

Member State Liability and Direct Effect: What's the Difference After All?

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1. Introduction

Can a breach of a non-directly effective provision lead to State liability? There are cases in which domestic courts have decided that liability is excluded in such a situation.¹ Before the Luxembourg courts, similar arguments have been put forward, in particular in the context of EU institutions' liability for breaches of obligations under international law.² Much depends on how direct effect is conceived. If direct effect is understood so that non-directly effective provisions are not judicially cognisable at all, or only cognisable for purposes of interpretation, that will exclude liability. In such cases the court is not able to establish that a breach occurred.

In Community law the question whether liability and therefore damages as a remedy should be made available in the case of infringements of non-directly effective provisions was for a long period of time either not addressed at all or it was cautiously suggested that such an option was conceivable.³ Cases decided in the pre-*Francovich*⁴ era under national regimes of public non-contractual liability concerned, in principle, breaches of directly effective provisions.⁵

There was also an opposite argument, submitted in the wake of *Francovich*. State liability, as a matter of Community law, should only come into the picture in case of a breach of non-directly effective provisions.⁶ Where provisions are

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¹ In the Netherlands, for instance, the proceedings which concerned the so-called 'Roosendaal-method' of expulsion of aliens and which were at the end of the day settled by the Hoge Raad, judgment of 11 June 1993, AB 1994, nr 10.

² Cf Case T-18/99 *Cordis* [2001] ECR II-913.

³ Cf Curtin, 'Directives: the Effectiveness of Judicial Protection of Individual Rights', (1990) CMLR 709 at 739.

⁴ Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357.

⁵ For a discussion see for instance Barav, 'State Liability in Damages for Breach of Community law in the National Courts', in: Heukels and McDonnell (eds), *The Action for Damages in Community Law*, (Kluwer, The Hague etc 1997), p 363.

⁶ Cf Nettesheim, 'Gemeinschaftsrechtliche Vorgaben für das deutsche Staatshaftungsrecht', (1992) DöV 999, at p 1002.

directly effective, individuals can assert their rights by relying on these provisions in national courts. Indeed, where appropriate and possible, directly effective provisions could be relied upon in the context of national rules of non-contractual liability. In such cases, there was no need for imposing Community law-based liability.

The ECJ dismissed both lines of argument. For the purpose of State liability under Community law, the question whether or not the provision breached is directly effective is irrelevant.⁷ However, it must be kept in mind that this Member State liability is a ‘minimum regime’, *ie* the State can incur liability under less strict conditions on the basis of national law.⁸ To what extent direct effect may feature as a decisive element for liability under national law is, in my view, not really clear. Arguably, it is closely linked to the question how the notion of direct effect is defined and understood.

In any case, State liability under Community law is governed by a set of conditions not related to the issue of the direct effect of the provisions concerned. Instead, other criteria apply. However, the question is whether, upon further consideration, there is not a ‘secret link’ between liability and direct effect, in particular when the conditions governing liability and direct effect are compared. Suggestions to this effect have been made in both legal writing and court practice.⁹ This ‘secret link’ is the central issue of this contribution. In order to unmask it, I will discuss briefly the conceptual overlap between direct effect and liability (Section 3). Next, I will look into the conditions of direct effect on the one hand and liability on the other (Section 4 and 5). Finally, conclusions will be drawn in Section 6. Before embarking upon this enterprise, I will briefly address the nature and function of liability and the nature and function of direct effect, where upon comparison, differences between them may be ascertained.

2. Difference in Nature – Difference in Function

Liability of the State for breaches of Community law is a ‘tailpiece mechanism’, a sort of residual remedy. In comparison with direct effect, and – also – consistent interpretation,¹⁰ liability of States for breach of community law operates at a different level. In principle, consistent interpretation and direct effect should

⁷ Cf Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, para 19–22.

⁸ Cf Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, para 66.

⁹ Cf Boch and Lane, ‘European Community Law in National Courts: a Continuing Contradiction’, (1992) LJIL 171, at p 183 and House of Lords, *Three Rivers District Council v Bank of England*, [2000] 3 CMLR 205, CA.

