulmann. He rejected Mrs. Johnson’s arguments that her case could be distinguished from *Steenhorst-Neerings* on the ground that it did not give rise to problems regarding verification of her eligibility for the disability allowance. She had argued that since national social security law put the burden of proof upon the applicant, she simply had to prove that she had been unfit for work. If she could not establish her eligibility for the full period of her claim, she would be unable to receive the benefit for the full period of her claim. He also rejected the argument that her claim for a non-contributory benefit would not have the same financial impact on the budget of the Member State as a contributory benefit (which was claimed in *Steenhorst-Neerings*). In his view, these differences were not sufficient to distinguish the national time-limit at issue from that contested in *Steenhorst-Neerings*. The Advocate General maintained that if Mrs. Johnson’s arguments were followed and these rules were treated differently, the principle of legal certainty would be put at risk. Furthermore, it would be contrary to the settled case-law of the ECJ, if the compatibility of national time-limits with Community law was based not only on the purpose of the rule, but also on an examination of whether the rule was necessary in every case to fulfil its purpose.

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The Advocate General was of the view that the national time-limits in both *Johnson* and *Steenhorst-Neerings* had the same purpose, namely that they were designed to ensure the sound administration of social security schemes by limiting the period in respect of which arrears of benefits may be obtained. In addition, both rules had the same content in the sense that they limited the period in respect of which arrears of benefits which could be obtained up to twelve months before the date of the claim. Moreover, both rules had the same effect in that they deprived Mrs. Johnson and Mrs. Steenhorst-Neerings from being able to claim benefits to which, under Directive 79/7, they had derived a substantive right since 23 December 1984. This was not affected by the fact that their failure to submit claims in due time resulted from the failure of the Member State to properly implement the aforementioned Directive by the prescribed date. Advocate General Gulmann concluded that both rules should be subject to the same treatment under Community law. Thus, provided the national time-limits at issue were non-discriminatory and did not make it virtually impossible to exercise individual Community rights, they could be relied upon by the national authorities to restrict a claim for the retroactive payment of benefits which should have been paid notwithstanding the Member State’s failure to implement the directive.

In its judgment, citing both *Steenhorst-Neerings* and *Emmott*, the Court followed the Advocate General’s Opinion and reiterated that, in accordance with the well-established formula laid down in *Rewe* and *Comet*, the right of a woman to rely on Article 4(1) of Directive 79/7 should be exercised in accordance with national rules, provided that the latter are not less favourable than those which apply to actions brought under national law and that they do not make it virtually impossible for an individual to exercise rights conferred by Community law.\(^{143}\)

\(^{143}\) Case C-410/92, *Elsie Rita Johnson v. Chief Adjudication Officer (No.2)*, op.cit., at paragraph 21.
The ECJ held that the national time-limit contested in Johnson fulfilled these two requirements.\textsuperscript{144}

The ECJ confirmed that its ruling in Emmott had been distinguished from Steenhorst-Neerings on its facts. However, it has been argued that the Court went a step further in Johnson\textsuperscript{145} and noted that:

"...the solution adopted in Emmott was justified by the particular circumstances of that case, in which a time bar had the result of depriving the applicant of \textit{any opportunity whatever} to rely on her right to equal treatment."\textsuperscript{146}

In relation to Johnson, the ECJ held that the national time-limit at issue was similar to the one contestant in Steenhorst-Neerings since they both limited the period of payment of arrears in benefit rather than barring the ability of an individual to rely on the right conferred by Community law \textit{completely}.\textsuperscript{147} Reiterating its conclusion in Steenhorst-Neerings, it held that:

"...Community law does not preclude the application, to a claim based on directly effective Directive 79/7, of a rule of national law which merely limits the period prior to the bringing of the claim in respect of which arrears of benefit are payable, even where that directive has not been properly transposed within the prescribed period in the Member State concerned."\textsuperscript{148}

The ECJ’s decision in Johnston (No.2) arguably suggests that the Emmott principle is now to be regarded as limited to its specific facts. As in Steenhorst-Neerings, Mrs. Johnston was not deprived of her right to benefits, but she did not obtain in full the same amount a man in the same position would have received.

\textsuperscript{144} \textit{Ibid}, at paragraphs 22 & 23.
\textsuperscript{145} Coppel, \textit{op.cit.}, at p. 156.
\textsuperscript{146} Case C-410/92, Elsie Rita Johnson v. Chief Adjudication Officer (No.2), \textit{op.cit.}, at paragraph 26. Emphasis added.
\textsuperscript{147} \textit{Ibid}, at paragraph 30.
\textsuperscript{148} \textit{Ibid}, at paragraph 36.
This inequality in treatment resulted from the Member State’s failure to implement the directive correctly. It follows that the Court considers this level of protection to be “effective” despite the fact that it does not guarantee individuals the full benefit of the directly effective Community right. It is submitted that, as such, the ruling clarifies the scope of the principle of effective judicial protection in relation to national rules which limit the retrospective payment of arrears in benefits.

The reasoning of the ECJ in Steenhorst-Neerings has again been followed in Case C-394/93, Alonso-Pérez\(^{149}\) where a German rule limiting claims for family allowance to six months prior to the date of the claim was permitted. Coppel emphasizes that the problems proving entitlement to retroactive payment of family allowance is not as difficult as proving eligibility to invalidity benefit. Thus, in his view, the fact that the Court chose not to distinguish Alonso-Pérez from its rulings in Steenhorst-Neerings and Johnston (No.2) indicates that the Emmott principle may be regarded as inapplicable to retroactive claims for benefits per se.\(^{150}\)

3.2.2. Distinguishing Emmott: a missed opportunity?

In Case C-62/93, BP Supergas,\(^{151}\) the Court was given the opportunity to rule on the application of the principle of effective judicial protection in relation to a national limitation period which was identical to the one disputed in Emmott, namely a time-limit which restricted the period within which an individual could bring proceedings. In this case, the plaintiff company claimed that the Sixth V.A.T. Directive had been incorrectly implemented into national law by the Member State and that consequently, it should be entitled to a refund of tax paid


\(^{150}\) Coppel, op.cit., at p. 156.

dating back to the date of implementation of the directive. National law imposed a time-limit of three years for appeals from the end of the tax year.

Having ruled that the Greek V.A.T. legislation was incompatible with the Sixth V.A.T. Directive and that the relevant provisions had direct effect, the ECJ considered whether a taxable person should be able to submit a claim for a refund of V.A.T. unduly paid, with retroactive effect, from the date on which the national legislation which was found to be contrary to the Sixth Directive, came into force.

Although the national time-limit at issue in *BP Supergas* was of the same kind as that contested in *Emmott*, the Court did not state that the national time-limit must only run from the date on which the individuals concerned could fully ascertain their rights. Neither did the Court follow its ruling in *Steenhorst-Neerings* and state that it is permissible for national law to restrict the claim in part. The ECJ chose a different approach and held that although the Sixth Directive does not contain any provisions relating to claims for refund of V.A.T. unduly paid by taxable persons, the Court itself has jurisdiction to give a ruling on the issue which has retrospective effect. It added that:

"...the right to obtain a refund of amounts charged by a Member State in breach of rules of Community law is the consequence and complement of the rights conferred on individuals by the Community provisions as interpreted by the Court."\(^{152}\)

The ECJ concluded that:

"...a taxable person may claim, with retroactive effect from the date on which the national legislation contrary to the Sixth Directive came into force, a refund of

V.A.T. paid without being due, by following the procedural rules laid down by the domestic legal system of the Member State concerned, provided that those rules are not less favourable than those relating to similar, domestic actions nor framed in a way such as to render virtually impossible the exercise of rights conferred by Community law."  

Thus, although the national time-limit at issue in *BP Supergas* was similar in kind to that invoked in *Emmott*, the Court chose not to follow its reasoning in this case. It cited the well-established principle that judgments of the Court have declaratory effect; they clarify and define the meaning and scope of a rule as it must be or ought to have been understood and applied from the time of its coming into force. Coppel argues that the cryptic reasoning of the ECJ is highly significant. The latter principle, essentially, that individuals are presumed to know Community law, has never before been applied by the Court of Justice to a rule of law which originates in a directive, and it is a principle to which *Emmott* is, or was, an obvious exception. Therefore, a national time-limit should arguably run from this date. However, Coppel emphasizes that “if individuals are now presumed to know the law even where that law originates in a directive, there can be little if any room for the *Emmott* principle, even in its original context of time limits for the bringing of proceedings.”

The apparent demise of the *Emmott* principle, which originated in *Steenhorst-Neerings* and was implicitly confirmed in *BP Supergas*, has been welcomed by some commentators. They claim that the application of the *Emmott* principle had resulted in disparities in the level of judicial protection provided for individuals seeking to protect their Community rights before the national courts. Although it was clearly available to individuals seeking to rely on directly effective provisions of a directive as against the State, the principle has been arguably

153 Ibid, at paragraph 42.
inapplicable to private sector plaintiffs, namely those seeking to enforce their Community rights by virtue of the concept of indirect effect as well as plaintiffs who derive their Community rights from regulations and Treaty provisions (as opposed to directives). 157

However, the manner in which Emmott has been marginalized by the Court in Steenhorst-Neerings, Johnson (No.2) and BP Supergas is questionable. Coppel argues that the lack of legal reasoning is a "poor advert for judicial decision-making in the EC" and the apparent "coup-de-grâce" delivered by the Court in BP Supergas to one of its "more notorious decisions" was done without referring to the principle which it was to overrule. 158

In a subsequent case, Case C-2/94, Denkavit,159 the ECJ also had the opportunity to review the scope of its judgment in Emmott. It avoided the issue by ruling that the national legislation at issue did not conflict with a Community directive, thus rendering a decision on the effect of the national time-limit unnecessary. On the other hand, Advocate General Jacobs considered the issue in some depth.

In this case, the appellants lodged a series of appeals before the national court on the ground that an annual levy imposed by the national authorities was incompatible with Directive 69/335.160 The authorities had rejected their initial complaints. Dutch law stated that an appeal must be lodged within 30 days following the day on which the decision was communicated, issued or dispatched. This national time-limit had expired when Denkavit made its complaint. However, if the levy was found to be unlawful, the appellants argued that in accordance with the principle laid down in Emmott, the authorities may

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157 Ibid, at p. 158.
158 Ibid, at p. 160.
not, in the absence of correct implementation of Directive 69/335 rely on the 30 day time-limit laid down by national law for appeals against decisions.

The defendants, the four intervening Member States and the Commission argued that the principle in Emmott was confined to the particular circumstances of that case and did not apply to the facts in Denkavit. They pointed out that in contrast to Emmott, the Netherlands Government had implemented the directive in good faith. In addition, the appellants in Denkavit had had the opportunity to challenge the decision at issue (albeit within 30 days) on the basis of the directive whereas Mrs. Emmott was denied any effective opportunity to rely on the directive in question. Finally, the parties argued that the litigants in Denkavit were large commercial undertakings whereas Mrs. Emmott was an individual dependant on the benefits at issue.

In his Opinion, Advocate General Jacobs pointed out that the judgment in Emmott had been considered in both Steenhorst-Neerings and Johnson (No. 2) in relation to limits on claims of arrears in benefits. In both cases, the ECJ had distinguished Emmott on the facts. He considered the principle in Emmott to be an illustration of a:

"...new application of that principle [of sufficient enforceability] in so far as it demonstrates that a national court may be obliged to set aside a limitation period which is in principle unobjectionable where the special circumstances of the particular case so demand. It seems to me that, in the interests of legal certainty, the obligation to set aside time-limits should be confined to wholly exceptional circumstances such as those in Emmott. There do not in any event seem to be any grounds for setting aside the time-limits in the present case."161

161 ibid, at p. 2851.
In applying the modified version of the Rewe and Comet formula laid down in Peterbroeck to the facts in Denkavit, the Advocate General Jacobs maintained that the national time-limit did not make it virtually impossible or excessively difficult for an individual to rely on Community law. It is submitted that the national rule was therefore in compliance with the principle of effective judicial protection. In reaching this viewpoint, he took several factors into account: each individual company had been given the opportunity to contest the decision imposing the annual levy; each annual decision could have been challenged separately; relatively short time-limits are not objectionable per se in view of the fact that administrative bodies have to take into account the budgetary implications of belated claims for past or current periods. He acknowledged, however, that a subsequent development, such as a ruling of the Court, which an individual could not have anticipated at the time, may justify contesting a short time-limit which had the effect of making it virtually impossible for an individual to rely on Community law. However, the Advocate General was keen to point out that he would have taken a different view if the national court had prevented Denkavit from contesting future decisions on the basis that he had failed to contest the initial decision. This would, in the Advocate General’s view, have contravened the principle of legal certainty.

One of the main criticisms of the Emmott principle is that it renders national time-limits inapplicable even where a Member State has implemented a directive in good faith. In Denkavit, both the Netherlands and U.K. Governments suggested qualifying the judgment in Emmott. They argued that the principle laid down in Emmott should only be applied to claims based on a grave and manifest infringement of Community law. This would allow the principle to develop in parallel with the conditions for State liability in damages. The Advocate General accepted that the arguments contained “a certain logic in so far as a Member State might be considered to forfeit the right to rely on time-limits

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163 Discussed further in this work in Chapter 5.
in the interests of legal certainty where it has committed an infringement which is both grave and manifest.\textsuperscript{164} However, the Advocate General did not agree that any such parallel should be drawn:

"Viewed from the perspective of ensuring effective judicial protection, it would be paradoxical if in administrative proceedings a Member State were able to rely upon a relatively short time-limit where the infringement was clear and could readily be detected by a diligent plaintiff. The requirement of a manifest infringement as a condition for imposing on the State liability in damages entails no such paradox. The special conditions for State liability are linked to its exceptional character as a remedy which goes beyond ordinary administrative remedies by providing compensation for loss or damage arising from flagrant legislative or administrative misconduct. The suggested parallelism disregards that exceptional and complementary character."\textsuperscript{165}

He added that such a development would give rise to considerable uncertainty. It would be arbitrary to restrict the concept of grave and manifest breach to cases where the Member State had failed to implement the directive at all, as was the case in \textit{Emmott}. However, such a breach could arise where a Member State had only partially implemented the directive or departed considerably from its provisions. There are no grounds for distinguishing between infringements of directives and other Community provisions. In his view:

"The result would inevitably be systematic challenges by individuals to past decisions, exposing the Member States to the risk of substantial - and possibly unlimited- retrospective liability. This would be inconsistent with the need for legal certainty, which is of particular importance in the case of challenges to routine administrative decisions arising out of the multitude of everyday transactions between public bodies and individuals."\textsuperscript{166}

\textsuperscript{164} \textit{Ibid.}, at p. 2852.
\textsuperscript{165} \textit{Ibid.} Emphasis added.
\textsuperscript{166} \textit{Ibid.}
The Advocate General concluded that the existing principles developed by the ECJ provide a "proper balance between the protection of rights under Community law and legal certainty for public authorities." He added that the development of the principle of State liability does not conflict with these principles. The development of a remedy against the State for damages, must be seen, in his view, as "exceptional and complementary nature and in particular should not be available as a means of circumventing time-limits for other remedies against administrative decisions."[167]

3.2.3. Emmott distinguished

The uncertainty surrounding the scope of the principle of effective judicial protection in relation to national time-limits remained unresolved until the Court's ruling in Case C-188/95, Fantask.[168] In this case, the Court expressly ruled on the application of the Emmott principle to the same kind of national time-limit that had been at issue in that case (and BP Supergas), namely a limitation on the period within which proceedings before the national court could be commenced.

In Fantask, the applicants were a number of Danish companies which brought claims against the Danish tax authorities for repayment of company taxes which, they alleged had been levied contrary to Directive 69/335/EEC concerning indirect taxes on the raising of capital.[169] A referral was made to the ECJ by the national court for an interpretation of the directive and on whether a Member State can rely on a national time-limit in proceedings brought against it even though it had failed to implement a directive properly. The applicants argued that

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[167] Ibid, at p. 2853.
the *Emmott* principle prevented the national authorities from relying on the limitation periods and that they should only run from 1 May 1992 when the Member States abolished an (unlawful) supplementary charge thus bringing national law into compliance with the Directive.

The scope of the *Emmott* principle was dealt with at some length by Advocate General Jacobs. He accepted the Court's ruling in *Emmott*, but maintained that a broad interpretation of the *Emmott* principle may not be applied to all national time-limits in all circumstances. He emphasized that a literal reading of the *Emmott* ruling would have far-reaching financial repercussions for the Member States exposing them to the risk of claims dating back to the final date for implementing the directive. In *Fantask*, application of the *Emmott* principle would permit claims based on the incorrect transposition of Directive 69/335 dating back to its date for implementation, namely 1 January 1972, notwithstanding national limitation periods.

Advocate General Jacobs accepted the argument of the French Government that the effect of the *Emmott* principle was to confer greater protection on rights derived from directives than on rights conferred by regulations or by Treaty provisions. He also agreed with the French Government's view that the ECJ's assertion that individuals are unable to ascertain the full extent of their rights until a directive has been properly transposed into national law is unfounded. He refuted Advocate General Mischo's arguments in *Emmott*, namely that, in the absence of any obligation to publish directives (prior to the Treaty on European Union) and the fact that the final date for implementation of a directive was not always completely clear from the directive itself, individuals would be unable to

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171 See Article 191 EC (now Article 254) as amended by Article G.63 T.E.U. (now Article 8.63) T.E.U.
ascertain their Community rights. In his view, it would be paradoxical to rely on these anomalies to support the conclusion that rights flowing from directives should be given greater protection than those arising from the Treaty or from regulations. Moreover, he asserted that the Court’s argument in *Emmott* conflicts with the conditions for direct effect. The direct effect of a directive presupposes that the basic content of the right conferred on an individual is sufficiently clear (or, at least, justiciable) for it to be protected by the national legal system. He argued that:

“It is inconsistent to recognize that a provision is sufficiently clear to create remedies for individuals in the national courts while at the same time exempting the individual, on the ground that the rights conferred upon him are insufficiently clear, from the limits placed by national law on the exercise of such remedies. The inevitable and wholly anomalous result is...to confer privileged status on directives by comparison with other Community provisions, even those of a superior rank.”

Advocate General Jacobs also emphasized that the Member State would be subject to claims irrespective of the seriousness of the breach. It would be liable for minor and unintentional breaches of the directive. In his view, particularly in matters of tax and social security:

“[S]uch a result wholly disregards the balance which must be struck in every legal system between the rights of the individual and the collective interest in providing a degree of legal certainty for the State.”

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174 He referred, in particular, to Case C-288/94, *Argos Distributors v. Commissioners of Customs and Excise*, op.cit.; Case C-317/94, *Elida Gibbs v. Commissioners of Customs and Excise*, op.cit. where a comparatively minor error in implementing a Community tax directive had huge financial repercussions for the defaulting Member State.
Advocate General Jacobs maintained that a broad view of the Court's ruling in *Emmott*:

"...disregards the need, recognized by all legal systems, for a degree of legal certainty for the State, particularly where infringements are comparatively minor or inadvertent; *it goes further than is necessary to give effective protection to directives*; and it places rights under directives in an unduly privileged position by comparison with other Community rights."\(^{176}\)

Advocate General Jacobs went on to argue that a wide reading of the *Emmott* principle could not be reconciled with the subsequent case-law of the ECJ on national time-limits (which arguably reduces the scope of the principle of effective judicial protection in this respect). He argued that it is clear from the Court's judgments in *Steenhorst-Neerings* and *Johnson (No.2)* that the *Emmott* principle does not prevent Member States from national rules which limit the back-dating of a claim. He argued that it is not feasible to distinguish between the two types of time-limits at issue despite the fact that in *Emmott*, the three month time-limit for instituting proceedings for judicial review amounted to an *absolute bar* to the plaintiff's claim whereas in *Steenhorst-Neerings* and *Johnson (No.2)*, the national time-limit merely *restricted the extent of the claim*. In his view, it was the particular circumstances of the case in *Emmott* which led the Court to national time-limit at issue being disapplied. Furthermore, he argued that the ECJ had made no distinction in *BP Supergas*, where the same kind of national time-limit at issue in *Emmott* was held to be applicable despite the fact that the relevant directive had not been transposed correctly at the material time. He further added that the statement that an individual cannot ascertain his rights until a directive has been properly implemented, would, if it were read without qualification, preclude any reliance by Member States on either type of time-limit.

Following his Opinion in *Denkavit, Van Schijndel and Peterbroeck*, Advocate General Jacobs sought to reconcile the Court’s ruling in *Emmott* with its less expansive approach based on the principles of comparability and sufficient enforceability by suggesting that the ruling represents an application of these principles in exceptional circumstances. In his view:

“The ruling can be read as standing for the proposition that a Member State cannot rely on a limitation period where it is in default both in failing to implement a directive and in obstructing the exercise of a judicial remedy in reliance upon it, or perhaps where the delay in exercising the remedy is in some way due to the conduct of the national authorities. In *Emmott* the Member State’s default in obstructing the remedy was compounded by Mrs. Emmott’s particularly unprotected position as an individual dependent on social welfare.”

He concluded that the *Emmott* principle provided an important safeguard for the effective judicial protection of individuals’ Community rights notwithstanding the more recent developments in the case-law, but should be confined to exceptional circumstances. Applying his reasoning to *Fantask*, the Advocate General held that the Member State was entitled to rely on the national time-limit in order to prevent the claims made by the applicants on the basis of the Directive. In his view, the five year limitation period was reasonable and did not make reliance on the Directive impossible or unduly difficult. Nor do there appear to be any special circumstances in the present case such as those in *Emmott*.

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Advocate General Jacobs went on to address the concerns of the Commission, namely that failure to allow the national limitation period to run from the date the directive had been correctly transposed into national law would allow a Member State to escape the consequences of its own unlawful conduct and discourage it from taking steps to remedy the defects in its rules. He argued that such concerns can be accommodated:

"...in a coherent system of remedies allowing a proper balance to be struck between the need for effective protection of Community rights, including those under directives, and the principles of respect for national procedural autonomy and legal certainty."\(^{179}\)

Moreover, Advocate General Jacobs drew attention to the Court’s recent case-law in relation to the principle of State liability which enables individuals to bring actions for damages against a Member State which fails to implement a directive in good time or correctly. It is submitted that the principle of State liability is a development of the principle of effective judicial protection.\(^{180}\) Advocate General Jacobs drew attention, in particular, to the Court’s rulings in two recent cases in which it arguably ensured the effective judicial protection of individuals’ Community rights by virtue of the principle of State liability (such actions are normally subject to longer time-limits) rather than an expansive interpretation of national procedural rules. In Joined Cases C 192-193/95 & 196-218/95, Comateb,\(^{181}\) the Court held that Member States could, subject to certain conditions, resist repayment of charges levied in breach of Community law on the ground that the repayment would unjustly enrich the trader. Further, national law which permitted the national court to take account of damage incurred by the trader by way of loss of business which wholly or partly negated any unjust

\(^{179}\) Case C-188/95, Fantask A/S and Others v. Industriministeriet, op.cit., at p. 495. Emphasis added.

\(^{180}\) Discussed further in Chapter 5.

enrichment was compatible with Community law. In accordance, with its current application of the principle of effective judicial protection, the Court also held that the trader had a right to bring a separate action for damages subject to the conditions of liability laid down in Joined Cases C-46 & 48/93, *Brasserie du Pêcheur and Factortame (No.3)* in order to obtain reparation of the loss caused by the overpaid charges (irrespective of whether those charges had been passed on).

Similarly, the Advocate General referred to the Court’s ruling in Case C-66/95, *Sutton*, in which the Court, refusing to require a Member State to pay an individual claimant interest on arrears of a social security benefit where the delay in payment of the benefit was the result of a defective implementation of the Directive, held that the claimant may be able to bring a claim for damages against the Member State. Thus, according to Advocate General Jacobs, repayment or entitlement claims which may be time-barred by a national time-limit may be recoverable under a separate damages claim. Furthermore, the duty to mitigate loss or damage by using other remedies laid down in *Brasserie du Pêcheur and Factortame (No.3)* would have no relevance to the restitutionary or entitlement element of the claim. The loss corresponding to overpaid tax or denial of benefits will not be aggravated by delay in bringing proceedings.

Advocate General Jacobs emphasized that, "...in assessing the adequacy of the protection of Community rights, in particular, those under directives," the *Emmott* ruling must not be read in isolation. He argued that relying upon the principle of State liability to arguably ensure the effective judicial protection of individuals’ Community rights has a number of advantages. In his view:

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"It provides comprehensive protection of individual rights within the existing framework of remedies and time-limits, making it unnecessary to set aside national time-limits for repayment or entitlement claims. It draws a proper balance between individual rights and the collective interest in legal certainty; in particular it takes proper account of the degree of culpability of the State in failing properly to implement a directive and ensures that claims are properly categorized and brought in the appropriate courts in accordance with appropriate substantive and procedural conditions, in particular time-limits. Moreover, while not giving unduly privileged treatment to rights under Community directives, such an approach will nevertheless provide a substantial incentive to Member States to implement directives on time and to make every effort to do so properly; it will also encourage them to repair without delay any inadequacies that become apparent, for example because of a ruling of the court."\(^{184}\)

It is submitted that the Opinion of Advocate General Jacobs in *Fantask* provides a clear insight into the current approach of the Court in relation to the principle of effective judicial protection in actions for breach of individuals’ Community rights before the national courts and is arguably reflected in the decision of the ECJ.

Following the approach of the Advocate General, the ECJ held that the answer to the question lay in the application of the principles of comparability and sufficient enforceability. Citing its case-law in *Rewe* and *Comet* and more recently in Case C-261/95, *Palmisani*,\(^{185}\) the ECJ added that:

"The Court has...acknowledged, in the interests of legal certainty which protects both the taxpayer and the authority concerned, that the setting of reasonable limitation periods for bringing proceedings is compatible with Community law.

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Such periods cannot be regarded as rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought.\textsuperscript{186}

In this case, the ECJ held that the five year limitation period was reasonable\textsuperscript{187} and was non-discriminatory since it applied to both actions brought on the basis of national law and Community law.\textsuperscript{188}

The ECJ went on to \textit{expressly} distinguish its ruling in \textit{Emmott} and reconfirm its case-law in \textit{Steenhorst-Neerings} and \textit{Johnson (No.2)}. Confirming its previous case-law,\textsuperscript{189} the Court held that:

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"...it is clear from Case C-338/91, \textit{Steenhorst-Neerings}...that the solution adopted in \textit{Emmott} was justified by the particular circumstances of that case, in which the time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under a Community directive."
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The Court confirmed therefore that:

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"...Community law, \textit{as it now stands}, does not prevent a Member State which has not properly transposed the Directive from resisting actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date in which the charges in question became payable, provided that such a period is not less favourable for actions based on Community law than for actions based on national law and does not render
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\textsuperscript{186} Case C-188/95, \textit{Fantask A/S and Others v. Industriministeriet}, op.cit., at paragraph 48.
\textsuperscript{188} Case C-188/95, \textit{Fantask A/S and Others v. Industriministeriet}, op.cit., at paragraph 49.
\textsuperscript{190} Case C-188/95, \textit{Fantask A/S and Others v. Industriministeriet}, op.cit., at paragraph 51.
virtually impossible or excessively difficult the exercise of rights conferred by Community law." 191

Thus, the Court has thus significantly limited the effect of its ruling in Emmott which in turn has the effect of reducing the level of protection granted to individuals' directly effective Community rights derived from directives where a Member State has failed to implement them properly into national law. It is submitted that the Court has chosen instead to ensure that the effective protection of individuals' Community rights derived from directives by adopting the "minimum standard" approach with regard to national time-limits. Furthermore, it has confirmed that a uniform test for assessing whether or not a national time-limit is contrary to the principle of effective judicial protection applies irrespective of whether an individual is seeking to rely on rights derived from a directive, regulation or Treaty provision.

The apparent change in the approach of the Court in its application of the principle of effective judicial protection to national time-limits which originally commenced in Steenhorst-Neerings may be due to a number of factors. It has been argued that the Court's ruling in Emmott was too out of step with the prevailing attitude of subsidiarity in national remedial law. 192 Indeed, this minimum standard approach has since been applied to disputes involving national procedural rules in general, and is not confined to national time-limits. 193

Moreover, it has been argued that the demise of Emmott marked a more cautious approach adopted by the Court in the run up to the Intergovernmental Conference 1996, particularly in the light of the proposals of certain Member States to reduce

191 Ibid, at paragraph 52. Emphasis added.


the scope of some of its judgments.\footnote{Coppel, J., “Time Up For Emmott?” (1996) 25 I.L.J. 153 at pp. 159-160.} Indeed, in the U.K. Memorandum on the European Court of Justice, it was argued that the approach of Advocate General Jacobs in \textit{Denkavit} should be followed.\footnote{Discussed above.} The U.K Government proposed that a Member State may rely on its own national time-limits when a directive has not been properly implemented unless, in the circumstances of a particular case, the implementation of the national time limit renders the exercise of Community rights impossible or excessively difficult. It suggested that a new Article be adopted which would have this effect.\footnote{The new Article is contained in Annex B of the U.K. Memorandum on the ECJ and provides that: “National rules relating to time-limits in which proceedings may be commenced shall apply to corresponding proceedings brought in national courts based on rights derived from the Treaty, provided that the rules governing such actions are not less favourable than those relating to similar actions of a domestic nature, and do not make impossible or excessively difficult the exercise of Community rights.”} Although this proposal was consistent with the current approach of the Court, and according to Wooldridge, would have been worthy of adoption,\footnote{Wooldridge, F., “The U.K. Memorandum on the European Court of Justice” (1996) E.B.L.Rev. 279 at p. 281.} it was not incorporated into the revisions of the Treaty. It does, however, support the argument that the strong criticisms of its ruling in \textit{Emmott} by the Member States, such as those expressed in \textit{Fantask}, have arguably influenced the ECJ’s decision to curb the scope of the \textit{Emmott} principle and to expressly confirm that the latter is to be confined to the circumstances of the case.

Finally, as suggested by Advocate General Jacobs in \textit{Fantask}, the Court may consider the principle of State liability to be a preferable means of ensuring the effective judicial protection of individuals’ Community rights and of curbing the late or improper implementation of directives. This is arguably borne out by the recent case-law of the Court such as \textit{Comateb},\footnote{Joined Cases C 192-193/95 & 196-218/95, \textit{Société Comateb and others v. Directeur Général Des Douanes et Droits Indirects}, op.cit. Discussed further below.} and \textit{Sutton}.\footnote{Case C-66/95, \textit{R.v. Secretary of State for Social Security, ex parte Eunice Sutton}, op.cit. Discussed further below.} This approach has several advantages. First, the remedy may be awarded in accordance with
existing national rules making it unnecessary to overrule such rules on an ad hoc basis and thus promoting legal certainty. Indeed, the ECJ has consistently held that although the substantive right to reparation can be found directly in Community law:

"...it is on the basis 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."

Second, the degree of culpability on the part of the Member State is taken into account in an action for damages. The incorrect implementation of a directive is not in itself sufficient for liability to be incurred. Third, recent developments in the case-law on State liability have extended the action to include breaches of Treaty provisions, thus the level of judicial protection for directives, Treaty provisions (and presumably) regulations is equal. Fourth, the principle of State liability provides the Member States with an incentive to implement directives in good time and correctly.

The ECJ’s ruling in Fantask has been subsequently confirmed by the Court in Case C-231/96, Edis and Joined Cases C-279/96, C-280/96 and C-281/96, Ansaldo.

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202 The appropriateness of the ECJ’s current approach in relation to the principle of State liability is assessed further in Chapter 5.


It is arguably clear from the Court’s case-law in Steenhorst-Neerings and Johnson (No.2) that a national-time limit which restricts the individual’s claim in respect of a period in the past satisfies the principles of comparability and sufficient enforceability and therefore does not infringe the principle of effective judicial protection. However, in Emmott, where the time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under a Community directive, the principle of sufficient enforceability was not fulfilled. It is submitted that in Case C-246/96, Magorrian, the Court clarified the scope of the principle of effective judicial protection in relation to national limitation periods further by indicating that a national time-limit which renders the exercise of a right conferred by Community law virtually impossible in the future, infringes the principle of sufficient enforceability and is hence in breach of the principle of effective judicial protection.

In this case, Mrs. Magorrian and Mrs. Cunningham began their careers as full-time mental health nurses working in the public sector. When their family commitments increased they worked on a part-time basis. They were both affiliated and contributed to their employer’s pension scheme. However, on retirement, they were excluded from a special scheme applicable to those mental health nurses over 50 years of age and with 20 years full-time service.

In proceedings before the national court, their claim that the exclusion as part-time nurses from the special scheme constituted indirect discrimination based on sex, was upheld. A considerably smaller proportion of women than men working

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205 Ibid, at paragraph 51. See also the Opinion of Advocate General Jacobs in Case C-188/95, Fantask A/S and Others v. Industriministeriet, op.cit., at p. 504.
207 Full-time nurses who fulfilled the requirements are said to have Mental Health Officer (MHO) status.
in the mental health sector in Northern Ireland were in a position to satisfy the requirements imposed.

The ECJ was required to rule, inter alia, on the compatibility with Community law (and arguably the principle of effective judicial protection) of a national time-limit which restricted the back-dating of a woman’s entitlement, in the event of a successful claim, to a period of two years prior to the date on which the claim was made.\textsuperscript{208} The national court asked whether the application of the national time-limit amounted to a denial of an effective remedy under Community law and whether it was under an obligation to set aside national law if it considered it necessary to do so.

Following the approach of Advocate General Cosmas, the Court held that the national time-limit at issue not only restricted access to the special scheme (and so to the additional benefits under that scheme) to a period of two years prior to the date of claim, but also had the effect of limiting to two years prior to the claim the period of time of part-time service which could be counted towards the twenty year requirement.\textsuperscript{209} This would mean that the minimum twenty year service could never be completed and that the individuals’ rights to additional benefits would be rendered impossible in practice.\textsuperscript{210} As Advocate General Cosmas emphasized, this national time-limit would:

"...substantially reduce the practical effectiveness of Article 119 [now Article 141] of the Treaty,\textsuperscript{211} and could have the consequence of deterring workers

\textsuperscript{208} Section 2 (5) of the Equal Pay Act (Northern Ireland) 1970.
\textsuperscript{209} Ibid, at paragraph 41.
\textsuperscript{210} Coppel doubts whether this was the intended effect of the national rule; Coppel, J., “Domestic Law Limitations on Recovery for Breach of EC Law” (1998) 27 I.L.J. 259 at p.261.
\textsuperscript{211} Article 119 (now Article 141) EC provides for the principle of equal pay between men and women.
suffering discrimination from vindicating their rights under that article and, finally, of depriving them of *actual and effective judicial protection*.

The Court's solution was to rule that the principles of comparability and sufficient enforceability should be applied and that this national time-limit failed the latter requirement. In other words, the national time-limit made it virtually impossible in practice for the applicants to exercise their right to equal treatment in relation to access to occupational pension schemes.

The Court distinguished the national rules on the limitation of retroactive claims in *Steenhorst-Neerings* and *Johnson (No. 2)* which were held to be compatible with Community law from the national rule at issue in *Magorrian*. It held that the latter is not a claim for:

"...the retroactive award of certain additional benefits but for recognition of entitlement to full membership of an occupational scheme through acquisition of MHO status which confers entitlement to the additional benefits."

