

## THE IMPACT OF EC LAW ON JUDICIAL REVIEW: A SURVIVOR'S GUIDE

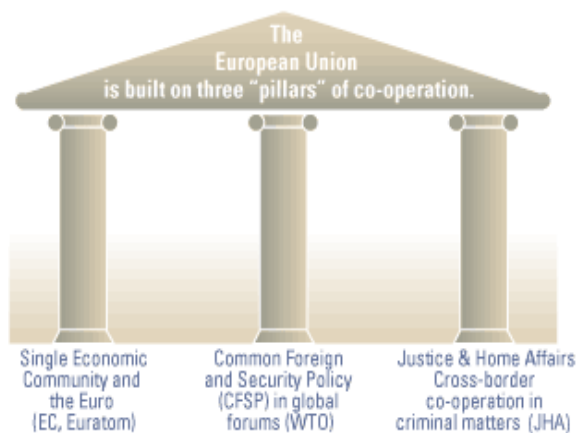
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### Introduction

1. The late Lord Kingsland QC was, as usual correct, when earlier this year he wrote “the contribution of European law cannot be overestimated.”<sup>2</sup> He was writing about its impact upon environmental law but the same may be said of judicial review.

### What's the difference between EU and EC Law?

2. The distinction between European Community (“EC”) law and European Union law (“EU”) is that based on the Treaty structure of the European Union. The European Community constitutes one of the ['three pillars' of the European Union](#) and concerns the social and economic foundations of the single market. The second and the third pillars were created by the Treaty on European Union (the Maastricht Treaty) and involve Common Security and Defence Policy and Internal Security. Decision-making under the second and third pillars is not subject to majority voting at present.



3. The Maastricht Treaty created the Justice and Home Affairs pillar as the third pillar. Subsequently, the Treaty of Amsterdam transferred the areas of illegal immigration, visas, asylum, and judicial co-operation to the European Community (the first pillar). Now Police and Judicial Co-operation in Criminal Matters is the third pillar. Justice and Home Affairs now refers both to the fields that have been transferred to the EC and the third pillar. In short all EC law is part of EU law but not all EU law is part of EC law. This paper focuses on EC law
4. This is not a paper about EC law in general or its overall impact on English law. The objective of this paper is to provide a basic overview of the way in which EC law impacts upon the process we know as judicial review (“JR”). The paper begins by examining some of the general principles of EC law (PART 1) and then gives

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<sup>2</sup> Foreword to Waite, Jewell Jones and Fogleman: *Environmental Law in Property Transactions* (3<sup>rd</sup> ed.) (2009) at p. xi.

examples of where these principles can and have been applied to various aspects of judicial review (PART 2).

### **Where to find it for Free**

5. EUR-Lex provides direct free access to European Union law. Here you can consult the Official Journal of the European Union as well as the treaties, legislation, case-law and legislative proposals. You can also use the search facilities available on EUR-Lex <http://eur-lex.europa.eu/en/index.htm>

## **PART I**

### **The European Communities Act 1972**

6. Lord Denning graphically likened the EC Treaty to “an incoming tide”. “It flows” he said, “into the estuaries and up the rivers. It cannot be held back.”<sup>3</sup> Within the domestic UK legal system, the critical constitutional law provisions are contained in the European Communities Act 1972 (“ECA 1972”), in particular, sections 2 and 3.
7. Section 2(1) ECA 1972 provides for the direct effect of EU into the UK domestic law. Section 2(2) as read with Schedule 2 allows Her Majesty by Order in Council and designated Ministers or department by regulation to make provision for the purpose of implementing EU law.
8. Section 2(4) ECA 1972 imposes an interpretive obligation whereby all past and future legislation is to be read and given effect subject to the provisions of the ECA 1972.
9. Section 3 ECA 1972 gives effect to the case law of the ECJ by requiring UK courts to determine all matters of EC law in accordance with that case law and where the meaning of EC law is unclear or question as to its validity, by referring the matter to the ECJ in accordance with Article 234 reference procedure.
10. Thus, whilst the Treaty may be regarded as an “incoming tide”, it is the ECA that forms the statutory “estuaries” and “rivers” to which Lord Denning referred.

### **Basic Principles of EU law**

#### **Supremacy of EU law**

11. Without doubt article 10 is the most important constitutional article of the EC Treaty. It provides that:

“Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

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<sup>3</sup> **Bulmer Ltd. v. Bollinger S. A.** [1974] 2 All ER 1226, [1974] Ch 401.

12. It upon the foundation of this widely drafted article (previously numbered 5) that the ECJ has developed its key constitutional principles, including the doctrine of supremacy of EC law. This doctrine was well established prior to the UK's membership of the European Communities (as it was then known). In *Simmenthal*<sup>4</sup> the ECJ stated that:

“...every nation court must, in a case within its jurisdiction, 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.”

13. The doctrine provides for the precedence of EC law over any conflicting national law of a member state. The working out of this doctrine of supremacy of EC law has led to the development of a number of other legal principles which are discussed later in this paper.

14. Within the UK it has been accepted that the combined effect of the provisions of the ECA 1972 is such that UK law also recognises the supremacy of EC law when it conflicts with domestic law, this is so whether the domestic law is in the form of primary or secondary law and whether or not it is enacted prior to or subsequent to ECA 1972.<sup>5</sup> The principle extends not merely to legislative provisions and to proceedings before national courts but also – and importantly in the context of JR- to the exercise of administrative discretion which must be exercised in conformity with EC law.<sup>6</sup>

15. This principle is perhaps most vividly illustrated by the *Factortame* litigation in which the House of Lords, on having made a reference to the ECJ at which the ECJ restated the principle set out in *Simmenthal* granted an injunction to prevent the Secretary of State enforcing the terms of the Merchant Shipping Act 1988 whose terms had been held to violate the EC Treaty.<sup>7</sup>

16. The doctrine of implied repeal has been held not to apply to a “constitutional” statute such as the ECA 1972.<sup>8</sup>

### **Direct Effect**

17. This principle allows an individual directly to rely upon a provision of EC law directly to trump a conflicting piece of domestic legislation or decision by a public body.

18. The test for whether a particular provision has direct effect can be summarised as follows<sup>9</sup>:

1. Sufficiently clear and precise
2. Unconditional; and
3. One that leaves no scope for discretion as to its implementation

<sup>4</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para 21.

<sup>5</sup> See e.g. *A v Chief Constable of West Yorkshire* [2005] 1 AC 51, 57 para 9, Lord Bingham.

<sup>6</sup> See e.g. *R v Secretary of State for the Home Department, ex parte Mayor and Burgess of the London Borough of Harrow* [1996] CMLR 524. and see also

<sup>7</sup> *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603.

<sup>8</sup> *Thoburn v Sunderland City Council* [2002] 3 WLR 247. The so-called “Metric Martyrs” case.

<sup>9</sup> See e.g. Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825.

### Different Types of EC law

19. Another key “constitutional” treaty article is article 249. It provides:

“In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

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

**A directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

**A decision** shall be binding in its entirety upon those to whom it is addressed.

**Recommendations and opinions** shall have no binding force.”

20. **Treaty Provisions** are themselves are capable of creating direct effect (Case 26/62 *Van Gend en Loos v Netherlands* [1963] ECR 1).

