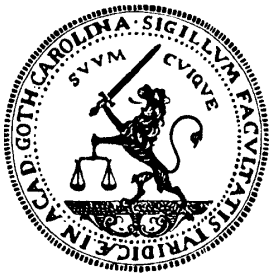

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University of Lund

Ola Larsson

Remedies and Procedures in National Courts

- Effectiveness of Community Law through Protection of Individual Rights

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Joakim Nergelius

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Contents

Abbreviations

C.M.L.Rev.	Common Market Law Review
EC	European Community
ECHR	European Convention on Human Rights
ECR	European Court Reports
ECSC	European Coal and Steel Community
EC Treaty	Treaty establishing the European Community
EEC	European Economic Community
E.L.J.	European Law Journal
E.L.Rev.	European Law Review
EU	European Union
J.T.	Juridisk Tidskrift vid Stockholms Universitet
M.L.R.	Modern Law Review
NJA	Nytt Juridiskt Arkiv
O.J.	Official Journal
RÅ	Regeringsrättens Årsbok
TEU	Treaty establishing the European Union
UK	United Kingdom

1 Introduction

1.1 Presentation of the Subject

When the European Community was founded, the Member States assigned mainly legislative and judicial functions to the Community. Executive functions lie mainly with the Member States since it is in those states that Community law is applied, and takes effect. Consequently, it is important to control that the Member States apply and enforce Community law in the proper way. The Commission has a supervisory function and according to Article 211 EC it shall ensure that the provisions of the Treaty and the measures taken by the institutions are applied. Under Article 226 EC, the Commission can take action against a Member State, which has breached Community law. Furthermore, a Member State can take action against another Member State under Article 227 EC. However, the Treaty says nothing about how Community law is to be enforced at the national level. Articles 226 and 227 both concern action before the Court of Justice. Enforcement at the national level, by application of Community law in national courts, was thus originally left to the legal systems of the Member States.

When it comes to enforcement of Community law, so called private enforcement is perhaps the most effective means. Private enforcement means that individuals become involved in the implementation of Community law by taking action at the national level. An example of this is when a private importer challenges national legislation, which seems to be in breach of the Treaty provisions on free movement of goods. When dealing with such a case, a national court can refer questions for a preliminary ruling from the Court of Justice under Article 234 EC. The effect of this is that the Court of Justice gets involved in many national cases, and consequently Community law will, hopefully, get the proper effect in the national proceedings. Private enforcement is an effective way of enforcing Community law since it involves the ones who are directly concerned by the

relevant Community provisions and, possibly, conflicting national legislation. It would be extremely hard for the Commission to go through every piece of legislation in the Member States in order to see whether it is compatible with the provisions of the Treaty or not. Member States do have an obligation to be loyal to the Community in Article 10 EC, but perhaps they do not always act totally loyal. It can also be difficult to see exactly how some, perhaps very old, piece of national legislation is in breach of the Treaty. By making the ones who want to take advantage of the Treaty, namely private parties, involved in the enforcement of the provisions of Community law, the Community as such has another means for ensuring the effective implementation of the Treaty in the Member States. The means for justifying this private enforcement was to give certain provisions of the Treaty direct effect so that individuals could rely on those provisions against the Member States. Community law can be said to deal with the existence of various individual rights. By giving these rights direct effect, they can be exercised at the national level. This works to the advantage of the individual and his or her specific right, as well as the effectiveness of Community law as such.

In the application and enforcement of Community law, the principles of supremacy, uniformity and effectiveness are very important. In fact, these principles have even be held to be central constitutional principles of Community law.[1] This is not so hard to understand when considering the fact that without these principles the Community would be rather useless. Although they are not expressly mentioned in the Treaty, they are crucial in order for the Community to function. They are all very closely connected. Without supremacy there would be no uniform application of Community law throughout the Community since national legislation would be able to take precedence. Without uniform application there would be no effectiveness of Community law as such since it would take different effect in different Member States. In order for a Community such as the EC to work, there has to be supremacy, uniformity and effectiveness. Without

these principles, the Member States would be able to do as they pleased and there would be no point in the Community trying to bring them all together.

In order to make the Community work effectively, the Court of Justice has developed the principle of direct effect further and, by relying on the principles just mentioned, introduced various means to facilitate the, private, enforcement of Community law in the Member States. Thus, the Treaty confers certain rights on individuals and if these rights have direct effect, they can be relied on in national courts. Furthermore, in order to protect individual rights and to enhance the effectiveness of Community law, the Court of Justice has introduced certain remedies which can be relied on against a Member State which infringes the right in question. Community law thus gets involved in national procedures in a way that was not envisaged by the Treaty. The main reason behind all this is a wish to enhance the implementation of Community law in the Member States. The consequence is that the Community as such works more effectively, and, almost as a bonus, private parties and their rights are given protection.

1.2 Purpose and Limits of the Topic

The purpose of this thesis is to have a closer look at how the Court of Justice, in the name of effectiveness, has developed the different means of private enforcement of Community law at the national level. In other words, to look at what means an individual trying to rely on a Community based right has at his or her disposal in order to enforce that particular right in a national court. This development began with the introduction of direct effect and supremacy of Community law. Since then the Court of Justice has added a requirement that individuals must have access to judicial control when their rights may have been infringed. Furthermore, the Court has laid down certain remedies which, under

[1] De Búrca, *National Procedural Rules and Remedies: The Changing Approach of the Court of Justice*, in Lonbay and Biondi (Eds.), *Remedies for Breach of EC Law* (1997), p. 37.

certain conditions, must be available to individuals. These remedies can be general, such as the disapplication of national legislation, but also more specific, namely restitution, interim relief and damages. These remedies are to be made available in accordance with national procedural rules. National procedures have however also been affected by the Court of Justice's strive to enhance the effectiveness of Community law, and consequently been struck down on various occasions. I will look at how the Court has undertaken this development and how the effectiveness of Community law has led the Court to introduce certain Community remedies. It has not always been a straight path to follow and the Court has changed its mind from a "hands off"[2] policy into more and more interference with the national rules on remedies and procedures.

It is not always easy to distinguish between remedies and procedural rules. By remedy I basically mean an action intended to obtain some sort of sanction for an infringement of Community law. The procedural rules are the rules which govern this action. The Court has not always made clear distinctions between the two areas and therefore it is even more difficult to interpret the judgements. I have tried though, and the parts of the judgements that deal with procedural matters will, as far as possible, be dealt with in the procedural chapter of this thesis. This has the effect that some cases are dealt with in more than one place of the thesis. However, I think that the distinction between remedies and procedures is important and hopefully it will not be too hard to follow.

Thus, in this thesis I will deal with the exercise, or enforcement, of individual rights vis-à-vis Member States in national courts. To some extent I will also consider such exercise of rights vis-à-vis other private parties. Relations between individuals and the Community, or Community law, will be considered briefly in the section on interim relief. The reason for this is that interim relief from Community law can be granted in national courts. Community liability for

[2] Ward, *Effective Sanctions in EC Law: A Moving Boundary in the Division of*

damages vis-à-vis individuals is a matter for the Court of Justice and will therefore not be dealt with in this thesis. Relations between the Community and the Member States will not be dealt with.

Although the European Union can be said to consist of three pillars, I will deal only with the first one. The first pillar is the European Community and it is in this pillar where individual rights are granted and where Community law is superior to national legislation. Consequently, it is only the first pillar which is interesting for the purposes of this thesis. Another consequence is that I will use the terms (European) Community and Community law instead of talking about the European Union as such.

1.3 Method and Material

Since the developments described in this thesis have taken place in preliminary rulings of the Court of Justice, I have studied mainly case law. In order to fully understand the case law I have studied also comments made on it in articles and text books. In order to make the text a bit easier to understand I will go through the facts of the cases where this is appropriate. If a case is less interesting, or if the facts of the case do not really add anything, I will only make a reference to the judgement. There is of course an enormous amount of case law to go through when looking at the effectiveness of Community law and it is quite likely that I have failed to take a judgement or two into account. However, I believe that I have managed to cover the main cases and consequently read enough of the case law to give a decent picture of the developments in the area covered by the thesis. Occasionally I have dealt with some national case law in order to show how Community law can take effect directly in national proceedings. Other than case law I have of course studied various articles in various legal journals, general text books and books dealing with more specific aspects.

Competence, (1995) 1 E.L.J 205, p. 208.

1.4 Contents

I will begin my investigations in the next chapter by looking at some important principles and concepts of Community law, such as direct effect, supremacy and uniformity. These principles are the basis for the further developments laid down by the Court of Justice. In Chapter 3 I will look at the right to judicial control, which has to be available to an individual trying to rely on a Community right. Chapter 4 deals with remedies in national courts and chapter 5, which is perhaps the main chapter of the thesis, deals with the specific remedies laid down by the Court. Another important chapter is chapter 6, where I look at the effect that Community law has on national procedural rules. After this, in chapter 7, I will consider two possible future developments in the area of remedies and procedures in national courts.

2 Effectiveness of Community Law

2.1 Introduction

In this chapter I will look at some important principles and developments in the case law of the Court of Justice. All of them are important to the effectiveness of Community law. These principles have also served as a basis for the effectiveness orientated developments which will be dealt with in the following chapters. This chapter can be said to lay the groundwork for what I will look at later.

2.2 Direct Effect

The first step towards the effectiveness of Community law was taken by the Court of Justice in the widely known Van Gend en Loos case.[3] Van Gend en Loos was a Dutch company importing certain goods from Germany. It argued, before a Dutch court, that the Netherlands had increased an import duty contrary to Article 12 of the EEC Treaty.[4] The Dutch court decided to ask for a preliminary ruling from the Court of Justice. The main question was whether Article 12 had direct application in national law in the sense that individuals could, on the basis of that provision, claim rights which the national court had to protect. The Court of Justice started of by stating that the EEC Treaty was more than an agreement which laid down obligations between the contracting states. In fact, it was a new legal order of international law for the benefit of which the Member States had limited their sovereign powers in certain fields. The subjects of this

[3] Case 26/62 Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1.
[4] Article 12 EEC prohibited Member States from adopting new customs duties and also from increasing existing ones. The provision has a slightly different wording today and can be found in Article 25 EC.

legal order were not only the Member States but also their nationals. Community law was held to confer both obligations and rights upon individuals. Article 12 was a clear and unconditional negative obligation for the Member States. It did not have to rely on any implementing measures in order to become part of national law. In fact, it was ideally adapted to produce direct effects in the legal relationship between Member States and their subjects. Thus, Article 12 did have direct effect and created individual rights which had to be protected by national courts.

The notion of direct effect means that the Treaty provision in question can be relied on by an individual before a national court. The conditions for establishing whether a certain provision has direct effect have not always been perfectly clear. However, the conditions are generally held to be that the provision has to be unconditional and sufficiently precise.[5] Many Treaty articles have been recognized by the Court of Justice to be sufficiently precise and unconditional to have direct effect.

In the Van Duyn case the Court for the first time gave direct effect to provisions of a directive.[6] The Court argued that it would be incompatible with the binding effect attributed to directives by Article 249 EC to exclude the possibility that individuals could invoke provisions of a directive. Moreover, the useful effect of a directive would be weakened if individuals were prevented from relying on it before a national court. Therefore, if the conditions for direct effect was fulfilled, a directive could have direct effect if it had not been implemented in time.

Under Article 249 EC, regulations are to be directly applicable in the Member States. Member States are not allowed to make their applicability dependent on

[5] Brealey and Hoskins, *Remedies in EC Law* (1998), p. 60, see also e.g. Case 9/70 Grad v. Finanzamt Traunstein [1970] ECR 825 paragraph 9, Case 8/81 Becker v. Finanzamt Münster-Innenstadt [1982] ECR 53 paragraph 25.
[6] Case 41/74 Van Duyn v. Home Office [1974] ECR 1337.

any implementing state measure.[7] This means that a regulation becomes part of national law as soon as it entries into force. There is however a difference between direct applicability and direct effect. All regulations are directly applicable in the Member States, but they still have to be unconditional and sufficiently precise in order to have direct effect.[8]

Decisions have also been able to produce direct effect.[9] The Court has held that the effectiveness of a decision would be weakened if individuals could not invoke it and national courts could not take it into consideration as part of Community law.

Direct effect can be both vertical and horizontal in nature. Vertical direct effect means that the provision in question can be relied on by individuals in relation to the state. A Community provision with horizontal direct effect can be relied on by a private party against other private parties. An example of Treaty provisions with horizontal direct effect is provided by the competition rules in Articles 81 and 82 EC.[10] Other Treaty provisions which have been given horizontal direct effect are Articles 12, 39 and 49.[11] In the Defrenne case the Court of Justice held that the principle of equal pay for men and women in Article 141 EC had horizontal direct effect.[12] Possible horizontal direct effect of directives will be discussed later on in this chapter.

In short, most binding types of Community law are capable of having direct effect.[13] The conditions for direct effect have to some extent varied and perhaps not always been completely respected.[14] However, the point here is that

[7] Case 39/72 Commission v. Italy [1973] ECR 101.
[8] Brealey and Hoskins p. 62.
[9] See Grad v. Finanzamt Traunstein, note 5 above, paragraphs 3-5.
[10] Case 127/73 BRT v. SABAM [1974] ECR 51.
[11] Case 36/74 Walrave v. Union Cycliste Internationale [1974] ECR 1405.
[12] Case 43/75 Defrenne v. Sabena [1976] ECR 455.
[13] Craig and De Búrca, *EU Law – Text, Cases and Materials* (1998), p. 176.
[14] An example of this is the Defrenne case, see note 12 above.

Community law confers rights upon individuals and that these rights can be invoked before national courts. The reason for introducing the concept of direct effect seems to have been the need to ensure that Member States really did comply with the provisions to which they had agreed. Direct effect was thus meant to be a mechanism for enhancing the effectiveness of Community law at the national level.[15]

Direct effect was thus introduced in order to enable individuals to enforce their rights against the Member States, and to some extent against other private parties. By involving individuals and the national courts, the Court of Justice could strengthen the force and effectiveness of Community provisions as well as taking some weight off the shoulders of the Commission and its enforcement function under Article 226 EC.[16] The Court held in Van Gend en Loos, that the procedures under Articles 226 and 227 were not sufficient measures in relation to Member State breaches of the Treaty. If these procedures were the only ones, there would be no legal protection of individual rights. Action by individuals in order to protect their rights was held to be an effective supervision in addition to the supervision under Articles 226 and 227. It is also possible to say that action under Articles 226 and 227 has a different aim than individual action based on direct effect. Individual action aims at protecting individual rights in a specific case. Intervention by Community institutions and other Member States aim at general and uniform observance of Community law, and is often more political in its nature.[17]

[15] Craig and De Búrca p. 174.
[16] Ibid p. 167.
[17] Barav, *Enforcement of Community Rights in the National Courts: The Case for Jurisdiction to Grant an Interim Relief,* (1989) 26 C.M.L.Rev. 369, p. 381.

2.3 Supremacy of Community Law

The main case in this area is Costa v. E.N.E.L.[18] In this case an Italian court asked the Court of Justice whether a number of Treaty provisions had direct effect. However, the important thing in this case is not the answers to the questions, but the reasoning in response to an argument of the Italian Government that the national court, which was obliged to apply national law, could not avail itself of Article 234 EC. The obligation to apply national law was held to make it impossible to use Article 234 in order to ask for a preliminary ruling. The Court of Justice stated that the Treaty had created its own legal system, which had become an integral part of national law and had to be applied by national courts. This integration into national law made it impossible for the Member States to give precedence to a unilateral and subsequent measure of national law. Instead Community law was to take precedence over national legislation. This meant that Article 234 EC was to be applied regardless of any domestic law, when questions about the interpretation of the Treaty arose.

Although the judgement in Costa v. E.N.E.L. was highly controversial, it was more or less accepted by the Member States. The reason has been held to be that the alternative to supremacy of Community law would have been a rapid erosion of the Community and that was not what the Member States wanted. The reasoning of the Court was built on a sort of hidden "or else" argument and the Member States, understanding the necessity of the principle, accepted the judgement.[19]

The doctrine of supremacy of Community law was developed further in the Simmenthal case.[20] An Italian judge found that there was a conflict between Community law and a subsequent national law. Under the Italian Constitution the

[18] Case 6/64 Costa v. E.N.E.L. [1964] ECR 585.
[19] Mancini, *The Making of a Constitution for Europe*, (1989) 26 C.M.L.Rev. 595, p. 600.
[20] Case 106/77 Amministrazione delle Finanze dello Stato v. Simmenthal SpA [1978] ECR 629.

question whether a certain law was unconstitutional could only be determined by the Constitutional court. The effect of this was that precedence could not be given to Community law since the conflicting national law could not be declared void by a lower national court. The judge did not know how to handle the situation and referred the case to the Court of Justice for a preliminary ruling. The Court stressed that direct applicability of Community law meant that its provisions had to be fully and uniformly applied in all the Member States from their entry into force and for as long as they continued to be in force. Furthermore, in the relationship between national and Community law, the latter was to take precedence over conflicting national provisions and also make it impossible to adopt new national legislation which was incompatible with Community law. The effect of this was that every national court was obliged to apply Community law in its entirety and protect rights which it conferred on individuals. Conflicting national provisions were, thus, to be set aside. The reason behind this was that any other solution would have impaired the effectiveness of Community law.