The Court added that:

"Thus, whereas the rules at issue in *Steenhorst-Neerings* and in *Johnson* merely limited the period, prior to commencement of proceedings, in respect of which backdated benefits could be obtained, the rule at issue in the main proceedings in this case prevents the entire record of service completed by those concerned after 8 April 1976 until 1990 from being taken into account for the purposes of

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213 Case C-246/96, *Mary Teresa Magorrian and Irene Patricia Cunningham v. Eastern Health and Social Services Board and Department of Health and Social Services*, op.cit., at paragraph 42.
calculating the additional benefits which would be payable even after the date of the claim."^{214}

Thus:

"...unlike the rules at issue in the judgments cited above, which in the interests of legal certainty merely limited the retroactive scope of a claim for certain benefits and did not therefore strike at the very essence of the rights conferred by the Community legal order, a rule such as that before the national court in this case is such as to render any action by individuals relying on Community law impossible in practice."^{215}

In other words, the rule at issue in *Magorrian* would have prevented the applicants from claiming access to the scheme for the future as well as for the period prior to the institution of proceedings. Thus, if the applicants were unable to count more than two years of past part-time service towards the twenty year requirement, both would have to come out of retirement and continue to work for some time to vindicate their rights of access under Article 119 (now Article 141) of the Treaty.^{216}

It is submitted that the Court's ruling in *Magorrian* determines the scope of the principle of effective judicial protection in relation to national time-limits and, in particular, the principle of sufficient enforceability. The ruling arguably suggests that where the application of a national limitation period would deprive an individual of asserting his rights in the future, the principle of effective judicial protection would render the national time-limit inapplicable. In contrast, a national time-limit which limits individuals' claims in respect of a period in the

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^{214} *Ibid*, at paragraph 43.
^{215} *Ibid*, at paragraph 44. Emphasis added.
^{216} Coppel, *op.cit.*
past may be considered to be acceptable. Thus, in the former situation, the need for effective judicial protection clearly outweighs the need for legal certainty.\textsuperscript{217}

However, it remains to be seen whether the \textit{Magorrian} ruling is one which turns on the particular nature of the 20 year requirement and the alleged effect that the national time-limit had upon it, or even on the particular nature of the claims concerning access to the pension schemes (which are, in effect, claims to benefits payable after the date of the claim).\textsuperscript{218} This may become clearer following the Court’s decision in Case C-78/98, \textit{Preston v. Wolverhampton Healthcare NHS Trust}\textsuperscript{219} in which the ECJ has been asked to rule, \textit{inter alia}, on the compatibility of a national procedural rule which limits the right to retroactive membership of the pension scheme from which part-time female employees have been illegally excluded to two years prior to the date of instituting proceedings with the principles of sufficient enforceability and comparability.

3.3. \textbf{Right to recovery of payments illegally levied}

The introduction by the ECJ of a Community remedy which may be invoked directly before the national court by an individual in order to obtain repayment of \textit{national charges} levied by a Member State in breach of Community law arguably constitutes a further development of the principle of effective judicial protection. It has been held to be:

"...a consequence of, and an adjunct to, the rights conferred on individuals by Community provisions prohibiting such charges."\textsuperscript{220}

\textsuperscript{217} This is in contrast to the ECJ's rulings in \textit{Steenhorst-Neerings} and \textit{Johnson (No.2)}. Discussed above.
\textsuperscript{218} \textit{Coppel}, \textit{op. cit.}
\textsuperscript{219} \textit{The Opinion of Advocate General Léger in Case C-78/98, Preston v. Wolverhampton Healthcare Trust} was delivered on 14 September 1999, not yet reported. He proposed that the ECJ's reasoning in \textit{Magorrian} should be extended and to cover the situation arising in \textit{Preston}.
Thus, by virtue of Article 5 EC (now Article 10) and arguably on the basis of the principle of effective judicial protection, directly effective rights conferred on individuals entail a corresponding right to repayment of the sums unlawfully levied. According to Advocate General Tesauro:

"The right to reimbursement of sums unduly levied by the authorities is...rooted in the direct effect of the relevant provisions of Community law and the effectiveness of the protection of the legal position created by those provisions. It is quite clear that that protection would not be effective if a judgment declaring a charge to be unlawful because it was levied in breach of a Community rule having direct effect were not accompanied by the possibility for individuals to obtain reimbursement."  

The Court has consistently held that, in the absence of Community rules governing the right to reimbursement, the remedy must be exercised before the national courts in accordance with national procedural rules subject to the principles of sufficient enforceability and comparability (discussed further above). There is extensive case-law relating to application of the latter principles, which are also characteristics of the principle of effective judicial protection particularly in relation to national time-limits, payment of interest and rules of evidence. They undoubtedly seek to establish a balance between the protection of the tax-payers directly effective rights and sound administration by the tax authorities.

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221 See earlier discussion in Chapter 1.
3.3.1. Principle of unjust enrichment

In Case 68/79, *Just*, the ECJ introduced an exception to the right to repayment of sums unlawfully levied. It held that:

"...the protection of rights guaranteed...by Community law does not require an order for the recovery of charges improperly made to be granted in conditions which would involve the unjust enrichment of those entitled." 226

The scope of the right to recovery of payment of sums illegally levied has therefore been limited by this principle of unjust enrichment. The ECJ reasoned that to reimburse the trader where it is established that the trader has actually passed the illegal charges on to other traders or consumers 227 would result in his unjust enrichment and goes further than that which is required for the "protection of rights," and therefore arguably beyond the scope of the principle of effective judicial protection.

The judgment in *Just* has been severely criticized by commentators. 228 The principal objection to the principle of unjust enrichment is that it enables national authorities to invoke the "passing on" exception as a defence in order to resist the refund of charges illegally levied. This may negate the right to reimbursement and only serves to benefit the Member State which imposed the illegal charge in the first place. 229 In other words, the Member State would benefit from its own default. Hubeau has argued that if there should be any remedy against the unjust enrichment of the trader, it should belong to the latter's customer. If the charge

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228 See, for example, Oliver, P., "Enforcing Community Rights in the English Court" (1987) M.L.R. 881 at p. 889 *et seq*.
229 Advocate General Tesauro in Joined Cases C-192/95 to C-218/95, *Société Comateb and Others v. Directeur Général des Douanes et Droits Indirects*, op.cit.,
had been passed on, it is the customer who would have suffered a loss by purchasing goods which he/she would have been able to buy at a lower price, but for the illegal tax imposed upon them. Furthermore, in a market economy, it is virtually impossible to establish whether or not the charge has been passed on. The importer’s prices will be determined by a number of factors, the charge being just one.

It has also been argued that the principle of unjust enrichment only existed (somewhat controversially) in Danish doctrine. The ECJ was therefore mistaken to adopt the doctrine as a part of Community law in general. On these grounds, it is difficult to justify the Court’s strict interpretation and limitation of the principle of effective judicial protection in Just. In practice, the principle of unjust enrichment undermines the ability of individuals to obtain an effective remedy before the national courts.

In response to the ECJ’s ruling in Just, it has been argued that certain Member States subsequently took the opportunity to introduce strict rules on the recovery of payments illegally levied. One such rule was challenged and brought before the Court in Case 199/82, San Giorgio. In this case, Italian legislation provided that traders could only recover duties illegally paid where they could provide evidence that the charges had not been passed on to customers or consumers. In other words, the national law contained a presumption that the charge had been passed on. The ECJ tested the compatibility of the legislation with Community law by applying the principles of sufficient enforceability and

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231 Hubeau states that he had located only one Danish judgment dating back to 1952 which supports the use of the doctrine of passing-on. Ibid, at p. 102.
232 Oliver, op.cit., at p. 890.
233 See, for example, Marks and Spencer plc v. Customs and Excise Commissioners, 30 January 1997 (unreported V.A.T Tribunal) in which the U.K. V.A.T. and Duties Tribunal held that the Customs and Excise Commission could lawfully refuse to refund mistakenly applied V.A.T. on children’s socks where the cost had been alleged passed on to customers. See, further Biondi, A. and Johnson, L, “The Right to Recovery of Charges Levied in Breach of Community Law: No Small Matter” (1998) 4 E.P.L. 313 at p. 317.
234 Case 199/82, Amministrazione delle finanze dello Stato v. SpA San Giorgio, op.cit.
comparability. It acknowledged that in accordance with its judgment in \textit{Just}, Member States may introduce national rules to prevent the unjust enrichment of the trader. However, it qualified the application of this rule by first stating that:

"...any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the tax-payer the burden of establishing that the charges unduly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence."\(^\text{235}\)

It has been argued that in \textit{San Giorgio},\(^\text{236}\) the Court sought to reduce the harshness of its ruling in \textit{Just} by reversing the burden of proof.\(^\text{237}\) According to Hubeau:

"This step forward which the Court has taken towards a more effective and useful protection of the individual's rights derived from primary or secondary Community law provisions with direct effect must be welcomed, although it seems insufficient."\(^\text{238}\)

He adds that the "efficacy of the direct effect of some Community law provisions will be enhanced" by virtue of the fact that the ruling in \textit{San Giorgio} will make it difficult for the national courts to apply the exception of unjust enrichment.\(^\text{239}\) In his view, the Court has "strengthened and made the remedies against a violation

\(^{235}\) \textit{Ibid}, at paragraph 14.


\(^{238}\) \textit{Ibid}, at p. 100. Emphasis added.

\(^{239}\) \textit{Ibid}, at p. 103.
of the rule of law more effective." The ECJ's approach is arguably underpinned by the principle of effective judicial protection.

In Joined Cases C-192/95 to C-218/95, Comateb, the ECJ had the opportunity to adopt a less restrictive approach towards the application of the principle of effective judicial protection in the context of the right to reimbursement to sums unlawfully levied and to redefine the exception embodied in the principle of unjust enrichment. In this case, the plaintiffs paid dock dues (octroi de mer) on goods brought into Guadeloupe coming from other Member States or other parts of French territory. Following the Court's judgments in Case C-163/90, Legros and Joined Cases 363/93, 407/93, 410/93, Lancry where it was held that the octroi de mer was in breach of Community law, the plaintiffs applied for the reimbursement of the sums unlawfully levied by the customs authority. The latter claimed that the dock dues could not be reimbursed as they had been passed on to the purchaser in accordance with national law. National law provided that a product cannot be sold at a loss, in other words, at a price lower than the actual purchase price. The matter was referred to the ECJ.

The ECJ was required to rule on whether the refusal to reimburse a charge levied in breach of Community law, on the ground that the charge has been passed on to the purchaser of the goods, even though it is the Member State's own legislation which required undertakings to incorporate the charge into the cost price of the goods sold, made it virtually impossible or excessively difficult to obtain reimbursement.

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240 Ibid, at p. 108.
In his Opinion, Advocate General Tesauro dismissed the arguments of the French Government and the Commission, namely that the obligation to incorporate the dock dues into the cost price does not in fact imply that traders have passed on the tax to the purchasers of the goods because the undertaking may have chosen to reduce their profit margin rather than passing on the charge. Advocate General Tesauro argued that although this interpretation was reasonable, it was also impracticable. It assumed that a distinction may be made between the costs and expenses of the trader and the amount of profit in the price of the product. He questioned whether or not it can be established that the importer has sought to bear the cost of the dues at issue, in whole or in part, by cutting its own profit margin given that the cost price of the product at issue statutorily incorporated the dock dues and that the selling price is made up of the cost price plus the importer's profit.\(^\text{244}\) He also gave short shrift to the proposition put forward by the Commission that the national court should use an expert to establish whether the profit margin of the individual trader accords with what is considered a normal profit margin.

The Advocate General started from the premise that the charge had been passed on in this case. He considered the issue facing the Court to be whether the reimbursement of charges illegally levied which have been “passed on” in accordance with national legislation would result in the unjust enrichment of the trader and whether, on this basis, such legislation is compatible with Community law, particularly if it negates the right to reimbursement.\(^\text{245}\)

First, he noted that it is impossible to ascertain in a market economy whether or not a trader has been unjustly enriched. In reality, this could only happen “if supply is elastic and demand is rigid.”\(^\text{246}\) Second, he argued that it is not appropriate to rely on the principle of unjust enrichment even if the charge has

\(^{244}\) Advocate General Tesauro in Joined Cases C-192/95 to C-218/95, Société Comateb and Others v. Directeur Général des Douanes et Droits Indirects, op.cit., at p. 170.

\(^{245}\) Ibid, at p. 176.

\(^{246}\) Ibid, at p. 177.
been passed on. In his view, it is the Member State itself which has been unjustly enriched and not the trader. He described the latter as being "unjustly impoverished." He emphasized that even where the trader may have passed on the charge to another party, he will have been forced to reduce his profit margin or accept a reduction on the volume of sales.

Advocate General Tesauro argued that when balancing the interests of the national administration against those of the tax-paying traders, it should be in favour of the latter. The opposite solution would:

"...have the effect of rendering nugatory a legal position guaranteed to the individual by Community law, and this would genuinely undermine the protection to be afforded by the courts of that legal position."247

Advocate General Tesauro admitted that the possibility of bringing an action against the State for the losses (e.g. reduction in the volume of sales) sustained as a result of the breach of Community law248 may eliminate the risk to an individual trader’s right to “full and effective protection”249 which may arise as a result of the application of the principle of unjust enrichment. However, he argued that it would be simpler for all concerned, in particular, the trader, to “recognize that the latter is entitled to reimbursement of the sum unduly paid.”250

He concluded that the ECJ has two options to ensure the full and effective judicial protection of the individual traders rights.251 On the one hand, it could rule that the national legislation at issue made it virtually impossible to exercise the right to reimbursement for sums illegally levied. This option would mean

247 Ibid, at p. 178.
250 Ibid.
251 Ibid, at pp. 178 - 179.
that the individual is always in a position to claim repayment. On the other hand, a more radical solution would be to decide that the passing on of the charges does not extinguish the right to reimbursement of sums unduly paid. This would reduce any legal uncertainty and reflects economic reality.

In the event the ECJ did not follow the approach of the Advocate General. The Court first recalled its existing case-law on the right to reimbursement of sums unduly paid. It reiterated that the right to recovery of payment is an adjunct to the directly effective provisions prohibiting such charges and that the “Member State is therefore in principle required to repay charges levied in breach of Community law” (and which, it has already been submitted, is arguably a characteristic of the principle of effective judicial protection). It added that the principle of unjust enrichment amounted to an exception to this principle of Community law. The Court confirmed that it is for the national court to decide whether or not the burden of the charge has been passed on “in whole or in part by the trader to other persons and, if so, whether reimbursement to the trader would amount to unjust enrichment.”

The Court went to refine the exception of the principle of unjust enrichment. It noted first that if the final consumer is able to obtain reimbursement through the trader of the amount of the charge passed on to him, that trader must in turn be able to obtain repayment from the national authorities. However, the question of reimbursing the trader does not arise if the final consumer is able to obtain reimbursement directly from the national authorities rather than through the trader for the amount of the charge passed on to him.

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252 Joined Cases C-192/95 to C-218/95, Société Comateb and Others v. Directeur Général des Douanes et Droits Indirects, op.cit., at paragraph 20.
254 Ibid, at paragraph 23.
255 Biondi and Johnson, op.cit., at p. 316.
256 Joined Cases C-192/95 to C-218/95, Société Comateb and Others v. Directeur Général des Douanes et Droits Indirects, op.cit., at paragraph 24.
Second, citing its ruling in Joined Cases 331/85, 367/85 and 378/85, *Bianco and Girard*, the ECJ held that it cannot be generally assumed that the charge has been passed on in every case even where national legislation may have been designed to ensure that indirect taxes are passed on to the final consumer and even if in commerce they are normally passed on in whole or in part. The actual passing on of such taxes in practice, either in whole or in part, depends upon a number of variable factors and should be decided by the national court in each case. It reiterated that:

"...it may not be assumed that there is a presumption that they have been passed on and that it is for the taxpayer to prove the contrary".

In relation to the facts in *Comateb*, the Court ruled that:

"The same [principle] applies where tax-payers have been obliged by the relevant legislation to incorporate the charge in the cost price of the product concerned. The fact that such a legal obligation exists does not mean that there is a presumption that the entire charge has been passed on, even where failure to comply with that obligation carries a penalty."  

On this basis, it held that:

"...a Member State may resist repayment to the trader of a charge levied in breach of Community law only where it is established that the charge has been borne in its entirety by someone other than the trader and that reimbursement of the latter would constitute unjust enrichment. It follows that if the burden of the charge

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has been passed on only in part, it is for the national authorities to repay the trader the amount not passed on.\textsuperscript{260}

The ECJ refused to reverse the principle of unjust enrichment as proposed by the Advocate General.\textsuperscript{261} Nevertheless, it stated that:

"It should be borne in mind, however, that even where it is established that the burden of the charge has been passed on in whole or in part to the purchaser, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment."\textsuperscript{262}

It added that it would be legitimate for the national courts to take into account the damage sustained as a result of the protective or discriminatory taxes. In this respect, the Court held that national law which permitted the national court to take account of damage incurred by the trader by way of loss of business which wholly or partly negated any unjust enrichment was compatible with Community law.\textsuperscript{263} Following the Opinion of Advocate General Tesauro, the Court acknowledged that despite passing on the charge, the trader may have sustained losses as a result of the illegally levied charge, for example, a reduction in the volume of sales because of the price increase. In accordance, with its current application of the principle of effective judicial protection, the Court also held that the trader had a right to bring a separate action for damages resulting from the overpaid charges (irrespective of whether those charges had been passed on)\textsuperscript{264} subject to the conditions of liability laid down in Joined Cases C-46 & 48/93, \textit{Brasserie du Pêcheur and Factortame (No.3)}.\textsuperscript{265}

\begin{footnotes}
\textsuperscript{260} \textit{Ibid}, at paragraph 27 and 28.
\textsuperscript{261} Biondi and Johnson, \textit{op. cit.}, at p. 316.
\textsuperscript{262} \textit{Ibid}, at paragraph 29.
\textsuperscript{263} \textit{Ibid}, at paragraph 33.
\textsuperscript{264} Joined Cases C-192/95 to C-218/95, \textit{Société Comateb and Others v. Directeur Général des Douanes et Droits Indirects}, \textit{op.cit.}, at paragraph 34.
\end{footnotes}
Although the ECJ failed to reverse the principle of unjust enrichment laid down in *Just* which may, in practice, negate the right to reimbursement, the Court’s ruling is consistent with its current approach towards the application of the principle of effective judicial protection. It has arguably sought to find a balance between the need for full and complete judicial protection of individuals’ Community rights and the sound administration and financial concerns of the national tax authorities. Any gaps in the effective judicial protection of an individual’s directly effective Community rights may be remedied by virtue of the principle of State liability.

It has been argued that this solution is impracticable and complex. It creates legal uncertainty and requires the trader to bring two separate sets of proceedings. Biondi and Johnson claim that it would be preferable for the Community to introduce a uniform action for restitution. In their view:

“To allow an individual who has suffered loss as a result of a charge levied in breach of Community law always to recover the money he or she paid, without restrictions on this recovery, would provide legal certainty and ensure effective protection of a Community right.”

It is submitted that a uniform Community remedy derived from legislative provisions would resolve some of the confusion and uncertainty surrounding the repayment of fees illegally levied. Not only would such a solution strengthen the principle of effective judicial protection, but it would also enhance the efficacy of the Single Market. It remains to be seen whether the Community will adopt such an initiative. In the meantime, the ECJ has clearly illustrated that it would rather promote the principle of State liability as the best means of securing the effective judicial protection of individuals’ Community rights.

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266 The principle of State liability is assessed in more detail in Chapter 5.
267 Biondi and Johnson, *op.cit.*, at p. 321.
3.4. Right to an effective remedy

The principle of effective judicial protection was further developed in Case 14/83, *Von Colson*268 and Case 79/83, *Harz*269 where the Court introduced the right to an effective remedy for individuals seeking to enforce their Community rights which, it is submitted, constitutes a characteristic of the principle.

In *Von Colson*, two female social workers applied for two vacancies which had arisen at a male prison. Two male candidates were recruited even though the plaintiffs were better qualified. The plaintiffs brought an action against the authority responsible for administering the prison (an emanation of the State), for breach of the Equal Treatment Directive.270 In Case 79/83, *Harz*, an action for breach of Directive 76/207 was brought by a female graduate against a private company. In both cases, the plaintiffs successfully established discrimination, but the issue of sanctions remained unresolved.

The Equal Treatment Directive contains an express provision relating to the availability of national remedies in the event of a breach. Article 6 of the Directive provides 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 the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities."

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The German legislation purporting to implement Article 6 of the Directive\textsuperscript{271} provided that where an employer acts in breach of the principle of equal treatment in the course of the establishment of an employment relationship, he is liable to compensate the individual whose rights have been infringed. However, the relevant national provisions expressly limited an individual’s right to compensation to payment of “negative interest”\textsuperscript{272} based on frustration of expectation. Thus, the national implementing legislation conferred on the plaintiffs in both cases the right to the repayment of expenses incurred in making their applications for the respective posts which, in their view, was inadequate. Furthermore, they argued that a sanction of this kind failed to guarantee individuals the right to equal treatment conferred by the Directive since it would be unlikely to deter an employer from acting in breach of the Directive on another occasion. The national remedy was ineffective and, it is submitted, was also in breach of the principle of effective judicial protection.

The plaintiffs in both cases claimed that in accordance with the meaning and purpose of the Equal Treatment Directive, Article 6 of the latter gave them a right to a contract of employment for the posts in question or, at the very least, a right to adequate damages in the event of a breach. Although the Federal Republic of Germany rejected the claim that the plaintiffs should be offered a contract of employment in the event of discrimination, it did agree that the implementing national law failed to ensure the effective transposition of the principle of equal treatment laid down in the directive. The German Government suggested that an adequate solution (i.e. a right to damages) which complied with the provisions of the Directive could be derived from the general rules of German private law by the national courts.\textsuperscript{273}

\textsuperscript{271}Paragraph 611a of the Bürgerliches Gesetzbuch (German Civil Code).
\textsuperscript{272}Vertrauensschaden.
\textsuperscript{273}Paragraph 823(2) of the Bürgerliches Gesetzbuch (German Civil Code) provides for a general right to compensation. The Court used this argument as the basis for the introduction of the concept of “indirect effect”; see further discussion in Chapter 4. The German Government added, however, that such a remedy should be proportionate and only be available where the discrimination occurred against a better qualified candidate.
The plaintiffs were faced with an additional problem in their attempt to effectively enforce their Community rights. In *Von Colson*, the ECJ held that Article 6 of Directive 76/207 was insufficiently precise and unconditional to produce direct effects thus preventing the plaintiffs from relying on the directive before the national court. Indeed, in *Harz*, even if the Court had held Article 6 to be directly effective, the action would have failed for lack of horizontal effect of directives. In this case, the action had been brought against a private employer and not against an "emanation of the State."

The national courts stayed proceedings and requested a preliminary ruling from the ECJ on the interpretation of Article 6 of Directive 76/207. Thus, the ECJ was required to determine how individuals could effectively protect their Community rights in the event of a breach where the national implementing legislation laying down sanctions was ineffective and where the provision of the directive they were seeking to rely upon did not have direct effect.

Advocate General Rozès suggested that a threefold test be introduced in order to ensure that the effective protection of individuals' Community rights is guaranteed by the national courts. She proposed that where national sanctions are intended to ensure compliance with a fundamental principle of the Treaty, these sanctions must first, be effective and therefore have a deterrent effect, second, be comparable with sanctions imposed under national law for offences of the same gravity and third, be proportionate to the seriousness of the offence.

Although in *Rewe* and *Comet*, the ECJ held that the principles of comparability and sufficient enforceability should be applied in the absence of Community harmonizing rules in the field of national remedies, it is submitted that the reasoning of the Advocate General supports the proposition advanced by

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this thesis, namely that these characteristics of the principle of effective judicial protection (supplemented by the principle of proportionality)\textsuperscript{277} are derived from Article 5 (now Article 10) of the Treaty and are, therefore, of general application. The Advocate General concluded that they should be applied in the case of \textit{Von Colson} and \textit{Harz} and override Article 6 of Directive 76/207, where the latter failed to provide effective judicial protection and irrespective of the fact that the relevant provisions did not have direct effect.

The ECJ adopted a different approach. The Court considered that although Article 189(3) (now Article 249 (3)) of the Treaty leaves the Member States with a choice as to the form and methods which they may adopt when implementing a directive, this discretion is fettered to the extent that it:

"...does not affect the obligation imposed on all Member States to which the directive is addressed, to adopt, in their national legal systems, all the measures necessary to ensure that the directive is \textit{fully effective}, in accordance with the objective which it pursues."\textsuperscript{278}

Although the Court did not refer to the legal source of the overriding obligation imposed on the Member States to ensure the full effect of a directive through its national implementing legislation, it is submitted that this legal basis is arguably derived from the principle of effectiveness which is also one of the legal bases of the principle of effective judicial protection.\textsuperscript{279} In applying this formula to the facts in \textit{Von Colson}, the Court reiterated that the object of the Equal Treatment Directive is to:

\textsuperscript{278} Case 14/83, \textit{Von Colson}, op.cit., at paragraph 15.
\textsuperscript{279} The relationship between the principle of effective judicial protection and the principle of effectiveness is explored in more detail in Chapter 1.
"...implement in the Member States the principle of equal treatment for men and women, in particular by giving males and females real equality of opportunity as regards access to employment."²⁸⁰

Referring to Article 6 of Directive 76/207, the Court held that:

"It follows from the provision that Member States are required to adopt measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned. Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation, backed up where necessary by a system of fines. However the directive does not prescribe a specific sanction; it leaves Member States free to choose between the different solutions suitable for achieving its objective."²⁸¹

Thus, the Court confirmed that Article 6 of Directive 76/207 did not confer any right to a specific sanction in the event of a breach of the Directive (i.e. a substantive right to a contract of employment in the event of a breach), but it went on to specify that the choice of sanction adopted by the Member State must be effective. In its view:

"It is impossible to establish real equality of opportunity without an appropriate system of sanctions. That follows not only from the actual purpose of the directive but more specifically from Article 6 thereof which, by granting applicants for a post who have been discriminated against recourse to the courts, acknowledges that those candidates have rights of which they may avail themselves before the courts."²⁸²

²⁸⁰ Case 14/83, Von Colson, op.cit., at paragraph 17.
²⁸¹ Ibid, at paragraph 18.
²⁸² Ibid, at paragraph 22.
Having established that Article 6, despite its lack of direct effect, conferred on individuals the right to a remedy for breach of the principle of equal treatment before the national courts, the Court held that:

“Although...full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that the sanction be such as to guarantee real and effective judicial protection. Moreover, it must also have a real deterrent effect on the employer.” ²⁸³

The Court added that:

“It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.” ²⁸⁴

Thus, the Court held that Article 6 of Directive 76/207, which does not produce direct effects, entails the right to an effective remedy. An effective national remedy must ensure effective judicial protection of individuals’ rights and it must have a deterrent effect. Further, it must be adequate in relation to the damage sustained. The German legislation implementing the Equal Treatment Directive clearly failed to comply with these requirements and, it is submitted, did not comply with the principle of effective judicial protection. It is argued that the right to an effective remedy and the right to adequate compensation introduced by the Court in Von Colson and Harz constitute additional characteristics of the principle of effective judicial protection.

The Court went on to specify how individuals could enforce their right to an effective remedy (including the right to adequate compensation) in the absence of direct effect.²⁸⁵ It held that:

"...the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 [now Article 10] of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No. 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 [now Article 249]." 286

Thus, where the provisions of a directive are not directly effective, a national court is still under an interpretative obligation to interpret and apply national implementing legislation in conformity with the requirements of Community law, in so far as it is given a discretion to do so under national law. It follows that individuals are able to derive their Community rights "indirectly" by virtue of the implementing national law, rather than "directly" by virtue of Community law. This concept of "indirect effect" enables individuals to derive rights independent of the concept of direct effect and thus avoids the problem posed by the lack of horizontal direct effect of directives. 287

The ECJ did not rely in this case, however, on the principles of comparability and sufficient enforceability 288 as a means of ensuring the effective judicial protection of the plaintiffs' Community rights. This is arguably due to the fact that the latter characteristics of the principle of effective judicial protection were introduced by the ECJ in order to ensure the effective judicial protection of individuals' directly effective Community rights before the national courts in the absence of

287 Ibid, at paragraph 28; see further discussion on the relationship between the principle of effective judicial protection and the concept of "indirect effect" in Chapter 4.
288 Discussed earlier in this Chapter.
Community harmonization. In contrast, in Von Colson and Harz, the plaintiffs were seeking to rely on a specific provision of a directive, namely Article 6 of Directive 76/207 which was insufficiently precise and unconditional to produce direct effects.

Neither did the ECJ adopt the "maximalist" approach of the Advocate General Rozès outlined above based on Article 5 EC (now Article 10) which has been described as an attempt to establish a "Community law standard of "effective judicial protection." The Court preferred instead, to introduce a duty upon the national courts to ensure that directives take full effect, which in turn, is implicitly based upon the principle of effectiveness. By applying this overriding duty to Article 6 of Directive 76/207, the ECJ reached the conclusion that the national court was under an obligation to provide individuals with a right to an effective remedy and a right to adequate compensation in the event of a breach of the principle of equal treatment.

The Court's avoidance of relying expressly on Article 5 (now Article 10) of the Treaty as a legal basis for its judgment, however, makes it unclear as to whether the obligation for a national court to provide an effective remedy and adequate compensation is confined to actions for discrimination based on Directive 76/207, or is broader in scope. This issue, and the corresponding scope of the principle of effective judicial protection has been examined by the ECJ in other cases (which are examined below). In contrast, the concept of indirect effect which was introduced by the ECJ in Von Colson as the basis for its judgment, is expressly based upon Article 5 EC (now Article 10) EC in conjunction with Article 189(3) EC (now Article 249(3)). It follows that this interpretative


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obligation arguably applies to both directly effective and non-directly effective rights and is discussed in more detail in Chapter 4 below.

3.5. Right to adequate compensation

In Case 14/83, Von Colson\textsuperscript{291} and Case, 79/83 Harz,\textsuperscript{292} the Court established that in the event of a breach of Directive 76/207, victims of unlawful sex discrimination in employment matters are entitled to an effective remedy which guarantees "real and effective judicial protection" and has "a real deterrent effect on the employer."\textsuperscript{293} It has been argued above that the right to an effective remedy arguably constitutes a characteristic of the principle of effective judicial protection. It is also submitted that the right to an effective remedy entails a right to adequate compensation. In Von Colson, the Court held that:

"...where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained."\textsuperscript{294}

In Von Colson, German national law limited the plaintiffs' right to compensation to "negative interest" which took the form of nominal expenses. The provisions did not satisfy the adequacy requirement embodied in Article 6 of Directive 76/207\textsuperscript{295} and hence did not guarantee effective judicial protection. However, the national court was placed under an obligation to interpret national law relating to sanctions in light of the directive, and more specifically, in


\textsuperscript{293}Case 14/83, Von Colson, op.cit., at paragraph 23.

\textsuperscript{294}Ibid.

\textsuperscript{295}Article 6 of Directive 76/207 states 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 within meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities."
accordance with the obligation to provide an effective remedy in the form of adequate financial compensation.\textsuperscript{296}

In Case C-271/91, \textit{Marshall (No. 2)},\textsuperscript{297} the ECJ took the opportunity to define more precisely the notion of "adequacy of compensation" in the context of discriminatory dismissal. In \textit{Marshall (No. 1)},\textsuperscript{298} the ECJ established that the plaintiff, Miss Marshall, had been discriminated against by her employer in breach of the Equal Treatment Directive. However, when the question of remedies was being assessed by the national court, it emerged that national law prohibited the latter from granting compensation which was "adequate in relation to the damage sustained." A statutory limit applied to the compensation which could be awarded depriving Ms. Marshall of the full extent of her loss. Furthermore, the national court did not have the power to award interest. The matter was referred to the ECJ.

The problem facing the ECJ was twofold: first, it was required to rule on whether an award of adequate compensation in the event of discriminatory dismissal entails the right to full compensation, which cannot be diminished by an upper limit on the amount of compensation available imposed by national law; second, it was asked to rule on whether the right to adequate compensation also includes the right to be awarded interest to compensate for the loss sustained by the victim as a result of the effluxion of time until the capital sum awarded is actually paid.

The ECJ based its ruling solely on its interpretation of the meaning and scope of Article 6 of Directive 76/207. It reiterated its ruling in \textit{Von Colson} in which it

\textsuperscript{296} For further discussion on how the preliminary ruling in \textit{Von Colson} was applied by the national court in Germany, see Curtin, D., "Effective Sanctions and the Equal Treatment Directive: The \textit{Von Colson} and \textit{Harz} Cases" (1985) 22 C.M.L.Rev. 505 at p. 525.
held that this provision grants the Member States a margin of discretion in implementing national sanctions to secure the principle of equal treatment in employment matters provided such sanctions guarantee "...real and effective judicial protection and have a real deterrent effect on the employer." The Court added that:

"Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. In the event of discriminatory dismissal contrary to Article 5(1) of the Directive, a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained."

In Marshall (No.2), the U.K. Government had chosen to confer on victims of discriminatory dismissal a right to financial compensation. It was thus necessary to consider whether the right to adequate compensation entailed the right to full compensation and an award of interest, thus rendering the statutory maximum limit unlawful.

Advocate General Van Gerven argued that in Von Colson, the ECJ was not seeking to eliminate all maximum limits on compensation, but to establish that nominal compensation was not acceptable. In his view, the use of the term "adequate" implies that less than full compensation is acceptable. It follows that:

"...the compensation must be adequate in relation to the damage sustained but does not have to be equal thereto." 

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300 Ibid, at paragraph 25.

301 Advocate General Van Gerven in Case C-271/91, M.H. Marshall (No.2) v. Southampton and South West Hampshire Area Health Authority, op.cit., at p. 4390.
However, the ECJ adopted a different approach and held that:

"Where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules." 302

The ECJ went on to apply this right to full compensation to the facts of the case and held that:

"...the fixing of an upper limit of the kind at issue in the main proceedings cannot, by definition, constitute proper implementation of Article 6 of the Directive, since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of discriminatory dismissal." 303

Similarly, in relation to the power to award interest, the ECJ held that:

"...full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real and equality of treatment." 304

303 Ibid, at paragraph 30.
304 Ibid, at paragraph 31.
3.5.1. Adequate compensation versus “full” effectiveness of a remedy

The ECJ’s ruling in *Marshall (No.2)* arguably complies with the principle of effective judicial protection and represents a clarification of the right to an effective remedy laid down in *Von Colson* which includes the right to adequate compensation. The remedy is *effective* in the sense that Ms. Marshall is able to obtain the full extent of the loss she had suffered which ultimately placed her in the same position that she would have been in notwithstanding the discriminatory dismissal (*restitutio in integrum*). The remedy is also *adequate* since the payment of compensation is not restricted to a maximum limit which may prevent the payment of full compensation. Further, the depreciation of the payment which has occurred by virtue of the delay in payment of the financial compensation is also remedied in full. Moreover, it would follow that such a sanction would constitute a sufficient deterrent to employers to refrain from adopting such discriminatory practices in the future.

In this respect, Curtin places the ECJ’s decision in *Marshall (No.2)* in the same category as *Simmenthal*,305 *Factortame (No.1)*306 and *Francovich*307 where, in her view:

“...the Court has moulded the patulous concept of effectiveness to form legal realities.”308

Although the Court based its ruling on Article 6 of Directive 76/207, Curtin argues that it:

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"...is merely a specific expression of a much more general principle, the right to an effective remedy, which is an obligation inherent to the system of Community law."  

She adds that as such, the principle of "full" compensation laid down in Marshall (No.2) should be given general application.  

Curtin further asserts that the ECJ's ruling in Marshall (No.2) falls within its "third generation" case-law. In such cases, the principle of effectiveness is drawn upon in order to introduce uniform Community rules such as the right to full compensation when divergent rules of national procedural law fail to ensure the effectiveness of Community law. As a result, "third generation" decisions impose on the Member States an obligation to "reshape" existing national remedies or to create new remedies in order to ensure the effective judicial protection of individuals' Community rights. In contrast, "second generation" cases simply require Member States to apply national procedural rules subject to the minimum Community standard. This standard entails that such national rules should not make it virtually impossible for individuals to assert their Community rights before the national court and that national law should treat actions brought under Community law as favourably as those brought on the basis of domestic law. These components are referred to as the principles of sufficient enforceability and of comparability, as discussed earlier. In Marshall (No.2), a "second generation" solution would have accepted less than full compensation as adequate because it would have satisfied the principle of sufficient enforceability, 

312 Discussed earlier in this Chapter.
in other words, it would not have been virtually impossible for an individual to obtain compensation. 313

Although a "second generation" solution had been proposed by the Advocate General, he nevertheless reached the conclusion that the upper statutory limit was incompatible with Community law. In his view, an upper statutory limit would be unlawful and fail to meet the adequacy requirement (which was part of the principle of sufficient enforceability) where it either prevented the national courts from making a payment of compensation or resulted in the payment of a nominal sum in respect of one (or more) of the following heads of damage normally taken into account in rules governing liability, namely, loss of physical assets; loss of income; moral damage (injury to feelings) and damage on account of effluxion of time. In this case, national law prevented the latter from being included in the award of compensation.

