

REMEDIES IN JUDICIAL REVIEW PROCEEDINGS FOR BREACHES OF EU LAW

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“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.”³

INTRODUCTION

1. The role of judicial review and the administrative court⁴ is critical to the effective enforcement of EU⁵ law. There are a number of reasons for this. Most cases involving points of EU law never get to the ECJ⁶ in Luxembourg. The narrow standing rules employed by the ECJ means that, for members of the general public at least, it is virtually impossible to challenge an act of EU institution before the ECJ. Relatively few preliminary references⁷ are made to the ECJ by national courts. The decision whether to make a reference to the ECJ is with the national court, not the litigants.⁸ Consequently, the majority of cases in which an EU law claim is raised are decided and disposed of within the domestic courts of the member states.
2. More particularly, much of the enforcement of EU law is achieved through steps taken by various national public law administrative bodies. The national mechanisms responsible

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³ *R v Secretary of State for the Home Department, ex parte Gallagher* [1996] CMLR 951 per Lord Bingham at paragraph 10.

⁴ And since 3 November 2008 the Upper Tribunal, as to which see further, Mitchell: *Judicial Review, But Not As We Know It: Judicial Review in the Upper Tribunal* [2010] JR 112.

⁵ Since the coming into force of the Lisbon Treaty in December 2009 and the transfer of legal personality to the newly consolidated European Union (legal personality previously being vested only in the European Community) that which was once correctly referred to as 'Community law' is now 'EU law' and shall be referred to as such throughout in this paper.

⁶ Now called the Court of Justice of the European Union, but referred to in this paper as the ECJ for the sake of brevity.

⁷ Made under Article 267 TFEU (formerly article 234 EC and before that article 177 EEC). See the information note on preliminary references published on 5 December 2009 in the OJ C-297/1 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:297:0001:0006:EN:PDF>

⁸ In contrast, for example, to complaints to the European Court of Human Rights which can be made directly once domestic avenues have been exhausted.

for enforcing EU law must satisfy EU standards of enforcement.⁹ In England and Wales it is principally by way of judicial review, whether under CPR 54 or in its various statutory manifestations, that any action or inaction by public bodies is subjected to judicial supervision. Thus it is that judicial review is often the procedure by which claimants seek the effective enforcement of EU law rights.

3. There are, however, two particular difficulties with judicial review, which will be familiar to any student or practitioner in the field. The first is that the road to bringing a successful claim in judicial review is one that is potentially both costly and strewn with procedural obstacles. The second is that even where a party overcomes those obstacles (at whatever price) there is no guarantee of a substantive remedy. Both of these issues are capable of compromising the principle of effectiveness. In order for the domestic courts to therefore give effect to the “cardinal principle” of ensuring both effective and adequate redress for breaches of EU law rights, it is not always the case that the standard procedures applicable to judicial review proceedings of a wholly domestic character will apply where the proceedings engage issues of EU law.
4. This paper sets out the principles applicable in such proceedings, and considers those areas in which judicial review may be falling short of the standards required by the ECJ.

OVERALL ANALYSIS

5. I suppose one is first entitled to ask what business does EU law have with national rules relating to remedies? Domestic courts are emanations of the state. The courts therefore are under the same obligations as other organs of state to exercise their powers in order to ensure the effective enforcement of EU law.
6. Thus, the ECJ has held that in the absence of EU rules it is for the domestic legal systems of each member state to designate the courts having jurisdiction and to lay down the rules governing actions intended to ensure the protection of rights conferred by EU law¹⁰. The instances where EU prescribes particular rules for remedies are still relatively unusual¹¹. However, national rules of procedure must nonetheless comply with two requirements¹²:
 - i. they must not be less favourable than those governing similar domestic actions (the so-called requirement of equivalence or non discrimination)and;
 - ii. they must not render the exercise of EU law rights virtually impossible or excessively difficult (the requirement of effectiveness or minimum protection)
7. According to Tridimas¹³ the principle of effectiveness, “bypasses national standards and grants [EU] law a quasi-constitutional status.” Some judgments of the ECJ have suggested that there is yet a third requirement, namely, that national rules of procedure and remedies must comply with fundamental rights as guaranteed by the European

⁹ That particular role of the state in the domestic enforcement is reflected to some degree in the ECJ’s historic refusal to give horizontal direct effect to directives.

¹⁰ See further paragraphs 43-49 below.

¹¹The EU Remedies Directive (Council Directive 2007/66/EC) is an example where EU law has laid down certain rules relating to remedies. In some rare instances EU law itself will specify a certain type of sanction (e.g. Art. 4 of the Equal Pay Directive: which requires the nullity or amendment of unlawful pay provisions).

¹² See further, Tridimas: *The General Principles of EU Law* (2nd ed) (2006) (OUP) at 9.3.

¹³ Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraph 31 and the case-law cited, Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 70 and Case C-246/06 *Josefa Velasco Navarro v. Fondo de Garantía Salarial (Fogasa)*, [2008] ECR I-00105.

Convention of Human Rights but it may be that this latter requirement is part of the requirement for ‘effectiveness.’¹⁴

8. The origin of the principle of effectiveness dates back to at least 1960 with the judgment of the ECJ in Case C-6/60 *Humblet v Belgium* [1960] ECR 559. That was the first time in which the court held that where a legislative or administrative provision of a Member State was contrary to Community law, that Member State was obliged to both rescind the provision and make reparation for any unlawful consequences arising there upon.
9. The decision in *Humblet* was founded on the requirement of Article 86 of the Treaty establishing the (now expired) European Coal and Steel Community (ECSC) that Member States “undertake all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from decisions and recommendations of the institutions of the Community and to facilitate the performance of the Community’s tasks”. Case C-6/90 *Francovich*¹⁵ which introduced the principle of state liability in damages of a failure to comply with EU law can be legitimately described as the ‘child’ of the decision in *Humblet* on the basis that the latter was referred to in the judgment in the former on the basis that Article 5 of the EEC Treaty (later Article 10 TEC, now Article 4 TEU), which was analogous to Article 86 of the ECSC Treaty at the heart of the decision in *Humblet*, provided “a further basis for the obligation of Member States to make good such loss and damage” occasioned by their breaches of Community law. *Humblet* contained the critical direction to member states that they must “annul the unlawful consequences” of a breach of European law.
10. But how does a rights-guaranteed system mesh with our system of judicial review, often said to comprise a bundle of discretionary remedies?¹⁶ At first sight a fundamental tension might be thought to exist. Lord Bingham when addressing this Association almost two decades ago,¹⁷ was engaged memorably in a discussion with an “intellectually curious Martian”:

“So the Martian persists, where unlawful conduct in the public law sphere is shown to have occurred or to be threatened, according to clear rules publicly stated, relief must follow as a matter of right and not of the judge’s discretion? ‘Well, no, not exactly,’ we reply, perhaps with a little less confidence, acknowledging that public law remedies are for the most part discretionary.”

11. Lord Bingham’s answer is also partially reflected in a statement which is still quoted at the beginning of the Public Law Project’s helpful guide to judicial review. Sedley J (as he then was) commented that: “Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power.”¹⁸

¹⁴ Nonetheless, the “third” requirement may yet result in potential consequences for litigants in England since (at least, collaterally in order to ensure the enforcement of an EU law right) a litigant might be able to rely upon EU law principles to disapply a domestic primary statute which breached a right guaranteed under the ECHR rather than simply obtain a declaration of incompatibility.

¹⁵ [1991] ECR I-5357.

¹⁶ See e.g. *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 656.

¹⁷ Lecturer delivered to the Administrative Law Bar Association in the Parliament Chamber of the inner Temple on 17 October 1990. Reprinted and Revised in *Public Law* (Spring), 64-75 and reprinted in *The Business of Judging* (2000) (OUP).

¹⁸ *R v Somerset CC ex parte Dixon* (1998) 75 P & CR 175, [1997]; JPL 1030; [1997] COD 323.

12. In his ALBA address Lord Bingham embarked upon a brief comparative analysis between the discretion-based approach in England with that of the continental public lawyer.

“The judge in a civil law country would not, I think, claim such a discretion. The French administrative judge can annul for *vice de forme* if an essential procedural requirement has been broken, as can the European Court under article 173 of the EEC Treaty, and this involves a judgment whether the procedural requirement broken is in truth essential. Similarly, in evaluating the legality of *mesures de police* the French judge must make a judgment on proportionality, and the doctrine of *erreur manifeste d’appréciation* require him to assess whether the *erreur* is *manifeste*. And it may be that a civilian judge will exercise a discretion without acknowledging it as such. It is however, my impression that a continental lawyer would raise an eyebrow at the notion that a remedy for a *proven* abuse of power should be discretionary.”

13. Yet perhaps the differences are not as great as one might first suppose. Lord Bingham noted in a footnote to the passage quoted above, that M Roger Errera, Conseiller d’Etat, considered that that passage might be ‘slightly misleading’,

“French judges exercise a discretion in respect of, for instance, standing, exhaustion of other remedies and restricted areas although not in respect of delay, acquiescence, conduct and motives, inevitability of outcome, lack of useful purpose or adverse public consequences. Overall he suggests, there is little distance between *politique jurisprudentielle* and judicial discretion.”

14. Based upon that, one might be tempted to say that there is no material difference to the outcome between the English approach to public law remedies and the continental approach; the judicial discretion “pinch points” -by which I mean the stages by which a challenge brought in public law can fail notwithstanding that there has been an error of law- are simply located at different stages of the procedure. However, in my view that it is not so. The difference in approach to the different “pinch points” can alter the outcome.
15. Nor does not it necessarily follow that the emphasis upon describing public law in terms of individual rights leads more readily to the grant of an effective remedy. It should be recalled that the comments made by Sedley J *in ex parte Dixon* quoted above were made in support of the English liberal approach to standing¹⁹ to reject an argument that the applicant who did not live in the area directly affected by the decision granting planning permission did not have sufficient interest to bring the claim. The continental approach to standing, by contrast, has generally been much less liberal. This is reflected in the approach of the ECJ to the standing of so-called non privileged applicant (i.e. the public) to bring judicial review proceedings against institutions of the EU. The ECJ requires that they demonstrate the decision complained of is of direct and individual concern to them and in doing has generally taken an artificially narrow approach.²⁰

¹⁹ The approach was ushered in by the new Rules of Court in January 1978 which had the test of “sufficient interest” in Order 53 r 3(5). Lord Denning hoped it would mean that “we have in England an *actio popularis* by which an ordinary citizen can enforce the law for the benefit of all-as against public authorities in respect of their statutory duties.” Lord Denning *The Discipline of Law* (1979) (Butterworths) at 133.