2.4 Indirect Effect

There are certain differences between directives and regulations. Under Article 249 EC the latter is held to be binding in its entirety, whereas the former binds Member States only as to the result to be achieved. Furthermore, regulations, but not directives, are directly applicable in the Member States. The effect of this is that a regulation can, if it has horizontal direct effect, be relied on in a dispute between private parties, just as any normal domestic provision. A directive on the other hand, has to be implemented into national legislation before it becomes binding between individuals. The question whether a directive could produce horizontal effects came up in the Marshall case.[21] Marshall was a female dietician employed by a British Health Authority. She was dismissed on the ground that she had passed the normal retiring age. The retiring age for women was lower

[21] Case 152/84 Marshall v. Southampton and South-West Hampshire Area Health Authority [1986] ECR 723.

than it was for men. Marshall thought that this was a case of discrimination on grounds of sex and brought an action. However, the national law on discrimination on grounds of sex did not cover matters relating to retirement. Marshall argued that the Equal Treatment Directive was applicable and wanted to rely on it in relation to the Health Authority. The question whether the directive could be relied on by an individual against another private party was referred to the Court of Justice. The Court answered the question in the negative. According to Article 249 EC, the binding nature of a directive existed only in relation to Member States. Therefore, a directive could not impose obligations on private parties and could not be relied on against an individual.[22] The rights, which a directive confers on an individual can thus only be relied on in relation to the Member State to which the directive is addressed.

The Marshall judgement seams to pose a real threat to the effectiveness of Community law since directives are often used in order to lay down Community rules. This is all the more so considering the protocol on the application of the principles of subsidiarity and proportionality, which was annexed to the EC Treaty by the Treaty of Amsterdam.[23] According to this protocol, directives are to be preferred to regulations and framework directives to detailed measures. This means that there will be a lot of directives, but the Marshall judgement seems to give, for example, private employers the possibility to breach Community law laid down in directives, and get away with it. When it comes to non-implemented directives there is no effective way for individuals to assert their rights against other individuals, and obtain a remedy. One solution can be to interpret the concept of the state very broadly, as has been done in the area of free movement of goods. That was exactly what the Court of Justice did in the Marshall case.[24] The Health Authority was held to be acting on behalf of the State and the provisions of the Equal Treatment Directive could be relied upon in relation to it.

[22] Ibid paragraph 48.
[23] O.J. C 340, 10/11/1997 p. 105.
[24] Marshall paragraphs 49,50.

This interpretation of the concept of a public body or state was used also in for example the Fratelli Costanzo[25] and Foster[26] cases.

Another way to give effect to directives in relations between private parties can be to give so to speak indirect effect to Community provisions. This solution was first used in the Von Colson case.[27] The case concerned remedies for discrimination on grounds of sex and did thus not directly concern horizontal effects of a directive. The plaintiffs, who were women, had applied for work at a German prison but two male applicants had been appointed instead. Von Colson and Kamann brought proceedings for discrimination on grounds of sex against the prison administrators. Their claim was to be appointed to a position in the prison or, in the alternative, to be awarded six months of salary. Under German law, the only remedy they could obtain was reimbursement of travelling expenses. The question then arose, whether the Equal Treatment Directive, which stated that judicial control had to be available, required that the plaintiffs were given positions in the prison. The Court of Justice held that the directive did not require any specific remedy under national law but that the remedies that did exist had to be adequate and effective. Furthermore, the Member States' obligation arising from a directive to achieve the result envisaged therein and their duty of cooperation and loyalty under Article 10 EC were held to be binding on all national authorities, including the courts. Therefore national courts were required to interpret national law, in particular law specifically introduced to implement the Equal Treatment Directive, in the light of the wording and the purpose of the Directive in order to achieve the result referred to in the third paragraph of Article 249 EC.[28] By its reasoning, the Court managed to enhance the effectiveness of the directive, although it had not yet been implemented.

[25] Case 103/88 Fratelli Costanzo v. Milano [1989] ECR 1839.
[26] Case C-188/89 Foster v. British Gas [1990] ECR I-3313.
[27] Case 14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] ECR 1891.
[28] Ibid paragraph 26.

The indirect effects of a directive were developed further in the Marleasing case.[29] It was a dispute between two private parties. There was a directive which was applicable to the situation but it had not yet been implemented into national law. The applicable national legislation had been enacted before the directive. The Spanish court referring the case asked whether the national legislation had to be interpreted in the light of the directive. The Court of Justice repeated its ruling from Von Colson and added that it did not matter that the national legislation had been adopted before the directive. National law, whether adopted before or after, had to be interpreted in the light of Community law.[30]

By requiring national courts to interpret national law in the light of a directive the Court secured the implementation of Community law in the Member States without having to give directives horizontal effects. The actual effect is more or less the same since provisions of a directive are, in practice, given effect in the Member States. The result in the Marleasing case would most certainly have been the same if the directive had been given horizontal direct effect.

However, there might be situations when indirect effects are not sufficient to secure the implementation of a directive. National law might, for example, be so clearly incompatible with Community law that an interpretation in the light of the latter just is not possible. Another example could be when there is no national law to interpret in accordance with a directive.[31] In such a case the effectiveness of Community law would be in great danger, at least in horizontal relations. Later on we will see that the Court solved this problem with the principle of state liability.

[29] Case C-106/89 Marleasing v. La Comercial Internacionale de Alimantacion [1990] ECR I-4135.
[30] Ibid paragraph 8.
[31] Steiner, *From direct effects to Francovich: shifting means of enforcement of Community Law*, (1993) 18 E.L.Rev. 3, p. 5-6.

2.5 Article 10 EC

Article 10 EC reads:
"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

Article 10 thus imposes two positive and one negative obligation on the Member States. It is a rather loosely formulated provision and it can therefore be interpreted very widely. The Court has done just that and used Article 10 in many important cases to stress that the Member States have certain obligations in relation to Community law. As we saw above, in section 2.4, Article 10 was used in order to oblige national courts to interpret national law in the light of Community law. Later on, we will also see that Article 10 plays an important role in judicial protection of individual rights and the state liability principle.

Article 10 can be said to impose two principal duties on national authorities. The first is a duty to, when necessary, make Community institutions, laws and policies work the way they are intended to work, thus to give full effect to Community law. The second is a more general duty and applies in every case. This second duty is a duty not to interfere with the way that the Community and its law are intended to work.[32]

The obligations arising under Article 10 have to be fulfilled by every national authority exercising governmental powers of any kind.[33] An example of this can

[32] Temple Lang, *The Duties of National Authorities Under Community Constitutional Law*, (1998) 23 E.L.Rev. 109, p. 111.
[33] Ibid p. 112.

be seen in the above mentioned Von Colson case where the Court said that the obligation under Article 10 to take all appropriate measures was binding on all the authorities of a Member State.[34]

2.6 Uniform Application of Community Law

Uniform application of Community law means that Community provisions are applied, and preferably also enforced, in the same way throughout the Community. It is quite clear that without uniform application the effectiveness of Community law would be in danger. The best way to reach uniformity is to give full effect to Community law in all the Member States. Thus, if the Member States comply with their obligation of cooperation in Article 10 EC, uniform application of Community law will be achieved. The Court of Justice stressed the importance of uniform application in the Costa v. E.N.E.L. case.[35] It held that the executive force of Community law could not vary from one state to another without jeopardizing the attainment of the objectives of the Treaty. Italy had tried to stop a national court from applying Article 234 EC but the Court of Justice did not tolerate this.

The Foto-Frost case is another example of how the Court of Justice has stressed the importance of uniformity of Community law.[36] The case concerned the question whether a national court could declare an act of the Community institutions invalid. The Court of Justice held that the requirement of uniform application was particularly important when the validity of a Community act was in question, and gave itself the exclusive right to annul such an act. The requirement of uniform application has also been given importance by the Court when laying down uniform conditions for the application of the remedies of interim

[34] Von Colson parargaph 26.
[35] See note 18 above.
[36] Case 314/85 Foto-Frost v. Hauptzollamt Lübeck-Ost [1987] ECR 4199.

relief and damages. Examples of this will be seen in the Zuckerfabrik[37] and Brasserie du Pêcheur[38] cases in chapter 5. At this stage it is enough to state that the full effectiveness of Community law can be secured by its uniform application in all the Member States.[39]

[37] Joined cases C-143/88 & C-92/89 Zuckerfabrik Süderdithmarschen v. Hauptzollamt Itzehoe [1991] ECR I-415.
[38] Joined cases C-46/93 & C-48/93 Brasserie du Pêcheur v. Germany, and R. v. Secretary of State for Transport ex parte Factortame and Others [1996] ECR I-1029.
[39] See Van Gerven, *Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?*, (1995) C.M.L.Rev. 679, p. 690-693.

3 Right to Judicial Control

3.1 Introduction

In the previous chapter we saw that Community law sometimes confers rights on individuals and that those rights can be relied upon before national courts, at least when they are rights in relation to the state. That is exactly what direct effect means; a right which can be relied on before a national court. The doctrines of direct effect and supremacy have been held to be indispensable to the uniform application of Community law, without which the internal market would not be able to function.[40] However, in order for Community law to be fully effective it is not enough that certain rights can be relied on. It is crucial that the individual relying on a Community right gets access to a court and that this court really tries the case. The Community right would be useless if there was no national court before which the right could be tried. In this chapter we will see how an individual with a claim for a Community right can rely on this right in order to get national courts to try whether the right has been infringed or not.

3.2 Right of Action

In Community law there is a right to judicial control when an individual's Community rights might have been infringed. There is no such right in the Treaty but it has been developed by the Court of Justice. The reason for this is to give effect and protection to the rights which Community law confers on individuals. The ECHR is a source of inspiration for Community law.[41] Articles 6 and 13 of the ECHR lay down the right to a fair trial and the right to judicial control. These

[40] Arnull, *Rights and Remedies: Restraint or Activism?*, in Lonbay and Biondi (Eds.) p. 16.
[41] Case 4/73 Nold v. Commission [1974] ECR 491.

are fundamental rights and the Court relied on these provisions in the Johnston case.[42]

Johnston was a female police officer in Northern Ireland. According to national law, only male police officers were allowed to wear fire arms. Because of this, female police officers were less useful and when Johnston's contract had run out she did not get it renewed. She challenged that decision and argued unlawful discrimination. The Chief Constable then issued a certificate which stated that the refusal to renew Johnston's contract was a justified derogation from the Northern Ireland Sex Discrimination Order. Under national law, such a certificate was held to be conclusive evidence that the derogation was justified and Johnston could thus not get the national court to try the matter. Johnston challenged the certificate as well and argued that it was incompatible with the Equal Treatment Directive. A reference for a preliminary ruling was made. Article 6 of the Directive told Member States to adopt measures in order to enable all persons, who considered themselves wronged by discrimination, to pursue their claims by judicial process. The Court of Justice held that the provision required the Member States to ensure that the rights conferred by the Directive could be effectively relied upon before national courts. The requirement of judicial control was held to be a general principle of law. This general principle was common to all the Member States and also laid down by Articles 6 and 13 of the ECHR. Article 6 of the Directive and the general principle of judicial control thus gave individuals the right to obtain an effective remedy in a competent court against measures which they considered to be contrary to the Directive. Article 6 was not sufficiently precise and unconditional to be relied on by an individual in order to get a sanction. However, it was given direct effect in so far as it required access to an effective judicial remedy. Member States were thus obliged to ensure effective judicial control when it comes to national law's compliance with Community law.[43]

[42] Case 222/84 Johnston v. Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651.
[43] Ibid paragraphs 17-19.

Another interesting case is the Heylens case.[44] Heylens was a Belgian national who worked as a football trainer in France. His Belgian trainer's diploma was however not recognised by the French authorities. That decision could not be challenged. Heylens continued to work as a trainer and was therefore prosecuted. The case came before the Court of Justice, which again referred to the right to an effective judicial remedy in Articles 6 and 13 of the ECHR. The Treaty gave Heylens a fundamental right to free access to employment. In order for that right to be effectively protected there had to be a remedy of a judicial nature available for Heylens against the national authority's decision refusing access to the French market.[45]

From the Borelli case[46] it is clear that the individual claiming a right has to make the existence of that right likely in order to obtain judicial control.[47] Borelli brought an action against a Commission decision not to grant a subsidy, which Borelli had applied for. The Commission decision was based on an opinion delivered by an Italian authority and that opinion was binding on the Commission. Therefore, the Court of Justice found that the action should be tried at the national level. The Court held that it was for the national courts to rule on the lawfulness of the national measure in question. This review should be undertaken on the same terms as a review of a definitive measure adopted by the same authority, which was capable of adversely affecting third parties. Borelli's action therefore had to be regarded as admissible even if the domestic rules of procedure did not allow an action to be brought in this case.[48]

[44] Case 222/86 UNECTEF v. Heylens [1987] ECR 4097.
[45] Ibid paragraph 14.
[46] Case C-97/91 Oleficio Borelli v. Commission [1992] ECR I-6313.
[47] Nergelius, *Förvaltningsprocess, Normprövning och Europarätt* (2000), p. 72.
[48] Paragraph 13 of the judgement.

3.3 Effective Judicial Protection

From the Johnston and Heylens cases it is clear that when an individual has a right under Community law and that right might have been infringed, he or she has the right to get the case tried before a national court.

The principle of effective judicial protection, as developed by the Court of Justice in Johnston and Heylens, means that it must be possible for an individual to get judicial control of any decision by a national authority, which deals with application of Community law at the national level.[49] National courts are obliged to ensure the effectiveness of Community law in general. This obligation can lead, in certain cases, to the setting aside of national provisions which might impede the effectiveness of Community law at the national level. This was exactly what happened in the Johnston and Heylens cases.

Thus, the principle of legal protection in Community law implies that an individual, in order to obtain protection of his or her rights, must have access to an independent and impartial court. However, the proceedings in this court and the remedies available to the individual fall under national legislation. Remedies and procedures are thus primarily a matter for the Member States.[50] This means that Community rights might not be enforced in a uniform manner throughout the Community and also that they might not get full protection under national law. This is of course a threat to the effectiveness of Community law. The ideal situation would be that Community rights were subject to the same procedural rules, obtained the same degree of protection and could lead to the same remedies in all the Member States. However, those are issues which are not regulated in Community law and until such legislation has been enacted there will be no complete uniformity and thus a threat to effectiveness. The Court of Justice has, however, taken action in order to secure effectiveness in the enforcement of

[49] Nergelius p. 39.

Community rights. In the following chapters we will see that the Court has intervened both in remedial and procedural matters and to some extent created Community remedies in order to ensure the effectiveness of Community law and the protection of individual rights. However, before turning to remedies and procedures we will look at a few national cases which illustrate the effect that the principle of effective judicial protection has had at the national level.

3.4 A Swedish Example

Sweden joined the Community in 1995. Before the accession there was some sort of a principle of effective judicial protection also in Sweden. However, two recent cases show that the Swedish legal system has been very influenced by Community law.

The first of these cases is the Stallknecht case.[51] Mrs Stallknecht claimed to be entitled to subsidies from the State under a Swedish agricultural regulation. The Supreme Court of Sweden held that Mrs Stallknecht's claim involved a civil right under the ECHR and therefore she had a right of action. However, the Supreme Court found that the claim should have been brought before an administrative court and therefore dismissed the case. The administrative courts, on the other hand, did not try the case since there was no law giving Mrs Stallknecht a right of action. Under Swedish law at the time, there had to be an express provision conferring competence on an administrative court in order for a case to get tried. The Supreme Administrative Court was not sure whether Mrs Stallknecht had a right of action under Article 6 of the ECHR and thus dismissed the case.[52]

Thus, although Mrs Stallknecht might have had a right of action, she was denied judicial protection. However, this gap in the judicial protection was filled by

[50] Van Gerven, *Of Rights, Remedies and Procedures*, (2000) 37 C.M.L.Rev. 501, at p. 521.
[51] NJA 1994 s. 657.
[52] RÅ 1995 ref. 58.

Community law in the Lassagård case.[53] This case also concerned the agricultural sector. The applicant relied on Community regulations in order to obtain certain subsidies. The relevant authority did not grant the subsidies and the applicant appealed against the decision. The appeal was dismissed on the ground that, under the applicable provisions, the decision in question could not be appealed against. The question whether Lassagård did have a right of action eventually came before the Supreme Administrative Court. The judgement was clearly influenced by the principle of effective judicial protection, as developed by the Court of Justice in Johnston, Heylens and Borelli. The Swedish court held that Lassagård did have a right of action according to the general principles of law developed by the Court of Justice, although the Swedish rules and the relevant EC regulations did not grant such a right. Community law was thus given precedence over Swedish law and Lassagård was granted a right of action.[54]

I think that the Stallknecht and Lassagård cases are good examples of how Community law is given effect in the Member States. In Stallknecht, Community law was not really relevant since the case arose before Sweden's accession to the Community. Therefore, it is a good illustration of Swedish law prior to accession. The Lassagård case was very similar. If it had been decided before Sweden's accession, the outcome may very well have been the same as in the Stallknecht case. However, due to the accession there was a new body of law to be taken into account. The principle of effective judicial protection had been fully developed by the Court of Justice and was clearly adopted by the Supreme Administrative Court. Community law was thus given full effect in the national system and the conflicting Swedish provision was set aside.

[53] RÅ 1997 ref. 65.
[54] Nergelius p. 77.

4 Remedies in National Courts

4.1 Introduction

So far, we have seen that Community law imposes an obligation on national authorities to provide effective judicial protection for an individual with a right based on Community law. The individual has a right to get an action, based on the right, tried by the national courts. Thus, first there is a right conferred on the individual by Community law, for example through direct effect of a Community provision. Secondly, there is a right to get the original right tried in a national court. However, the Court of Justice has gone even further and laid down the right to obtain specific remedies when certain conditions are fulfilled. This has not always been the case. In the beginning remedies were considered to be a matter for the national legal systems. Community law conferred rights on individuals but remedies intended to secure these rights were a matter for national law. Likewise, the procedural rules governing actions for that purpose were left to the legal systems of the Member States.