However, the fact that the ECJ based its ruling in Marshall (No.2) to a large extent on its previous interpretation of Article 6 of Directive 76/207 laid down in Von Colson (and is arguably based, as discussed earlier, on the principle of effectiveness) 314 suggests that the Court may have been seeking to develop a lex specialis based on Article 6 of Directive 76/207 rather than a lex generalis which would be applied to all breaches of Community law. 315 It is arguable that the ECJ was seeking to limit the right to adequate compensation, which in the event of discriminatory dismissal entails the right to full compensation, to actions brought on the basis of the Equal Treatment Directive or at least, to leave the opportunity open to limit the principle in future case-law.

314 See earlier discussion in Chapter 1.
3.5.2. Scope of the right to adequate compensation in relation to Directive 76/207

The extent to which the ECJ has been prepared to extend the scope of the principle of adequate compensation to actions for breach of Community law, in addition to those based on Directive 76/207, the Equal Treatment Directive, arose in Case C-66/95, *Sutton*. In this case, the ECJ was required to rule on whether the right to adequate compensation (which, it is argued above, is a characteristic of the principle of effective judicial protection) laid down in *Von Colson* and subsequently expanded in *Marshall (No.2)*, confers on individuals the right to obtain interest on payment of arrears in benefits, where the delay in payment of the benefit is the result of the Member State’s failure to implement Directive 79/7 correctly. The latter provides for equal treatment between men and women in matters of social security.

In this case, Mrs. Sutton had successfully challenged, on appeal, the compatibility of U.K. Social Security legislation with Directive 79/7. Following the judgment, the Social Security Commissioner exercised his statutory power to backdate the payment of the benefits claimed to one year prior to the date of the claim. An application was subsequently made on behalf of Mrs. Sutton by the Child Poverty Action Group for payment of interest on the arrears of benefits awarded. The Secretary of State refused the claim on the basis that national law did not provide for payment of interest on social security benefits.

Mrs. Sutton brought an action before the High Court claiming, *inter alia*, that she was entitled to payment of interest on social security benefits by virtue of the ECJ’s ruling in *Marshall (No.2)*. Mrs. Sutton argued that the principle of

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adequate compensation derived from Article 6 of Directive 76/207 which includes the payment of interest resulting from the effluxion of time should also apply to individuals seeking to rely on rights granted by Article 6 of Directive 79/7. She argued that both provisions should be interpreted in the same way. She based this argument on the grounds that first, the wording of both provisions is practically identical. Second, that they pursue the same objective, namely equality of treatment for men and women. Third, that they form part of the same Equal Treatment Harmonization programme. Furthermore, in Joined Cases C-63 & 64/91, Jackson & Cresswell and Case C-116/94, Meyers, the ECJ held that social security benefits which relate to employment may fall within the scope of Directive 76/207. Her claim was supported by the Commission which argued that if the discrimination fell within the scope of Directive 79/7, there is no reason to suggest that the principle of equal treatment laid down in this Directive is any narrower than that laid down in Directive 76/207 and therefore the same interpretation should apply.

Advocate General Léger dismissed the claim based on Marshall (No.2) on the ground that the latter related to a payment of compensation which amounted to a remedy for discriminatory dismissal. He argued that it was in this context only that Member States were obliged to ensure that financial compensation, where chosen as the appropriate remedy, is adequate and must entail full compensation

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318 Article 6 of Directive 76/207 states 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 within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.”

319 Article 6 of Directive 79/7 states 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 the principle of equal treatment to pursue their claims by judicial process, possibly after recourse to other competent authorities.”

320 Directive 79/7 gives effect to the Community’s legislative programme in the field of equal treatment which was initiated by the adoption of Directive 76/207. The fourth recital of the preamble of Directive 76/207 as well as Article 1 (2) make reference to the fact that subsequent legislative instruments will be adopted with a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security.


taking account of the effluxion of time when the amount of damages to be paid
by the employer is being assessed. He emphasized that the ECJ had held that “the
particular circumstances of each breach of the principle of equal treatment should
be taken into account” and that the ECJ had not sought to lay down a general
principle of Community law to the effect that:

“...any restoration of equality of treatment presupposes payment of interest on
account of the effluxion of time.” 323

Having dismissed the claim that the right to adequate compensation entails the
right to full compensation and is a general principle applicable to all breaches of
Community law, Advocate General Léger went on to consider whether Mrs.
Sutton should be entitled to payment of interest on arrears of benefit on the basis
of the broader principle of effectiveness. 324 He acknowledged that in order to
ensure the full effectiveness of the principle of equal treatment, which has been
recognized by the ECJ as a fundamental principle of Community law, the
retroactive payment of a benefit should take into account any monetary
depreciation which has occurred. It must therefore be possible under Community
law for an individual to claim interest on the amount paid by way of arrears of
benefit, where the delay in paying the benefit is the result of discrimination
prohibited by the said Directive. 325

However, he argued that in the case at issue, the payment in arrears of social
security benefits to Mrs. Sutton was sufficient to remove the discrimination which
had occurred. Furthermore, in the absence of harmonizing measures for the
implementation of sanctions relating to the principle of equal treatment, the
requirement to award interest of arrears of benefits was a matter for the national
courts, in accordance with national law, subject to the principles of comparability

323 Opinion of Advocate General Léger in Case C-66/95, R. v. Secretary of State for Social
Security, ex parte Eunice Sutton, op.cit., at p. 2173.
324 See earlier discussion in Chapter 1.
325 Ibid, at pp. 2174 - 2175.
and sufficient enforceability.\textsuperscript{326} He concluded that the relevant national procedural law which imposed a one-year limit on the back-payment of social security benefits was compatible with Community law if it complied with these two requirements. This might be classified as a "second generation" solution, as discussed earlier.

The ECJ also distinguished the Court's ruling in \textit{Marshall (No.2)} from that in the present case. It reiterated that:

"The judgment in \textit{Marshall (No.2)} concerns the award of interest on amounts payable by way of reparation for loss and damage sustained as a result of discriminatory dismissal. As the Court observed in paragraph 31 of that judgment, in such a context full compensation for the loss and damage sustained cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment.\textsuperscript{327}

By contrast, the Court held that the main proceedings in \textit{Sutton}:

"...concern the right to receive interest on amounts payable by way of social security benefits. Those benefits are paid to the person concerned by the competent bodies, which must, in particular, examine whether the conditions laid down in the relevant legislation are fulfilled. Consequently, the amounts paid in no way constitute reparation for loss or damage sustained and the reasoning of the Court in its judgment in \textit{Marshall (No.2)} cannot be applied to a situation of that kind.\textsuperscript{328}

\textsuperscript{326} These principles have been discussed earlier in this Chapter.
\textsuperscript{327} Case C-66/95, \textit{R. v. Secretary of State for Social Security, ex parte Eunice Sutton, op.cit., at paragraph} 23.
\textsuperscript{328} \textit{Ibid}, at paragraph 24.
The Court dismissed the arguments of Mrs. Sutton (and the Commission) and held that Article 6 of Directive 79/7 was more limited in scope than Article 6 of Directive 76/207. It stated that the former only requires Member States to adopt measures necessary to enable persons to establish a breach of that directive and to obtain the benefits to which they would have been entitled in the absence of discrimination. The payment of interest on arrears of benefit could not be regarded as an essential component of such a right.\(^{329}\) The ECJ also refuted the claims that on the basis of its previous case-law, in which the Court had held that certain social security benefits relating to employment fall within the scope of Directive 76/207, it followed that where such benefits were awarded belatedly in the event of discrimination, interest should be payable on the arrears of payment in conformity with the principle laid down in *Marshall (No. 2)*. The ECJ held that where the payment of social security benefits are not compensatory in nature, the payment of interest cannot be required on the basis either of Article 6 of Directive 76/207 or of Article 6 of Directive 79/7.\(^{330}\)

In *Sutton*, the Court thus clarified the scope of the right to adequate compensation which, it is submitted, is a characteristic of the principle of effective judicial protection. It made it clear that right to be awarded interest does not apply where the belated payment is not compensatory in nature. It may be argued that the ECJ's judgment in *Sutton* deprived Mrs. Sutton of effective judicial protection. Indeed, in reality, she would receive a sum which, in real terms, would be lower than that which a man in the same circumstances would have been paid. Thus, the lack of power on the part of the Social Security Commissioner to award interest (and the failure of the ECJ to impose upon him a duty to do so) reduced the effectiveness of the remedy. Furthermore, the solution adopted by the ECJ undermines the uniformity of Community law in the Member States. For example, although in the U.K. (as in Sweden), Mrs. Sutton was not, on the basis of national law, entitled to payment of interest on arrears in benefits, interest

\(^{329}\) *Ibid*, at paragraph 25.  
\(^{330}\) *Ibid*, at paragraph 27.
would have been awarded to a claimant in Germany at a standard rate of 4% in respect of 30-day periods between the date on which the benefit is due and the date of payment. 331

Yet despite the ECJ's reluctance to develop the principle of effective judicial protection to include the right to interest on payment of arrears of benefits in the event of a breach of Community law as a general component of the right to adequate compensation, the Court has sought to ensure that Mrs. Sutton's Community rights are, in practice, effectively protected before the national courts. The Court did so by considering the alternative claim, namely that she might be entitled to claim damages on the basis of the principle of State liability, resulting from the U.K.'s failure to implement Directive 79/7 correctly into national law. The damages claimed resulted from the erosion of the real value of benefits due to the delay in the payment of the social security benefit. The ECJ held that in order to establish a right to damages, Mrs. Sutton had to satisfy the conditions of liability laid down in its case-law. 332 The payment of damages, however, is a matter for the national court to decide in accordance with national law provided the latter complies with the principles of comparability and sufficient enforceability. 333

Thus, although the principle of effective judicial protection guarantees individuals a right to an effective remedy by virtue of the principle of State liability, 334 the Court's ruling in Sutton is nevertheless arguably another example of its shift away from "third generation" solutions in the field of national law.

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331 On the other hand, following an argument submitted by the Swedish Government, Advocate General Léger warned against "reverse discrimination" in some Member States at least. He argued that if Mrs. Sutton was successful in her claim based on Community law for payment of interest on arrears of benefits, she would be in a more favourable position that claimants who based their claims for arrears in social security benefits upon national law where no such right to an award of interest is provided for: Opinion of Advocate General Léger, Case C-66/95, R. v. Secretary of State for Social Security, ex parte Eunice Sutton, op.cit., at p. 2179.

332 Case C-66/95, R. v. Secretary of State for Social Security, ex parte Eunice Sutton, op.cit., at paragraph 32.

333 Ibid, at paragraph 33 and 34.

334 See assessment of this approach by Advocate General Jacobs in Case C-188/95, Fantask, op.cit., at p. 502.
procedural rules to a more restricted “second generation” approach. It is submitted that the shift in the ECJ’s approach in Case C-338/91, Steenhorst-Neerings in relation to national time-limits in 1991 has proved to be more than an isolated case limited to such procedural issues. Curtin argues that:

“It is axiomatic that a constant increase in the effectiveness of the Community rules through improved systems of supervision and legal remedies, will make States more acutely aware of their surrender of sovereignty and more anxious to remove entire areas of the law from the reach of the Court’s tentacles.”

Curtin tentatively suggested that rulings such as Steenhorst-Neerings reveal on the part of the Court:

“...a nuanced strategy designed in some way to appease the impression that the sovereignty of States has been surrendered in entirely limited fields.”

Thus, she envisaged in 1994 (correctly) that the ECJ would redraw the dividing line between cases which fall within the “hard core” of Community law such as Treaty provisions and directives to which the “requirement of effective judicial protection of rights created under Community law” would be applied in full, in order to maintain the “intensity of legal integration,” and those cases relating to matters which fall outside the domain of the Court and squarely into that of the Member States. It is the latter which will be subject to national laws subject to a minimum Community standard of protection provided by the principles of sufficient enforceability and comparability.

335 See earlier discussion.
337 Discussed earlier in this Chapter.
339 Case C-338/91, Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel Ambachten en Huisvrouwen, op.cit
340 Curtin, op.cit.

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It has been argued that this approach conforms with the principle of subsidiarity.\textsuperscript{341} The latter was first introduced into the EC Treaty by the Treaty on European Union\textsuperscript{342} and is embodied in ex-Article 3(b)(2) EC (now Article 5) which provides that:

“In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”

Thus, by analogy, it follows that in areas such as national procedural rules and remedies, which do not fall within the exclusive competence of the Community, the Court has allowed the national courts to decide which procedural rules and remedies should be applicable, subject to the general application of the principle of effective judicial protection and its characteristics. The application of the latter principle arguably ensures that individuals’ Community rights are “effectively” protected even if this means something short of “full” effectiveness. At the same time, the ECJ is arguably encouraging the use of the principle of State liability as an alternative means of ensuring the effective judicial protection of individuals’ Community rights.\textsuperscript{343}

\textsuperscript{341} For a general discussion on subsidiarity, see D'Sa, R., \textit{European Community Law and Civil Remedies in England and Wales}, London: Sweet and Maxwell, 1994 at pp. 72 - 77. See now also Protocol (No.2) of the Amsterdam Treaty which is intended to define precisely the criteria for the application of the principles of “subsidiarity” and “proportionality” by all the Community institutions.

\textsuperscript{342} As inserted by Article G (5) TEU (now Article 8 (5) TEU).

\textsuperscript{343} See discussion below. The principle of State liability is discussed further in Chapter 5.
3.5.3. Adequate compensation and the principle of comparability

It is submitted that principle of adequate compensation was also clarified further by the ECJ in Case C-180/95, *Draehmpaehl*. In this case, the plaintiff, Mr. Draehmpaehl, brought an action for compensation against Urania Immobilienservice, a private company for breach of Directive 76/207. The plaintiff alleged that he had been discriminated against by the company when they failed to reply to his application for the position of female assistant in the sales management department. German law permits an employer to discriminate against workers on the grounds of sex where the post can only be performed by workers of a particular sex. According to German law, in the event of a breach of Directive 76/207, an applicant who has been discriminated against may apply for financial compensation not exceeding three months' earnings. Furthermore, where a number of persons has been discriminated against, German law limits the payment of financial compensation to six months' earnings. Where a single recruitment procedure is adopted with the aim of filling more than one post, a maximum of 12 months' earnings may be claimed. No such limits are set in respect of compensation for breach of domestic civil law provisions or domestic labour law. The national court referred the case to the ECJ for a ruling on the compatibility of these national procedural rules with Community law.

Advocate General Léger argued, *inter alia*, that the principle of adequate compensation first laid down in *Von Colson* and developed further in *Marshall (No. 2)* which established that damage arising from discrimination must be made in full applied in this case and rendered the maximum ceiling on compensation available in the event of a breach unlawful. He argued that if this was not the

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case, the Court would be required to adapt the rule to different discriminatory situations.\textsuperscript{346} He acknowledged that the extent of the damage suffered by workers may differ according to the type of discrimination suffered, but argued that it was for the national court to assess the damage suffered and to order the employer to make reparation for the breach in accordance with national law.\textsuperscript{347} In his view, this answer would not differ according to the level of qualifications of the candidate, since the discrimination sustained was on the basis of gender and not on the basis of qualifications.\textsuperscript{348} Moreover, and in the alternative, he argued that since there were no ceilings applicable in actions for damages under comparable national rules, the national law at issue would be in breach of principle of comparability as laid down in Case 68/88, \textit{Commission v. Greece}.\textsuperscript{349}

The ECJ did not follow the reasoning of the Advocate General in its entirety, but also based its rulings on principles laid down in \textit{Von Colson}. It reiterated that Article 6 of Directive 76/207 imposes upon the Member States an obligation to:

"...adopt measures which are sufficiently effective for achieving the aim of the Directive and to ensure that those measures may be effectively relied on before the national courts by the persons concerned."\textsuperscript{350}

Furthermore:

"...if a Member State chooses to penalize breach of the prohibition of discrimination by the award of compensation, that compensation must be such as to guarantee \textit{real and effective judicial protection, have a real deterrent effect on the employer and must in any event be adequate in relation to the damage}

\textsuperscript{346} Opinion of Advocate General Léger in Case C-180/95, \textit{Nils Draehmpaehl v. Urania Immobilienservice OHG}, op.cit., at p. 2209.
\textsuperscript{347} \textit{Ibid}, at pp. 2209 - 2210.
\textsuperscript{348} \textit{Ibid}, at pp. 2205 - 2206.
\textsuperscript{350} Case C-180/95, \textit{Nils Draehmpaehl v. Urania Immobilienservice OHG}, op.cit. at paragraph 24.
sustained. Purely nominal compensation would not satisfy the requirements of an effective transposition of the Directive. 351

The ECJ made no reference to its decision in Marshall (No. 2) (which concerned an action for discriminatory dismissal), but held that the maximum limit of 3 months' salary did not satisfy the above requirements since it did not allow for adequate compensation in relation to the damage sustained. 352

Drawing upon its decision in Case 68/88, Commission v. Greece, 353 as suggested by the Advocate General, the ECJ also held that since national law does not impose a similar ceiling in respect of other domestic provisions of civil or labour law it was in breach of Community law. The Court held that:

"In choosing the appropriate solution for guaranteeing that the objective of the Directive is attained, the Member States must ensure that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of domestic law of a similar nature and importance." 354

This is arguably the first time that the ECJ has applied the principle of comparability in the context of a breach of Directive 76/207. In doing so, it is of interest that it derived the legal basis of this principle from Article 5 (now Article 10) of the Treaty. In Case 68/88, Commission v. Greece, the ECJ had held that:

"It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regional and administrative provisions, Article 5 (now Article 10) of the

352 Ibid, at paragraph 27.
354 Case C-180/95, Nils Draehmpaehl v. Urania Immobilienservice OHG, op.cit. at paragraph 29.
Treaty requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law."\(^{355}\)

Further:

“For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive."\(^{356}\)

It is submitted that the above requirement, drawn from the ECJ’s decision in Case 68/88, *Commission v. Greece*, and which is expressly based upon Article 5 (now Article 10) of the Treaty, is remarkably similar to the principle of comparability laid down in *Rewe* and *Comet*. However, it is further submitted that the ECJ drew upon its ruling in *Commission v. Greece*, instead of its formula laid down in *Rewe* and *Comet*, for the following reasons. First, a closer examination of the case-law will reveal that the principles of comparability and sufficient enforceability laid down in *Rewe* and *Comet* apply: a) in the absence of harmonizing legislation and b) to effectively protect directly effective Community rights. In *Draehmpaeohl*, although not expressly referred to by the Court,\(^{357}\) the case involved an action brought by an individual who was seeking to rely on Article 6 of Directive 76/207 which has a limited harmonizing effect in respect of the available remedies in the Member States against a private

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\(^{356}\) Ibid, at paragraph 24.

\(^{357}\) Note that in *Marshall (No.2)*, the ECJ held that the combined provisions of Article 5 and Article 6 of Directive 76/207 granted an individual a right to invoke the directive vertically irrespective of the fact that Member States have several options as to the sanctions that they may chose to adopt to give effect to the directive. It is unclear as to whether the same interpretation may be granted to Article 6 in proceedings brought against another individual in the context of a discriminatory recruitment procedure: Case C-271/91, *Marshall v. Southampton and South West Hampshire Area Health Authority (Marshall No.2)*, op.cit., at paragraphs 33 - 38.
company. The ECJ has consistently held that directives do not have horizontal direct effect. Thus, it follows that the principles of comparability and sufficient enforceability could not be applied by the national court. However, by relying on the principle of comparability laid down in *Commission v. Greece* which is also based upon Article 5 (now Article 10) of the Treaty, it is implicit that the national courts were, as a result of the ruling, required to interpret national law in light of the Court's interpretation of Community law.\textsuperscript{358} It is arguable that the ECJ has strengthened the principle of effective judicial protection in respect of actions for breach of Directive 76/207 by drawing upon analogous developments of characteristics of the principle of effective judicial protection based upon Article 5 (now Article 10) of the Treaty. Member States are now under an obligation to ensure the sanctions introduced to transpose Article 6 of Directive 76/207 are effective and comparable to those which apply to breach of national provisions.

Moreover, despite the ECJ's apparent preference in *Sutton* for creating a *lex specialis* in respect of the remedies available for breach of Directive 76/207, its reasoning in *Draehmpaehl* suggests that the Court is, at the same time, seeking to maintain some coherence in the development of the principle of effective judicial protection. It is submitted that where individuals seek to rely on Community rights, whether such rights are directly effective or not, the national court is under an obligation to apply national remedies in the same manner as those applicable to actions brought on the basis of domestic law.

Having established that a maximum ceiling on the payment of compensation in the event of a discriminatory recruitment procedure did not fulfil the adequacy requirement laid down in *Von Colson* or the comparability requirement laid down in *Commission v. Greece*, the ECJ went on to consider whether this answer would differ in relation to the level of qualifications of the candidates.

\textsuperscript{358} This interpretative obligation imposed on the national court is referred to as the concept of indirect effect. The relationship between the principle of effective judicial protection and the concept of indirect effect is discussed further in Chapter 4.
The ECJ distinguished between two different situations: first, where a candidate would not have been offered the job because of the existence of another candidate with superior qualifications even if there was no discrimination, and second, where a candidate would have been offered the post in the absence of any discrimination. The Court held that the damage sustained by the victim of discrimination would differ in each case. In the former case, the damage sustained would only amount to a failure to consider the application, whereas in the latter case, the damage sustained would be greater and amount to the salary that would have been obtained, but for the discriminatory recruitment process.

Focussing upon whether the level of compensation would be *adequate* in relation to the damage sustained by the victim of discrimination, the Court held that in respect of the former situation, namely failure to consider the application, the national court could legitimately impose a maximum limit upon the compensation available. However, in respect of the latter, (namely the loss of the job), the Court held that no ceiling could be imposed on the amount of compensation available unless the employer could prove that the candidate would not have been employed even if there had been no discrimination.

The ECJ adopted the same approach in determining the compatibility of the maximum limit of the aggregate of six months' salary as compensation where more than one applicant has been discriminated against with Community law. It held that such a ceiling is prohibited by Article 6 of Directive 76/207 since it may first lead to the award of a reduced level of compensation which may have the effect of dissuading victims of discrimination from asserting their Community rights. The ECJ emphasized that this would be contrary to the requirement of:

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359 Case C-180/95, *Nils Draehmpaehl v. Urania Immobilienservice OHG*, op.cit. at paragraph 31.
"...real and effective judicial protection and would have no really dissuasive effect on the employer, as required by the Directive."\textsuperscript{360}

Furthermore, no such limits are imposed on claims for compensation brought in the event of a breach of other domestic (civil law) provisions or domestic employment legislation which conflicts with the requirement:

"...the procedures and conditions governing a right to reparation based on Community law must not be less favourable than those laid down by comparable national rules."\textsuperscript{361}

The importance of the ECJ’s decision in \textit{Draehmpaehl} is therefore, \textit{inter alia}, that it clarifies the notion of adequacy laid down in \textit{Van Colson} in respect of a breach of Directive 76/207 resulting from a discriminatory recruitment procedure as opposed to discriminatory dismissal. The ruling also suggests that the principle of adequate compensation does not automatically render any statutory limit on the amount of compensation available unlawful (as may have been thought following the ECJ’s decision in \textit{Marshall (No.2)}). It has been argued that this will depend upon the facts of the case and the damage actually sustained.\textsuperscript{362}

3.6. Right of access to an effective judicial remedy

It is submitted that in Case 222/84, \textit{Johnston v. Chief Constable of R.U.C.},\textsuperscript{363} the ECJ expanded the right to an effective remedy laid down in \textit{Von Colson} to include the right of \textit{access} to an effective judicial remedy. This arguably

\textsuperscript{360}\textit{Ibid}, at paragraph 40.
\textsuperscript{361}\textit{Ibid}, at paragraph 42.
amounts to a further manifestation of the principle of effective judicial protection which is analysed below.

Mrs. Johnston had been employed on a part-time basis by the Royal Ulster Constabulary (R.U.C.) since March 1974. In November 1974, she was recruited to the full-time Reserve on a three year renewable contract. In 1980, the Chief Constable of the R.U.C. adopted a new policy in response to intensified conflict in Northern Ireland which required all male officers to be trained in the handling and use of fire-arms. Female officers were not permitted to receive training or to be issued with fire-arms for reasons of national security. As a result of this new policy, the Chief Constable decided from 1980 onwards to employ women on a full-time basis for duties which could only be performed by women. Since there were only a limited number of positions which satisfied this criteria, the Chief Constable refused to renew Johnston’s contract on a full-time basis when her contract came up for renewal, and engaged her in part-time employment only.

Johnston challenged the decision of the Chief Constable before an Industrial Tribunal on the basis that it was in breach of both the Equal Treatment Directive and the national implementing legislation, namely, the Sex Discrimination Order (N.I.) 1976. Before the first hearing, the Secretary of State produced a certificate in accordance with Article 53 of the Sex Discrimination (N.I.) Order 1976. The latter provided that an act contravening the prohibition of sex discrimination in employment matters was not unlawful if it was done “for the purpose of safeguarding national security or of protecting safety or public order.” Furthermore, a certificate signed by the Secretary of State and certifying that an act was done for such purposes amounted to conclusive evidence that it was done for such purposes. Since the decision of the Chief Constable was not open to judicial review, Mrs. Johnston argued before the Industrial Tribunal that the national procedural rule contained in Article 53 of the Sex Discrimination (N.I.) Order 1976 deprived her of a judicial remedy against the decision of the Chief Constable and that this was allegedly in breach of Article 6 of the Directive
It is submitted that such a breach was also arguably an infringement of the principle of effective judicial protection. The matter was referred by the Industrial Tribunal to the ECJ.\footnote{The Industrial Tribunal deferred drafting the questions. An appeal was lodged by the Chief Constable against this decision to refer, but was dismissed by the Lord Chief Justice of Northern Ireland. The Chief Constable appealed to the Court of Appeal in Northern Ireland. That appeal was adjourned and the substance of the case was re-argued before the Industrial Tribunal. The Industrial Tribunal referred the matter to the ECJ and included additional questions based on new arguments derived from Community law introduced on the part of the Chief Constable. The appeal before the Court of Appeal of Northern Ireland was subsequently dismissed. Arnull is highly critical of the length of time which passed between the Industrial Tribunal’s initial decision to refer and the date on which the reference was actually made which arguably further impaired the plaintiff’s right to effective judicial protection: Arnull, A., “Social Policy: The Beat Goes On” (1987) 12 E.L.Rev. 56 at p. 61.}

In essence, the ECJ was required to rule, \textit{inter alia}, on whether a national procedural rule could deprive individuals of the right of access to an effective judicial remedy in the event of a breach of their Community rights enshrined in Article 6 of Directive 76/207. In \textit{Von Colson}, although a remedy had been available under national law in the event of a breach, it was held not to be sufficiently “effective” to ensure the aim of the directive and the full effectiveness of the principle of equal treatment. In other words, it was the \textit{nature} of the sanction available by virtue of national law purporting to implement Article 6 of Directive 76/207 which was at issue. However, in \textit{Johnston}, the Court was required to rule on whether or not Mrs. Johnston should have \textit{access} to a judicial remedy in the event of an alleged breach of the Community rights conferred on her by Directive 76/207. National law deprived her of access to a legal remedy \textit{per se} thus preventing her from effectively protecting her Community rights before a national court.

In his Opinion, the Advocate General Darmon drew heavily on the ECJ’s ruling in \textit{Von Colson}. He argued that the Court had recognized the right to recourse before the national courts to challenge any infringement of the rights granted by the Directive. He further emphasized that where national law compromises the effectiveness of an obligation arising under a Directive, the Member State is in
breach of Article 5 EC (now Article 10) and its duty to take all the appropriate measures, whether general or particular, to ensure the fulfilment of their obligations under Community law. This included the duty to interpret and apply the legislation in conformity with the requirements of Community law. In applying this reasoning to Johnston, Advocate General Darmon deduced that a national court which holds itself to be bound by a national law which excludes all judicial review of the implementation of Community legislation is in breach of ex-Article 5 of the Treaty as well as the Equal Treatment Directive. Furthermore, he asserted that the right to judicial determination is a fundamental principle inherent in the rule of law. It follows therefore that a provision of national law which is purported to be based on considerations of public order and which prevents the possibility of judicial review is incompatible with the Community legal order.

In its ruling, the ECJ first drew upon its interpretation of Article 6 of Directive 76/207 laid down in Von Colson in which it held that the provision imposes an obligation upon Member States to:

"...take the necessary measures which are sufficiently effective to achieve the aim of the directive and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned."365

The Court went on to state that:

"The requirement of judicial control stipulated by the article reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950.366 As the European Parliament, Council and Commission

365 Case 222/84, Johnston v. Chief Constable R.U.C., op.cit, at paragraph 17.
366 Article 6 of the European Convention of Human Rights provides for the right to a fair trial whilst Article 13 provides for the right to an effective national remedy.
recognized in their Joint Declaration of 5 April 1977 and as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law.\textsuperscript{367}

It thus concluded that:

"By virtue of Article 6 of the Directive No 76/207, interpreted in the light of the general principle stated above, all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women laid down in the directive. It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the directive provides."\textsuperscript{368}

The above conclusions may be regarded as a further characteristic of the principle of effective judicial protection. In applying the principle to the facts of the case, the Court ruled that:

"A provision which, like Article 53(2) of the Sex Discrimination Order, requires a certificate such as the one in question in the present case to be treated as conclusive evidence that the conditions for derogating from the principle of equal treatment are fulfilled allows the competent authority to deprive an individual of the possibility of asserting by judicial process the rights conferred by the directive. Such a provision is therefore contrary to the principle of effective judicial control laid down in Article 6 of the directive."\textsuperscript{369}

It is of interest that in its ruling, the Court chose not to guarantee Mrs. Johnston her right to effective judicial protection by interpreting Article 6 of Directive "Case 222/84, Johnston v. Chief Constable R..U.C., op.cit., at paragraph 18. Emphasis added.\textsuperscript{367} Ibid, at paragraph 19.\textsuperscript{368} Ibid, at paragraph 20.\textsuperscript{369}
76/207 expressly in light of the principle of effectiveness. Instead, it confirmed that the right of access to an effective remedy contained in this provision is based on a general principle of Community law which is derived from the constitutional traditions of all the Member States and is also incorporated in the European Convention on Human Rights (E.C.H.R.). Article 6 of Directive 76/207 is simply a reflection of this right in legislative form. The fact that the ECJ drew upon the constitutional traditions of all the Member States and the E.C.H.R. arguably suggests that it was seeking a more tangible legal basis for this characteristic of the principle of effective judicial protection.\textsuperscript{370} Furthermore, it arguably indicates that the right of access to an effective judicial remedy is not confined to breaches of Directive 76/207.\textsuperscript{371} Indeed, this was subsequently confirmed by the Court in Case 222/87, \textit{Heylens} \textsuperscript{372} in which the Court extended the right of access to justice in the event of a breach of Article 48 (now Article 39) of the Treaty.

The right of \textit{access} to an effective remedy was confirmed and extended in Case C-185/97, \textit{Coote}.\textsuperscript{373} In this case, Ms. Coote brought a claim against her former (private) employer, Granada Hospitality Ltd, for breach of the national legislation purporting to implement the Equal Treatment Directive. During her employment, she had brought a claim for sex discrimination against her employer, which was settled. Following the end of the employment relationship, Ms. Coote found difficulty in finding work and claimed that this was caused or contributed to by her former employer's refusal to provide her with a reference. She argued that this amounted to a retaliatory measure for bringing a claim of sex discrimination against the company during her employment. The Industrial Tribunal held that, regrettably, the national legislation at issue was to be interpreted as prohibiting retaliatory measures whose prejudicial effect appears

\textsuperscript{370} See further discussion in Chapter 1.
during the employment relationship only; it could not be applied once the contract of employment had ended. This had the effect of leaving Ms. Coote without a remedy. On appeal, the Employment Appeal Tribunal was uncertain as to how it should interpret the national legislation in light of Directive 76/207 and referred the matter to the ECJ.

The ECJ confirmed first that directives do not produce horizontal direct effects, but emphasized that national courts are under an obligation to interpret national law in conformity with Community law. This arguably confirms that Article 6 of Directive 76/207 only has direct effect in conjunction with Article 5 of the same norm and thus only applies in the context of discriminatory dismissal.

The Court recalled that on the basis of its interpretation of Article 6 of Directive 76/207 in Von Colson, Member States are required to take all the necessary measures to achieve the aim of the directive and “must ensure that the rights thus conferred can be effectively relied upon before the national courts by the persons concerned.” It reiterated that, in accordance with its judgment in Johnston, the requirement laid down by that Article, namely that recourse must be available to the courts, reflects a general principle of law which underlies the constitutional traditions common to the Member States and which is also enshrined in Article 6 of the E.C.H.R. It further asserted that the principle of

\[\text{\textsuperscript{374} Ibid, at paragraphs 17 - 18. The relationship between the principle of effective judicial protection and the prohibition on the horizontal direct effect of directives is discussed further in Chapter 2.}\]

\[\text{\textsuperscript{375} Article 5 of Directive 76/207 requires Member States to introduce all the necessary measures to ensure that the principle of equal treatment between men and women applies to conditions governing dismissal.}\]

\[\text{\textsuperscript{376} Article 6 of Directive 76/207 states that: Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.}\]

\[\text{\textsuperscript{377} Case C-185/97, Belinda Jane Coote v. Granada Hospitality Ltd, op.cit., at paragraph 20.}\]

\[\text{\textsuperscript{378} Ibid, at paragraph 21.}\]
equal treatment is one of the fundamental human rights which it is under a duty to protect. On this basis, the Court held that:

"The principle of effective judicial control laid down in Article 6 of the Directive would be deprived of an essential part of its effectiveness if the protection which it provides did not cover measures which, as in the main proceedings in this case, an employer might take as a reaction to legal proceedings brought by an employee with the aim of enforcing compliance with the principle of equal treatment. Fear of such measures, where no legal remedy is available against them, might deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardize implementation of the aim pursued by the Directive."  

The ECJ dismissed the argument of the U.K. Government that it had introduced sufficient measures in accordance with Article 7 of Directive 76/207 designed to protect workers against retaliatory measures pursued by the employer solely in cases of dismissal. The Court held that this would be contrary to the objective of the Directive, namely real equality of opportunity for men and women and to the "fundamental nature of the right to effective judicial protection" since these are not the only measures which may deter a worker from making use of the right to judicial protection. An employee may be equally deterred by measures such as those taken in the present case which are a reaction to proceedings brought against an employer and are intended to obstruct the dismissed employee's attempts to find new employment. This arguably illustrates that the dissuasive

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380 Ibid, at paragraph 24.
381 Article 7 of Directive 76/207 provides that Member States are to: "take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment."
effect of a remedy is also an element of the principle of effective judicial protection.

The Court clearly indicated that the full effectiveness of Community law may only be secured in these circumstances by ensuring that individuals' have the right to effective judicial protection in the form of an effective remedy which is also available after the employment relationship has ended. Ms. Coote would be deprived of her fundamental right to equal treatment if her ex-employer could refuse to supply her with a reference in response to her claim of sex discrimination. Moreover, this would also deter other workers from bringing such claims, thus undermining the effectiveness of Community law.

3.7. Duty to state reasons

It is submitted that the Court expanded the effectiveness of the Community system of enforcement in Case 222/87, *Heylens* by introducing an additional characteristic of the principle of effective judicial protection, namely the right for an individual to obtain a statement of reasons for a decision taken by a national authority which is allegedly in breach of directly effective provisions of Community law.