21. **Regulations** will almost invariably be directly effective. They are of “general application” that means they have immediate legal effect in the domestic law without further domestic provisions to implement the regulations. Indeed, it is contrary to EC law for a member state to introduce domestic law legislation purporting to implement the regulations, this is because it may cause confusion and suggest that a regulations requires implementation in order to have effect on the domestic law; this does not mean that they will be sufficiently clear and precise to have direct effect.

22. **Directives** are binding in substance on Member States but are not directly applicable. A directive may have vertical direct effect. That means that an individual may rely directly upon the directive (subject to satisfying the conditions) against a public authority (see e.g. *Van Duyn v Home Office* Case 41/74 [1974] ECR 1337, paras 9-15.). The fact that a directive may give a Member State a range of ways of implementation does not preclude direct effect. It is the result that constitutes the relevant obligation so that the result must be expressed in unequivocal terms (see e.g. Case C-389/95 Klattner v Greece [1997] ECR I-2719, para 33). Since with the exception of fields such as agriculture, the majority of secondary legislation will be by way of directives, the status of a directive will be of great practical importance.

23. However a directive does not have horizontal direct effect that is it cannot be relied upon by an individual against another individual. (*M.H. Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)*, Case 152/84 [1986] ECR 723). However, while direct effect would allow legal actions based on directives against the state (vertical direct effect), the ECJ did accept that the ‘state’ could appear in a number of guises: (paragraph 49)

‘...it must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the state he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In

either case it is necessary to prevent the state from taking advantage of its own failure to comply with Community law.’

24. It is therefore of great importance to establish what is a public authority, the test is not quite the same as what is a public authority for judicial review. In *Foster, A. and others v. British Gas plc*, [Case C-188/89](#), [1990] the ECJ defined emanation of the state as:

‘a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond that which result from the normal rules applicable in relations between individuals.’ The government, local authorities, health authorities and the police are emanations of the state. An employer carrying out a public service which is in the control of the state (such as managing a prison or governing a school) may also be classed as an emanation of the state.

25. In other words, the state may appear in a number of ‘emanations’. The scope of the different emanations of the state depends on the criteria developed by the ECJ to define them. These were laid down in the ECJ’s decision in *Foster v. British Gas*, [Case C-188/89](#), [1990]. Consequently, directives may confer directly enforceable rights not only on employees of the state, but also on employees of emanations of the state. This included employees of health authorities, as in *Marshall*, [Case C-152/84](#), [1986], but also employees of local government bodies (*Fratelli Constanzo SpA v. Comune di Milano*, [Case C-103/88](#), [1989]), and even a police chief (*Johnston v. Chief Constable of the RUC*, [Case C-222/84](#) [1986]).

26. Thus the legal form of the emanation of the state is irrelevant, so long as it is responsible for providing a public service under the control of the state and has, for that purpose, special powers. This could include privatised industries or services, which formerly provided public services. Employees in these services may rely directly on provisions in EU directives. The wide scope of the definition of ‘emanation of the state’ means a large proportion of the national workforce can directly enforce rights contained in EU directives.

27. An individual may bring proceedings for judicial review against a public body relying upon the direct effect of a directive even where the re would be direct consequences for a third party. Such an example is where proceedings are brought which would result in the quashing of a third party’s planning permission, licence or other consent granted by the public body (see *Fratelli Constanzo SpA (supra)* as applied by the Court of Appeal in *R v Durham County Council, ex parte Huddleston* [2000] 1 WLR 148, the approach of the Court of Appeal in *Huddleston* was effectively applied by the ECJ in [Case C-201/02 R \(Delena Wells\) v Secretary of State for Transport, Local Government and the Regions](#) [2004] ECR I-723).

28. **Decisions, recommendations, opinions and direct effect:** A decision being “binding in its entirety upon those to whom it is addressed” is capable of direct effect. Neither recommendations nor opinions are binding and therefore are not capable of direct effect: but they may produce some legal effects. The ECJ has stated that national courts bound:

“...bound to take community recommendations in to consideration in deciding disputes submitted to them, in particular where they clarify the interpretation of national provisions adopted in order to implement them or where they are designed to supplement binding EEC measures.”<sup>10</sup>

29. **International Agreements:** In some cases international agreements are specifically given direct effect by secondary EC legislation (an example of this is the Dublin Convention on the determination of which Member/Contracting State is responsible for examining applications for asylum is made directly effective by Regulation (EC) 343/2003). However, where the agreement provides that one or more of its provisions is not intended to be directly effective, that is conclusive. Where the agreement is silent the ECJ has applied the same principles of direct effect so that where the treaty article is sufficiently clear and precise and does not depend on the adoption of any subsequent measure the ECJ has given it direct effect (see case C-277/94 Taflan-Met [1996] ECR I-4085, para 24; case C-37/98 R (Abdulnasir Savas) v Secretary of State for the Home Department [2000] ECR I-2927). The application of these principles may however be quite difficult to predict, the approach of the ECJ in Case 213/03 Pecheurs de L’Etang de Berre v EDF [2004] ECR I-0000 which took a broad approach to direct effect can be contrasted with the ECJ’s decision in C 308/06 Intertanko v SST [2008] 3 CMLR 9 and the comments in Morgan & Baker v Hint on Organics (Wessex) Ltd [2009] EWCA Civ 107 doubting that the Aarhus Convention had direct effect.

#### “Indirect Effect”: The Interpretative Duty

30. Grounded in article 10 EC treaty, EC law requires national courts interpreting national legislation to apply the principle of “conforming interpretation” in those situations in which there is a potential infringement of Community law. Under the doctrine of “indirect effect”<sup>11</sup>, national courts must interpret national law in a way that gives effect to the rules of Community law. The duty applies even if a member state has failed to transpose a directive by the due date,<sup>12</sup> or not done so fully. It applies, too, whether or not the national legislation was passed before or after the directive was

<sup>10</sup> Case C-322/88 Grimaldi v Fonds des Maladies Professionnelles [1989] ECR 4407 at paras 16-19.

<sup>11</sup> Weatherill calls this the obligation of “conform interpretation” (S Weatherill, *Cases and Materials on EU Law* (2007), 148). The key cases are Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 189, see especially para 26 and Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135. Important House of Lords cases on the nature of the duty of interpretation are Litster v Forth Dry Dock & Engineering Co Ltd [1990] 1 AC 546 and Pickstone v Freemans [1989] AC 66.