4.2 National Autonomy

In the beginning, remedies for Member State breaches of Community law were held to be a matter for the national legal orders. Community law contained no provisions in relation to individual action against a Member State. An early example in this area is the Humblet case.[55] Humblet was an official of the Community and was therefore exempted from tax on his incomes. However, Belgium considered these incomes when calculating the tax for Humblet's wife. This was held to be contrary to the ECSC Treaty. The Court of Justice said that it did not have the power to annul a legislative or administrative measure adopted

by a Member State. However, if the Court was to rule that a national measure was contrary to Community law, the Member State was obliged, by virtue of Article 86 ECSC[56], to make reparation for any unlawful consequences. In this case that would mean an obligation for Belgium to reimburse Humblet of any amounts which were wrongfully collected. The Court was however not able to order Belgium to reimburse Humblet and to pay compensatory interest. This was a matter for the national legislation. Thus, Humblet had a right to obtain a remedy. Belgium's obligation to make reparation for its infringement of Community provisions was derived from the loyalty clause in the Treaty. In this case the remedy would be to reimburse Humblet. However, the question of reparation fell under national law and could not be decided by the Court of Justice

The Lück case was the first case dealing with national remedies in relation to a breach of the E[E]C Treaty.[57] The Treaty provision in question was, what is now, Article 90 EC concerning discriminatory taxes on products from other Member States. The Court of Justice held that the Article had the effect of excluding the application of any national measure incompatible with it. However, the Article could not be held to lay down any specific remedy. That was a question for the national courts. When it came to protecting individual rights under Community law, national courts were competent. It was for the national court to choose the most appropriate of the various procedures available to it under national law. The national court referring the case had suggested a number of possible solutions under national law and asked the Court of Justice to indicate which solution to choose. According to the judgement, the choice was a matter for the national court, and not the Court of Justice. For example, it was for the national court to decide whether the whole tax was illegal or only the part of it that exceeded the amount allowed by Article 90. The only requirement imposed by Community law was that the solution, or remedy, should be the most appropriate one.

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[55] Case 6/60 Humblet v. Belgium [1960] ECR 559.
[56] Article 86 ECSC is the same as Article 10 EC.
[57] Case 34/67 Lück v. Hauptzollamt Köln-Rheinau [1968] ECR 245.

Another early, and interesting, case is the Salgoil case.[58] This case concerned breaches of the rules on free movement of goods. Salgoil was an Italian company which claimed to have been affected by the Italian State's infringement of Community provisions. The Court of Justice held that national authorities, and courts in particular, had to protect the interests of individual parties when Community provisions had been infringed. This was to be done by ensuring for direct and immediate protection of the individuals' interests, no matter what the existing relationship may be under national law between those interests and the public interest to which the question refers. It was for the national legal system to determine which court or tribunal that had jurisdiction to give the protection, and to decide how the individual position thus protected were to be classified. Again, the Court of Justice did not expressly say what kind of remedy that should be provided and under what circumstances. These matters were left to national law. However, the Court did say that national courts should provide direct and immediate protection of individuals' rights.

The strategy of the Court of Justice not to interfere with national rules on sanctions and remedies applied also to the reversed situation when individuals breached Community law. This area too was a matter for the Member States. The Amsterdam Bulb case is a good example.[59] The case concerned the common organization of the market in flower bulbs. The Netherlands had introduced additional legislation which was not incompatible with the common rules. The national legislation contained sanctions to be imposed on individuals for breaches of the common rules. The Court of Justice held that in the absence of any provision in the Community rules providing for specific sanctions, the Member States were competent to adopt appropriate sanctions. In fact, on the basis of Article 10 EC the Member States were obliged to impose sanctions for breaches of the Community provisions. At the same time the Article left the choice of which

[58] Case 13/68 Salgoil v. Italy [1968] ECR 453.

sanctions to impose to the Member States. Thus, once again Community law required that appropriate sanctions existed, but the Member States were free to choose what kind of sanctions to adopt.

Up to this point there had been relatively few cases concerning remedies under national law in relation to infringements of Community law. It was clear that remedies should exist but what kinds of remedies, and under what circumstances they were to be made available were left to the legal orders of the Member States. In the middle of the 1970's the Court started to formulate its position more clearly in what has been called the principle of national procedural autonomy.[60] In this principle the term procedural covers both purely procedural matters and more remedial questions, such as what remedies to apply and under what circumstances. In this chapter I will focus on the latter aspect of the matter. The procedural part will be dealt with in chapter 6.

The principle of national procedural autonomy was first formulated in the Rewe-Zentralfinanz[61] and Comet[62] cases, which were decided on the same day. Both cases concerned restitution of charges imposed contrary to Community law. Since the reasoning of the Court of Justice was more or less identical in the cases I will focus on the Rewe-Zentralfinanz case. Rewe-Zentralfinanz was a German company importing fruit from France. In association with such import it had to pay certain German charges for inspection. These charges were subsequently found by the Court of Justice to be contrary to the Treaty.[63] The importer then brought an action in Germany in order to get its money back from the German authorities. The case came before the German Federal Administrative Court,

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[59] Case 50/76 Amsterdam Bulb v. Produktschap voor Siergewassen [1977] ECR 137.
[60] See for example Craig and De Búrca p. 214, Hoskins, *Tilting the Balance: Supremacy and National Procedural Rules*, (1996) 21 E.L.Rev. 365.
[61] Case 33/76 Rewe-Zentralfinanz v. Landwirtschaftskammer für das Saarland [1976] ECR 1989.
[62] Case 45/76 Comet BV v. Produktschap voor Siergewassen [1976] ECR 2043.
[63] Case 39/73 Rewe-Zentralfinanz v. Direktor der Landwirtschaftskammer Westfalen-Lippe [1973] ECR 1039.

which found that, under national procedural rules, the time limit for challenging an administrative measure had passed. The German court decided to ask the Court of Justice whether Community law required that the applicant should be reimbursed. In other words, whether there was a right under Community law to obtain the remedy of restitution. The Court of Justice started off by stating that, in accordance with the principle of cooperation laid down in Article 10 EC, national courts were obliged to ensure the legal protection which individuals derive from the direct effect of Community provisions. In the absence of Community rules in the matter it was for the domestic legal systems to designate the courts having jurisdiction and to determine the procedural conditions governing actions intended to ensure the protection of individual rights conferred by Community law. Such conditions could, however, not be less favourable than those relating to similar actions in purely national matters. The Court pointed to the possibilities of harmonization under, what is now, Articles 94, 95 and 308 EC. However, in the absence of such harmonization, rights conferred by Community law had to be exercised before national courts in accordance with the conditions laid down by national rules. This situation would change only if the national rules made it impossible in practice to exercise a right conferred by Community law, a right which national courts were obliged to protect. The Court's conclusion was that reasonable national time limits were compatible with Community law, since they were based on legal certainty.

The Rewe-Zentralfinanz case seems to deal mainly with the procedural aspects of remedies in national courts. However, it is also important from a remedy point of view, since it lays down the position of the Court of Justice in relation to remedies and procedures in national courts. At the time of the judgement the position was that both remedies for breaches of EC law and procedural rules governing actions intended to obtain a remedy were matters for the legal systems of the Member States. Community law would interfere only when Community actions were treated less favourably than purely domestic actions, or when national law made it

impossible in practice to exercise a right conferred by Community law. The focus was clearly on procedural matters, such as time limits. This should mean that at that stage of Community law there was no intention to regulate remedies or to give to individuals other remedies than the ones existing under national law. This position was taken by the Court of Justice in the Rewe-Handelsgesellschaft case.[64] Some German companies arranged certain 'butter-buying cruises' during which it was possible to do tax-free shopping. Rewe, a local wholesaler, considered itself to be at a competitive disadvantage compared with the companies that arranged the cruises. Rewe considered that German law was contrary to Community law in so far as it allowed the cruises, and brought an action. The purpose of the action was to obtain a remedy which would compel national authorities to observe Community law and therefore be forced to take action against the 'butter-buying cruises'. That kind of remedy did not exist in German law, at least not in relation to the situation in question. The Court of Justice declared that Community law was not intended to create new remedies in the national courts to ensure observance of Community law, other than those already laid down by national law. Thus, no new remedy could be created on the basis of Community law. However, the system of legal protection established by the Treaty, required that every national type of action had to be available also for the purpose of ensuring observance of Community provisions having direct effect. Conditions concerning admissibility and procedure were to be the same as for actions intended to ensure observance of national law. Thus, from Rewe-Handelsgesellschaft it is clear that Community law was originally not intended to create any new remedies in national courts in order to deal with breaches of Community law. It is also clear that every national remedy must be available to an individual bringing a Community based action.

[64] Case 158/80 Rewe-Handelsgesellschaft v. Hauptzollamt Kiel [1981] ECR 1805.

4.3 Adequate Sanctions

When it comes to remedies and sanctions for breaches of Community law, the case law of the Court of Justice follows to separate lines of reasoning. One focuses on the quality of the sanctions provided by national law. The other line of case law deals with the availability of remedies in the Member States. It is based on effective judicial protection and the full effect of Community law, and has resulted in certain specific remedies based directly on Community law.[65] In this section I will focus on the quality of national sanctions. The remedies as such will be dealt with in the next chapter.

As we saw above, the Court of Justice said in the Salgoil case that national courts had to give direct and immediate protection to individual rights. In Lück and Amsterdam Bulb it was for the national court to choose the most appropriate of the remedies available to it. Thus, appropriate remedies were to be provided by national courts but they had a considerable discretion when it came to the actual choice of a remedy.

Starting with the Von Colson[66] case, the Court of Justice began to provide some directions as to the quality that was required of sanctions or remedies imposed under national law in order for them to be appropriate. In the Von Colson case the Court said that the sanction provided for by national law, in this case it was compensation, had to be such as to guarantee real and effective judicial protection and it had to have a real deterrent effect. The Equal Treatment Directive as such did not require for any specific remedy to be provided but the remedy chosen by the Member State when implementing the Directive had to guarantee real and effective judicial protection.[67] The basis for this was found in the purpose of the Equal Treatment Directive and its Article 6, which provided for judicial control.

[65] Prechal, *EC Requirements for an Effective Remedy*, in Lonbay and Biondi (Eds.) p. 4-5.
[66] See note 27 above.
[67] Von Colson paragraph 23.

The Member States were free to choose what kind of remedy to impose. However, if the Member State had chosen compensation, then in order to ensure that it was effective and had a deterrent effect, the compensation had to be adequate in relation to the damage sustained. Purely nominal compensation, for example reimbursement only of the expenses incurred in connection with the application, would not be enough.[68] The Directive did not proscribe any specific sanction but the Court mentioned actual employment and financial compensation as sufficiently effective remedies in order to achieve the objective of the Directive.

On the same day as the Court of Justice decided the Von Colson case it also gave a ruling in the Harz case.[69] The Harz case was also an equal treatment case and was referred to the Court of Justice by a German court. The only sanction provided for by German law was reimbursement of travel expenses. The Court of Justice repeated its ruling from the Von Colson case and held that such a remedy was not appropriate. It also stressed that the Equal Treatment Directive did not provide for any specific remedy, and therefore the employer could not be required to give the applicant a position.

The approach taken by the Court of Justice in the Von Colson and Harz cases was followed also in subsequent equal treatment cases. In Dekker, where a woman had not been appointed to a position on the sole ground that she was pregnant, the Court of Justice confirmed that the sanction chosen under Article 6 of the Equal Treatment Directive had to be such as to guarantee real and effective protection.[70] Furthermore, it had to have a real deterrent effect on the employer. In Marshall II the Court was asked whether national legislation setting an upper limit to compensation for discrimination on grounds of sex, and not allowing for interest to be paid on the compensation, was compatible with the Equal

[68] Ibid paragraph 28.
[69] Case 79/83 Dorit Harz v. Deutsche Tradax [1984] ECR 1921.
[70] Case C-177/88 Dekker v. VJV Centrum [1990] ECR I-3941.

Treatment Directive.[71] The case concerned an action for compensation following the dismissal which gave rise to the first Marshall case.[72] The Court held that an individual who had been discriminated against was entitled to get adequate reparation. An upper limit to the reparation was not sufficient since it limited the amount of compensation to a certain amount. There was no guarantee that the maximum amount would always be sufficient reparation for any case of discrimination. For the same reason it had to be possible to order the payment of interest on compensation until the time when the sum awarded was actually paid.

The quality of national sanctions applicable to breaches of Community law has come up also in cases concerning the implementation of regulations. The question first arose in the Greek Maize case.[73] The Commission brought an action against Greece for not having dealt with breaches of certain regulations concerning inter alia harmonization of the cereal market. The Court held that when Community legislation did not expressly provide any penalty for infringement, Article 10 EC required the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. The choice of sanctions was thus left to the Member States but with some requirements imposed by Community law. First of all, infringements of Community law had to be dealt with under similar conditions, both procedural and substantive, as were applicable in the case of infringement of national law. Secondly, the penalty had to be effective, proportionate and dissuasive.[74] The Court subsequently repeated its reasoning in the Hansen[75] and Vandevenne[76] cases, both dealing with enforcement of regulations. The interesting point in the area of enforcement of regulations is that the Court based its reasoning on Article 10 EC instead of some provision in the

[71] Case C-27/91 Marshall v. Southampton and South West Hampshire Area Health Authority [1993] ECR I-4367.
[72] See note 21 above.
[73] Case 68/88 Commission v. Greece [1989] ECR 2965.
[74] Ibid paragraphs 23 and 24.
[75] Case 326/88 Anklagemyndigheden v. Hansen [1990] ECR I-2911, paragraph 17.
[76] Case C-7/90 Criminal proceedings against Paul Vandevenne and Others [1991] ECR I-4371, paragraph 11.

relevant legislative act, as it did in the cases concerning the Equal Treatment Directive. In two later cases between the Commission and the United Kingdom, the Court relied on Article 10 EC also in respect of implementation of directives.[77] In both cases the Court repeated the arguments laid down in Greek Maize and held that the sanctions laid down in national law were not sufficiently deterrent in relation to the infringement of Community law. In both cases the United Kingdom was found to be in breach of Article 10 EC.

National remedies for breaches of Community law thus have to be effective, dissuasive and proportionate in order to be adequate. This requirement of effective remedies can be reached in basically two different ways. One is to interpret some specific provision in a Community legislative act. An example of this is the interpretation of the Equal Treatment Directive in Von Colson. The other way, which was introduced in the Greek Maize case, is to rely directly on Article 10 EC as the basis for requiring effective remedies.[78]

4.4 Disapplication of National Law

Before going into the specific remedies imposed by Community law it seems appropriate to deal with the more general remedy of disapplication, or setting aside, of provisions of national law. This remedy is used when national provisions are incompatible with Community law and therefore stand in the way of its effectiveness. The basis for setting aside provisions of national law can be found in the supremacy of Community law and the requirement of effectiveness. The principle of disapplication of national law was first formulated in the Simmenthal case.[79] The Court held that every national court had to apply Community law in its entirety and protect rights which it conferred on individuals. This meant that

[77] Cases C-382/92 Commission v. United Kingdom [1994] ECR I-2435, C-383/92 Commission v. United Kingdom [1994] ECR I-2479.
[78] Prechal in Lonbay and Biondi (Eds.) p. 6.
[79] See note 20 above.

conflicting provisions had to be set aside. Any other solution would have the effect of impairing the effectiveness of Community law.[80] The Community provision in question was directly applicable in the Member States and therefore its enforcement relied only on national courts giving effect to it. The effectiveness of Community law would clearly be in danger if a national court was prevented from applying it due to provisions of national law. The national provision in the Simmenthal case said that only the Constitutional Court was able to declare a provision of national law invalid. The lower court was therefore, under national law, unable to set aside the national provision which was in conflict with Community law.

The Simmenthal case was rather theoretic in nature, but of course very important to the effectiveness of Community law. Disapplication of national law has however been relevant also in cases where individual interests have been more obvious. The Becker case is an example of this.[81] In this case Germany had not implemented a directive dealing with tax issues. Becker wanted her tax to be calculated in accordance with the provisions of the directive. The Court made an "estoppel" argument and held that the provisions of the directive could, if they were unconditional and sufficiently precise, be relied on against the State if the time for implementing the directive had expired. Becker could thus rely on the directly effective provisions of the directive in order to get the conflicting national provisions set aside.

Another important case in the area of setting aside provisions of national law is the Factortame case.[82] Factortame Ltd and several other companies, mainly owned by Spanish nationals, were incorporated under British law and owned or operated fishing vessels registered in the United Kingdom, in accordance with the Merchant Shipping Act. In 1988 the Merchant Shipping Act was amended in

[80] Ibid paragraphs 21,22.
[81] See note 5 above.

order to prevent so called "quota-hopping".[83] The practical effect of the national law was that only British nationals could be assigned fishing quotas. Factortame did not fulfil the requirements for registration under the new legislation and challenged it in the British courts. Factortame also applied for interim relief from the national legislation until the time when a final judgement was given. The question of interim relief was thus the first to come up. In the United Kingdom there is a presumption that an Act of Parliament is in conformity with Community law until a decision on its compatibility has been given. Likewise, there is an old common law rule that interim relief cannot be granted against the Crown. These national rules made it impossible to grant interim relief to Factortame under national law. The question then arose whether Community law required that national courts granted interim relief in this case. The substantive conditions for granting interim relief under national law, risk of irreparable damage and likely to be successful in the main proceedings, were fulfilled. However, under the circumstances of the case the national courts did not have the power to grant interim relief. The Court of Justice held that, in accordance with the principle of cooperation in Article 10 EC, it was for the national courts to ensure the legal protection which individuals derive from the direct effect of provisions of Community law. It also repeated its statement from Simmenthal that national provisions which might impair the effectiveness of Community law had to be set aside. Furthermore, the full effectiveness of Community law would be clearly impaired if a national court was prevented, by national law, from granting interim relief in a case concerning rights conferred by Community law. Interim relief had to be granted in order to ensure the full effectiveness of the judgement to be given on the substance of the case, which concerned the existence of a right under Community law. The conclusion was that when a national court considered, in a

[82] Case C-213/89 The Queen v. Secretary of State for Transport ex parte: Factortame Ltd and Others [1990] ECR I-2433.