Heylens, a Belgian national, was working as a football trainer in France. The French authorities refused to recognize his Belgian football trainer's diploma as being equivalent to a diploma issued by the host State and ordered him to refrain from engaging in any tuition for gain in France. Heylens refused to comply with this request and criminal proceedings were brought against him and the management of his football club for breach of French national law. The

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384 Article 43 of Law 84-610 of 16 July 1984 on the organization and promotion of physical and sporting activities and Article 259 of the French Criminal Code with regard to the wrongful assumption of titles. Criminal sanctions could be imposed on any persons acting in breach of these provisions.
national criminal court stayed proceedings and referred the matter to the ECJ for a preliminary ruling. It requested the ECJ to rule on whether Articles 48 to 51 (now Articles 39 to 42) of the Treaty required the French authorities to state the reasons upon which they had based their earlier decision and to provide a specific legal remedy against such a decision.

In its ruling, the ECJ held that:

"Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right. As the Court held in its judgment in...Johnston..., that requirement reflects a general principle of Community law which underlies the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."  

The Court continued:

"Effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons. But where, as in this case, it is more particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on Community workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full

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385 The issue was subsequently reconsidered by the French authorities and a recommendation made that the Belgian diploma be recognized as equivalent. The Minister for Youth and Sport confirmed the recommendation. However, since the decision took effect \textit{ex nunc} (from the date of the judgment and not retroactively), it had no effect on the criminal proceedings in course.

knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request." 387

However, the Court went on to limit this right. It held that:

"...the existence of a judicial remedy and the duty to state reasons, are however limited only to final decisions refusing to recognize equivalence and do not extend to opinions and other measures occurring in the preparation and investigation stage." 388

The Court's ruling in Heylens arguably extends the scope of the right to an effective remedy to include the duty to state reasons. It is submitted that the Court recognized, in accordance with the principle of effective judicial protection, that individuals must be able to defend their Community rights under the best possible conditions. This includes having the opportunity to decide, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts.

3.8. Right to interim relief

It is submitted that in Case C-213/89, R v. Secretary of State for Transport, ex parte, Factortame Ltd and Others (hereinafter referred to as Factortame (No.1)), 389 the ECJ developed another characteristic of the principle of effective judicial protection, namely the right to interim protection of (directly effective) Community rights. The Court placed an obligation on the national courts to

387 Ibid, at paragraph 15.
388 Ibid, at paragraph 16.
provide interim relief for putative directly effective rights and to disapply any conflicting national rule pending a final determination on the interpretation of such rights by the ECJ. The Court expressly based this characteristic of the principle of effective judicial protection upon Article 5 (now Article 10) of the Treaty and the principle of effectiveness.

In this case, the U.K. Government introduced the Merchant Shipping Act 1988 which amended national legislation governing the registration of fishing vessels in the U.K. It marked an attempt to eliminate the practice of "quota-hopping." The Act introduced new conditions subjecting owners and/or shareholders of such vessels to nationality and residence requirements. In addition, the Act stated that such vessels must be operated and controlled from the U.K. The 95 fishing vessels of the appellants failed to satisfy one or more of the conditions and therefore could not be entered on the new register. Consequently, from the 1 April 1989, these fishing vessels could no longer operate. The appellants sought judicial review of the Act alleging that it was in breach of Community law.

The Divisional Court made a reference to the ECJ for a ruling on the substantive issues, namely an interpretation of the contested Treaty provisions and granted interim relief. The Divisional Court ordered that the new legislation be disapplied pending a final ruling or further order by the court. The Secretary of State appealed against the order. The appeal was upheld by the Court of Appeal. However, on appeal to the House of Lords, the court found a prima facie case for interim relief on the basis that, if it was not granted, the appellants would suffer

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390 This practice occurs where fishing vessels with no genuine economic link with the U.K. benefit from quotas allocated to the U.K. by virtue of the Common Fisheries Policy.

391 It was argued that the Act was in breach of Articles 7, 52, 58 and 221 (now Articles 12, 43, 48 and 294 respectively) of the Treaty and the Spanish Treaty of Accession.

392 The Divisional Court reference to the ECJ for an interpretation on the substantive issues: See Case C-221/89, R. v. Secretary of State for Transport ex parte Factortame Ltd and others (referred to as Factortame (No.2)). In addition, the Commission successfully brought an action against the U.K. by virtue of Article 169 (now Article 226) claiming that the nationality requirement was in breach of EC law. The ECJ granted an order suspending the application of the Act until the necessary amendments had been made by the U.K.: Case 246/89, Commission v. U.K. [1989] ECR 3125.
irreparable damage. However, the House of Lords went on to confirm the ruling of the Court of Appeal maintaining that, as a national court, it was prevented from disapplying an Act of Parliament on a temporary basis and granting interim relief against the Crown by two rules of English law. The first rule, namely the presumption of validity, provides that an Act of Parliament is compatible with Community law and that until such time as national law is declared incompatible, the courts cannot grant interim relief against an Act. The second rule, derived from the common law, states that a court cannot grant interim relief against the Crown.\textsuperscript{393} The appellants, however, argued that in the specific circumstances of the case, the national court was under an obligation to grant interim relief in order to ensure the “effective protection”\textsuperscript{394} of individuals’ rights conferred by the contested directly effective provisions of Community law.

In view of this conflict between national procedural rules and Community law, the House of Lords referred the matter to the ECJ for a preliminary ruling. It asked the Court to determine whether a national court was under a duty or has the power to grant interim relief (and if so, under what conditions) where a national measure operates to automatically deprive an individual of putative rights conferred by Community law, pending a preliminary ruling to assert the existence of such rights. The Court reformulated the two questions posed by the House of Lords to produce a single issue, namely whether a national court which considers that the sole obstacle which precludes it from granting interim relief to protect Community law rights is a rule of national law, must disapply that rule.\textsuperscript{395} The Court answered that question in the affirmative.

For the most part, the Court’s ruling followed the Opinion of Advocate General Tesauro. The Court recalled that directly effective rules of Community law must

\textsuperscript{393} R v. Secretary of State for the Home Department, ex parte Herbage [1986] 3 All E.R. 209 and R v. Licensing Authority, ex parte Smith Kline & French Laboratories Ltd. (Generics (UK) Ltd intervening) (No. 2) [1989] 2 All E.R. 113.

\textsuperscript{394} Case C-213/89, R. v. Secretary of State for Transport ex parte Factoriame Ltd & Others, op. cit., at p.2445.

\textsuperscript{395} Ross, M., “Refining Effective Enjoyment” (1990) 15 E.L.Rev. 476.
be fully and uniformly applied in all Member States from the date of their entry into force and for so long as they continue in force.\textsuperscript{396} Furthermore, in accordance with the principle of supremacy, any national provision which is incompatible with Community law is rendered automatically inapplicable from the date of entry into force of the latter.\textsuperscript{397} Drawing upon the basis of Article 5 (now Article 10) of the Treaty, the ECJ held that national courts are under a duty to ensure the "legal protection" of individuals’ directly effective Community rights.\textsuperscript{398} The Court went on to confirm its ruling in Case 106/77, \textit{Simmenthal}\textsuperscript{399} in which it held that:

\textquotedblleft...any provision of a national legal system and any legislative, administrative or judicial practice which might \textit{impair the effectiveness of Community law} by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law.\textsuperscript{400}\textquotedblright

In applying this reasoning to the facts of the case, the ECJ held that:

\textquotedblleft...the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by


\textsuperscript{397} \textit{Ibid}. See also Case 106/77, \textit{Amministrazione delle Finanze dello Stato v. Simmenthal}, \textit{op.cit.}, at paragraph 17. Discussed also in Chapter 2.


\textsuperscript{399} Case 106/77, \textit{Amministrazione delle Finanze dello Stato v. Simmenthal, op.cit.}

\textsuperscript{400} Case C-213/89, \textit{R. v. Secretary of State for Transport ex parte Factortame Ltd & Others, op.cit., at paragraph 20}; Case 106/77, \textit{Amministrazione delle Finanze dello Stato v. Simmenthal, op.cit.} at paragraphs 22 and 23.
Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule."\(^{401}\)

The Court went on to claim that, if this was not the case, the effectiveness of the preliminary ruling procedure laid down in Article 177 (now Article 234) of the Treaty would be impaired.\(^{402}\) In other words, an individual may be deprived of the full effect of a putative directly effective right if a national court is prevented from granting interim relief whilst awaiting a preliminary ruling from the ECJ.

It is submitted that the Court drew upon both Article 5 (now Article 10) of the EC Treaty together with the principle of effectiveness as the legal basis for the introduction of this duty imposed on the national courts to guarantee interim protection of (putative) directly effective rights of Community law.\(^{403}\) This obligation arguably constitutes a new manifestation of the principle of effective judicial protection. The Court sought to ensure that individuals are not deprived of their right to effective judicial protection of their Community rights before the national courts by the application of a national rule which may have caused the applicants irreparable damage pending the final decision of the ECJ on the interpretation of individuals' Community law rights. Indeed, in the absence of interim protection, the final determination of the directly effective rights by the ECJ would have been too late for the applicants to have derived the full effect of the right. As emphasized by Advocate General Tesauro:

"...in such a case, the utility as well as the effectiveness of judicial protection may [have been] lost and there could have been a betrayal of the principle, long

\(^{401}\) Ibid, at paragraph 21.
\(^{402}\) Ibid, at paragraph 22.
\(^{403}\) For further discussion on the legal basis of the principle of effective judicial protection, see Chapter 1.
established in jurisprudence, according to which the need to have recourse to legal proceedings to enforce a right should not occasion damage to the party in the right." 404

He added that:

"...the purpose of interim protection is to achieve that fundamental objective of every legal system, the effectiveness of judicial protection. Interim protection is intended to prevent so far as possible the damage occasioned by the fact that the establishment and the existence of the right are not fully contemporaneous from prejudicing the effectiveness and the very purpose of establishing the right, which was also specifically affirmed by the Court when it linked interim protection to a requirement that, when delivered, the judgment will be fully effective; or to the need to 'preserve the existing position pending a decision on the substance of the case.'" 405

However, the ECJ did not go as far as the Advocate General who stated that:

"...I ...suggest that the Court should expressly link this power and duty of the national court [to grant interim protection of directly effective rights pending the outcome of a preliminary ruling provided certain pre-conditions are met] to the requirement of effective judicial protection which applies in relation to provisions of Community law just as much as it does in relation to provisions of national law." 406

It is regrettable that the Court did not take the opportunity to expressly lay down a general principle of effective judicial protection in Factortame (No.1). However, it is submitted, as suggested by Ross, that this principle is nevertheless

implicit in the ruling. The Court's judgment is based on the principle of cooperation laid down in Article 5 (now Article 10) of the Treaty which, in its view, includes a duty to provide "legal protection" together with the principle of effectiveness. It is arguable that these two concepts provide the legal basis of the principle of effective judicial protection.

It is submitted that the Court may have been influenced by a desire to avoid introducing a general jurisprudential principle which may arguably not have a sound Treaty base and chose instead to lay down key obligations for the national courts which they are under a duty to impose by virtue of Article 5 (now Article 10) of the Treaty. The ruling does nevertheless represent an example of the Court seeking to ensure the full effectiveness of Community law through the effective judicial protection of individuals' Community rights before the national courts.

In subsequent case-law, the Court has arguably increased the scope of the principle of effective judicial protection by extending the circumstances in which a national court is under a duty to grant interim relief. For instance, in Joined Cases C-143/88 and C-92/89, Zuckerfabrik, the Court held that national courts were able (and arguably under an obligation) to grant interim protection where the validity of a Community measure is contested. Subsequently, in Case C-465/93, Atlanta, the ECJ held that the national courts were also able (and arguably subject to an obligation) to grant interim relief in the form of positive measures in order to effectively protect individuals' Community rights pending the issue of a preliminary ruling from the ECJ on the validity of a Community measure.

See also Ross, op.cit., at p.478.
3.9. Right to a “new” remedy

It is submitted that the importance of the ECJ’s ruling in *Factortame (No.1)* in relation to the development of the principle of effective judicial protection is not restricted to the introduction of the right to interim protection. It is argued that the ruling also implies that national courts are under a duty to introduce a new remedy in order to effectively protect directly effective Community rights where one does not already exist under national law. This duty to create a new remedy arguably constitutes a characteristic of the principle of effective judicial protection.

In his Opinion, Advocate General Tesauro emphasized that in *Factortame (No.1)*, the duty of the national court to grant interim protection involved the use of an *existing procedure* in order to effectively protect a directly effective Community right.411 However, he did not entirely dismiss the possibility of Community law imposing on the national courts a duty to create a new remedy. He added that even if there was no such remedy available under national law, the national court would still be subject to a specific obligation to grant interim relief, provided the appropriate conditions had been satisfied, otherwise the national procedural system would be in breach of the principle of sufficient enforceability. A breach of this kind would be all the more serious in view of the fact that national remedial law does not provide for a remedy to compensate for damages suffered during the interim period pending the decision to definitively assert the existence of the right. He considered this deficiency to be “in itself a matter for concern in the light of the obligation of national courts to give full effects to the provisions of Community law.”412

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412 Ibid, at p. 2463.
However, Toth\textsuperscript{413} argues that it is clear from the judgments of the Court of Appeal and the House of Lords that the issue was not a question of the national courts using an existing procedure, since they simply did not have jurisdiction to grant interim relief. However, by reformulating the question and by imposing a duty to "disapply" any conflicting national rules, the Court avoided expressly authorizing national courts to "devise" a remedy where one does not exist in national law.

It is generally considered that in \textit{Factortame (No.1)}, the ECJ imposed, at the very least, an obligation upon the national courts to provide interim relief for the protection of Community rights even where they would be unable to do so under national law. This has arguably been confirmed by Advocate General Jacobs in Case C-355/96, \textit{Silhouette}.	extsuperscript{414} He recalled that in \textit{Factortame (No.1)}, an interlocutory injunction was at issue and added that:

"[I]t seems clear that the same [obligation] applies to a final injunction: that remedy also must be ensured by the national court where it is necessary to ensure the \textit{effective protection} of the rights conferred by Community law."	extsuperscript{415}

However, it was not until the ECJ's landmark ruling in Joined Cases C-6/90 & 9/90, \textit{Francovich}\textsuperscript{416} that the ECJ expressly laid down a \textit{Community obligation} upon the national courts to create a new remedy, namely an action for damages for State liability, where such a remedy was unavailable under national law. This would ensure that individuals' Community rights were effectively protected before the national courts. The Court held that an individual has the right to bring an action directly against the State for failure to implement a Community

\textsuperscript{413} Toth, A., "Case-note on Case C-213/89, \textit{R. v. Secretary of State for Transport ex parte Factortame Ltd & Others (No.1)}" (1990) 27 C.M.L.Rev. 573 at p. 586.


\textsuperscript{415} Ibid, at p. 972. Emphasis added.

directive, irrespective of whether or not the provisions of the directive produced direct effects, provided three conditions of liability are satisfied. Moreover, the Court derived the legal basis for its introduction of the principle of State liability from Article 5 (now Article 10) of the Treaty417 and the “full effectiveness...and protection” of individuals’ Community rights418 and declared that the principle is inherent in the system of the Treaty. The ruling represents an important step taken by the Court in the development of the principle of effective judicial protection and narrows the previous gap in judicial protection for individuals created by the inadequacies of the concepts of direct effect and indirect effect.419

The relationship between the principle of State liability and the principle of effective judicial protection is discussed in detail in Chapter 5.

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417 Ibid, at paragraph 36.
418 Ibid, at paragraph 33.
CHAPTER 4: THE RELATIONSHIP BETWEEN THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION AND THE CONCEPT OF "INDIRECT EFFECT"

The quest of the European Court of Justice to secure the effectiveness of Community law through the principle of effective judicial protection is, it is submitted, in a constant state of flux. Having denied directives horizontal direct effect in *Marshall (No.1)*, the Court introduced another means by which individuals could rely on their Community rights before the national courts. The ECJ imposed an obligation on the national courts to interpret national law *purposively* in accordance with Community law.¹ This is known as the concept of "indirect effect" and it arguably shares a common legal basis with other manifestations of the principle of effective judicial protection, namely Article 5 (now Article 10) and Article 189 (3) (now Article 249 (3)) of the EC Treaty together with the principle of effectiveness.²

4.1. Origin of the concept of indirect effect

The so-called concept of indirect effect was laid down for the first time in Case 14/83, *Von Colson*³ and Case 79/83, *Harz*.⁴ In both cases, the plaintiffs sought to rely upon a provision of the Equal Treatment Directive⁵ in order to argue that the level of damages available under the German implementing legislation in the event of a breach was inadequate. On referral to the ECJ, it was held by the

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¹ The ECJ has also adopted a broad interpretation of the State: see, for example, Case C-188/89, *Foster v. British Gas plc* [1990] E.C.R. I-3313.
² See earlier discussion in Chapter 1.
⁵ Article 6 of Council Directive No. 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regard access to employment, vocational training and promotion, and working conditions [1976] O.J. L 39, p. 40 which requires all Member States to: "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 within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities."
Court that the relevant provision was not sufficiently precise and unconditional to produce direct effects, and further, did not require Member States to adopt a specific sanction. Thus, the dilemma facing the Court was how to ensure that the plaintiffs derived the full effect of their substantive right to equal treatment and that the effective judicial protection of individuals' Community rights were not undermined in the absence of direct effect.\(^6\)

The cases of *Von Colson* and *Harz* highlight the gaps in the Community system of enforcement in relation to directives. Article 189(3) (now Article 249(3)) of the Treaty imposes an obligation upon the Member States to implement the objective of a directive, but leaves them a discretion as to how this is to be achieved. If a Member State fails to implement a directive correctly or by the prescribed date, individuals may be deprived of their full Community rights in circumstances in which the concept of direct effect is inapplicable. In this case, although Germany had transposed the directive into national law, the implementing national legislation failed to effectively protect the Community rights conferred on individuals by the Directive by failing to provide an adequate remedy. In the event of discrimination by a prospective employer, German law granted individuals the right to payment of a nominal sum only. Such a remedy could not safeguard their right to equal treatment nor would it deter employers from infringing the principle of equal treatment. Moreover, in *Harz*, the gap in the protection of the plaintiff's right to equal treatment was exacerbated by the fact that directives could not be invoked horizontally, that is against other individuals, such as the defendant company.\(^7\)

Although the Court found that the relevant provision of the directive did not contain a right to a specific sanction, the Court held that, in the light of the purpose of the directive (and arguably the principle of effectiveness), the provision entitles individuals to a remedy which provides real and effective

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\(^6\) The distinction between the "full effect" of Community rights and their "effective judicial protection" is discussed in Chapter 1.

\(^7\) The ECJ's refusal to grant directives horizontal direct effect is discussed further in Chapter 2.
judicial protection and has a real deterrent effect on the employer.\textsuperscript{8} Furthermore, if the remedy provided by the Member State in the event of discrimination is in the form of compensation, that compensation must be adequate in relation to the damage sustained.\textsuperscript{9} The national implementing legislation clearly failed these requirements (which are arguably characteristics of the principle of effective judicial protection).\textsuperscript{10} However, the ECJ was prepared to develop a means by which individuals could derive the above rights in the absence of direct effect and hence ensure that the principle of effective judicial protection was not undermined. The Court recalled the argument submitted by the German Government,\textsuperscript{11} namely that the effective transposition of the directive could be achieved (in relation to sanctions), by applying the general rules of compensation laid down in the German Civil Code. The Court held that this was a matter exclusively for the national courts. However, it went on to establish how the national court could ensure the effective judicial protection of individuals’ Community rights in this case by adopting a purposive interpretation of national law in light of the directive. On the basis of Article 5 EC (now Article 10) in conjunction with Article 189(3) EC (now Article 249) and arguably the principle of effectiveness, the Court devised a way in which both Ms. Von Colson and Ms. Harz could derive their rights from the directive via the national implementing legislation. It held that:

“...the Member States’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 [now Article 10] of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that,
in applying the national law and in particular the provisions of a national law, specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.”

Applying the concept of indirect effect to the facts of the case, the ECJ held that:

“It should...be pointed out to the national court that although Directive No. 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.”

Thus, in this case, the Court concluded that the national courts were under an obligation to interpret national law in order to ensure that the plaintiffs were able to invoke their right to an effective and adequate remedy embodied in Article 6 of Directive 76/207.

The introduction of an obligation on the national courts to adopt a purposive interpretation of national law in conformity with Community law has the effect,

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it is submitted, of expanding the scope of the principle of effective judicial protection so that it can also apply in circumstances beyond those governed by the concept of direct effect. Thus, where national implementing legislation fails to give full effect to a directive, individuals, even in the absence of direct effect, are able to derive their Community rights "indirectly" by virtue of the implementing national law, rather than "directly" by virtue of Community law. In *Harz*, this also meant that an individual was able to rely on the directive as against another individual, thus circumventing the lack of horizontal direct effect of directives. Furthermore, it is submitted that by relying expressly on Article 5 (now Article 10) of the Treaty (in conjunction with Article 189(3) (now Article 249 (3)) of the Treaty), the ECJ has introduced a general interpretative obligation on the national courts. It is submitted that the Court's ruling in *Van Colson* is typical of its increasing reliance on Article 5 (now Article 10) of the Treaty to impose obligations on the national courts in order to secure the effective judicial protection of individuals' Community rights.\(^\text{14}\) Indeed, de Bürca argues that the interpretative obligation represents a continuation of the desire of the ECJ to ensure the effectiveness of Community directives through the involvement of the national courts. In her view, it highlights the strategic role granted to the national courts by the ECJ in the effective enforcement of Community law.\(^\text{15}\) In this respect, it is submitted that the introduction of the concept of indirect effect represents a fundamental development of the principle of effective judicial protection as originally outlined in *Humblet*.\(^\text{16}\)

### 4.2. Scope of the interpretative obligation

It has been consistently argued in this thesis that the principle of effective judicial protection is distinct from the principle of effectiveness in the sense that the

\(^{14}\) The relationship between Article 5 (now Article 10) of the Treaty and the principle of effective judicial protection is discussed in Chapter 1.


application of the former (unlike the latter) does not always guarantee the “full and complete” protection of individuals' Community rights before the national courts. Rather, it seeks to ensure that an “effective” level of protection is provided by the national courts which may be less than “full and complete.” It is submitted that the extent to which the concept of indirect effect provides “effective judicial protection” depends on the scope of the interpretative principle laid down in Von Colson. This has been clarified in the subsequent case-law of the ECJ which is discussed below.

4.2.1. Absence of national implementing legislation

A narrow interpretation of the Court’s judgment in Von Colson and Harz would suggest that the interpretative obligation only applies to national law purporting to implement a directive. Indeed, in Case 152/84, Marshall (No.1), Advocate General Slynn argued that the operative part of the judgment in Von Colson referred solely to legislation adopted in order to implement the contested directive. In his view, it follows that Community law provides that the obligation only arises in relation to legislation adopted to implement a directive or to fulfil a Treaty obligation. However, it is submitted that if this was the case, the effect of confining the duty of the national courts to the interpretation of national legislation purporting to bring national law in conformity with a Community directive would undermine the principle of effective judicial protection.

Such a gap in the application of the principle of effective judicial protection did in fact result from a narrow view of the interpretative obligation in relation to the concept of indirect effect in early cases before the UK national courts. In essence,

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17 Discussed further in Chapter 1.


19 Opinion of Advocate General Slynn in Case 152/84, Marshall v. Southampton Area Health Authority (Marshall No.1), op.cit., at p.732. This case is discussed in more detail in Chapter 2.

20 Ibid, at p. 733.
the national courts refused to “interpret” national law in conformity with a directive where that national law had not been enacted in order to implement the latter. The effect was to deprive individuals’ of the effective judicial protection of their Community rights. It has been argued that this indicated a failure on the part of the national judiciary to use the concept of indirect effect to its full potential to ensure “the effet utile of directives and the protection of individual rights.”

In *Finnegan v. Clowney Youth Training Programme Ltd*, the plaintiff sought to rely on the Equal Treatment Directive to contest her private employer’s retirement policy, which she claimed was discriminatory. The House of Lords refused to follow the ECJ’s ruling in *Von Colson* and to construe the national legislation at issue (which had been enacted after Directive 76/207) in conformity with the latter because, in its view, it had not been implemented to give effect to the Directive. The ruling of the House of Lords arguably illustrates the extent to which the refusal to recognize the horizontal direct effect of directives and the uncertainty surrounding the concept of indirect effect serve to the undermine the principle of effective judicial protection, particularly in relation to cases brought by one private individual against another. It is arguably unsatisfactory that the effectiveness of the principle of effective judicial protection should differ according to the public/private status of the defendant.

It was not until its ruling in Case C-106/89, *Marleasing* (discussed further below) that the ECJ was able to confirm that national courts are under a duty to interpret national law which has been enacted prior to the directive and/or has not been enacted specifically to give effect to the directive in light of the provisions of that Community directive. This clarification by the Court has led to a more constructive approach being adopted by the national courts towards its interpretation of national law in the light of Community Directives.

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21 Arnull, A., “Having your cake and eating it ruled out” (1988) 13 E.L.R. 42 at p.44.
22 *Finnegan v. Clowney Youth Training Ltd* [1990] 2 AC 407.
interpretative obligation. It is submitted that the ECJ in *Marleasing* clearly extended the scope of the original interpretative obligation laid down in *Von Colson* to include national law enacted before the directive and/or where national law has not been adopted specifically to give effect to Community law. It thus increases the ability of individuals to rely on the concept of indirect effect to enforce their Community rights where a Member State has failed to implement a directive correctly or in good time. As a consequence, the judgment, it is submitted, has increased the impact of the principle of effective judicial protection.

It is further submitted that the effectiveness of the interpretative obligation may also depend upon the nature of the national implementing legislation. This point is illustrated by the decision of the Court of Appeal in *Mighell v. Reading, Evans v. Motor Insurers Bureau and White v. White*. The cases (joined on appeal) related to the enforcement of the Second Motor Insurance Directive which requires Member States to establish a compensation fund for the victims of uninsured drivers and “hit and run” accidents. The U.K. Government had implemented the Directive by continuing its practice of concluding a series of agreements between the Motor Insurers’ Bureau (M.I.B.) and the Department of Transport. These took the form of contracts under seal. Having declared that the relevant provisions of the Directive were insufficiently precise to have direct effect, the national court considered using the concept of indirect effect as an alternative means of giving effect to the Directive. However, the national court ruled that the contractual agreements purporting to implement the Second Motor

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24 See, for example, Case C-32/93, *Carole Louise Webb v. EMO Air Cargo (UK) Ltd* [1994] E.C.R. I-3567. However, Craig argues that having generally accepted the obligation imposed by the concept of indirect effect, there now seems to be confusion in the UK courts between the concepts of direct effect and indirect effect and the manner in which they should be applied. He cites, in particular, the judgment of the House of Lords in *Imperial Chemical Industries plc v. Colmer (Inspector of Taxes)* [1997] 3 C.M.L.R. 1204; see further Craig, P., “Directives: Direct Effect, Indirect Effect and the Construction of National Legislation” (1997) 22 E.L.Rev. 519 at pp. 533 - 535.


Insurance Directive could not be categorized as "national law" for the purpose of the concept of indirect effect. It may be deduced the national court in this case would only invoke the interpretative obligation if it considered the nature of the national legislation at issue to be capable of being interpreted in conformity with a Community directive.

It is submitted that the ruling reduces the scope of the concept of indirect effect and ultimately undermines the principle of effective judicial protection. The ruling of the Court of Appeal has the effect of permitting a Member State to avoid enforcement of its Community obligations contained in directives by implementing the latter in the form of a private law contract. However, in practice, the situations in which this might occur are arguably limited. In addition, the national court acknowledged that the plaintiffs may have been able to secure the effective protection of their rights by instigating a claim for damages against the Member State by virtue of the principle of State liability.

4.2.2. Application of general principles of law

The ECJ has long recognized that the general principles of law which are common to the constitutional traditions of the Member States constitute a source of Community law. In the context of the development of the principle of effective judicial protection, it is submitted that the scope of the concept of indirect effect has been developed to conform with general principles of law such as the principles of legal certainty, non-retroactivity and legality in criminal law, which are discussed below.

In Case 80/86, *Kolpinghuis*, the Dutch Public Prosecutor sought to rely on a directive in order to impose criminal liability on Kolpinghuis Nijmegen, a private company, even though the Member State had failed to transpose the Directive by the prescribed date and there was no national implementing legislation in force at the material time. The result sought by the Member State would clearly have deprived the individual company of effective judicial protection and would have been in clear conflict with the principles of legal certainty and non-retroactivity.

The ECJ first ruled that the Member State could not rely upon the concept of *inverse vertical direct effect* to impose an obligation upon an individual where the Member State had failed to implement the directive by the prescribed date. The concept of inverse direct effect applies where a Member State seeks to rely on a directly effective provision of a directive which it has failed to implement in order to impose an obligation upon an individual. The ECJ then addressed the issue of whether or not the interpretative obligation extended so far as to require national courts to interpret national law in the light of an unimplemented directive so as to impose a criminal sanction upon an individual where one did not otherwise exist under national law. In other words, the Court considered whether the concept of indirect effect would apply even where it conflicts with the principles of legal certainty and non-retroactivity.

The ECJ followed the Opinion of Advocate General Mischo and took the opportunity to qualify the interpretative obligation laid down in *Von Colson*. It held that the:

“...obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity. Thus the Court ruled in...Case 14/86, Pretore di Salò v. X...30 that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.”31

It followed that the Dutch authorities were prevented from interpreting the existing Dutch law in conformity with the non-implemented directive where the effect would be to impose a criminal sanction upon Kolpinghuis Nijmegen. Thus, the exercise of a purposive interpretation by the national courts is limited by the principles of legal certainty and non-retroactivity. This arguably supports the contention made earlier that the principle of effective judicial protection is based ultimately upon the rule of law.32

4.2.2.2. Principle of legality in criminal law

The limitation laid down in Kolpinghuis on the scope of the concept of indirect effect was confirmed and extended in Joined Cases C-74 & 129/95, Procura della Repubblica v. X.33 In this case, criminal proceedings had been instigated against X for an alleged breach of an Italian law on the minimum health and safety requirements for work with display screen equipment. This law was intended to implement Directive 90/270.34 The Procura della Repubblica (Office of the Public Prosecutor) and the Pretura Circondariale (District Magistrate’s Court) referred the same questions to the ECJ on the interpretation of the said

31 Case 80/86, Criminal Proceedings against Kolpinghuis Nijmegen BV, op.cit., at paragraph 13.
32 See further discussion in Chapter 1 and 2.
Directive in order to determine whether or not a breach of the national law had taken place which would give rise to criminal penalties. In the event, the ECJ ruled that *Procura della Repubblica* did not constitute a "court or tribunal" capable of utilizing the Article 177 EC (now Article 234) procedure. However, the Court went on to answer the questions which had been referred by the *Pretura Circondariale*. The question facing the Court was whether a national court could interpret national law to comply with an incorrectly transposed Directive where this would result in criminal liability being imposed on individuals.

Advocate General Ruiz-Jarabo Colomer proposed that the solution adopted by the ECJ in *Kolpinghuis* should apply in *Procura della Repubblica v. X*. This would amount to a limit being imposed on the use of indirect effect in accordance with general principles of law to cover a situation where the transposition of the directive into national law is defective. In support of his proposition, he explained that the principle of legal certainty in the field of criminal law takes the form of the principle of legality (*nullum crimen, nulla poena sine lege*). It affords citizens of the Member States the legal certainty that their conduct will lead to criminal liability only if it contravenes a national provision which defines it beforehand as an offence of that kind. The corollary of this principle is that an extensive interpretation to the disadvantage of the defendant is prohibited. Thus:

"The legal basis for the imposition of penal sanctions must thus be clear and unequivocal, that is to say, unambiguous. No doubt a criminal provision also requires interpretation by the courts, but they are not permitted to fill any lacunae in the definition of offences by resorting to an extensive interpretation." 

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35 Fearing that the *Procura della Repubblica*’s referral would be refused, the *Pretura Circondariale* referred the same questions to the ECJ.
36 "No crime without law, no penalty without law."
38 Ibid.
39 Ibid.
He acknowledged that the application of the principle of legality would place a restriction upon the national courts' obligation to adopt a purposive interpretation. He maintained that:

"...the principle of legality in criminal law forms [an] insuperable barrier to the effectiveness of directives and to the need to interpret national law in conformity with them. This does not arise from any imaginary supremacy of national criminal law (which the Member States in question will have to amend when its failure to comply with Community law has been proved), but from compliance with one of the principles common to the constitutional traditions of the Member States, which is at the same time a fundamental right of the citizens of those States and a basic principle of Community law itself."\(^{40}\)

He concluded that:

"The principle of legal certainty, when understood in this way, precludes resorting to a Community directive in order to extend the definition of an offence, to the disadvantage of the accused, to situations different from those which strictly match the definition of the punishable acts given by national criminal law."\(^{41}\)

The ECJ followed the Advocate General's Opinion. It reiterated its ruling in *Kolpinghuis*\(^{42}\) and added that:

"More specifically, in a case such as that in the main proceedings, which concerns the extent of liability in criminal law arising under legislation adopted for the specific purpose of implementing a directive, the principle that a provision of the criminal law may not be applied extensively to the detriment of the

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\(^{41}\) *Ibid.*

\(^{42}\) *Joined Cases C-74 & 129/95, Procura della Repubblica v. X, op.cit.*, at paragraph 24.
defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law. That principle, which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 743 of the Convention for the Protection of Human Rights and Fundamental Freedoms.44

It is submitted that the Court has drawn upon the principle of legality, which is a form of the principle of legal certainty in criminal law, in order to ensure the effective judicial protection granted to individuals under Community law. As emphasized by the Advocate General, the Court has chosen:

"...to consider the principle of legality in criminal law as an inherent limit to the effectiveness of Community directives."45

This may also serve to illustrate the proposition that the principle of effective judicial protection (which is arguably also based upon the rule of law)46 can be distinguished as being separate from the principle of effectiveness, which is wider in scope.47 It is submitted that the Court is unwilling to guarantee the full effectiveness of Community law where this would be contrary to general principles of the Member States which serve to protect the individual in the national legal systems,48 in particular, by providing legal certainty in the context of criminal proceedings. Moreover, the ECJ may be said to have drawn its inspiration for its approach to the principle of effective judicial protection from

43 Article 7 of the E.C.H.R. states that: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."
44 Ibid, at paragraph 25.
46 See earlier discussion in Chapter 1.
47 See discussion in Chapter 1.
the European Convention of Human Rights. In doing so, the Court has, in conformity with the principle of effective judicial protection, restricted its application where the retrospective imposition of criminal liability would, in practice, not only be to the detriment of the individual concerned, but would also benefit the Member State which had failed to implement a directive in good time or correctly.

4.2.3. Expiry of the time-limit for national implementation

It is not yet clear from the case-law of the ECJ as to when the duty placed upon the national court arises to interpret national law in conformity with a Community directive based on Article 5 (now Article 10) and Article 189(3) (now Article 249 (3)) of the Treaty. In view of the fact that Member States have a limited period in which to transpose a directive into national law, it would be conducive to the uniform application of Community law and in the interests of legal certainty of all parties, for the ECJ to indicate at which point in time the duty takes effect.

In Case 80/86, Kolpinghuis, the ECJ indicated that the limitation on the interpretative obligation imposed on the national court, prohibiting it from interpreting pre-existing national law to comply with a non-implemented directive where it would have a detrimental effect on the criminal liability of an individual, would not differ if, at the material time, the date for implementing the directive had not expired.

Some commentators have argued that this means that the interpretative obligation imposed on national courts may arise as soon as the relevant directive

51 See Arnell, op.cit., at p. 45 and de Búrca, op. cit.
is adopted irrespective of whether the time-limit for implementing a directive into national law has expired or not (provided there is no conflict with the principles of legal certainty and non-retroactivity).