²⁰ The ECJ’s approach based upon the German approach to public law standing has despite some signs of a liberal approach has remained historically highly restrictive, see e.g. A. Ward *Individual Rights and Private Party Judicial Review in the EU* (2nd Ed) (2007) (OUP); Rasmussen ‘Why Is Article 173 Interpreted Against Private Plaintiffs (1986)

16. I venture to suggest that most English public lawyers would find the approach of the ECJ to standing for member of the public seeking to challenge acts of EU institutions to be one which seriously impairs the rights of individuals to secure effective enforcement of their rights. However, we have been traditionally less troubled by denying a remedy to a claimant who has brought his action within the three months period mentioned in CPR 54 but is later deemed by the judge not to have acted with sufficient promptitude within that period.
17. Why does any of this matter? It matters if one is trying to predict the way in which the ECJ court will react to our own rules of procedure on judicial review which may operate to ration the availability of a remedy. The ECJ was for example was content not to intervene on the question as to whether the lawfulness of a more restrictive locus standing requirement (than that used in England) even in the field of environmental law (see e.g. *European Commission v Ireland* (Case C-427/07) (judgment 16 July 2009)).
18. In my view, the ECJ is more likely to be interventionist in areas which are not pinch points for continental public lawyers or within its own rules of procedure (areas such as delay and refusal of remedy on the basis that it would not make a difference to the outcome). This is important I think when one considers how, for example, the ECJ would approach questions relating to the grant of remedies, such as its approach to determining what are “the unlawful consequences” of an unlawful decision which must be annulled. An English lawyer might understand that to be no different to the English law exercise of judicial discretion principles that a remedy may be refused because the outcome would inevitably have been the same.
19. More widely, however, the dynamism of judicial review from the 1980’s conveniently coincided with the growing impact of EU law upon approaches to judicial interpretation. It is no surprise that Lord Denning welcomed the broad purposive approach of the ECJ.²¹ It may however be thought somewhat ironic that the purposive approach of EU law to judicial interpretation which gives judge’s a wide power in their decision making process is regarded as acceptable and sufficiently certain whereas, for example, a rule which requires a judge to determine whether an application has been brought promptly apparently is not²².

STRUCTURE OF THE PAPER

20. This paper continues in two parts. The first part is more general and is intended primarily for those less familiar with the principles of EU law but may nonetheless hopefully serve as a helpful précis for those who are. It sets out how these principles are applied generally to

⁵ EL Rev 112 and B O’Connor ‘Rocky Road to EU Justice. Barriers to European courts should be lifted for individuals.’ *Financial Times* 31 March 1995.

²¹ Lord Denning ended his discussion of the subject of judicial interpretation with the question: “which is better? The old grammatical approach or the modern purposive approach- the traditional English approach or the modern European approach?” Although posed as a question left to the reader, typically, Lord Denning has already provided the answer a few pages earlier when he stated: “I venture to suggest that this new approach is much to be desired: because it brings our method of interpretation into line with those adopted by the European court.” Lord Denning: *The Discipline of Law* at p.17 and p.22

²² See Case 407/08 *Uniplex (UK) Limited v NHS Business Services Authority* and nd paragraphs 61-65 below.

the enforcement of EU law. The second part of the paper is concerned directly with the impact of EU law upon judicial review in England and Wales.

PART I: BASIC PRINCIPLES OF EU LAW

Introduction

21. The case law of the EU hitherto²³ has been built on what is now article 4 of the TEU²⁴. 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 fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Union. They shall facilitate the achievement of the Unions' tasks.

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

22. 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*²⁵ 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

²³ Under the pre-existing treaties, the EU comprises a system of three legal pillars, of which only the European Community pillar has its own legal personality. The Treaty of Lisbon abolishes the pillar system and the European Union becomes a consolidated body with a legal personality. Furthermore, the Treaty on European Union now states that "The Union shall replace and succeed the European Community." Hence, the existing names of EU bodies have the word 'Community' removed (e.g. the *de facto* title 'European Commission' becomes official, replacing its treaty name of 'Commission of the European Communities.' The legal acts adopted by the European institutions to exercise the Union's competences are listed in Article 288 of the Treaty on the Functioning of the European Union (TFEU). These are regulations, directives, decisions, recommendations and opinions. These legal acts may be undertaken by the institutions of the Union only if they are empowered to do so by a provision of the Treaties. The principle of attribution which defines the extent of the Union's competence is enshrined in Article 5(1) of the Treaty on European Union (TEU). The Treaty of Lisbon clearly divides competences into three separate groups: exclusive competence, shared competence and supporting competence. Articles 3, 4 and 6 TFEU list the areas that come under each type of competence. In the absence of the necessary powers to attain one of the objectives set out in the Treaties, the institutions may, in certain circumstances, apply Article 352 TFEU (ex Article 308 TEC). It is important to note that following the entry into force of the Treaty of Lisbon, the simplification of the system will mean fewer legal acts. Effectively, since the Treaty of Lisbon abolishes the Union's 'pillar structure', the Community method applies to all European policy, except for common foreign and security policy. Consequently, the legal instruments of the old 'third pillar' (police and judicial cooperation in criminal affairs), namely the framework decision and the convention, were removed from the classification of Union legal acts. Henceforth, in all areas covered by Union competence, the institutions will only adopt the legal instruments listed in Article 288 TFEU. The only exceptions are common foreign, security and defence policies, which will continue to be subject to intergovernmental procedures. Instruments which may be adopted to achieve these policies shall retain their political nature but have a new classification: common strategies, common actions and common positions will be replaced with 'general guidelines' and by 'decisions defining' actions to be undertaken and positions to be taken by the Union and arrangements for the implementation thereof. There are, in addition, various forms of action, such as recommendations, communications and acts on the organisation and running of the institutions, the designation, structure and legal effects of which stem from the individual provisions of the Treaties or the overall context of law embodied in the Treaties. As preliminaries to the adoption of legal acts, white papers, green papers and action programmes are also significant. It is through these documents that the Union institutions and more specifically the Commission usually agree on longer-term objectives.

²⁴ Previously article 10 of the EC Treaty and before that article 5 EEC Treaty.

²⁵ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para 21.

accordingly set aside any provision of national law, which may conflict with it, whether prior or subsequent to the Community rule.”

23. 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.
24. Within the UK it has been accepted that the combined effect of the provisions of the European Communities Act ('ECA') 1972 is such that UK law also recognises the supremacy of EC law when it conflicts with domestic law, and 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 1972.²⁶ The principle extends not merely to legislative provisions and to proceedings before national courts but also to the exercise of administrative discretion which must be exercised in conformity with EU law.²⁷
25. 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, 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.²⁸
26. The doctrine of implied repeal has been held not to apply to a “constitutional” statute such as the ECA 1972.²⁹

Direct Effect

27. This principle allows an individual directly to rely upon a provision of EU law directly to trump a conflicting piece of domestic legislation or decision by a public body.
28. The test for whether a particular provision has direct effect can be summarised as follows³⁰. A provision must be:
 - i. Sufficiently clear and precise
 - ii. Unconditional; and
 - iii. One that leaves no scope for discretion as to its implementation.

Different Types of Secondary Law

29. These are:

“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.”

[Embolden added]

²⁶ See e.g. *A v Chief Constable of West Yorkshire* [2005] 1 AC 51, 57 para 9, Lord Bingham.

²⁷ 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.

²⁸ *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603.

²⁹ *Thoburn v Sunderland City Council* [2002] 3 WLR 247. The so-called “Metric Martyrs” case.

³⁰ See e.g. *Case 9/70 Grad v Finanzamt Traunstein* [1970] ECR 825.

30. Treaty Provisions are themselves are capable of creating direct effect (Case 26/62 *Van Gend en Loos v Netherlands* [1963] ECR 1).
31. Regulations will almost invariably be directly effective. They are of “general application” which 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.
32. 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 implementing it 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.
33. 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.’

34. 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.

35. 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]).

36. 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.

37. An individual may bring proceedings for judicial review against a public body relying upon the direct effect of a directive even where the result would have 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).

38. 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 are:

"...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."³¹

39. 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

³¹ Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407 at paras 16-19.

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” or the Interpretative Duty

40. Grounded in what is now article 4 of the TEU (previously article 10 of the EU treaty and article 5 of the EEC Treaty) EU 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”³², 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,³³ or has not done so fully. It applies, too, whether or not the national legislation was passed before or after the directive was passed. And it applies whether or not the national legislation was passed specifically to implement the directive.³⁴
41. The position in *Marleasing*, endorsed in the mid nineties,³⁵ 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”.³⁶ 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 paragraph 10 of the judgment).³⁷

Limits on the Doctrine of Supremacy

³² 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.

³³ 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).

³⁴ See Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43 at para 68.

³⁵ See Case C-91/02 *Dori v Recreb Srl* [1994] ECR I-3325 para 26.

³⁶ *Marleasing*, para 8.

³⁷ 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 and in respect of the analogous approach in respect of section 3 of the Human Rights Act 1998, see J. van Zyl Smit: ‘The new purposive interpretation of statutes: HRA section 3 after *Ghaidan v Godin-Mendoza*’ (2007) 70 MLR 294.

