

# Direct Effect & State Liability: remedies for EU Law in the Member States

EU LAW 2230/ 3145

Lecture 10

Professor Iyiola Solanke

# Consequences of the 'new legal order of international law'

- New relationship between legal systems:
  - Primacy of EU law over national law (*Internationale*)
  - Autonomy of EU law from international law (*Kadi*)
- New relationship with individuals
  - EU law and MS citizens = citizens can claim rights in EU law in MS courts: EU law has 'direct effect' (subject to conditions)
- EU law can *of itself* 'produce direct effects'
  - C26/62 *van Gend en Loos*: Article 30 TFEU 'ideally adapted to produce direct effects in the legal relationship between MS and their subjects'
  - C 6/64 *Costa v ENEL*: Article 49 TFEU is 'legally complete in itself' and 'capable of producing direct effects...'

# Conditions for direct effect of EU law

- Direct effect not determined by national courts or legislatures
- *van Gend* criteria: 'clear and unconditional' prohibition; **requires no further action for implementation**; negative obligation  
the MS have to stop doing sth.
  - Vertical direct effects (C-26/62 *van Gend*)
  - Horizontal direct effects (C-43/75 *Defrenne*)

# Hierarchy of EU law: eg. protection from discrimination

- **Primary law;**

- **Treaty on Functioning of the European Union (TFEU): Article 19** - 'Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'
- **Charter on Fundamental Rights, Title III (Equality) Article 21 on Non-discrimination** – 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

- **Secondary Law (Art 288 TFEU)**

- **Directive 2006/78 establishing a general framework for equal treatment in employment and occupation - Article 1** 'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

# Direct Effect of the EU Charter

- Vertical: C-176/12 *Association de mediation sociale v Union locale des syndicats CGT* (“AMS”)
  - the principle of non-discrimination on grounds of age in Article 21(1) of the Charter ‘is sufficient in itself to confer on individuals an individual right’ [47]
  - BUT not Art 27 CFR
- Horizontal: C-684/16 *Max Planck v. Shimizu*
  - “The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature, [...] that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter...”
  - <http://eulawanalysis.blogspot.com/2019/02/the-relationship-between-eu-charter-of.html>

# Direct Effect of Regulations & Decisions

- C 34/73 *Fratelli Variola SpA*:
  - as a result of nature and place in system of sources of EC law, regulations have immediate effect and confer rights which national courts have a duty to protect. The entry into force is independent of any national measure.
- C 156/91 *Hansa Fleisch*:
  - 19 Where a decision addressed to the Member States contains precise and unconditional provisions which must be implemented within a specified period, the provisions may be relied on by individuals as against a Member State **only** if that State fails to implement the decision before the expiry of the period prescribed or implements it in time, but incorrectly.

require MS to do sth. within a certain time limit

## Direct effect of Directives

- **Advantages:**

- Decentralisation of enforcement from the Commission to individuals
- Reduction of burden on the Commission
- Empowerment of individuals to monitor national transposition
- Faster and more effective implementation
- Promotion of legal certainty and uniformity: Directive applies automatically after implementation period

- **Disadvantages:**

- Blurring of formal distinction between regulations and directives

— must give rights to individuals  
eg. *Defrenne v SABENA*  
(No. 2) [1979]

— The time limit must have passed  
eg. *Pubblico Ministero v Ratti*  
[1979]



### Article 3 of Directive 64/221?

‘It would be incompatible with the binding effect attributed to a directive by Article 189 [288 TFEU] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned .’

**C-41/74 *van Duyn***

**EU Directive on labelling of solvents vs. stricter MS law on labelling of solvents**

‘So long as the period prescribed for the member states to incorporate the provisions of a directive into their internal legal orders has not yet expired, the directive cannot have direct effect; such effect only arises at the end of the period prescribed and in the event of default by the member state concerned.’

estoppel

**C-148/78 *Ratti***





What about before  
the time frame  
expires?

*C-129/96 Inter-  
Environnement Wallonie  
ASBL v Région Wallonne:*

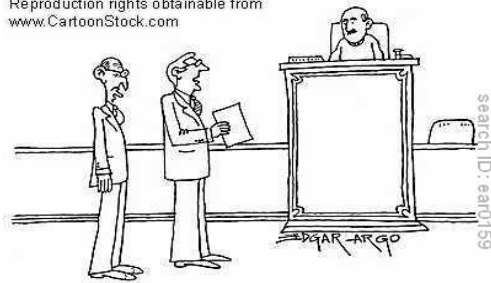
Member states are under a  
duty to refrain from taking  
measures which would  
compromise the attainment  
of the Directive's  
objectives.

# Vertical direct effect of directives?

- *Foster v British Gas*: an 'emanation of the state' -
- a body, whatever its legal form, which
  - has been made responsible, pursuant to a measure adopted by the State,
  - for providing a public service under the control of the State
  - and has for that purpose special powers
- is included among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.

# No horizontal direct effect of Directives

- Case 152/84 *Marshall v Southampton and South-West Hampshire Health Authority*
  - Equal Treatment Directive 76/207
  - A Directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual [48].
- C-91/92 *Faccini Dori v Recreb Srl*
  - Consumer Protection Directive 85/577 (door-2-door selling)
  - sufficiently precise and detailed? **Yes**
  - Capable of taking effect
    - between individuals and the Italian Member State? **Yes**
    - between individuals themselves? **No**



"THIS OLD GEEZER HAS AN AGE DISCRIMINATION  
SUIT, YOUR HONOR."

