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Quasi-governmental organisations - who is responsible in *Laval*?

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Summary

In the *Laval* case the Court set firm that trade unions should be held responsible for transgressions of EU law in the form of obstructing the freedom to provide services. This paper has the aim to investigate the legal responsibility of trade unions and other organisations separate from the state that can still wield state-like powers – what I call quasi-governmental organisations. They wield the state's powers at times but do they have the power of a state? Moreover, who should be held responsible for transgressions of EU law when said powers are used?

In order to find the answers to these questions, two principles of EU law will have to be explained, namely direct effect and state liability.

Direct effect of EU law, founded in *Van Gend en Loos*, established the doctrine where nationals of a Member State can invoke EU law in national courts against the Member State. Direct effect at the start was fairly limited but developed in the subsequent case law, which established that direct effect did not apply just to the Treaties themselves, but to regulations, decisions and directives as well. As this paper's main focus is the *Laval* case, the direct effect for directives is also the focus herein. The doctrine of horizontal direct effect made it possible for individuals to bring matters against other individuals before the courts for transgressions of EU law. However, *Marshall* complicated matters with a prohibition of horizontal direct effect for directives. The Court holds firm the prohibition although it has developed alternatives to reduce the impact of *Marshall* through a broadening of the concept of the state and the concept of indirect effect. Although introduced in *Van Colson,* it was *Marleasing* that established horizontal effect for indirect effect – or the obligation of national legislation to be interpreted in the light of EU law.

The principle of state liability for harm suffered by individuals as a result of an infringement of EU law attributable to a state was established in *Francovich* wherein Italy was found to be guilty of failure to implement a directive that granted certain rights to individuals and therefore had to pay damages to the individuals in question. The principle was subsequently developed to all sufficiently serious breaches made by public institutions that affected a provision that had been intended to confer rights on individuals, where there could be found a direct casual link between the breach of the obligation resting on the state and the damage sustained by the injured parties.

In the discussion I argue for the, at the very least, co-responsibility for Sweden in the case of *Laval* due to the transgressions and the magnitude of them in the facts regarding that case. How we are all responsible for our own actions but that we sometimes cannot be held completely responsible for the same.

Sammanfattning

I *Laval* målet så höll Domstolen fast att fackförbund ska hållas ansvariga för överträdelser av EU-rätten i form av blockering av den fria rörelsen för tjänster. Den här uppsatsen har som mål att undersöka det juridiska ansvaret för fackförbund och andra organisationer som är skilda från staten och som kan utöva statsliknande krafter – det jag kallar semi-statliga organisationer. De utövar vid tillfällen statens krafter men har de en stats makt? Dessutom, vem borde hållas ansvarig för överträdelser av EU-rätten när de nämnde krafterna är använda?

För att finna svaren på dessa frågor så kommer två EU-rättsliga principer att förklaras, det vill säga direkt effekt och statsansvar.

Direkt effekt i EU-rätten, grundad i *Van Gend en Loos*, etablerade doktrinen där medborgare av medlemsstater kan åberopa EU-rätten i nationella domstolar mot medlemsstaten. Till en början var direkt effekt tämligen begränsad men utvecklades i den följande rättspraxisen, vilken etablerade att direkt effekt inte bara tillämpas på de själva fördragen utan även på förordningar, beslut och direktiv. Eftersom denna uppsats huvudfokus är *Laval*-målet så är det direkt effekt för direktiv som är fokus häri. Doktrinen om horisontell direkt effekt gjorde det möjligt för enskilda att stämma andra enskilda inför domstol för överträdelser av EU-rätten. Dock så komplicerade *Marshall* saken genom att förbjuda horisontell direkt effekt för direktiv. Domstolen håller fast vid förbudet även om den har utvecklat alternativ för att inskränka inverkan av *Marshall* genom en breddning av statsbegreppet och genom konceptet av indirekt effekt. Även om det var introducerat i *Van Colson* så var det *Marleasing* som etablerade horisontell direkt effekt för indirekt effekt – eller skyldigheten att tolka all nationell rätt i ljuset av EU-rätten.

Principen för statsansvar för skada liden av enskilda som en följd av en överträdelse av EU-rätten hänförlig till en stat etablerades i *Francovich* vari Italien befanns skyldig till underlåtenhet att implementera ett direktiv som gav vissa rättigheter till enskilda och var således tvungna att betala skadestånd till de enskilda ifråga. Principen utvecklades därefter till alla tillräckligt allvarliga brott begångna av offentliga institutioner som påverkade bestämmelser som hade för avsikt att ge rättigheter till enskilda, där det kunde finnas en direkt kausalitet mellan brottet mot skyldigheten som vilar på staten och skadan liden av de skadelidande.

I diskussionen så argumenterar jag för åtminstone ett medansvar för Sverige i *Laval*-målet på grund av överträdelserna, och omfattningen av dem, rörande omständigheterna i målet. Hur vi alla är ansvariga för våra egna handlingar men att vi ibland inte kan hållas helt och hållet ansvariga för desamma.

Preface

Ever since I read the *Laval* case I have been interested in the many aspects of that case. Especially so the question of who the guilty party actually was? As so often in law there is no black or white answer, instead we have many shades of grey. This paper is my attempt to come to grip with whom I think should have been held liable for the wrongs done in the light of EU law.

I would like to take the opportunity to thank my family for the support and patience shown to me during the course of my university studies. Without their unending support, this paper would never have been written.

Speaking of patience, I would also like to thank my mentor Jörgen Hettne, for the patience shown to me when I have written this paper despite my irregular email correspondence.

Last but not least, I would like to thank Paula who pushed me throughout my writing of this paper and whose advice and support has been invaluable.

Thank you all.

Abbreviations

CJEU	The Court of Justice of the European Union
EEC	Treaty establishing the European Economic Community (Rome Treaty)
MBL	Lag (1976:580) om medbestämmande i arbetslivet (Law on workers' participation in decisions) [Medbestämmandelagen]
MLR	Modern Law Review
TFEU	The Treaty on the Functioning of the European Union
TEU	The Treaty on European Union
TEU(M)	The Treaty on European Union (Maastricht)

1 Introduction

"With great power comes great responsibility"

-Voltaire[1]

Should the same, great responsibility come when the power is less? Alternatively, when there is no power to be had, should the responsibility still be as great?
The legislative power belongs to the state, as does the responsibility to legislate new laws and change outdated laws when the need arises.

Who bears the responsibility for national laws that are not compliant with EU law?
Is it the state that does not implement them correctly or the actors adhering to the laws even though they are faulty?

This paper brings up the issue of liability for quasi-governmental organisations when following national law that is not in harmony with EU law, organisations that wield state-like powers but are not an extension of the State such as trade unions, bar associations and football associations. Since they have no power over the national law should they have the responsibility for its faults as well?

I have chosen three cases to highlight this issue:
Case C-2/74 *Reyners,* [2] Case C-415/93 *Bosman,* [3] and Case C-341/05 *Laval.*[4]

In *Reyners*, we have the issue of freedom of establishment where the Belgian State was found responsible for the infringement of the Belgian Bar due to the national legislation found to be in breach of the Treaty.

In *Bosman*, we have the issue of freedom of movement of workers where the international organisation UEFA was found responsible for the infringement of the national football clubs and football associations adhering to UEFA's rules and regulations.

Finally, in *Laval* we have the issue of freedom to provide services where the national and regional trade unions were found to be guilty of their infringement of EU law whilst following a course of action in concurrence with national law.

The point I will make at the end of this paper is whether the Swedish State should be the one liable for the faults made in *Laval*.

[1] *Œuvres de Voltaire, Volume 48*. Lefèvre, 1832.
[2] Case 2/74 *Reyners v. Belgium* [1974] ECR 631.
[3] C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others* [1995] ECR 1-4921.
[4] C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetarförbundet and Others* [2007] ECR I-11767.

In order to find out the answer to these questions we must take a closer look on EU law and two of its core principles, direct effect and state liability – principles which enable individuals to bring matters before court, both against the state itself and against each other as we shall discover.

I have chosen to do so primarily through the extensive case law of the CJEU in this field. The focus of this paper is not a complete work of the principles of direct effect and state liability but rather a factual basis to the arguments made in *Laval* and my discussion through the problem state above.