42. There are two possible limits to the doctrine of supremacy of EU law:
- i. EU 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
 - ii. 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 EU law (something called the “doctrine of indirect effect”)

The Principles of Effectiveness

43. If EU 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: EU 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 ensure the protection of the rights which citizens have from the direct effect of community law”³⁸

44. But this principle has long been subject to two other important principles³⁹. 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 matter⁴⁰. 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 rights⁴¹.
45. 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 *Francoovich and Bonifaci v Italy* [1991] ECR I – 5337 at paras 32-33:

³⁸ 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.

³⁹ 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.

⁴⁰ 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.

⁴¹ 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”.

“...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”.

46. The principle has domestic recognition at the highest level (see Lord Bingham CJ (as he then was) in *R v Secretary of State for the Home Department ex p Gallagher* [1996] CMLR 951 para 10 quoted at the beginning of this paper).
47. 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 Community rules from having full force and effect”⁴². This led, in that case, to an entirely novel grant of relief: the suspension of the operation of a Westminster statute.
48. 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”⁴³.

49. 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.⁴⁴

⁴² Case C-213/89 *R v Secretary of State for Transport ex p Factortame Ltd* [1990] ECR I-2433, para 20.

⁴³ 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.

⁴⁴The 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

General Principles of EU Interpretation

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

- i. The principle of uniform interpretation: EU law must be interpreted consistently 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 a version in a foreign tongue [should] alert 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 filed on each side. That will usually 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.”

- ii. 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.
- iii. 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

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 Krankenhaustechnik 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.

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: THE IMPACT OF EU LAW UPON REMEDIES IN JUDICIAL REVIEW

51. Access to the judicial review is absolutely critical to ensuring the effective protection of EU law rights. It is self-evident that if a person aggrieved⁴⁵ cannot put their case before a judge, then potentially their only route to accessing a substantive remedy for any breach is closed off⁴⁶. It is therefore critical for anyone seeking to secure a substantive remedy for breach of their EU law rights to know how the rules governing access to review operate in such cases.
52. Perhaps less obvious though is that the mere fact of accessing, or being able to access, the review procedure can in some cases provide a remedy of itself. How so is discussed further below.
53. There are a number of aspects of access to judicial review that fall for consideration. The first is the time limit imposed. The second is the requirement for standing. The third is the requirement to obtain permission to proceed with the claim.⁴⁷

Time limits

54. The time limit for filing a claim form with the Administrative Court is imposed by CPR r.54.4, which provides that 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 Senior Courts Act 1981 ('SCA 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".

Issues arising in relation to the time limit

55. It seems that the flexible three months time limit is compatible with the EU law requirement for an effective remedy.⁴⁸ The areas of doubt relate to the requirement for

⁴⁵ Using that term to mean a person who believes that their Community rights have been infringed.

⁴⁶ Remembering that, unlike references to the European Court of Human Rights, an individual has no right to take their claim to the ECJ of their own motion.

⁴⁷ There are of course other issues falling under the umbrella of access to review, notably the requirement for standing, but there is nothing of which I am aware to suggest that this requirement needs to be amended in light of EU law.

⁴⁸ Although 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

‘promptitude’ and the point at which time starts to run for the purposes of r.54.5, and whether they are sufficiently certain for the purposes of EU law⁴⁹.

56. Uncertainty in relation to time limits can of course have a profound effect on a person’s ability to get an effective remedy: if a claimant is deprived of the ability to bring a claim in judicial review because of they have fallen foul of the procedural rules governing access to review as a result of some uncertainty inherent in those rules, then they may lose their right to an effective remedy⁵⁰.

Promptitude

57. The doubt as to whether the requirement for proceedings to be brought “promptly” (or without “undue delay” under the Senior Courts Act (‘SCA’) 1981) can be said to satisfy the principle of legal certainty is a relatively longstanding one. It is clear that the concept of promptitude contains a degree of inherent uncertainty; the question is whether that degree of uncertainty is acceptable under the Community law regime.
58. The issue was addressed 10 years ago by Jones and Phillipot in *“He Who Hesitates is Lost: Judicial Review of Planning Permissions”* [2000] JPL 564⁵¹. The article was considered by the 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 Union 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.”

59. This *dicta* has been considered subsequently by the lower courts.⁵² The English courts more general approach to attacks on the promptitude rule can be seen by the approach

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).

⁴⁹ 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, see: 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 *Grandrand Freres* [1981] ECR 1931 at 1942; Case C-245/97 *Germany v Commission* [2000] ECR I-11261, para 72.

⁵⁰ I say ‘may’ only because of the court’s discretion to allow claims brought outside the time limits contained in r.54.5, noting however that such a discretion has been said to be inadequate for the purposes of ensuring that a person’s Community rights are effectively protected, see the opinion of Advocate General Kokott in Case C-407/08 *Uniplex (UK) Limited v NHS Business Services Authority* at paras 46-48.

⁵¹ 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* (6TH May 2006) The Supreme Court of Judicature Jamaica in Common Law, (Claim No HCV 3022 of 2005).

⁵² 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 case doubt on the compatibility of ‘promptness’ it

taken by them to the contention that it was in breach of article 6 of the ECHR. In *LAM v UK* (Application No 41671/98) (5th 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 just⁵³ 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”⁵⁴, and 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.

60. 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 my view, it should be regarded as a decision on its merits, rather than shutting off the question in 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 a later decision⁵⁵.
61. The most recent indication of the ECJ’s thinking on the matter is to be found in the judgment of the court in Case 407/08 *Uniplex (UK) Limited v NHS Business Services Authority*. *Uniplex* concerned a time limit in Regulation 47(7)(b) the Public Contracts Regulations 2006⁵⁶ which, like CPR r.54.5, require any proceedings brought under those Regulations to be “brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose...”. This time limit was also subject to the discretion of the court to allow proceedings to be brought outside that time where there is ‘good reason’ for them to do so. On a reference by the High Court, the ECJ was asked to rule on two issues, (i) whether the requirement that time run ‘from the date when grounds for the bringing of proceedings first arose’ be interpreted, having regard to *inter alia* the principle of effectiveness, as meaning that time runs from the date when the claimant knew or ought to have known of the breach of procurement law, or from the date of the alleged breach itself, and (ii) how the national court ought to apply both the requirement that proceedings be brought promptly, and the discretion to extend the relevant period.

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.

⁵³ 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.

⁵⁴ *Sunday Times v UK* [1979-80] 2 EHRR 245, para 49.

⁵⁵ See further *R (Noble Organisation) v Thanet District Council* [2005] EWCA Civ 782.

⁵⁶ Transposing the Community Directive 89/665 /EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended (‘the Public Procurement Directive’).

62. The response to the first question is addressed further below, but in relation to the first part of question (ii), the court held that requirement that proceedings be brought promptly was not compatible with EU law.
63. Whilst Article 1(1) of the Public Procurement Directive required the swift conclusion of any review proceedings brought under it without itself laying down any specific limitation period, any limitation period imposed by Member States in order to achieve that objective had still to comply with the requirements of legal certainty, and ensure that the principle of effectiveness was not compromised. That means it must be “sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations”, and “must not render impossible or excessively difficult” the exercise of any rights derived from EU law.⁵⁷
64. It is, of course, not certain that if the same question were to come before the court in respect of the rule contained in CPR r.54.5, it could come to the same conclusion to that reached in *Uniplex*. In my view, there is however precious little in the judgment itself which suggests that the approach taken by the court was other than one of principle, or that it was particularly influenced by its view of the nature and seriousness of the rights affected in the public procurement context⁵⁸.
65. The accompanying Opinion of Advocate General Kokott could perhaps be said to have left the matter a little more open, emphasising as she does that in the procurement context “the requirements of clarity, precision and predictability apply to a special degree” because of the “serious harmful consequences for individuals and undertakings” that being time-barred would entail, and that (in the context of her decision as to when time begins to run, at least) a “fair balance” is to be struck between the competing requirements for rapidity and effectiveness “in light of the type and consequences of the particular legal remedy and the rights and interests of all parties concerned”⁵⁹.
66. The opinion of the Advocate General was however addressed in the case of *R (oao Pampisford Estate Farms Ltd v S/S for Communities and Local Government* [2010] EWHC 131 (Admin).
67. *Pampisford* concerned challenges to the jurisdiction of an Inspector on a pending planning inquiry and to the adequacy of an Environmental Statement submitted pursuant to the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, the domestic regulations implementing Community Directive 85/337/EEC (as amended). The case did therefore entail an EU law element⁶⁰. One of the arguments raised by the Defendant was that the Claimant’s application had not been made promptly, and in response, attention was drawn to the opinion of the Advocate General in *Uniplex*. However, in making a finding in favour of the Defendant that the application in *Pampisford* had not been made promptly, Coulson J expressed his view on the implications of *Uniplex*:

“That view [that the claimants had not acted promptly] is unaffected by the opinion in *Uniplex*, which cannot as a matter of EC law overturn on its own the

⁵⁷ See the judgment of the ECJ at paras.39-40.

⁵⁸ Indeed, it seems very much to base its decision on the general principles of legal certainty and effectiveness, see paragraphs 39-40.

⁵⁹ See paras 68 and 31 of the Opinion respectively.

⁶⁰ Although the matter directly in issue was not of course the effectiveness of a remedy for breach of Community law.

statutory basis of CPR 54.5, and was not concerned with a situation in which a lack of promptness could have a significant adverse effect on numerous other parties”⁶¹.