¹⁰ I am not dealing in this contribution in detail with the obligation of national courts to interpret national law in conformity with Community law provisions. However, it must be born in mind that legal protection is also often safeguarded through this mechanism.

as far as possible remedy the consequences of infringements of Community law, such as non-implementation, non-application, incorrect implementation or incorrect application at the level of the applicable norm itself. In the case of consistent interpretation, it is the national law, interpreted in conformity with community law, that applies.¹¹ In case of direct effect, it is often the Community law provision itself that is applied instead of national law.¹² Arguably, Community law is primarily interested in its application, for which, in the case of a Member State's failure, consistent interpretation and direct effect are the 'second best' solutions. Similarly, an individual may be more favoured by the application of national law in conformity with the Community law provisions or by their direct application, than by an award of damages as a result of liability of the State. All this is, in my view, particularly emphasized by the very obligation of national administrations to apply directly effective provisions or to proceed with consistent interpretation of national law.¹³

Liability constitutes a 'second rank alternative' for direct effect and consistent interpretation. To put it differently, consistent interpretation and direct effect operate at the level of primary norms and, in terms of rights, primary rights. Liability is a second level sanctioning norm or, again when put in terms of rights, a sanctioning right. It originates from the breach of a Community law obligation and not from the Community law provision itself, such as a Treaty provision or a directive. Therefore, liability of the State for damages the individual incurs as a consequence of an infringement of Community law comes, in principle, into consideration only if and in so far as the mechanism of direct effect or consistent interpretation can bring no relief.¹⁴ From the perspective of a Member State, it may indeed result in 'buying off' the failure.

This *subsidiary character* of liability seems to be confirmed in a whole line of judgments of the Court, like *Miret*, *Faccini Dori*, *Carbonari*, *Dorsch Consult* and to a certain extent also *Wells*.¹⁵ These cases show that only where direct effect or consistent interpretation are not possible, State liability comes into consideration.¹⁶ In this sense, liability is a *supplement to* direct effect and consistent interpretation, and not a substitute for them. A further argument to this effect may be drawn from

¹¹ Or may even result in *de facto* disapplication of national law, as we learn from Joined Cases C-397/01 to C-403/01 *Pfeiffer*, judgment of 5 October 2004, nyr in ECR.

¹² See below, Section 3.

¹³ Cf Prechal, *Directives in EC Law*, (Oxford: OUP 2005), at p 66.

¹⁴ Cf, for instance, Schockweiler, 'Die Haftung der EG-Mitgliedstaaten gegenüber dem einzelnen bei Verletzung des Gemeinschaftsrechts', (1993) EuR 107, at p 120. Cf, however, also Joined Cases C-397/98 and C-410/98 *Metallgesellschaft* [2000] ECR I-1727, paras 105–107 and the not very conclusive point 35 in Case C-150/99 *Lindöpark* [2001] ECR I-493.

¹⁵ Case C-334/92 [1993] ECR I-6911, Case C-91/92 [1994] ECR I-3325, Case C-131/97 [1999] ECR I-1103, Case C-54/96 [1997] ECR I-4961 and Case C-201/02, judgment of 7 January 2004, nyr. in ECR.

¹⁶ In *Wells* compensation was suggested as an alternative if revocation or suspension of a consent for the working of a quarry were not possible as a matter of national law.

the requirement formulated in *Brasserie* as to the limitation of the extent of loss or damage. In determining the loss or damage for which reparation may be granted, a national court may, as a matter of Community law, inquire whether ‘the injured person showed reasonable care so as to avoid the loss or damage or to mitigate it.’¹⁷ In this context it is important whether the claimant availed himself in time of all the legal remedies available to him.¹⁸ This should, in principle, imply that where the provisions concerned have direct effect, the claimant should bring an action and rely on the provisions first.¹⁹ On the other hand, there are situations in which the requirement to follow the direct effect avenue first would boil down to a rather absurd formality. In *Metallgesellschaft*, the Court found that, for the purposes of reparation, the company could not be obliged to take steps to obtain a tax advantage which national law denied to it before seeking compensation for breach of Community law.²⁰

Liability of the State may also function as a *complement* to the other two methods. Under certain circumstances, direct effect or consistent interpretation as such do not suffice to achieve a situation which entirely corresponds with what Community law wants *and* what would have been achieved if the Member State would have complied with its obligation, such as the correct transposition of a directive. In other words, the full effectiveness of Community law is also not always safeguarded by direct effect and consistent interpretation. Similarly, the individual may still be left with additional damage which is not remedied by direct effect or consistent interpretation. For instance, where the national court reviews the legality of national measures and subsequently disapplies them, the result may be a gap.²¹ The payment of damages to the persons affected may seem to be the appropriate complementary remedy in many respects.²² It may also include legal costs.