2 Principal Cases

The three cases I have chosen in order to highlight this issue are the aforementioned *Reyners*, *Bosman* and *Laval*. In this section I will describe the factual background and highlight the Court's arguments and then shortly describe the importance of the cases. The cases' common denominators are that the transgressional party in each case is an organisation (bar association, football association and a labour union) and they all involve direct effect in EU law. The difference between the former case and the two latter is that in *Bosman* and *Laval* organisations are defendants while in *Reyners* it is the Belgian State that is the defendant, the importance of which I will return to in the discussion.

2.1 Case C-2/74 *Reyners*

Jean Reyners was a Dutch national who obtained his legal education in Belgium, but he was refused admission to the Belgian Bar due to the lack of a Belgian nationality. Reyners brought the issue before the Conseil d'Etat that in turn referred several questions to the CJEU, one of which is of particular interest, whether Article 49 TFEU had direct effect despite the absence of implementing directives under Articles 50 TFEU and 53 TFEU. The Belgian government argued that Article 49 TFEU only expressed a simple principle that was to be implemented through secondary legislation as provided for by said Articles 50 TFEU and 53 TFEU. In addition, the Belgian government argued that it was not for the Court to exercise a discretionary power reserved to the legislative institutions of the Community and the Member States.

The CJEU

"24. The rule on equal treatment with nationals is one of the fundamental legal provisions of the Community.

25. As a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals, this rule is, by its essence, capable of being directly invoked by nationals of all the other Member States.

26. In laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 (49 TFEU) thus imposes an obligation to attain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures.

27. The fact that this progression has not been adhered to leaves the obligation itself intact beyond the end of the period provided for its fulfilment...

...

29. It is not possible to invoke against such an effect the fact that the Council has failed to issue the directive provided for by Articles 54

and 57 (50 and 53 TFEU) or the fact that certain of the directives actually issued have not fully attained the objective of non-discrimination required by Article 52 (49 TFEU).

30. After the expiry of the transitional period the directives provided for by the Chapter on the right of establishment have become superfluous with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect."

This was the principal case where the Court employed direct effect for individuals even though the conditions for genuine freedom of establishment were far from being achieved. Moreover, not only against a Member State which has failed to comply with Community harmonization, but primarily to compensate for insufficient action on the part of the Community legislative institutions.

2.2 Case C-415/93 *Bosman*

Jean-Marc Bosman was a Belgian football player who upon the end of his contract with the Belgian First Division club R.F.C. Liège (Liège) refused renewing his contract and was going to be transferred, with his consent, to the French club USL Dunkerque (Dunkerque). The transfer broke down however, due to doubts regarding Dunkerque's solvency and their ability to pay the transfer fee requested. Liège suspended him and despite Bosman being out of contract, the club refused to allow him to move to Dunkerque until the demanded transfer fee had been paid which in turn meant that Bosman was unable to work as a footballer. Bosman brought the matter to court and challenged the transfer system operating in football, which allowed clubs to restrict and even stop the movement of players after their contracts had expired, arguing that it violated Article 45 TFEU.

The CJEU

"94. ... the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State ...

95. In that context, nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their country of origin to enter the territory of another Member Sate and reside there in order there to pursue an economic activity ...

96. Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned ...

97. The Court has also stated in [Case 81/87 *Daily Mail*][5] that even though the Treaty provisions relating to freedom of establishment are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that state, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58 (54 TFEU). The rights guaranteed by Article 52 (49 TFEU) et sec. of the Treaty would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State. The same considerations apply, in relation to Article 48 (45 TFEU), with regard to rules which impede the freedom of movement of nationals of one Member State wishing to engage in gainful employment in another Member State.

98. It is true that the transfer rules in issue in the main proceedings apply also to transfers of players between clubs belonging to different national associations within the same Member States and that similar rules govern transfers between clubs belonging to the same national association.

99. However ... those rules are likely to restrict the freedom of movement of players who wish to pursue their activity in another Member State by preventing or deterring them from leaving the clubs to which they belong even after expiry of their contracts of employment with those clubs.

100. Since they provide that a professional footballer may not pursue his activity with a new club established in another Member State unless it has paid his former club a transfer fee agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations, the said rules constitute an obstacle to freedom of movement for workers.

101. As the national court has rightly pointed out, that finding is not affected by the fact that the transfer rules adopted by UEFA in 1990 stipulate that the business relationship between the two clubs is to exert no influence on the activity of the player, who is to be free to play for his new club. The new club must still pay the fee in issue, under pain of penalties which may include its being struck off for debt, which prevents it just as effectively from signing up a player from a club in another Member State without paying that fee.

...

103. It is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different nationals associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. They cannot, thus, be

[5] Case 81/87 *R.v.HM Treasury and Commissioners of Inland Revenue, ex p. Daily Mail and General Trust plc* [1988] ECR 5483.

deemed comparable to the rules on selling arrangements for goods which in (joined Cases C-267/91 and C-268/91) *Keck and Mithouard*[6] were held to fall outside ambit of Article 30 of the Treaty (34 TFEU).

104. Consequently, the transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty. It could be only be otherwise if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose."

The Court went on to find that the rules could not be justified by the need to maintain the financial and competitive balance in the world of football. Nor could the need to find and develop young talent justify the rules being enforced despite likelihood that they did, indeed, encourage football clubs to do so. The Court was convinced that the aims could be achieved by means less restrictive to free movement.

2.3 Case C-341/05 *Laval*

Laval, a company incorporated under Latvian law, sent around 35 Latvian workers, to Sweden to work on a construction site for a school in Vaxholm through its wholly owned subsidiary Baltic. These earned about 40% less than comparable Swedish workers.

Baltic and Laval entered into negotiations with Byggettan, a trade union for construction workers in Stockholm and on Gotland. Laval asked for the wages and other terms and conditions of employment to be defined in parallel with the negotiations which Byggettan agreed to, even though the collective agreement, generally, have to be agreed upon before such discussions can take place.

The parties could not agree upon the terms of the wages because "it was not possible for Laval to know in advance what conditions would be imposed on it in relation to wages"[7] and the negotiations broke down the day after Laval signed a collective agreement with the Latvian building sector's trade union. This meant that the peace obligation, triggered by Swedish law once a collective agreement had been entered into, was not in effect, whereupon Byggettan announced it would request Byggnads, trade union for all of the construction workers in Sweden, to initiate collective action against Laval.

A blockade ('blockad') of the Vaxholm construction site began which consisted of, among other things, preventing goods to be delivered onto the site, prohibiting Latvian workers and vehicles from entering the site and placing pickets.

Subsequently, the collective action against Laval intensified when Elektrikerna, the electrician's trade union, initiated sympathy action

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[6] Joined Cases C-267-268/91 *Keck and Mithouard* [1993] ECR I-6097.

[7] C-341/05 *Laval* para. 36

consisting of preventing Swedish undertakings belonging to the trade union to provide services to Laval.

Other trade unions followed suit and announced sympathy actions consisting of boycotts of all of Laval's construction sites in Sweden. The result was that Laval could no longer carry out its activities in Sweden, sent its workers home and the town of Vaxholm requested the contract to be terminated between it and Baltic, which lead to Baltic going bankrupt.

Laval brought the issue before Arbetsdomstolen (the Labour Court) against Byggnads, Byggettan and Elektrikerna seeking a declaration that the collective actions were illegal and all such actions would cease and that the trade unions pay compensation for damages suffered.

Arbetsdomstolen referred two questions for a preliminary ruling:

1. "Is it compatible with the rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC[8] for trade unions to attempt, by means of collective action in the form of a blockade ('blockad'), to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as that described in the decision of the Arbetsdomstolen [of 29 April 2005 (collective agreement for the building sector)], if the situation in the host country is such that the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?

2. The Law on workers' participation in decisions (Medbestämmandelagen or MBL) prohibits a trade union from taking collective action with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provisions contained in part of the law known as the "Lex Britannia"[9], only where a trade union takes collective action in relation to conditions of work to which the MBL is directly applicable, which means in practice that the prohibition is not applicable to collective action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on grounds of nationality and the provisions of Directive 96/71 preclude application of the latter rule – which, together with other parts of the Lex Britannia, mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective

[8] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. *Posting of Workers Directive*

[9] Lex Britannia is a part (§ 25a, § 31a and § 42 paragraph 3) of MBL (SFS 1976:58) and named after the so called Britannia judgment of AD 1989 nr 120. Note that Lex Laval has subsequently changed § 42 paragraph 3.

agreements already concluded – to collective action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?”