68. It seems likely that the court in *Pampisford* would have reached the same conclusion even if it had had sight of the final decision of the court. In particular the second reason, which is clearly seeking to interpret the scope of the judgment restrictively, indicates that the court might resist any inference that the ECJ was asserting any principle of general application on time limits.
69. Although at present no transcript exists it is understood that in *R (on the application of Carroll) v Westminster City Council* (CO/13067/2009) (9 July 2010) Michael Supperstone QC (as he then was), in refusing permission to bring proceedings for judicial review, expressed the *obiter* view that the *Uniplex* principle is restricted only to EU public procurement cases.
70. In my view that is an unduly restrictive interpretation of the *Uniplex* judgment. If the promptitude requirement is insufficiently certain to guarantee EU rights under public procurement, it must be similarly uncertain in respect of other EU law rights⁶². Indeed the case law relied upon by the ECJ on this point in *Uniplex* related to general principles of EU rights and was not specific to EU public procurement.
71. In the circumstances, it seems to me likely that the promptness requirement under CPR.54.5 remains at least *at risk* of breaching the principle of certainty, and so the principle of effectiveness, depending on the circumstances of the case.⁶³
72. So what about the position in respect of promptitude when there is no EU law right at stake? EU law does not require the domestic courts to change procedure in order to guarantee non EU law rights. The requirement of promptitude has been generally recognised by the domestic court as being sufficiently certain. Indeed, Lord Bingham writing extra judicially stated: “The question whether an applicant has applied promptly may involve an exercise of judgment, but it involves no exercise of discretion.”⁶⁴ Lord Bingham considered that even where discretion is to be applied that is, in circumstances where there has been undue delay and a judge had to exercise discretion under s.31(6) of the SCA 1981, by balancing any detriment to good administration or prejudice to third parties against any good reason for extending the time:
- “[T]he rules are publicly stated. In most cases the outcome could be safely predicted. Any decision outside the area of appreciation reserved to the trial judge would be challengeable. There is, as it seems to me, no risk of arbitrariness, which is the real bane of uncontrolled discretion.”
73. On the other hand, can there really be a two tier system for claims brought in respect of EU rights and those which rely solely upon domestic grounds of review? One is reminded

⁶¹ *Pampisford*, para 58.

⁶² See also Nigel Giffin QC: ‘Introduction to Judicial Review, Administrative Law Bar Association continuing education course, spring 2010’ (4th May 2010) commenting upon *Uniplex* stated “It is therefore not easy to see why any different conclusion should be reached in any judicial review claim founded upon a breach of EU law and for which judicial review is the only available (effective) remedy.”

⁶³ A view also shared by academic authority, see Gordon *EC Law in Judicial Review* (OUP) (2007) at para 3.92.

⁶⁴ Lecturer delivered to the Administrative Law Bar Association in the Parliament Chamber of the inner Temple on 17 October 1990. Reprinted and Revised in *Public Law* (Spring), 64-75 and reprinted in *The Business of Judging* (2000) (OUP).

of the position immediately post *Factortame* in respect of injunctions against the Crown. *Factortame* had held that where a domestic rule, in this case the prohibition of obtaining injunctive relief against the Crown inhibited the effectiveness of an EU law right it must be disapplied. What was the position where the claimant seeks injunctive relief against the Crown in order to give effect to a domestic law right? Could he obtain injunctive relief against the Crown? In *M v Homes Office* [1994] 1 AC 377 Lord Woolf in a speech endorsed by the other members stated:

“Since the decision in *Factortame* there has also been the important development that the European Court has determined the second reference against the Crown so that the unhappy situation now exists that while a citizen is entitled to obtain injunctive relief (including interim relief) against the Crown or an Officer of the Crown to protect his interests under Community Law he cannot do so in respect of his other interests which may be just as important”

74. Lord Woolf went on to hold that there was in fact jurisdiction to grant injunctive relief against the Crown in respect of purely domestic grounds.
75. We await with interest the approach taken by the court on this point.

When does the time start to run?

76. Prior to the decision in *Uniplex*, a body of case law had developed establishing when time started to run for the purposes of r.54.5, i.e. when the grounds to make the claim can be said to have first arisen, in a number of contexts. For example, in the planning context, the House of Lords held in *R v Hammersmith and Fulham London Borough Council, ex p Burkett* [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 also taken in the context of a challenge to the absence of a decision not to require an environmental impact assessment under the EIA Directive 85/337,⁶⁵ and, more recently, in the context of EU public procurement challenges, see *Brent LBC v Risk Management Partners* [2009] EWCA Civ 490, where it was held that time began to run not when the resolution to award a contract to a particular tenderer was made, but only once the procurer actually went ahead with awarding the contract to that tenderer.
77. An obvious merit of this approach is that it can be said to be certain in its effects. It can also be construed as an approach which itself favours a claimant – allowing them to wait until a decision is actually made, notwithstanding that they might have been aware at an earlier stage what that decision was likely to be.
78. However in *Uniplex* the ECJ adopted an apparently even more favourable approach, holding that time only starts to run once a claimant knew or ought to have known that the provisions of the Regulation had been infringed⁶⁶. This will usually be once reasons have been given for the decision, as it is only then that a party will have sufficient information

⁶⁵ See *Catt v Brighton* [2007] EWCA Civ 298

⁶⁶ Compare the bifurcated approach suggested by Advocate General Kokott in her opinion at paras.31-8, whereby time would start to run at different times depending on the nature of the relief being sought by the claimant and the impact of that claim on other parties.

before it to identify whether the decision is tainted by illegality and whether the bringing of a claim would be appropriate.⁶⁷

79. This particular aspect of the decision in *Uniplex* has yet to be considered by a domestic court outside of the context of public procurement and so it is as yet unknown how, in general terms, the courts will approach it. However, even within the procurement context, the court has sought to give the judgment a narrow interpretation, see *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2010] EWHC 680 (Ch).⁶⁸
80. Even if the court were to adopt the approach of the ECJ in all judicial review cases (or at least all judicial review cases engaging EU law), it is not necessarily the case that this would have a significant impact in practice. In many cases, decisions are already accompanied by reasons, meaning that the date of the decision will remain the date on which the claimant knew or ought to have known that the grounds for a claim had arisen.
81. Naturally, hard cases would arise where the courts had to determine whether date when the claimant had actual or constructive knowledge of the grounds for a claim some time *after* the date of the decision itself, and where the courts concluded that it had arisen after that date, they would of course be obliged to run the 3 month period from that later time. However it seems likely that many of these cases would have been ones in which it would have been argued that the court should use its discretion to extend time in any event. Whilst it is true that the court would not likely have exercised its discretion in all cases, it would do in at least some.
82. As such, it seems unlikely that the difference between the number of claimants being found to have brought their claims in time under the present system and under a system where the approach in *Uniplex* was adopted without qualification, with timing running from the date of the claimant's actual or constructive knowledge, would be of great significance.
83. In any event, it must be remembered that bringing a claim within in time is only one of the hurdles a claimant must overcome when seeking judicial review. Any claimants who would satisfy the time limit in r.54.5 purely because of the approach taken to the date from which time runs in *Uniplex* will still require, under r.54.4, the court's permission to proceed.

Standing

84. The test for standing in judicial proceedings is generally considered to be a wide one, causing few problems for litigants in practice. But judicial review also exists beyond the scope of CPR 54. Some of the statutory forms of judicial review have differently worded standing tests, of which 'person aggrieved' being quite common.
85. In the recent case of *English Heritage v Secretary of State for Local Government* [2010] EWCA Civ 600, the Court of Appeal found that a person who had participated in a

⁶⁷ See the judgment of the ECJ at paragraph 31.

⁶⁸ In which it was held that whilst the court did have to interpret Regulation 34(2)(b) of the Public Services Contract Regulations 1993 as meaning that time only once the claimant had knowledge, or constructive knowledge, that there had been an infringement of those Regulations, this did not mean either (i) that the Claimant had to know that some damage or injury had resulted from that breach, or (ii) that they had to have sufficient information to prove that infringement, simply facts that "clearly indicated" that an infringement had occurred (paras.25 and 130 respectively).

planning inquiry only as a member of a group (and not in their own right) and who had only attended parts of that inquiry, was not a 'person aggrieved' pursuant to s.288 of the Town and Country Planning Act 1990, in spite of the fact they would personally be affected by the development proposed. In determining who was a 'person aggrieved' for the purposes of the section, Pill LJ considered a variety of case law identified to him by Counsel in the case, before helpfully summarising the principles he derived from those authorities. Those principles to which the Court of Appeal considers regard should be had are as follows (references in brackets are original, referring to the relevant case law/legislative provisions):

- “1. Wide access to the courts is required under section 288 (article 10a, N'Jie).
2. Normally, participation in the planning process which led to the decision sought to be challenged is required. What is sufficient participation will depend on the opportunities available and the steps taken (Eco-Energy, Lardner).
3. There may be situations in which failure to participate is not a bar (Cumming, cited in Lardner).
4. A further factor to be considered is the nature and weight of the person's substantive interest and the extent to which it is prejudiced (N'Jie and Lardner). The sufficiency of the interest must be considered (article 10a).
5. This factor is to be assessed objectively. There is a difference between feeling aggrieved and being aggrieved (Lardner).
6. What might otherwise be a sufficient interest may not be sufficient if acquired for the purpose of establishing a status under section 288 (Morbaine).
7. The participation factor and the interest factor may be interrelated in that it may not be possible to assess the extent of the person's interest if he has not participated in the planning procedures (Lardner).
8. While recognising the need for wide access to the courts, weight may be given, when assessing the prior participation required, and the interests relied on, to the public interest in the implementation of projects and the delay involved in judicial proceedings (Advocate General Kokott in Ireland)” (para.53 of the judgment).

86. Two points should however be noted about this decision: (i) the decision on standing was not strictly necessary for the judgment given the court's findings on another substantive issue; accordingly the remarks of Pill LJ are *obiter* only, and (ii) the decision was made in relation to the 'person aggrieved' test contained in s.288 of the 1990 Act which is, of course, a form of statutory review and not precisely the same test as applied in normal judicial review proceedings (one of 'sufficient' interest).
87. Notwithstanding either of these points, the decision is in my view a useful and important one. The *dictum*, whilst not binding, is of course highly persuasive, and Pill LJ's treatment of the appellant's interest gives us a clear insight into the court's current thinking on access, at least to statutory review.
88. It seems likely however that there will be scope for arguing that a less restrictive approach should be taken in normal judicial review proceedings, with Pill LJ having declined to consider whether the meaning whether 'person aggrieved' has a different meaning to 'sufficient interest' under s.31 of the Senior Courts Act.