[83] Quota-hopping means, in this case, that foreign companies registered under British law and obtained fishing quotas in the United Kingdom. When these quotas were filled the companies registered in another country and obtained quotas there. This was not popular in the United Kingdom.

case concerning Community law, that the only obstacle to granting interim relief was a rule of national law, it had to set aside that rule.[84]

The Factortame ruling comes very close to creating a new remedy in national courts. Whether it did in fact do that or not will be discussed in the next chapter. At this point it is enough to note that the Court of Justice ordered national law to be set aside in order to ensure the full effectiveness of Community law. If interim relief had not been granted, the ruling on the substance of the case would have lost its practical effect. The damage suffered by Factortame would have been irreparable,[85] and a subsequent ruling to the effect that Factortame did in fact have a right to be assigned a fishing quota would not have made any difference. The principle of state liability for breaches of Community law was not established yet and Factortame would therefore have been unable to rely on any remedy in order to obtain compensation, had things turned out differently. The right conferred on it by Community law would have been totally useless. The Court of Justice thus secured the effectiveness of its later ruling on the substance of the case by requiring that interim relief was granted. At the same time the effectiveness of Community law was secured by giving it precedence over national law, which was even constitutional in nature.[86]

The Borelli case is also interesting from the point of view of disapplying national law.[87] The principle of effective judicial protection, as established by the Court in the Johnston and Heylens cases, was held to confer a right on individuals to obtain judicial control of any decision of a national authority. In the Borelli case this principle had the effect of giving Borelli a right of action. The relevant provisions of national law, which did not allow for an action to be brought, had to be set aside. Borelli's action was thus to be considered as admissible although it was not admissible under national law. The Lassagård case is a good example of

[84] Factortame paragraphs 19-21.
[85] Ibid paragraph 13.
[86] Prechal in Lonbay and Biondi (Eds.) p. 7.

a national court disapplying provisions of national law in order to give effect to the Community law requirement of judicial control.[88]

Disapplication of provisions of national law affects every aspect of the national legal system. From the Simmenthal case it is clear that all kinds of Community law takes precedence over all kinds of national law. This means that as soon as any national provision, irrespective of its status in the domestic legal order, is incompatible with Community law it has to be set aside. In Borelli, the disapplication gave the private party a right of action before national courts. In Factortame the applicants were to be granted a remedy which could not be granted under national law. At the same time, the provision to be set aside was of a very high rank. When we come to the chapter on procedural rules we will see that the effectiveness of Community law has, occasionally, required national procedural rules to be set aside. At this stage the San Giorgio case can be mentioned as an example.[89] In this case the Court of Justice ruled that a national rule of evidence had to be set aside since it made it almost impossible to rely on the right conferred by Community law.

The importance of the remedy of disapplication of national law seems thus to be huge. It is also a crucial remedy in order to secure the full effectiveness of Community law. The principle of effective judicial protection can, in this regard, be said to require the Member States to ensure that Community law rights can be asserted in national courts, and also to oblige national judges to set aside specific domestic rules which make it too difficult to rely on the right in question.[90]

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[87] See note 46 above.
[88] See note 53 above.
[89] Case 199/82 Amministrazione delle Finanze dello Stato v. San Giorgio [1983] ECR 3595.
[90] Caranta, *Judicial Protection Against Member States: A New Jus Commune takes shape*, (1995) C.M.L.Rev. 703, p. 706.

5 Specific Remedies

5.1 Introduction

As we have seen above, Community rights can be relied on in order to get national courts to try the validity of decisions of national authorities. Community law gives an individual, with a claim based on Community law, a right of action in national courts. The right conferred by Community law would be totally ineffective if it was not possible for the individual to rely on it in relation to a Member State. Furthermore, Community law requires national law to be set aside when there is a conflict between the two. Community law takes precedence and requires that conflicting national provisions are disapplied. Again the basis is the effectiveness of Community law. All this can be traced back to the Van Gend en Loos case where the Court of Justice explained that Community law was able to produce direct effects and confer individual rights which national courts had to protect. Giving the individual access to a court is naturally a necessary initial step when protecting his or her rights. At the same time it is crucial that national provisions which work against this protection are set aside. In as much as a national provision is contrary to the judicial protection of the individual's right, it is also impairing the effectiveness of Community law since it does not allow for the Community right to be given effect. Disapplying this national provision is then a rather natural step to take when striving towards the effectiveness of Community law.

However, disapplication of national rules does not automatically lead to uniform application of Community law. Disapplication eliminates rules which are incompatible with directly effective Community law but it does not lead to harmonization of national legal provisions. This poses a threat to the uniform application of Community law since individual Community rights, which are

indeed uniform since they have the same source, are enforced in a non uniform manner in the different Member States. According to the Court of Justice, uniform application of Community law is a fundamental requirement of the Community legal order.[91] If individual rights are not enforced in a uniform way, they get different protection in the various Member States and, consequently, Community law is not fully effective throughout the Community. It is also possible to say that there is a need for harmonized legal remedies when it comes to protecting the individuals' Community rights, because without sufficiently harmonized legal remedies, uniform rights cannot be adequately secured throughout the Community.[92]

In this chapter we will see how the Court of Justice has laid down uniform rules concerning remedies. These remedies are to be applied by national courts in cases concerning breaches of Community law. Uniform Community remedies are the best way to secure the full effectiveness and uniformity of Community law. The rights conferred by Community law are of course uniform since they are derived from the same source, Community law. By laying down uniform rules for their protection the Court has tried to secure their uniform and effective enforcement in the Member States.

5.2 Restitution

Restitution means that an individual who has, contrary to Community law, been obliged to pay money to a Member State, has an opportunity of getting the money back. The main rule is that an individual has the right to obtain the remedy of restitution when money has been paid contrary to Community law. The right to restitution has been recognised by the Court of Justice in various situations. In Rewe-Zentralfinanz[93] the private party was given a right to restitution when the

[91] Zuckerfabrik, see note 37 above, paragraph 26.
[92] Van Gerven (1995) p. 690.
[93] See note 61 above.

Member State had collected an import duty, which was contrary to Article 25 EC. In Express Dairy Foods the Court held that there was a right of restitution when a Member State had collected money on behalf of the Community, under a Community measure which was subsequently held to be invalid.[94]

When money has been paid contrary to a directly effective provision of Community law the right to restitution is based on Article 10 EC.[95] Under Article 10 the Member States are obliged to give effect to Community law. The Court held in Rewe-Zentralfinanz that under Article 10, it is the national courts which are entrusted with ensuring the legal protection which individuals derive from directly effective provisions of Community law.[96] This means that if money has been paid contrary to directly effective Community law, there has to be a right for the individual to be able to recover the money. Without that right, or remedy, the effectiveness of the relevant provision would be seriously impaired. The relevant Member State would also have failed to protect the individual right conferred by Community law. Therefore, the remedy of restitution of money paid contrary to Community law is necessary for the effectiveness of Community law.

The first important case in the area of restitution, and indeed in the area of remedies in national courts, was the Rewe-Zentralfinanz case. As can be seen above, the case dealt with a customs duty which was levied in breach of Article 25 EC. The actual right of restitution was not really discussed in the case. Perhaps this was because the referring court had no doubts about the company's right to recover the money. The question in the case was of a more procedural nature. What the Court of Justice did say was that it was for the national courts to ensure the legal protection of individual rights under Community law. The procedural matters were then left to the national legal system, with the reservation that claims under Community law could not be treated less favourably than similar domestic

[94] Case 130/79 Express Dairy Foods v. IBAP [1980] ECR 1887.
[95] Brealey and Hoskins p. 165.
[96] Rewe-Zentralfinanz paragraph 5.

claims, and the procedural conditions under national law could not be such as to make it impossible in practice to exercise the right conferred by Community law. Thus, there was a right to obtain the remedy of restitution, but the claim was to be governed by national procedural law. In the next chapter we will see why Rewe-Zentralfinanz did not succeed in its claim.

The Court of Justice stated in the Van Gend en Loos case that Community law can confer both rights and obligations on individuals.[97] In order for an obligation conferred by Community law to be effective, it is necessary that the remedy of restitution works also in the other direction. Thus, when a Member State has mistakenly paid out money to an individual, the State has a right of restitution. Article 10 EC obliges national courts to ensure that individuals comply with their obligations under Community law.[98] An example of this is the Ferwerda case.[99]

In the Just case the Court of Justice made it clear that the right of restitution is not absolute in the sense that the individual is always entitled to get the money back.[100] In Just the Member State was allowed to argue unjust enrichment as a defence against the individual's claim to be reimbursed of money paid contrary to Community law. Thus, when the cost of an unlawful charge has been passed on to someone else, the national court can take this into consideration and, if it is possible under national law, refuse restitution.

The San Giorgio case is another example of the possibility to use the defence of unjust enrichment.[101] San Giorgio was an Italian company which had paid health inspection charges to the Italian authorities. These charges were contrary to Community law on free movement of goods, and San Giorgio brought an action for restitution. Italian law recognized a right to restitution where charges had been

[97] See note 3 above.
[98] Brealey and Hoskins p. 166.
[99] Case 265/78 Ferwerda v. Produktschap voor Vee en Vlees [1980] ECR 617.
[100] Case 68/79 Hans Just v. Danish Ministry for Fiscal Affairs [1980] ECR 501.
[101] See note 89 above.

levied contrary to Community law. However, restitution was not possible when the cost of the charges had been passed on to others. The Court of Justice started off by saying that the right to restitution was a consequence of, and an adjunct to, the rights conferred on individuals by Community law. A claim for restitution was to be governed by national law in so far as it was not treated less favourably than similar domestic claims or made virtually impossible to exercise. The Court then stated that Community law did not prevent national rules from prohibiting restitution when it would constitute unjust enrichment on the part of the recipient. Thus, national provisions which prevented restitution of taxes, charges and duties levied in breach of Community law would not be contrary to Community law when it was established that the person required to pay the charges actually had passed them on to other persons. The case did not end there. The remedial part was settled but the procedural aspects were still to be considered. These will be dealt with in the next chapter.

Thus, to use the words of the Court in its Comateb judgement, entitlement to repayment of charges levied by a Member State in breach of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting such charges.[102] The Member State is therefore in principle required to repay charges levied in breach of Community law. The possibility to refuse restitution when the charges have been passed on to someone else is an exception to this principle. The exception can be relied on only where it is established that the charge has been borne in its entirety by another person and that reimbursement of the trader would constitute unjust enrichment. This requirement of restitution was quite smoothly accepted by the Member States. Perhaps this was because there already existed some form of action for restitution in the Member States, and, in particular, there was no direct clash with some constitutional or other principles, as was the case in, for instance, Factortame.[103]

[102] Joined cases C-192/95 – C-218/95 Comateb and Others v. Directeur Général des Duoanes et Droits Indirects [1997] ECR I-165, paragraph 20.
[103] Prechal, in Lonbay and Biondi (Eds.) p. 7.

There is some Community legislation in the area of restitution of duties.[104] This legislation is applicable only to taxes, charges, levies and duties created by various Community provisions and collected by the Member States on behalf of the Community. Consequently it does not apply to national taxes, charges and duties, even when they are levied in breach of Community law.

5.3 Interim Relief

The second specific remedy imposed by Community law is the remedy of interim relief. Interim relief can be said to be a procedural right, in the sense that it is intended to ensure the effectiveness of substantive proceedings commenced before a court.[105] The remedy of interim relief has been considered to be a corollary of the existence of directly effective rights.[106] In order for a possible right under Community law not to be wholly ineffective it is necessary that an individual can ask a court to grant interim relief to protect his or her position while the content of the right in question is being established. If such protection was not possible, the individual would not be able to effectively rely on his or her right, once it is fully established.

The first case in the area of interim relief is the Factortame ruling.[107] The applicants in the case relied on their right to free movement and the freedom of establishment under the EC Treaty. There was a risk that they would suffer irreparable damage while the exact content of their rights were being established by the national courts and the Court of Justice. To protect the position they might be entitled to under Community law, to be registered as fishing companies in the United Kingdom, they applied for interim relief from the national law. Such interim

[104] Council Regulation No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (O.J. 1979 L 175, p. 1).
[105] Van Gerven (2000) p. 515.
[106] Arnull, *Rights and Remedies: Restraint or Activism?*, in Lonbay and Biondi (Eds.) p. 16.

relief would mean that the applicants could pursue fishing activities while the case was being decided. As can be seen above, the substantive conditions in national law for interim relief to be granted were fulfilled. However, the national courts did not have the power, under national law, to grant the application. The Court of Justice focused on the effectiveness of Community law together with the principle of cooperation in Article 10 EC, and held that the national court had to grant the relief. The national rule standing in the way of the effectiveness of Community law, and the right granted thereby, had to be set aside.

It is not entirely clear whether the Court of Justice, in Factortame, created a new remedy or merely relied on the general remedy of disapplication of national law. The Advocate General Tesauro held in his opinion that is was merely a question of setting aside provisions of national law.[108] However, the House of Lords, which was the referring court, held that it, under national law, simply did not have the power to grant interim relief against the Crown. From this point of view the judgement can also be seen as requiring the national court to provide a remedy, and consequently to create a jurisdiction, which did not exist under national law.[109] That would mean that the Court of Justice did not follow its reasoning in the Rewe-Handelsgesellschaft case where it held that Community law was not intended to create new remedies in the national courts.[110] It has even been held that the Factortame ruling buried the principle laid down in Rewe-Handelsgesellschaft.[111] However, the remedy of interim relief was clearly not unknown in the United Kingdom before the Factortame case. On the other hand, it was not an option in relation to Acts of Parliament. Thus, the remedy existed in the United Kingdom but not in relation to Acts of Parliament. Perhaps the best way to put it is to say that the Court of Justice required the House of Lords to

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[107] See note 82 above.
[108] See [1990] ECR I-2462.
[109] Arnull, in Lonbay and Biondi (Eds.) p. 17, see also Curtin, *Directives: The Effectiveness of Judicial Protection of Individual Rights*, (1990) 27 C.M.L.Rev. 709, at p. 736.
[110] See note 64 above.
[111] Ward, p. 209.

broaden the scope of a national remedy in order to secure the effectiveness of Community law.[112] An interesting point here is that after Factortame, the House of Lords has granted interim relief against the Crown also in cases of a purely domestic nature. The reason for this might be that otherwise individuals relying on Community based rights would be in a better position than individuals with claims based on rights under national law.[113]

The consequence of Factortame is that the remedy of interim relief must be available for an individual trying to enforce a Community based right against a Member State. Thus, the remedy is uniform in the sense that it has to be available to any individual relying on a right conferred by Community law. The House of Lords also asked the Court of Justice to explain under what substantive conditions the remedy had to be made available. The Court of Justice did not answer this question so the conditions for granting interim relief were not established in a uniform manner throughout the Community. The Advocate General Tesauro had proposed a ruling which referred to the conditions under national law. Such a ruling would be similar to the Rewe-Zentralfinanz ruling by referring to national law with the conditions that Community based claims should not be treated less favourably than national claims and not be virtually impossible to exercise.[114] However, the Court of Justice did not deal with the question at all and therefore there was a uniform remedy under Community law but no uniform conditions for its application.

In the Zuckerfabrik case the Court of Justice did answer the question as to which criteria a national court should apply when granting interim relief.[115] This time the case did not concern the compatibility with Community law of national law but instead a national measure based on a Community regulation. The national measure was adopted on the basis of the Community regulation, which concerned

[112] Van Gerven (1995) p. 693.
[113] Arnull, in Lonbay and Biondi (Eds.) p. 18.
[114] See Rewe-Zentralfinanz paragraph 5.

the sugar market, and was intended to give effect to it. The applicants challenged the regulation and applied for interim relief from the national measure. In practice, the interim relief sought would have the effect of indirectly suspending also the regulation. The national court asked the Court of Justice whether it could suspend the enforcement of the national measure and if so, under what conditions such suspension was to be granted. The Court of Justice held that when national authorities were responsible for the administrative implementation of Community regulations, the legal protection guaranteed by Community law meant that individuals had a right to challenge the legality of such regulations before national courts and try to get the case referred to the Court of Justice.[116] That right would have been in danger if it was not possible for the individuals to obtain interim relief. According to the Foto-Frost case, only the Court of Justice has jurisdiction to declare that a Community regulation is invalid.[117] While a case regarding the validity of a regulation was pending before the Court of Justice, individuals challenging that regulation were entitled, under certain conditions, to obtain a decision suspending the effects of the regulation in relation to themselves. The Court then referred to the possibility, under Article 242 EC, of granting interim relief in relation to an action for annulment of a Community measure. The coherence of the system of interim legal protection required that national courts should be able to order suspension of enforcement of a national administrative measure based on a Community regulation, when the legality of that regulation was challenged.[118] After referring to the Factortame ruling, the Court of Justice held that the interim legal protection for individuals before national courts under Community law had to be the same, irrespective of whether they contested the compatibility of national legal provisions with Community law or the validity of secondary Community law. This was so because of the fact that in both situations the dispute would be based on Community law itself.[119]

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[115] See note 37 above.
[116] Zuckerfabrik paragraph 16.
[117] See note 36 above.
[118] Zuckerfabrik paragraphs 17,18.
[119] Ibid paragraph 20.

