3. THE SOURCES AND METHODS OF COMMUNITY LAW

124. Sources. The sources of European Community law can be categorised as follows:

(1) (a) the treaties:
   (i) the 'founding Treaties' establishing the three Communities;
   (ii) treaties amplifying, modifying or amending the founding Treaties, notably and principally the Single European Act and the Treaty on European Union, the latter also comprising the constitutional basis of the European Union;
   (iii) the Treaties of Accession providing for the accession of new member states;
   (iv) protocols, conventions, and acts ancillary to the founding Treaties and the Treaties of Accession;

(b) conventions between the member states distinct from, but concluded within the context of, the founding Treaties, notably the Brussels Judgments Convention and the Rome Contracts Convention;

(c) agreements with third countries, concluded either by the Community and the member states together or by the Community alone, notably
   (i) the Treaty establishing the European Economic Area (EEA);
   (ii) the Lomé Convention with the ACP countries;
   (iii) the 'Europe Agreements' with some of the countries of Eastern Europe;
   (iv) other 'association agreements';
   (v) other agreements;

(2) legislative acts and lawfully binding decisions of the Community institutions acting under the powers conferred upon them by the treaties, including judgments of the Court of Justice in so far as they are binding on the parties and upon the courts and tribunals of the member states;

(3) legislative acts and lawfully binding decisions of the governments of the member states meeting in the Council and acting under the powers conferred upon them by the treaties;

1 See para 300 below.
2 (Brussels) Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, OJ C97, 11.4.83, p 2; Cmnd 7395. The United Kingdom (and Denmark and Ireland) acceded to the Convention by virtue of an Accession Convention of 9 October 1978, OJ L304, 30.10.78, p 1; it is incorporated in the United Kingdom by the Civil Jurisdiction and Judgments Act 1982, c 27, in force from 1 January 1987.
4 See para 269 below.
5 See para 57 above.
(4) the jurisprudence (case law) of the Court of Justice in so far as it states or applies principles of Community law or provides an interpretation of the treaties or of legislative provisions in cases involving different parties;

(5) 'general principles of law' derived from the constitutions and laws of the member states or from international agreements, such as the European Convention on Human Rights, to which the member states, but not the Community, are party.

125. Ancillary sources. Although they are not strictly speaking 'sources' of law, the following may be invoked as offering guidance to the interpretation and application of Community law:

(1) declarations, communiqués and resolutions of the Community institutions;

(2) notices and other statements of policy issued by the Commission;

(3) answers to parliamentary questions in the European Parliament;

(4) learned opinion, such as academic writing (la doctrine being a respected guide to law in continental member states) and other respected reports such as those of the House of Lords Select Committee on the European Communities.

126. Languages. The ECSC Treaty was drawn up in French and French is its sole authentic language text. Otherwise the basic Treaty texts, conventions and international agreements exist in twelve language versions – Spanish, Danish, German, Greek, English, French, Irish, Italian, Dutch, Portuguese, Finnish and Swedish – all equally authentic. All these languages except Irish are 'official languages' of the Community. All legislative acts are adopted in all official languages, each text equally authentic. Where a discrepancy emerges amongst the various language versions, the Court will have recourse to all of them in order to determine the legislative intent and purpose. Decisions and other administrative acts addressed to particular member state(s) or person(s) are adopted in the language(s) of the addressee(s).

127. Methods of interpretation. It is sometimes suggested that the approach of the Court of Justice to the interpretation of the sources of Community law is in some sense 'continental' and unlike that of the common law. This is true to the extent that the Court of Justice does not adopt the literal method of interpretation customarily adopted by United Kingdom courts in construing statutes, and that judgments of the Court of Justice do not constitute binding precedent the effect of which can be altered only by legislation. In other
respects the suggestion is based upon a misconception as to the nature of the sources of Community law.

128. Contractual nature of the Treaties. The Treaties themselves are not legislative acts but international agreements. They state the purposes for which they have been concluded and create reciprocal rights and obligations for the signatory states and their nationals. The courts of the United Kingdom are accustomed to interpret contracts in such a way as to give them business efficacy and, where the parties have expressly stated the purpose of the contract, in such a way as to give effect to that purpose. The approach of the Court of Justice to the interpretation of the Treaties is not materially different, and is consistent with the rule of international law that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty [including its preamble and annexes] in their context and in the light of its object and purpose’.