Where for a long period direct effect was considered to be the last resort, today the non-contractual liability of the State for breaches of Community law has taken over. Non-contractual liability of the State seems to be a safety net in cases where other devices fail.²³ One may also wonder whether the Court is sometimes not too easily

¹⁷ Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer* [1996] ECR I-4845, para 72, referring to *Brasserie*, para 84.

¹⁸ Cf Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, para 84.

¹⁹ Comparable questions may indeed also arise in relation to consistent interpretation.

²⁰ Cf Joined Cases C-397/98 and C-410/98 *Metallgesellschaft* [2000] ECR I-1727, paras 105–107. See also the somewhat curious observations in Case C-150/99 *Lindöpark* [2001] ECR I-493, para 35.

²¹ See below, Section 3.

²² As examples of such a ‘complementary function’ of liability can be mentioned Case C-66/95 *Sutton* [1997] ECR I-2163, Joined Case C-192/95 to C-218/95 *Comateb* [1997] ECR I-165 and to an extent also Case C-90/96 *Petrie* [1997] ECR I-6527. Cf further also Case C-373/95 *Maso* [1997] ECR I-4051 and Joined Cases C-94/95 and C-95/95 *Bonifaci* [1997] ECR I-3969, for reparation of complementary loss in case the retroactive application of the transposition measures would not suffice to cover the loss or damage actually sustained.

²³ All this, indeed, in so far as liability and direct effect *protect* individuals. Direct effect may also turn against individuals.

inclined to accept State liability as a panacea for different problems in the area where national judicial protection is lacking, and ultimately, lowers the effectiveness of the latter.²⁴ Liability may seem to be an elegant way out, but rather onerous conditions must be fulfilled such as the sufficiently serious character of the breach.

3. Conceptual Overlap?

While direct affect and liability differing in character and playing different roles in the system of judicial protection, they also have some ground in common. The most important interface between the two is the notion of 'rights'.

The notion of rights features, in the first place, in the Community law conditions for State liability. One of these condition, as is well-known, is that the rule of law infringed must have been intended to confer rights. However, the concept as such is by no means easy to pin down. The Court's case law on State liability have triggered a broader discussion on the concept of a right in Community law. In this debate, doctrinal differences and divergent jurisprudential traditions come to the fore. Some have used the Hohfeldian analytical framework in order to clarify the Court's rights-language and describe more precisely the legal relationships and the specific legal effects involved.²⁵ Others have given a very general and 'tentative' definition²⁶ or criticized the Court's approach.²⁷ The debate also differs between Member States, reflecting divergent national views on the issue.²⁸

Until now, the Court's indiscriminate rights language has hardly contributed to a clarification of the matter. In particular, the ECJ has not really indicated what it means by the first condition and especially by the term 'right'. In some cases the issue

²⁴ For this critique see in particular Dougan, 'The *Francovich* Right to Reparation: Reshaping the Contours of Community Remedial Competence', (2000) EPL 103.

²⁵ See, in particular, Hilson and Downes, 'Making sense of Rights: Community Rights in E.C. Law' (1999) ELR 121 and Gilliams, 'Horizontale werking van richtlijnen: dogma's en realiteit', in: *Liber Amicorum Walter van Gerven*, (Kluwer, Deurne 2000), p 223. Cf also Van Gerven in C-70/88 *European Parliament v Council* [1990] ECR I-2041, para 6, who pointed out the necessity to conceive 'rights' in the widest sense of the term, namely as right, power and prerogative.

²⁶ Cf, for instance, Van Gerven, 'Of Rights, Remedies and Procedures' (2000) CMLRev. 501, at p 502. In his view, 'the concept of rights refers (...) to a legal position which a person recognized as such by the law ... may have and which in its normal state can be enforced by that person against ... others before a court of law by means of one or more remedies ...'.