The main importance of the Zuckerfabrik case lies in the fact that the Court of Justice not only held that interim measures should be available, but also specified the conditions under which such relief was to be granted. In effect, the Court of Justice laid down uniform conditions for the remedy of interim relief in relation to a national measure based on Community law. The Court held that the different rules in the different Member States posed a threat to the uniformity of Community law and went on to hold that uniform application was a fundamental requirement of the Community legal order. Therefore the granting of interim relief, although governed by national law when it came to procedural matters, had to be subject to conditions which were uniform for all the Member States.[120] The Court then drew a parallel to Article 242 and explained that the conditions for interim relief applied by the Court of Justice itself had to be applied also by national courts. Since the case involved something similar to a national court's power to suspend the enforcement of Community law, the Court of Justice laid down very strict conditions. Interim relief could be granted by a national court only:

(i) if that court had serious doubts as to the validity of the Community measure and, if the question of validity had not already been brought to the Court of Justice, referred that question itself;

(ii) if there was urgency and a threat of serious and irreparable damage to the applicant;

(iii) and if the national court took due account of the Community's interests.[121]

Thus, national courts were held to have the power to suspend the enforcement of a national administrative measure adopted on the basis of a Community regulation. In practice this was the same as suspending the enforcement of the regulation in itself since the national measure was implementing the regulation. This is interesting in relation to the Foto-Frost case where the Court of Justice

[120] Ibid paragraphs 25,26.

declared itself to have exclusive competence to rule on the validity of Community law. On the other hand, it is even more interesting in relation to individual rights under the Treaty. In effect, the judicial protection of individuals can be said to prevail over other Community law, or at least be presumed to prevail. Then again, it is rather obvious that individual rights should be protected against a possibly invalid measure of Community law. In my opinion, individual rights should get the same protection in national courts regardless of the nature of the law posing a threat to them, whether national or Community. The effectiveness of individual rights is thus heavily secured whereas the effectiveness of Community law as such might be a bit compromised if the measure in question should turn out to be valid after all. However, the strict conditions laid down by the Court, should have the effect that the national court is likely to make the right decision. An illustration of the strictness of the conditions can be found in the Court's statement that purely financial loss cannot be regarded as irreparable.[122]

The next case to consider is the Atlanta case.[123] This case differs from the Zuckerfabrik in two rather important aspects. First of all, the contested measure was a Community regulation and not a national measure based on Community law. Secondly, the application was not for interim relief but rather for an interim measure to be granted. The applicants in Zuckerfabrik wanted to suspend the enforcement of the contested measure. That application can be compared with Article 242 EC which gives the Court of Justice the power to suspend the enforcement of a Community measure which is being attacked under Article 230 EC. In this case Atlanta, while challenging the Community measure as such, applied for a positive order which was in conflict with the terms of the regulation. The parallel in the EC Treaty is Article 243 which empowers the Court of Justice to grant interim measures, as opposed to interim relief. The Community regulation in question provided for a system of import quotas for bananas imported from

[121] Ibid paragraph 33.
[122] Ibid paragraph 29.

outside the Community. Atlanta was an importer of such bananas who did not like the regulation and therefore challenged it. At the same time Atlanta applied for an interim measure increasing its quota under the regulation. The question whether a national court could grant such an order, which would in effect disapply the regulation, was referred to the Court of Justice. The Court referred to Articles 242 and 243 EC and held that the interim legal protection of individuals under Community law in national courts had to be the same whether the individuals were seeking suspension of enforcement, as in the Zuckerfabrik case, or the grant of interim measures settling or regulating the disputed legal positions for their benefit.[124] Thus, the interim measures sought by Atlanta had to be available in a national court. When it came to the conditions for granting the interim measures, the Court repeated the conditions from Zuckerfabrik and made one amendment. When the national court was considering the three main conditions, it had to respect any decisions of the Court of Justice or the Court of First Instance on the validity of the regulation or on an application for similar interim measures at Community level.[125]

Thus, from Atlanta it is clear that national courts can order both interim relief and interim measures in relation to a Community regulation. Again the rights of individuals are given effective protection not only in relation to incompatible national law but also in relation to Community law which is likely to be invalid.

In the T. Port case the Court of Justice was asked whether a national court could grant interim measures in a situation where the Community had failed to act.[126] Again the case concerned the banana quotas. T. Port considered that the Community had failed to take action in order to protect importers which had been

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[123] Case C-465/93 Atlanta Fruchthandelsgesellschaft and Others v. Bundesamt für Ernährung und Fortswirtschaft [1995] ECR I-3781.
[124] Ibid paragraphs 27,28.
[125] Ibid paragraph 51.
[126] Case C-68/95 T. Port v. Bundesanstalt für Landwirtschaft und Ernährung [1996] ECR I-6065.

assigned only a small import quota. It turned to the German courts and requested to be assigned a higher quota until the Community had taken action. The Court of Justice held that when it came to failure to act, only the Community courts could grant interim protection of individuals. The Treaty did not say that national courts could ask for a preliminary ruling to the effect that an institution had failed to act. Because of this national courts could not order interim measures pending action on the part of the Community institutions. Such interim protection for an individual could be afforded only under Article 243 EC in relation to an action for failure to act in accordance with Article 232 EC.[127]

Thus, the protection of individuals rights in national courts goes rather far when it comes to interim relief granted in those courts. A reason why the protection was not extended to the situation in T. Port can be that the individual rights in question were not fully established yet.[128] If there were any individual rights at all in this area, they had not been granted yet. Consequently they could not be protected.

The conditions for granting interim relief laid down by the Court of Justice in Atlanta seem to differ from the Factortame ruling. In Factortame, the Court of Justice, although not laying down any conditions, focused only on the effectiveness of Community law, but in Atlanta the question concerned a Community measure in relation to individual rights. Maybe that is the reason why the Court seems to have made it harder to grant interim relief. By requiring national courts to take due account of the Community's interests the Court of Justice seems to have blurred the conditions a bit. It must be very hard for a national court to know what kind of Community interest to take into account, and even harder to balance that interest against the individual interest of obtaining interim relief.[129] On the other hand, by relying on the Community's interest, it might be possible to stress the supremacy, uniformity and effectiveness of

[127] Ibid paragraphs 53,54.
[128] Ibid paragraph 52.
[129] Sharpston, *Interim Relief in the National Courts*, Lonbay and Biondi (Eds.) 47, p. 54.

Community law. Perhaps that was what the Court of Justice meant. Although national courts have been given the possibility of granting interim relief so to speak against the Community, Community law is still superior and it is only the Court of Justice that can annul a Community measure. Thus, there seems to be a clash between Community law and individual interests here. However, irrespective of this possible clash, national courts do have rather wide powers under Community law to grant interim relief for the protection of individual rights. Such interim relief is however not in principle available if the damage likely to be suffered by the individual is purely financial. In such a case there is another remedy available, namely damages under the state liability principle.

5.4 State Liability

As we have seen thus far there are some gaps in the judicial protection of individuals. In chapter 2 we saw that an unimplemented directive cannot be relied on by an individual in relation to another individual. In the section on interim relief we saw that an individual is generally unable to obtain interim relief when the damage that might occur is purely financial. The remedy available in these two situations is the remedy of damages, or state liability. The principle of state liability for breaches of Community law was developed rather recently by the Court of Justice. However, there has been a few judgements touching upon the subject in earlier years. In the Humblet case, which was the very first case of a remedial nature, the Court of Justice held that if a national measure was contrary to Community law, the Member State had to make reparation for any unlawful consequences.[130] However, the case concerned restitution rather than compensation. In the Russo case, Italy intervened on the cereal market and by its actions breached Community law.[131] The Court of Justice held that if an individual had suffered damage as a result of this, Italy had to take the consequences of that

[130] See note 55 above.
[131] Case 60/75 Russo v. AIMA [1976] ECR 45.

in the context of the provisions of national law relating to state liability. Apart from these two cases the Court of Justice has been more or less silent on whether, and under what circumstances, there is a right to damages for an individual when a Member State has breached Community law. It was not until the beginning of the 1990's and the Francovich case that the principle of state liability was established in Community law.[132]

5.4.1 The Francovich Ruling

The dispute in the case arose out of the fact that Italy had failed to implement a directive on protection of employees in the event of the insolvency of the employer. Francovich was an employee which would have been protected if the directive had been correctly implemented. Instead, when his employer could not pay him, he brought an action against the Italian state in order to get either his guarantee payment under the directive, or damages for Italy's failure to implement the directive. The Court of Justice was asked, firstly, whether the directive produced direct effect so that Francovich could rely on it in relation to the Italian state. The second question was whether employees could sue the Member State for damages, which they had suffered as a result of the non-implementation of the directive in question.

The Court of Justice held that the directive did not have direct effect. The provisions of the directive were sufficiently precise and unconditional as regards the persons entitled to the guarantee and the content of the guarantee. However, the provisions did not identify the person who was liable to pay the guarantee and the Member State could not be held liable just because it had failed to implement the directive. Thus, there was no directly effective right of payment which could be relied on in the national courts.[133]

[132] Cases C-6/90 and C-9/90 Francovich and Bonifaci v. Italy [1991] ECR I-5357.

The question then was whether there was any principle of state liability in Community law. The Court began by referring to the very important rulings from the Van Gend en Loos[134], Costa v. E.N.E.L.[135], Simmenthal[136] and Factortame[137] cases. The duty of national courts to ensure that Community rules take full effect and to protect the rights that Community law confers on individuals was particularly stressed.[138] The court went on to state that the full effectiveness of Community rules would be impaired and the protection of the rights which they granted would be weakened if individuals were unable to obtain redress when their rights were infringed by a breach of Community law, for which a Member State could be held responsible. This was particularly so when, like in this case, the effectiveness of Community rules depended on state action, and when an individual could not assert his or her right because of lack of action on the part of the state. The principle of state liability for breaches of Community law was then found to be inherent in the system of the Treaty. To further illustrate its point the Court referred to Article 10 EC, and the Member States' obligations to take all appropriate measures in order to ensure fulfilment of their obligations under Community law, as a further basis for state liability. Thus, state liability for reparation of damages caused to individuals by breaches of Community law attributable to the state was found to be a principle of Community law.[139]

When the principle was laid down the Court went on to establish three substantive conditions for state liability, in the case of non-implementation of a directive. The first condition was that the directive must be intended to confer rights on individuals. As a second condition those rights should be possible to identify and the third condition was that there had to be a causal link between the breach of the state's obligation and the loss or damage suffered by the individual.

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[133] Ibid paragraph 26.
[134] See note 3 above.
[135] See note 18 above.
[136] See note 20 above.
[137] See note 82 above.
[138] Francovich paragraph 32.
[139] Ibid paragraphs 33-37.

When those conditions were fulfilled the individual had a right, founded directly on Community law, to obtain reparation. Although the right was founded directly on Community law it was on the basis of national law on liability that the State had to make reparation. The Court referred to Rewe-Zentralfinanz[140] and said that in the absence of Community rules it was for the national legal order to designate the competent courts and lay down the procedural rules for proceedings intended to safeguard the rights which individuals derived from Community law. However, the substantive and procedural conditions for reparation could not be less favourable than those relating to similar domestic clams, and could not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.[141]

5.4.2 The Basis for State Liability

From Francovich it is clear that the principle of state liability is a principle of Community law. In fact, it was found to be inherent in the system of the Treaty and, consequently, the right to obtain reparation is founded directly on Community law. Thus, the court laid down in Francovich a remedy arising solely out of Community law. It is not a national remedy being made available in a Community situation, but rather a specific Community law remedy.[142] The question whether the Court created a new remedy in Factorame is not really clear. In Rewe-Handelsgesellschaft the Court did say that Community law was not intended to create new remedies. In Factortame the effect was that the national court had to provide a remedy which it did not have jurisdiction to grant. However, that case can also be seen as merely a disapplication of national law. In Francovich it is perfectly clear that the Court of Justice did create a new remedy which was to be applied by national courts. The statement in Rewe-Handelsgesellschaft was thus definitely overruled by Francovich and a Community remedy was introduced.

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[140] See note 61 above.
[141] Francovich paragraphs 40-43.
[142] See Ross, *Beyond Francovich*, (1993) 56 M.L.R. 55, at p. 57.

The basis for this new remedy was the full effectiveness of Community rules and the protection of individual rights. The risk of having to pay damages is naturally a strong incentive for Member States to fulfil their obligations under Community law. That the effectiveness of Community law is likely to be enhanced by state liability is rather obvious. The protection of individual rights is interesting from the point of view that the right relied on by Francovich was not directly effective and could thus not be enforced against the Member State. In a way the state liability principle is a complement to, but at the same time separate from, the doctrine of direct effect. Francovich could not rely on his right in relation to the Italian state because the right did not have direct effect. The solution, when the right could not be enforced, was to make the remedy of compensation available to the individual. The consequence of Francovich is that the concept of direct effect seems to lose a bit of its importance. We remember from Rewe-Zentralfinanz that the Court of Justice held that national courts were, under Article 10 EC, obliged to ensure the legal protection which individuals derive from directly effective Community provisions.[143] After Francovich legal protection of individuals exists also in relation to rights which are not directly effective. The difference is that a directly effective right can be immediately enforced in the national courts whereas a right without direct effect can only be remedied by way of compensation for damages. Either way, the Francovich judgement clearly works to the advantage of both the effectiveness of Community law and the judicial protection of individuals.

However, to me the reasoning of the Court of Justice in relation to the direct effect of the directive is a bit hard to understand. The directive did not have direct effect since it did not identify the person liable to provide the guarantee payments, and the state could not be liable on the sole ground that it had failed to implement the directive in due time.[144] The right of the individual to get a guarantee payment was sufficiently clear and unconditional but the person liable to pay could not be

[143] Rewe-Zentralfinanz paragraph 5.

identified. Under the directive the state was supposed to set up some sort of guarantee institutions which would be liable for the guarantee payment. To me it seems logical to make the state liable for the failure to set up such institutions since that leads to failure to implement the directive. By using an "estoppel" argument, as in the Becker[145] case, the Member State could have been made liable for the guarantee payments since it had failed to implement the directive in time. This would have meant that the individual right could be directly enforced and not just protected subsequently, by way of reparation. The really confusing part is that the Court could not identify the person liable to provide the guarantee. In my opinion the state is the only person who could ever be made liable for the guarantee. We remember from the Marshall case that the binding nature of a directive exists only in relation to Member States.[146] It was the Member State, in this case Italy, that was responsible for setting up the guarantee institutions. Failure to do so should therefore lead to the state being liable for the guarantee payments. The guarantee institutions, although perhaps not always totally state controlled, could definitely be made attributable to the Member State itself by interpreting the notion of the state widely, as was done in for example Fratelli Costanzo[147] and Foster[148]. Thus, I think that the Court in fact could, if it wanted to, have given the provisions of the directive direct effect. The problem with identifying the liable person could have been solved. However, there was a need of a principle of state liability in Community law and perhaps the Court thought that the Francovich case was the perfect situation to lay down the principle. In any case, the question is not really relevant since state liability can occur in relation to both directly effective and non-directly effective rights. The only difference in the Francovich case would have been that Francovich himself would have been able to enforce his right immediately, instead of waiting for the loss to occur and then obtain reparation.

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[144] Francovich paragraph 26.
[145] See note 5 above.
[146] See note 21 above.
[147] See note 25 above.
[148] See note 26 above.

Another important aspect of the Francovich ruling is that it provides a remedy for individuals who wish to rely on a non-implemented directive against another individual. As stated above, the Marshall and Marleasing cases provided for indirect effect of non-implemented directives in horizontal relations. Such an interpretation might not always be sufficient, but after Francovich an individual can sue the Member State for damages instead of having to rely on an interpretation in the light of a directive. The Faccini Dori case is an example of such a situation.[149] Dori had bought an English language correspondence course in Milan but changed her mind and tried to cancel the contract in accordance with a Community directive. The directive had however not been implemented in Italy so Dori could not rely on it against the seller of the language course, and it was not possible to interpret Italian law in the light of the directive. The Court of Justice held that in such a situation Community law required the Member State to make good damage caused to individuals through failure to transpose a directive. Dori could thus not escape the contract but she could bring an action for reparation against the Italian state.

In the Brasserie du Pêcheur and Factortame III ruling it was made clear that also breaches of directly effective Treaty provisions can lead to state liability.[150] In Brasserie du Pêcheur, Germany had breached Article 28 EC by its beer purity laws. As a consequence of this legislation a French company was unable to export its beer to Germany and thus suffered loss of income. The Court of Justice had in another ruling held this legislation to be contrary to Article 28 and Brasserie du Pêcheur subsequently brought an action in German courts for damages against Germany.[151] Factortame III concerned the same national legislation as the earlier mentioned Factortame ruling.[152] The Spanish fishermen challenging the legislation held that it was contrary to the Article 43 EC and sued the United Kingdom for reparation.

[149] Case C-91/92 Faccini Dori v. Recreb [1994] ECR I-3325.
[150] See note 38 above.
[151] Case 178/84 Commission v. Germany [1987] ECR 1227.

The German, Irish and Netherlands Governments held, in the Brasserie du Pêcheur ruling, that the principle of state liability should not be extended to breaches of directly effective provisions of Community law. The Court of Justice did not agree. The right of individuals to rely on directly effective provisions of Community law was held to be only a minimum guarantee, and not sufficient in itself to ensure the full and complete implementation of the Treaty.[153] The purpose of that right was to ensure that provisions of Community law prevailed over national provisions but that was not always sufficient to protect individuals from suffering loss when a Member State breached Community law. Therefore the full effectiveness of Community law would be impaired if individuals were unable to obtain reparation when their rights were infringed by a breach of Community law. The right to reparation was then held to be a necessary corollary of direct effect.[154]

5.4.3 Nature of Breach

From the Francovich case it is clear that state liability can arise from a Member State's failure to implement a directive. The same conclusion was reached in the Dillenkofer case.[155] In the Brasserie du Pêcheur judgement the Court made it clear that the principle of state liability applied to any case in which a Member State breached Community law, irrespective of which organ of the state whose act or omission had caused the breach.[156] Community law was breached by national legislation and thus the legislature was the organ of the state which was responsible for the breach. In the Hedley Lomas case the principle of state liability

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[152] See note 82 above.
[153] See Case 168/85 Commission v. Italy [1986] ECR 2945.
[154] Brasserie du Pêcheur and Factortame III paragraphs 20-22.
[155] Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and 190/94 Dillenkofer and Others v. Germany [1996] ECR I-4845.
[156] Brasserie du Pêcheur and Factortame III paragraph 32.

was applied to an administrative decision taken by a national administrative authority.[157]

From the Konle case it is clear that a Member State cannot escape liability by referring to the distribution of powers and responsibilities in its national legal order.[158] The question in the case was whether, in a federal system, the federal state had to provide reparation for breaches of Community law committed by another organ. The Court held that Community law did not require Member States to make any change in the distribution of powers and responsibilities between the public bodies which existed on their territory. The federal state did not necessarily have to provide reparation itself, as long as it was possible to obtain reparation from some other state organ.