<sup>12</sup> It is now clear that the interpretative duty arises only on the date on which the period for transposition of the directive has expired (Adeneler [2006] ECR 6057, para 115). This does not mean, however that the member state is free to adopt an interpretation at odds with the purpose sought by the Directive prior to that time (ibid, para 123).

passed. And it applies whether or not the national legislation was passed specifically to implement the directive.<sup>13</sup>

31. The position in *Marleasing*, endorsed in the mid nineties,<sup>14</sup> was that national courts should interpret domestic law in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter “so far as possible”.<sup>15</sup> As might have been expected, a more measured approach was adopted on the part of our domestic courts. Thus, in *Clarke v Kato* [1998] 1 WLR 1647, Lord Clyde said that “the exercise must still be one of construction and it should not exceed the limits of what is reasonable” (at 1656). In *R v Durham CC ex p Huddleston* [2000] 1 WLR 1484, it was held that the primary legislation was simply incompatible with the EC Directive and a “convergent construction” was not possible (see para 10).<sup>16</sup>

### Limits on the Doctrine of Supremacy

32. There are two possible limits to the doctrine of supremacy of EC law:
1. EC law respects national autonomy in the procedural rules governing proceedings in the domestic courts subject to the general principles of EC law and in particular, those of effectiveness and equivalence; and
  2. It may also be that the supremacy principle is limited to rights that are directly effective. This limitation is in practice constrained by the duty of sympathetic interpretation of the law in accordance EC law (something called the “doctrine of indirect effect”)

### The Principles of Effectiveness

33. If EC law is to be truly effective, it needs to be capable of addressing the procedural rules through which it can be accessed and the remedies to which it can give rise. There is a balance to be struck: EC law does not ride roughshod over domestic legal systems. The ECJ has developed the principle of “national procedural autonomy”, expressed in the *Comet* case as follows:

“...it is for the domestic legal system of each member state to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to

<sup>13</sup> See *Case C-144/04 Mangold v Helm* [2006] 1 CMLR 43 at para 68.

<sup>14</sup> See *Case C-91/02 Dori v Recreb Srl* [1994] ECR I-3325 para 26.

<sup>15</sup> *Marleasing*, para 8.

<sup>16</sup> In *Case C-397-403/01 Pfeiffer v Deutsches Rotes Kreuz* [2004] ECR I-8835 the ECJ was concerned with the interpretation of a measure passed in Germany to implement the Working Time Directive (93/104). The measure permitted derogation from the 48-hour weekly limit found in the Directive. The court described the interpretative obligation in this context as being that the national court must “do whatever lies within its jurisdiction, having regard to the whole body of national law, to ensure” that the directive is fully effective (see paras 118-119). This meant that the national court had to search for interpretative methods which would enable it to interpret national legislation permitting derogation from the 48 hour limit to preclude derogation from the 48 hour limit. This might be seen as stretching the duty to its limit, although it comes in the context of a member state measure which the ECJ seems to have particularly disliked. There remains an upper threshold to the duty: even the ECJ has indicated that a *contra legem* interpretation is not required, and that sometimes the only course is for a claimant to seek a damages remedy against the state (see *Case C-334/92 Wagner-Miret v Fondo de Garnantia Salarial* [1993] ECR I-6911, para 22). Those interested in further reading on this topic may wish to read S Drake, “Twenty Years after *Von Colson*: the impact of “Indirect Effect” on the Protection of the Individual’s Community Rights” (2005) 30 EL Rev 329.

ensure the protection of the rights which citizens have from the direct effect of community law”<sup>17</sup>

34. But this principle has long been subject to two other important principles<sup>18</sup>. First, there is the “principle of equivalence”. This means that national rules which concern the exercise of Community law rights must not be less favourable than those governing the same right of action on an internal matter<sup>19</sup>. Second, there is the “principle of effective protection”. The idea here is that national rules must not make it impossible or excessively difficult in practice to exercise Community law rights<sup>20</sup>.
35. The principle of effective protection, in particular, warrants further analysis. The first clear statement of the principle appears to be in *Simmenthal* [1978] ECR 629, and it was articulated in the following way in *Joined Cases C-6/90 and C-9/90 Francovich and Bonifaci v Italy* [1991] ECR I – 5337 at paras 32-33:

“...it has been consistently held that 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 ...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”.

36. The principle has domestic recognition at the highest level. Lord Bingham CJ (as he then was) expressed it thus in *R v Secretary of State for the Home Department ex p Gallagher* [1996] CMLR 951 para 10:

“It is a cardinal principle of Community law that the laws of Member States should provide effective and adequate redress for violations of Community law by Member States where these result in the infringement of specific individual rights conferred by the law of the Community”.

37. Perhaps the most powerful illustration of the application of the principle in a domestic context came in the *Factortame* litigation: the ECJ required that national courts have “the power to do everything necessary” at the moment of application of Community law “to set aside national legislative provisions which might prevent, even temporarily

<sup>17</sup> *Case 45/76 Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043, para 13. See recently the decision in *Case C-432/05 Unibet (London) Ltd v Justitiekanslern* [2007] 2 CMLR 30 at para 39.

<sup>18</sup> Examples of the application of the principles are *Case 158/80 Rewe-Handelsgesellschaft Nord mbH v Hauptzollamt Kiel* [1981] ECR 1805, at para 5; *Case C-473/00 Cofidis SA v Jean Louis Fredout* [2002] ECR I-10875, paras 36-7.

<sup>19</sup> In *Case C-326/96 BS Levez v TH Jennings (Harlow Pools) Ltd* [1998] ECR I-7835, at para 39, the principle was explained in these terms: “the national rule at issue must be applied without distinction, whether the infringement alleged is of community law or national law, where the purpose and cause of action are similar”. See also recently *i-21 Germany GmbH and Arcor AG & Co KG v Germany* [2007] 1 CMLR 10 at para 69.

<sup>20</sup> *Joined Cases C-430/93 and C-431/93 Van Schijndel v SPF* [1995] ECR I-4705 para 17. The phrases “virtually impossible” and “excessively difficult” are the ECJ’s own: see *Case 199/82 Amministrazione delle Finanze v San Giorgio* [1983] ECR 3595, para 14. A-G Jacobs has preferred the phrase “unduly difficult” (see para 75 of his Opinion in *Case C-2/94 Denkavit International* [1996] ECR I-2827). In *Autologic Holdings Plc v Inland Revenue Commissioners* [2004] EWCA Civ 690 [2004] 2 All ER 957 at [25] Peter Gibson LJ said: “The importance of the principle of effectiveness in Community law cannot be overstated. Any provision of national law which makes the exercise of a right conferred by Community law practically impossible or extremely difficult cannot prevail”.

Community rules from having full force and effect” (*Case C-213/89 R v Secretary of State for Transport ex p Factortame Ltd* [1990] ECR I-2433, para 20. This led, in that case, to an entirely novel grant of relief: the suspension of the operation of a Westminster statute.

38. Often, of course, the principle of effectiveness conflicts with a domestic procedural provision. It then becomes a question of balance. National procedural autonomy must be respected within certain bounds. The ECJ determines whether a national procedural rule renders application of Community law impossible or excessively difficult:

“...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 the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure, must, where appropriate, be taken into consideration”<sup>21</sup>.

39. In other words, one looks at all the circumstances in the specific circumstances of the case. An example of where the ECJ found that there was insufficient protection was in the case of *Peterbroeck* [1995] ECR I-4599. Here there was a national rule which prevented a tax payer from raising a new point of law on appeal to the Court of Appeal from the decision of an administrative tax official, after the lapse of a period of 60 days, where the Court of Appeal could not raise the issue of its own motion. The ECJ found this rule to be against the principle of effective protection, noting that the administrative official could not himself make a reference to the ECJ under Article 234, and that no other court or tribunal was entitled to raise the issue.<sup>22</sup>

### General Principles of EC Interpretation

40. The multi state and multi lingual nature of the EC has encouraged a different type to judicial interpretation to that previously more familiar to English lawyer.

<sup>21</sup> *Case C-312/93 Peterbroeck, Van Campenhout & Cie v Belgian State* [1995] ECR I-4599, para 14; *Cases C-430-431/93 Van Schijndel & Van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705, para 19; *C-327/00 Santex SpA v Unita Socio Sanitaria Locale No 42 di Pavia* [2003] ECR I-1877, para 56.