However, since Article 189(3) (now Article 249 (3)) of the Treaty grants Member States a discretion as to the implementation of directives into national law within a certain period, there may be a lack of uniformity in the application of Community directives where Member States adopt the directive at different times before the expiry of the date for implementation. Furthermore, if a Member State transposes the provisions of a directive into national law before the expiry of the time-limit, individuals may still be in a position of legal uncertainty as the interpretation of their rights and obligations which may differ according to whether or not the date for implementation has passed.

In the context of direct effect, the ECJ has sought to avoid this problem by ruling in Case 148/78, *Ratti* that the provisions of directives may only produce direct effects following the expiry of the date for implementation. D'Sa argues that the same general principle should apply in the context of indirect effect. It is submitted that this latter approach would be consistent with the development of the principle of effective judicial protection.

### 4.2.4. Imposing obligations upon individuals: horizontal direct effect of directives by the backdoor?

In Case C-106/89, *Marleasing*, the applicant, Marleasing, brought an action against the defendant company, La Comercial claiming that the latter had been incorporated fraudulently by a company called Barviesa. Marleasing was a creditor of Barviesa and contended that the defendant company had been set up

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for the sole purpose of putting its assets beyond the reach of the creditors. On the basis of pre-existing national legislation, the applicant sought, *inter alia*, a declaration as to the nullity of the instrument incorporating the defendant company, on the ground that it was void for lack of lawful cause. In its defence, the defendant company sought to rely on Article 11 of the First Company Directive which provides an exhaustive list of grounds upon which a company may be declared void. The list does not include "lack of lawful cause" as a ground of nullity as relied upon by the applicant and accordingly, the defendant claimed that no declaration of nullity could be made. However, Spain had failed to implement Directive 68/151 at the material time.

Having confirmed in *Marleasing* that the interpretative duty laid down in *Von Colson* on the national courts extends to all national law, whether or not the provisions in question were adopted before or after the directive, the ECJ held that the national court was under a duty to interpret the pre-existing national law in compliance with the directive. The net effect of the ruling was to enable the defendant company to invoke the directive in its defence. In doing so, it could argue that only those grounds for declaring nullity of contract laid down in Article 11 of the Directive could be applied in this case. It followed that the applicant’s claim that the contract was void for “lack of lawful cause” could not be upheld.

It has been consistently argued that the *effect* of the ECJ’s ruling in *Marleasing* was to allow individuals to rely on directives in actions against other individuals. This has led many commentators to argue that the Court’s ruling has introduced

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54 Article 1261 and 1275 of the Spanish Civil Code. Article 1275 states that: "Contracts with no cause or whose cause is unlawful are of no effect. A cause is unlawful where it is contrary to law or morality."

55 First Council Directive 68/151/EEC on the coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [1968] O.J. (I), p. 41.

the horizontal direct effect of directives through the backdoor. However, Stuyck and Wytinck argue, in a more tentative manner, that although the ECJ’s ruling in Marleasing may have the same effect as granting horizontal direct effect to directives, it was probably not the ECJ’s intention to recognize directives as producing horizontal direct effects. Further, they suggest that it is not wise to draw such conclusions “from one isolated ground or even the operative part of the judgment.” Maltby is also sceptical of such assertions and considers it unlikely that the ECJ sought to introduce the horizontal direct effect of directives through the backdoor. He asserts that:

“...while the horizontal direct effect of directives may be desirable as far as the efficacy of EC law is concerned, it is not the law at present, and that the two page judgment of a chamber of the Court of Justice is a slender thread on which to hang such a thesis.”

The situation which emerged in Marleasing may be described as passive horizontal direct effect of directives. In other words, an individual is able to rely on a directive to protect his Community rights, but without imposing any corresponding obligations upon the other party. In Marleasing, by invoking the directive in its defence, the defendant company did not impose an obligation on another party in the sense previously referred to by the Court in Marshall (No.1). The only obligation to be imposed on the plaintiff would be its duty, as a third party, to respect such Community rights. Stuyck and Wytinck argue that the passive horizontal direct effect of directives should be permissible. Thus, an individual should be able to rely on a directive to protect his Community rights derived from the directive provided the directive does not put an obligation on

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57 For a summary of such views, see Maltby, N., “Marleasing: What is all the fuss about?” (1993) 109 L.Q.R. 301.
59 Maltby, op.cit.
the individual against which the directive is invoked. However, it is submitted that granting directives passive horizontal direct effect would not achieve “full and complete” judicial protection for individuals. To permit a directive to be invoked horizontally depending upon the type of obligation laid down in the directive and whether or not an obligation is imposed on an individual still leaves gaps in the Community system of enforcement. The effect of Marleasing interpreted in this manner may extend the boundaries of the concept of indirect effect, but it is insufficient to eliminate the discrepancies in the protection of individuals’ rights (and arguably the principle of effective judicial protection) which have arisen since Marshall (No.1). It is submitted that the principle of effective judicial protection would only be further guaranteed by granting directives full, rather than partial horizontal direct effect.

It is argued that in subsequent case-law and arguably in compliance with the principle of effective judicial protection, the ECJ has not restricted the application of the concept of indirect effect to a Marleasing type situation. For example, in Faccini Dori, the plaintiff sought to invoke her right to cancel a contract concluded with the defendant company away from its business premises as contained in Directive 85/577. In the absence of direct effect, the Court held that the national court would be under an obligation to interpret national law in the light of the content of the Directive. This would result in an obligation being imposed on the defendant trader to allow customers a certain period of time in which they may cancel their contracts which he would not have been subject to but for the concept of indirect effect. Similarly, following the ECJ’s ruling in Case C-32/93, Webb, the House of Lords was required to give a broader

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60 Stuyck and Wytinck, op.cit., at p. 214. See also discussion in Chapter 3 on “incidental horizontal direct effect.”
64 Ibid, at paragraph 26.
interpretation of national law than it had initially considered viable in order to conform with the ECJ’s interpretation of Directive 76/207 in that case. The effect of employing the concept of indirect effect in this manner was to render the defendant’s dismissal of the plaintiff on the ground that she was pregnant unlawful. This also led to the imposition of an obligation upon the employer to comply with the principle of equal treatment and not to dismiss an employee on the grounds of pregnancy when she was a replacement for another employee on maternity leave. The employer would not have been required to comply with such an obligation under national law prior to the ECJ’s ruling since national law did not cover such a dismissal. This arguably confirms that the ECJ has sought to maximize the effective judicial protection of individuals’ Community rights in the absence of the horizontal direct effect of directives. Thus, the principle of effective judicial protection requires national courts to interpret national law in conformity with a Community directive even where it results in an obligation being imposed on an individual in proceedings with another individual.

4.2.4.1. A shift in approach?

It has been argued by some commentators that the extent of the national courts’ obligation to adopt a purposive interpretation of national law in conformity with Community law should now be read in the light of the ECJ’s ruling in Case C-168/95, Arcaro. They argue that the Court has subtly limited the scope of the interpretative obligation imposed on the national courts.

In this case, criminal proceedings were instigated by the Public Prosecutor against the defendant proprietor, Mr. Arcaro, for discharging cadmium into a river without prior authorization. This conduct was allegedly in breach of an

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Italian Legislative Decree purporting to implement two Community Directives.\textsuperscript{68}

In his defence, Mr. Arcaro argued that he had complied with the national implementing legislation which made a distinction between new plants and existing plants. He claimed that the requirement to obtain prior authorization to discharge would only apply to his plant (an existing plant) once the appropriate ministerial decrees had been issued in accordance with the Legislative Decree. Such decrees had not been issued at the time that criminal proceedings were commenced. The \textit{Pretore} subsequently referred to the ECJ for a ruling on the correct interpretation of the Community directives in question. The national court was also keen to establish whether the concepts of direct effect or indirect effect could be invoked in order to enforce the provisions of the directives even if this impaired the legal position of Mr. Arcaro.

Both the Advocate General and the ECJ considered that the national implementing legislation failed to fully implement the directive. They also came to the conclusion that the relevant provisions of the directive were not directly effective. With regard to the concept of indirect effect, the ECJ recalled its rulings in \textit{Marleasing}\textsuperscript{69} and \textit{Wagner Miret}\textsuperscript{70} and reiterated that when applying national law, the national courts are, by virtue of Article 5 (now Article 10) and Article 189(3) (now Article 249 (3)) of the Treaty, under a duty to interpret national law as far as possible in the light of the wording and purpose of the directive in order to achieve the result pursued by the directive.\textsuperscript{71} The Court went on to qualify this interpretative obligation. It held that:

\begin{itemize}
  \item \textsuperscript{69} Case C-106/89, \textit{Marleasing SA v. La Comercial Internacional de Alimentación SA} [1990] E.C.R. I-4135. Discussed earlier in this Chapter.
  \item \textsuperscript{71} \textit{Ibid,} at paragraph 41. Discussed further below.
\end{itemize}
"However, that obligation of the national court to refer to the content of the
directive when interpreting the relevant rules of its own national law reaches a
limit where such an interpretation leads to the imposition on an individual of an
obligation laid down by a directive which has not been transposed or, more
especially, where it has the effect of determining or aggravating, on the basis of
the directive and in the absence of a law enacted for its implementation, the
liability in criminal law of persons who act in contravention of that directive’s
provisions."72

It follows that the criminal proceedings brought against Arcaro would fail on the
grounds that the duty of a national court to interpret national law to comply with
Community directives does not arise where it would lead to the imposition of an
obligation contained in a non-implemented directive upon the defendant thus
aggravating his criminal liability. Although the latter section of the paragraph
outlined above corresponds with the Court’s ruling in Kolpinghuis,73 a literal
interpretation of the first section (italicized) appears to call into doubt the very
concept of indirect effect. On this basis, the reasoning of the ECJ in this case has
given rise to some controversy among commentators.

Craig highlights that the concept of indirect effect has been utilized by the
national courts in previous cases to impose an obligation on a private party which
he or she would not have been subject to under national law alone, for example,
Faccini Dori and Webb. In his view:

"[T]his was the point of engaging in the interpretative exercise. If the plaintiff
could have sustained his or her desired case by relying on national law alone
there would have been no need to have recourse to Community law. It was
precisely because such a litigant believed that the provisions of a directive which
had not been implemented would give greater rights than national law alone that

72 Ibid, at paragraph 42.
73 Discussed above.
the issue arose at all. Greater rights for the plaintiff will almost always mean commensurately greater obligations for the defendant.”

On the basis of a literal interpretation of the ECJ’s ruling in Arcaro, Craig contends that a national court will now need to determine whether or not the exercise of purposive interpretation would result in the imposition of an obligation on an individual laid down by a directive which had not been properly transposed into national law. If so, the concept of indirect effect does not operate. However, if there is no issue of imposing an obligation on the defendant, then the expanded version of the concept of indirect effect set out by the ECJ in Marleasing will apply. He suggests that many cases may therefore fall at the first hurdle such as the ECJ’s ruling in Case C-32/93, Webb discussed earlier. He suggests that in the light of Arcaro, an interpretative obligation would no longer be operative in this kind of case.

Alternatively, it could be argued that the Court was not seeking to reverse the concept of indirect effect, which still provides a useful means of circumventing the limits of direct effect. It is suggested that the qualification should be read in the context of the case. The Arcaro decision arose in the context of criminal proceedings brought by a Member State against an individual. The issue of a horizontal direct effect therefore strictly speaking does not arise. The Member State was seeking to impose an obligation upon an individual on the basis of a Community directive which it had failed to implement correctly into national law and which did not produce direct effects. If the Member State’s argument had succeeded, the result would have been to aggravate the criminal liability of the defendant, Mr. Arcaro. It is thus argued that the first paragraph should be read as prohibiting a national court from adopting a purposive interpretation of national law where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been

76 Craig, op.cit., at p. 537.
transposed by the Member State and which confers an advantage on the Member State despite its default. This could be termed as “inverse indirect effect.”

It is further submitted that on this basis, it is possible to distinguish the qualification in Arcaro from the Court’s decisions in Marleasing and in Webb. Both latter cases involved actions in civil proceedings between individuals. In Marleasing, although the plaintiff did find itself in a detrimental position as a result of the purposive interpretation of the directive in favour of the defendant, the effect of the purposive interpretation was not to impose an obligation on the company. The directive was invoked in the defence of the defendant (i.e. as a shield). Furthermore, the Court may have been influenced by the fact that Marleasing may have had access to alternative means of redress under national law. In Webb, the ECJ’s ruling resulted in a legal obligation being imposed on another individual in civil proceedings. It did not confer a benefit on the State. Admittedly, it could be argued that the employer was adversely affected through what was essentially a failure on the part of the Member State to properly implement a directive.

It is thus submitted that the ECJ’s decision in Arcaro has restricted the scope of the interpretative obligation, but only where a Member State is seeking to rely on the concept of indirect effect in order to impose an obligation upon an individual in criminal proceedings. Its application to circumstances where it would, in effect, allow an individual to rely on a directive to impose an obligation on another individual is not affected. This arguably ensures that the principle of effective judicial protection is not undermined.

77 The concept of “inverse direct effect” was dismissed by the Court in Case 80/86, Criminal Proceedings against Kolpinghuis Nijmegen BV [1987] E.C.R. 3969 as a means of permitting a Member State to rely on the directly effective provisions of a non-implemented Directive as against an individual. See earlier discussion.

78 In his Opinion, Advocate General Van Gerven argued that Marleasing SA should not be prevented from pursuing alternative national remedies (unaffected by the directive) which may be more effective. For example, an action could be brought where the company’s interests have been adversely affected by the decision to set aside transfers made in order to defraud creditors, op.cit., at p. 4155.
Although in *Marleasing*, the ECJ extended the application of the principle of effective judicial protection by ruling that the concept of indirect effect must be applied to *pre-existing* national law, this is still arguably insufficient to ensure the "full and complete" judicial protection of individuals' Community rights. The ECJ has consistently held that national courts are under an obligation to interpret national law in conformity with Community law "as far as it is possible to do so." The extent to which an individual may be guaranteed effective judicial protection of their Community rights by relying upon the concept of indirect effect thus depends upon whether the national provision in question is ambiguous and hence the degree to which it may be "interpreted" by the national courts. Does this mean that national courts are required to interpret national law *contra legem* in order to comply with Community law? Maltby argues that the qualification "as far as it is possible" indicates that a genuine interpretation of national law in conformity with a Community directive has its limits, as language can only be stretched so far.\(^79\) He further argues that the scope of the obligation is limited by the fact that in some cases it will be difficult to construe national legislation in conformity with a later directive without creating legal uncertainty.\(^80\) In support of this argument, he refers to the Advocate General Van Gerven's Opinion in *Marleasing* in which it was stated that the national court was under a duty to interpret its national law in conformity with the directive "whenever the provision in question is to any extent open to interpretation."\(^81\)

In Case C-334/92, *Wagner Miret*,\(^82\) the issue as to whether the concept of indirect effect requires a national court to interpret national law *contra legem* arose directly before the ECJ. Mr. Wagner Miret, a senior manager, had been made

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80 Ibid, at p. 305.
redundant by his employer. Following the subsequent insolvency of his ex-employer, he instigated proceedings against the Spanish authorities for payment of arrears in salary and for a severance payment on the basis of a Directive 80/979. The directive requires Member States to establish a National Guarantee Fund which is responsible for the payment of outstanding claims to employees in the event of the insolvency of their employer. The Spanish authorities had established a National Guarantee Fund under national law before the adoption of Directive 80/987. On accession to the Community, Spain did not consider it necessary to amend its existing national law which it considered to be in compliance with the directive.

At first instance, Mr. Wagner Miret’s claim was dismissed on the basis that, as a member of the senior management staff, he fell outside the categories of employees which were entitled to protection by the guarantee fund under national law. However, under Directive 80/987 in conjunction with Directive 87/164, it appeared that the Spanish authorities were only permitted to exclude “domestic servants ‘employed by’ a natural person” from the scope of the directive. The national court therefore stayed proceedings and asked the ECJ to give a preliminary ruling on the correct interpretation of the Directives in question.

Both the Advocate General and the ECJ considered that senior management staff may not be excluded from the scope of Directive 80/987. However, in their view, the relevant provisions of the directive were insufficiently precise and unconditional to be relied upon by Mr. Wagner Miret before the national court. The Court then went on to establish whether the national court was nevertheless under an obligation to interpret the existing national law in conformity with the directive.

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The Commission argued that it was possible to interpret national law in such a way as to conform with the directive and thereby confer the rights granted by the Guarantee Fund to higher management staff. On the other hand, the Advocate General emphasized that although the duty of interpretation lies exclusively with the national court, it might not be possible in this case to rely on the concept of indirect effect in order to enable Mr. Wagner Miret's claims to be met by the Spanish Guarantee Fund. In his view, the directive did not appear to prevent Member States from assigning to a special institution the task of implementing, with regard to certain categories of employee, the guarantee provided for by Directive 80/987. Thus, it would be futile to attempt to interpret national law in conformity with the directive. However, this would be a matter for the national court to determine.

In its judgment, the Court followed the Opinion of Advocate General Lenz. It emphasized that the Directive does not impose a specific obligation on the Member State to set up a single guarantee institution for all categories of employees and consequently to bring higher management staff within the ambit of the guarantee institution established for the other categories of employees. The directive confers on the Member State a discretion as to how to ensure that the guarantee institution ensures the payment of employees' outstanding claims. In its judgment, the Court followed the Opinion of Advocate General Lenz. It emphasized that the Directive does not impose a specific obligation on the Member State to set up a single guarantee institution for all categories of employees and consequently to bring higher management staff within the ambit of the guarantee institution established for the other categories of employees. The directive confers on the Member State a discretion as to how to ensure that the guarantee institution ensures the payment of employees' outstanding claims. In its judgment, the Court followed the Opinion of Advocate General Lenz. It emphasized that the Directive does not impose a specific obligation on the Member State to set up a single guarantee institution for all categories of employees and consequently to bring higher management staff within the ambit of the guarantee institution established for the other categories of employees. The directive confers on the Member State a discretion as to how to ensure that the guarantee institution ensures the payment of employees' outstanding claims.

"...higher management staff cannot rely on the directive in order to request the payment of amounts owing by way of salary from the guarantee institution established for the other categories of employee."86

With regard to the interpretative principle laid down in Von Colson and Marleasing, the Court stated that:

85 Case C-334/92, Teodoro Wagner Miret v. Fondo de Garantia Salarial, op.cit., at paragraph 18.
86 Ibid, at paragraph 19.
"...it should be borne in mind that when it interprets and applies national law, every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned."\textsuperscript{87}

The Court reiterated that national courts were under a duty to interpret all national law in conformity with the wording and purpose of the directive \textit{in so far as it was possible to do so} under national law in accordance with its ruling in \textit{Marleasing}. It then added that:

"The principle of interpretation in conformity with directives must be followed in particular where a national court considers, as in the present case, that the pre-existing provisions of its national law satisfy the requirements of the directives concerned."\textsuperscript{88}

Thus, acknowledging that there are limits to the interpretative principle, the Court referred to the facts of the case and held that:

"It would appear from the order for reference that the national provisions cannot be interpreted in a way which conforms with the directive on the insolvency of employers and therefore do not permit higher management staff to obtain the benefit of the guarantees for which it provides."\textsuperscript{89}

It is arguably implicit in the ECJ’s ruling that national courts are not required to interpret national law in conformity with Community law \textit{contra legem}. However, Craig and de Búrca have criticized the ECJ for failing to make it clear in \textit{Wagner Miret} why national law could not be interpreted in conformity with the directive.\textsuperscript{90} They suggest that it may have been that the Court considered national

\textsuperscript{87}Ibid, at paragraph 20.
\textsuperscript{88}Ibid, at paragraph 21.
\textsuperscript{89}Ibid, at paragraph 22.
law to be too clearly contrary to the requirements of the directive in question, or due to the fact that the directive in question did not require the result claimed by Mr. Wagner Miret. In other words, the Directive requires the salaries of all categories of employees to be protected, but permitted the Member States to set up different institutions for different categories. The Guarantee Fund set up by Spain did not cover management staff. This indicates that either the ECJ was not prepared to rule that national courts are under a duty to interpret national law in conformity with a directive contra legem or that the obligation did not arise since the pre-existing national law gave full effect to the directive. Craig and de Bürca consider that the latter interpretation seems more likely, on the grounds that the guarantee institution which had already been established by the Member State may not have been adequately financed to cover the salary claims of groups of employees who were considered not to fall within its remit. 91 However, they add that:

"If it was this factor that led the Court to conclude that the national law was not capable of being read in the way required by the Directive, then the scope of the interpretation principle was limited not so much by the language of the national law as by the fact that to read it in the way requested might actually undermine the effectiveness of the Directive's aims, given that the defendant institution might not be in a financial position to guarantee the salaries of all the claimants."

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The ECJ's refusal to rule conclusively on whether or not the concept of indirect effect requires a national court to interpret national law contra legem suggests that the responsibility may rest entirely with the national court. Craig and de Bürca argue that the ECJ may be moving away from a strong mandatory obligation to interpret national law in compliance with a Community directive as indicated in Von Colson and Marleasing to a more deferential approach where it

91 Ibid.
92 Ibid.
is left to the national courts to decide the scope of the interpretation subject to
the general principles of Community law. They argue this trend has also been
followed in the subsequent cases of Faccini Dori and El Corte Inglés. It is
submitted that this shift in the approach of the ECJ may reflect a growing
adherence to the principle of "subsidiarity." In this context, the principle of
subsidiarity requires the national courts to decide if national law may be
interpreted in conformity with Community law and whether this is sufficient to
achieve the objectives of the Treaty. It is submitted that the ECJ may be
extending this approach to its case-law relating to the concept of direct effect,
to the application of Community law to national procedural rules explored in
earlier chapters and, more recently, to the principle of State liability.

4.3. Guaranteeing effective judicial protection: the relationship between
the concept of indirect effect and the principle of State liability

It is clear from the discussion above that the Court has placed some limitations on
the concept of indirect effect which may have limited the full potential for its use
in the further development of the principle of effective judicial protection.
However, at the moment in time when the position might be thought to have
stagnated, the ECJ has opened another window of opportunity for extending
effective judicial protection through the development of the principle of State
liability for breach of Community law. In Wagner Miret, the ECJ held that Mr.
Wagner Miret should be entitled to an alternative claim in the form of an action

University Press, 1998 at pp. 203-204.
discussed in more detail in Chapter 2.
95 See further discussion in Chapter 3.
96 See, for example, Case C-129/94, Criminal Proceedings Against Rafael Ruiz Bernáldez [1996]
E.C.R. I-1829 discussed in Chapter 2.
97 See, for example, Case C-66/95, R. v. Secretary of State for Social Security, ex parte Eunice
98 See, for example, Case C-302/97, Klaus Konle v. Republic of Austria, judgment of 1 June 1999,
not yet reported which is discussed further in Chapter 5.
for damages brought against the State for failure to implement the directive.\textsuperscript{99} Thus, it is arguable that, in this case, the ECJ recognized that, in practice, there are limits to the use of the concept of indirect effect as a means of enforcing individuals' rights derived from a Community directive. However, in order to ensure that the application of the principle of effective judicial protection is not thereby restricted, the ECJ expressly stated that individuals should be assured of an alternative means of redress in the form of a right to reparation against the State.

It is submitted that the Court's ruling in \textit{Wagner Miret} reflects a growing trend in the case-law of the ECJ to ensure that the principle of effective judicial protection is not undermined by the limits inherent in the concept of direct effect and indirect effect (and more recently in relation to national procedural rules). It is increasingly directing the national courts to examine the possibility of relying on the principle of State liability as a means of protecting individuals' Community rights. As a result, it is implicit that the principle of State liability may be applied independently from the concepts of direct and indirect effect. The ECJ's approach in \textit{Wagner Miret} was arguably confirmed in Case C-91/92, \textit{Faccini Dori},\textsuperscript{100} Case C-192/94, \textit{El Corte Inglés},\textsuperscript{101} Case C-54/96, \textit{Dorsch Consult}\textsuperscript{102} and Case C-131/97, \textit{Carbonari}.\textsuperscript{103} The merits of this approach are discussed further in Chapter 5.

\textsuperscript{99} Case C-334/92, \textit{Teodoro Wagner Miret v. Fondo de Garantía Salarial}, \textit{op.cit.}, at paragraph 22.
\textsuperscript{100} Case C-91/92, \textit{Paola Faccini Dori v. Recreb Srl} [1994] E.C.R. I-3325. See also Case C-192/94, \textit{El Corte Inglés SA}, \textit{op.cit.}
\textsuperscript{103} Case C-131/97, \textit{Annalisa Carbonari and others v. Università degli Studi di Bologna and others}, judgment of 25 February 1999, not yet reported, at paragraph 52.
CHAPTER 5: THE RELATIONSHIP BETWEEN THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION AND THE PRINCIPLE OF STATE LIABILITY

5.1. Introduction

This thesis has examined the role of the ECJ in developing a complex Community system of enforcement which is designed to allow individuals to protect effectively their rights before the national courts. In Joined Cases C-6/90 and C-9/90, Francovich, the ECJ introduced the principle of State liability which entitles individuals to bring an action for damages against the State for breach of Community law provided three conditions of liability have been satisfied. It is submitted that the principle of State liability is underpinned by the principle of effective judicial protection.

Tridimas suggests that:

"The establishment of the principle of State liability and of the cognate right to reparation of injured parties represents a high point in the judicial quest for effective protection of Community rights and marks a new stage in the development of the law of remedies."2

In Francovich, the plaintiffs were unable to enforce their Community rights effectively before the national courts. First, the directive which the plaintiffs sought to rely on, namely Directive 80/987/EEC3 which grants employees the right to payment of arrears in salary in the event of the insolvency of their employer, had not been implemented by the Italian Government by the

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prescribed date. The Commission had successfully brought an Article 169 EC (now Article 226) action against the Italian State for failure to implement the Directive, but the Member State had not taken any measures to transpose it into national law at the material time. Second, the relevant provisions of the directive were insufficiently precise and unconditional to have direct effect. Third, national law did not provide an effective remedy for the individuals who had been deprived of their Community rights; Italian law on State liability does not permit an action for damages to be brought against the State for failure to legislate. As stated by Advocate General Mischo:

“Rarely has the Court been called upon to decide a case in which the adverse consequences for the individuals concerned of failure to implement a directive were as shocking as in the case now before us.”

In response to this gap in Community law which would otherwise have undermined the principle of effective judicial protection, the ECJ established the principle of State liability. In its Francovich judgment, the ECJ expressly based the principle of State liability on both Article 5 (now Article 10) of the Treaty and the “full effectiveness...and protection” of individuals’ Community rights. Drawing upon the general system of the Treaty and its fundamental principles laid down in Case 26/62, Van Gend en Loos, Case 106/77, Simmenthal and

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5 The inadequacies of the enforcement procedures laid down in Article 169 EC (now Article 226) and 170 EC (now Article 227) in ensuring the effective judicial protection of individuals’ Community rights had been recognized by the ECJ in Case 26/62, Van Gend en Loos [1963] E.C.R 1. See further discussion in Chapter 2. These inadequacies led to the amendment of Article 171 EC (now Article 228) by Article G (51) the Treaty on European Union 1993 to allow the ECJ to impose a lump sum or penalty payment on a Member State which fails to comply with judgments of the Court.
6 The Court held that the directive could not have direct effect since the identity of the guarantor was not sufficiently clear and precise: Joined Cases C-6/90 & 9/90, Francovich and Others v. Italian Republic, op.cit. at paragraph 26.
7 Opinion of Advocate General Mischo in Joined Cases C-6/90 & 9/90, Francovich and Others v. Italian Republic, op.cit. at p. 5371.
8 Joined Cases C-6/90 & 9/90, Francovich and Others v. Italian Republic, op.cit. at paragraph 36.
9 Ibid, at paragraph 33.
Case C-213/89, *Factortame (No.l)*, the ECJ emphasized that the Community legal order has created, *inter alia*, rights for the benefit of individuals which the national courts must protect. Furthermore, the national courts must ensure that those rights take full effect. It followed that:

"The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible."

The Court added that:

"The possibility of obtaining redress from the Member States is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law."

The Court then sought to lay down the legal basis for the introduction of the principle of State liability. First, it held that:

"It follows that the principle whereby a State must be liable for loss and damage caused by individuals as a result of breaches of Community law for which the State can be held responsible is *inherent* in the system of the Treaty."
The Court added that:

"A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 [now Article 10] of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law (see, in relation to the analogous provision of Article 86 of the ECSC Treaty, the judgment in Case 6/60, Humblet v. Belgium [1960] E.C.R. 559)."17

It has been argued in this thesis that both Article 5 EC (now Article 10) and the principle of effectiveness, together constitute the legal basis for the principle of effective judicial protection. However, in Francovich, the ECJ has arguably gone one step further and held that the principle of State liability, which represents a fundamental development of the principle of effective judicial protection, is inherent in the system of the Treaty.18

5.1.1. Rationale for the principle of State liability

It is submitted that the rationale of the principle of State liability is twofold. First, the remedy was introduced in order to have a deterrent effect on those Member States which persistently fail to implement directives in good time. The problem of late implementation of Community directives into national law had become particularly acute in the late 1980s. The Francovich case itself was a clear example of how the Article 169 EC (now Article 226) procedure was insufficient to ensure that individuals are guaranteed effective protection of their Community rights. However, the Community has only been prepared to go so far as to amend the Treaty to allow the ECJ to impose fines or penalty payments on

17 Ibid, at paragraph 36.
18 See further discussion in Chapter 1.
offending Member States. It has not responded to a call from the Commission to allow the ECJ to award damages for breach of Community law by the Member States. Consequently, the principle of State liability is, in one sense, a jurisprudential creation of the ECJ designed to punish the disobedient State when a breach of Community law has occurred.

The principle of State liability has also been introduced as a means of ensuring the full effectiveness of Community law through the provision of effective judicial protection of individuals’ Community rights before the national courts. Tridimas argues that it is important not to consider the principle of State liability simply as an instrument or “legal fiction” which provides an additional means (to the concepts of direct and indirect effect) of guaranteeing Member States’ compliance with Community law. Such a view gives the impression that judicial developments of Community law take place in a theoretical vacuum. He argues that this is not the case and that:

"...the Court’s approach can be encapsulated in the principle ubi jus, ibi remedium. Accordingly, to this approach, the value of the right is determined by the legal consequences which ensue from its violation, namely the remedies available from its enforcement. The common thread underlying the Court’s case-law on remedies is the concern to ensure the availability of effective judicial protection."

In other words, if a right conferred on an individual by Community law is incapable of being protected in the event of a breach before the national courts,

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19 Article 171 EC (now Article 228) EC as amended by Article G (51) the Treaty on European Union 1993.
the right itself is worthless and ultimately, this lack of effective judicial protection of individuals' Community rights would undermine the Community legal order. It is argued by Tridimas that a similar approach to judicial protection exists in the national legal systems. He cites, for example, the dissenting judgment of Oliver L.J. in Bourgoin\(^{23}\) in which a distinction was made between a general right to have provisions of the law observed which is shared by everyone, and an individual right requiring protection. In Francovich, the ECJ held that State liability was a natural consequence of the breach of individual rights granted by Community law. Thus, the ECJ has sought to

"...reinforce the effectiveness of Community provisions through the effectiveness of the judicial supervision of the legal interests created by those provisions and likewise in order not to leave Member States' failures to fulfil obligations without - \textit{inter alia},\ - tangible - consequences. Consequently, it is precisely in the light of those objectives that the position of the individual has been used and given its proper importance. The State's financial liability \textit{vis-à-vis} individuals for the loss and damage caused by legislative inaction has been created by the Court in the final analysis as \textit{an instrument for securing protection for individuals} and thereby also the proper implementation of Community law."\(^{24}\)

In this respect, it may be argued that the principle of State liability shares its rationale with other manifestations of the principle of effective judicial protection such as the concepts of direct effect\(^{25}\) and indirect effect\(^{26}\) as well as the Court's case-law on national procedural rules and remedies.\(^{27}\) This view is supported by Advocate General Tesauro in \textit{Brasserie du Pêcheur and Factortame (No.3)} in which he argued that:

\(^{226}\)

\(23\) \textit{Bourgoin S.A. v. Ministry of Agriculture Fisheries and Food [1986] Q.B. 716.}


\(25\) See further discussion in Chapter 2.

\(26\) Discussed further in this work in Chapter 4.

\(27\) Discussed further in this work in Chapter 3.
“...the individual’s position directly created by a provision with direct effect binding on the State is used in order to guarantee full, effective protection to the rights conferred by that provision.”

Consequently, the:

“...national court is under a duty to provide full, effective judicial protection of the rights conferred on the individual by the relevant Community provision.”

Comparing the concept of direct effect with that of the principle of State liability, he added that:

“In the same way, the individual’s right to compensation is used to guarantee protection of the rights conferred by a provision which does not have direct effect in the sense that it cannot be invoked directly before the national court, yet also places an obligation on the State, in the case of a failure to fulfil an obligation on the part of the State.”

Thus, it is submitted that the principle of State liability represents a development of the principle of effective judicial protection. Advocate General Tesauro has further argued that the principle of State liability:

“...has remote roots, both in terms of specific precedents for the liability and obligation to compensate of the Member States and in the more general setting of the effective protection of rights asserted by individuals under Community provisions.”

29 Ibid, at p. 1087.
30 Ibid, at p. 1086.
In his view, its introduction is:

“...completely consistent with and a logical extension of a value which has been upheld on several occasions in Luxembourg: effectiveness of Community provisions and hence complete judicial protection.”

Moreover, it is submitted that the origin of the principle of State liability can be traced to the ECJ’s judgment in Case 6/60, *Humblet* which is also arguably the origin of the principle of effective judicial protection. In that case, the ECJ indicated the rationale for individual protection and identified Article 86 ECSC as its legal basis. The ECJ went on to rule that on the basis of Article 86 ECSC, national courts are under an obligation to make reparation for damage suffered by individuals as a result of an infringement of Community law committed by a Member State. In *Francovich*, the ECJ confirmed that, by analogy, the equivalent provision in the EC Treaty, ex-Article 5 (now Article 10), was also the basis for the principle of State liability.

5.1.2. Principle of State liability as a general principle of Community law

In *Francovich*, the principle of State liability was used as a means of “filling a lacuna” in the Community system of enforcement, in circumstances where the concept of direct effect failed to grant individuals a means of enforcing their Community rights. The “effective judicial protection” of these rights was therefore achieved in the absence of direct effect. In subsequent case-law, the

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34 Article 86 ECSC states that: “Member States undertake to take all appropriate measures whether general or particular, to ensure fulfilment of the obligations resulting from decisions and recommendations of the institutions of the Community and to facilitate the performance of the Community’s tasks. Member States undertake to refrain from any measures incompatible with the common market referred to in Articles 1 and 4.”
35 Joined Cases C-6/90 & 9/90, *Francovich and Others v. Italian Republic*, op.cit. at paragraph 36.
scope of the principle of State liability has been expanded in an attempt to further
develop the principle of effective judicial protection and to secure the "full and
complete" protection of individuals Community rights. It may be argued that the
principle of State liability has emerged as a general principle of Community law
in the field of remedies.

In Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame
(No.3), the ECJ confirmed that the Community right to reparation was more than
a residual right which is only applicable where the limitations inherent in the
concept of direct effect prevent individuals from enforcing their rights before the
national court. In accordance with the principle of effective judicial protection,
the ECJ established that the principle of State liability must be extended to
include the right to reparation even where directly effective provisions of
Community law have been infringed. In its view, the right arises irrespective of
the fact that individuals are already able to invoke directly effective rights before
the national courts and guarantee their substantive enforcement. Drawing upon
its previous case-law, the ECJ held that it has been:

"...consistently held that the rights of individuals to rely on the effective
provisions of the Treaty before national courts is only a minimum guarantee and
is not sufficient in itself to ensure the full and complete implementation of the
Treaty."37

It added that although the purpose of the concept of direct effect is:

"...to ensure that provisions of Community law prevail over national provisions.
It cannot, in every case, secure for individuals the benefit of the rights conferred

36 The ECJ referred, in particular, to Case 168/85, Commission v. Italy [1986] E.C.R 2945 at
paragraph 11; Case C-120/88, Commission v. Italy [1991] E.C.R I-621 at paragraph 10 and Case
37 Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v. Federal Republic of Germany
and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others, op.cit., at
paragraph 20. Emphasis added.
on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State.” 38

Confirming its ruling in Francovich, the ECJ stated in Brasserie du Pêcheur and Factortame (No.3) that the principle of State liability would also apply where a Member State had acted in breach of a directly effective Community right. Otherwise, it argued that:

“...the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law.” 39

It added that not only would this be the case in the event of non-implementation of a directive by a Member State, but also:

“...in the event of infringement of a right directly conferred by a Community provision upon which individuals are entitled to rely before the national courts. In that event, the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.” 40

Thus, the principle of State liability is independent from, and exists in addition to, the concept of direct effect. They are complementary means of granting maximum effect to the principle of effective judicial protection. 41 Further support for the argument that the concept of direct effect and the principle of State liability are complementary methods of securing the effective judicial protection of individuals’ Community rights may be drawn from the Court’s ruling in Case

38 Ibid.
39 Ibid.
40 Ibid, at paragraph 22.
41 See, for example, Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others, op.cit.
In this case, although Mrs. Sutton was able to invoke her directly effective Community right before the national courts, the ECJ refused to develop the right to adequate compensation (arguably a characteristic of the principle of effective judicial protection) to include the right to interest on payment of arrears of benefits in the event of a breach of Community law. This would have guaranteed Mrs. Sutton the full and complete protection of her directly effective Community right and would have been consistent with the Court’s ruling in Marshall (No.2) in which it recognized that the right to adequate compensation included the right to payment of interest on damages for breach of Community law. Nevertheless, the Court stated that the plaintiff may, in the alternative, be able to bring an action for damages against the U.K. for incorrect transposition of the contested Directive provided the conditions of liability laid down in its case-law were fulfilled.

It is submitted that the ECJ has thereby sought to encourage individual litigants to bring actions for damages against the State where national procedural rules create an impediment to the effective judicial protection of their directly effective Community rights. This approach has been confirmed by the ECJ in Joined Cases C-192/95 to C-218/95, Comateb and has emerged as the Court’s preferred route to “full and complete” enforcement of Community law in the absence of effective national remedies (or Community harmonization legislation in the field of remedies).


47 See further discussion in Chapter 3.
In accordance with established principles, where individuals are unable to enforce their Community rights by virtue of the concept of direct effect, the national court is under an obligation to interpret national law in conformity with the Community provision in question, subject to the limitations placed upon this obligation by the ECJ (the concept of indirect effect).\(^{48}\) The scope of the concept of indirect effect does not systematically guarantee full and complete judicial protection of an individuals' Community rights.\(^{49}\) Nevertheless, it has emerged from the case-law that the principle of State liability may also be applied where the level of protection conferred by virtue of the concept of indirect effect is inadequate. In Case C-334/92, Wagner Miret\(^{50}\), both the ECJ and the Advocate General considered that if, on the facts of the case, the referring national court was unable to interpret national law in conformity with the directive to the extent that the plaintiff would be unable to benefit from the guarantee to which he was entitled, he did nevertheless have an alternative right to compensation against the Spanish State under the principle of State liability. Similarly, in Case C-91/92, Faccini Dori\(^ {51}\), although the ECJ refused to grant directives horizontal direct effect in order to allow the plaintiff to rely on the provisions of Directive 85/577\(^ {52}\) against a private individual, the ECJ went on to state that if the national court could not guarantee her Community rights by virtue of the concept of indirect effect, Ms Faccini Dori could invoke the principle of State liability provided the three conditions of liability laid down in Francovich were satisfied. Thus, the ECJ emphasised that the principle of State liability was an additional or alternative remedy available to individuals who are unable to enforce their rights by virtue of

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\(^{48}\) See earlier discussion in Chapter 4.
\(^ {49}\) The relationship between the principle of effective judicial protection and the concept of indirect effect is discussed further in this work at Chapter 4.
the indirect effect. This approach ensures that national courts are able to effectively protect individuals' Community rights independently from the concept of indirect effect, thus reinforcing the principle of effective judicial protection. This approach has been subsequently confirmed in Case C-192/94, *El Corte Inglés*, Case C-54/96, *Dorsch Consult* and Case C-131/97, *Carbonari*.

It is submitted that the principle of State liability may go far to guarantee individuals an "effective" level of protection for their Community rights and to persuade Member States to comply fully with their Community obligations. However, it will not provide "full and complete" protection. In practical terms, it would require an individual to instigate two sets of proceedings, either simultaneously or successively, resulting in additional litigation costs for individuals seeking to enforce their Community rights. It has been argued that this is "hardly compatible with the requirements of an effective remedy." In addition, Tridimas argues that the effectiveness of the remedy of reparation may differ from State to State given its dependence on national procedural rules. He warns that "State liability therefore should not be seen as a panacea." Moreover, where the action is successful, it will be the Member State which bears the financial consequences even if, in some cases, the breach of Community law

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53 It is arguably implicit in the ECJ's ruling that national courts are not required to interpret national law in conformity with Community law contra legem. See further discussion in Chapter 4.
54 See further discussion in Chapters 2 and 4.
57 Case C-131/97, *Annalisa Carbonari and others v. Università degli Studi di Bologna and others*, judgment of 25 February 1999, not yet reported, at paragraph 52.
60 Discussed further in Chapter 5.
is committed by a private individual. Admittedly, this may be an acceptable solution given that the Member State may have failed to implement the directive in good time or correctly in the first place. However, Craig contends that this solution is problematic. Where a directive is designed to govern relations between individuals and its provisions are directly effective, he is of the view that there is no reason why the consequences of a breach should not fall squarely on the defendant rather than the State. He suggests that if Member States were fully aware of the financial implications of their opposition to granting directives horizontal direct effect which is evident in Faccini Dori, they may reconsider their position.

5.1.2.1. Nature of the Community law infringed

In its ruling in Francovich, in addition to laying down three uniform conditions of liability (which are discussed further below), the ECJ also held that the relevant conditions would depend upon the nature or status of the Community provision which has been breached and thus given rise to the loss and damage. In Francovich itself, the principle of State liability had been introduced in order to guarantee the principle of effective judicial protection where a Member State had failed to implement a Community directive. The ECJ held in this case that:

"The possibility of obtaining redress from the Member States is particularly indispensable where, as in this case, the full effect of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law."

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63 Ibid, at pp. 537-538.
64 Joined Cases C-6/90 & 9/90, Francovich and Others v. Italian Republic, op.cit., at paragraph 40.
65 Ibid, at paragraph 34. Emphasis added.
Thus, it may be implied from the ECJ's ruling that the principle of State liability is not confined to actions against the State for non-implementation of a Community directive, but may also apply to other kinds of breach. In other words, the ECJ has introduced a general principle of State liability. This development was confirmed in post-Francovich cases: the ECJ held that the principle of State liability is equally applicable where a Member State has infringed a directly effective Treaty provision as well as where a Member State has implemented a directive, but failed to do so correctly. Thus, it is submitted that in accordance with the principle of effective judicial protection, the level of protection does not differ according to the nature of Community law which has been infringed.

5.1.2.2. Perpetrator of the breach: unified concept of “the State”

In Brasserie du Pêcheur and Factortame (No. 3), the ECJ confirmed that, in accordance with the fundamental requirement of uniformity of Community law, the principle of State liability applies regardless of the State organ which has committed the breach. It is submitted that this development is also consistent with the principle of effective judicial protection. The ECJ held that since the principle of State liability is inherent in the system of the Treaty, it is applicable irrespective of the State organ whose act or omission was responsible for the

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68 This approach is also consistent with the ECJ's case-law on Article 169 EC (now Article 226) where the State will be liable irrespective of the State organ which has failed to comply with its Community obligations: See Advocate General Léger in Case C-5/94, R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd [1996] E.C.R. I-2553 at p. 2582.

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breach. The Court drew upon the argument of Advocate General Tesauro, namely that in the context of International law, State liability is attributed to the State as a single entity regardless of the organ responsible for the breach which gave rise to the damage. The ECJ thus held that this same principle must also apply a fortiori in the Community legal order on the grounds that:

"...all State authorities...are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals." 71

In this case, the national legislature was the State organ which had allegedly committed the breach of Community law. In subsequent cases, the ECJ has held that breaches committed by the national administrative authorities, 72 and the national executive 73 fall within the scope of an action for State liability. On this basis, it may be deduced that the principle of State liability applies irrespective of whether the breach was committed by the legislature, the executive or the judiciary. Although this development of the principle of State liability arguably increases the scope of the principle of effective judicial protection, it has been argued that constitutional difficulties may arise if such liability is imposed on the judiciary in respect of decisions which contravene Community law. 74

It has been further argued that the State may sometimes be responsible for breaches of Community law committed by subordinate authorities over which it has no control. For example, where a local authority acts in breach of a directly effective Treaty provision, an action for damages will be brought against the

71 Ibid, at paragraph 34.
73 See Case C-392/93, H.M. Treasury ex parte British Telecommunications plc, op.cit.
74 See also Steiner, op.cit., at pp. 91-92.
Member State itself. This was confirmed by the ECJ in Case C-302/97, *Konle*. In this case, an action for damages was initiated by Mr. Konle against the Republic of Austria for losses sustained by him as a result of an alleged breach of Community law by provisions of legislation enacted by the Tyrol Länder. The Court held that:

"It is for each Member State to ensure that individuals obtain reparation for damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation. A Member State cannot, therefore, plead the distribution of powers and responsibilities between the bodies which exist in its national legal order to free itself from liability on that basis."

Thus, the principle of effective judicial protection requires the principle of State liability to be available irrespective of the State organ which committed the breach. It is arguable that the ECJ will adopt an expansive interpretation of the notion of the "State" in the context of State liability as it has in relation to the concept of direct effect. This will ensure that the right to reparation, as a means of ensuring the effective judicial protection of individuals' Community rights before the national courts, will be maximized.

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75 Wooldridge, F. & D'Sa, R., "ECJ decides Factortame (No.3) and Brasserie du Pêcheur" (1996) 7 E.B.L.Rev. 161 at p. 163.
76 Case C-302/97, Klaus Konle v. Republic of Austria, judgment of 1 June 1999, not yet reported.
77 Ibid, at paragraph 62.
78 The ECJ's broad interpretation of "the State" in the context of vertical direct effect in order to increase the effectiveness of directives has been discussed extensively in academic literature. For general discussion, see D'Sa, R., European Community Law and Civil Remedies in England and Wales, London: Sweet & Maxwell, 1994, at pp. 131-149.
5.2. Principle of effective judicial protection and the conditions for State liability

The action for damages for State liability introduced by the ECJ in *Francovich* and developed in subsequent case-law is dichotomic in nature. On the one hand, the Court has introduced a *Community right to reparation* which is derived directly from Article 5 (now Article 10) of the Treaty, the principle of effectiveness, and is inherent in the system of the Treaty to secure the full and complete protection of Community law. This right is conferred on individuals irrespective of the State body which committed the breach provided the uniform *Community substantive conditions for liability* have been satisfied. On the other hand, an action must be brought before the national courts in accordance with *national procedural rules governing liability*. The latter must comply with the principles of sufficient enforceability and comparability which arguably constitute characteristic elements of the principle of effective judicial protection designed to guarantee a minimum level of protection in the national legal order (discussed later in this chapter). It is submitted that both aspects of the principle of State liability are underpinned by the principle of effective judicial protection. Nevertheless, an examination of the Court's development of both the substantive conditions of State liability and the introduction of minimal requirements which the national courts must comply with when awarding the remedy, reveal the true extent to which the principle of State liability is able to secure the "full and complete" protection of individuals Community rights.

5.2.1. A Community remedy: uniform conditions of liability

A common *leitmotif* in the development of the principle of effective judicial protection has been the need for *equality* and *uniformity* of protection before the national courts of the 15 Member States. In *Francovich*, the ECJ has therefore laid down substantive conditions for establishing State liability for breach of

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79 See earlier discussion in Chapter 3.
Community law which apply in all the Member States. A similar approach was adopted by the Court in Joined Cases C-143/88 and C-92/89 Zuckerfabrik \(^{80}\) in relation to the grant of interim relief under Community law. In Brasserie du Pêcheur and Factortame (No.3), Advocate General Tesauro argued that to allow the Member States to determine for themselves the pre-conditions for State liability and the detailed substantive and procedural rules in accordance with national law:

"...would not ensure the result sought by Community law through an affirmation of the principle of liability, that is to say, full, effective protection of rights claimed by individuals under the Community provision which is assumed to have been infringed."\(^{81}\)

He added that the fact that the risk of weakening the “effective protection” in this case is real is illustrated:

"...by the very questions referred by the national courts, which arose precisely because the applicable national law did not allow any compensation to be granted in the cases before them. Again, in any event, it is only too obvious that a mere reference to national law would be in danger of endorsing a discriminatory system, in so far as for a given infringement Community citizens would receive different protection, some none at all."\(^{82}\)

Thus, in essence, uniform Community conditions for State liability eliminate the possibility of divergences in national legislation in the field of torts which would arguably fail to ensure that the principle of effective judicial protection was

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\(^{82}\) Ibid, at pp. 1095-1096.
guaranteed to the same level, for individuals in all the Community. The principle of effective judicial protection seeks to ensure that the judicial protection provided by the national courts is effective and that it is equal throughout the Member States. Nevertheless, it will emerge later in the chapter that despite the introduction of uniform conditions for State liability, the effectiveness of the principle of State liability is undermined by the absence of Community principles relating to causation and the award of damages (discussed below).

The original conditions for State liability laid down in Francovich in which the Member State had failed to implement a directive in good time were subsequently expanded in Brasserie du Pêcheur and Factortame (No.3). The ECJ was required to introduce conditions for determining State liability where a national legislature had acted in breach of Community law. In Brasserie du Pêcheur, the applicants alleged that they had sustained damage as a result of the failure on the part of the national legislature to amend national law which violated Community law. In Factortame (No.3), the damage was allegedly caused by the enactment of national primary legislation which was incompatible with Community law. In both cases, the applicants were unable to obtain damages under national law on State liability. However, the ECJ held that the Member State could be liable in damages under Community law.

In determining the requisite conditions of liability, the ECJ was required to take into account the political, and ultimately the financial, implications of its new Community remedy. The introduction of the principle of State liability in Francovich as a general principle of Community law had been hailed by commentators as a fundamental development of the Community system of enforcement.\(^\text{83}\) Not only did it give Member States an incentive to comply with Community law, but it also enhanced the "effective protection" of individuals’

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Community rights through the provision of a new Community remedy. 84
Nevertheless, the Member States expressed their concern as to the scope of the principle of State liability and, in particular, the nature of the breach for which they may be held liable. 85

In the legal systems of all Member States, the basic requirements for establishing State liability are the same: unlawful conduct, actual damage and a direct causal link between the damage and the unlawful conduct. The *Francovich* test broadly reflects these criteria. Yet, in that case, the ECJ failed to specify the *nature* of the unlawful conduct required in order to establish a breach. As argued by Steiner, a breach of Community law can take many forms, embracing a wide range of culpability. 86 At its most blatant, it can be a deliberate breach such as the persistent non-implementation of a directive as seen in *Francovich*. 87 However, a breach may just as easily result from a partial failure on the part of the Member State, for example, where it has implemented in good faith a directive which has later been found to be defective or inadequate. Some directives are difficult to interpret and the failure of a Member State to arrive at the correct conclusion may not involve any actual fault on its part. In *Brasserie du Pêcheur and Factortame (No.3)*, the ECJ was obliged to address this gap in the case-law and determine the nature of the breach which would give rise to liability on the part of the State.

It is arguable that in *Brasserie du Pêcheur and Factortame (No.3)*, the ECJ was aware that the effectiveness of the new remedy would depend upon the cooperation of the national courts. Further, it would be the Member States and ultimately the tax-payers who would be responsible for the cost of the breaches of

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85 See, for example, the submissions of the Member States in Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others*, op.cit., at pp. 1057 - 62.
87 See discussion below.
Community law committed by the Member States. It is submitted that the conditions for State liability introduced by the ECJ for breach of Community law illustrate the extent to which the Court is prepared to ensure the full effectiveness of Community law whilst respecting the interests of the Member States and their tax-payers.

In its ruling in Brasserie du Pêcheur and Factortame (No.3), the ECJ recalled its ruling in Francovich and stated that:

"In order to determine those conditions, account should first be taken of the principles inherent in the Community legal order which form the basis for State liability, namely, first, the full effectiveness of Community rules and the effective protection of the rights which they confer and, second, the obligation to cooperate imposed on Member States by Article 5 [now Article 10] of the Treaty." 88

However, in order to allay the fears of the Member States, the ECJ followed the approach of the Advocate General and sought to realign the conditions for State liability with its case-law on the non-contractual liability of Community institutions under Article 215(2) EC 89 (now Article 288(2)). The ECJ attempted to reconcile the restrictive nature of the conditions of liability under Article 215(2) EC with the principle of effective judicial protection by emphasizing the need for uniformity and equality in the sphere of individual protection. First, the ECJ recalled that Article 215(2) of the EC Treaty refers to:

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89 Article 215(2) (now Article 288(2)) EC states that: "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."
"...the general principles common to the laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of Community law." 90

Second, the ECJ stated that the possibility of liability should be equal irrespective of the perpetrator of the breach and the Court held that:

"...the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage." 91

In its ruling, the ECJ emphasized the similarity between its case-law on non-contractual liability and the liability of the State where the breach has been committed by the national legislature. It held that:

"The system of rules which the Court has worked out with regard to Article 215 [now Article 288] of the Treaty, particularly in relation to liability for legislative measures, takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question." 92

It added that:

91 Ibid, at paragraph 42.
92 Ibid, at paragraph 43.
"...in developing its case-law on non-contractual liability of the Community, in particular as regards legislative measures involving choices of economic policy, the Court has had regard to the wide discretion available to the institutions in implementing Community policies."\textsuperscript{93}

Citing Joined Cases 83/76, 94/76, 4/77 and 40/77, \textit{HNL},\textsuperscript{94} the ECJ recalled the policy decisions underlying this restrictive approach. It held that:

"The strict approach taken towards the liability of the Community in the exercise of its legislative activities is due to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterized by the exercise of a wide discretion which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers."\textsuperscript{95}

The ECJ acknowledged that Member States may find themselves facing different situations to the Community institutions stating that:

"...the national legislature - like the Community institutions - does not systematically have a wide discretion when it acts in a field governed by Community law. Community law may impose upon it obligations to achieve a particular result or obligations to act or refrain from acting which reduce its margin of discretion, sometimes to a considerable degree. This is so, for

\textsuperscript{93} \textit{Ibid}, at paragraph 44.
\textsuperscript{95} Joined Cases C-46/93 and C-48/93, \textit{Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others}, op.cit., at paragraph 45.
instance, where, as in the circumstances to which the judgment in *Francovich and Others* relates, Article 189 [now Article 249] of the Treaty places the Member States under an obligation to take, within a given period, all the measures needed in order to achieve the result required by a directive. In such a case, the fact that it is for the national legislature to take the necessary measures has no bearing on the Member State’s liability for failing to transpose the directive.” ⁹⁶

Nevertheless, the ECJ held that:

“...where a Member State acts in a field where it has a wide discretion comparable to that of the Community institutions in implementing Community policies, the conditions under which it may incur liability must, in principle, be the same as those under which the Community institutions incur liability in a comparable situation.” ⁹⁷

The ECJ established that in both *Brasserie du Pêcheur and Factortame (No. 3)*, the national legislatures had acted in fields in which they had a wide discretion and were faced with choices of economic policy similar to those facing the Community institutions when they adopt legislative measures pursuant to a Community policy. ⁹⁸ In *Brasserie du Pêcheur*, the ECJ held that in the absence of Community harmonization, the German legislature had a wide discretion in legislating in the field of foodstuffs, including rules relating to the quality of beer put on the market. ⁹⁹ Similarly, in *Factortame (No. 3)*, the ECJ held that:

“The legislation at issue was concerned, first, with the registration of vessels, a field which, in view of the state of development of Community law, falls within the jurisdiction of the Member States and, secondly, with regulating fishing, a

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⁹⁶ *Ibid*, at paragraph 46.
⁹⁷ *Ibid*, at paragraph 47.
⁹⁸ *Ibid*, at paragraph 50.
sector in which implementation of the common fisheries policy leaves a margin of discretion to the Member States."\textsuperscript{100}

The ECJ concluded that where a Member State acts in an area in which it has a \textit{wide margin of discretion},\textsuperscript{101} the right to reparation arises under Community law provided the following three conditions of liability are satisfied:

1) the rule of law infringed must have intended to confer rights on individuals;
2) the breach must be sufficiently serious;
3) there must be a direct causal link between the breach of the obligation imposed on the State and the damage sustained by the injured parties.\textsuperscript{102}

The ECJ emphasized that:

"...those conditions satisfy the requirements of the full effectiveness of the rules of Community law and of the \textit{effective protection} of the rights which those rules confer."\textsuperscript{103}

\textbf{5.2.1.1. Conferring rights on individuals}

It is submitted that despite the relatively strict criteria for establishing State liability, the ECJ has been prepared to interpret the first condition of the test widely in order to maximize the effective judicial protection of individuals' Community rights. The first requirement of the test for State liability demands that the rule of law must confer rights upon individuals and that these rights must be sufficiently identifiable from the provision concerned. In \textit{Brasserie du}

\textsuperscript{100} \textit{Ibid, at paragraph} 49.
\textsuperscript{101} The issue of the relevance of the extent of State discretion to the principle of State liability is discussed further below.
\textsuperscript{102} \textit{Ibid, at paragraph} 51.
\textsuperscript{103} \textit{Ibid, at paragraph} 52.
Pêcheur and Factortame (No.3), the ECJ held that this condition is automatically satisfied where the breached Community provision has direct effect since such provisions give:

"...rise to rights for individuals which the national courts must protect."\(^{104}\)

However, as laid down by the ECJ in Francovich, the principle of State liability also applies where the contested provisions are not directly effective. This requirement may also be fulfilled where a provision does not have direct effect. On this basis, it is arguable that in Three Rivers District Council v. The Governor of the Bank of England,\(^ {105}\) the English High Court erred in its assessment of whether or not the provisions of Directive 77/780 (First Banking Directive) satisfied the first condition of the test for liability. The national court held that:

"...if the plaintiffs cannot establish a sufficient right or interest to enable them to rely upon the Directive as having direct effect, they equally cannot succeed by relying upon the principle in Francovich because here too it is necessary to establish the same right or interest."\(^ {106}\)

The national court has seemingly failed to apply the test for State liability correctly. The duty imposed on the national courts to make reparation for damages sustained by individuals resulting from an infringement of Community law committed by the State does not depend upon the contested provision having direct effect. A fundamental characteristic of this new remedy is the fact that it is independent from the concept of direct effect.\(^ {107}\) As a result, this decision arguably undermines the principle of effective judicial protection and highlights

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\(^{104}\) Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others, op.cit., at paragraph 54.


\(^{106}\) Ibid, at paragraph 66.

the need for co-operation between the Community and national legal orders as well as the need for a clear and coherent set of principles which the national courts are under a duty to apply. It is submitted that the ECJ should be more explicit in its reference to the types of provisions which confer rights on individuals and are thus deserving of effective judicial protection. It may be, however, that the *Three Rivers* case is an example of the reticence of the national courts to the principle of State liability similar to their early reticence to accepting the direct effect of directives, the primacy of Community law over conflicting national law and the concept of indirect effect.

This first condition is also more lenient than the test for non-contractual liability of a Community institution under Article 215 EC (now Article 288) whereby an action may be brought where there is a breach of a superior rule of law. The requirement is used to avoid penalizing every infringement of a Community measure which is designed to protect individuals and thus restricts liability to breaches of the general principles of the legal system. In his Opinion, Advocate General Tesauro argued that:

“If it is true that the Member States’ obligation in damages is imposed in order to guarantee individuals *effective judicial protection* of rights claimed under Community provisions, it follows that it would not be easy to identify reasons justifying limiting that obligation to the breach of a particular class of rule, albeit one fundamental to the Community system.”

He argued that the fact that a legislative measure is unlawful automatically implies that a higher-ranking rule has been breached. Furthermore, it would not be feasible to distinguish between breaches of the different Community acts and

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thus allow the breach of a Treaty provision to incur liability where the breach of a regulation would not. He considered that for the purpose of State liability:

"...it is sufficient...that the provision infringed should confer on the individual a right whose content is capable of determination and precise.""^^111

In Dillenkofer, the ECJ arguably illustrated that it is willing to adopt a generous approach when interpreting provisions which have as their aim the protection of individuals’ rights. In this case, the ECJ was required to rule on whether the contested provision, Article 7 of Directive 90/314, conferred rights on individuals. The latter states that:

“The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.”

The Court answered in the affirmative. Although a literal reading of the text of Article 7 of the Directive would have indicated that the provision imposes an obligation upon the travel organizer and does not expressly confer on individuals the right to a refund or the right to repatriation in the event of the insolvency of a tour operator, the ECJ held that it was implicit in the terms of the provision. The Court based its reasoning upon the purpose of the provision. The ECJ held that:

“The purpose of Article 7 is accordingly to protect consumers, who thus have the right to be reimbursed or repatriated in the event of the insolvency of the organizer from whom they purchased the package travel. Any other interpretation would be illogical, since the purpose of the security which the

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110 Ibid.
111 Ibid.
organizers must offer under Article 7 of the Directive is to enable consumers to obtain a refund of money paid over or to be repatriated."\textsuperscript{114}

The ECJ added that this interpretation of the purpose of the directive is confirmed in the preamble. The penultimate recital in the preamble of the Directive states that in order to:

"...protect consumers against the financial risks arising from the insolvency of package travel organizers, the Community legislature has placed operators under an obligation to offer sufficient evidence of such security in order to protect consumers against those risks."\textsuperscript{115}

The ECJ dismissed the arguments of the German and U.K. Government which claimed that the purpose of the Directive, which found its legal basis in Article 100a EC (now Article 95),\textsuperscript{116} was essentially to guarantee the freedom to provide services and, more generally, free competition.\textsuperscript{117} The ECJ held that the frequent referrals in the preamble of the directive to the protection of the consumer did not prevent the Directive from also serving to ensure the freedom to provide services and fair competition. It follows that where a Directive has more than one objective, it is not prevented from also aiming to protect consumers.\textsuperscript{118} The ECJ referred to Article 100a (3) (now Article 95 (3)) which requires any Commission proposals adopted pursuant to this Treaty provision which concern, \textit{inter alia}, consumer protection, to: "take as a base \textit{a high level of protection}."\textsuperscript{119}

\begin{footnotesize}
\begin{enumerate}
\item[115] \textit{Ibid.}, at paragraph 35.
\item[116] Article 100a EC (now, after amendment, Article 95) permits the Council to adopt legislation for the purpose of securing the establishment and functioning of the Common Market.
\item[118] \textit{Ibid.}, at paragraph 39.
\item[119] \textit{Ibid.} Emphasis added.
\end{enumerate}
\end{footnotesize}
The ECJ also rejected claims that the rights conferred on consumers by Article 7 of the Directive were indirectly derived from the obligation imposed on the travel organizers to provide sufficient evidence of security. The ECJ held that:

"...it suffices to point out that the obligation to offer sufficient evidence of security necessarily implies that those having that obligation must actually take out such security. Indeed, the obligation laid down in Article 7 would be pointless in the absence of security actually enabling money paid over to be refunded or the consumer to be repatriated, should occasion arise."  

The ECJ has interpreted widely this part of the first condition of liability in relation to directives and arguably strengthened and increased the scope of the principle of effective judicial protection. Thus, it may be deduced that a directive confers rights on individuals where reference to the protection of individuals' rights may have been made in the preamble, but not in the provision itself. In addition, the condition may also be satisfied in this respect if the directive has more than one objective, although, it is likely that the protection of individuals will need to be the primary aim of the directive.

It has been argued that ECJ's approach ultimately renders the first condition, namely that the provision must confer rights on individuals, easier to satisfy and that it may have a fundamental impact on the effective enforcement of individuals' Community rights, particularly in area of employment law as well as proposed disability directives.

Directives which have more than one objective may therefore be suitable for a Francovich claim. It will remain to be seen whether the ECJ will adopt the same approach.

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120 Ibid, at paragraph 40.  
121 Ibid, at paragraph 41.  
123 Article 13 EC (ex Article 6a) permits the Council to introduce legislation aimed at eliminating discrimination based, inter alia, on disability.
approach in relation to directives adopted in other areas, for example, in the field of competition law and environmental law. In Bowden v. South West Water, the English High Court held that a number of Community environmental directives\(^{124}\) did not grant specific individual rights giving rise to a right of action for State liability and therefore such claims should be struck out.\(^{125}\) However, on appeal, the Court of Appeal\(^{126}\) held that it was arguable that one of the contested directives, namely the Shellfish Water Directive, which has as its purpose the protection of shellfish populations in order to avoid unequal conditions of competition, could have intended to grant a right of reparation to those who collect and market shellfish in the event of a breach of its provisions.\(^{127}\)

It must borne in mind that the ECJ may, in future, adopt a restrictive approach where it considers that the potential costs of extensive claims outweigh the benefit of guaranteeing the effective judicial protection of individuals' Community rights. It has thus emerged in this thesis that the development of the principle of effective judicial protection may therefore be hindered by policy constraints and that this also applies in relation to the principle of State liability.

In Dillenkofer, the ECJ also considered whether the rights contained in Article 7 of Directive 90/314 which are designed to protect individuals are sufficiently identifiable from the terms of the directive. The Court applied a test which is remarkably similar to that used to establish the direct effect of directives. First, the ECJ held that it was clear from the provisions of the directive who is intended

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\(^{127}\) Since this would need to be decided by the court which finally heard the case, the Court of Appeal held that this part of the claim should be restored.
to benefit from the directive.\textsuperscript{128} Second, it confirmed that the content of the rights are also sufficiently identifiable from the provisions of the directive.\textsuperscript{129}

Following the approach of Advocate General Tesauro, the ECJ dismissed the arguments of the German Government in which it had been argued that since the "security" referred to in Article 7 could be provided in different forms, the Member States have a wide discretion in the implementation of the directive which means that the content of the right cannot be identified from the provisions of the directive. The Court held that:

"The fact that States may choose between a wide variety of means for achieving the result prescribed by a directive is of no importance if the purpose of the directive is to grant to individuals rights whose content is determinable with sufficient precision."\textsuperscript{130}

This is arguably consistent with the ECJ's approach in relation to the test for direct effect where it has consistently held that a provision of a Community directive may have direct effect provided it is possible to discern a minimum level of protection granted to individuals by the provisions of the directive. In other words, the measure of discretion granted to the Member States in no way alters the result required by the directive or the substance of the right granted to individuals.

5.2.1.2. Sufficiently serious breach and the requirement of fault

The "sufficiently serious" criterion is derived from the ECJ's case-law on the non-contractual liability of the Community institutions under Article 215 (2) EC (now Article 288 (2)), and in particular, the \textit{Schöppenstedt} test\textsuperscript{131} (as discussed

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{128} \textit{Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, Dillenkofer and others v. Federal Republic of Germany, op.cit., at paragraph 44.}
\item \textsuperscript{129} \textit{Ibid.}
\item \textsuperscript{130} \textit{Ibid, at paragraph 45.}
\item \textsuperscript{131} \textit{Case 5/71, Zuckerfabrik Schöppenstedt v. Council [1971] E.C.R. 975.}
\end{enumerate}
\end{footnotesize}
above). The ECJ held in *Brasserie du Pêcheur and Factortame (No.3)* that the decisive test for finding that breach is sufficiently serious is to decide whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.  

However, in his Opinion, Advocate General Tesauro expressed concern at drawing upon the Court's Article 215 (2) EC case-law in its entirety since the conditions for non-contractual liability are renowned as being restrictive. Similarly, in *Hedley Lomas*, Advocate General Léger considered the Article 215(2) EC rules to be:

"...unduly stringent and affording insufficient protection for the right to effective judicial relief at least with regard to the condition concerning the breach of Community law."  

In addition, the Court has consistently applied its Article 215 EC case-law in a strict manner making it difficult for individuals to satisfy the conditions and obtain a right to reparation for any damage sustained as a result of the breach. At the time of the proceedings in *Brasserie du Pêcheur and Factortame (No.3)*, Advocate General Tesauro noted that only eight actions of non-contractual liability brought against the Community institutions on the basis of Article 215 (2) EC been successful.  

However, the ECJ has adopted a less restrictive approach in relation to the principle of State liability which is arguably underpinned by the principle of

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effective judicial protection. In Brasserie du Pêcheur and Factortame (No.3), the ECJ expressly stated that the conditions for liability:

"...satisfy the requirements of the full effectiveness of the rules of Community law and of the effective protection of the rights those rules confer." 135

It is argued that the notion of a "sufficiently serious" breach has been adopted by the ECJ as the criterion for determining the nature and extent of the unlawful conduct required to establish State liability because of its flexible nature. First, it allows the ECJ to shape its policy on State liability in accordance with the principle of effective judicial protection. It is clear that the test for State liability represents a balance between the need for full and complete protection of individuals Community rights against the need to protect the Member States from incurring excessive liability. If the national administrative and legislative authorities are hindered in the exercise of their discretion from making difficult policy decisions by the threat of actions for damages, this may lead to further calls for the powers of the ECJ to be curtailed by legislative amendments to the EC Treaty. Furthermore, the ECJ has also been required to take into account the fact that it would ultimately be the tax-payer which foots the bill for any successful claim. Tridimas argues that:

"Viewed from that perspective, a public authority should incur liability as a result of legislative action only where the interest of compensating a group of persons who suffer loss is judged as more worthy of protection than the interest of the tax-payer." 136

Thus, it is submitted that the ECJ has adopted a pragmatic approach whereby the requirement of a sufficiently serious breach will be used by the Court to “control”

135 Ibid, at paragraph 52.
136 Ibid, at p. 32.
the liability of the State provided it does not unduly restrict the ability of individuals to effectively protect their Community rights. It has been argued that:

"...the balancing exercise is heavily influenced by the requirement to provide effective protection of Community rights which acquires overriding importance."

Second, the notion of a "sufficiently serious" breach enables the ECJ to bypass the diverse national rules for establishing State liability which are often restrictive in nature. For example, by introducing the notion of a "sufficiently serious" breach, the ECJ is able to eliminate the need to establish fault (whether intentional or negligent) on the part of the organ of the Member State to which the infringement is attributable. This is arguably an important step in ensuring that individuals' Community rights are effectively protected where a Member State has committed a breach of Community law since the notion of fault is often used in the Member States to curtail the liability of the State. In Brasserie du Pêcheur and Factortame (No.3), the ECJ emphasized that:

"The obligation to make reparation for loss or damage caused to individuals cannot...depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling into question the right to reparation founded on the Community legal order."

However, the ECJ added that:

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137 Ibid.
140 Ibid, at paragraph 79.
"...certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of Community law is serious."\(^{141}\)

The ECJ went on to refer to certain factors listed in paragraph 56 of its judgment which must be taken into account by the competent court when establishing whether or not a breach is sufficiently serious to give rise to liability. These are:

i) the clarity and precision of the rule breached;
ii) the measure of discretion left by that rule to the national or Community authorities;
iii) whether the infringement and the damage caused was intentional or involuntary;
iv) whether any error of law was excusable or inexcusable;
v) the fact that the position taken by a Community institution may have contributed towards the omission;
vi) the adoption or retention of national measures or practices contrary to Community law.