89. Somewhat unusually though, scope for arguing that a less restrictive approach should be taken in cases engaging issues of EU law (particularly in the environmental context, where one has to have particular regard to the requirements laid down in the Aarhus Convention on public participation in decision making) may be limited as a result of the decision of the ECJ in Case C-427/07 *Commission v Ireland. Ireland*, in which it was held that the more narrow Irish standing requirement in planning cases, where an applicant must have a “peculiar and personal interest of significant weight which is affected by or connected with the development in question” (*Harding v Cork County Council* [2008] IESC 27) was in accordance with EU law, was expressly referred to by Pill LJ in his judgment. Whether any distinction can be made in cases outside the planning context remains to be seen.

Permission

90. In claims involving EU law as in claims that are wholly domestic in scope, the threshold for permission in judicial review proceedings is one of ‘arguability’. Generally speaking, a claimant whose challenge is founded on rights deriving from EU law will be treated no more favourably than any other claimant.
91. There is however an exception to this generality. It was held, in *R v HM Customs and Excise, ex p Davies Products (Liverpool) Ltd* 25th June 1991 unreported, that where the claim was one giving rise to a question of EU law which may conceivably require a reference to the ECJ under Article 234 of the EC Treaty (now Article 267 of the Treaty of Lisbon)⁶⁹, (i.e. one where the interpretation of EU law is not *acte clair*) it was wrong for the court to refuse permission.
92. It is true that in that case the court found that, on the material before it, the claimant had a “very real grievance” and defendant’s arguments were “unattractive”, but it is our view that the decision is nonetheless another noteworthy example of the operation of the principle of effectiveness. Moreover, it has been applied relatively recently by the Court of Appeal in *Boggis v England Nature* [2008] EWCA Civ 335.
93. Although unlikely to affect the position that a court will not generally entertain an academic or abstract challenge, the *ex p Davies* argument is clearly a valuable tool in the armoury of the public interest litigant, and one of which all parties to claims involving EU law should be aware.

Access to review as a remedy

94. One could be forgiven for asking how the mere fact of being able to bring a claim or being granted permission can in any way be said to constitute a remedy for the infringement of EU law rights. In the majority of cases it is true that, of itself, it will not. Nevertheless, in some cases the grant of permission acts as a ‘trigger’ for respondents consenting to

⁶⁹ Article 267 provides that “Where such a question [of EU 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 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”. 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* 2nd Edn (2002).

judgment so as to avoid a full hearing, ensuring a rapid and presumably effective vindication of the claimant's EU law rights. It follows that if more generous access rules are applied to claimants with cases raising issues of EU law, permission will be granted more readily and this may in turn encourage more respondents to concede.

95. This may be particularly so if one considers that it is at the permission stage that the 'duty of candour' is engaged⁷⁰. The duty of candour requires the decision maker to provide full and frank information about the decision made and the reasons for it, and some may, for whatever reason, prefer to concede rather than expose the whole decision making process.
96. A more important implication of access to review however is that where a person is entitled to seek permission (because they are not time-barred), or a person has in fact been granted permission, that person may make an application for interim relief and this clearly is a substantive remedy in itself.

Challenging EU legislation in the English Courts

97. Given the limited scope for those other than EU institutions of member states to challenge the lawfulness of acts of EU institutions by way of judicial review directly before the ECJ the scope to bring a collateral challenge by way of judicial review in the English courts is particularly valuable.
98. It must also be remembered that there are instances where a person wishes not to challenge the validity of a domestic measure because of non-compliance with EU law, but where a person wishes to challenge the validity of a domestic measure founded on secondary EU legislation which that person believes is in itself invalid. This is, effectively, a collateral challenge on the validity of EU law.
99. Such a collateral challenge is to be brought by proceedings for judicial review as any other. It is clear, however, that where the validity of an EU measure is in doubt, a reference to the European court will be required. It was confirmed in *Joined Cases C-143/88 and C-92/89 Zuckerfabrik Suederdithmarschen & Zuckerfabrik Soest* [1991] ECR I-415 that Article 177 of the Treaty (later Art 234 TEC, now Art 267 TFEU) could be invoked regardless of whether an individual is challenging EU or domestic provisions.
100. It was also confirmed in *Zuckerfabrik* (relying on Case C-314/85 *Foto Frost v Hauptzollamt Luebeck-Ost* [1987] ECR 4199) that the effect of a national measure based on the impugned European provision could be suspended pending the determination of the reference. This approach is also based on the reasoning that a person challenging the validity of an EU law measure by reference to the ECJ should have equivalent access to relief as a person challenging a national measure in the same way (remembering that it was held in *Factortame* that national measures could be suspended pending the ruling of the ECJ).
101. There is however a slight difference in the approach taken where the interim measure sought is not simply the suspension of the implementing national measure, but a positive order disapplying the impugned EU measure and imposing an alternative requirement. This question was addressed in Case C-465/93 *Atlanta Fruchthandelsgesellschaft mbH v*

⁷⁰ *R v Lancashire County Council ex parte Huddleston* [1986] 2 All ER 941. This decision however predated the changes of procedure for judicial review. In my view the duty of candour is on a public authority should exist right from the outset, particularly if one believes that the Pre-Action Protocol process should be a meaningful one.

Bundesamt für Ernährung und Forstwirtschaft [1995] ECR I-3761 (a case, like so many, concerning banana importation). The court held that such positive interim relief could indeed be granted, but only if such conditions normally applied by the ECJ itself when dealing with an application for interim measures to be taken were satisfied.

102. In summary, those reasons are:

- i. that the court entertains serious doubts as to the validity of the EU act and, if the validity of the contested act is not yet before the ECJ, that it is so referred;
- ii. there is urgency for the interim measure because of serious and irreparable damage that will otherwise be caused to the party seeking relief;
- iii. the court takes due account of the 'Community interest'; and
- iv. in assessing these conditions, the national court respects any decision of the European courts on the lawfulness of the impugned measure or applications seeking similar relief at EU level.

103. The Court also gave more detailed explanations in respect of various factors. One of its comments was that, when making the interim order, the court must identify the basis for its serious doubts about the validity of the EU measure having regard to the extent of the discretion which must be allowed to the EU institutions in the sector(s) concerned. It was further reiterated that purely financial harm is unlikely to be irreparable and that, in considering the 'Community interest', national courts must consider factors including:

- i. whether the measure would be deprived of all effectiveness if not immediately implemented;
- ii. what damage would be caused to the legal regime as a whole if the interim measure were also to be implemented by a number of member states; and
- iii. whether there is any financial risk to the EU that must be addressed by way of undertakings.

104. It is clear that this is not an easy test to satisfy, although it has been suggested that the requirement for consideration to be given to the 'Community interest' may make it slightly easier to meet than that imposed by the court in *Factortame*, i.e. the approach broadly reflecting the *American Cyanamid* test⁷¹. I am not convinced that this is so when one has regard to the further factors for consideration as part of the 'Community interest' test. In practice, there does not seem to be any firm evidence that it does.

Interim Remedies

105. In judicial review proceedings, interim relief is generally available by way of interim injunction, a stay of proceedings⁷², or interim declaration⁷³, although they are by no means used in the majority of cases.

106. Such remedies may have a key role to play in ensuring the effective protection of EU law rights. The ECJ has held that, as a matter of principle, interim relief should be available until the compatibility with EC law of an act is determined, if necessary to ensure the

⁷¹ See Gordon, *EC Law in Judicial Review*, 2007 p.100 at para.3.138.

⁷² There is some debate about the precise effect of a 'stay', as to whether it prevents a defendant from implementing the decision being impugned before the court, or whether it simply suspends the actual court proceedings pending some other event (such as the outcome of ADR). This debate is outside of the scope of this paper, but a useful summary can be found in *De Smith's Judicial Review*, 6th ed, pp.891-893.

⁷³ A little-used provision of the CPR, see r.25.1(b).

effectiveness of the judgment [which may find a breach of EC law] (*Unibet* [2007] 2 CMLR 30 para 47)⁷⁴.

107. The question therefore arises as to whether a claimant can rely on EC law in order to improve his chances of securing interim relief.

108. It is to be noted first of all that it has been accepted that there is no in principle objection to doing so in the context of securing interim relief. A party 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 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 EU 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”.

109. This, of course, says nothing about the difference that raising an EU law point is likely to make in practice. That point can be tested in the context of interim injunctive relief.

110. The test for interim injunctive relief in judicial review cases is, as in private law litigation, based on the principles derived from *American Cyanamid*⁷⁵, although they apply with some modification in practice. Firstly, a claimant must show that there is a serious issue to be tried. Once this is established, the court will normally consider whether damages would be a sufficient remedy for the breach, and, if that is not conclusive, where the ‘balance of convenience’ lies. It has been noted that in cases of judicial review, where damages are not a standard form of remedy, consideration of their adequacy will carry less weight than normal and the foremost test to be applied will in fact be the latter ‘balance of convenience’⁷⁶.

111. In private law litigation, of course, a claimant’s ability to provide an undertaking in damages is also 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

⁷⁴ It is important to note that this is not saying that the right to interim relief is guaranteed in general. The ECJ itself governs the grant of interim relief with fairly stringent criteria. For a full discussion of the approach taken by the ECJ to interim relief, which is beyond the scope of this paper, see Brearley and Hoskins, *Remedies in EC Law*, 2nd ed, Chapter 17.

⁷⁵ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

⁷⁶ See *De Smith’s Judicial Review*, (6th ed) (S&M), at p.890, para.18-013. The point is also made in Gordon, *EC Law in Judicial Review*, 2007, where it is also noted that although, in the context of claims based on EU law damages may be more widely available than in ‘ordinary’ judicial review proceedings, they are still not an automatic remedy (there being a requirement for the breach to be ‘sufficiently serious’ to merit their award, and that as such it is not clear that the traditional *American Cyanamid* test should be applied).