Thus, state liability can arise in relation to any breach, both acts and omissions, of Community law committed by any organ of the state. The breach as such has to fulfil specific conditions laid down by the Court of Justice. These will be considered in the following section. The interesting point here is that it does not matter what organ of the state that breached Community law. The Court of Justice has ruled on infringements committed by legislative and administrative organs. So far, there has been no case concerning breach by a judicial organ. From the Brasserie du Pêcheur case it is, however, clear that liability can arise in relation to acts or omissions of any state organ. This ought to mean that also breaches committed by a national court can lead to state liability. The obligation to comply with Community law exists in relation to all state authorities.[159] Consequently, there seems to be a possibility that state liability can arise when a national court has not referred a case to the Court of Justice for a preliminary ruling. The Swedish Barsebäck case could have been an example of this.[160]

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[157] Case C-5/94 The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas Ltd. [1996] ECR I-2553.
[158] Case C-302/97 Konle v. Austria [1999] ECR I-3099.
[159] Brasserie du Pêcheur and Factortame III paragraph 34.
[160] RÅ 1999 ref 76.

The Barsebäck case concerned a decision by the Swedish government to close one Swedish nuclear reactor. There were state run reactors but the government decided that Barsebäck, which was run by a private company, should be closed. This was a highly controversial decision and raised points of Community law, such as competition and proportionality aspects. The Supreme Administrative Court of Sweden upheld the decision without asking for a preliminary ruling, although the case involved some uncertain interpretations of Community law. At this stage Barsebäck might have been able to be successful in a claim for damages as a result of the Swedish court's refusal to ask for a preliminary ruling. Barsebäck contacted the Commission but did not bring an action for damages in Swedish courts. Eventually, the Swedish government and Barsebäck reached a settlement, and Barsebäck was compensated. There was thus never any action in national courts for damages. However, if there had been one the case would probably have come before the Court of Justice and then we would have an answer to the question whether a failure of a national court to ask for a preliminary ruling is a breach of Community law for which damages can be awarded. So far the Court of Justice have not dealt with such a question, and although it seems likely that a breach committed by a national court can result in state liability, the question has not been settled yet.

5.4.4 The Conditions for State Liability

The conditions for state liability to arise laid down by the Court of Justice in Francovich were slightly rephrased in Brasserie du Pêcheur. The Court referred to the liability of the Community under Article 288 EC and held that the conditions for state liability should be the same. The reason was that the protection which individuals derive from Community law could not vary depending on whether a national authority or a Community authority was

responsible for the damage.[161] A right to reparation under Community law was held to arise when three conditions were met: the infringed rule had to be intended to confer rights on individuals; the breach had to be sufficiently serious; and there had to be a direct causal link between the breach and the damage suffered by the individual.[162] The Court then laid down some guidelines for the application of those criteria, for example what to consider when assessing whether the breach in question is sufficiently serious.[163] However, in principle it is for national courts to apply the criteria and to establish the liability of Member States for damage caused to individuals by breaches of Community law.[164] Of course there is still the possibility for a national court to ask for preliminary rulings and much of the subsequent case law from the Court of Justice deals with the question whether a specific breach of Community law is to be considered as being sufficiently serious. An example of this is the Dillenkofer case where a Member States failure to implement a directive in due time was considered to constitute a sufficiently serious breach. From this case it is also clear that the conditions laid down in Brasserie du Pêcheur replaced the conditions laid down in Francovich. Although differently worded, the new conditions are the same as the old ones.[165]

Thus, the question whether the conditions are fulfilled and consequently whether state liability should arise is to be determined by the national court dealing with the case. Furthermore, the action for damages is governed by national procedural rules. The remedy of state liability is thus based directly on Community law and is to be applied at the national level in order to protect individual rights and the effectiveness of Community law.

[161] Brasserie du Pêcheur and Factortame III paragraph 42.
[162] Ibid paragraph 51.
[163] See paragraphs 55-57.
[164] Konle paragraph 58.
[165] Brealey and Hoskins p. 131.

6 Procedures

6.1 Introduction

In the previous chapters we have seen that when an individual claims to have a right based on Community law, national courts are obliged to try the existence of the right and also whether the right has been infringed or not. In order to protect the individual right and uphold the effectiveness of Community law, national courts can remedy Member State breaches of Community law which lead to infringements of individual rights. In order to protect an individual right, national courts can grant interim relief. When a right has been infringed the individual can obtain restitution and damages. The proceedings in the national courts have to be governed by some sort of procedural rules. Procedural rules, as well as remedies, were originally supposed to be a matter for the national legal systems. Thus, individual rights were to be asserted and breaches were to be remedied under national procedural law. It is also possible to say that the existence of an individual right was a matter for Community law and the exercise of the right was a matter for national law. This exercise then needed to be subject to reasonable procedural rules.[166]

6.2 National Procedural Autonomy

Early case law, such as Lück[167] and Salgoil[168], said that procedural, as well as remedial, matters should be dealt with by the legal systems of the Member States. The Court of Justice held that national courts should choose the most appropriate solution available under national law. The principle of national procedural

[166] Hoskins, *Tilting the Balance: Supremacy and National Procedural Rules*, (1996) 21 E.L.Rev. 365.
[167] See note 57 above.
[168] See note 58 above.

autonomy was developed in the Rewe-Zentralfinanz[169] and Comet[170] cases, which were decided on the same day. As can be seen above the cases concerned restitution of sums paid contrary to Community law. The Court of Justice held that in the absence of Community rules it was for the domestic legal systems to designate the courts having jurisdiction and to lay down the procedural conditions governing actions intended to ensure the protection of directly effective rights. The right conferred by Community law thus had to be exercised before the national courts in accordance with the procedural conditions laid down by national rules. However, such conditions could not be less favourable than other conditions relating to similar actions of a domestic nature. Furthermore, the domestic rules were not allowed to make it impossible in practice to exercise the rights conferred by Community law. In the Rewe-Zentralfinanz and Comet cases the national procedural conditions in question were time limits. The relevant national authorities in the cases claimed that the plaintiffs had brought their actions too late. The charge paid by Rewe-Zentralfinanz had been held to be contrary to Community law by the Court of Justice in a previous ruling.[171] Rewe then brought an action for restitution of its money but failed to respect the one month time limit under German law. The time limit in Comet was 30 days. The Court of Justice held in both the cases that reasonable periods of limitation of actions were allowed by Community law. Such time limits were an application of the fundamental principle of legal certainty and protected both the tax payers and the concerned authorities. The national procedural time limits were thus upheld and restitution could not be granted.

From these two cases it is clear that rights granted by Community law are to be exercised under national procedural rules. The Court pointed to the possibility of harmonization under Articles 94, 95 and 308 EC but held that in the absence of such harmonization, procedural matters were left to the Member States.

[169] See note 61 above.
[170] See note 62 above.
[171] See note 63 above.

However, the Court imposed two conditions which national procedural rules must fulfil. The first is that actions based on Community rights cannot be treated less favourably than similar actions of a domestic nature. This condition has been referred to as the principle of equivalence. The second condition has been called the principle of effectiveness and says that the applicable national procedural rules cannot make it impossible in practice to exercise the right in question.[172]

Thus, subject to the two conditions imposed by the Court of Justice, the Member States can be said to possess national procedural autonomy. The question whether a given national rule fulfils the conditions will, if necessary, be determined in preliminary rulings by the Court of Justice on an ad hoc basis.[173] The approach taken by the Court in Rewe-Zentralfinanz and Comet was followed in a number of subsequent cases concerning claims of restitution. In all the cases the national procedural conditions were held not to infringe Community law and the national procedural autonomies were upheld.[174]

The principle of national procedural autonomy can be said to strike a balance between the supremacy of Community law and the need for procedural rules.[175] Of course it is important that Community law takes precedence over national law standing in the way of its effectiveness. This has been stressed in important cases such as Costa v. E.N.E.L.[176] and Simmenthal.[177] However, when a national court deals with a Community based claim it is equally important to follow procedural rules. In other words, no system could function in a procedural vacuum.[178] For example, if no time limits existed there would be absolutely no legal certainty for

[172] Case C-261/95 Palmisani v. INPS [1997] ECR I-4025, paragraph 27.
[173] Andersson, *Rättsskyddsprincipen*, 1997, p. 80.
[174] See Case 61/79 Amministrazione delle Finanze dello Stato v. Denkavit Italiana [1980] ECR 1205, Case 68/79 Hans Just v. Danish Ministry for Fiscal Affairs [1980] ECR 501, Case 130/79 Express Dairy Foods v. Intervention Board for Agricultural Produce [1980] ECR 1887, Case 811/79 Amministrazione delle Finanze dello Stato v. Ariete [1980] ECR 2545, Case 826/79 Amministrazione delle Finanze dello Stato v. MIRECO [1980] ECR 2559.
[175] Hoskins p. 365-366.
[176] See note 18 above.
[177] See note 20 above.

anyone, and that would naturally not be a pleasant situation. Thus, the effectiveness of Community law seems to have had to take a step back in relation to procedural rules. An illustration of this can be seen when comparing the reasoning of the Court of Justice in the Simmenthal and Rewe-Zentralfinanz cases. In Simmenthal the Court said that any national rule that might impair the effectiveness of Community law had to be set aside.[179] However, in Rewe-Zentralfinanz the national procedural rules were to be set aside only if they made it impossible in practice to rely on a Community right. Thus, when it comes to procedural rules, the Court of Justice has to balance these against the effectiveness of Community law in a way that sometimes works against the latter. Although this might not be that good for the effectiveness of Community law it is fully understandable and definitely necessary. As long as there are no common procedural rules, Community law will have to rely on national procedural rules.

6.2.1 The Principle of Equivalence

The principle of equivalence is the first of the conditions that a national procedural provision has to fulfil in order to be compatible with Community law. The condition means that a claim based on Community law cannot be treated less favourably than a similar claim based on domestic law. When assessing this, a comparison has to be made between the rule applicable to the Community based claim and the rule that would be applicable to a similar domestic claim. The Palmisani case concerned equivalent actions.[180] The case, just as the Francovich case, arose out of Italy's failure to implement the directive on the protection of employees because of the employer's insolvency. Italy subsequently implemented the directive and also adopted provisions on compensation to be paid to employees who had suffered loss. An action for damages had to be brought within a time limit of one year. Palmisani brought an action too late but argued that

[178] Hoskins p. 366.
[179] Simmenthal, paragraph 24.
[180] See note 172 above.

the time limit was incompatible with Community law. The ordinary system of non-contractual liability in Italy provided for a time limit of five years and the question was whether these two courses of actions could be held to be equivalent. In such a case, the Community based claim would clearly be treated less favourably than an ordinary domestic claim, and Italian law would consequently not fulfil the condition of equivalence. The Court of Justice held that, in principle, it was for the national courts to ascertain whether the national procedural provisions complied with the principle of equivalence, but nevertheless provided some guidelines. In order to establish the comparability of the two systems of compensation, the essential characteristics of the systems had to be examined. The Court found that it did not have all the necessary information and that therefore the national court had to make the examination. If the national court was to find that the ordinary system of non-contractual liability was not comparable to the Community based one, and that there was no other comparable national rules, the time limit could not be held to breach the principle of equivalence. This is the problem with the principle of equivalence. It is very hard to know how to assess whether there are any comparable national claims.

The Court of Justice provided some further guidelines in the Preston and Fletcher case.[181] In this case the plaintiffs applied for retroactive membership of a pension scheme. The national court asked what criteria to apply when determining whether national procedural rules treated Community claims less favourably than similar domestic claims. The Court of Justice held that the national court had to consider both the purpose and the essential characteristics of allegedly similar domestic actions. As an example, the Court held that the principle of equivalence would be infringed if a person relying on a Community right was forced to incur additional costs and delay by comparison with a claimant whose action was based solely on domestic law. An objective comparison of the procedural rules at issue was to be undertaken.

The principle of equivalence is based on the general Community law prohibition of discrimination on grounds of nationality.[182] Consequently, national procedural rules can also breach the principle of non-discrimination in Article 12 EC. In the Data Delecta case, the Swedish procedural rules required foreign plaintiffs to provide a security payment in order to be allowed to bring an action.[183] The Court of Justice held that although it was for the Member States to lay down procedural rules, such rules could not discriminate against persons who had a right of equal treatment under Community law. Article 12 required perfect equality of treatment between nationals and foreigners. The Swedish rule was held to be a manifest case of direct discrimination on grounds of nationality. The same conclusion was reached a year later in the Saldanha case.[184]

6.2.2 The Principle of Effectiveness

In order for national procedural rules to fulfil this condition they cannot make the exercise of a Community right impossible in practice. This condition is perhaps somewhat easier to apply and also more relevant to the purpose of this thesis. The first case in which the principle of effectiveness was really applied was the abovementioned San Giorgio case.[185] This case was the first where the Court of Justice really struck down a national procedural rule. It can be seen as a starting point because after San Giorgio the Court began interfering on a more regular basis with national procedural rules.[186] San Giorgio brought an action against Italy for restitution of charges paid contrary to Community law. Under the national rules, restitution was not possible when the charge had been passed on to other

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[181] Case C-78/98 Preston and Others v. Wolverhampton Healthcare, Fletcher and Others v. Midland Bank [2000] ECR I-3201.
[182] Reuterswärd, *EG-rättens processuella verkan* (1996), p. 32-33.
[183] Case C-43/95 Data Delecta and Ronny Forsberg v. MSL Dynamics [1996] ECR I-4661.
[184] Case C-122/96 Saldanha and MTS Securities Corporation v. Hiross Holding [1997] ECR I-5325.
[185] See note 89 above.
[186] Andersson, *EG-rätten och den svenska processrätten*, (1998/99) 10 J.T. 807, p. 811.

persons. Furthermore, Italian law presumed that that the charges had been passed on. In order to recover the charge, San Giorgio was required to prove, by documentary evidence, that it had not passed the charges on to anyone. The Court of Justice held that the defence of unjust enrichment was allowed. However, any requirement of proof which had the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law. The burden of proof resting on San Giorgio was exactly such a requirement and therefore it breached the principle of effectiveness. The Court held that when a charge had been found to be incompatible with Community law, the national court had to be free to decide whether or not the charge had been passed on.

In Rewe-Zentralfinanz and Comet the Court said that national rules could not make it "impossible in practice" to exercise a Community right.[187] In San Giorgio this had changed to "virtually impossible or excessively difficult".[188] The same term has also been used in subsequent cases, for example in the Francovich case.[189] It can now be said to be the official wording of the condition.[190] Perhaps this means that the principle of effectiveness has gained a bit of strength so that it is now slightly harder to comply with it than it was earlier.

Another thing that follows from the San Giorgio case is that a national procedural rule has to fulfil both the conditions in order for it to be compatible with Community law.[191] The Court held that a national rule had to comply with the principle of effectiveness, even if it was equally applicable to both domestic and Community claims.[192] Thus, although the requirement of proof was applicable also

[187] See Rewe-Zentralfinanz paragraph 5.
[188] See San Giorgio paragraph 14.
[189] See Francovich paragraph 43.
[190] Reuterswärd p. 41.
[191] Kapteyn and VerLoren van Themaat, *Intoduction to the Law of the European Communities*, p. 561.
[192] San Giorgio paragraph 17.

to purely domestic claims, it was still incompatible with Community law since it made it excessively difficult to obtain restitution.

6.3 The Particular Nature of Directives

The principle of national procedural autonomy was applied successfully and consistently from 1976 until 1991. That it was a successful principle can be seen in the fact that it caused no significant controversy.[193] However, in 1991 the Court of Justice suddenly decided to make an adjustment of the principle. This was made in the Emmott case.[194] The case concerned a directive on social security payments. Ireland had implemented the directive too late and Emmott applied for back payments of the social security she was entitled to under the directive. The relevant Irish authority responded that it could not deal with her claim until the Court of Justice had decided the Cotter and McDermott case[195], which concerned the same directive. When nothing happened Emmott finally decided to bring an action against the decision of the national authority. However, by that time the national time limit of three months had passed. The Court of Justice was asked whether the national time limit was compatible with Community law. The Court started of by referring to Rewe-Zentralfinanz and said that reasonable time limits did, in principle, fulfil the principles of equivalence and effectiveness. As can be seen above the time limit in Rewe-Zentralfinanz was thirty days, which is less than three months. If thirty days is a reasonable time, three months seems likely to be reasonable as well, since it gives the individual more time in which to bring action in order to assert his or her right. However, the Court of Justice held that account had to be taken of the particular nature of directives. So long as a directive was not correctly implemented into national law, individuals were unable to ascertain the full extent of their rights. This state of uncertainty for individuals

[193] Hoskins p. 367.
[194] Case C-208/90 Theresa Emmott v. Minister for Social Welfare and the Attorney General [1991] I-4269.

could only be brought to an end by a correct implementation of the directive. Consequently, the time limit for bringing action could not start to run until the directive had been correctly implemented. Thus, the Court of Justice focused on the right of the individual and held that the content of that right was not clear until the directive had been implemented. Consequently, it was not until the directive was implemented that the individual could try to assert his or her right. Therefore, time limits could not start to run until the directive was implemented. This seems a bit odd considering the fact that directives can have direct effect before they have been implemented. On the other hand, the solution can perhaps be a complement to direct effect since it seems to imply that the right granted to Emmott could not be fully established until the directive was implemented. Emmott's right seems to not have been directly effective. Nevertheless, the Court found that the right deserved to be protected. It is also possible to say that the Court of Justice wanted to help Emmott, since in a way it was not her fault, but the national authority's, that she had failed to bring her action in time.[196] What the Court of Justice actually did was that it, at the same time as it helped Emmott, created an exception to the principle of national procedural autonomy.[197] This exception says that national time limits cannot be applied against an applicant seeking to rely on the provisions of a directive until that directive has been implemented into national law. It has also been stated that the fact that the behaviour of the Member State contributed to Emmott's bringing her action too late should be taken into account when laying down the exception created by the Court of Justice.[198] It is quite clear that the judgement in Emmot was not popular in the doctrine. Perhaps a better solution would have been to apply the principle of state liability to the case. However, Francovich was not decided yet and Emmot had not claimed damages.