Thus, although the ECJ expressly stated that the establishment of fault, in its subjective sense, was not a pre-requisite for a right to reparation, the factors that a national court must take into account as laid down in paragraph 56 of its judgment included certain connotations of fault.\(^{142}\)

It is submitted that success of the new Community remedy of State liability depends ultimately on how it is applied by the national courts. In its *Brasserie du Pêcheur and Factortame (No. 3)* judgment, the ECJ laid down extensive guidance to the national courts as to how the test for a serious breach of Community law

\(^{141}\) *Ibid*, at paragraph 78.

should be applied in order to ensure that the principle of effective judicial protection is not undermined.

In relation to *Brasserie du Pêcheur*, the ECJ recommended that the German Federal Court draw a distinction between on the one hand, the fact that the German legislature had maintained in force provisions of the German Purity Law prohibiting the marketing under the designation “bier” any beer lawfully produced in another Member State and, on the other hand, the provisions prohibiting the import of beers containing additives. The ECJ added that it would be difficult to regard the breach of Article 30 EC (now Article 28)\(^{143}\) by the rules relating to the marketing as an “excusable error” since it was clear from the preceding case-law of the ECJ that these rules were incompatible with ex-Article 30 EC. However, the case-law determining whether or not the rules relating to additives were in breach of ex-Article 30 EC was less conclusive until the Court’s decision in Case 178/84, *Commission v. Germany*, delivered on the 12 March 1987, in which it was held that the prohibition was incompatible with Community law.

The German Federal Supreme Court\(^{144}\) followed the (non-binding) recommendations of the ECJ and in determining whether the breach of ex-Article 30 EC had been sufficiently serious, drew a distinction between the rules relating to marketing and those relating to additives. The national court then sought to determine whether the action for damages brought by Brasserie du Pêcheur was based on the rules relating to marketing or those relating to the additives. From the documentary evidence produced by both parties, the court came to the conclusion that prohibition of the import of French beer has been imposed as a result of the rules governing additives. The label on the bottle of the French beer produced by Brasserie du Pêcheur stated that: “As always, brewed according to the German Purity Law,” as an attempt to mask the use of additives. This

\(^{143}\) Article 30 EC (now Article 28) prohibits quantitative restrictions and measures having an equivalent effect on imports between Member States.

\(^{144}\) *Brasserie du Pêcheur SA v. Germany* [1997] 1 C.M.L.R. 971.
enabled the national court to conclude that there was no causal link between the breach of ex-Article 30 EC by the rules relating to marketing and the loss sustained by Brasserie du Pêcheur.

However, in relation to the rules on additives, the German Federal Supreme Court stated that it was not until Case 178/84, Commission v. Germany on 12 March 1987 that the Court indicated that these rules were in breach of ex-Article 30 of the Treaty. Therefore, the claim by the plaintiffs for losses sustained between 1981 and 1987 based on rules on additives was inadequately proven since the rules on additives contained in the German Purity Law did not constitute a sufficiently serious breach of Article 30 (now Article 28) of the Treaty.

The ECJ also made a number of observations in relation to Case 48/93, Factortame (No.3) where by virtue of the Merchant Shipping Act 1988, the national legislature had made changes to the registration requirements for fishing vessels. The ECJ made a distinction between the conditions which made registration subject to nationality requirements which constituted a manifest breach of Article 52 (now Article 43)\textsuperscript{145} of the Treaty and those laying down residence and domicile conditions for vessel owners and operators. In its view, the latter conditions were, prima facie, in breach of ex-Article 52 of the Treaty, but the UK had sought to justify them in terms of the objectives of the common fisheries policy. However, these arguments were dismissed by the ECJ in Case C-221/89, R. v. Secretary of State for Transport, ex parte Factortame Ltd (No.2).\textsuperscript{146}

\textsuperscript{145} Article 52 EC (now Article 43) provides for the freedom of establishment in the territory of another Member State subject to the rules which apply to nationals in the host State.

\textsuperscript{146} Case C-221/89, R. v. Secretary of State for Transport, ex parte Factortame Ltd (No.2) [1991] ECR 1-3905.
On this basis, the ECJ indicated that in order to determine whether the breach of ex-Article 52 EC committed by the UK was sufficiently serious, the following factors could be taken into account by the national court:

i) the legal disputes relating to particular features of the common fisheries policy;

ii) the attitude of the Commission, which made its position known to the United Kingdom in good time (i.e. illegality of the Statute);

iii) the assessments as to the state of certainty of Community law made by the national courts in the interim proceedings brought by individuals affected by the Merchant Shipping Act.

Before the English High Court (QBD), it was held that held that the U.K. had adopted and retained legislation which was in breach of Community law and which could give rise to liability on the part of the State. The Divisional Court held that the adoption and retention of conditions of nationality, residence and domicile were each sufficiently serious to give rise to liability for any damage which the applicants can show they had suffered in consequence of the Act.

In determining whether or not there had been a manifest and grave disregard of the discretion conferred on the U.K. Government, the Divisional Court drew upon the case-law of the ECJ in relation to Article 215 EC (now Article 288). It referred, in particular, to a summary of the relevant principles made by Advocate General Van Gerven in Case C-104/89, Mulder who had argued that the following factors should be taken into account when making such an assessment: the importance of the principle infringed; whether its disregard affected clearly defined group of operators; whether the resulting damage exceeded the bounds of


the economic risks inherent in the relevant sector and whether the principle was infringed without sufficient justification. The Divisional Court considered that on the basis of the facts of the case, the first three criteria were satisfied; the principle of non-discrimination, a fundamental principle of Community law had been infringed; a limited group had been affected by the breach of this principle and those affected had suffered damage beyond the economic risks inherent in their activities. With regard to the fourth criteria, the Divisional Court took into account four further factors which it considered to be relevant in addition to those laid down by the ECJ in Factortame (No.3). First, discrimination on the ground of nationality was the intended effect of the domicile and residence conditions together with the nationality condition. Second, the United Kingdom government was aware that these conditions would injure the applicants and therefore, in law, intended to injure them. Third, the use of primary domestic legislation meant that the applicants could not obtain interim relief without the intervention of the ECJ. Fourth, the Commission had made it clear throughout the dispute that it considered that the measures taken by the United Kingdom to be contrary to Community law. The national court acknowledged that the Commission is not always correct in its interpretation of the law, but that Member States which disregarded its views did so at their peril. The Divisional Court concluded that together with the fundamental nature of the principle breached, indicated that the United Kingdom had manifestly and gravely disregarded the limits on its discretion and was therefore liable to compensate any applicant who could prove that they had suffered damage as a consequence.\(^{150}\)

Having regard to the guidelines laid down by the ECJ in Factortame (No.3), the Divisional Court ruled that the provisions which had been breached were clear and precise and no discretion had been granted by the Member States by those provisions. The infringement and the damage caused were intentional since the main purpose of the conflicting national legislation was to prevent the individuals

\(^{150}\) R. v. Secretary of State for Transport, ex parte Factortame Ltd and Others (High Court), op.cit., at paragraphs 119 -130.
concerned from fishing against the British quota. The error of law on which the
said legislation was based was inexcusable and no Community institution had
contributed to the breach. On the contrary, the European Commission had
consistently held that the national legislation was in breach of Community law.¹⁵¹

On appeal, the judgment of the Divisional Court was upheld by the Court of
Appeal.¹⁵² On appeal to the House of Lords, the latter also confirmed that the
action of the U.K. Government constituted a sufficiently serious breach of
Community law giving rise to liability in damages.¹⁵³

In Factortame (No.3), one of the claimants alleged that by failing to adopt
immediately measures to comply with the ECJ’s judgment in Case 246/89R,
Commission v. UK¹⁵⁴ that the loss suffered by the applicant was needlessly
increased. In its ruling, the ECJ indicated that if this was found by the national
court to be correct, this omission in itself constituted a sufficiently serious breach
of Community law.¹⁵⁵ Before the Divisional Court, it was held that U.K.’s
failure to comply with the President’s Order was a distinct breach and provided
the applicants could prove the necessary causation and loss in accordance with
the relevant conditions of liability laid down in Factortame (No.3), they had a
right to recover damages for breach of Community law arising from the failure to
immediately suspend the national measures.¹⁵⁶

¹⁵² R. v. Secretary of State for Transport, ex parte Factortame Ltd and Others [1998] 3
C.M.L.R.192.
¹⁵³ R. v. Secretary of State for Transport, ex parte Factortame Ltd and Others (House of Lords),
judgment of 28 October 1999, not yet reported. The issue of causation and quantum must now be
decided by the national court.
¹⁵⁴ Case 246/89R, Commission v. U.K. [1989] E.C.R. 3125. In this ruling, the President of the
ECJ issued an Order requiring the suspension of the contested provisions of the Merchant
Shipping Act 1988 pending a ruling by the ECJ in an action brought by the Commission under
Article 169 EC (now Article 226) on whether the U.K. Government had failed to comply with its
Community obligations by enacting the said legislation. The Order was issued on 10 October
1989, but the U.K. Government did not suspend the measures until the 2 November 1989.
¹⁵⁵ Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v. Federal Republic of Germany
and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others, op.cit., at
paragraph 64.
¹⁵⁶ R. v. Secretary of State for Transport, ex parte Factortame Ltd and Others (High Court),
op.cit., at paragraphs 141 - 153.
In *British Telecommunications plc*,\(^{157}\) the ECJ was required to rule on whether the U.K. Government's implementation of Directive 90/531\(^{158}\) was defective and therefore amounted to a sufficiently serious breach giving rise to liability. In this case, Article 8 (1) of the abovementioned Directive provided for the exemption of certain categories of contracts from the scope of its provisions. Article 8 (2) required contracting entities seeking such an exemption to "notify the Commission of any services they regard as covered by the exclusion." British Telecommunications plc claimed that the U.K. Government had transposed Article 8 of the Directive incorrectly by exempting its competitors from the scope of the directive with the exception of one company. The applicant argued that the contracting entities themselves should have decided whether or not they were exempt from the provisions of the directive. It therefore brought, *inter alia*, an action for compensation against the U.K. Government for losses arising from the alleged error. It claimed that it had sustained additional expense through complying with the national implementing legislation and, further, that the obligations contained in the Directive placed it at a commercial and competitive disadvantage and prevented it from concluding profitable transactions.

The ECJ drew upon the test laid down in *Brasserie du Pêcheur and Factortame (No.3)* and held that the competent court may consider the clarity and precision of the rule breached. It went on to state that since Article 8(1) of Directive 90/531 was imprecisely worded, it was reasonably capable of bearing the interpretation given to it not only by the U.K. acting in good faith, but also by other Member States. Such an interpretation was not manifestly contrary to the wording of the directive or to the objective pursued by it.\(^{159}\) The ECJ also took into account the fact that there was no guidance available to the U.K.


\(^{159}\) Case C-392/93, *H.M. Treasury ex parte British Telecommunications Plc*, op.cit., at paragraph 43.
Government from the case-law of the Court as to the interpretation of the provision at issue and that when the U.K. Government informed the Commission of the adoption of the national implementing legislation, the latter did not indicate that the legislation contravened Community law. On this basis, the ECJ concluded that the breach was not sufficiently serious.

There is no doubt that, on the facts, the outcome of the case British Telecommunications plc is correct. However, it has been suggested that:

"...the ECJ's ruling, strongly directory and expressed in unequivocal terms, was clearly conciliatory, influenced by the interventions of the Member States, and calculated to allay their fears as to their vulnerability in the wake of Brasserie du Pêcheur and Factortame."

This approach of the ECJ was arguably confirmed in Case C-283/94, Denkavit International which also concerned an action for damages brought against a State for losses which ensued from the alleged defective transposition of a directive into national law. In determining whether or not there had been a sufficiently serious breach giving rise to liability, the ECJ once again emphasized that the clarity and precision of the breached provision should be taken into account. In this case, it noted that the other Member States had adopted the same (incorrect) interpretation of the contested provision following discussions in the Council on the issue and that there was no case-law available to guide the national executive, indeed, this case was one of the first to be referred to the ECJ

160 Ibid, at paragraph 44.
161 Ibid, at paragraph 45.
166 Ibid, at paragraph 51.
in relation to the interpretation of the said Directive.\textsuperscript{167} The ECJ concluded that the German Government had not committed a sufficiently serious breach of Community law when it had incorrectly transposed the provisions of the directive and, as a result, Denkavit had no right to reparation under Community law.

It is clear from the ECJ’s judgments in \textit{British Telecommunications plc} and \textit{Denkavit} that although it is possible to establish an error of law on the part of the State, its existence may not be sufficient in itself to result in an award of damages, particularly where a Member State has incorrectly transposed a directive, an area in which it traditionally has a wide margin of discretion.\textsuperscript{168} It is submitted that in \textit{British Telecommunications plc} and \textit{Denkavit} the ECJ has drawn the dividing line between effectively protecting individuals Community rights and protecting the Member States from excessive liability where a Member State has allegedly failed to implement a directive correctly into national law.

The criteria to be taken into account in establishing the existence of a “sufficiently serious” breach was also considered in Case C-5/94, \textit{R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd}\textsuperscript{169} where the U.K. administrative authorities had acted in breach of a directly effective Treaty provision. In this case, the national authorities refused to issue licences for the export of live animals to Spain on the ground that Spanish slaughterhouses were not complying with Directive 74/577 on the stunning of animals before slaughter.\textsuperscript{170} The directive had been implemented in Spain, but neither the directive nor the national implementing measures contained provisions governing sanctions or procedures for non-compliance. Complaints were also made by animal welfare groups to the Commission. Following

\textsuperscript{167} \textit{Ibid}, at paragraph 52.
\textsuperscript{168} Wooldridge and D’Sa, \textit{op.cit.}, at p. 165. See also \textit{R. v. Secretary of State for the Home Department, ex parte John Gallagher} [1996] 2 C.M.L.R. 951.
\textsuperscript{169} Case C-5/94, \textit{R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd}, \textit{op.cit.}
negotiations, the Spanish Government stated that the provisions of the directive would be respected. The Commission thus refrained from initiating Article 169 EC (now Article 226) proceedings against Spain. The U.K. Minister lifted the general ban on 1 January 1993. On 7 October 1992, Hedley Lomas Ltd, an Irish exporting firm, was refused a licence from the U.K. to export sheep to a named slaughterhouse which had been identified as one which complied with the terms of the directive. The company brought an action against the administrative authorities for a declaration that the refusal was contrary to Article 34 EC (now Article 29)\(^1\) and for damages. The UK authorities accepted that the refusal may have been, _prima facie_, in breach of Article 34 EC (now Article 29), but claimed that it was justified under Article 36 EC (now Article 30).\(^2\) However, the Minister gave no evidence of this alleged non-compliance by the particular Spanish slaughterhouse involved in this case.

The ECJ considered that there had been a breach of Article 34 EC (now Article 29) of the Treaty which could not be justified under Article 36 EC (now Article 30) since Directive 74/577/EEC had been enacted in order to harmonize measures in this field.\(^3\) Where a directive does not contain provisions relating to enforcement procedures and sanctions in the event of non-compliance, the Member States are still bound to “take all the necessary measures to guarantee the application and effectiveness of Community law” by virtue of Article 5 (now Article 10) and Article 189 (3) (now Article 249 (3)) of the Treaty.\(^4\)

With regard to the issue of State liability, the ECJ held that the conditions of liability laid down in _Brasserie du Pêcheur and Factortame (No.3)_\(^5\) should be

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\(^1\) Article 34 EC (now Article 29) prohibits all quantitative restrictions and measures having an equivalent effect on exports.

\(^2\) Article 36 EC (now Article 30) permits Member States to derogate from the free movement provisions contained in Article 34 EC (now Article 29) on grounds of, _inter alia_, the protection of health and life of humans, animals and plants provided that such measures do not constitute arbitrary discrimination or a disguised restriction on trade between Member States.

\(^3\) Case C-5/94, _R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd_, _op. cit._, at paragraph 18.

\(^4\) _Ibid_, at paragraph 19.

applied in this case. Thus, having ruled that the directly effective nature of Article 34 EC (now Article 29) indicated that the provision granted rights to individuals which the national courts were under a duty to protect, the Court considered whether the breach was sufficiently serious. It held that:

"...where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach."  

The ECJ added that the U.K. authorities were not even in a position to prove that the slaughterhouses to which the animals to be exported under the said licences were destined were acting in breach of the directive.

Thus, it may be deduced from the ECJ's ruling in *Hedley Lomas* that the Court has sought to ensure that individuals' Community rights are effectively protected where there has been a clear infringement of a directly effective Treaty provision in an area where the Member State in question has little or no margin of discretion. In such circumstances, the mere violation of the Community norm will constitute a sufficiently serious breach.

Similarly, the ECJ has ruled that a Member States' failure to implement a directive in good time will be sufficient to give rise to liability and thus ensure that individuals' Community rights are effectively protected. In Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer*, the ECJ held that the non-implementation of a directive by a Member State constitutes a

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176 *Ibid*, at paragraph 27.
178 *Ibid*, at paragraph 29.
sufficiently serious breach of Community law in itself which amounts to a manifest and grave disregard of the limits on its discretion.

5.2.1.3. Relevance of the extent of State discretion: a single test for State liability

In the aftermath of the Brasserie du Pêcheur and Factortame (No.3) judgment, it was thought that the test for State liability depended upon the extent of State discretion. This view stemmed from the fact that the ECJ had drawn parallels between the test for State liability and the test for non-contractual liability of the Community institutions under Article 215 EC (now Article 288). It was feared that in limiting the test for liability to infringements committed by the State where the latter has a wide discretion would render the principle of State liability ineffective as a means of effectively protecting individuals’ Community rights. Subsequent case-law has clarified the issue and it is submitted that there is now one single test for determining the liability in damages of the State for breach of Community law. 180

It follows that the test for State liability laid down in Brasserie du Pêcheur and Factortame (No.3) is designed to apply to diverse kinds of discretion. In Case C-392/93, British Telecommunications plc, 181 the ECJ was required, inter alia, to lay down the conditions for State liability where a Member State had incorrectly transposed a directive into national law. In the event, the Court applied the test for State liability laid down in Brasserie du Pêcheur and Factortame (No.3). 182 The ECJ reasoned that:

“A restrictive approach to State liability is justified in such a situation, for the reasons already given by the Court to justify the strict approach to non-

180 Steiner, op.cit., at p. 79; Tridimas, op.cit., at p. 23.
182 Ibid, at paragraphs 39 and 40.
contractual liability of Community institutions or Member States when exercising legislative functions in areas covered by Community law where the institution or State has a wide discretion - in particular, the concern to ensure that the exercise of legislative functions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests.\(^{183}\)

The ECJ acknowledged that it was usually for the national court to apply the test for liability to the specific facts, but in this case, the Court had sufficient knowledge of the facts to assess whether or not there was a sufficiently serious breach.\(^{184}\) The Court confirmed that the appropriate test was to establish whether the Member State, in the exercise of its legislative powers, had manifestly and gravely disregarded the limits on the exercise of these powers.\(^{185}\)

The true extent of the Court's approach which now arguably establishes a uniform (three-fold) test for State liability was subsequently confirmed in *Dillenkofer*.\(^{186}\) In this case, the plaintiffs brought actions for damages against the German Government for losses sustained as a result of its failure to implement a directive in good time.\(^{187}\) One of the main issues facing the ECJ was whether the *Francovich* test for liability was still valid in the light of the developments in *Brasserie du Pêcheur and Factortame (No. 3)* in which the Court introduced an additional "sufficiently serious" criterion. First, the Court stated that, in essence, the tests for liability laid down in *Francovich* and *Brasserie du Pêcheur and Factortame (No. 3)* are the same. Second, it held that the non-implementation of a directive by a Member State constitutes a sufficiently serious breach of

\(^{183}\) *Ibid*, at paragraph 40.
\(^{184}\) *Ibid*, at paragraph 42.
\(^{185}\) *Ibid*. Emphasis added.
\(^{187}\) The plaintiffs claimed either reimbursement of the cost of the holiday or cost incurred when returning home from their holiday at their own expense following the insolvency of the travel company.
Community law in itself and that third, this amounts to a manifest and grave disregard of the limits on its discretion. 188

On the basis of the Court's judgment in Dillenkofer, it has been argued that there is now therefore one test for State liability. 189 This view gains support from the Court's subsequent ruling in Case C-283/94, Denkavit, 190 in which the ECJ cited its rulings in Brasserie du Pêcheur and Factortame (No.3) and Dillenkofer 191 stating that, having regard to the circumstances of the case, a right to reparation arises under Community law provided: the rule of law infringed must have been 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 resting on the State and the damage sustained by the injured parties. 192

5.2.1.4. Causal connection between the breach and the damage sustained

The third condition of State liability requires a direct causal link between the breach committed by the Member State and the damages sustained by the injured party. The ECJ has consistently held 193 that it is the responsibility of the national courts to assess whether or not this condition has been satisfied by applying national procedural rules, subject to the principles of sufficient enforceability and comparability. 194 However, it has been argued by Van Gerven 195 that the ECJ

188 It has been presumed that the Court was referring to the Member State's discretion as to when (within the time-limits prescribed) and in what manner the obligations imposed by the directive are to be implemented: R. v. Secretary of State for Transport, ex parte Factortame Ltd and Others [1998] 1 C.M.L.R. 1353 at p. 1393.
193 See, for example, Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others, op.cit., at paragraph 165.
194 See earlier discussion in Chapter 3.
should be more prescriptive in relation to the causation requirement. He suggests that the Court could draw upon its case-law on the non-contractual liability of the Community institutions under Article 215 (2) EC (now Article 288 (2)) to lay down guidelines on determining proof of a direct causal link and in deciding which events break the chain of causation. However, Smith and Woods have argued that the rules of causation which apply to actions brought under ex-Article 215 (2) EC are currently too strict and would not provide “effective support” for a claim for damages.\(^{196}\)

It is submitted, as suggested by Van Gerven, that the current state of the law may lead to divergent interpretations of the third condition for establishing State liability which would ultimately jeopardize the extent to which individuals may effectively protect their Community rights. Furthermore, national courts may seize the opportunity to use the causation requirement to curtail the liability of the State.\(^{197}\)

It has been suggested that the ECJ may, in subsequent case-law, seek to introduce new principles in relation to causation.\(^{198}\) Not only would this avoid a “re-nationalization” of the conditions for State liability,\(^{199}\) but would arguably reinforce the principle of effective judicial protection.

5.3. Principle of effective judicial protection and the award of damages

In *Francovich*,\(^{200}\) the Court held that notwithstanding the existence of a Community right to reparation:


\(^{197}\) Ibid.

\(^{198}\) Ibid.

\(^{199}\) Ibid.

"...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."²⁰¹

The ECJ then extended its application of the principles of sufficient enforceability and comparability²⁰² (which arguably constitute characteristic features of the principle of effective judicial protection) to national procedural rules which govern actions for State liability. The ECJ held that:

"...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."²⁰³

This approach secures a minimum standard of protection for individuals’ Community rights before the national courts. These principles of sufficient enforceability and comparability ensure that the Community right to reparation is not undermined by national procedural rules and hence guarantees the principle of effective judicial protection. The ECJ currently favours this strategy in its quest to secure the effective judicial protection of Community law. It establishes an acceptable equilibrium between the effective protection of Community rights and the procedural autonomy of the national legal systems.²⁰⁴

²⁰¹ Ibid, at paragraph 42.
²⁰² See earlier discussion in Chapter 3.
However, it has been argued that the diversity of national procedural rules in the Member States means that this approach ultimately undermines the level of protection provided by the national courts. It poses a risk to the uniform application of Community law in the Member States and creates legal uncertainty. To avoid this gap in the level of protection provided by the national courts, it is argued that in subsequent cases, the ECJ is likely to lay down further Community requirements governing the award of damages and therefore increase the scope of the principle of effective judicial protection.\(^{205}\) In the remainder of this chapter, particular attention will be paid to whether the Court, in its case-law, has developed such principles in relation to damages for State liability to the same extent as for the characteristics of the principle of effective judicial protection which apply in the general field of national procedural rules and remedies discussed earlier in this thesis.\(^{206}\)

The purpose of reparation is to put the individual in the same position that he/she would have been in had there not been a breach of his/her Community rights (the principle of *restitution in integrum* which is common to the legal systems of the Member States). In both *Brasserie du Pêcheur and Factortame (No.3)*, the ECJ was asked by the referring courts to lay down the criteria by which the national courts could determine the actual extent of the reparation payable by the Member State responsible for the breach. Van Gerven asserts that the extent of compensation depends upon:

"...the function which the remedy fulfils, as a sanction, within the framework of the specific Community rule that it purports to make effective."\(^{207}\)

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\(^{206}\) See further discussion in Chapter 3.

It is submitted that in accordance with the principle of effective judicial protection, the ECJ laid down the following general principle:

"Reparation for loss or damage caused by individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights."\textsuperscript{208}

The approach of the ECJ in relation to reparation is consistent with the right to adequate compensation developed in \textit{Marshall (No.2)}\textsuperscript{209} which is arguably a characteristic of the principle of effective judicial protection. In that case, the ECJ held that where financial compensation is the only remedy available which would guarantee effective judicial protection, such reparation must be adequate in the sense that it must enable the loss or damage actually sustained to be made in full.\textsuperscript{210} Although the judgment referred to compensation as a remedy for a breach of the Equal Treatment Directive committed by a State body, it is submitted that the reasoning adopted is equally applicable in the context of State liability. Similarly, the principle of \textit{restitutio in integrum} applies in the context of the ECJ's Article 215(2) EC (now Article 288 (2)) case-law.\textsuperscript{211} Thus, the ECJ has been consistent in its approach to the adequacy of compensation which is a characteristic feature of the principle of effective judicial protection.

\textbf{5.3.1. Loss of profits}

With regard to heads of damage, in \textit{Brasserie du Pêcheur and Factortame (No.3)}, the ECJ held that, in the absence of Community rules, it is for the national court to rule on those heads of damage which are available in accordance with the

\textsuperscript{208} Joined Cases C-46/93 and C-48/93, \textit{Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others}, op.cit., at paragraph 82.


\textsuperscript{210} Discussed further in this work in Chapter 3.


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relevant domestic law, but subject to the principles of comparability and sufficient enforceability.\textsuperscript{212}

In both \textit{Brasserie du Pêcheur and Factortame (No.3)}, the appellants sought to claim compensation for loss of profits (or economic loss). Under German law, obligation to make reparation is restricted to damage done to specifically protected individual interests, for example, property. Heads of damage such as loss of profit are excluded. Similarly, in \textit{Factortame (No.3)}, it was unclear under U.K. national law whether an action for damages may be brought for pure economic loss occasioned by the negligent exercise of power by the Executive and/or Parliament, the latter being even more unlikely to found an action in damages.

In its judgment, the ECJ held that payment of compensation could not be limited for damage to specifically protected individuals interests, for example property, and therefore could not exclude payment for other financial losses, such as loss of profits. The ECJ went on to state that:

"Total exclusion of loss of profits as a head of damage for which reparation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the context of economic or commercial litigation, such as total exclusion of loss of profit would be such as to make reparation of damage \textit{practically impossible}."\textsuperscript{213}

The ECJ has illustrated in its case-law (which has been examined elsewhere in this thesis)\textsuperscript{214} how the principle of sufficient enforceability, arguably a characteristic of the principle of effective judicial protection, guarantees

\textsuperscript{212} Discussed further in this work in Chapter 3.
\textsuperscript{214} See earlier discussion in Chapter 3.
individuals “effective” judicial protection of their Community rights before the national courts. In *Brasserie du Pêcheur and Factortame (No.3)*, although the plaintiffs could establish a right to reparation under Community law by satisfying the three conditions of liability, in practice, there was no remedy because damages for loss of profits were unobtainable under the U.K. and German national law of tort respectively. It is therefore submitted that the ECJ has developed the principle of State liability in accordance with the principle of effective judicial protection to secure, where possible, the full and complete enforcement of individuals’ Community rights in the absence of adequate rules at national level or harmonizing legislation in this field.

5.3.2. **Exemplary damages**

In *Factortame (No.3)*, a claim for exemplary damages was made by one of the plaintiffs. Under the law of England and Wales, as a general principle, exemplary damages are payable where the public authorities concerned are guilty of acting oppressively, arbitrarily or unconstitutionally. The referring national court asked whether Community law requires exemplary damages to be made available. In response, the ECJ held that:

> "In so far as such conduct may constitute or aggravate a breach of Community law, an award of exemplary damages pursuant to a claim or an action founded on Community law cannot be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law."\(^{215}\)

On referral back to the English High Court, the key issue was whether the national rules on exemplary damages complied, in particular, with the principle of comparability.\(^{216}\) The relevant test was whether such damages would be available to individuals in circumstances where a similar claim was brought on

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\(^{215}\) *Ibid*, at paragraph 89.

\(^{216}\) See also discussion in Chapter 3.
the basis of national law. The Divisional Court noted that exemplary damages are penal and discretionary in character and are available exclusively in the common law jurisdictions of the Community. They are imposed in order to have a deterrent effect on wrongdoers rather than to provide reparation for the victim. The national court was of the view that to grant the remedy of penal damages for breaches of Community law would be contrary to the requirement of uniformity referred to by the ECJ in *Factortame (No.3)*. It would result in litigants in England, Wales and Ireland being treated differently from those elsewhere in the Community (including Scotland).

In the Divisional Court’s view, the Community *minimum* criteria relating to the extent of reparation available in an action for State liability (and arguably the principle of effective judicial protection) seemed to be satisfied in this case. It did not therefore consider it necessary to grant additional punitive damages in the form of exemplary damages. First, the applicants would receive a full indemnity for the losses which they had suffered as a result of the breach of Community law committed by the Member State in accordance with the requirement for full and effective compensation laid down in *Brasserie du Pêcheur and Factortame (No.3)*. Second, the remedy of the award of compensatory damages in the context of the present case did not make it virtually impossible or excessively difficult to obtain a remedy. Third, in considering whether exemplary damages were available under a similar claim based on domestic law, the national court held that although an action for State liability is *sui generis*, it has the character of a breach of statutory duty. In drawing this analogy, the Divisional Court held that, under English law, unless the relevant statute expressly makes provision for punitive damages, only compensatory damages will be awarded. It held that the relevant statute in this case was Section 2(1) European Communities Act 1972.

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219 Sections 2(1) European Communities Act 1972 states that: “All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the
There is no express provision in the latter statute conferring a right to exemplary damages in the event of a breach of Community law. Thus, it followed that exemplary damages were not available in this case. A minimum, but "effective" level of protection had been, nevertheless, provided by the national courts. It is submitted that this outcome complies with the principle of comparability and hence with the principle of effective judicial protection as developed by the ECJ.

The approach adopted by the English High Court in *Factortame (No.3)* has, however, been criticized by Hoskins as being based on an artificial distinction. He argues that the action for breach of statutory duty was not designed to deal with unlawful acts of public authorities, but rather those of individuals. Further, section 2 (1) European Communities Act 1972 is general in nature. It does not impose a "very limited or specific statutory duty" and does not provide for the availability of exemplary damages in the event of a breach. Thus, the national court's argument was "self-justifying" in nature. Hoskins suggests that it would be preferable for the national court to introduce a new *sui generis* remedy for an action for State liability and to draw upon the principles laid down in the ECJ's Article 215(2) EC (now Article 288 (2)) case-law which has been developed specifically for breaches of Community law committed by the legislature.\(^{220}\)

The decision of the English High Court illustrates the need for an independent cause of action for State liability for breach of Community law to be introduced into the national legal systems of the 15 Member States, in order to avoid uncertainty in relation to the application of national procedural rules. The extent to which the principle of effective judicial protection is applied in practice by the national courts of the various Member States is outside the scope of this thesis, but is an area which merits further comparative research.

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Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies."

5.3.3. Limitations on arrears of damages

Following the ECJ's judgment in *Francovich*, Italy belatedly adopted a legislative decree which contained provisions which implemented Directive 80/987 (which provides for the protection of employees in the event of the insolvency of their employer) and laid down a regime for claims for damages against the State. The compatibility of the latter system with the principles of Community law governing the extent of reparation discussed above was challenged before the Italian courts. In Case C-261/95, *Palmisani*, the plaintiff contested the Italian legislation which provided that actions for reparation arising from the late implementation of Directive 80/987 must be brought within a period of one year from the date of its entry into force. In Case C-373/95, *Maso* and Case C-94 and C-95/95, *Bonifaci*, the plaintiffs challenged the limits placed on the payment of damages by the legislative decree.

5.3.3.1. Limitation periods

In Case C-261/95, *Palmisani*, the ECJ was required to declare whether the one-year national limitation period for bringing an action for losses suffered as a result of the late implementation of the Directive 80/987 laid down in the legislative decree was compatible with the principles of comparability and sufficient enforceability. In other words, was the one-year time limit less favourable than those limitation periods which apply to similar claims under

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224 Case C-373/95, *Frederica Maso and others, Graziana Gazette and others v. Instituto Nazionale Della Previdenza Sociale (INPS) and Italy* [1997] 3 C.M.L.R. 1244.
225 Case C-94 and C-95/95, *Bonifaci, Berto and others v. Instituto Nazionale Della Previdenza Sociale (INPS) and Italy* [1998] 1 C.M.L.R. 257.
227 See earlier discussion in Chapter 3.
national law and did it make it excessively difficult for the plaintiff to bring a claim for reparation?

Confirming its ruling in *Brasserie du Pêcheur and Factortame (No.3)* (and arguably in accordance with the principle of effective judicial protection), the ECJ held that any reparation paid on the basis of the principle of State liability must be commensurate with the loss sustained, in order to ensure the effective protection of the Community rights of individuals.

As discussed earlier in this thesis, the ECJ has consistently held that Member States are entitled to lay down reasonable time-limits in the interests of legal certainty and sound administration provided they do not infringe the principle of comparability and the principle of sufficient enforceability. The ECJ arguably adopted the same approach in relation to national limitation periods which are applicable to actions against the State for damages thus promoting greater coherence in its development of the principle of effective judicial protection. In *Palmisani*, the ECJ held that:

"...a time-limit of one year commencing from the date of entry into force of the measure transposing the Directive into national law, which not only enables the beneficiaries to ascertain the full extent of their rights but also specifies the conditions under which the loss or damage sustained as a result of the belated transposition will be made good, cannot be regarded as making it excessively difficult or, *a fortiori*, virtually impossible to lodge a claim for reparation." 

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230 Case C-261/95, *Rosalba Palmisani v. Instituto Nazionale Della Previdenza Sociale (INPS)*, *op.cit.*, at paragraph 29.
The compatibility of the one year limitation period with the principle of comparability was, however, more contentious. The ECJ held that the national court should only compare the time-limit at issue with those national time-limits which possess similar objectives, namely those which apply to claims for actions for damages based on national law (as opposed to Community law). This excluded an appropriate comparison being made with the provisions implementing the directive itself and with the time-limits which apply to actions brought to claims for arrears in payment of social security benefits. These latter time-limits have objectives which differ in substance from that which applies to an action for damages against the State.

The ECJ went on to state that although the five year time-limit for claims for non-contractual liability under Italian civil law did share the same objective as the time-limit which was applicable in this case, it had insufficient information about such claims made under national law to make a valid comparison. The matter was therefore left to the national court for examination. However, it added that if the Italian civil law system of non-contractual liability could not provide the basis for an action for damages to be brought against a public authority, the national court would be unable to make any relevant comparison with the one-year time-limit which applied in the present case. In those circumstances, the national court would have to rule that the one-year time-limit was compatible with Community law principle of comparability.

The approach of the ECJ in \textit{Palmisani} is illustrative of the Court’s deferential approach adopted in a number of cases relating to the enforcement of Community law before the national courts. Tridimas has argued that the adoption of this

\footnotesize{\begin{itemize}
\item \textsuperscript{232} See further discussion of ECJ’s approach in Chapter 3.
\item \textsuperscript{233} Case C-261/95, \textit{Rosalba Palmisani v. Instituto Nazionale Della Previdenza Sociale (INPS)}, \textit{op. cit.}, at paragraph 36.
\item \textsuperscript{234} \textit{Ibid}, at paragraph 37.
\item \textsuperscript{235} See further discussion in Chapters 3, 4 and 5.
\end{itemize}}
attitude towards the principle of comparability rather than the principle of sufficient enforceability is understandable since it is the ECJ's responsibility to decide whether or not national conditions governing the exercise of a Community claim offer the requisite degree of protection. The principle of comparability requires comparisons to be made with similar domestic claims which the national courts are in a better position to assess. Nevertheless, Tridimas has warned that by granting the national courts a wider margin of discretion in this respect may lead to disparities in the level of protection awarded in the different national jurisdictions. This would arguably undermine the principle of effective judicial protection.