<sup>22</sup> The ECJ has emphasised the importance of the principle of effective protection in the context of judicial review. *Case 22/84 Johnston v Chief Constable of the Royal Ulster Constabulary* [1987] QB 129 remains an important illustration of the approach. The national authority had issued a certificate stating that the conditions for derogating from the principle of equal treatment for men and women for the purposes of protecting public safety were satisfied. The authority had argued before the Industrial Tribunal (as it then was) that this certificate was to be treated as conclusive evidence so as to exclude the power of review of the Tribunal’s decision by the courts on judicial review. On a preliminary reference from the Industrial Tribunal, the ECJ ruled that the principle of judicial review (itself provided for by the Treaty in the context of reviewing the lawfulness of acts of EU institutions themselves) reflected a general principle of law which underlay the constitutional traditions common to the Member States (and which, it noted, was also laid down in Articles 6 and 13 of the European Convention on Human Rights). The national authority could not oust judicial review in that way. See also *Case 222/86 UNECTEF v Heylens* [1987] ECR 4097. See further *Case C-92/00 Hospital Ingenieure Krankenhausstechnik Planungs GmbH (HI) v Stadt Wien* [2002] ECR I-5553, para 63, where the ECJ held that a national rule system providing for review only in the case of arbitrariness infringed the principle of effective protection. The decision under challenge concerned a local authority’s withdrawal of an invitation to tender for a public service contract. The Court held that this did not satisfy the requirement in Directive 89/665 to ensure effective review of contracting authorities to ensure compliance with the Community public procurement rules.

1. The principle of **uniform interpretation**: EC law must be interpreted consistency throughout the Community. Consistent with this principle each language version is considered to be equally authoritative (see e.g. Case C-149/97 *Institute of the Motor Industry v Commissioners of Customs & Excise* [1998] ECR I-7053, para 16). Guidance has been provided by the Court of Appeal on how litigants should approach the question of different language versions.

“...any party which proposes to rely on an aversion in a foreign tongue [should] alter the other side to this fact and...seek to agree a translation of that version. If there is agreement it is improbable that the court will wish to disagree. Certainly, if it does then it should indicate its views so that the parties can comment on them. If there is no agreement between the parties then the appropriate course is for the parties’ legal advisers first to consider whether it is really likely to be productive in the national court to pursue submissions based on disputed translations of text expressed in foreign languages. That will seldom be the case. If, however, the conclusions of one or more parties is that it is likely to be productive then evidence by translation should be field on each side. That will usually be suffice for the judge to be prepared to come to a decision on the point. Cross examination is an option, but not one which we would generally wish to encourage. In a case where the difference in meaning attributed to the authorities version is crucial to the decision and the point irresolvable on the affidavits then the appropriate course may well be to refer the matter to the ECJ which is linguistically better placed than any national court to resolve the matter.”

2. The **purposive** approach. The ECJ has emphasised the importance of the interpretative principle. It must be applied in regard to the context of the Community legal order as whole.
3. **Derogation principle** – any derogations are to be interpreted narrowly (see e.g. *Thomas v Adjudication Officer* [1991] 2 QB 164, 180 per Slade J).- currently the scope of derogation from the SEA directive is the subject of a reference from the high court in Northern Ireland to the ECJ in *Seaport (No2)*.

## **PART II**

### **Time Limit for Judicial Review**

41. CPR r.54.5 imposes a time limit for filing a claim form with the Administrative Court. The claim must be filed promptly and “in any event not later than 3 months after the grounds to make the claim first arose”. If proceedings are issued outside the three month limit, the court has a power to extend the time limit as part of its general case management powers under r.3 (see r3.1(2)), but in practice this is not done unless there are good reasons for doing so. Rule 54.5 needs to be considered alongside s.31(6) of the Supreme Court Act 1981, which provides that “where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant – (a) leave for the making of the application; or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration”.

When does the time start to run?

42. The House of Lords held in *R v Hammersmith and Fulham London Borough Council, ex p Burkett* [2002] UKHL 23; [2002] 1 WLR 1593 that trigger point for the period for judicial review was the issue of the planning permission and not the resolution to grant planning permission. The same approach was taken in the context of a challenge to the absence of a decision not to require an environmental impact assessment under the EIA Directive 85/337 (see *Catt v Brighton* [2007] EWCA Civ 298). More recently this approach has also been considered in the context of EU public procurement challenges (see *Brent LBC v Risk Management Partners* [2009] EWCA Civ 490).

Three Months

43. The three months time limit would seem compatible with the requirements of EC law.<sup>23</sup>

Promptitude

44. The doubt as to the requirement that proceedings be brought “promptly” (or without “undue delay” in the context of permission or remedy) can be said to satisfy the principle of legal certainty. The ECJ has repeated on numerous occasions that the effect of Community legislation must be clear and predictable for those who are subject to it<sup>24</sup>. The concept of promptitude contains a degree of inherent uncertainty.<sup>25</sup>
45. This issue was addressed by Jones and Phillipot in *“He Who Hesitates is Lost: Judicial Review of Planning Permissions”* [2000] JPL 564<sup>26</sup>. The article was considered by the

<sup>23</sup> ECJ jurisprudence demonstrates that a fixed time-limit is less likely to be reasonable if a claimant’s delay in exercising the remedy is due in some way to the conduct of the national authorities (*Edis* [1998] ECR I -4951, para 48; *Santex* [2003] ECR I-1877). The more mitigating the circumstances by which delay can be explained the more likely a refusal of permission or relief based on delay will be unlawful. An example is the *Levez* case [1998] ECR I-7835 paras 20, 27-34. There the ECJ held that a national rule applicable in an equal pay claim under which entitlement to arrears of remuneration is restricted to the last years preceding the date on which the proceedings were instituted was not in itself open to criticism; however given that the claimant in the national proceedings was late in bringing her claim because of inaccurate information provided by her employer, to allow the employer to rely on the time limit in such circumstances would be “manifestly incompatible with the principle of effectiveness”. There is no reason why such an approach would not be followed in respect of the unfixed “promptness” requirement, or in respect of the provisions of s.31(6).

<sup>24</sup> Opinion of AG Jacobs in *Case C-168/91 Konstantinidis* [1993] ECR I-1191; *Case C-233/96 Kingdom of Denmark v Commission* [1988] ECR I-5759, para 38 (Community rules must enable those concerned to know precisely the extent of the obligations imposed on them); *Case 169/80 Grondrand Freres* [1981] ECR 1931 at 1942; *Case C-245/97 Germany v Commission* [2000] ECR I-11261, para 72.

<sup>25</sup> The attractiveness to the judiciary in adopting the so-called “six week” rule in judicial review for planning cases was no doubt because it could at least it provided a time frame which might be said to be certain. We suggest that it was an implied recognition by the courts that “promptitude” was inherently uncertain. The six week rule suffered however because it was based upon a flawed legal basis. As Lord Steyn pointed out in *Burkett* it was an impermissible attempt by judicial discretion to redefine a limitation period. Furthermore, when properly considered the analogy with the six week statutory time limit for challenges under section 288 of the Town and Country Planning Act 1990 (as amended) was flawed since it did not compare like with like see further Jones and Phillipot in *“He Who Hesitates is Lost: Judicial Review of Planning Permissions”* [2000] JPL 564. Finally, the court undermined the quest for legal certainty by saying that even if an applicant were within six weeks he may not be prompt in effect it had replaced three months with six weeks for judicial reviews involving planning cases.