***Mangold C144/04:*** Is the conclusion of fixed-term employment contracts, without any objective reason, with workers aged 52 and over compatible with the **EU Equal Treatment (Employment) Directive 2000/78**?

74. '...above all, Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation.'

- source of the actual principle = various international instruments and in the constitutional traditions common to the Member States.

75. 'The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law....'

76. 'Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition ...'

# Case C-555/07 Seda



1. European Union law, more particularly the principle of non-discrimination on grounds of age ....must be interpreted as precluding national legislation...which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.

2. It is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, **disapplying** if need be any contrary provision of national legislation....

Indirect effect allows directives to be horizontally effective

## ‘indirect effect’ (duty of compatible interpretation)

- C 14/83 Von Colson & Kamman: sex discrimination
- No *van Gend* conditions
- Duty on national judges to protect EU rights
  - Must refer to the content of the directive when interpreting relevant rules of national law
- Applies to all judges and all national law
- Priority: establish Union obligations
- **BUT** limits of duty  
C 80/86 *Kolpinghuis*: no criminal liability arising from unimplemented directive

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# The gaps of direct effect and indirect effect

- Direct effect → in order to fill the gap → principles of state liability
  - conditions must be fulfilled
  - No HDE or Directives
- Indirect effect limited: MS judge cannot re-write law
- **Gaps in implementation of EU law means individuals can lose rights**
- Eg C 6 & 9 /90 *Francovich*:
  - Bankrupt companies in Italy left employees unpaid for 5 years
  - Directive 80/987: minimum level of protection in event of company insolvency
    - Article 11: guaranteed payment of unpaid wages
    - Directive unimplemented by Italy
    - Not directly effective
  - Art 258 TFEU infringement finding against Italy

*Francovich v Italy [1991]*

# Principle of State Liability (SL)

A State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible

Conditions - SL arises where measure:

1. Grants rights

*The directive gives rights to individuals*

2. The rights are identifiable from the Directive

3. There is a causal link between breach of obligation and loss/ damage suffered

*the failure to implement the directive and the damage suffered.*



# C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer* – Package Directive

- *Per se* breach :

Failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes *per se* a serious breach of Community law and consequently gives rise to a right of reparation.

# C-5/94

## *Hedley*

## *Lomas*

- Article 34 TFEU & Directive 74/577 on slaughter of animals
  - Spanish non-compliance?
  - UK refusal to issue an export licence
- 'A Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law' [20]
- *Francovich* conditions met
  - MS may not make it impossible or excessively difficult to obtain reparation.

# C 46/93

## Brasserie du Pêcheur

- German law on beer purity
- French company prevented from exporting its beer to Germany
- C- 178/84 *Commission v Germany* – German law contrary to Article 34 TFEU
- Brasserie du Pêcheur action against Germany for reparation of the loss suffered due to import restriction between 1981 and 1987 - damages of @ 1 million Euro

applies to all forms of EU law

## *Brasserie*: further condition for SL

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Breaches must be

- sufficiently serious breach - has the MS 'manifestly and gravely disregarded the limits on its discretion'?
- Factors:
  - clarity and precision of the rule breached
  - measure of discretion left by rule to the national or EU authorities
  - was the infringement and the damage caused was intentional or involuntary
  - Was any error of law was excusable or inexcusable
  - Did a Community institution contribute towards the omission
  - Did MS adopt or retain national measures or practices contrary to EU law
  - Has breach persisted despite a CJ judgment under Art 258, 267 or other case law which makes clear conduct is an infringement

# Does SL protect individual rights effectively? *Koebler & Negassi*

- CJ in C-224/01 *Köbler*
- Length-of-service payments only to professors in Austrian universities – compatible with Article 45 TFEU?
- Mis-interpretation of EU law by the Supreme Administration Court
  - Could Köbler claim damages from the Austrian state as a result and non-payment to him of the length-of-service increment?
- *Brasserie*: ‘manifest infringement’ thus sufficiently serious breach?
  - breach not manifest in nature and thus not sufficiently serious to incur state liability.

LJ Arden, *Negassi & Lutalo* Negassi and Anr v Home Secretary [2013] EWCA Civ 151  
Directive 2003/9

## Misinterpretation of Art 11 (right to work) = ‘Manifest infringement’?

‘It was not deliberate. It was the result of a misunderstanding of new provisions in an area of recent EU concern. It was not a cynical or egregious misunderstanding. It was not confined to the Secretary of State. It was shared, as a matter of first impression, by a number of judges. Whilst now all is clear, I do not think that it can be said to have been self-evidently so before the conclusion of ZO.’

# C 282/10 Dominguez: compatible interpretation, direct effect then state liability

- can the national court find an **interpretation** of that law that allows the absence of the worker due to an accident on the journey to or from work to be treated as being equivalent to one of the situations covered by that article of the Code du travail.
- If not, it is for the national court to determine whether, in the light of the legal nature of the respondents in the main proceedings, the **direct effect** of Article 7(1) of Directive 2003/88 may be relied upon against them.
- If direct effect not possible, parties may be able to rely on *Francovich and Others* in order to obtain, if appropriate, compensation for the loss sustained.