129. Context of interpretation. The approach of the Court of Justice to the interpretation of legislative and other binding acts of the Community institutions is equally understandable in its context. In the first place, the powers of the institutions are derived from the Treaties and can be exercised only in a manner compatible with the Treaties. In the second place, the Treaties provide that legislative and other binding acts of the institutions must ‘state the reasons on which they are based and ... refer to any proposals or opinions which were required to be obtained’. That being so, it would be inappropriate to construe the dispositive provisions of such acts as if they were sections of a United Kingdom statute.

130. The autonomy of Community law. Community law is an autonomous legal system drawing inspiration from, but independent of, the legal systems of the member states. The consequences for the interpretation of Community law were summarised by the Court of Justice as follows:

'To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.

It must also be borne in mind, even when the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various member states.

Finally, every provision of Community law must be placed in its context and

---

2 EC Treaty, art 190; see para 144 below.
interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied”.

131. The ‘acquis communautaire’. Community law is an evolving legal order. Its substantive rules, rights, obligations and remedies develop over time, and the Court of Justice makes frequent reference to ‘the present state of Community law’. However, there is a presumption that evolution, or ‘progression’, is in one direction, that at any point in time there can be identified a state of the development of the law which embodies essential rights, obligations and remedies and which cannot be reversed. This state of the law is referred to as the acquis communautaire and is fundamental to the continuous development of the Community legal order.

132. Precedent. In the United Kingdom the courts are directed by statute to take notice of judgments of the Court of Justice on the meaning or effect of the Treaty and of Community legislation. It is important to understand precisely what this means. A declaratory judgment under article 169 has the force of res judicata and is binding for the defaulting member state. A preliminary ruling under article 177 binds the referring court in relation to the case in which the reference has been made. In cases where a successful appeal to the Court of Justice is remitted back to the Court of First Instance, the latter is bound by the former’s judgment on points of law. These are the only circumstances in which a judgment of the Court of Justice is formally ‘binding’ in the sense that another court must comply with it. But the Court has also said that a declaration of invalidity in article 177 proceedings may be relied upon by other national courts and that there is no obligation for a national court of last resort to refer to the Court of Justice a question of Community law where ‘the Community provision in question has already been interpreted by the Court’. These dicta imply that a previous decision on the interpretation of a specific legislative provision can, for practical purposes, be treated as binding. Further, the Court frequently makes reference to the consistent or well-established case law (jurisprudence constante) of the Court, implying that a series of decisions in the same sense upon an issue of principle can be treated as binding authority. Nevertheless, as in any case law-based system, the Court may depart from, or modify, its previous case law, and has on two occasions expressly ‘reversed’ previous judgments. So, it is always open to a national court to invite the Court of Justice to ‘reconsider’ a previous decision or line of case law.

3 European Communities Act 1972, s 3.
THE NATURE AND ENFORCEMENT OF COMMUNITY LAW

133. Direct effect. In the early case of Van Gend en Loos\(^1\) it was argued that, whilst the EEC Treaty conferred rights and obligations upon the signatory states, it did not confer rights upon individuals which they could enforce directly in their national courts. The Court of Justice disagreed; it said that:

> 'the Community constitutes a new legal order of international law, for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals\(^2\). 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\(^3\).'

Hence the doctrine of 'direct effect', which holds that Community law is of itself capable of creating rights and obligations enforceable before national courts. As developed and refined by the Court of Justice\(^4\), the doctrine applies where a Treaty or legislative provision:

- is clear and concise;
- is unconditional and unqualified and is not subject to the taking of any further measures on the part of a Community or national authority; and
- leaves no substantial discretion in its implementation to a Community or national authority.

In such circumstances, where the provision in question creates rights or obligations, it is said to have direct effect and may be enforced before the appropriate national court or tribunal. The Court of Justice has held that a number of articles of the Treaty have direct effect. It has also held directly effective a great mass of Community legislation which implements those Treaty rights and obligations which are not themselves directly effective. In terms of the European Communities Act 1972, rights created by directly effective Community law are 'enforceable Community rights' in the United Kingdom\(^5\).

134. Primacy. In another early case, Costa v ENEL\(^6\), it was argued that the Italian courts were bound to apply Italian legislation subsequent in date to the entry into force of the EEC Treaty. Again the Court of Justice disagreed:

> 'The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and spirit of the Treaty,'

---

2 This formula was reiterated by the Court in a 1991 opinion verbatim, except that it substituted 'in ever wider fields' for 'albeit within limited fields'; see Opinion 1/91 re the Draft EEA Treaty [1991] ECR I-6079 at 6102, [1992] 1 CMLR 245 at 269.
3 [1963] ECR 1 at 12; [1963] CMLR 105 at 129. 'Heritage' is an inadequate translation of patrimoine; 'patrimonial rights' or 'assets' would be a more meaningful translation.
5 See para 136 below.
make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity... The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories.  