5.3.3.2. Adequacy of damages

In both Case C-373/95, *Maso* and Joined Cases C-94 and C-95/95, *Bonifaci*, legal challenges were made to the restrictions placed on the liability of the National Guarantee Institution which had been set up pursuant to the Italian legislation giving effect to the relevant Community directive.

Article 4(2) of Directive 80/987 permits Member States to limit the payment of outstanding claims for certain periods of the employment relationship and grants Member States a number of options for determining those periods. In *Bonifaci*,

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236 Tridimas, *op.cit.*, at p. 185.
238 Case C-373/95, *Frederica Maso and others, Graziana Gazzette and others v. Instituto Nazionale Della Previdenza Sociale (INPS) and Italy* [1997] 3 C.M.L.R. 1244.
239 Case C-94 and C-95/95, *Bonifaci, Berto and others v. Instituto Nazionale Della Previdenza Sociale (INPS) and Italy* [1998] 1 C.M.L.R. 257.

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the plaintiffs contested the Legislative Decree which restricted payment for State liability claims to those made for the last 3 months of the employment period, and only within the 12 months prior to the onset of the employer’s insolvency.

In *Maso*, the plaintiffs challenged a provision of the Legislative Decree which purported to implement Article 4(3) of the Directive and imposed a ceiling on the payment made by the National Guarantee Institution in State liability claims. It provided that the compensation payable was limited to 3 months’ pay, net of social security deductions, and was not to be aggregated with the *indemnità di mobilità* (job-seeker’s allowance) granted under Italian law to those remaining unemployed in the three months following dismissal.

In both cases, the ECJ was therefore required to consider whether the retroactive application of the various limitations on claims for State liability with retroactive effect, complied with Community law and were thus sufficient to ensure the effective judicial protection of individuals’ Community rights. The ECJ's rulings in both cases are similar. The ECJ confirmed that the extent of reparation must be commensurate to the loss or damage sustained by applicants in order to ensure effective protection of their Community rights. It reiterated that Member States must make reparation on the basis of national rules which comply with the principles of sufficient enforceability and comparability.

In clarifying whether or not retroactive implementation of a directive complies with these requirements of Community law (and arguably the principle of effective judicial protection), the ECJ stated that:

“As regards the extent of reparation for the loss or damage arising from such failure, it should be noted that retroactive application in full of the measures implementing the Directive to employees who have suffered loss as a result of belated transposition enables *in principle* the harmful consequences of the breach of Community law to be remedied, *provided that the Directive has been*
transposed properly. Such application, should have the effect of guaranteeing to those employees the rights from which they would have benefited if the Directive had been transposed within the prescribed period. 241

Thus, in principle, full and proper retroactive implementation of a directive is accepted by Community law and will comply with the principle of effective judicial protection. However, in both Maso and Bonifaci, the ECJ held that the Legislative Decree did not correctly transpose the directive into national law. 242

The ECJ added that Member States were entitled to impose limitations on the National Guarantee Institution’s liability in accordance with Article 4(2) where the Member State had in fact exercised that option when transposing Directive 80/987 into national law. The ECJ specified that:

"...retroactive application in full of the implementing measures necessarily implies that any rules against aggregation contained in the transposition measure may also be applied, provided they do not affect the rights conferred on individuals by the Directive..." 243

Thus, Member States were permitted to introduce limitations on liability contained in substantive provisions of directive provided these did not affect the rights conferred on individuals by the directive. This arguably complies with the

241 Case C-373/95, Frederica Maso and others, Graziana Gazzette and others v. Instituto Nazionale Della Previdenza Sociale (INPS) and Italy, op. cit., at paragraph 39.
242 The ECJ held that the provisions relating to the calculation of the period of employment were incorrect. It stated that the calculation of the period of employment for which the guarantee institutions were responsible should be made by reference to the date when a request for the opening of insolvency proceedings is made rather than the date of the onset of insolvency proceedings. The ECJ noted that since the judgment declaring insolvency may be rendered some time after the request to open proceedings, the application of the limitations in Article 4 (2) may result in the guarantee of payment of outstanding wage claims for any period of employment being removed for reasons unconnected to the conduct of the employees. This would be contrary to the objectives of the Directive; Case C-373/95 Maso, op. cit., at paragraph 43-54; Case C-94 & 95/95 Bonifaci, op. cit., at paragraphs 42-44.
243 Ibid, at paragraph 40.
approach of the ECJ in Steenhorst-Neerings,\textsuperscript{244} Fantask\textsuperscript{245} and Magorrian\textsuperscript{246} in which the Court held that restrictions may be imposed by Member States on the extent of an individual's claim for arrears in benefits in respect of a period in the past, but not in respect of future claims. Such limitations do not restrict the exercise of the right itself and do not make it virtually impossible to make a claim before the national courts.

However, the ECJ did add that the national court is subject to an overriding obligation, namely that the reparation for the loss sustained must be \textit{adequate}. It held that:

"Retroactive and proper application in full of the measures implementing the Directive will suffice for that purpose \textit{unless the beneficiaries establish the existence of complementary loss} sustained on account of the fact that they were unable to benefit at the appropriate time from the financial advantages guaranteed by the Directive with the result that such loss must also be made good."\textsuperscript{247}

Thus, in principle, the retroactive application of belated implementation measures of a directive may satisfy the requirement for full reparation. This will be the case even where the Member State has introduced a limitation provided this is contained in the provisions of the directive, which restrict the plaintiff's claim for reparation. Tridimas argues that in Maso and Bonifaci, the ECJ has made it clear that a Member State is not permitted to introduce a regime which is less favourable than the one introduced by the Directive since this would conflict with the requirement that individuals are placed in the same position they would have


\textsuperscript{245} Case C-188/95, Fantask A/S and Others v. Industriministeriet [1998] 1 C.M.L.R. 473. Discussed further in Chapter 3.

\textsuperscript{246} Case C-246/96, Mary Teresa Magorrian and Irene Patricia Cunningham v. Eastern Health and Social Services Board and Department of Health and Social Services [1997] E.C.R. I-7153. Discussed further in Chapter 3.

\textsuperscript{247} Case C-373/95, Frederica Maso and others, Graziana Gazzette and others v. Instituto Nazionale Della Previdenza Sociale (INPS) and Italy, op.cit., at paragraph 41.
found themselves in if the Member State had implemented the directive in good
time. Nevertheless, in some situations retroactive application of implementing
measures will not guarantee adequate compensation in accordance with the
principle of effective judicial protection where the individual concerned has
suffered additional losses. The protection by the ECJ of such consequential loss
in relation to actions based on the principle of State liability arguably represents
an extension of the principle of adequate compensation and may be a
development of the principle of effective judicial protection as laid down in
Marshall (No.2).248

The ECJ’s ruling in Maso and Bonifaci has been subsequently confirmed in Case
C-131/97, Carbonari.249 It arguably amounts to a clarification of the scope of the
principle of effective judicial protection in relation to the extent of reparation to
be made payable by the national courts. However, it has also been argued by
Tridimas that the Court will need to clarify in future cases the specific nature of
the additional losses which need to be sustained “on account of the fact” that the
employees were unable to benefit at the appropriate time from the financial
advantages guaranteed by the Directive.250 The issue of additional Community
requirements relating to such issues as the causation of consequential losses
arguably implies that there is further scope for developing the principle of
effective judicial protection in relation to the amount of damages payable as a
result of State liability for a breach of Community law in the future.

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248 See further discussion on Case C-271/91, M.H. Marshall (No.2) v. Southampton and South
249 Case C-131/97, Annalisa Carbonari and others v. Università degli Studi di Bologna and
others, judgment of 25 February 1999, not yet reported, at paragraph 52.
250 Tridimas, T., “Epilogue: The Law relating to State Liability Damages” in New Directions in
pp. 186 - 187.
5.4. Extending effective judicial protection in the future: individual liability for breach of Community law?

This Chapter is limited to a consideration of the principle of State liability in relation to the principle of effective judicial protection. However, it is submitted that in order to have complete or full application of the principle of effective judicial protection, individuals should also be able, inter alia, to bring an action for damages against another individual for losses sustained as a result of an infringement of their Community rights. Although it is not possible, within the framework of this thesis to develop this theme in full, some brief comments may be made. At present, individual liability for damages resulting from a breach of Community law will only arise where such liability is provided for under national law.\(^{251}\) Although such rules should also be, in principle, subject to the principles of sufficient enforceability and comparability, even if national law permits such a cause of action, there is scope for the existing diversity of national rules to undermine the principle of effective judicial protection.

It has been argued by Hoskins that it would be feasible for the ECJ to introduce an action for damages for individual liability in order to protect relevant Community rights.\(^{252}\) It is submitted that the legal basis for this cause of action should be the principle of effective judicial protection. As argued earlier in this thesis, directly effective provisions of Community law are “a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law.”\(^{253}\) In accordance with Article 5 EC (now Article 10), it is the duty of the national courts to ensure the legal protection of rights which individuals derive from

\(^{251}\) *Garden Cottage Foods v. MMB* [1984] A.C. 130. In this case, House of Lords held that damages are available *in principle* for breach of Article 86 (now Article 82) EC by another individual and that the appropriate cause of action is breach of statutory duty.


Community law. This arguably entails an obligation to provide a remedy, even if no such remedy is available under national law. Further, the full effect and the effective protection of directly effective provisions would be impaired if the individual or undertaking did not have the possibility of obtaining reparation from the party which can be held responsible for the breach of Community law. Thus, there is sufficient authority in the case-law of the ECJ relating to the principle of effective judicial protection to introduce a principle of individual liability.

In 1994, D’Sa argued that the ECJ could not continue to ignore the issue of individual liability since the matter was becoming of increasing importance to individual litigants. The impetus for a change in the enforcement of the EC Competition rules in order to simplify their administration and increase their effectiveness has been reinforced by the Commission in a recent White Paper. A substantial percentage of litigation between private individuals based on Community law arguably arises in the context of competition law. Articles 85 (1) EC (now Article 81(1)) and 86 (now Article 82) of the Treaty have horizontal direct effect and may therefore be invoked by individuals inter se before the national courts. The Commission has proposed that Article 85 (3) EC (now Article 81 (3)) should be made horizontally directly effective enabling the whole of Article 85 EC (now Article 81) to be invoked by individuals directly before the national courts. It considers the national courts to be the most effective forum for the enforcement of EC competition rules in view of the fact that they are able to order interim measures and, unlike the Commission, grant damages (where

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258 At present, a national court may only apply Article 85 (1) EC (now Article 81 (1)) if it is beyond doubt that Article 85 (3) EC (now Article 81 (3)) is not applicable, to order interim measures pursuant to national law and to make a positive assessment of the application of Article 85 (3) EC (now Article 81 (3)).
available under national law). Both parties to an agreement would benefit from such a system. First, the defendant would be able to resolve quickly whether or not a restrictive practice infringes the Treaty, thus reducing legal uncertainty. Second, complainants would be able to obtain damages (where available) more rapidly. Mechanisms would be introduced in order to ensure that this new decentralized application of Community law would be consistent and uniform throughout the national courts. The Commission has proposed that an obligation should be placed upon the national courts to inform the Commission of any proceedings before them in which ex-Articles 85 and 86 EC have been invoked. In addition, it has suggested that the Commission should be allowed to intervene as amicus curiae in proceedings before the national courts. Amending Regulation 17 to incorporate the Commission notice on co-operation between the Commission and national courts would also enhance consistency of interpretation as well as introducing a mechanism to allow the national competition authorities to intervene in proceedings in some form.

The opportunity for the ECJ to introduce a general principle of individual liability arose in Case 128/92, Banks. The ECJ was asked to rule, inter alia, on whether Community law imposes on national courts a duty to award damages in respect of losses sustained by an individual company as a result of various breaches of the competition rules of the ECSC Treaty (and, in the alternative, Articles 85 (now Article 81) and 86 (now Article 82) of Treaty) by another individual company. In the event the ECJ side-stepped the issue by ruling that the relevant provisions did not have direct effect. However, Advocate General Van Gerven considered the issue in depth and has subsequently expressed his

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260 Ibid, at paragraph 100.
261 Ibid, at paragraph 107.
263 The ECJ held that since it was the sole responsibility of the Commission for ensuring enforcement of these provisions, it followed therefore that national courts had no competence to rule on compatibility of the provisions or to award damages for breach of the said provisions; Case 128/92, Banks v. British Coal Corporation, op.cit., at paragraph 21.
views on the matter writing in an extra-judicial capacity.\textsuperscript{264} He has argued that the principle of State liability laid down by the ECJ in \textit{Francovich} should be extended to include the liability of individuals in the event of a breach of Community law. The rationale for the introduction of the principle of State liability is equally applicable in the context of individual liability. He argued that:

"...the full effect of Community law would be impaired if the ...individual or undertaking did not have the possibility of obtaining reparation from the party who can be held responsible for the breach of Community law..."\textsuperscript{265}

Furthermore, he adds that in the light of the ECJ's decision in \textit{Brasserie du Pécheur and Factortame (No.3)} in which the principle of State liability was extended to breaches of directly effective Community law which provide "a direct source of...duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law,"\textsuperscript{266} he can see no reason why individual liability cannot be incurred for breach of Treaty provisions which have horizontal direct effect such as Articles 85 (now Article 81) and 86 (now Article 82) of the Treaty\textsuperscript{267} and which thus impose obligations upon individuals, particularly in the field of competition law.\textsuperscript{268} He argues that recognition of the right to obtain reparation would be a logical conclusion of the horizontal effect of the rules concerned and the only truly effective method by which the national court would be able to fully safeguard the directly effective provisions which have been infringed. For example, a declaration by virtue of Article 85 (2) EC (now Article 81 (2)) that the legal relationship between the

\textsuperscript{264} Van Gerven, W., "Bridging the Unbridgeable: Community and National Tort Laws after \textit{Francovich} and \textit{Brasserie}" (1996) 45 I.C.L.Q. 507.


\textsuperscript{268} Van Gerven, W., "Bridging the Unbridgeable: Community and National Tort Laws after \textit{Francovich} and \textit{Brasserie}" (1996) 45 I.C.L.Q. 507 at p. 531.
parties is void is insufficient for making good the loss and damage suffered by a third party. In addition, he argues that a rule on reparation of this kind would make the Community rules of competition more "operational." 269

The Commission has already proceeded with part of its plans to modernize EC competition law and it remains unclear as to whether the ECJ will rule upon the possibility of bringing an action for damages for breach of Community law against an individual in the meantime. 270 However, as with all jurisprudential principles developed on an ad hoc basis, the ECJ will need to wait for an appropriate case to come before it. 271 The introduction of the principle of individual liability for damages for a breach of Community law would undoubtedly increase the scope of the principle of effective judicial protection. On the other hand, it is argued that it may conflict with the principle of legal certainty by imposing liability for damages upon individuals where no such liability is incurred under national law. 272

It is submitted that the development of a general principle of individual liability for a breach of Community law is consistent with the ECJ's desire to guarantee individuals effective judicial protection of their Community rights before the national courts. At present, even if the Commission's new strategy for modernizing EC competition law is successful, it may be undermined by the fact that, in some Member States, national rules may not provide for damages for breach of Community law in proceedings between individuals. The White Paper

271 Such an opportunity might be afforded through the reference by the Court of Appeal to the ECJ of the case Courage Ltd v. Crehan, The Times, 14 June 1999 which concerns the issue of the availability of damages for breach of a Community law obligation in relation to private parties (namely an alleged infringement of Article 81 (ex Article 85) concerning a "beer-tie" provision in a pub lease).
272 Deards, E., ""Curiouser and Curiouser"? The Development of Member State Liability in the Court of Justice" (1993) 3 E.P.L. 117 at p. 143.

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does not contain any proposals for amending Regulation 17 to provide a uniform Community right to damages for parties who have suffered losses as a result of an infringement of the EC Competition rules. This arguably suggests that the determination by the ECJ of more general principles governing the issue of individual liability which could then be applied to specific breaches such as those of competition law, is becoming overdue and merits early consideration.
CONCLUSIONS

The ECJ has played a prominent role in ensuring that an "effective" standard of justice is guaranteed by the national courts for individuals seeking to enforce their Community rights. The main aim of the thesis has been to explore the proposition that the ECJ has sought to achieve this goal through the development of a principle of Community law, namely the principle of effective judicial protection, which underpins the Community system of enforcement. Although the existence of such a principle has been extolled by Advocate General Van Gerven and various academic commentators, the research undertaken in this thesis takes the academic debate further by fleshing out the principle of "effective judicial protection" through the identification of its origin, legal basis and its different manifestations. It may be concluded that a single definition of the principle of effective judicial protection has not been laid down by the ECJ in its case-law. Nevertheless, the principle of effective judicial protection reveals itself through a complex paradigm woven around four key features of the Community system of enforcement, namely the concept of direct effect, the relationship between Community law and national procedural rules and remedies, the concept of indirect effect and the principle of State liability. Accordingly, an examination of the case-law concerning each feature has been undertaken to identify and evaluate the scope of the principle of effective judicial protection. This has enabled the parameters within which the principle of effective judicial protection

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1 The thesis deals exclusively with the ECJ's policy towards the effective enforcement of Community law by individuals before the national courts. It does not investigate how the ECJ has sought to secure the effectiveness of Community law in direct actions before the ECJ. The policy issues and techniques of the ECJ differ and would require separate analysis.


4 See, for example, the ECJ's judgment at paragraph 23 in Case 14/83, Sabine Von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen [1984] E.C.R. 1891.
has been developed to be determined. Future developments of the principle of effective judicial protection by the ECJ may hence be predicted.

It may be concluded from the analysis of the case-law conducted in Chapter 1 that the principle of effective judicial protection made its first appearance in *Humblet*. In this ruling, the ECJ outlined the framework within which the principle of effective judicial protection was to operate. It confirmed that the national courts, by virtue of Article 86 ECSC, are under a general obligation to ensure the effective enforcement of the ECSC Treaty. In subsequent cases, the analogous provision within the context of the EC Treaty, namely Article 5 EC (now Article 10), was found to have the same effect. The ECJ also laid down two early manifestations of the principle of effective judicial protection. First, that where an individual derives a right under Community law, there must be a corollary right for the individual to enforce it directly. Second, that the provisions guaranteeing such rights must not, in a case of doubt, be interpreted in a detrimental way vis-à-vis the individual concerned. The aim was to ensure that the level of judicial protection provided by a national court to protect individuals' asserting their Community rights, reached a minimum standard in each Member State. The Court's ruling in *Humblet* provides the foundation upon which the principle of effective judicial protection has been built. However, in subsequent case-law, the focus of the ECJ shifted from the enforcement of individuals' Community rights derived from the ECSC Treaty to those conferred by the EC Treaty.

In essence, the principle of effective judicial protection consists of specific Community obligations imposed on the national courts which are designed to guarantee the effective judicial protection of individuals' Community rights. The ECJ has drawn upon various legal sources as the legal basis for the introduction

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5 In Case C-213/89, *R. v. Secretary of State for Transport ex parte Factortame Ltd & Others (No. 1)* [1990] E.C.R. I-2433 (which is discussed in Chapter 3), the ECJ did not adopt the approach suggested by the Advocate General which was to expressly recognize the principle of effective judicial protection as a general principle of Community law.
of the principle of effective judicial protection. First, the ECJ has recognized that
the need for the "full effectiveness and effective protection" is inherent in the
system of the Treaties and, it is thus based on the rule of law. Second, as
indicated above, the Court has drawn upon the so-called principle of Member
State co-operation embodied in Article 5 EC (now Article 10) as the Treaty basis
for the obligations imposed on the national courts. Third, the "principle of
effectiveness" has emerged as an additional legal basis for the principle of
effective judicial protection. It is submitted that one of the most important
conclusions which emerge from the research is the finding that the principle of
effective judicial protection is distinct from the principle of effectiveness. In
literature on judicial protection, many academic commentators equate the two
principles. This is understandable given that prior to its judgments in
Francovich and Brasserie du Pêcheur and Factortame (No.3), the Court itself
had failed to make a distinction between the two principles. However, it may be
concluded that although the principle of effectiveness and the principle of
effective judicial protection are inextricably linked, they are separate principles of
law. The principle of effective judicial protection may be based upon the
principle of effectiveness, but it is narrower in scope and more focussed than the
latter. This proposition has been borne out by the case-law of the ECJ examined
in the preceding chapters. Finally, the ECJ has also drawn upon general
principles of law common to the constitutional traditions of the Member States,
some of which are codified in the European Convention on Human Rights
(E.C.H.R.), as the legal basis for obligations imposed on the national courts
which constitute further manifestations of the principle of effective judicial
protection.

To determine the scope of the principle of effective judicial protection, the case-
law relating to the concepts of direct effect, the relationship between Community
law and national procedural rules and remedies, the concept of indirect effect and

The principle of State liability have been analysed and evaluated. Two conclusions emerge from this analysis. First, it may be concluded that the ECJ has developed a level of judicial protection which is "effective," but which does not always reasonably secure the full and complete protection of Community rights. The ECJ operates in a broader political context and therefore has to take into account the interests of the Member States when pursuing its goal of full and complete enforcement of Community law. It is fully aware that an effective system of enforcement depends upon the co-operation of the national courts of the Member States. Moreover, the ECJ has been required to develop the principle of effective judicial protection in compliance with the general principles of law common to each of the Member States. These have included the need for legal certainty (including respect for the principles of legitimate expectations, non-retroactivity and legality in criminal law) and the proper conduct of proceedings before the national courts. Second, it emerges from an analysis of the development of the principle of effective judicial protection that where, for the reasons indicated above, the Court is unable to secure full and complete judicial protection by one method of enforcement, it has explored other means of achieving this goal.

The result is a complex web of legal principles which aim to secure the effective judicial protection of Community law. The research has therefore centred around what is meant by "effective" judicial protection. It seeks to identify where the balance has been struck between the need for the full and complete enforcement of Community law and the need to respect the national interests of the Member States and general principles of law.

The first manifestation of the principle of effective judicial protection within the context of the EC Treaty was the introduction of the concept of direct effect which was examined in Chapter 2. This concept, which is based upon ex-Article 5 EC and the principle of effectiveness, enables individuals to rely directly on their directly effective Community rights before the national courts provided such
rights are unconditional, sufficiently precise and legally perfect. Individuals do not have to rely on the intervention of the Commission (or a Member State) to enforce their Community rights. However, it emerges that the ability of the concept of direct effect to effectively protect individuals’ rights has been restricted in the context of directives. The ECJ has refused to recognize the horizontal direct effect of directives. Although the ECJ’s reasoning undermines the full effect of Community law, it is consistent with the assertion that the principle of effective judicial protection is based upon the rule of law. In addition, this restriction may reflect the fact that there was clear resistance from the Member States in this case to the further expansion of the principle of effective judicial protection to allow directives to produce horizontal direct effects.

Although it appears from Chapter 2 that the scope of the principle of effective judicial protection appears to have been limited, it emerges that the ECJ’s quest to secure the full effectiveness of Community law has continued. Its latest development of the principle of effective judicial protection in the context of direct effect has been the introduction of the so-called doctrine of “incidental horizontal direct effect.” This concept arguably arose in its CIA judgment. The practical effect of the ECJ’s ruling in this case was to allow an individual to rely on a directive in proceedings against another individual. Although the scope of the principle of effective judicial protection has thus arguably been modified, it is unlikely that the Court has reversed its prohibition of the horizontal direct effect of directives. Further clarification of the concept of “incidental horizontal direct effect” is needed, but even this new development seems too limited in scope to secure the full effectiveness of Community law.

Moreover, the granting of horizontal direct effect for directives may not be sufficient to secure the full and complete protection of Community law. The concept of direct effect (both vertical and horizontal) may allow individuals to invoke their directly effective Community rights before the national courts, but in
the absence of Community harmonizing legislation, national procedural rules and remedies will still have to be applied by the national courts. The diversity of such rules and remedies in the 15 Member States poses a risk to the uniform and effective enforcement of Community law and has therefore led the ECJ to develop the principle of effective judicial protection further by introducing specific obligations in the field of national procedural law and remedies. These have been identified and explored in Chapter 3. The application of the principle of effective judicial protection to national procedural rules and remedies has fluctuated. The extent of the right to “effective” judicial protection of Community rights granted to individuals has shifted over time. A higher standard of protection has been granted to individuals seeking to assert the principle of equal treatment in employment matters laid down in Directive 76/207.

In the context of national procedural rules, the ECJ has consistently been seeking ways in which to secure the full and complete protection of individuals’ Community rights whilst respecting the procedural autonomy of the Member States. Initially, in the absence of Community harmonization, the ECJ permitted national procedural rules and remedies to be applied by the national courts subject to the principles of sufficient enforceability and comparability, thus ensuring a minimum standard of protection. However, in subsequent cases, the ECJ arguably departed from this formula and gave more precedence to the principle of effectiveness. Criticisms of this shift in approach to the principle of effective judicial protection by the Member States, particularly in relation to the ECJ’s ruling on national time-limits in Emmott, have led the Court to revert to the original minimalist approach. The latter, however, has been subsequently modified by the introduction of a new “purposive” test in Van Schijndel and Peterbroeck. The national courts must now balance the restrictive impact of a national procedural rule against its role and purpose in the national legal system and decide whether the level of protection guaranteed, which may be less than full and complete, is justified.
The Court's minimalist approach (in relation to national procedural rules) undermines the Court's quest for the full and complete protection of Community law. For example, in *Johnson (No. 2)*, the plaintiff was prevented from relying on the full extent of her directly effective right for equal treatment in social security matters *in full*. A national procedural rule prevented the payment of arrears in benefit to be back-dated for more than one year from the date of the claim. Although Mrs. Johnson was able to exercise her right to equal treatment, in reality, as a result of the Member States' failure to implement the said directive correctly, she was prevented by a national procedural rule from receiving the equivalent sum that a man in the same circumstances would have been paid. Thus, even where a national rule satisfies the requirements of principles of sufficient enforceability and comparability, the level of protection guaranteed by the national court in the circumstances falls below that which is required to provide full and complete protection of individuals' Community rights.

The ECJ has introduced a range of fundamental remedies on the basis of the principle of effective judicial protection. These manifestations of the principle of effective judicial protection have included the right to an effective remedy, the right to adequate compensation, the right of access to an effective remedy, the right to be informed of reasons, the right to interim relief, the right to reimbursement of charges illegally levied under national law and the right to damages. However, the ability of these Community remedies to secure the full and complete enforcement of Community law is undermined where they must be exercised in accordance with national procedural rules.

The principle of effective judicial protection has been most successful in securing the full and complete protection in the field of remedies in relation to the enforcement of the Equal Treatment Directive. In *Van Colson*, the Court imposed a duty upon the Member States to give full effect to Directive 76/207 which entails an obligation to provide an *effective remedy*. An examination of the case-law reveals that this arguably characteristic feature of the principle of
effective judicial protection must be "real and have a deterrent effect." It also includes the right to adequate compensation. In subsequent case-law, the ECJ has expanded the scope of these elements of the principle of effective judicial protection in order to secure the full and complete protection of Community law. The ECJ may have been influenced by two factors. First, where the Community has introduced harmonizing legislation, there is a clear Treaty basis upon which the ECJ may fetter the Member State's discretion without its legitimacy being questioned. Second, the principle of equal treatment has been recognized by the Court as a fundamental principle of Community law and is also a basic principle of human rights which the ECJ is under a duty to protect. This suggests that the harmonization of procedural rules and remedies may be the key to a system of enforcement which is "full and complete". However, in Sutton, the ECJ made it clear that it would not adopt a similar expansive approach when enforcing the Equal Treatment Directive in social security matters. It is submitted that even where harmonizing legislation has been introduced, the interests of the Member States must be taken into account. In Sutton, the ECJ was clearly reluctant to increase the financial liability of the Member States by opening the door for claims of interest to be paid on arrears in social security benefits resulting from a defective transposition of a directive.

The ECJ's refusal to grant directives horizontal direct effect led the Court to introduce the concept of indirect effect which is examined in Chapter 4. This feature of the principle of effective judicial protection requires national courts to interpret national law in conformity with Community law where it is possible to do so. The concept of indirect effect strengthens the principle of effective judicial protection in the sense that it offers individuals the opportunity to invoke rights derived from directives before national courts which have failed the test for direct effect, and even against other individuals, in the absence of horizontal direct effect. However, it emerges clearly from the analysis of the case-law that the principle of indirect effect does not offer "full and complete" judicial protection.
There are restrictions on the scope of the interpretative obligation incumbent on
the national courts. The caveat "where it is possible to do so" indicates that there
are limits inherent in this manifestation of the principle of effective judicial
protection. A national court will be unable to interpret national law to comply
with Community law if there is no national legislation, which falls within the
scope of the directive. Furthermore, constitutional restraints may prevent
national courts from interpreting national law in compliance with Community
directives contra legem. General principles of law common to the Member
States, some of which have been codified in international treaties including the
E.C.H.R., have also restricted the application of the purposive obligation by the
national courts. More specifically, the principles of legal certainty, non-
retroactivity and legality in criminal law prevent national courts from adopting
the concept of indirect effect where it would result in the criminal liability of an
individual being determined or aggravated.

Despite the inadequacies of the concepts of direct effect and indirect effect as
well as the Community rules governing the application of national procedural
rules and remedies in attaining the full enforcement of individuals' Community
rights, the ECJ’s approach is continually evolving. The high point of the Court’s
development of the principle of effective judicial protection has been its
introduction of the principle of State liability in its Francovich judgment. The
principle of State liability requires national courts to grant individuals
compensation where their Community rights have been breached by a Member
State provided the requisite conditions of liability have been fulfilled. It may be
concluded that the principle of State liability is currently seen by the ECJ as the
preferred remedy for securing the full and complete enforcement of individuals’
Community rights. First, individuals may bring an action for damages for breach
of Community law before their national courts as an alternative means of

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7 See, for example, Joined Cases C-6/90 & C-9/90, Francovich and Others v. Italian Republic
enforcement to the concepts of direct effect and indirect effect. Second, an action for damages may be initiated as a *complementary or additional* remedy, where national procedural rules and remedies fail to guarantee "full and complete" protection.

However, the principle of State liability is no panacea for securing the *full and complete* enforcement of Community law. First, in practical terms, an individual's right to an effective remedy is undermined by the fact that where it is invoked as an additional remedy, two different sets of legal proceedings will need to be commenced. Second, the ECJ has developed a test of liability which reconciles the need for the full and complete judicial protection of individuals' Community rights with the financial and administrative concerns of the Member States (and ultimately the tax-payers of the European Union). As a result of its judgments in *Francovich, Factortame (No.3)* and later cases, a Member State will only incur liability for breach of Community law where such a breach is sufficiently serious. Third, the award of damages must be made by the national courts in accordance with national procedural rules. Although the latter will be subject to the principles of sufficient enforceability and comparability, there is a risk of diversity in the protection of Community law provided in the different Member States. Fourth, the principle of State liability does not guarantee an effective remedy where an individual's directly effective Community right has been infringed *by another individual* and there is no provision for compensation under national law for such an infringement. This undermines an individual's right to effective judicial protection of his/her Community rights. It is suggested that the merits of increasing the scope of the principle of effective judicial protection by introducing a principle of individual liability requires further investigation.

An analysis of the principle of effective judicial protection has revealed a complicated judge-made edifice of legal rules which is being continuously developed and refined by the ECJ. It may be concluded that the sheer complexity
of the Community system of enforcement may in itself weaken an individual’s right to effective judicial protection. The uncertainty surrounding the scope of the principle of effective judicial protection and the absence of a clear Treaty basis means that its legitimacy is constantly under review. It may be argued that this is an unsatisfactory state of affairs. A system of enforcement which is ineffective has the potential to undermine the Community legal order as well as the single Market and economic and monetary union. The hostility expressed by the Member States towards the ECJ’s attempt to ensure full and complete protection through the further development of the principle of effective judicial protection in line with the principle of effectiveness suggests that the only feasible alternative would be for the Community to introduce harmonizing legislation in relation to remedies for breach of Community law. However, to date, such action has not been forthcoming, despite calls from the Commission and academic commentators.

In the current political climate, where the intergovernmentalist notion of European integration prevails, the ECJ has found itself caught between a (supranational) Community legislator which is unwilling (or unable) to act and national governments which are reluctant to reduce their discretion in this field. This may explain the ECJ’s current approach towards the development of the principle of effective judicial protection. It has arguably gradually become more deferential in its outlook. The national courts are being given increasing flexibility in how they will apply the different characteristics of the principle of effective judicial protection. Some commentators argue that the ECJ’s policy encapsulates the notion of “subsidiarity” which is currently favoured as a means of containing the powers of the Community institutions responsible for furthering European integration.

Alternatively, it may be concluded that the ECJ’s policy towards the enforcement of Community law has become more focussed. The Court has realized that the paradigm of the principle of effective judicial protection is in fact sufficient to
secure the "effective" protection of individuals' Community rights before the national courts. This is, as explained earlier, a more limited form of protection granted to individuals in the event of a breach of their Community rights. In the absence of Community legislation, the ECJ has therefore deemed the national courts capable of undertaking the task of securing the effective enforcement of Community law. Indeed, it is tentatively suggested that this may explain why the Commission has considered decentralizing enforcement of EC Competition law to the national courts. This subject requires further research.

There will undoubtedly be calls in the future for the ECJ to adopt a more coherent policy in securing the effective enforcement of Community law. It is unclear at present where this stimulus for a change in policy may come from though this may occur at the next Inter-Governmental Conference which is planned for 2000. It is possible that the Community may, in the future, introduce harmonizing legislation in an attempt to rationalize its now complex system of enforcement.

The principle of effective judicial protection is generally illustrative of the ECJ's developing and ongoing relationship with the national courts. There is considerable further scope to assess how the principle of effective judicial protection works in practical terms. This would require further research into the application of the various obligations identified in this thesis, which constitute the key elements of the principle of effective judicial protection, by the national courts. Such research may provide further valuable insight into the problems that prospective harmonizing legislation in the field of remedies would need to address. 8

8 To date, only limited research has been undertaken in this area. In February 1990, the Commission requested a group of experts to undertake research into "the approximation of the laws of the procedure of the Member States. The "Storme Report" or report on the "Approximation of Judiciary Law in the European Union" (Dordrecht: Martinus Nijhoff) edited by Marcel Storme was published in 1994, but has received little attention. See further discussion in Himsworth, C., "Things Fall Apart: The Harmonisation of Community Judicial Procedural Protection Revisited" (1997) 22 E.L.Rev. 291.
BIBLIOGRAPHY

Books


Journal Articles


Bebr, G., "Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg" (1983) 20 C.M.L.Rev. 35.


Deards, E., “‘Curiouser and Curiouser?’ The Development of Member State Liability in the Court of Justice” (1993) 3 E.P.L. 117.


Hilson, C., "Liability of Member States in Damages: The Place of Discretion" (1997) 46 I.C.L.Q. 941.


Hoskins, M., "Damages for Breach of Article 85", unpublished paper presented on 26 February 1998 at the Centre of European Law, School of Law, King’s College, London.


Hubeau, Fr., "Case-note on Case 199/82, San Giorgio" (1985) 22 C.M.L.Rev. 87.


Steiner, J., "Coming to terms with EEC Directives" (1990) 106 L.Q.R. 144.


Szyszczak, E., "Case-note on Case 188/89, Foster" (1990) 27 C.M.L.Rev. 859.


Van Gerven, W., “Non-Contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a view to a


Van Gerven, W., “Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie” (1996) 45 I.C.L.Q. 507.


Wooldridge F. and D’Sa, R., “ECJ decides Factortame (No. 3) and Brasserie du Pêcheur” (1996) 7 E.B.L.Rev. 161.