²⁷ Cf recently Eilmansberger, 'The Relationship between Rights and Remedies in EC law: in search of the Missing Link', (2004) CMLRev 1199.

²⁸ In Germany, for instance, numerous studies have been devoted to the question of the necessity to rethink traditional national legal concepts of 'subjective public rights' as well as the starting point of '*Individualrechtsschutz*'. Cf for instance Triantafyllou, 'Zur Europäisierung des subjektiven öffentlichen Rechts', (1997), DÖV 192, Ruffert, 'Dogmatik und Praxis des subjektiv-öffentlichen Rechts unter dem Einfluss des Gemeinschaftsrecht', (1998) DVBl 69 and Winter, 'Individualrechtsschutz im deutschen Umweltrecht unter dem Einfluss des Gemeinschaftsrechts', (1999) NVwZ 467.

was treated as an evident matter, in others the ECJ also relied on the preamble and the intentions laid down therein.²⁹ Again in other cases the ECJ merely stated that the relevant provision created rights for the purposes of establishing State liability, because the Court had previously found that the provision at issue created rights in the sense of having direct effect.³⁰ Yet, upon further consideration, the latter option seems more confusing than elucidating.

Although central to Community law, like rights, direct effect turned out to be an ambiguous notion. Its precise meaning and scope is uncertain and it seems to be coloured by national perceptions.³¹ What matters for the purposes of this contribution is that there are, broadly speaking, two different notions of direct effect. The first one is direct effect in a *narrow* sense. This notion is defined as the capacity of a Community law provision to create rights for individuals. However, as has been pointed out by various scholars, direct effect may also be understood as a *broader concept* than the mere creation of rights. In fact, direct effect is a matter of justiciability. This means that Community law provisions can be invoked or relied upon for a wide variety of purposes, for example as a defence in criminal proceedings or as a standard for review of the legality of a Member State's action in administrative proceedings, including the control of the use of discretion by the Member States.³²

Depending on the case at issue, a court may confine itself to reviewing the national law in the light of Community law provisions and, where appropriate, disapplying the national provisions. In these cases, the Community law provisions will serve as a touchstone for reviewing the legality of national measures. In some cases the control of legality, often with the inapplicability of the contrary national rules as a sanction, thus by way of *exclusion*, may suffice to resolve the Community law point. In other cases it may be necessary for the domestic court to apply the provisions of the directive *instead of* the national provisions, by way of *substitution*.³³ This will

²⁹ Cf for instance C-91/92 *Faccini Dori* [1994] ECR I-3325 and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer* [1996] ECR I-4845.

³⁰ Cf Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, Case C-5/94, *Hedley Lomas* [1996] ECR I-2553 and Case C-150/99 *Lindöpark* [2001] ECR I-493. Cf also Eilmansberger, *supra* n 27 at p 1225–1227.

³¹ Cf Craig and De Búrca, *EU law: text, cases and materials*, (Oxford University Press, Oxford 2003, 3rd ed), at p 178 and Prechal, 'Does Direct Effect still Matter?', (2000) CMLRev 1047.

³² Cf Case C-72/95 *Kraaijeveld* [1996] ECR I-5403 and Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee*, judgment of 7 September 2004, nyr in ECR, Cf also Case C-443/98 *Unilever* [2000] ECR I-7535, where, according to the Court Directive 83/189 does not 'define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals' (para 51). Nonetheless Unilever was allowed to rely on the Directive for the purposes of having the Italian law at issue set aside.

³³ This distinction between 'substitution effect' and 'exclusion effect', which has, in the meantime, also gained ground in English legal writing (eg Tridimas, 'Black, White and shades of Grey: Horizontality of Directives Revisited', (2002) YEL 327) corresponds closely with the French distinction '*invocabilité d'exclusion*' and '*invocabilité de substitution*' and to an important extent also with the German distinction '*Wirkung als Maßstabnorm*' (Community law as a gauge for legal review) and '*unmittelbare subjektive*

be necessary in particular where the mere disapplication results in a lacuna or where, for some reasons, the claim is based directly on the Community law provisions. This application by way of substitution may, in turn, often result in the creation of rights. This 'dual nature' of the broadly defined direct effect is, for instance, clearly mirrored in the classical formula in *Becker* where the ECJ held that '... wherever the provisions of a directive appear ... to be unconditional and sufficiently precise, those provisions may ... be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the state.'³⁴