This application of the doctrine of international law that *pacta sunt servanda* is known as the doctrine of the primacy (or supremacy) of Community law. It is a doctrine which is well known in federal systems where, in the event of conflict, the law of the federal authority will usually have precedence over the law of the regional authorities.

135. The status of Community law generally. The doctrine of direct effect seeks to ensure that rights accruing from Community law are available to the individual, whilst the doctrine of primacy ensures that such rights will take precedence over any conflicting national rule or practice. So far as Community law is concerned, the obligations imposed upon national courts and tribunals are clear, and are best stated in the *Simmenthal* judgment in 1978:

'[I]n accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures... render automatically inapplicable and conflicting provisions of current national law... [and] preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions,... [E]very national 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.'

136. The status of Community law in the United Kingdom. Community law is incorporated into United Kingdom law by the European Communities Act 1972, which provides, in effect, that rights arising from the Treaty are 'enforceable Community rights' to be applied and enforced as part of the law of the United Kingdom. There are, at least in theory, constitutional difficulties in applying the doctrine of primacy in a number of member states. In the United Kingdom the difficulty stems from the doctrine of parliamentary supremacy, according to which there are no entrenched laws and the provisions of an Act of Parliament will impliedly repeal any prior rule of law (which might include Community rules) with which they are inconsistent. The most authoritative judicial consideration of the meaning and breadth of the 1972 Act is now provided in the speech of Lord Bridge in *Factortame*:

3 European Communities Act 1972, s 2(1).
The Nature and Enforcement of Community Law

Para 139

If the supremacy within the European Community of Community law over national law was not always inherent in the EEC Treaty, it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitations of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it is the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law¹.

So, constitutional difficulties which, according to Lord Bridge, were in any event ‘based on a misconception’², appear to be resolved. This is so where the Community right is embodied in terms which can be construed as having direct effect (an ‘enforceable Community right’). Different problems arise with the enforcement of rights granted by provisions which are not directly effective³.

137. Enforcement of Community rights before the Court of Justice. The EC Treaty provides for judicial review of acts of the Community institutions, through direct actions or references by the procedure of article 177, and an action for damages for loss caused by the Community and its institutions. In all these actions the Court of Justice has (or shares with the Court of First Instance) exclusive jurisdiction. They are discussed above⁴.

138. Enforcement of Community rights before national courts. Since the day-to-day administration of most substantive aspects of Community law lies with national authorities, and since in accordance with the doctrine of direct effect Community law gives rise to rights and obligations enforceable by national courts, the availability of appropriate and satisfactory national remedies is an essential element in the proper application and enforcement of Community law.

139. Methods of enforcement. Where a person wishes to enforce a Community right against a public authority before a national court, the basic principle is that, in the absence of relevant Community rules, national

2 R v Secretary of State for Transport, above.
3 See para 140 below.
4 See paras 100–110.
remedies and procedures should be used\(^1\), provided that the conditions for the enforcement of the Community right are

- no less favourable than those relating to similar domestic actions and
- not such as to render virtually impossible the exercise of the Community right\(^2\).

In the United Kingdom therefore a person would normally seek judicial review\(^3\) (including injunction or interdict\(^4\)) or damages\(^5\) as appropriate. A rule of national law – for example, the rule against granting an injunction against the Crown\(^6\) – cannot be invoked to prevent the national court granting a remedy to ensure the effective protection of a Community right\(^7\). Where a national substantive or procedural rule would have the effect of limiting that protection – for example, a fixed (and insufficient) statutory limit on the quantum of damages\(^8\) or an irrebuttable legal presumption of national law\(^9\) – that rule must be set aside. A time limit for bringing a claim is not in principle contrary to Community law, but may be so if it makes it impossible to assert a Community right\(^10\). In criminal proceedings a defence may be raised that the national measure creating the offence is contrary to Community law\(^11\); if the