<sup>26</sup> Cited by Lord Steyn in *R v Hammersmith and Fulham London Borough Council, ex p Burkett* [2002] UKHL 23 [2002] 1 WLR 1593 at paras 41, 44, 49 and 53 and by Sykes J in *The Northern Jamaica Conservation Association and others v. The Natural Resources Conservation Authority and The National Environment and Planning Agency* (6<sup>TH</sup> May 2006) The Supreme Court of Judicature Jamaica in Common Law, (Claim No HCV 3022 of 2005).

House of Lords in *R v Hammersmith and Fulham London Borough Council, ex p Burkett* [2002] UKHL 23 [2002] 1 WLR 1593, leading Lord Steyn, with whom Lord Hope agreed, to state in an *obiter* passage at paragraph 53:

“...there is at the very least doubt whether the obligation to apply “promptly” is sufficiently certain to comply with European Community law and the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). It is a matter for consideration whether the requirement of promptitude, read with the three months limit, is not productive of unnecessary uncertainty and practical difficulty.”

46. This *dicta* has been considered subsequently by the lower courts.<sup>27</sup> The English courts more general approach to attacks on the promptitude rule can be seen by the approach to the contention that in was in breach of article 6 of the ECHR. In *LAM v UK* (Application No 41671/98) (5<sup>th</sup> July 2001), the ECtHR had held that the promptness requirement was not in breach of Article 6(1) of the Convention. In *Hardy v Pembrokeshire County Council and Pembrokeshire Coast National Park Authority* [2006] EWCA Civ 240, the Court of Appeal seized upon the fact that *LAM* had not been cited in *Burkett* (*LAM* of course post dated Jones and Philpot) in refusing permission to appeal a refusal of permission to apply for judicial review of an environmental challenge to a grant of planning permission brought just<sup>28</sup> within the three month period. Keene LJ gave the leading judgment. He recognised the judgment of the ECtHR in *LAM*, and pointed out that the ECtHR has held that legal certainty does not connote “absolute certainty”<sup>29</sup>; that this is especially applicable to a procedural rule in applications seeking judicial review where the degree of promptness required will vary from case to case.
47. But *Hardy* did not deal with the position under EU law. Indeed, one of the factors on which Keene LJ based the decision was the use of a “promptness” test in the ECHR itself. In our view, it should also be regarded as a decision on its merits, rather than shutting off the question of principle: since a number of the decisions it was sought to challenge were made more than three months before the application for judicial review was made, the court was understandably reluctant to allow the bringing of what were, in reality, out-of-time challenges to earlier decisions under the guise of a challenge to

<sup>27</sup> Lord Justice Sedley, granting permission to appeal in *R (Kides) v South Cambridgeshire District Council* commented in respect of *Burkett*: “Its effect seems to be to open a new chapter on time bars in public law. ... It is clear from paragraphs 53 and 59-60 of the report of their Lordships’ decision that promptness within the three-month period is now an instrument to be handled with great circumspection.” In *R (Boulton) v Leeds School Organisation Committee* [2002] EWCA Civ 884 Sedley LJ emphasised that ‘promptness is a tool to be handled now with great care’. *Burkett* was considered by the Court of Appeal in *R (Young) v Oxford City Council* [2003] JPL 330 Lord Justice Pill stated quite correctly that whilst *Burkett* had cast doubt on the compatibility of ‘promptness’ it remained a feature of English law. Claimants should not assume that they could defer proceeding until the end of the three month period. The application of promptness depended on the circumstances. Pill LJ stated that: “Unless and until the issue is resolved adversely to the rule, the obligation to file the claim form promptly remains a feature of English law, in my view, and the presence of the word ‘promptly’ in the rule should not be ignored. Those who seek to challenge the lawfulness of planning permissions should not assume, whether as a delaying tactic or for other reason, that they can defer filing their claim form until near the end of the three-month period in the expectation that the word ‘promptly’ in the rule is a dead letter.” This was followed by Mr Justice Harrison in *R (Lynes) v West Berkshire District Council*. [2002] EWHC 1828, [2003] JPL 1137.

<sup>28</sup> Although most of the decisions were made more than three months prior to the application for permission to seek judicial review, the court impliedly accepted that the question in respect of the last decision was whether the proceedings to challenge it had been brought promptly.

<sup>29</sup> *Sunday Times v UK* [1979-80] 2 EHRR 245, para 49.

a later decision<sup>30</sup>. Notwithstanding the *Hardy* case, the promptness requirement under r.54.5 (and certainly the residual discretion to refuse relief even where proceedings have been brought promptly under s.31 (6)) are at risk of being in breach of the principle of effectiveness depending on the circumstances of the case.<sup>31</sup>

48. It should be noted that the promptitude rule may yet be reconsidered at least insofar as environmental cases are concerned as a result of the implications of the Aarhus Convention. In relation to the characteristics of the procedure to challenge acts or omissions (whether administrative or judicial), Article 9(4) of the Convention requires that:

- It is adequate and provides for effective remedies, including injunctive relief;
- It is fair, equitable, timely and not prohibitively expensive; and
- The decisions are recorded in writing and publicly accessible.

49. Its proposed implementation into EU law is currently contained in Article 10 of the draft **Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters, COM (2003) 624 final, 24.10.2003.**

#### **The permission stage: the prospect of an Article 234 reference**

50. The prospects of a possible Article 234 of the EC Treaty<sup>32</sup> can be turned to a claimant's advantage at the permission stage, where the basis of the challenge gives rise to a question of EU law. Equally this is an argument of which the government will wish to be aware. In *R v HM Customs and Excise, ex p Davies Products (Liverpool) Ltd* 25<sup>th</sup> June 1991 unreported, it was held that since the judicial review challenge raised a question of EC law which might conceivably call for a reference to be made, it was wrong to refuse permission. On the material currently before the court, the claimant had a "very real grievance" and defendant's arguments were "unattractive". Nonetheless, the decision is another noteworthy example of the operation of the principle of effectiveness and has been applied recently by the Court of Appeal in *Boggis v England Nature* [2008] EWCA Civ 335. Although a court will not generally entertain an academic or abstract challenge, the *ex p Davies* argument is a valuable tool in the armoury of the public interest litigant.

#### **The undertaking to give damages when seeking an interim injunction pending substantive judicial review**

51. The principle of effective protection extends to the question of interim remedies. The ECJ has held that, as a matter of principle, interim relief should be available until the

<sup>30</sup>See further *R (Noble Organisation) v Thanet District Council* [2005] EWCA Civ 782.

<sup>31</sup> A view also shared by academic authority, see Gordon *EC Law in Judicial Review* (OUP) (2007) at para 3.92.