The CJEU

“57. Conversely, Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by management and labour relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established ... The application of such rules must, however, be appropriate for securing the attainment of the objective which they pursue, that is, the protection of posted workers, and must not go beyond what is necessary in order to attain that objective ...

...

59. It follows from recital 13 to Directive 96/71 that the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there.

60. Nevertheless, Directive 96/71 did not harmonise the material content of those mandatory rules for minimum protection. That content may accordingly be freely defined by the Member States, in compliance with the Treaty and general principles of Community law.

...

67. It is common ground that, in Sweden, the terms and conditions of employment covering the matters listed in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, save for minimum rates of pay, have been laid down by law. It is also not disputed that the collective agreements have not been declared universally applicable, and that that Member State has not made use of the possibility provided for in the second subparagraph of Article 3(8) of that directive.

...

71. It must therefore be concluded at this stage that a Member State in which the minimum rates of pay are not determined in accordance with one of the means provided for in Article 3(1) and (8) of Directive 96/71 is not entitled, pursuant to that directive, to impose on undertakings established in other Member States, in the framework of the transnational provision of services, negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees, so that the undertakings concerned may ascertain the wages which they are to pay their posted workers.

...

80. Nevertheless, Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the

degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness.

81. Therefore – without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable – the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.

...

91. Although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.

...

93. In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods (see Case C-112/00 *Schmidberger,*[10] paragraph 74) of freedom to provide services (see Case C-36/02 *Omega,*[11] paragraph 35).

94. As the Court held, in *Schmidberger* and *Omega*, the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty. Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega,* paragraph 36).

95. It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another Member State which posts workers in the framework of the transnational provision of services.

...

[10] Case C-112/00 *Schmidberger* [2003] ECR I-5659

[11] Case C-36/02 *Omega* [2004] ECR I-9606

98. Furthermore, compliance with Article 49 EC (56 TFEU) is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services. The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 17 and 18; Case C-415/93 *Bosman* [1995] ECR I-4291, paragraphs 83 and 84, and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120).

99. In the case in the main proceedings, it must be pointed out that the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector – certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 and others relate to matters not referred to in that provision – is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC (56 TFEU).

...

107. In that regard, it must be observed that, in principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers.

108. However, as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which that collective action forms cannot be justified with regard to such an objective. In addition to what is set out in paragraphs 81 and 83 of the present judgment, with regard to workers posted in the framework of a transnational provision of services, their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State.

109. Finally, as regards the negotiations on pay which the trade unions seek to impose, by way of collective action such as that at issue in the main proceedings, on undertakings, established in another Member State which post workers temporarily to their territory, it must be emphasised that Community law certainly does not prohibit Member States from requiring such undertakings to comply with their rules in minimum pay by appropriate means.

110. However, collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not rend it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum par.

111. In the light of the foregoing, the answer to the first question must be that Article 49 EC (56 TFEU) and Directive 96/71 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

...

116. In that regard, it must be pointed out that national rules, such as those at issue in the case in the main proceedings, which fail to take into account, irrespective of their content, collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established, give rise to discrimination against such undertakings, in so far as under those national rules they are treated in the same way as national undertakings which have not concluded a collective agreement.

...

118. It is clear from the order for reference that the application of those rules to foreign undertakings which are bound by collective agreements to which Swedish law does not directly apply is intended, first, to allow trade unions to take action to ensure that all employers active on the Swedish labour market pay wages and apply other terms and conditions of employment in line with those usual in Sweden, and secondly, to create a climate of fair competition, on an equal basis, between Swedish employers and entrepreneurs from other Member States.

119. Since none of the considerations referred to in the previous paragraph constitute grounds of public policy, public security or public health within the meaning of Article 46 EC (52 TFEU), applied in conjunction with Article 55 EC (62 TFEU), it must be held that

discrimination such as that in the case in the main proceedings cannot be justified.

120. In the light of the foregoing, the answer to the second question must be that, where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC (56 TFEU) and 50 EC (57 TFEU).

The Court found that the Swedish implementation of the Posting Workers Directive was faulty in the sense that it did not provide for rules regarding minimum pay and therefore ruled that the trade unions were obstructing the freedom to provide services and therefore was in breach of the Treaty and the Directive.

Although the Directive does provide for what terms and conditions of employment should be minimum provisions, it also states, in Article 3(7), that more favourable conditions for workers are allowed. However, as can be found in Article 3(1), it has to be laid down in law or in collective agreements that has been declared universally applicable as well as provide for the actual minimum provisions, which Sweden has not done. The Court even goes so far as to state in paragraphs 64-66 of the case what Sweden could have done to remedy this matter.

The Court also states that the right to collective action is a fundamental right in the EU but that it is not an unconditional one; it is subject to the principles of proportionality and justifiability.

3 Direct Effect

In the cases I have brought up above direct effect is a prominent part of the judgements even a crucial one at that for the cases even to be brought before the CJEU.
What is then direct effect?
In short, the doctrine which provides for EU law to be invoked in national courts. The remarkable aspect of which, is that it is the individuals in a Member State that can invoke it against the Member State itself.

3.1 The foundation

The doctrine of direct effect was first introduced in 1963 in *Van Gend en Loos*[12], which is arguably the most famous and important ruling of the CJEU. The Van Gend en Loos company was charged with an import duty on chemicals imported from Germany into the Netherlands and subsequently brought the matter before the national court arguing that it was against Article 12 EEC (30 TFEU). The Dutch court referred two questions to the CJEU of which the first one is the most relevant to this paper: "whether Article 12 of the EEC Treaty has direct application within the territory of a Member State; in other words, whether nationals of such a state can, on the basis of the Article in question, lay claim to individual rights which the courts must protect"[13].

The CJEU[14]:

> "To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.
>
> The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.
>
> In addition the task assigned to the Court of Justice under Article 177 (267 TFEU), the object of which is to secure uniform

[12] Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.
[13] *Ibid.,* page 3.
[14] *Ibid.,* page 12-13.

interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

...

The wording of Article 12 (30 TFEU) contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of Article 12 (30 TFEU) does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.

...

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 (30 TFEU) must be interpreted as producing direct effects and creating individual rights which national courts must protect.

In addition the argument based on Articles 169 and 170 of the Treaty (258 and 259 TFEU) put forward by the three governments which have submitted observations to the court in their statements of case is misconceived. The fact that these Articles of the Treaty enable the Commission and the Member States to bring before the court a state which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court....

A restriction of the guarantees against an infringement of Article 12 (30 TFEU) by Member States to the procedures under Article 169 and 170 (258 and 259 TFEU) would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 (258 and 259 TFEU) to the diligence of the Commission and of the Member States."

The direct effect was not unlimited in its scope however, but the judgement introduced the necessary criteria the Treaty provisions needed to meet in order for individuals to be able to invoke the doctrine of direct effect before a national court, and they were: *clear, unconditional, negatively phrased* and *require no legislative intervention*.

3.2 Broadening the principle

The principle of direct effect is a living creature and has evolved through subsequent case law and both the provisions as well as the nature of it have changed since *Van Gend en Loos*.

In *Van Duyn,*[15] the CJEU found that Article 45 TFEU was to be directly effective despite its third paragraph, which allows limitations on the free movement on workers on grounds of public policy, public security, or public health, due to "the application of these limitations is, however, subject to judicial control".[16] This meant that the principle of direct effect could apply even where the Member States possessed discretion due to judicial control, which was a groundbreaking statement in the area of direct effect. Craig and de Búrca hailed it as "a significant juridical shift in thinking about direct effect"[17] while Chalmers et al. went a step further with defining direct effect and declared that "as no provision or condition in the Treaty has ever been held to be outside judicial control, this effectively discarded the requirement that a provision be unconditional."[18]

In *Reyners,*[19] the provision that only negatively phrased provisions could be held to have direct effect was removed when the Court found that Article 49 TFEU, which imposes positive obligations on Member States to enable freedom of establishment, was directly effective.