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 law⁷⁷.

112. Nevertheless, 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. Whilst it is recognised that the absence of a cross undertaking in damages is not per se a bar to the grant of interim relief⁷⁸, neither can a claimant always be confident of securing interim relief without adequate funds. This may be thought to offend against the principle of effectiveness⁷⁹.
113. There is some however some support for the proposition that the courts are more willing to grant interim injunctive relief where a person is seeking to enforce a EU law right: see *R v Durham County Council, ex p Huddleston* [2000] Env LR D21, in which the claimant was unable to give a cross-undertaking in damages but was nonetheless granted an interim injunction because the case raised questions of wider public interest involving EC law.
114. This can be contrasted with the approach taken by Privy Council in a case which did not involve a question of EC law: *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment (Interim Injunction)* [2003] UKPC 63; [2003] 1 WLR 2839. 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. It was emphasised that:

“[T]he 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” (at para.39).

115. The approach taken in *Huddleston* was also relied upon in a recent decision in which a local resident 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 9th September 2009⁸⁰). No doubt the UK government would wish to draw these cases to the attention of the EC Commission which is currently investigating the UK for possible infraction proceedings⁸¹ in respect of possible breaches of the EIA Directive and the requirements of access to environmental justice under the Aarhus Convention. One issue that the Commission has apparently raised is the requirement for an individual to give an undertaking in damage in order to obtain interim relief to stop the development which is the subject of the legal challenge going ahead.

⁷⁷ 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.

⁷⁸ *Ex p Hammell* [1989] 1 QB 518; *Allen v Jambo Holdings Ltd* [1980] 1 WLR 1252. Slightly more recently, see *R v Staffordshire County Council, ex parte Farley* [1997] CLY 4712.

⁷⁹ This view also finds academic support – see Gordon, *EC Law in Judicial Review*, 2007, p.103. It is noted that the ECJ and the other Institutions of the Union are in general committed to ensuring that a person’s finances are not determinative of their ability to effectively enforce their Community law rights. See for example the requirement laid down in Article 9 of the Aarhus Convention that access to justice must not be “prohibitively expensive”.

⁸⁰ In that *Morge* the claimant was also in receipt of legal aid and could in addition rely upon *Allen v Jambo Holdings Ltd* [1980] 1 WLR 1252

⁸¹ <http://www.europeanlawmonitor.org/News/Latest-EU-News/Environment-Commission-warns-UK-about-unfair-cost-of-challenging-decisions.html>

116. Whilst one might take these cases as an indication that the courts are generally more amenable to granting interim injunctions in cases concerning EU law rights. There have however been no further reported examples of interim injunctions being granted without a requirement for a cross undertaking in damages on an EU law or any other basis, which one might also think rather goes against the argument being made.
117. That said, the absence of such reported cases is not necessarily indicative of the fact that interim injunctions are not being granted on this basis. What their absence in fact indicates is a dearth of reporting on the grant of interim relief - something of an anomaly in modern times, where the trend might be thought to lean towards over, rather than under-reporting of judgments. It seems that the only interim injunction cases being reported on are those that establishing some point of principle, or which are noteworthy for other reasons.
118. Unfortunately, in the absence of such reporting, it is difficult to know for certain whether the courts are approaching the grant of interim relief more generously where EU law issues are engaged or not. Clearly though, the message for claimants seeking interim relief should be that the argument is one at least worth running with; it is hardly likely to harm their chances even if it doesn't in the event substantially improve them.
119. A further point of which claimants should however be aware is that even if the court is approaching the grant of interim relief in a more generous way in EU law cases, it is clear that they are still concerned to ensure that a balance is struck not only between the interests of the claimant and the body being challenged, but also of third parties. The EU law rights of one party will not necessarily trump all rights held by another. This is evident in the decision in *R v Secretary of State for the Environment, ex p Royal Society for the Protection of Birds* [1997] Env LR 431.
120. In *ex parte RSPB*, the claimant could not offer a cross-undertaking in damages to secure an interim injunction, and so instead sought to circumvent the requirement by seeking an interim declaration from the court which would have the same practical effect (i.e. hold up development at Lappel Bank)⁸².
121. A cross-undertaking would however have been particularly important on the facts of the case because of the extent of the commercial losses that would result from the suspension of development. The court was unconvinced by the RSPB's attempt to circumvent the restrictions placed on interim injunctive relief. 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...A declaration that “the Secretary of State

⁸² The interim declaration was, in this case, sought under EC law not CPR r.25.1(1)(b), which did not exist at that time.

acts unlawfully if...he fails to act” in a certain way is tantamount to an instruction to the Secretary of State to act in a particular way. It is not declaratory of anyone’s rights but a mandatory order which if it were to be granted by way of relief would usually be granted in the form of an interim injunction”⁸³.

122. As well as showing that the courts will be sensitive to the rights of all parties to proceedings, this judgment also shows one limit on the scope of interim declaratory relief: the courts will not tolerate it being used to seek *de facto* injunctive relief on a basis which places a less onerous basis to a claimant.

123. In fact, aside from the requirement for an undertaking in damages, the test for granting interim declaratory relief is the same as that for interim injunctive relief, namely the requirement for a strong *prima facie* case, and an assessment of the balance of convenience⁸⁴. As with interim injunctive relief, there is an absence of reported decisions, and so the comments about the difficulty of knowing if the courts are treating applications made where there is an EU law element any more favourably apply with equal force here.

Judicial discretion and the nature of relief

Discretion to grant relief

124. Up to this point the focus has been on access to review proceedings and how that can be or provide access to a remedy in itself. However once a party has got through this stage, their next opportunity for a substantive remedy will come only if they are successful at the full hearing.

125. As in ‘ordinary’ judicial review proceedings, the principal remedies available following a successful judicial will be a quashing order, a mandatory order or a prohibiting order (damages are addressed further below). However, in such proceedings, the court has a discretion as to whether to grant any of those remedies which, returning to the decisions in *Humblet* and *Francovich* discussed at the outset of this paper, is plainly contrary to the requirement that Member States rescind any provision and make reparation for any unlawful consequences arising from a breach of EU law.

126. *Humblet* and *Francovich* were both referred to in a more recent restatement of the principle by the ECJ in Case C-201/02 *Wells v Secretary of State for Transport, Local Government and the Regions*. *Wells* concerned an EIA for a quarry development which was found to be contrary to both the national EIA Regulations and the original Directive. In considering the nature of the obligation to remedy the failure to carry out an EIA 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 EC Treaty (now Article 4 of the Consolidated Treaty on the European Union) that the Member States are “required to nullify the unlawful consequences of a breach of Community law “.

⁸³ At pp.440-441.

⁸⁴ Consideration of the adequacy of damages is, again, often inappropriate in this context, although it was applied in the leading decision on interim declaratory relief, *R v Secretary of State for Transport, ex parte Factortame* [1991] 1 AC 603. The balance of convenience approach alone has been applied in many cases, see e.g. *R (On the application of Mayer Parry Recycling Ltd) v Environment Agency* [2001] Env LR 35 (although noting that this was another case in which a party was in reality seeking mandatory relief by way of declaration).

127. Consequently, in cases where a claimant's rights under EU law have been infringed, the court's discretion to refuse final relief under EC law is limited.

128. This principle had in fact already been recognised at a national level immediately prior to the ECJ's ruling in *Wells*, by the House of Lords in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603. In that case, which also concerned a breach of the EIA Regulations, it was argued on behalf of the Defendant *inter alia* that had an EIA been carried out, the result would have been the same in any event and so the court should exercise its discretion not to quash. Giving the leading judgment, Lord Hoffmann stated: "Although section 288(5)(b) in providing that the court 'may' quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty".

129. The House had however more recently appeared to qualify the judgments given in *Berkeley* in *R (on the application of Edwards and another (Appellant)) v Environment Agency and others* [2008] UKHL 22 where Lord Hoffman himself said:

"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".

130. Whatever appearances might be, this judgment does not in fact qualify the position in *Berkeley*. As ever, context is King, and the proper context in which the above *dicta* should be considered is one in which no breach of EU law was in fact found to have occurred, and where the effect of the only breach of domestic law had, by the time of the hearing, become academic.

131. There have however been other cases in which the courts have exercised their discretion to refuse relief⁸⁵. Again though, when one considers the facts of those cases it becomes clear that they are ones in which a further fundamental principle of EU law – that of proportionality – is engaged and that the decision not to quash (or to suspend the effect of the quashing order) is one based on a balancing of those considerations⁸⁶.
132. It therefore remains the case that the judicial discretion not to quash will not be exercised against a successful claimant in cases involving a known breach of EU law unless there is a strong case that the grant of relief would be disproportionate⁸⁷. A recent example can be seen from the approach adopted by the Court of Appeal in *R (on the application of Brown) v Carlisle City Council and Stobarts Air Ltd* [2010] EWCA Civ 523; *Times* June 24th, 2010, [2010] All ER (D) 181 (May).

Exercising the discretion in a certain way

133. If the court is obliged to exercise its discretion to grant a remedy to a successful claimant, a further question arises as to whether it is obliged to grant a particular remedy, such as making a mandatory order to achieve a certain result.
134. In the first instance decision in *Ardagh Glass Ltd v Chester City Council* [2009] EWHC 745 (Admin) the claimant sought *inter alia* a mandatory order requiring the Council to take enforcement action against a development initiated without planning permission by a glass manufacturer, which would have required an EIA had permission been sought.
135. Counsel for the claimant argued that a failure by the court and the Council take immediate enforcement action against the development that had been carried out in breach of EU law might result in the development becoming immune from future enforcement under the 4-year rule⁸⁸. This would be contrary to the requirement on the UK under EU law to nullify the effects of a breach. In circumstances where the evidence indicated that the Council might not take such action before the end of the 4 year period, the court was obliged to apply the precautionary principle and require the taking of such action itself.
136. The respondent parties argued that such action was within the exclusive purview of the local authority and that, on the legal advice that the Council had taken as to when the time for enforcement would expire, the Council had not acted irrationally in considering that immediate action was not required, and as such mandatory action should not be required.
137. HHJ Mole QC, sitting as a High Court Judge, accepted the claimant's arguments, holding that the Council had "made errors of law in their consideration of whether it is expedient to issue an enforcement notice" and that time was "now short". Accordingly, he made a

⁸⁵ *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 992 (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).