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[195] Case C-377/89 Cotter and McDermott v. Minister for Social Welfare and Attorney General [1991] ECR I-1155.
[196] Hoskins p. 369.
[197] Ibid.
[198] Jacobs, *Enforcing Community Rights and Obligations in National Courts: Striking the Balance*, in Lonbay and Biondi (Eds.) 26, p. 29-30.

The Court of Justice has, in later cases, refused to extend the principle laid down in Emmott to other types of national procedural rules.[199] In Steenhorst-Neerings the applicant also claimed to be entitled to back payments of social security.[200] The relevant national procedural rule in this case was not a time limit for bringing action but a limitation period in respect of the time for which retroactive payments could be made. Under Dutch law an applicant could only be entitled to retroactive payment of benefits which were back dated to one year before the date of the claim. The Netherlands had failed to implement the directive on time and Steenhorst-Neerings argued that the Emmott ruling had the effect of making the national provision inapplicable. The Court of Justice however distinguished between the cases. The relevant rule was held not to affect the right to rely on the directive. Instead it was just a limitation of the retroactive effects of a claim for benefits. Although the claim was limited by the national limitation period, it was not completely blocked and consequently the national rule did not make it impossible to exercise rights based on the directive.

The Court continued its reasoning in the Johnson case.[201] This time the national rule in question was British. Just as in Steenhorst-Neerings it limited an applicant to claiming social security benefits back dated to one year before the claim. The Court of Justice held that the ruling in Emmott was justified by the particular circumstances of that case. The time limit in Emmott was held to have had the effect of depriving the applicant of any opportunity whatever to rely on her right under the directive. The rule in Johnson, as well as Steenhorst-Neerings, did not have that effect since it merely limited the retroactive effects of claims for benefit.

Thus, in Emmott the relevant national rule was held to deprive the individual of her opportunities to rely on her right under the directive. This means that the effectiveness of Community law, and the protection of the individual right, was in

[199] Hoskins p. 371.
[200] Case C-338/91 Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen [1993] ECR I-5475.

danger. The Court did strike down the rule but it did not expressly refer to the principle of effectiveness. Instead it referred to the particular nature of directives. However, by reading the statements in Steenhorst-Neerings and Johnson it can be argued that the Court did in fact rely on the principle of effectiveness in Emmott.[202] On the other hand, the Court did create a special rule for the special circumstances in Emmott. The three months time limit was not in itself contrary to the principle of national procedural autonomy but in this particular case it could not be applied against Emmott.[203] In Steenhorst-Neerings and Johnson the Court refused to apply its reasoning in Emmott and instead it relied on the fact that the national rules in question did not make it excessively difficult to rely on the Community right. Thus, it might be better to see Emmott as an exception to the principle of national procedural autonomy.

6.4 A New Approach to National Procedural Provisions

If the Court of Justice created an exception to the national procedural autonomy in Emmott, it seems like it made a more fundamental change to the principle in two cases decided in 1995.[204] The Van Schijndel[205] and Peterbroeck[206] cases both concerned the power of national courts to raise Community points of their own motion.

In Van Schijndel two Dutch physiotherapists wanted to escape membership of a compulsory occupational pension scheme. When the case came before the Supreme Court of the Netherlands, the appellants, for the first time, argued that

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[201] Case C-410/92 Johnson v. Chief Adjudication Officer [1994] ECR I-5483.
[202] Jacobs, in Lonbay and Biondi (Eds.) p. 30.
[203] Craig and De Búrca p. 226.
[204] Hoskins p. 372.
[205] Cases C-430-431/93 Van Schijndel & Van Veen v. Stichting Pensionen fonds voor Fysiotherapeuten [1995] ECR I-4705.
[206] Case C-312/93 Peterbroeck, Van Campenhout & Cie v. Belgian State [1995] ECR I-4599.

the compulsory membership was in breach of the competition rules of the EC Treaty. This was a new plea and under Dutch law such a plea was possible only if it did not raise new issues of fact. The new plea did raise new issues of fact and consequently the Supreme Court, bound by a principle of judicial passivity, was prevented from trying it. The Supreme Court then asked the Court of Justice whether a national court was required to apply provisions of Community law even where the parties to the proceedings had not relied on them. The Court of Justice started off by stating that if there was a possibility under national law for national courts to apply domestic law of their own motion, then they had to apply also Community law of their own motion. That was not the case here and the Court went on to the principle of national procedural autonomy and the principle of effectiveness in particular. This is where the change in approach to the national procedural autonomy comes in. The Court held that "each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration."[207] The Court then held that the Dutch rule was justified by the principle that the parties were to take the initiative in a civil suit and the Court had a more passive role. Furthermore, the Dutch rule was justified by both protection of the rights of the defence and the proper conduct of procedure. Thus, the rule in question did not breach the principle of effectiveness and consequently the Dutch courts did not have to consider Community law of their own motion.

The Peterbroeck case concerned a very similar situation. The plaintiffs in this case argued for the first time before the Belgian Court of Appeal that the relevant

[207] Van Schijndel paragraph 19.

Belgian provisions were in breach of the EC Treaty. Under Belgian law there was a 60-day time limit for bringing a new plea. The time limit had passed and the Court of Appeal did not have the power to raise points of its own motion. Quite surprisingly the Court of Justice reached a different conclusion than in the Van Schijndel case. The time limit was not objectionable in itself, but in combination with the special features of the procedure in question the Belgian rules were found to be incompatible with the principle of effectiveness. The special features were: the Court of Appeal was the first court able to seek a reference from the Court of Justice; the rule prevented the Court of Appeal from raising of its own motion the question of compatibility; no other court could consider that question; and the rule preventing points being raised by a court of its own motion was not reasonably justifiable by principles such as the requirements of legal certainty or the proper conduct of procedure.[208] Thus, the rule in question made it impossible for any court which was capable of making a reference to the Court of Justice to raise points of Community law of its own motion. Therefore, there was a breach of the principle of effectiveness. The ruling is very hard to understand. Why the outcome was different from the Van Schijndel case seems to be a bit of a mystery. It has been held that Peterbroeck is a rather exceptional case and perhaps even "bad law".[209] Another way to put it is to say that the outcome of Peterbroeck is rather confusing and the reasoning is rather muddled.[210]

Irrespective of the difference in outcome between Van Schijndel and Peterbroeck, both cases clearly represent a new approach to the principle of effectiveness. Before the two rulings the Court of Justice merely looked at the practical effect of a national procedural rule in a given case. However, according to the two rulings it is not just the practical effect that has to be considered, but also the role or purpose which the provision in question serves in the light of the

[208] For a more thorough discussion of these features see De Búrca, *National Procedural Rules and Remedies: The Changing Approach of the Court of Justice*, Lonbay and Biondi (Eds.), p. 37.
[209] Jacobs, in Lonbay and Biondi (Eds.) p. 32.
[210] De Búrca, in Lonbay and Biondi (Eds.) p. 42.

basic principles of the domestic legal system.[211] In a way, the new approach can be seen as a sort of proportionality test; the restrictive impact on a Community right is weighed against the legitimate aim served by the relevant rule.[212] Instead of introducing the new approach, the Court of Justice could have said that national procedural rules must not make it practically impossible for national courts to raise Community law points of its own motion. That would have been more in line with the principle of effectiveness and less vague than the new approach. It has been held that every national procedural rule can be justified by reference to principles such as legal certainty and the proper conduct of proceedings. This makes it very hard for national courts to apply the new version of the principle of effectiveness. The fact that Van Schijndel and Peterbroeck concerned similar rules but were decided differently may serve as an illustration of this problem. The original principle of national procedural autonomy can be seen as a more objective means since it deals only with the practical effect of a rule in a given situation.[213] Another interesting point here is that the new approach could lead to more references being made under Article 234 EC. Considering the heavy workload of the Court of Justice, such a development might not be totally satisfying.

[211] Hoskins p. 373.
[212] Craig and De Búrca p. 235.
[213] Hoskins p. 375.

7 Possible Future Developments

7.1 Introduction

Naturally there are many possible future developments in the area of remedies and procedures in Community law. I have chosen to look a bit closer at two possibilities, namely harmonization of procedural law and individual liability for breach of Community law. The first area is an area where there is a need for greater uniformity in order for Community law to be fully effective whereas the other area represents a completely new remedy for the protection of individual rights.

Individual rights conferred by Community law are by their very nature uniform. This is because they come from the same source. When it comes to exercising those rights, Community law depends on the legal systems of the Member States, and these are naturally not uniform. Therefore there is a threat to the effectiveness of Community law. To protect the rights, and hence to enhance the effectiveness of Community law, the Court of Justice has laid down certain remedies and also provided conditions under which the remedies are to be applied by national courts. Those conditions need to be further clarified. For example when it comes to compensation the Court of Justice will have to clarify more precisely the content of the condition that a breach has to be sufficiently serious. Likewise, there is a need for greater clarity when it comes to the conditions under which individuals are entitled to restitution. The same goes for interim relief.[214] Of course, these matters are very important and future case law will hopefully bring

[214] Van Gerven (2000) p. 526-527.

more clarity to them. However, I find it more interesting at this point to look at two other, more uncertain, questions.

7.2 Procedural Harmonization

When a national procedural provision infringes the conditions of the principle of national procedural autonomy, that provision has to be set aside. In the San Giorgio case, for example, the national requirement of proof could not be applied. As has been held above in relation to specific remedies, disapplication of national law clears away obstacles to uniform application of Community law but it does not in itself provide for uniformity. The only way to reach uniform application, and full effectiveness, of Community law is to harmonize the national legal systems by laying down uniform rules. That is what the Court of Justice has done in the field of remedies. The same is true for procedural rules. Without common procedural rules there can be no uniformity in the application of Community law and, consequently, effectiveness is threatened. Neither the Court nor the legislative organs has however laid down any common procedural rules for the Community.[215] Consequently, Community law has to rely on the procedural rules of the Member States for its enforcement. The reason why procedures, and remedies, were left out of the Treaty in the beginning might be that the authors of the Treaty assumed that the national legal systems, which were based on the rule of law, could be relied upon to provide an adequate level of judicial protection.[216]

An effect of the lack of uniformity in procedural matters might be that individuals, when dealing with each other, choose to have any disputes settled by arbitration. By turning to arbitrators the individuals can avoid the problem of facing a, for them, unknown set of procedural rules in another country. These disputes may contain matters of substantive Community law. Arbitrators can, in principle, not

[215] There is legislation dealing with remedies, for example in the field of public procurement. See Directive 89/665 OJ 1989, L 395/33.
[216] Jacobs in Lonbay and Biondi (Eds.) p. 26.

ask the Court of Justice for a preliminary ruling.[217] The effect of this is that the arbitrators will have to settle questions of Community law on their own and consequently there is a threat to the uniformity, and effectiveness, of substantive Community law.[218] Harmonization of the procedural rules in the Member States might help to solve this problem.

That there is a problem with the uniform application of Community law is rather easy to see when looking at time limits which are applied in the different Member States. The time limit within which to bring action in order to assert the same Community right can be everything between two months and 10 years, depending on in which Member State the action is brought.[219] This means that one and the same Community right will be afforded different protection in the various Member States. The threat to the uniformity and effectiveness of Community law is obvious. The Court of Justice has been trying to balance between the need for effectiveness of Community law and the procedural autonomy of the Member States, but perhaps there is a need for legislation to be enacted. The Court pointed to the possibility of harmonization as early as in the Rewe-Zentralfinanz case. That was 25 years ago. In Express Dairy Foods the Court of Justice talked about the "regrettable absence of Community provisions harmonizing procedure and time-limits" and made it quite clear that it would prefer the legislative organs to take action.[220]

Thus, as the Court held in Rewe-Zentralfinanz, Articles 94,95 and 308 could be used as the basis for legislation in procedural matters. Furthermore, the Treaty of Amsterdam introduced explicit legislative competence in procedural matters in Article 65 EC. However, although Article 65 talks about eliminating obstacles to

[217] Case 102/81 Nordsee Deutsche Hochseefischerei v. Reederei Mond Hochseefischerei Nordstern [1982] ECR 1095.
[218] Storme, *Procedural Consequences of a Common Private Law for Europe*, in Hartkamp et al. (Eds.), *Towards a European Civil Code* (1994) 83, p. 91.
[219] Andersson (1997) p. 80.
[220] Express Dairy Foods paragraph 12.

the good functioning of civil proceedings, it seems to be more focused on judicial cooperation between the Member States in civil matters with cross-border implications. Article 65 EC is situated in Title IV of the Treaty, which deals with the free movement of persons. That particular provision might thus not be an ideal basis for a far-reaching harmonization of the procedural laws of the Member States. Nevertheless, it might still serve as an illustration of the fact that the Community does have competence to legislate in the area of procedural matters.

An interesting, but perhaps not totally relevant, question regarding competence is whether the Member States actually do possess any national procedural autonomy.[221] The Community legislative competence can be seen as an indication that the Member States do not have any such autonomy. Another indication is that the Court of Justice has repeatedly held that the national procedural rules are applicable "in the absence" of Community rules.[222] As a matter of fact, the Court of Justice has never used the term "procedural autonomy" and there are no indications of procedures as a manifestation of the Member States' sovereignty in the case law.[223]

A final remark in this matter concerns the principle of subsidiarity. Given that the Community does seem to have competence in procedural matters there is still the question of whether Community action is necessary. The problems that do exist, the lack of uniformity and effectiveness of Community law, clearly point in the direction of necessity of Community action. I do not think that the objective of harmonized procedural laws, uniformity and effectiveness, can be sufficiently achieved by the Member States. Still it is interesting to note that the principle of procedural autonomy has been applied in a way that very much resembles

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[221] See Kakouris, *Do the Member States possess Judicial Procedural "Autonomy"?*, (1997) 34 C.M.L.Rev. 1389 and Prechal, *Community Law in National Courts: The Lessons from Van* Schijndel, (1998) 35 C.M.L.Rev. 681. See also Van Gerven (2000) who, at p. 502, prefers to speak of procedural competence of Member States.
[222] This term has been used in an enormous amount of cases. Two examples are Rewe-Zentralfinanz paragraph 5 and Brasserie du Pêcheur paragraph 83.
[223] Kakouris, p. 1405.

application of the principle of subsidiarity. The Court of Justice has balanced the interest of full application of Community law against the procedural rules and principles of the Member States.[224] The latter have been struck down only when they made it too difficult to exercise a Community right or, to use the words of Article 5 EC, when the objective could not be sufficiently achieved by the Member States. The objective in this case would be the effectiveness of Community law. The term subsidiarity was never used by the Court, but unnecessary interference with national procedures seems to have been treated in accordance with it.[225]

7.3 Individual Liability

The question whether national courts can oblige an individual, who has breached Community law, to pay damages to another individual has never come before the Court of Justice. In other words, it is unclear whether the principle of state liability is applicable also to individuals in so called horizontal situations. Looking at the Van Gend en Loos case, it is clear that Community law confers both rights and obligations on individuals.[226] As can be seen above, Community law confers on individuals the remedy of damages when their rights have been infringed by a Member State. If an individual holds a Community right in relation to another individual, and the latter infringes the right, should it not be possible for the holder of the right to obtain reparation? It has been held that there are no good arguments not to extend the liability principle from Francovich and Brasserie du Pêcheur also to such situations.[227] I share this opinion. In order for Community law to be fully effective there has to be remedies also between individuals. Article 141 EC can be used as an example. The Court of Justice held in the Defrenne

[224] Jacobs, in Lonbay and Biondi (Eds.) p. 26-27.
[225] See Himsworth, *Things Fall Apart: The Harmonisation of Community Judicial Procedural Protection Revisited*, (1997) 22 E.L.Rev. 291.
[226] See note 3 above.

case that the principle of equal pay in that provision has horizontal direct effect.[228] Article 141 is thus applicable between individuals. An employee has the right of equal pay and at the same time the employer is obliged to respect this. An infringement of the principle of equal pay by the employer would be bad for both the employee, relying on his or her right, and the effectiveness of Community law. The best way to protect that right would be to oblige the employer to pay damages to the employee. At the same time that would enhance the effectiveness of Community law. The same reasoning can be used in relation to Articles 81 and 82 EC, which both have horizontal direct effect. Future case law will have to indicate whether there is a principle of individual liability in Community law.[229]

The question of individual liability almost came before the Court of Justice in the Banks case.[230] Banks was a British company in the coal industry. Under national legislation, British Coal, which was a public company, had the sole right to work and get coal and to grant licences to third parties. Banks thought that the prices set by British Coal were in breach of Community competition rules and brought an action for damages. The applicable Community rules were laid down in the ECSC Treaty, and thus not the EC Treaty. The Court of Justice held that the provisions of the ECSC Treaty did not have direct effect since the Commission had sole jurisdiction to find that the provisions in question had been infringed. On the same ground, the exclusive jurisdiction of the Commission, it was not possible for a national court to hear an action for damages such as the one brought by Banks. The Court did thus not introduce individual liability into Community law. An important aspect here is that the case concerned the ECSC Treaty, instead of the EC Treaty, and that the applicable rules did not have horizontal direct effect. Perhaps the outcome would have been different if the case had concerned the

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[227] Quitzow, *"Private enforcement" i EG-rätten – en studie av medlemsstaternas skadeståndsansvar i samband med överträdelser av gemenskapsregler*, (1996/97) 8 J.T. 682, p. 696.
[228] See note 12 above.
[229] Van Gerven (1995) p. 683.
[230] Case C-128/92 H.J. Banks & Co. v. British Coal Corporation [1994] I-1209.

competition rules in the EC Treaty, Articles 81 and 82, which do have horizontal direct effect. However, the Court could have avoided the question anyway since British Coal was a public undertaking and could, under the Foster case[231], possibly have been brought within the notion of the state.