2 See eg Case 199/82 San Giorgio v Amministrazione delle Finanze dello Stato [1983] ECR 3595; Case C-410/92 Johnson v Chief Adjudication Officer, judgment of 6 December 1994, not yet reported. So a domestic rule imposing a time limit upon applications for judicial review could not be invoked where the national authorities had made it impossible for the claimant to apply for review within the time limit; Case C-208/90 Emmott v Minister for Social Welfare and Attorney General [1991] ECR I-4269 (but see note 10 below).
3 For recent examples see Kincardine and Deeside District Council v Forestry Commissioners 1992 SLT 1180, [1994] 2 CMLR 869 (OH); R v Secretary of State for the National Heritage, ex parte Continental Television [1993] 2 CMLR 333 (QBD); National Union of Public Employees v Grampian Regional Council, judgment of 11 March 1993 (OH), not yet reported; R v Secretary of State for Employment, ex parte Equal Opportunities Commission [1995] 1 AC 1 (in which the House of Lords confirmed the availability of declaratory relief in judicial review proceedings).
5 See para 141 below.
6 R v Secretary of State for Transport, ex parte Factortame [1990] 2 AC 55, [1989] 3 CMLR 1 (HL); since reversed in English law in M v Home Office [1993] 3 All ER 537 (HL), but not in Scots law owing to the terms of the Crown Proceedings Act 1947; see McDonald v Secretary of State for Scotland 1994 SLT 692 (2nd Div).
10 The very broad statement in Case C-208/90 Emmott v Minister for Social Welfare and Attorney General [1991] ECR I-4269 to the effect that time does not start to run until the provisions of a directive have been fully and clearly transposed into national law should be treated with caution; see Case C-335/91 Steenhorst-Neerings v Bedrijfsvereniging voor Detailhandel, Ambachten en Huisservaren [1993] ECR I-5475 and Case C-410/92 Johnson v Chief Adjudication Officer, judgment of 6 December 1994, not yet reported.
11 Use of this 'Euro-defence' arose most famously in the recent clutch of cases involving Sunday trading legislation in England and Wales; see para 187 below.
national measure is found to be so, a conviction is incompatible with Community law. Where a person can establish an enforceable Community right against another person or persons, which arises most frequently under Community employment rules and the rules on competition, the national court must enforce that right. It is not yet clear whether judicial review must precede a private law action or whether the existence of a private law remedy pre-empts judicial review, nor whether such rules are compatible with the effective protection of Community rights.

140. Article 5 remedies. Where a Community right is articulated in a manner which is not directly effective, the right is not, as such, enforceable in the national courts. However, the Court of Justice has drawn from article 5 of the Treaty two principles which enable the indirect enforcement of such rights: the ‘uniform interpretation’ of national law, which is discussed below, and a remedy in damages against public authorities, as follows.

141. Damages against public authorities: Francovich liability. There is a wide disparity in national law of public tort liability and so a risk that the right to damages as a means of protecting a Community right will vary from member state to member state. Very generally, the civilian systems have tended to provide easy access to damages against public authorities, whilst the common law jurisdictions have not. However, in Francovich the Court of Justice held that where a member state has failed timeously to implement into national law the requirements of a directive, so giving rise to economic loss on the part of an individual who would have acquired rights had the directive been properly implemented, a remedy in damages lies against the state. In the United Kingdom an action in damages will therefore lie against the appropriate Minister of the Crown or the Attorney-General, and the

2 See para 278 below.
3 See para 239 below.
4 See eg Argyll v Distillers 1987 SLT 514, [1986] 1 CMLR 764 (OH); Hopkins v National Power [1994] 1 CMLR 147 (QBD), referred to the Court of Justice as Case C-18/94 (pending).
5 Eg R v Secretary of State for Employment, ex parte Equal Opportunities Commission [1995] 1 AC 1 (HL).
6 National Union of Public Employees v Grampian Regional Council, judgment of 11 March 1993 (OH), not yet reported; R v Secretary of State for Employment, ex parte Equal Opportunities Commission [1994] 1 All ER 910 (HL).
7 See para 167 below.
8 See para 148.
10 See the English case of Bourgoin v Minister for Agriculture, Fisheries and Food [1985] 3 All ER 585, [1986] 1 CMLR 267 (CA). This judgment can no longer be considered safe.
12 As to directives see paras 147-148 below.
13 See R v Secretary of State for Employment, ex parte Equal Opportunities Commission [1995] 1 AC 1 (HL) at 32 per Lord Keith; see also Kirklees Municipal Borough Council v Wickes Building Supplies Ltd [1993] AC 227 (HL) at 282 per Lord Goff.
Crown Proceedings Act 1947 must now be read and applied in the light of Francovich. Francovich has been considered by the Court of Justice in only two subsequent cases. Its full implications will become clearer with judgment in two cases pending before the Court.