⁸⁶ Although I note that it is only expressly stated as being a decision based on proportionality in the *Rockware Glass* case, *ibid*, the consideration is plainly implicit in the others.

⁸⁷ For example, having regard to the time that has passed or the behaviour of the claimant.

⁸⁸ There being dispute on the facts about when the end of the 4 year period for enforcement was.

mandatory order in the terms requested so as to ensure that the UK did not fail to nullify the effects of another breach of EU law⁸⁹.

138. Having regard to the findings of facts made in the *Ardagh* case, it is hard to see how the Judge could have come to any other conclusion than the one he did in respect of the mandatory order. It is clear, however, that he did not himself categorise the decision as one he was legally obliged to make. Para.63 of the judgment (under the revealing sub-heading ‘Discretion’) reads thus:

“In considering the exercise of my discretion to order the commencement of the enforcement action it seems to me that the balance of advantage is all one way. I have in mind the points made by [counsel] on behalf of Quinn Glass. I do not find them persuasive...It seems to me that there are pressing reasons for taking enforcement action now”.

139. The decision of HHJ Mole QC in *Ardagh* has been subsequently relied upon by a claimant in the case of *R(on the application of) Baker v Bath and North East Somerset Council* [2010]. *Baker* concerned a waste facility that was continuing to operate without planning permission (it having been quashed) and without a screening opinion determining whether it was in fact EIA (a purported screening opinion also having been quashed), against which the Council had taken enforcement action. The submission of counsel based on *Ardagh* was that where EIA development was concerned, the discretion to take enforcement action was a very narrow one indeed and as such, the Council should be compelled to do so by means of a mandatory order.

140. In the event however such relief was refused. The case of *Ardagh* was one where it was common ground that EIA was required. There was no such certainty that the EIA regulations were engaged in the present case, that being the purpose of a screening opinion. Furthermore, there was evidence that such a screening opinion was likely to be made in the very near future. In the circumstances, a mandatory order was not justifiable.

141. Unfortunately (but not surprisingly) the Judge made no comment as to whether his decision would have been different if the development *had* been EIA. In the absence of any other decision, it is not yet clear whether the approach in *Ardagh* will be treated as an exercise of discretion on the particular facts or whether it will be treated as having established a general principle as to the use of mandatory orders to enforce EU law obligations.

142. In truth, the latter seems unlikely when one considers the approach of the courts to mandatory orders in other contexts – principally in cases concerning requests for mandatory orders requiring Parliament or Ministers to amend legislation⁹⁰. Whilst the courts have acknowledged (as they have had to, see *Case C-103/88 Fratelli Constanzo SpA v Comune di Milano*) that legislation can be disapplied to give effect to Community law

⁸⁹ *Ardagh* subsequently went to the Court of Appeal ([2010] EWCA Civ 172). This was in respect of the Judge’s conclusions on another issue in the case, and the mandatory order was not disturbed by their judgment. In fact, as is noted at the beginning of the judgment of Sullivan LJ in the CA, the interested party (Quinn Glass) had also appealed against the mandatory order, but on 29 January 2010 its appeal was dismissed with consent.

⁹⁰ See *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1993] 1 WLR 872, Kennedy LJ quoting approvingly the judgment in the Divisional Court that a mandatory order requiring the SoS to introduce amending legislation to be “wrong and unconstitutional” because the European Communities Act 1972 could itself be amended or repealed.

rights, and that they can declare national law to be incompatible with EU law⁹¹, they do not accept that they are constitutionally entitled to declare incompatible statutes to be unlawful.

143. Accordingly, even if the *Ardagh* approach is to be given a wide application, it seems unlikely ever to be used so generally as to require legislative amendment.

Other means of securing action

144. Aside from the use of a mandatory order, there is in fact another means by which the court can secure that a specific action is taken in circumstances where a quashing order is made. A little-known and little-used provision of the CPR, r.54.19(2)(b) provides that (“where the court makes a quashing order in respect of the decision to which the claim relates”) the court may “in so far as any enactment permits, substitute its own decision for the decision to which the claim relates”⁹²

145. It is suggested that this provision could prove a particularly useful tool in cases where the need arises to not only ensure that an obligation fulfilled, but that it is fulfilled in a timely manner if there is to be effective protection of a successful claimant’s rights.

Alternative forms of relief

146. The traditional orders are not the only means of relief that a court can grant following a successful claim in judicial review. In certain cases, a claimant might be awarded damages as a remedy. There is also a question about the extent to which a requirement to give reasons can be considered to be a remedy for the purposes of EU law. Both these options are considered below.

Damages

147. In judicial review proceedings involving breaches of EU law, damages are awarded on a slightly different basis to that upon which they are awarded in cases based on domestic law alone, where they are very much an exceptional remedy.

148. The ‘right’ of individuals to claim damages against public bodies for infringements of EU law rights was first acknowledged in *Joined Cases C-9/90 Francovich and Boniface v Italy*. The conditions defining when such relief is actually available were considered by the court in subsequent years, and following the decisions of the ECJ in *Joined Cases C-46/93 and C-48/93 Brasserie du Pecheur and Factortame*, are now clear. Accordingly, damages are available to a successful claimant where:

- i. the rule of European law infringed was one intended to confer rights on individuals;
- ii. the breach of that rule was “sufficiently serious”; and
- iii. there was a “direct causal link” between the breach and the damage sustained by the claimant.

⁹¹ This is comparable to the procedure of ‘declarations of incompatibility’ in relation to national legislation that is contrary to the European Convention on Human Rights (Human Rights Act 1998, s.4).

⁹² See *R (On the application of Haracoglou) v Department for Education and Skills* [2001] EWHC Admin 678 for a reported example of the use of this provision in a case involving the breach of a right deriving from EU law (although noting that the European element did not form the basis of the decision to use 54.19(2)(b)).

149. It should be noted that 'state liability' in damages is not confined to breaches of EU law by public authorities in the administrative or legislative context. The decision of the ECJ in Case C-224/01 *Köbler v Republik Österreich* made clear that, in certain circumstances, where a domestic court of last instance itself failed to correctly apply EU law, Member States might also be liable to individuals in damages for such failure. The point was made succinctly at para.59 of the judgment:

"...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."

150. The principle was first put to the test in the English courts in the case of *Cooper v. HM Attorney General* [2008] 3 CMLR 45. In *Cooper*, a trustee of Council for the Protection of Rural England (CPRE) sought to recover damages in respect of a failure by the Court of Appeal correctly to apply the EIA Directive in respect of the White City litigation (that which has led to the development of Europe's largest urban shopping centre, Westfield). The court rejected the claim.

151. Its basis for doing so was that, in cases concerning state liability, whilst the need for the breach to be 'sufficiently serious' did not mean that the breach had to be intentional or involve serious misconduct⁹³, but it did have to be manifest. In determining whether the breach was manifest, regard had to be had to all the circumstances of the case, including *inter alia* the certainty of the rule breached, whether the breach was in fact intentional and the approach the court had taken to the need for a reference under Article 267. The actions of the court in *Cooper* simply did not meet the threshold of manifest breach. It is understood that the claimant's are seeking permission to appeal to the Supreme Court.

152. The claimant appealed to the Court of Appeal. The court delivered its judgment in May of this year ([2010] EWCA Civ 464), upholding the judgment of the court below and restating the point that *Köbler* liability will only be available in exceptional circumstances.

153. As noted by Arden LJ, giving the leading judgment, liability under *Köbler* has been much (and probably justifiably) criticised⁹⁴. To that end, it is not surprising that the court has taken a narrow approach to its application.

154. Criticism notwithstanding, as noted by the Court of Appeal, such liability is now a feature of EU law and in our view the courts will have to be on their guard when adjudicating on matters of EU law. It is not clear whether *Köbler* liability has resulted in an increase in references to the ECJ, but it is probably advisable in light of *Köbler* for the courts to make such a reference if there is any uncertainty as to how a matter of EU law would be approached by the court.

⁹³ Following the approach of the ECJ in Case C-173/03 in *Traghetti del Mediterraneo SpA v Italy*.

⁹⁴ See the judgment at paras.59-61.

155. We note also that the threat of such liability might also be another basis upon which the courts can be encouraged to use their powers under CPR 54.19 (discussed above) and mandatory orders to ensure that EU law is complied with.

Reasons as a remedy

156. It remains the case in domestic law that there is no general duty on a decision maker (*R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531), in spite of an increasing trend towards their requirement. But what is the position in judicial review cases where EU law is engaged?

157. The position, it has to be said, is not in all cases clear. Categories of case in which it has been established that there is a duty to give reasons include:

- i. where a decision impacts upon directly effective rights (*Case C-222/86 UNECTEF v Heylens*); and
- ii. where reasons are expressly required by legislation (e.g. Regulation 4(6) of the Environmental Impact Assessment Regulations 1999⁹⁵ provides 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”).

158. Sir Francis Jacobs (one time Advocate General of the ECJ) went further, believing the duty to be a general one, and expressed himself in the following terms:

“...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”⁹⁶. Such a principle does not however seem to have general and wide-ranging support.

159. An example of a specific area of difficulty is whether reasons have to be provided in EIA cases where a negative screening opinion has been given. The domestic courts have been highly resistant to the idea that reasons are required in these circumstances⁹⁷.