3.2.1 Case 43/75 Defrenne v Sabena[20]

Gabrielle Defrenne worked as an air hostess for the Société Anonyme Belge de Naviation Aérienne (referred to in the heading and hereinafter as Sabena) until 15 February 1968 when Defrenne was forced to retire due to the contract of employment which stipulated that the contract shall be

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[15] Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337.
[16] *Ibid.,* para. 7.
[17] Craig and de Búrca, *EU Law text, cases and materials*, 4th edition, Oxford University Press, Oxford, 2008, p. 275.
[18] Chalmers Damian et al. *European Union law*, 2nd edition, Cambridge University Press, Cambridge, 2010, p. 271.
[19] See Chapter 2.1.
[20] Case 43/75 *Defrenne v. Société Anonyme Belge de Navigation Aérienne* [1976] ECR 455.

terminated on the day which female members of the crew reaches the age of 40 years. However, the same condition did not apply to their male counterparts. Defrenne brought the question before the Tribunal du travail of Brussels for compensation for the loss she had suffered in terms of salary, allowance on termination of service and pension as a result of the fact that air hostesses and male members of the air crew performing identical duties did not receive equal pay. The Tribunal du travail of Brussels dismissed all Defrenne's claims whereupon Defrenne appealed the judgement to the Cour du Travail of Brussels that decided on the first head of claim (arrears of salary) to ask for a preliminary ruling of the CJEU on two questions:

1. Does Article 119 of the Treaty of Rome (157 TFEU) introduce directly into the national law of each Member State of the European Community the principle that men and women should receive equal pay for equal work and does it, therefore, independently of any national provision, entitle workers to institute proceedings before national courts in order to ensure its observance, and if so as from what date?
2. Has Article 119 (157 TFEU) become applicable in the internal law of the Member States by virtue of measures adopted by the authorities of the European Economic Community (if so, which, and as from what date?) or must the national legislature be regarded as alone competent in this matter?

The CJEU

"16. Under the terms of the first paragraph of Article 119 (157 TFEU), the Member States are bound to ensure and maintain 'the application of the principle that men and women should receive equal pay for equal work'.

...

18. For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of Article 119 (157 TFEU) between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community or national character.

19. It is impossible not to recognize that the complete implementation of the aim pursued by Article 119 (157 TFEU), by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level.

...

21. Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by Article 119

(157 TFEU) must be included in particular those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation.

22. This applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private.

23. As is shown by the very findings of the judgment making the reference, in such a situation the court is in position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks.

24. In such situation, at least, Article 119 (157 TFEU) is directly applicable and may thus give rise to individual rights which the courts must protect."

Article 157 appeared to have lacked sufficient precision for a national court to directly enforce it as it was, therefore the Court gave the provision a double meaning for the direct effect to be enabled. On the one hand, the Court stated that it is meant to secure equality between men and women within the economic system as a whole. On the other hand, the Court stated that there is a second interpretation within this, namely to prohibit unequal pay between men and women in individual workplaces. Considering how Article 157 enforces a principle which is not clearly defined, nor are the terms 'pay' and 'equal work', it could be argued, as Chalmers et al do[21], that the Court relaxed the provision for clarity in the *Van Gend en Loos* provisions. This would leave us with the following provisions to meet in order to establish direct effect: *a Treaty Article has to be intended to confer rights on individuals and be sufficiently precise and unconditional.*

However, this is by no means a definitive definition of the provisions required to establish direct effect. Pescatore, a former judge of the Court, argued that: "It appears thus in the last analysis that the prerequisite of the unconditional character and the sufficient degree of Community provisions, in order to be recognised as having "direct effect," boil down to a question of justiciability."[22]

3.3 Direct effect for directives

Direct effect is not only limited to the Treaty Articles but applies also for certain secondary legislation as well.

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[21] *Supra* note 18, page 272: "However one looks at it, the Court had significantly relaxed the requirement for legal clarity. To acknowledge that a provision as too uncertain an ambit to be invoked, per se, in national courts and to suggest that it has a double meaning is to indicate that it is not clear."

[22] P. Pescatore. *The Doctrine of 'Direct Effect': An Infant Disease of Community Law* (1983) 8 ELRev 155, p 176-7

The direct effect for Regulations is provided in the second paragraph of Article 288 TFEU: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States" which was first set down in *Politi*[23].

The CJEU

> "9. Under the terms of the second paragraph of Article 189 (Article 288 TFEU) regulations "shall have general application" and "shall be ... directly applicable in all Member States". Therefore, by reason of their nature and their function in the system of the sources of community law, regulations have direct effect and are as such, capable of creating individual rights which national courts must protect. "

Decisions are covered in the fourth paragraph of Article 288 TFEU but unlike regulations, there is no mention of direct applicability. The Court had no doubts about the applicability of direct effect for decisions and set it firm in *Grad*[24].

The CJEU

> "5. However, although it is true that by virtue of Article 189 (288 TFEU), regulations are directly applicable and therefore by virtue of their nature capable of producing direct effects, it does not follow from this that other categories of legal measures mentioned in that Article can never produce similar effects. In particular, the provision according to which decisions are binding in their entirety on those to whom they are addressed enables the question to be put whether the obligation created by the decision can only be invoked by the Community institutions against the addressee or whether such a right may possibly be exercised by all those who have an interest in the fulfilment of this obligation. It would be incompatible with the binding effect attributed to decisions by Article 189 (288 TFEU) to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision. Particularly in cases where, for example, the Community authorities by means of a decision have imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness ("*l'effet utile*") of such a measure would be weakened if the nationals of that state could not invoke it in the courts and the national courts could not take it into consideration as part of Community law. Although the effects of a decision may not be identical with those of a provision contained in a regulation, this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measure before the courts, may be the same as that of a directly applicable provision of a regulation."

Although directives are also covered in Article 288 TFEU, the provisions for directives are somewhat different compared to the provisions for

[23] Case 43/71 *Politi v Italy* [1971] ECR 1039.

[24] Case 9/70 *Franz Grad v. Finanzamt Traunstein* [1970] ECR 825.

regulations and decisions. A directive is binding as to the result to be achieved instead of being binding in its entirety, it is also left to the national authorities' discretion how to implement the directive and realise it.
The court ruled in *Van Duyn* and *Ratti*[25] that directives could generate direct effect and the reasons therefore, of which two are found in *Van Duyn* and the third in *Ratti*.

The CJEU in *Van Duyn*

> "12. [I]t would be incompatible with the binding effect attributed to a directive by Article 189 (288 TFEU) to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law. Article 177 (267 TFEU), which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between Member States and individuals."[26]

The first reason is functional albeit an *a contrario* reasoning: directives are binding and will be more effectively enforced if individuals can rely on them than if they cannot.

The second reason is textual: Article 177 (267 TFEU) empowers national courts to refer questions to the CJEU concerning any Union measure, including directives, which implies that such acts may be invoked by individuals in the national courts.

The third reason, given in the *Ratti* case, is the estoppel argument: it precludes a Member State to rely upon and gain advantage through its own failure to implement a directive properly or failure to implement it at all within the given time period.

Directives will therefore be directly effective only when they are held to be unconditional and sufficiently precise, the transposition period has ended[27], and if the Member State has failed to implement the directive correctly[28].

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[25] Case 148/78 *Ministero Publico v Ratti* [1979] ECR 1629.
[26] *Supra* note 15.
[27] Although the Member States have an obligation to refrain from any measures liable to seriously compromise the result prescribed by a directive, see Case C-129/96 *Inter-Environnement Wallonie ASBL v. Région Wallone* [1997] ECR I-7411.
[28] The directive must still be *applied* correctly however and not just implemented in a correct way, see Case C-62/00 *Marks & Spencer plc v. Commissioners of Customs & Excise* [2002] ECR I-6325, paras. 22-28.

3.4 Horizontal direct effect

It is important to distinguish what kind of direct effect is applicable. Is the individual able to plead direct effect against just the Member State or are individuals able to plead against each other as well?

For reasons described in the previous section, it is clear that an individual can invoke direct effect in a vertical manner, i.e. towards the state. Especially so through the estoppel argument in *Ratti* wherein a culpable party cannot rely on its own wrongdoing to justify its action. However, whether or not individuals can invoke direct effect against each other is an entirely different matter and one not as clear cut.

3.4.1 Case 152/84 *Marshall*[29]

The answer to the question above was first given in the *Marshall* case in a negative way to direct effect existing on a horizontal plane, i.e. between individuals.

Helen Marshall, 62 years of age, was dismissed after 14 years of service by the respondent health authority on the ground that she had passed the pensionable age, which was 60 years for women at the time but 65 for men. National legislation did not impose an obligation on women to retire at the age of 60 but neither did it prohibit discrimination on grounds of sex in retirement matters. Marshall argued that it violated the 1976 Equal Treatment Directive[30], which provides for equal treatment regardless of sex concerning the terms and conditions of dismissals.

The CJEU

> "48. With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article 189 of the EEC Treaty (288 TFEU) the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. ...
>
> 49. In that respect 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.
>
> ...