(2) COMMUNITY LEGISLATION

142. Forms of Community legislation. Article 189 of the EC Treaty provides:

In order to carry out their tasks 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.’

The ECSC and Euratom Treaties have similar but not identical provisions.

143. Form and substance. The difference between the various forms of act lies not in any hierarchical ordering but in their scope and effect. Regulations and decisions have immediate legal effect; directives require further implementing measures. Regulations are of the nature of general legislation; decisions are more particular in their application. The simplicity of these distinctions has become blurred, and the Court of Justice will always consider the substance of an act rather than its form in order to determine its legal effects.

144. Substantive requirements of Community legislation. The Community legislative process is subject to procedural requirements, discussed above. It

1 Case C-334/92 Wagner Miret v Fondo de Garantía Salarial [1993] ECR I-6911; Case C-91/92 Faccini Dori v Recreb [1994] ECR I-3325, in which the Court simply confirmed that where national implementation of a directive provides insufficient protection for a right provided in the directive, an injured party has a remedy in damages against the state.

2 Case C-46/93 Brasserie de Pêcheur v Germany and Case C-48/93 R v Secretary of State for Transport, ex parte Factortame (No 3).

3 Article 161 of the Euratom Treaty is in identical terms but omitting the words ‘the European Parliament acting jointly with the Council’. Under art 14 of the ECSC Treaty ‘decisions’ and ‘recommendations’ correspond respectively to regulations and directives adopted under the EC and Euratom Treaties.

4 See paras 76–81.
is also subject to substantive requirements. All Community institutions are required to act within the limits of the powers conferred upon them by the Treaty; they may legislate (or adopt other binding acts with legislative effect) only when acting pursuant to express authority in the Treaty, which normally prescribes the form of legislative act to be adopted. Further, all Community acts are required to state the reasoning upon which they are based. The Court of Justice has found that it is necessary not only to state reasons but also to state sufficient and correct reasons. Thus an act which is insufficiently reasoned or which cites as its legal base the wrong article of the Treaty, is an infringement of the Treaty within the meaning of article 173 and so liable to annulment or invalidation. This has acquired especial significance with the variety of legislative procedures introduced by the Single European Act and the Treaty on European Union, as the Treaty basis of an act determines the procedures required to be followed.

145. Regulations. A regulation is analogous to statute law, and is ‘binding in its entirety and directly applicable in all Member States’. ‘Direct applicability’ – to be carefully distinguished from direct effect – means that a regulation requires no implementation or further action in the member states. Indeed, a member state may not even attempt to pass implementing measures which might have the consequence of limiting or altering the effects of a regulation which must be enforced as it stands. A provision of a regulation may or may not have direct effect, depending upon whether it fulfils the necessary criteria.

146. Decisions. Decisions, generally more limited and specific application than regulations, are ‘binding ... upon those to whom [the] are addressed’. The Treaty requires notification of a decision to its addressee and provides

1 EC Treaty, art 4(1).
2 Ibid, art 190.
7 See para 133 above.
that it will take effect upon notification. A decision therefore has immediate legal effect for its addressee (either a member state or a natural or legal person). A decision may also create rights for third parties. Where, for example, a decision is addressed to a member state and the decision fulfills the criteria of direct effect, it may be relied upon by third parties as against the state.

147. Directives. A directive is always addressed to member states. In principle, it prescribes a particular result to be achieved by a particular date, leaving it to the member states, in accordance with their own constitutional rules, to determine how and by whom it should be implemented or 'transposed' into national law. So far as Community law is concerned, the obligation to implement fully and timeously rests with the member state as such, and the member state cannot excuse its failure to do so upon the ground of internal difficulties. So far as the individual is concerned, rights and obligations are brought into being in principle by the national implementing measures, not by the directive.

148. Uniform interpretation and direct effect of directives. Whilst the individual is normally concerned only with national measures implementing a directive, there are important exceptions.

- First, where there is a divergence between the national measures and the directive the national measures must, so far as it is possible for the national court to do so, be interpreted and applied so as to give effect to the directive. This interpretative duty, called uniform interpretation (interprétation conforme), is derived from article 5 of the Treaty and applies even where the directive remains unimplemented and even where the national rule in question existed prior in time to the adoption of the directive. Hitherto the House of Lords has been prepared to comply with it only partially.