<sup>32</sup> Article 234 provides that "Where a question of EC law is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the court of justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice". Practitioners considering, or faced with making preliminary rulings should have handy the Note for Guidance on References by National Courts for Preliminary Rulings [1997] All ER (EC) (issued by the ECJ) and Practice Direction (Supreme Court: References to the Court of Justice of the European Communities) [1999] 1 WLR 260 (issued in England and Wales). There is much helpful guidance in D Anderson and M Demetriou, *References to the European Court* 2<sup>nd</sup> Edn (2002).

compatibility with EC law of an act is determined, if necessary to ensure the effectiveness of the judgment [which may find a breach of EC law] (*Unibet* [2007] 2 CMLR 30 para 47).

52. Even if it is uncertain under national law whether an action to safeguard respect for an individual's rights under Community law is admissible, the principle of effective judicial protection still requires the national court to be able, at that stage, to grant the interim relief necessary to ensure those rights are respected *Unibet* [2007] 2 CMLR 30 para 73. (This is provided that the application is admissible in national law (*ibid.*)).
53. In private law litigation, of course, a claimant's ability to provide an undertaking in damages is an important factor going to the court's discretion in deciding whether or not an interim injunction should be granted against the defendant (see generally CPR Part 25 and Practice Direction 25 which deal with interim remedies in general). In the ordinary case, so too it is an important factor in public law<sup>33</sup>.
54. As with all applications of the principle of effective protection, a balance needs to be struck between the interests of the claimant and those not only of the body being challenged, but also third parties (see by analogy the above arguments relating to delay). A good illustration of the importance of a claimant's being able to offer a cross undertaking in damages was the decision in *R v Secretary of State for the Environment, ex p Royal Society for the Protection of Birds* (1995) 7 Admin LR 434, at 443B-C, where Lord Jauncey said this:

“[Counsel] conceded that his objective in seeking a declaration was to hold up further development of Lappel Bank pending a ruling by the ECJ. Any such hold up could result in a very large commercial loss to the Port of Sheerness and possibly to Swale Borough Council as planning authority. However, the RSPB were not prepared to give any undertaking in damages. Had they sought an interim injunction against the port or other developer proceeding further they would undoubtedly have been required to give such an undertaking as a condition of being granted [a remedy]. Instead, they are seeking to achieve the same result without the risk of incurring very substantial expenditure and thereby asking this House to adopt a most unusual course”.

55. But the ability to provide a cross undertaking in damages, particularly where the sum required would be substantial, is difficult for many claimants seeking to challenge public decisions.
56. This is not per se a bar to the grant of interim relief<sup>34</sup>, but neither can a claimant always be confident of securing interim relief without adequate funds. Such a claimant may need to turn to EC law to bolster his cause. He should not be constrained to argue with the bounds of what purely domestic procedural rules allow. In *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, 280D-H, the court rejected as “too sweeping ... [the argument that] the question whether the court should require an undertaking in damages ... is to be decided on the principles

<sup>33</sup> In *R v Secretary of State for the Environment ex p Rose Theatre Trust Company* [1990] 1 QB 504 Schiemann J held the court should be extremely slow to grant an injunction without a cross-undertaking in damages. See also *R (on the application of Greenpeace Ltd) v Inspectorate of Pollution* [1994] 1 WLR 570 at 574.

<sup>34</sup> *Ex p Hammell* [1989] 1 QB 518; *Allen v Jambo Holdings Ltd* [1980] 1 WLR 1252.

applicable to that question under the national law, being a question of procedure which, on established principles of Community law, is left to the national law". The Court said:

"...no doubt it is part of the function of the national court to assess the strength of the challenge to the national law in question, and to weigh both the possibility of damage in the interim to the subject if the law in question is enforced against him, and the possibility of damage to the public interest if the law is not so enforced. But the question of the terms upon which an injunction may be granted to enforce, or to restrain the enforcement of, a law which is under challenge on Community law grounds, cannot in my opinion necessarily be regarded as a matter of procedure for the national law where the imposition of the term under consideration is directed towards preserving rights which may arise under Community law".

57. Just as the prospects of successfully obtaining permission may be improved where issues of EU law are at stake, so too may be the prospect of securing interim relief even with an inadequate or non-existent, cross-undertaking. In *R v Durham County Council, ex p Huddleston* [2000] Env LR D21, the claimant was unable to give a cross-undertaking in damages. Nonetheless, an interim injunction was granted because the case raised questions of wider public interest involving EC law. One might compare the approach in *ex p Huddleston* with that of the Privy Council in *BACONGO* [2004] Env LR 314, which did not involve a question of EC law. In that case, a challenge was made by an environmental pressure group to prevent the construction of the Chalillo Dam on the basis that no EIA had been carried out. The Privy Council held that before granting interim relief a cross-undertaking in damages would ordinarily be required.
58. Nevertheless, the approach in *BACONGO* and other cases illustrate that the *ex p Huddleston* approach will not always be appropriate. In *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment (Interim Injunction)* [2003] UKPC 63; [2003] 1 WLR 2839 at [39], the Privy Council emphasised: "the court is never exempted from the duty to do its best, on interlocutory applications with far-reaching financial implications, to minimise the risk of injustice". It should be noted, too, that neither local authorities nor Ministers enjoy any exemption from giving cross-undertakings in damages<sup>35</sup>.
59. Most recently a local resident relying *inter alia* upon *Huddleston* was able to obtain an interim injunction without giving an undertaking in damages prohibiting Hampshire County Council from carrying out works it implement a planning permission granted to itself to construct part of a guided bus way system (CO/10056/2009 *R on the application of Morge -v- Hampshire County Council* order granted by Silber J on 9<sup>th</sup> September 2009).

### A duty to give reasons?

<sup>35</sup> Nonetheless, a court will not often exercise its discretion to require a cross-undertaking where an injunction is sought in a law enforcement action (*F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295; *Director General of Fair Trading v Tobyward Ltd* [1989] 1 WLR 517; *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227; *Coventry City Council v Finnie* (1997) 29 HLR 658).

60. What is the impact of EU law on the duty of decision-making bodies to give reasons? The simple answer is that, as at common law, it depends on the body and it depends on the decision. The impact of EU law on the duty to give reasons is another example of the operation of the principle of effectiveness because it is only where satisfactory reasons are given for a decision that an individual is in a position to know whether or not to challenge it as being (among other potential reasons) contrary to EU law.
61. The ECJ has consistently held that, in order for a person to know whether to challenge by way of judicial review the legality of a decision of a public authority, on the basis of its unlawfulness under Community law, the person must be able to ascertain the reasons for the decision so that he can decide whether to take proceedings with full knowledge of the relevant facts<sup>36</sup>. There is of course a duty in an increasing range of circumstances for decision-makers to give reasons for their decisions as a matter of purely internal domestic law (notwithstanding that there remains no *general* common law duty to give reasons – *R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531). But what of judicial review cases where EU law is in issue?
62. In Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097, the ECJ held that national authorities must give reasons for decisions which impact upon directly effective rights, so as to enable individuals properly to exercise their right to judicial control. Mr Heylens was a Belgian national, employed as a football trainer for a French football club. Under French law, a person had to possess either a French diploma or a recognised foreign diploma in order to practise as a football trainer. The French Minister for Sport failed to recognise Mr Heylens' Belgian diploma. There was no requirement under French law for the Minister to provide reasons for the refusal and no provision was made for any specific legal remedy against the decision. The ECJ held that the inability to appeal and the failure to give reasons infringed the principle of effective protection:

“...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 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”.