An additional source of confusion lies in the fact that the case law on liability seems to suggest that provisions which are not directly effective, may nevertheless create rights, or at least be intended to do so. The most obvious example in this respect is the *Francovich* case.³⁵ In this case the directive at issue was regarded as being designed to create rights for the benefit of individuals but the direct effect doctrine was of no avail for the individuals concerned, since the provisions on the identity of the debtor were not sufficiently clear and unconditional. Another example to indicate that the creation of rights and the possible direct effect must be considered separately can be drawn from cases concerning rights of individuals which are to be asserted against other individuals. The content of the relevant provisions may very well confer rights upon a person but since directives do not have horizontal direct effect, the person concerned cannot assert them against another individual. This does not mean, however, that no right has been created. It is 'only' not enforceable against the other individual.

One should not equate, on the one hand, the concept of direct effect and, on the other hand, the creation of rights. Direct effect in the broad sense refers to the ability to rely on a provision of Community law for a variety of purposes, even where the provision does not confer rights. On the other hand, Community law provisions may confer rights upon individuals, or at least be intended to do so, without being directly effective. Direct effect and creation of rights may often coincide; the provision can thus both have direct effect and define rights. However, this is not always necessarily the case. The crux is that the question whether a provision creates individual rights is *a matter of its content*; the question whether a provision has direct effect relates to *the quality ascribed to it*, namely whether it can be invoked by those concerned within the national legal system.³⁶ Therefore, the questions of the creation of rights and the possible direct effect must be considered separately. At the same time, the 'creation of rights' is a feature that also seems to link liability and direct effect, at

Wirkung' (direct effect, used in the sense of creation of individuals rights). Cf also A-G Kokott, Opinion in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee*, of 29 January 2004 and A-G Léger in his Opinion in Case C-287/98 *Linster* [2000] ECR I-6917.

³⁴ Since Case 8/81 *Becker* [1982] ECR 53, para 25.

³⁵ Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357 and Case C-131/97 *Carbonari* [1999] ECR I-1103.

³⁶ A good example of such an approach provides Case C-37/98 *Savas* [2000] ECR I-2927.

least direct effect in the narrow sense. Whether this is true and in how far it does so will be explored in the next two Sections.

4. Ascertainability and Sufficient Precision/Unconditionality: Twin Notions?

The idea that rights function as the interface between direct effect in a narrow sense and the State liability regime is prompted by at least two additional arguments. These relate to the conditions that are often used in order to establish whether a certain provision confers rights upon individuals or not.

The first set of conditions to look into are the classical conditions for direct effect. While in relation to *Francovich*, for instance, it has been observed that the Court intentionally did not use the orthodox terms of direct effect conditions *ie* ‘unconditional and sufficiently precise’,³⁷ others have argued that since the Court required that it should be possible to identify the content of the rights on the basis of the directive, this boils down to the same test.³⁸ The latter may be partially true.

In the context of direct effect, the question whether the provisions at issue are sufficiently precise and unconditional has to be examined in the light of the concrete case. The assessment will depend on for what purposes they are relied upon. While in a case of the review of legality, certain provisions may satisfy the conditions of the necessary precision and unconditionality, this may be different in a case where an individual is asserting rights on the basis of the Community law provisions at issue.³⁹ For the purposes of this contribution it is the latter situation that matters. Here the Community law provisions usually serve as ‘*Alternativ-Normierung*’, *ie* legal norms which can be applied by national courts, where appropriate, instead of national rules which are incompatible with Community law provisions. For this type of application, which is a fully fledged alternative, the national court will need ‘more’ and another type of guidance from the provisions concerned than when it is asked to proceed to the review of legality. The provisions must be unconditional and sufficiently precise in order to enable the court to establish the content and the beneficiaries of the right at issue. Similarly, for the purposes of direct effect it

³⁷ Cf Gilliams, ‘Overheidsaansprakelijkheid bij schending van Europees recht’, (1991–1992) RW 877, at p 879.