[29] 152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723.

[30] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment vocational training and promotion, and working conditions OJ L39/40.

> 51. The argument submitted by the United Kingdom that the possibility of relying on provisions of the directive against the respondent *qua* organ of the state would give rise to an arbitrary and unfair distinction between the rights of state employees and those of private employees does not justify any other conclusion. Such a distinction may easily be avoided if the Member State concerned has correctly implemented the directive in national law."

The reasoning of the Court in this case has created several problems for future legal precedence, of which I will bring up a few in the following text. One in particular relates to the reasoning the Court did ten years earlier in *Defrenne.*

The CJEU

> "30. It is also impossible to put forward arguments based on the fact that Article 119 (157 TFEU) only refers expressly to 'Member States'.
>
> 31. Indeed, as the Court has already found in other contexts, the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.
>
> 32. The very wording of Article 119 (157 TFEU) shows that it imposes on states a duty to bring about a specific result to be mandatorily achieved within a fixed period.
>
> ...
>
> 39. In fact, since Article 119 (157 TFEU) is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals."

In *Marshall,* the Court argues that the binding nature of a directive in Article 288 TFEU exists only in relation to each Member State to which it is addressed and states that a directive may not be relied upon against an individual. That, however, goes against the reasoning in *Defrenne* where the Court even stated that it is impossible to put forward arguments based on the fact that Article 157 TFEU only refers expressly to Member States.

A second debatable issue is that despite that *Marshall* ruled against one type of discrimination, that of gender discrimination, it actually opened up for another type of discrimination, that of workers in the private sector compared to the state sector. Marshall could rely on the directive due to the fact that she was working for a public authority, a part of the state, yet if she had worked for a private company she would not have been able to rely on the directive.

Finally, one other major issue that was brought into light following the ruling was how a public health authority can be held responsible for transposing the terms of the Equal Treatment Directive into national law. There is no doubt that the public health authority is a part of the state but it is the states responsibility to implement the directives and not the public

authorities. I will go into more detail on this matter in the following chapters.

Despite academic[31] criticism against *Marshall* and numerous opinions by Advocates General[32] questioning the ruling as well as supporting horizontal direct effect the CJEU has continued to deny directives horizontal direct effect and confirmed the ruling ten years later in *Dori*[33]. However, the Court has in subsequent case law developed alternatives to horizontal direct effect that have reduced the impact of the *Marshall* ruling whilst still holding it firm. It is to this confusing matter we now turn.

3.4.2 Broadening the concept of the state

The first exception came already, as we have seen above, in *Marshall* wherein the Court found that although Marshall could not rely on the directive against another individual she could nevertheless do so in this case due to the fact that the respondent did not act as an individual but was to be regarded as an organ of the state. [34] This begs the question, what constitutes the state in the meaning of the *Marshall* reasoning?

The *Foster* case is the primary case that addresses this question. Foster was forced to retire from her employment at British Gas at a premature age compared to that of her male counterparts just as in *Marshall.* British Gas was at the time a nationalized industry with responsibility for and monopoly of the gas-supply in Great Britain. Foster relied upon the 1976 Equal Treatment Directive just as Marshall had done and the House of Lords asked the Court whether the British Gas was a body of such a type that Foster could rely directly upon the directive against it.

The CJEU

> "17. The Court further held in ... *Marshall* that where a person 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 as employer or as public authority. In either case it is necessary to prevent the state from taking advantage of its own failure to comply with Community Law.
>
> 18. On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the state or had special powers beyond those which result from the normal rules applicable to relations between individuals.

[31] See for instance: J. Coppel. *Rights, Duties and the End of Marshall*, (1994) 57 MLR 859.
[32] See among others: Advocate General Van Gerven in Case C-271/91 *Marshall v Southampton and South-West Hampshire AHA* [1993] ECR I-4367; Advocate General Jacobs in Case C-316/93 *Vaneetveld v Le Foyer* [1994] ECR I-763.
[33] Case C-91/92 *Dori v. Recreb Srl* [1994] ECR I-3325.
[34] Confirmed in C-438/99 *Jiménez Melgar v. Ayunamiento de Los Barrios* [2001] ECR I-6915 paras. 32-33.

19. The Court has accordingly held that provisions of a directive could be relied on against tax authorities (the judgements in Case 8/81 *Becker* [1982] ECR 53, Case 221/88 *ECSC v. Busseni* [1990] ECR I495), local or regional authorities (judgement in Case 103/88 *Costanzo* [1989] ECR 1839), constitutionally independent authorities responsible for the maintenance of public order and safety (judgement in Case 222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR 1651), and public authorities providing public health services (judgement in Case 152/84 *Marshall* [1986] ECR 723).

20. It follows from the foregoing that 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 those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon."

Whether or not a body is part of the state is a dual test. If an entity is carrying out a public service and, because of that, has special powers then it is considered to be a part of the state.[35] Alternatively, if an entity forms a part of, or is subject to the authority of public authority then it is also considered to be a part of the state.[36]

3.4.3 Indirect effect

The concept of indirect effect was introduced in *Van Colson*[37] where the two female plaintiffs were refused employment in a German prison by virtue of their sex. They brought their complaint to the German labour court relying on the 1976 Equal Treatment Directive.

The CJEU

"26. However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty (4 TEU) to take all the appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to

[35] Case C-180/04 *Vassallo v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate* [2006] ECR I-7251.
[36] Case C-297/03 *Sozialhilfeverband Rohrbach v Arbeiterkammer Oberösterreich* [2005] ECR I-4305.
[37] Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891.

achieve the result referred to in the third paragraph of Article 189 (288 TFEU).

...

28. ... It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law."

Although the Court found that the relevant provisions were insufficiently clear and unconditional for them to satisfy the provisions for direct effect the Court ruled that through the doctrine of harmonious interpretation, or 'indirect effect', the requirement to satisfy the specific justiciability criteria is not needed. The Court strengthened the indirect effect in subsequent case law, especially so in *Pfeiffer*[38].

The CJEU

"114. The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it (see, to that effect, Case C-160/01 *Mau* [2003] ECR I-4791, paragraph 34)."

The doctrine of indirect effect applies to all competent authorities and not only the national courts as evident in *Henkel*[39].

The CJEU

"60. As the Court has held, the competent authorities called on to apply and interpret the relevant national law must do so, as far as possible, in the light of the wording and the purpose of the Directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 249 EC (288 TFEU)."

Van Colson was a groundbreaking ruling, by its introduction of indirect effect, but it still was limited in the scope of whom the new doctrine could be used against, as the defendant in *Van Colson* was a state employer. *Marleasing*[40] changed that, as the two parties in the case at hand were two private ones, introducing horizontal effect for indirect effect.

Marleasing brought proceedings against La Comercial in order to have the latter's articles of association declared void as the company was created for the sole purpose of defrauding and evading creditors. The Spanish Civil Code stated that contracts made with this 'lack of cause' were void,

[38] Cases C-397–403/01 *Pfeiffer v. Deutches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835.

[39] Case C-218/01 *Henkel KGaA* [2004] ECR I-1725.

[40] Case C-106/89 *Marleasing SA v. La Comercial Internacionale d Alimentacion SA* [1990] ECR I-4135.

however the relevant Council Directive[41] did not include such a provision in its exhaustive list of reasons to declare a contract void. The Spanish Court asked the CJEU whether the Council Directive could have direct effect between individuals so as to preclude the declaration of nullity of a company on grounds other than those set out in the Directive.

The CJEU

> "7. However, it is apparent from the documents before the Court that the national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.
>
> 8. In order to reply to that question, it should be observed that, as the Court pointed out in its judgement in *Von Colson,* paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty (4(3) TEU) to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty (288 TFEU)."[42]

Marleasing expanded the doctrine of indirect effect by requiring all national legislation to be interpreted in the light of EU law even if the national law predates the directive or even if it has no specific connection with the EU law in question. However, it is not an obligation without limitations; one in particular is the obligation of indirect effect, which does not require *contra legem* interpretations of national law as evident in *Pupino.*[43] Nor can it impose criminal liability or strong obligations on individuals as the Court stated in *Arcaro*[44]*:*

The CJEU

> "42. However, that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the

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[41] First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards throughout the Community.
[42] *Supra* note 35.
[43] Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285.
[44] Case C-168/95 *Luciano Arcaro* [1996] ECR I-4705.

> imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions."