63. The importance of the duty has been recognised, notably, by Sir Francis Jacobs, one time Advocate General of the ECJ, in the following terms:

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<sup>36</sup> *Case 222/86 UNECTEF v Heylens* [1987] ECR 4097; *Case C-340/89 Vlassopoulou v Ministerium für Justiz, Bundes-und Europaangelegenheiten Bden-Württemberg* [1991] ECR I-2357; *Case C-104/91 Colegio Oficial de Agentes de la Propiedad Inmobiliaria v Aguirre Borrell* [1992] ECR I-3003; *Case C-19/92 Kraus v Land Baden Württemberg* [1993] ECR I-1663.

“...the requirement that reasons must be given for an administrative decision to enable the decision to be subjected to effective judicial review can now be regarded as a general principle of Community law”<sup>37</sup>

64. The duty to give reasons impacts, logically, upon the promptness of bringing a claim. The later that reasons are given, the less reasonable it is to expect a claimant to bring proceedings within the outer three month limit. Conversely, if reasons are given at the time of the decision, this issue is unlikely to arise. It was this thinking which underlay the ECJ’s approach in *Michel v European Parliament* [1981] ECR 2861 at [22]:

“...the requirement that a decision adversely affecting a person should state the reasons on which it -is based is intended to enable the Court to review the legality of the decision and to provide the person concerned with details sufficient to allow him to ascertain whether the decision is well founded or whether it is vitiated by an error which will allow its legality to be contested. It follows that a- statement of reasons must in principle be notified to the person concerned at the same time as the decision adversely affecting him and that a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Court”<sup>38</sup>.

65. Sometimes the legislation implementing an EU Directive will itself impose a duty to give reasons. For instance, Regulation 4(6) of the Environmental Impact Assessment Regulations 1999<sup>39</sup> provide that when a screening opinion or a screening direction is given to the effect that development is EIA development, it must be accompanied by “a written statement giving clearly and precisely the full reasons for that conclusion”. This provision was the subject of consideration in *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Marson* [1998] 3 P.L.R. 90; [1998] J.P.L. 869. The court held that although the Secretary of State was required by the regulations to state his reasons “clearly and precisely” if he determined that an environmental statement should be submitted. But what was the position if the Minister refused a direction?
66. The applicant submitted that there was a right under Community law in certain cases to require that a planning application should not be considered without an environmental statement having been filed, and that the duty of the English courts to protect that right could not be properly performed in the absence of reasons. If reasons were not to be given when a direction was refused, the effective protection of EU law would be undermined.
67. The Court of Appeal held that there was no *general* duty to give reasons under either Community law or national law, nor was there a specific duty under the Directive or the Regulations in instances where a direction was refused. The Court noted that the

<sup>37</sup> [1999] PL 232, 236

<sup>38</sup> See also *Council of European Municipalities and Regions v EC Commission* 3<sup>rd</sup> February 2000 unreported.

<sup>39</sup> 1999/293

local planning authority were still free to take environmental considerations into account when determining the planning application, albeit not presented to them in the form of the statement that would be required by the Regulations. And, importantly, reasons for the Secretary of State's decision *had* been given, albeit in very summary form, that the development proposed would not be likely to have significant effect on the environment by virtue of factors such as its nature, size or location. The Court considered that it would be difficult to identify a more elaborate form of reasoning which could sensibly prove the negative averment that an assessment was not required, and thought further gratuitous comment of a negative kind by the Secretary of State could have prejudiced the local planning authority against the environmental interest which it was the object of the applicant to protect. So it rejected the application<sup>40</sup>.

68. *Marson* was followed by Richards J in *Gillespie v First Secretary of State*<sup>41</sup>. But ECJ authority since both *Marson* and *Gillespie* casts some doubt on whether or not they were correctly decided. The facts of *Commission v Italy*<sup>42</sup> were that the Italian authorities had given approval for a road scheme and subsequently decided that it did not require an EIA. The Commission argued that “clear and precise reasons” had to be given for any decision not to require EIA, and that this had not occurred. Although the ECJ did not directly decide the point, it noted that the screening opinion of the Italian authorities as to whether there should have been an EIA was “based on a cursory statement of reasons and merely refer[red] to the favourable opinion of the Coordinating Committee”. The strong implication of this statement, in our view, is that EU law does in fact require reasons to be given for a decision not to require EIA. Insofar as it indicates a change of direction from the position in *Marson*, the force of the reasoning in the *Commission v Italy* case was recognised by Burton J in *R(Probyn) v First Secretary of State* [2005] EWHC 398, who observed that “it is plain that the drift of the European Courts – or at any rate, those arguing before the European Court – is flowing in the other direction from *Marson*”.

69. In *R (oao Mellor) v. S/S Communities and Local Government* [2008] EWCA Civ 213 the Court of Appeal recorded that a complaint had been made by the Commission relating to the Court of Appeal's decision in *Marson* and its understanding the Commission are in the process of bringing that matter before the ECJ under Article 226(2) of the Treaty. The Court of Appeal agreed to make a reference to the ECJ effectively revisiting the *Marson* judgment.<sup>43</sup> The questions referred by the Court of Appeal were:

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<sup>40</sup> Perhaps what ultimately swayed the court in *Marson* was the fact that another decision remained to be made along the line: the decision of the local planning authority as to whether or not to grant permission, based on the information, environmental and otherwise, provided to it. Had the planning authority's reasoning been inadequate, that in itself would have provided a basis for challenge. Nevertheless, it is questionable, given the increasingly serious way in which EIA has been approached by the House of Lords after *Marson* that the same result would be reached today.

<sup>41</sup> [2003] EWHC 8, para 94

<sup>42</sup> Case C-87/02 [2004] ECR I-5975

<sup>43</sup> It did so because, as Waller LJ stated: “The position of both parties before us is that they would seek to refer the question to the European Court of Justice as to whether the Secretary of State was obliged to give reasons at this stage for the following reasons; first because the answer to that question turns on European legislation;

1. Whether under Article 4 of Council Directive 85/337/EEC as amended by Directives 97/11/EC and 2003/35/EC Member States must make available to the public reasons for a determination that in respect of an Annex II project there is no requirement to subject the project to assessment in accordance with Articles 5 to 10 of the Directive?
2. If the answer to Question 1 is in the affirmative whether that requirement was satisfied by the content of the letter dated 4 December 2006 from the Secretary of State?
3. If the answer to Question 2 is in the negative, what is the extent of the requirement to give reasons in this context?

70. The opinion of the Advocate General<sup>44</sup> were robust and laid down a clear duty to give reason. The ECJ however answered the questions more conservatively<sup>45</sup> holding that:

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second because it is not precisely clear what European law has been said to be since the decision in *Marson*; third, because *Marson* has stood as good law here for some years and this court may be reluctant not to follow it; and fourth because proceedings are now being taken in the European Court of Justice relating to *Marson*. So it is said it would be convenient for the European Court to decide the issue in these proceedings at the same time as the issues in the enforcement proceedings. It is further said that because of the position in which *Marson* places this court, it is both desirable and necessary that the European Court should express a view on the European legislation at this stage, so as to provide a clear answer to the question as to whether reasons should be given for the Secretary of State's decision."

<sup>44</sup> Advocate General Kokott delivered her opinion suggesting that reply to the reference should be:

"1. The Member States must, under Article 4 of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, make available to the public the reasons for a decision that, in respect of an Annex II project, it is not necessary to subject the project to an assessment in accordance with Articles 5 to 10 of the directive.