The really interesting part of the Banks case is not the ruling as such but the opinion of Advocate General Van Vergen, who argued in favour of individual liability.[232] He found that the relevant provisions of the ECSC Treaty did have direct effect and held, according to settled case-law, that direct effect is only a minimum guarantee and therefore not sufficient in itself to ensure the full and complete implementation of the Treaty.[233] A further argument was found in Article 10 EC, which, in Simmenthal and Factortame, required national courts to ensure the legal protection which individuals derived from the direct effect of Community law.[234] This legal protection was necessary in order for Community law to be applied in full. The Advocate General then built on the Francovich ruling and held that national courts have to ensure that Community law takes full effect and also protect individual rights. The general basis of state liability was thus held to apply also to a breach of a right which an individual derives from an obligation imposed by Community law on another individual. The effectiveness of Community law would indeed be impaired, and the protection of individual rights would be weakened, if an individual was unable to obtain reparation when his or her rights have been infringed by a breach of Community law committed by another individual. The conclusion of Advocate General Van Gerven was that individual liability for breach of directly effective Community competition law was based on the Community legal order itself. Consequently, the national court had to oblige British Coal to pay damages for the loss suffered by Banks.

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[231] See note 26 above.
[232] See [1994] ECR I-1243-1251.
[233] See Case C-120/88 Commission v. Italy [1991] ECR I-621, paragraph 10.
[234] See Factortame paragraph 19. The principle of cooperation in Article 10 EC is laid down also by Article 86 of the ECSC Treaty.

An important aspect here is that individual liability would only exist in relation to breaches of provisions with horizontal direct effect. This means that an individual can never be obliged to pay damages for breach of provisions of a non-implemented directive. As can be seen above, provisions of directives can never produce horizontal direct effect. The reason for this is, according to the Marshall case[235], that a directive is binding only in relation to the state. Consequently there can be no obligations on individuals until the directive has been correctly implemented. Without individual obligations there can be no infringement of other persons' rights and consequently no liability. In cases of unimplemented directives, the state liability principle is applicable instead. According to the Dillenkofer case, failure to implement a directive is always a sufficiently serious breach for damages to be awarded.[236]

[235] See note 21 above.
[236] See note 155 above.

8 Conclusions

The Van Gend en Loos case is the basis for all the developments described in this thesis. That ruling open the door for the private enforcement of Community law. There was nothing on individual action at the national level in the Treaty so the Court of Justice definitely brought a new aspect into Community law by involving individuals in its enforcement. I think that the Van Gend en Loos case is the most important factor when it comes to ensuring the effectiveness of Community law. By stating early on that there were individual rights in Community law, the Court seems to have brought Community law to the attention of individual parties. The developments after the ruling have worked to the benefit of individual rights and the effectiveness of Community law at the same time. Thus, there are two winners, individual parties with Community rights and the Community itself.

The rights conferred on individuals by Community law are to be exercised at the national level. The remedies and procedures existing in the legal systems of the Member States were originally not always perfectly suited for private enforcement of Community law. This is quite understandable when considering the fact that when the Community was founded, there was suddenly a whole new body of law to take into account at the national level. National remedies and procedures thus had to be adjusted to the Community system. It is not totally certain that the Member States were fully prepared for the Court's introduction of direct effect and supremacy. However, the principles were accepted and the development proceeded. Once private enforcement was introduced, the Court of Justice was asked to rule on various national provisions standing in the way of the full effectiveness of Community law. In the beginning the Court was rather passive and referred remedial and procedural matters to the national legal systems. In cases such as Humblet, Lück, Salgoil and Russo, remedial questions were held to

be matters for the Member States. The Court merely talked about appropriate sanctions, but held that it could not oblige the Member States to actually give the individuals a remedy. A similar approach was taken a few years later in relation to procedural issues. In Rewe-Zentralfinanz and Comet, the Court of Justice laid down the principle of national procedural autonomy. This principle had the effect of letting the Member States deal with procedural matters, such as time limits for bringing claims, as long as Community claims were not discriminated against and national rules not made it too difficult to rely on a Community right. In another case the Court said that Community law was never intended to create new remedies in national courts. Thus, the Court of Justice was initially clearly reluctant to interfere with national provisions on remedies and procedures.

The turning point can be said to be the Simmenthal case. In this case the Court said that any national rule that might impair the effectiveness of Community law had to be set aside. The national rule in the Simmenthal case prevented a lower court from disapplying national law on the ground that it was incompatible with Community law. Under Italian law that was a matter for the Constitutional court. However, that would mean that a lower court might be prevented from following a preliminary ruling from the Court of Justice and consequently the effectiveness of Community law would be impaired. The Court of Justice relied on the supremacy and effectiveness of Community law and required that the national provision was set aside. Although the national rule that had to be set aside had procedural consequences, I think it is better to say that it was a matter of remedies. The case originally concerned import levies which were incompatible with Community law. As a consequence of this the national legislation had to be set aside and that was where the question of disapplying national rules came up. Thus, the case in fact concerned the remedy of disapplication of national substantive law, namely the law laying down the levies. In order to be able to disapply this legislation, another national provision had to be set aside, namely the rule preventing the lower Italian court from disapplying national legislation. The

first remedy developed by the Court of Justice was thus the remedy of disapplication of national legislation. The reason for disapplying national law is that otherwise the effectiveness of Community law would be impaired. By relying on the supremacy of Community law, the Court of Justice can require national substantive law to be set aside when there is a conflict with Community law.

The specific remedy of restitution has never been controversial. In the first case dealing with restitution, Rewe-Zentralfinanz, the remedy as such was never really discussed. The national court referring the case, seems to have had no doubts when it came to the applicants' right, in principle, to be reimbursed. The question in the case concerned a time limit, which is a procedural matter. The Court of Justice held in the Comateb case that when money has been levied in breach of Community law, the Member States are, in principle, obliged to repay the money. The right of restitution can be derived from the right not to have to pay any money contrary to Community law. For example, the Treaty provisions on free movement of goods prohibit all kinds of customs duties and charges with equivalent effects. These provisions have direct effect. Consequently a private party has the right not to be subject to any such charges. Should such charges nevertheless be imposed, the private party has the right to obtain restitution. The only exception to this principle is the defence of unjust enrichment. If reimbursing the private party should lead to unjust enrichment on the ground that the charge has been passed on to someone else, the Member State can refuse to give restitution. This is quite natural since the party who passed the charge on has managed to protect his right, by letting someone else bear the loss, and in a way already been reimbursed. The person who the charge has been passed on to, probably a consumer, might have a case for restitution against either the trader, who passed the charge on, or the Member State imposing the charge.[237]

[237] See Comateb paragraph 24.

The remedy of interim relief was first touched upon in the Factortame ruling. This ruling was rather controversial, in comparison with the rulings concerning restitution, since it struck down a national rule with almost constitutional status. Nevertheless, it was fully justified in order to protect the individual right in the case and the effectiveness of Community law as such. The Community rules on freedom of establishment were possibly being infringed by the United Kingdom. While this was being established, it was necessary to protect the applicants' rights of establishment in the United Kingdom. At the same time the effectiveness of the principle of freedom of establishment was secured. The Court used the same reasoning as it had done in Simmenthal and held that any national provision impairing the effectiveness of Community law had to be set aside. In addition to this powerful argument the Court also relied on Article 10 EC which obliges national courts to protect individual rights conferred by Community law. The national provision saying that interim relief could not be granted against the Crown clearly stood in the way of the effectiveness of Community law by preventing the national court from protecting the applicants' rights of establishment. Consequently, that obstacle had to be set aside and interim relief had to be granted. The question whether the Court imposed a new remedy on national courts or whether it just required a national remedy to be applied to a Community situation will not be thoroughly discussed here. It is possible to see it both ways and there are various arguments for both positions. In any case, a new remedy was definitely imposed a few years later in the Francovich case and the Factortame ruling probably made the decision in Francovich a bit easier to take.

The remedy of interim relief was further developed in Zuckerfabrik and Atlanta. These rulings gave national courts the power to grant interim relief to individuals in relation to Community legislation. This is rather interesting considering the fact that the Court of Justice has sole jurisdiction to annul a Community legislative measure. Another interesting point is that the remedy of non-contractual liability of the Community institutions, in Article 288 EC, seems to be a matter only for the

Court of Justice and not national courts. Thus, an individual relying on a Community right can obtain interim relief against Community legislation in national courts. However, if an individual suffers loss as a consequence of Community legislation, an action for damages against the Community has to be brought before the Court of Justice.

The conditions for granting interim relief were laid down in Zuckerfabrik and clarified in Atlanta. The basic point is that they are the same as the conditions applied by the Court of Justice under Articles 242 and 243 EC. These are strict conditions and consequently they work to the advantage of the effectiveness of the relevant piece of Community law. However, they seem rather hard to apply in national courts. They focus less on effectiveness than the Court of Justice did in its Factortame ruling, but that seems rather obvious since Factortame concerned effectiveness and individual rights in relation to national legislation. Zuckerfabrik and Atlanta on the other hand, deal more with individual rights in relation to Community legislation. This ought to mean that situations with conflicts between individual rights and the effectiveness of a specific piece of Community law are likely to arise. In such a case the strict conditions might work to the advantage of the effectiveness of Community law.

The principle of state liability, and the remedy of damages from the state, is perhaps the most significant of all the remedies laid down by the Court of Justice. It is not a development of the principle of direct effect, since the provisions in the Francovich case did not have direct effect. Instead the Court of Justice concentrated upon the effectiveness of Community law and the protection of individual rights. The fact that the rights claimed by Francovich did not have direct effect was never really considered by the Court of Justice when laying down the principle of state liability. Instead it focused on the fact that the enforcement of the rights was dependent on prior action by the Member State and found that the principle of state liability was inherent in the system of the Treaty. Out of an

effectiveness point of view it is of course a very useful remedy. Compensation for breaches of Community law is the best way to ensure that effectiveness is upheld, or at least reinstated, and that individual rights are protected. In the Brasserie du Pêcheur ruling, the Court of Justice clarified the conditions for state liability to arise laid down in Francovich. Furthermore, the principle of state liability was applied also to infringements of directly effective rights. I think that that was a totally natural development since the Court had in a way gone even further in Francovich. In Francovich the Court focused merely on the infringement of a right under Community law and not whether the right was directly effective or not. Thus, whether a certain right has direct effect or not is not important when it comes to state liability. The important thing is that there is a right which the national court has to protect.

The San Giorgio case was the first case where the Court of Justice struck down a national procedural rule. The rule in question was an evidential presumption that made it excessively difficult to enforce a Community based right. However, on the whole the Court has been less eager to interfere with national legislation in procedural matters than it has been in remedial matters. The reason for this seems to be the importance of having a procedural system. There are other concerns than purely effectiveness related ones when dealing with procedural matters. Important principles such as legal certainty are also influential in the area of procedures. The Treaty is completely silent when it comes to procedural rules in national courts and, although the Community might have legislative competence in the area, the Court of Justice has been very careful not to infringe the national procedural autonomy anymore than absolutely necessary. The term “autonomy” is probably not totally justified since the Community does have legislative competence in the area. However, it might still indicate that the Community thinks, or has to think, that procedures are primarily a matter for the Member States. The Court of Justice has then been forced to balance the interest of supremacy and effectiveness of Community law against the need for procedural rules, a need

satisfied by the legal systems of the Member States. This balancing act is of course very difficult and the different outcomes in the Van Schijndel and Peterbroeck cases may serve as an illustration of this. The cases were very similar but nevertheless they were decided differently.

Supremacy of Community law means that all kinds of Community law are superior to all kinds of national law. That ought to mean that Community law is superior also to national procedural law. However, there seems to be a difference between substantive and procedural supremacy. In Simmenthal and Factortame the Court of Justice said that any national rule which might impair the effectiveness of Community law must be set aside. When there is a conflict between a substantive provision of Community law and a substantive provision of national law, the principle of supremacy means that the national provision has to be set aside. However, when it comes to procedural rules, the Court says, for example in San Giorgio, that national rules are to be set aside only when they make it excessively difficult or virtually impossible to exercise a Community right. National procedural rules are thus allowed to impair the effectiveness of Community law to a certain extent. It is only when it they make it excessively difficult that they are to be set aside. The reason for this can, I think, once again be found in the fact that the Community has no procedural rules. This means, first of all, that there can be no direct clash between a procedural Community provision and a national one. Secondly, it means that the Community is forced to rely on national procedural rules for its implementation in the Member States. As stated above, there are other interests in a procedural system than just the effectiveness of substantive law. In order not to undermine the procedural systems of the Member States, the Court of Justice is forced to accept obstacles to the effectiveness of Community law to a larger extent than in purely substantive and remedial matters. However, the situation was very similar in earlier case law in relation to remedies. That situation changed though and perhaps the procedural area may change as well.

The rights which individuals derive from Community law are the same throughout the Community. This is necessarily so because the rights have the same source and consequently the same content. However, the rights are mainly exercised in the Member States, under national legislation and in national courts. The legal systems of the Member States are different and that means that the exercise of Community rights is not completely uniform throughout the Community. Originally, the Member States were competent in matters relating to remedies and procedures. The Court of Justice did not want to interfere but gradually it changed its mind about the remedies. Today there are three specific remedies that are uniform throughout the Community. The Court has also laid down uniform conditions for their application. Both restitution and interim relief were very much known to the legal systems of the Member States. What the Court of Justice did was that it made them applicable also to Community based claims and laid down uniform conditions for their application. The principle of state liability on the other hand was developed solely on the basis of Community law. This makes the term "Community remedy" fit very well to at least state liability. However, in my opinion the Court of Justice has developed three Community remedies which are applicable, under certain uniform conditions, to Member State breaches of Community law. The fact that there are uniform conditions for their application enhances the opportunities for uniform and effective application of Community law throughout the Community. However, the remedies still have to be exercised under national procedural rules and consequently there is still a threat to the uniformity and effectiveness of Community law. Thus, there are uniform rights and, thanks to the Court of Justice, uniform remedies for their protection but no uniform procedural rules for the application of the remedies. An example of the problem with different procedural rules is the various time limits for bringing action that exist in the various Member States. The question is then whether it is time to harmonize the procedural rules of the Member States in order to maximize the effectiveness of Community law and the protection of individual rights. That would of course be the ideal situation and the necessary legislative competence seems to

exist. However, although such a harmonization might be necessary, it seems less likely when considering the principle of subsidiarity. The principle of national procedural autonomy as applied by the Court of Justice comes very close to being an application of the principle of subsidiarity at the judicial level. The Court has never mentioned the principle of subsidiarity as such but the reasoning of the Court nevertheless seems to be in line with it. The Court has intervened only when necessary and left as much as possible to the Member States. One reason why the Court never expressly mentioned subsidiarity is of course that it applies mainly to legislative and not judicial action. Another reason might be the fact that the principle of subsidiarity was not made part of Community law until the early 1990's whereas the principle of national procedural autonomy was introduced in the middle of the 1970's. The principle of subsidiarity has become a more influential part of Community law over the last few years. An example of this is the protocol dealing with the principle, which was attached to the Treaty of Amsterdam. This development makes a big procedural harmonization less likely.

There are thus three Community remedies laid down by the Court of Justice. However, in order to further enhance the effectiveness of Community law I think it would be a good idea to introduce a fourth remedy, namely individual liability. Such liability would give individual rights even better protection at the same time as being an incentive for other individuals to comply with their obligations under Community law. The effectiveness of for example the principle of equal pay in Article 141 EC, and the competition rules in Articles 81 and 82 would definitely be enhanced. Individual liability would then arise when an individual has failed to comply with an obligation under national law, and therefore infringed another individual's Community right. By allowing for such actions to be brought in a national court, Community law would become even more relevant to private parties. I think that such a development might take place when the Court of Justice gets a perfect opportunity to introduce the remedy. However, there are still some problems with directives and horizontal direct effect. Given the fact that

directives cannot produce horizontal effects, not all Community law can be relied on in relations between private parties. This means that a part of Community law will not be available for individuals until implementation has taken place. This is of course a problem, since the effectiveness of the provisions of a directive will always depend on the Member States. A further point here is that, according to the protocol on subsidiarity and proportionality attached to the Treaty of Amsterdam, the amount of directives will increase in the future. A good solution would, in my opinion, be to give directives also horizontal direct effect so that they can be relied on between individuals. This would definitely increase the effectiveness of the relevant provisions and the rights that they grant to individuals. As long as horizontal direct effect, and individual liability, are not adopted by the Court of Justice, individuals with a Community right will have to rely on the principle of state liability.

Thus, I think that private enforcement has come a long way in the Community. I also think that is has been extremely important to the effectiveness of Community law and consequently to the integration within the Community. The next step, after laying down uniform Community remedies, would be to develop the protection of individual rights further by introducing a more horizontal aspect of Community law. This would, as I said earlier, make the Community even more relevant to its citizens, and thus making it less hard to grasp. In the Costa v. E.N.E.L. case, the Court of Justice held that Community law was an integral part of the national legal systems. By making directives horizontally effective and introducing individual liability, Community law would become even more integrated. Needless to say, such a development would have wonderful effects for the effectiveness of Community law. By harmonizing procedural rules in the Member States, the rights and remedies laid down by Community law would be uniformly applied throughout the Community. Once again, the effectiveness of Community law would be greatly enhanced.

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