However, it can impose legal obligations on individuals through an 'exclusionary effect' of a directive, in the sense that through the directive's prevention of conflicting national law being enforced, it creates a legal obligation for the individual that would not exist otherwise. It is not the directive itself that creates the legal obligation but the national law or, as evident in *Centrosteel*[45], the contract which imposes the obligation on the individual.

The doctrine of horizontal direct effect of directives is a complicated matter. Seeing how the Court in *Marshall* declared that there was no such thing but has subsequently tried to go around its own prohibition through different approaches such as the doctrine of indirect effect or broadening the concept of the state. This brings me to my next chapter where I will discuss the liability of the Member States in transgressions of EU law.

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[45] Case C-456/98 *Centrosteel v. Adipol* [2000] ECR I-6007.

4 State Liability

In the previous chapter, we have covered how EU law can be held directly applicable towards a Member State even if it has not been implemented into national legislation at the time being. We have also covered how individuals can hold each other responsible for acting contrary to EU legislation even if the action is not contrary to national legislation. However, what happens when the Member State has deliberately failed to live up to its obligations according to EU law? In short, when can the Member State be held liable according to EU law?

4.1 Cases C-6 and 9/90 *Francovich*[46]

The principle of state liability for harm suffered by individuals as a result of an infringement of EU law attributable to a state was established, confirmed and developed by the Court of Justice of the European Union in three long, informative and detailed cases: *Francovich, Factortame* and *Köbler*.

The 34 applicants brought proceedings against Italy for the government's persistent failure to implement Directive 80/987.[47] The applicants were owed back pay by the now bankrupt employers and so they brought action against the State for the losses suffered due to Italy's failure to transpose said directive. This would have provided in particular specific guarantees of payment of unpaid wage claims.

The CJEU

> "29. The national court thus raises the issue of the existence and scope of a State's liability for harm resulting from the breach of its obligations under Community law.
>
> ...
>
> *(a) The existence of State liability as a matter of principle*
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> 31. It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions.

[46] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.
[47] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.

32. Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals.
33. 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.
34. The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.
35. It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.
36. A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty (4(3) TEU), under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law.
37. It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

(b) The conditions for State liability

38. Although State liability is thus required by Community law, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.
39. Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty (288 TFEU) to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.
40. The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the

State's obligation and the loss and damage suffered by the injured parties.

41. Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.

42. Subject to that reservation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law.

43. Further, the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation."

Although the provisions of the directive was found to be lacking sufficient precision to be directly effective, the CJEU nevertheless conferred the rights of which these individuals had been deprived, through the state's failure to implement the Directive. As can be read in paragraphs 39-40 of the case three conditions were established for a right of reparation due to a Member State's failure to implement a directive: the conferment of rights, whose content must be identifiable from the directive, to an individual, and a causal link between the breach of the Member State's obligation and the damage suffered by the individual.

4.2 Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* and *Factortame*[48]

Groundbreaking as *Francovich* was, it only considered the narrow circumstances of when a Member State had failed to transpose a directive. *Brasserie du Pêcheur* and *Factortame III* extended the principle and clarified when a Member State would be held liable for breaching EU law.

Brasserie du Pêcheur was a French brewery that had suffered losses due to Germany's beer purity laws that prohibited the export of Brasserie du Pêcheur's beer into the country. This was declared to contravene, what is now, Article 34 TFEU in *Commission v. Germany (German Beer)*[49] and the relevant laws prohibiting the import of the beer was declared illegal. Brasserie du Pêcheur sought compensation for the losses incurred between 1981 and 1987 from Germany.

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[48] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v. Germany* and *Secretary of State for Transport, ex parte Factortame (no. 3)* [1996] ECR I-1029.

[49] Case 178/84 *Commission v. Germany (German Beer)* [1987] ECR 1227.

Factortame III has the same factual background as I[50] and II[51] in which Spanish fishermen invoked Article 49 TFEU in a challenge against the United Kingdom's Merchant Shipping Act 1988. This Act laid down obstacles against non-British boats to fish in British waters by imposing residence requirements as a precondition.

The CJEU

"38. Although Community law imposes State liability, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.

39. In order to determine those conditions, account should first be taken of the principles inherent in the Community legal order which form the basis for State liability, namely first, the full effectiveness of Community rules and the effective protection of the rights which they confer and, second, the obligation to cooperate imposed on Member States by Article 5 of the Treaty (4(3) TEU).

40. In addition ... it is pertinent to refer to the Court's case law on non-contractual liability on the part of the Community.

41. First, the second paragraph of Article 215 of the Treaty (340 TFEU) refers, as regards the non-contractual liability of the Community, to the general principles common to the laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of Community law.

42. Second, the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.

43. The system of rules which the Court has worked out with regard to Article 215 of the Treaty (340 TFEU), particularly in relation to liability for legislative measures, takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question.

44. Thus, in developing its case law on the non-contractual liability of the Community, in particular as regards legislative measures involving choices of economic policy, the Court has had regard to the wide discretion available to the institutions in implementing Community policies.

45. The strict approach taken towards the liability of the Community in the exercise of its legislative activities is due to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the

[50] Case C-213/89 *R v. Secretary for State Transport, ex parte Factortame Ltd* [1990] ECR I-2433.

[51] Case C-221/89 *R v. Secretary for Transport, ex parte Factortame II* [1991] ECR I-3905.

prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterised by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.

46. That said, the national legislature – like the Community institutions – does not systematically have a wide discretion, sometimes to a considerable degree. This is so, for instance, where, as in the circumstances to which the judgment in *Francovich* relates, Article 189 of the Treaty (288 TFEU) places the Member State under an obligation to take, within a given period, all the measures needed in order to achieve the result required by a directive. In such a case, the fact that is for the national legislature to take the necessary measures has no bearing on the Member State's liability for failing to transpose the directive.

47. In contrast, where a Member State acts in a field where it has a wide discretion, comparable to that of the Community institutions in implementing Community policies, the conditions under which it may incur liability must, in principle, be the same as those under which the Community institutions incur liability in a comparable situation.

48. In the case which gave rise to the reference in Case C-46/93, the German legislature had legislated in the field of foodstuffs, specifically beer. In the absence of Community harmonization, the national legislature had a wide discretion in that sphere in laying down rules on the quality of beer put on the market.

49. As regards the facts of Case C-48/93, the United Kingdom legislature also had a wide discretion. The legislation at issue was concerned, first, with the registration of vessels, a field which, in view of the state of development o Community law, falls within the jurisdiction of the Member States and, secondly, with regulating fishing, a sector in which implementation of the common fisheries policy leaves a margin of discretion to the Member States.

50. Consequently, in each case the German and United Kingdom legislatures were faced with situations involving choices comparable to those made by the Community institutions when they adopt legislative measures pursuant to a Community policy.

51. In such circumstances, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct casual link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

...

54. The first condition is manifestly satisfied in the case of Article 30 of the Treaty (34 TFEU), the relevant provision in Case C-46/93 and in the case of Article 52 (49 TFEU), the relevant provision in Case C-48/93 ...

55. As to the second condition, as regards both Community liability under Article 215 (340 TFEU) and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State of the Community institution concerned manifestly and gravely disregarded the limits of its discretion.

56. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.

57. On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.

...

65. As for the third condition, it is for the national courts to determine whether there is a direct causal link between the breach of the obligation borne by the State and the damage sustained by the injured parties.

...

67. As appears from paragraphs 41, 42 and 43 of *Francovich*, subject to the right to reparation which flows directly from Community law where the conditions referred to in the preceding paragraph are satisfied, the State must make reparation for the consequences of the loss and damage caused in accordance with the domestic rules on liability, provided that the conditions for reparation of loss and damage laid down by national law must not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.

...

82. Reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights.

83. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation."

The Court reiterated two of the conditions established in *Francovich* but introduced a new second condition:

1. The provision must be intended to confer rights on individuals
2. The breach must be sufficiently serious
3. There must be a direct casual link between the breach of the obligation resting on the state and the damage sustained by the injured parties.

The Court also suggested a distinction between contexts where Member States have discretion and where they do not. In the latter contexts, the three criteria have to be met for liability but in the former context, there is no requirement for the breach to be sufficiently serious.
When will liability then be found? *Factortame* and *Brasserie du Pêcheur* indicate three circumstances when it will be easily found. These are:

- a complete failure to transpose a directive
- a breach of an order of the Court of Justice
- a breach of settled case law

In these circumstances the Court looks at the clarity of the provision of law and therefore liability only occurs when a Member State is breaching EU law in a manner that must be obvious to it and in a way that leaves little room for doubt.