2. That decision must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening carried out in accordance with the requirements of the Directive 85/337. In particular, there must be a sufficient demonstration of the reasons why legal and factual aspects which have already been raised in the procedure do not show that there is a possibility of significant effects on the environment."The opinion also commented on the significance of effects in EIA terms, stating that 'the harming of bat roosts is ... in principle a significant impact on the environment, requiring an environmental impact assessment'.

<sup>45</sup> "1. Article 4 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as not requiring that a determination, that it is unnecessary to subject a project falling within Annex II to that directive to an environmental impact assessment, should itself contain the reasons for the competent authority's decision that the latter was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents in response to the request made.

2. If a determination of a Member State not to subject a project, falling within Annex II to Directive 85/337 as amended by Directive 2003/35, to an environmental impact assessment in accordance with Articles 5 to 10 of that directive, states the reasons on which it is based, that determination is sufficiently reasoned where the reasons which it contains, added to factors which have already been brought to the attention of interested parties, and supplemented by any necessary additional information which the competent national administration is required to provide to those interested parties at their request, can enable them to decide whether to appeal against that decision."

1. there is no need for a negative screening decision to itself contain reasons;
2. but there is a duty to provide further information on the reasons for the decision if an interested person subsequently requests the same;
3. that request need not be met by a formal statement of reasons but also by providing “information and relevant documents”; and
4. reasons, when given, can be very short.

### **Proportionality**

71. Another general principle applied by the ECJ is that of proportionality. This principle is derived from German law (there referred to as *Verhältnismässigkeit*) where it underlies certain provisions of the German Constitution. This principle first affected EC law in the *Internationale Handelsgesellschaft* case. It was stated that

"A public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure."

72. If the burdens imposed are clearly out of proportion to the object in view, the measure will be annulled by the Court. Proportionality has been confirmed in the EC Treaty itself where in Article 3b it is stated that "An action of the Community shall not go beyond what is necessary to achieve the objectives of the Treaty." Even with the incorporation of the principle into the Treaty, the creative role of the ECJ is still felt: as proportionality is a relative concept, it is up to the Court to determine whether a measure is disproportionate or otherwise. Nonetheless, it gives the Court an opportunity to apply a more intensive form of review than the test that it so unreasonable that no reasonable decision maker could come to such a view (commonly referred to as *Wednesbury* unreasonableness)

### **The Grant of Final Remedy**

73. A court's discretion to refuse final relief, where a claimant has shown a breach of a directly effective right under EC law, is limited.
74. The obligation arising out of article 10 EC Treaty is for the court to nullify the unlawful consequences of a breach of Community law. In *Wells v The Secretary of State for Transport*, a decision of the European Court of Justice, an Environmental Impact Assessment for a particular quarry development was found to be contrary to the Regulations and the Directive. In considering the nature of the obligation to remedy the failure to carry out an Environmental Impact Assessment the ECJ addressed the UK Government's contention that in the circumstances of the case there was no obligation on the competent authority to revoke or modify the permission issued for the working of the quarry or to order the discontinuance of the quarry. The ECJ stated that it was clear from settled case law and under the principle of co-operation and good faith laid down by Article 10 of the Treaty that the Member States are "required to nullify the unlawful consequences of a breach of Community law." The ECJ referred to the decision of *Humblet v Belgium* [1960] ECR 559 and *Francovich v Italy* [1991] ECR 153 57 and stated that "Such an obligation is owed,

within the sphere of its competence, by every organ of the Member State concerned” and to that effect referred to *Germany v The Commission* [1990] ECR I-2321.

75. The most important statement of this principle in English law remains in *Berkeley* [2001] 2 AC 603, where the House of Lords rejected the argument that relief should be refused since all the environmental information that would have been part of an environmental impact assessment (which had not been conducted at all) was already in the public domain. However in certain circumstances the court will nevertheless exercise its discretion to refuse relief<sup>46</sup> or to grant declarations only<sup>47</sup>.
76. The most recent word of the House of Lords on the matter of discretion (significantly coming from Lord Hoffmann who gave one of two reasoned opinions in *Berkeley*) is that *R (on the application of Edwards and another (Appellant)) v Environment Agency and others* [2008] UKHL 22 at para 73:

“It is well settled that “the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary” (Lord Roskill in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 656.) But the discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it. So in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 it was conceded, and the House decided, that the Court of Appeal had been wrong to refuse to quash a planning permission granted without the impact assessment required by the EIA directive on the ground only that the outcome was bound to have been the same. The relevant domestic legislation provided that in such a case the grant of permission was to be treated as not within the powers of the Town and Country Planning Act 1990. Lord Bingham of Cornhill said (at p.608) that even in a domestic context, the discretion of the court to do other than quash the relevant order “where such excessive exercise of power is shown” is very narrow. The Treaty obligation to give effect to European law reinforces this conclusion. I made similar observations at p. 616. But I agree with the observation of Carnwath LJ in *Bown v Secretary of State for Transport, Local Government and the Regions* [2004] Env LR 509, 526, that the speeches in *Berkeley* need to be read in context. Both the nature of the flaw in the decision and the ground for exercise of the discretion have to be considered. In *Berkeley*, the flaw was the complete absence of an EIA and the sole ground for the exercise of the discretion was that the result was bound to have been the same.”

## Damages Against Public Authorities

<sup>46</sup> *Bown v Secretary of State for Transport, Local Government and the Regions* [2003] EWCA Civ 1170 [2004] Env LR 26; *R (on the application of Rockware Glass Ltd) v Chester City Council* [2006] EWCA Civ 99 (operation of quashing order suspended); *R (on the application of Gavin) v Harringey LBC* [2004] 2 P & CR 13 at [40]-[41] (delay provisions in SCA s.31(6) not inconsistent with principles relating to Environmental Impact Assessment).

<sup>47</sup> See the *Seaport Remedies* judgment.

77. In Joined Cases C-9/90 Francovich and Boniface v Italy [1991] ECR I-5357 the ECJ “discovered” a right based again on article 10 EC Treaty for individuals to claim damages against public authorities for the breach of EC law
78. Following the decisions of the ECJ in the conjoined cases of *Brasserie du Pêcheur and Factotame* [1996] ECR I-1029 the conditions for state liability may be shortly summarised as follows (paras 48-51):
1. The rule of law infringed must have been intended to confer rights on individuals.
  2. The breach of such rule must have been “sufficiently serious.”
  3. There must have been a “direct causal link” between the breach and the damage sustained.
79. Case C-224/01 Köbler v Republik Österreich [2003] ECR I-10239 further extended the principle of damages for breaches of EC law establishing that member states might in certain circumstances be liable in damages for the failure of their domestic court to apply EU law correctly. In that case the ECJ stated (at para 59):

“..the principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest.”

80. The subsequent action in *Stephen Cooper v. HM Attorney General* [2008] EWHC 2178 (Admin) *The Times* 8 October 2008 by a trustee of CPRE to recover damages in respect of a failure by the Court of Appeal correctly to apply the EIA Directive in the White City litigation indicates that recovery may prove difficult in the English courts.

### **Conclusion**

81. Knowledge of the EC law is no longer an optional extra. We are all European lawyers now.

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