160. Where there is an express requirement under EU law to give reasons, the English court has restricted the grant of remedy to a requirement to produce reasons where it considered that giving of reason would not have altered the decision (see *R (on the application of Richardson) v North Yorkshire CC* [2003] EWHC 764 (Admin); [2004] Env. L.R. 13; [2004] 1 P. & C.R. 23).

161. However, as was noted by Burton J⁹⁸, “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 [the domestic courts]”. The most recent statement of the law came after a reference

⁹⁵ 1999/293

⁹⁶ [1999] PL 232, 236

⁹⁷ *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Marson* [1998] 3 P.L.R. 90; followed by *Gillespie v First Secretary of State* [2003] EWHC 8, para 94.

⁹⁸ Giving judgment in *R(Probyn) v First Secretary of State* [2005] EWHC 398.

was made to the ECJ in *R (On the application of Mellor) v. S/S Communities and Local Government* [2008] EWCA Civ 213⁹⁹. Giving judgment, the ECJ stated that:

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

162. This was, it must be said, a far more conservative approach than that taken by the Advocate General in the case¹⁰⁰. However, it clearly indicates that the ECJ is committed to ensuring that EU subjects have access to sufficient information about decisions taken that affect them to enable challenges to be made to those decisions, and EU rights to be effectively enforced¹⁰¹.

163. It is this impact on the ability of individuals to assess and effectively enforce their rights under EU law that means that an order requiring reasons to be given for a decision can in our view be classed as a remedy. If a person suspects that some right of theirs deriving from EU law has been breached by the decision of a public body, but they do not have any reasons for that decision, they are unlikely to be able to determine for themselves whether that breach has actually occurred, and whether or not they in fact have a viable claim against that body. But by requiring that body to give reasons, a court can confer upon a potential claimant the facts it will need to determine whether it can seek a further substantive remedy for the perceived breach itself.

164. Without the remedy of reasons therefore, more serious breaches of EU law might go unchallenged.

⁹⁹ The reference was made 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; 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.”

¹⁰⁰ 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.”

¹⁰¹ One wonders if the requirement for reasons might be shored up by the ECJ in future. If it is right, as was held in *Uniplex*, *ibid*, that the time to initiate review proceedings will not run until a person has actual or constructive knowledge of the grounds giving rise to the claim, and this knowledge will only be acquired once they are in possession of the reasons for the decision, how could it be that there is no general duty for such reasons to be given?

Costs and PCOs

165. The final point to be covered in this paper on remedies is costs, and the associated issue of Protective Costs Orders ('PCOs'). Strictly speaking, the issue of PCOs falls under the 'Access to review' umbrella, but given their relationship to costs are more appropriately dealt with here.

PCOs

166. A protective costs order is one that limits or excludes the costs liability of a claimant in legal proceedings whatever its outcome. Such orders are made at the discretion of the court, and only in exceptional circumstances. The leading statement on the criteria governing the award of a PCO is *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 (which refined the original criteria set out in *R v Lord Chancellor, ex parte Child Poverty Action Group* [1999] 1 WLR 347, and those criteria can be summarised as follows:

- i. the issues raised are of general importance;
- ii. the public interest requires that those issues be resolved;
- iii. the applicant has no private interest in the outcome¹⁰²;
- iv. it is fair and just to make the order having regard to the respective financial resources of the parties;
- v. if the order is not made the applicant would probably discontinue and would be acting reasonably in doing so.

167. At present, the fact that a claimant's claim raises an issue of EU law does not have any bearing on the rigidity with which the above criteria are applied. That said, in cases where a discretionary reference to the ECJ is being made under Article 267¹⁰³ on the basis that the point is an important one, it might be argued that this shows that the issue raised is *prima facie* one of general importance and one where resolution is in the public interest (although noting that the other *Corner House* tests would still have to be met).

168. It is questionable whether such tight rules on access to PCOs are compatible with the right to effective protection under EU law. For example, even if a claimant cannot afford to continue with proceedings without costs protection, unless they can satisfy the remaining tests they will not be entitled to it. Further, the particular requirement that an individual has no private interest in the outcome of the proceedings is, in our view, anathema to the principle of effectiveness, which is squarely aimed at ensuring that individual EU citizens can enforce their rights deriving from EU law.

169. Although noting the potential for the principle of proportionality to be used to argued against the relaxation of the criteria for the award of PCOs in cases with an EU law

¹⁰² I note that this particular provision has been subject to judicial criticism. See the judgment of Sir Mark Potter in *Wilkinson and Kitzinger v Attorney General* [2006] EWHC 835 (Fam), para.54. For our part, we too consider this test to be unnecessary and agree with the comments of Sir Potter that where a PCO would otherwise be appropriate, it is hard to see why the private interest should render it less so. In any event, if one considers the rules for standing, it is clear that the majority of parties bringing a claim in judicial review will by definition have a private interest.

¹⁰³ A discretionary reference being one made by a court that is not a court of last instance (which has a duty to refer if the criteria for referral are met), e.g. the High Court.

element, it may be that the criteria do have to be revisited in future in light of the principle of effectiveness¹⁰⁴.

The bar on ‘prohibitive expense’

170. A particular problem has arisen for the national courts in respect of costs in judicial review cases involving principles of EU law relating to the environment. Article 9 of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (‘the Aarhus Convention’, concluded 25th June 1998) states that access to justice in environmental matters “shall be...not prohibitively expensive”. This provision is clearly intended to enhance the ability of claimants to effectively remedy infringements of their rights under EU law.
171. This requirement has been specifically implemented in Article 10a of the EIA Directive, and Article 16 of Council Directive 2008/1/EC of 15th January 2008 concerning integrated pollution prevention and control (‘the IPPC Directive’), meaning that Member States are now obliged to give effect to the provision in domestic law.
172. The approach to be taken was considered by the costs officers of the Supreme Court in *R (Edwards & Pallikaropoulos) v Environment Agency, First Secretary of State and Secretary of State for the Environment Food and Rural Affairs* [2008] 1 WLR 1587, in which an applicant had been unsuccessful at the substantive hearing.
173. The officers held that in relation to the test that access to environmental justice should not be “prohibitively expensive” the interpretation they were minded to adopt was that in the Sullivan Report, namely “costs, actual or risked, should be regarded as ‘prohibitively expensive’ if they would reasonably prevent an ‘ordinary’ member of the public (that is, ‘one who is neither very rich nor very poor, and would not be entitled to legal aid’) from embarking on the challenge falling within the terms of Aarhus”. The officers stated: “That seems to us to require us to start by making an objective assessment of what costs are reasonable costs. However, any allowance or disallowance of costs we make must be made in the light of all the circumstances”. In so doing, the officers in that case took into account: the financial resources of both parties, their conduct in connection with the appeal, the fact that the threat of an adverse costs order did not in fact prohibit the appeal, the fact that a request to waive security money was refused and security was in fact provided, and the amount raised and paid for the appellant’s own costs.
174. It was understood that the respondents were seeking to appeal the decision to the justices in accordance with para. 49 of the Supreme Court Rules. However, at the time of writing¹⁰⁵, there had been no reported decision of such an appeal. It therefore remains to be seen whether the approach taken by the court here is compatible with EU law.
175. Attention is however drawn to Case C-427/07 *Commission v Republic of Ireland* in which the ECJ held that the Irish costs provisions, which are broadly similar to those in England and Wales, are not compatible with the EIA Directive. The ECJ accepted that in principle some costs recovery is acceptable, but did not go on to say what approach would be regarded as compatible with the need to prevent costs from making proceedings prohibitively expensive.

¹⁰⁴ A position apparently supported by academic authority, see Gordon, *EC Law in Judicial Review*, 2007 at p.108.

¹⁰⁵ July 2010

176. The costs situation applicable in judicial review proceedings concerning matters of EU law (and particularly EU environmental law) is at present subject to investigation by the EC Commission. The Commission is concerned that in the United Kingdom legal proceedings can prove too costly, and that the potential financial consequences of losing challenges is preventing NGOs and individuals from bringing cases against public bodies. The Commission sent an initial warning letter to the UK about this issue in October 2007, and the UK replied that the procedures were under review. Whilst reviews have been undertaken since 2007 it appears that the Commission still considers that the UK is failing to comply with the legislation. A failure to comply with a final warning could see the UK brought before the European Court of Justice.

177. Attempts have been made to rely on the provisions of Aarhus and the exclusion of prohibitive expense when seeking a PCO, see *R (Garner) v Elmbridge Borough Council & Gladedale and Network Rail Infrastructure Ltd* [2010] EWHC 567 (Admin). The claimant sought a cap which meant he would bear no liability in costs but the respondent would be liable to pay his costs at the normal commercial rate. An important point which should however be borne in mind when considering the implications of this decision is that there was no evidence before the judge as to the claimant's means. This precluded the Judge from considering whether, in fact, the proceedings would be 'prohibitively expensive' for him (and whether he would have been forced to discontinue if no grant was made). It may therefore be the case that, had this information been before the Judge, the decision would have gone the other way, or, at least, more guidance might have been given by the court on the relevance of the bar on prohibitive expense to PCO applications. Permission to appeal that decision was refused by Sullivan LJ on the papers but granted by Mummery LJ "without enthusiasm" upon renewal. The substantive hearing in respect of the PCO is listed before the Court of Appeal for 29th July 2010.

Conclusion

178. It is clear from the foregoing that the issue of effective remedies in judicial review proceedings where matters of EU law are raised requires consideration of a far wider range of issues than just the substantive forms of relief alone. It can also be seen that in a number of areas, it is not yet entirely clear that the UK is conforming with its obligations to ensure that its subjects have access to effective remedies.

179. What does seem clear however is that, as the ECJ becomes increasingly firm about what it requires from Member States to ensure that the obligations are met and that breaches of EU law are effectively remedied, the legal landscape will continue to change, with the likelihood being that claimants will continue to be afforded greater rights of challenge. It will be interesting to see how the courts respond.

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