Other circumstances where liability might incur are, but not limited to, when there has been a breach of an EU legal norm; a breach of case law that is not completely settled; or an inadequate transposition of or compliance with a directive.

4.3 Case C-224/01 Gerhard Köbler[52]

Brasserie du Pêcheur extended the state liability principle established in *Francovich* to the acts of all public institutions, and in a notable development, *Köbler* went one step further still and included a state liability for rulings by national courts.

Köbler was a university professor employed in Austria who challenged the wage policy of that time which included a long-service increment for university professors, only if they had spent fifteen years at an Austrian university, on the basis that it was restricting free movement of workers. The Austrian Verwaltungsgericht (Supreme Administrative Court) first decided to refer the matter to the CJEU, but then changed its mind and withdrew on the grounds of *res judicata* since the Court had already decided the matter[53]. Köbler argued that the state was liable in respect of the court's ruling on the grounds that it failed to refer the matter when obliged to do so and had given an erroneous ruling.

[52] Case C-224/01 *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239.
[53] Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47.

The CJEU

"33. In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.

34. It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights.

35. Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article 234 EC (267 TFEU) a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.

36. Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance ...

37. Certain of the governments which submitted observations in these proceedings claimed that the principle of State liability for damage caused to individuals by infringements of Community law could not be applied to decisions of a national court adjudicating at last instance. In that connection arguments were put forward based, in particular, on the principle of legal certainty and, more specifically, the principle of *res judicata*, the independence and authority of the judiciary and the absence of a court competent to determine disputes relating to State liability for such decisions.

38. In that regard the importance of the principle of *res judicata* cannot be disputed ... In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question.

39. However, it should be borne in mind that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to

establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revisions of the judicial decision which was responsible for the damage.

40. It follows that the principle of *res judicata* does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance.

41. Nor can the arguments based on the independence and authority of the judiciary be upheld.

42. As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.

43. As to the argument based on the risk of a diminution of the authority of a court adjudicating at last instance owing to the fact that its final decisions could by implication be called in question in proceedings in which the State may be rendered liable for such decisions, the existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary.

44. Several governments also argued that the application of the principle of State liability to decisions of a national court adjudicating at last instance was precluded by the difficulty of designating a court competent to determine disputes concerning the reparation of damage resulting from such decisions.

45. In that connection, given that, for reasons essentially connected with the need to secure for individuals protection of the rights conferred on them by Community rules, the principle of State liability inherent in the Community legal order must apply in regard to decisions of a national court adjudicating at last instance, it is for the Member States to enable those affected to rely on that principle by affording them an appropriate right of action. Application of that principle cannot be compromised by the absence of a competent court.

...

51. As to the conditions to be satisfied for a Member State to be required to make reparation for loss responsible, the Court has held that these are threefold: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct casual link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties ...

52. State liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringes a rule of Community law is governed by the same conditions.

53. With regard more particularly to the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the Member States which submitted observations in this case have also contended. State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred case where the court has manifestly infringed the applicable law.

54. In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it.

55. Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC (267(3) TFEU).

56. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case law of the Court in the matter ...

...

122. Community law does not expressly cover the point whether a measure for rewarding an employee's loyalty to his employer, such as a loyalty bonus, which entails an obstacle to freedom of movement for workers, can be justified and thus be in conformity with the Community law. No reply was to be found to that question in the Court's case law. Nor, moreover, was that reply obvious.

123. In the second place, the fact that the national court in question ought to have maintained its request for a preliminary ruling ... is not of such a nature as to invalidate that conclusion. In the present case the Verwaltungsgerichtshof had decided to withdraw the request for a preliminary ruling, on the view that the reply to the question of Community law to be resolved had already been given in the judgment in *Schöning-Kougebetopoulo* ... Thus, it was owing to its incorrect reading of that judgment that the Verwaltungsgericthshof no longer considered it necessary to refer that question of interpretation to the Court.

124. In those circumstances and in the light of the circumstances of the case, the infringement ... cannot be regarded as being manifest in nature and thus as sufficiently serious."

Although several governments made a range of arguments[54] against the application of state liability in this case, the Court dismissed them all on the basis that none of these arguments could justify the complete exclusion of the possibility of state liability in this matter. The Court reiterated[55] the conditions for state liability from *Brasserie du Pêcheur* and added one further indicator of a sufficient breach as established in *Brasserie du Pêcheur*[56]: non-compliance by the court in question with its obligation to refer to the CJEU for a preliminary ruling.

Köbler was reaffirmed in *Traghetti*[57] where the main question was if there is a requirement for intentional fault and serious misconduct by the national court for it to be held liable.

The CJEU

> "44. Accordingly, although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred for an infringement of Community law attributable to a national court adjudicating at last instance, under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law, as set out in paragraphs 53 to 56 of the *Köbler* judgment."

Traghetti indicates that liability is determined through a competence-based test rather than a fault-based one. This line of reasoning is evident in the earlier case of *British Telecom*[58] where the Court ruled that the United Kingdom had not implemented a public procurement directive correctly but concluded that it did not amount to a sufficiently serious breach. The reasoning thereof was threefold:
The provision of EU law was not clear and precise, the interpretation of the United Kingdom had been made in good faith as well as in keeping with the wording of the directive, and no guidance was available from case-law of the Court or the Commission.

We have now covered when individuals and Member States can be found liable for infringements of EU law, particularly when following national law. Now it is time to discuss when they <u>should</u> be liable.

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[54] C-224/01 *Köbler,* n. 48 paras. 37-50.
[55] *ibid* para 51.
[56] Cases C-46/93 and C-48/93 *Brasserie du Pêcheur,* n 44 paras. 56-57.
[57] Case C-173/03 *Traghetti del Mediterraneo v. Italy* [2006] ECR I-5177.
[58] Case C-392/93 *R. v. HM Treasury, ex parte British Telecommunications plc* [1996] ECR I-1631.

5 Discussion

In the previous chapters, we have discussed when we are to be held responsible for our transgressions of EU law, whether it be as Member States, individuals or organisations. This paper takes aim at the discussion around quasi-governmental organisations responsibilities under EU law especially regarding *Laval* and the questions of responsibility and liability in that case.

By quasi-governmental organisation in this paper, I mean an organisation, separate from the state that through either national law or otherwise, can regulate terms and conditions of individuals, such as regulating conditions of employment or imposing conditions on its members not unlike national laws that impose conditions on its citizens. In *Bosman,* it is the international organisation of UEFA that has its own structure of rules for its members, the national football associations. In *Laval*, it is the trade unions (primarily Byggnads, see Chapter 2.3) power to negotiate the terms and conditions of employment as well as the power of collective action that grants them a certain place aside from other organisations. In *Reyners,* it was a different matter as it was the Belgian State that was the defendant and not the Belgian Bar. However, the Bar can definitely be counted amongst the quasi-governmental organisations, as seen in *Wouters*[59]*,* where it has an independent status from the government in regulating its own profession and members. In short, my definition of a quasi-governmental organisation would be an organisation, separate from the state, which can wield state-like powers.

The problem with these organisations is the responsibility and liability for their rules and conditions – with greater power comes greater responsibility – as in who should be responsible for the transgressions of EU law? Moreover, who should be held liable?

The default position is that we are all responsible as well as liable for our own actions and mistakes but as so often in the field of law, the answers to those questions are not that simple and they differ on a case-by-case basis. What power is it that they have and how was it used? And the crucial question, from the perspective of EU law, against whom?

Just because they have a special position in society wielding more or a different power than other organisations does not automatically mean that they are at fault. However, if the power in question is exercised in such a manner that it is deemed to be against EU law then we come back to the previous questions about responsibility and liability. They should be held responsible for their transgressions, but should they also be held liable if they could not affect the matter?

The doctrine of direct effect in EU law did not just grant the private parties in the Member States a legal path to hold the Member States themselves

[59] C-309/99 *Wouters*

accountable for their actions in the courts; private parties can hold each other accountable via the courts through the doctrine of horizontal direct effect. This in turn means that if an organisation transgresses EU law then it can be held accountable in court even by another organisation or individual as seen in *Reyners* and *Bosman*.

However, this is not without its limitations, as horizontal direct effect does not extend to directives, which was the matter of fact in *Laval*. The Court ruled in *Marshall* that horizontal direct effect shall not apply to directives, although the Court has in subsequent case law, most notably *Marleasing* circumvented its own prohibition primarily through the introduction of the doctrine of indirect effect.