1 EC Treaty, art 191(3).
2 See para 133 above.
6 See para 167 below.
8 The House of Lords has held that where Parliament or the government has acted to implement a directive, it is proper for the courts to give a 'purposive' interpretation to the implementing national law in order that it accords with the provisions of the directive (Pickstone v Freemans [1989] AC 66, [1989] 3 CMLR 221; Litster v Forth Dry Dock Ltd 1989 SC 96, [1989] 2 CMLR 194). But where Parliament or the government has not so acted, the House of Lords has refused to construe (or 'distort') British legislation so as to conform with the provisions of a directive (Duke v GEC Reliance Ltd [1988] AC 618, [1988] 1 CMLR 719; Finnegan v Clonney Youth Training Programme [1990] 2 AC 407, [1990] 2 CMLR 859). Implicit in the House of Lords' view is that there is a limit beyond which British courts cannot go in seeking to ensure UK compliance with a directive; beyond that limit responsibility lies with Parliament and/or the government.
• Second, where the directive imposes upon the member state a clear, precise and unconditional obligation intended to create rights for individuals, then even if the member state has failed to implement, those individuals can rely upon the 'vertical direct effect' of the directive as against the state or an 'emanation of the state'.

• Third, a directive cannot of itself have 'horizontal direct effect', creating rights as between private (non-state) parties. But where an individual has suffered loss in consequence of a member state failure to implement, which is not, or cannot be, remedied by uniform interpretation of national law, the individual may, by application of Francovich principles, be able to claim damages from the state.

The full implications of these rules are still to be worked out. The practitioner must in any event develop antennae to detect the Community 'inspiration' of national legislation, and also be aware of directives which, although not properly implemented, may nevertheless give rise to rights against the state and may, or must, be used as a guide to the construction of national statutes.

149. Recommendations and opinions. According to the Treaty, recommendations and opinions have no binding force. This means that a true recommendation or opinion cannot create an enforceable right. However, the Court of Justice will consider whether an act in the form of a recommendation or opinion is in substance a different type of act which is intended to create and capable of creating such rights. Even if it is not, a national court is bound to take them into consideration, in particular where they cast light upon the interpretation of other provisions of national or Community law.

150. Other binding acts. The list of measures prescribed in article 189 of the Treaty is not exhaustive. The Community institutions may create legally

---


3 Case 152/84 Marshall v Southampton and South West Hampshire Area Health Authority (No 1) [1986] ECR 723, [1986] 1 CMLR 768; Case C-91/92 Facchin Dori v Recreb [1994] ECR I-3325. A national authority may not however rely, as against an individual, on a provision of a directive which has not been implemented as it should have been; see Case 80/86 Officier van Justitie v Kolpinghuis Nijmegen [1987] ECR 3969, [1989] 2 CMLR 18.

4 See para 141 above.


6 Directives are sometimes given effect in the United Kingdom by amendment of relevant statutes, but also by Order in Council or regulation by authority of ss 2(2) of the European Communities Act 1972. Their Community origin is therefore not always obvious. The notes in Current Law Statutes will normally identify British enactments which have been 'inspired' by Community directives. The Explanatory Memorandum annexed to statutory instruments will identify any Community measure upon which subordinate legislation is based.

binding acts – and therefore acts capable of creating enforceable rights – by means other than those mentioned in article 189, for example through a resolution¹, through administrative memoranda² or by entering into a treaty with third states³.

151. Judicial review. The means by which these legislative and administrative acts of the Community institutions may be challenged before the Court of Justice is discussed above⁴. It will be observed that a natural or legal person has no standing to challenge either a true regulation or a true directive under article 173, as the former will be of no individual concern, and the latter of no direct concern, to him⁵. He will have access to the Court only indirectly under article 184 or article 177⁶. True recommendations and opinions are expressly barred from review by the Court of Justice under article 173⁷, but they may properly be the subject of a preliminary reference under article 177⁸.

(3) THE GENERAL PRINCIPLES OF COMMUNITY LAW

152. The general principles of Community law. As in other legal systems, it has been necessary for the Court of Justice to develop legal principles of general application to assist in applying the law and to temper its rigidities. Article 164 of the Treaty requires the Court to ‘ensure that ... the law is observed’. ‘The law’ in this context means more than the written law of the Treaties. The principles developed by the Court are ‘general principles common to the law of the member states’, the shared tradition of the member states being seen as a source of law prior to the written law of the Treaties. However, the Court has not limited itself to principles found in the law of every member state and has adopted those which seemed best adapted to the Community system. Since much of Community law is administrative law, some of the most important principles have been taken from the highly developed administrative law of France and Germany. But the Court has also adopted some of the principles of natural justice as developed in the

3 See para 284 below.
4 See paras 100-110.
6 See para 110 above.
7 See para 100 above.
United Kingdom. The most important principles referred to by the Court fall into five groups: fundamental rights; legal certainty; proportionality; equal treatment or non-discrimination; and subsidiarity.