The Court ruled that Byggnads actions were against Article 56 TFEU as well as against the Posting Workers Directive, as they constituted an obstruction of the freedom to provide services for Laval, by demanding that Laval signed a collective agreement with them and the subsequent collective action that forced the company into bankruptcy. The Court reasoned that the prohibition to provide obstacles to the freedom to provide services would be compromised if quasi-governmental organisations could provide such obstructions unchecked. The direct effect of Article 56 TFEU should therefore apply to such organisations as it does for Member States themselves.

The crucial difference between *Laval* and the line of case law cited in the case[60] where the Court determined that quasi-governmental organisations could be held responsible is that Byggnads did not implement the faulty rules or laws themselves, unlike the aforementioned line of case law.

In *Walrave and Koch,* the body that regulated international professional cycling as a sport was found to be implementing and enforcing discriminatory rules against nationals.

In *Bosman*, UEFA and FIFA's regulation of the transfer market imposed obstacles to the free movement of workers.

In *Wouters*, it was the Dutch Bar association's prohibition of multidisciplinary partnerships that was found to be in accordance with EU law due to the necessity of ensuring proper practice of the legal profession.

In *Viking*, we have a similar situation to *Laval* where a trade union takes collective action against a company in order to protect its worker-members. The right to take collective action is, just as in Sweden, a legislated right in Finland; however, there was no faulty legislation such as Lex Britannia in *Viking*. The Court determined that the collective action was an obstruction of the right of establishment but that it could be justified, which was left for the national court to decide.

Lex Britannia came into force, and got its name, after a much-debated case in the Swedish Labour Court, *Britannia*[61]*,* with the purpose of limiting the impact the judgement had on trade unions' positions and power in Sweden. The case regarded the lawfulness of the collective action taken by

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[60] See C-341/05 *Laval* para. 98 as well as C-438/05 *Viking* para. 33

[61] AD 1982 nr. 120

the trade union in order to set aside a foreign collective agreement, which was ruled to be against national law (the MBL).

That is especially interesting in regards to the *Laval* case because of the similarity in the core legal issue that would suggest, at a glance, that Byggnads collective action would be deemed unlawful, according to national law, if it would not have been for the introduction of the aforementioned Lex Britannia.

The fact that Lex Britannia was legislated before the Posting Workers Directive is no excuse not to fulfil the obligation of interpreting it in the light of the relevant EU law as *Marleasing* showed.

Lex Britannia was deemed contrary to EU law and therefore the relevant legal justification for the trade unions to take collective action against a party that already has signed a collective agreement was removed.

Although as we can see both in *Laval* and in *Viking*[62], such actions can still be justified by an overriding reason of public interest provided that is in accordance with the principle of proportionality. The public interest in this case would be the protection of workers as regards to social dumping but also the right to take collective action, which is laid down in the Swedish constitution in Regeringsformen (RF) chapter 2 §17[63].

However, the Court ruled in *Laval* that the obstruction made to the freedom to provide services by the trade unions could not be justified, since Sweden had not fulfilled its obligation to implement the rules regarding minimum wage, from a directive that has an explicit aim to form a nucleus of mandatory rules of minimum protection nonetheless, coupled with the importance to safeguard the freedom to provide services. Moreover, the provisions in Lex Britannia that grants the trade unions the legal ability to disregard foreign collective agreements for the sake of equality of terms and conditions of employment, were found to be discriminating against foreign undertakings and did not constitute an overriding reason of public interest as laid down in Article 52 TFEU.

The trade unions in both *Viking* and *Laval* did have the power to regulate the terms and conditions of employment as well as the power to take collective action but my point is that they have a more regulated manner in which they do so. In the other three cases it is left more to the organisations own devices to regulate their field and members while the trade unions have a more structured framework to adhere to, over which they have no direct influence. Certainly they can lobby for change but they cannot change it directly as it is the national laws that regulate their activities in a more direct manner.

An interesting argument tied into that regards *contra legem* and indirect effect, which the Court set firm in *Pupino;* the obligation of indirect effect does not require *contra legem* interpretations of national law. Since that is the case in *Laval* in regards to Lex Britannia and RF then that would mean

[62] C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line and OÜ Viking Line Esti* [2007] ECR I-10779

[63] SFS 1974:152

that the Swedish Court is not obliged to disregard from the national law. However, the Swedish implementation (Utstationeringslagen[64]) of the Posting Workers Directive has a crucial flaw in that it does not provide for a definition of minimum wage, which means that even if the two former laws would fall under the *contra legem* argument the third one would not.

Sweden's failure to provide a harmonised legislation with EU law in this matter is a crucial point in my argument. It is not enough just to point out the flaws. Could Sweden have been held liable for their faults?

As evident already in *Van Gend en Loos,* the Member State liability towards both the European Union as well as towards the Member State's own citizens is an important foundation upon which the EU relies on. The Court states, as cited above in Chapter 4, both the importance of the legal protection of the individual rights of the Member State's nationals, and how the vigilance of individuals concerned to protect their rights amount to an effective supervision of the Commission and of the Member States. It came to a point in *Francovich,* where the principle of state liability and the conditions for a right of reparation for individuals were established, of which the latter were developed in *Factortame III*:

1. The provision must be intended to confer rights on individuals.
2. The breach must be sufficiently serious.
3. There must be a direct casual link between the breach of the obligation resting on the state and the damage sustained by the injured parties.

The right in the case of *Laval* would be the right to provide services and the breach was definitely serious enough, considering that Sweden had discriminated, in a deliberate attempt, against foreign collective agreements albeit having tried justifying it with the protection of workers[65]. The faulty implementation of the Posting Workers Directive answers the third condition seeing how both that transgression and especially the legislation of Lex Britannia are direct actions taken by Sweden in order to make it possible for the trade union to set aside a foreign collective agreement. The Court even pointed out, repeatedly in paragraphs 64-66, how Sweden could have made collective agreements universally applicable, which would have shifted the liability more on the trade unions.

In regards to my three principal cases, I find it very interesting to see the differences between *Laval* and *Reyners* & *Bosman*. In *Reyners,* the Belgian State is held responsible for the faulty legislation despite it being the Belgian Bar that carries out the actual transgression of EU law. The Belgian Bar did not have any discretion in this matter as it was a prohibition laid

[64] Lag (1999:678) om utstationering av arbetstagare

[65] In 1994, on the eve of Sweden's entry to the EU, there was an investigation conducted by Sven-Hugo Ryman regarding Lex Britannia in the light of EU law. According to the investigation, Lex Britannia could very well be seen as to be contradictory to EU law. However, as the purpose of Lex Britannia is to prevent social dumping he thinks that it could be justified and in accordance with EU law. See Ds 1994:13 pages 332-36 in particular.

down in Belgian law and only the King could grant an exemption. In *Bosman*, it was the rules of an international organisation with its own set of rules, primarily the transfer system, that were responsible despite it being the national football clubs and football associations that carried out the transgressions of EU law. My point is that it was the actual legislator or the equivalent of such that was held liable for the faults of its members. In *Viking* it was a different matter where it was the trade union that was held both responsible as well as liable but the difference in that case is that Finland had not a national law equivalent to Lex Britannia granting an expressed discrimination, nor a faulty implementation of a directive. That is why the trade union's collective action in *Viking* could be justified but the collective action in *Laval* could not.

In conclusion, the responsibility of the quasi-governmental organisations can therefore be said to lie squarely on their own shoulders, we are all responsible for our own actions after all, but the question of liability is another matter in this particular case.
After all, the power of legislation and the harmonising of EU legislation lies on the shoulders of the Member States, therefore the liability of the same should lie on the same shoulders, at the very least partly.

How that could be done practically is not an easy question as the Swedish legal room for such an event after the conclusion in courts is very limited. However, the Swedish professor emeritus in civil law, especially labour law, Tore Sigeman made an unconventional suggestion in a newspaper article[66], that Sweden itself should acknowledge its co-responsibility in this matter and *ex gratia* provide reparations for the trade unions for the damages they have been sentenced to pay Laval. Due to the fact that this turn of events would never had come about if Sweden had correctly implemented the Posting Workers Directive and acted in accordance with the loyalty principle regarding the prohibition of discrimination of nationalities in national law.

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[66] http://www.svd.se/opinion/brannpunkt/staten-har-medansvar-i-laval-malet_5055493.svd (in Swedish)

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