153. The principle of fundamental human rights. From the early 1970s the Court of Justice has held that 'respect for fundamental human rights forms an integral part of the general principles of law protected by the Court of Justice'. Such rights find their sources in 'the constitutional traditions common to the Member States' and 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'. The most important of the international treaties is of course the European Convention on Human Rights. The Court's case law was codified in the Common Provisions of the Treaty on European Union (and so within the constitutional order of the Union), which provides that

'[The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

Respect for fundamental rights constitutes a constraint not only upon the legislative and executive action of the Community institutions but also upon that of the authorities of the member states when acting within the scope of Community law - when they are applying, obliged to apply, or seeking to justify derogation from, Community rules. This means, inter alia, that there must be an effective means of judicial review of all national measures adopted in the Community sphere. So, even though the ECHR has never been incorporated into United Kingdom law, British courts must apply it as appropriate when dealing with matters which fall within the sphere of Community law.

Principles related to fundamental rights, and aligned with British concepts of natural justice, include:

3 The Community itself is not a party to the ECHR, but both the Parliament and the Commission have urged that it ought to be; see EP Resolution of 9 July 1991, OJ C240, 16.9.91, p 45; Bull EC 10-1990, P 74. In 1994 the Council requested from the Court of Justice an Opinion as to whether accession to the ECHR would be consistent with the EC Treaty; see Opinion 2/94 re Accession to the European Convention on Human Rights (pending).
4 TEU, art F(2).
(1) *Audi alteram partem*: a person is entitled to be heard in his own defence before a penalty is imposed or a measure taken which will prejudice his interests. It is a necessary precondition that he should be informed of the case against him before being required to state his defence. However, an infringement of the right to be heard can result in annulment only if it can be established that, but for the irregularity, the outcome of the procedure might have been different.

(2) *Nulla poena sine lege*: a penalty, even of a non-criminal nature, cannot be imposed unless it rests upon a clear and unambiguous legal basis.

(3) *Non-retroactivity*: a law cannot be applied to a person who could not have known of its existence. In particular, criminal offences cannot be declared retrospectively.

(4) *Non bis in idem*: no one should be tried twice for the same offence; and no one should be subjected to two penalties for the same offence.

(5) *The right to legal assistance*: a person is entitled to the help and presence of a lawyer, and to be represented by a lawyer when his legal rights are in issue. This principle leads in turn to two further principles: (a) that the lawyer is entitled to see all relevant documents, and (b) that communications between lawyer and client are confidential.

(6) *Protection from self-incrimination*: whilst a person may be required to supply information to a Community authority, even if the information supplied would incriminate him, he cannot be compelled to answer leading questions the answers to which would constitute an admission of unlawful activity, that being for the Community authority to establish.

(7) *Respect for private life and inviolability of premises*: a person cannot be compelled to undergo medical examination in order to reveal the state of his health prior to appointment to a Community post, although refusal to consent to a test objectively necessary for fulfilling the tasks of the post will justify a refusal to employ him. The inviolability of the home is a

---


4 Case 63/83 R v Kirk [1984] ECR 2689, [1984] 3 CMLR 522. However, the principle is not applied vigorously outwith the sphere of criminal law; see Case 331/88 R v Minister for Agriculture, Fisheries and Food, ex parte FEDESA [1990] ECR I-4023, [1991] 1 CMLR 507.


154. **The principle of legal certainty.** The principle is that application of the law to a specific situation must be predictable. The Court of Justice applies this principle when it declares the provisions of a measure it has annulled to be operative\footnote{On the application of the principle in Community law generally see Case C-338/91 Steenhorst-Neerings v Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen [1993] ECR I-5475 per Advocate-General Darmon.} and when it limits the temporal effects of an interpretative judgment which is new, genuinely unforeseen and likely to give rise to significant difficulty. From the general principle spring other principles:

1. *Respect for acquired rights:* a legal right, once acquired, should not be withdrawn. Further, a case must be judged in the light of the law as it stood at the time of the events in question, not as it may have been changed or developed subsequently.\footnote{See para 102 above.}

2. *Legitimate expectation:* a person is entitled to act (and conduct his business) in the reasonable expectation that the law as it exists will continue to apply. This is especially so in the event of assurances, explicit or implicit, being given by a Community authority.\footnote{See eg Case 112/77 Topfer v Commission [1978] ECR 1019.}

3. *Identifiability of persons affected:* the addressee of a decision intended to create rights or obligations must be clearly identifiable.\footnote{See eg Case 12/71 Henck v Hauptzollamt Emmerich [1971] ECR 743; see also Case 80/86 Officier van Justitie v Kolpinghuis Nijmegen [1987] ECR 3969, [1989] 2 CMLR 18.}


5. *Prescription:* an act cannot be declared unlawful, a penalty exacted or performance of an obligation required after an excessive lapse of time\footnote{See eg Case 12/71 Henck v Hauptzollamt Emmerich [1971] ECR 743; see also Case 80/86 Officier van Justitie v Kolpinghuis Nijmegen [1987] ECR 3969, [1989] 2 CMLR 18.}

155. **The principle of proportionality.** The principle of proportionality requires that the means employed must be proportionate to the end to be achieved. It was written into the EC Treaty by the Treaty on European Union as a formal principle of Community law thus:

---

\footnote{2 On the application of the principle in Community law generally see Case C-338/91 Steenhorst-Neerings v Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen [1993] ECR I-5475 per Advocate-General Darmon.}
\footnote{3 See para 102 above.}
\footnote{5 See eg Case 12/71 Henck v Hauptzollamt Emmerich [1971] ECR 743; see also Case 80/86 Officier van Justitie v Kolpinghuis Nijmegen [1987] ECR 3969, [1989] 2 CMLR 18.}
\footnote{6 See eg Case 112/77 Topfer v Commission [1978] ECR 1019.}
\footnote{8 Case T-38/92 All Weather Sports Benelux v Commission [1994] ECR II-211.}
\footnote{10 See eg Case 48/69 Imperial Chemical Industries Ltd v Commission [1972] ECR 619 at 653, [1972] CMLR 557 at 621.}
Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

So, limitation of lawful economic activities is justifiable only where the measures taken are appropriate and necessary in order to achieve public objectives legitimately pursued. If there is a choice between several appropriate measures, recourse must be had to the least burdensome. Penalties must be proportionate to the gravity of the offence, and a heavy burden should not be imposed upon some people in order to achieve something that is of only small importance to others. Derogations from general Community rules must be limited to those which are necessary to achieve the purpose of the derogation.

156. The principle of equality of treatment or non-discrimination. Equal situations must be treated equally, or, otherwise expressed, similar situations should not be treated differently unless there is objective justification for doing so. Conversely, unequal situations can, and sometimes should be, treated differently. The principle finds expression in the Treaty in two specific areas: a general prohibition of discrimination based upon nationality and a prohibition of discrimination between men and women in the area of employment. Nevertheless, equal treatment is recognised as a fundamental principle of Community law equally applicable elsewhere.

157. Subsidiarity. What is now called the principle of subsidiarity appears in other guises throughout the founding Treaties. It was incorporated as a formal principle into the EC Treaty by the Treaty on European Union as follows:

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 in so far 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.

1 EC Treaty, art 3b, 3rd para.
4 See paras 192, 217 below.
5 See eg Case C-280/93 Germany v Council (Bananas), [1994] ECR I-4973.
6 See para 168 below.
7 See paras 275ff below.
9 Subsidiarity - put simply, that decisions be taken as closely as possible to the citizens affected by them - is also recognised in the constitutional law of some member states; see eg art 72(2) of the German Basic Law.
10 EC Treaty, art 3b, 2nd para.
There is thus a two-fold test: Community action is justified only if it serves an end which both (a) cannot be achieved satisfactorily at the national level and (b) can be achieved better at Community level. The European Council and the Commission have indicated their views on the meaning of subsidiarity, the three political institutions have agreed a procedure amongst them which takes account of its requirements, and the Parliament now scrutinises every legislative proposal in order to determine whether it complies with the principle. How far the principle is, as such, justiciable remains to be tested. There are, however, numerous judgments of the Court of Justice which can be read as implicit application of the principle.

158. Applicability of the general principles. Although the Court of Justice has upheld all these principles in decided cases, it has quite often found that the principle invoked did not apply to the facts of the case before it. Even where they apply, the rights are not absolute and may, as permitted both by the European Convention and in national law, legitimately be restricted in the general interest. In relation to the confidentiality of communications between lawyer and client, the Court limited itself, exceptionally, to adoption of the principle only in so far as it had been shown to be common to all the member states.

3 Rules of Procedure, rule 54.