³⁸ Cf Barav, ‘Omnipotent Courts’, in: Curtin and Heukels (eds.), *The Institutional Dynamics of European Integration*. (Liber Amicorum Henry G. Schermers, Nijhoff, Dordrecht 1994), p 265, at p 290.

³⁹ In terms of A-G Léger in his Opinion in Case C-287/98 *Linster* [2000] ECR I-6917: ‘When reviewing the compatibility of a subordinate rule, the need to ensure that the directive is precise is less important ...’ (para 74). Cf also Gilliaux, ‘Contribution des juges belges à l’application du droit communautaire en matière de protection de l’environnement’, in *Les juges et la protection de l’environnement*, (Bruylant, Bruxelles 1998), p 111, at p 118–121 and Prechal, *Directives in EC Law*, op cit note 13, at p 250–253.

must be ascertainable who is the person under obligation in relation to this right, *ie* against whom may the right be claimed.⁴⁰

Discretion does not sit easily with this type of application. As a rule, discretion implies certain choices, either by the legislator or by the executive, which cannot be made by a court.⁴¹ In such a case, the court is unable to know what the applicable rules should be. Therefore, it is not surprising that, initially, the mere existence of discretion was generally considered to be an obstacle to direct effect.⁴² Yet, in the meantime, the case law of the Court has considerably evolved in this respect. In a number of cases the Court was willing to accept direct effect despite the existence of a certain degree of discretion on the part of the Member States. This was because it was possible to determine the minimum guarantee provided for on the basis of the terms of the provisions concerned.⁴³

As to the assessment of the first condition for liability, namely that the rule of law infringed must be intended to confer rights on individuals, the Court's case law does not provide much guidance, and the criteria provided are applied loosely. The Court made clear that the question is a matter of content of the relevant provisions and, therefore, of their interpretation.⁴⁴ The terms and the purpose of the provisions are central. We may also derive from the few cases on this issue that the rights – more precisely, their content and the beneficiaries of the rights⁴⁵ – must be so that they can be determined with sufficient precision, *ie* they must be ascertainable. The more explicit the rule, the better.⁴⁶ The cases on non-implemented directives are perhaps the most clear in this respect: the result prescribed by the Directive concerned must entail the grant of rights to them and *the content of those rights must be identifiable* on the basis of the directive.⁴⁷

⁴⁰ Cf no ascertainable debtor in *Francovich*.

⁴¹ Cf Case C-365/98 *Brinkmann II* [2000] ECR I-4619, para 38 and C-157/02 *Rieser*, judgment of 4 February 2004, nyr in ECR, para 40. Similarly, where the discretion left to the Member States is very broad and in so far as it is not subject to conditions open to judicial review, the Court will deny direct effect. Cf Case C-374/97 *Feyrer* [1999] ECR I-5153, para 27.

⁴² Cf the judgment in *Kaefer and Procacci* (Joined Cases C-100/89 and C-101/89 [1990] ECR I-4647), where the Court held that 'an unconditional provision is one which leaves no discretion to the Member States' (para 26). See, however, also Case C-441/99 *Garehveran* [2001] ECR I-7687.

⁴³ Cf Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, Case C-91/92 *Faccini Dori* [1994] ECR I-3325, Case C-303/98 *Simap* [2000] ECR I-7963 and Joined Cases C-397/01 to C-403/01 *Pfeiffer*, judgment of 5 October 2004, nyr in ECR.

⁴⁴ Cf for instance Joined Cases C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer* [1996] ECR I-4845, paras 33–46 and Case C-131/97 *Carbonari* [1999] ECR I-1103.

⁴⁵ Cf the Opinion of A-G Tesouro in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer* [1996] ECR I-4845, para 18 and Case C-140/97 *Rechberger* [1999] ECR I-3499, para 22.

⁴⁶ Cf Case C-222/02 *Peter Paul*, judgment of 12 October 2004, nyr in ECR, para 41.

⁴⁷ Cf Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer* [1996] ECR I-4845, para 27.

Here again the problem of discretion may come in. Public law rules may impose obligations on public authorities or on the State as a whole, while leaving them a considerable degree of discretion with respect to the concrete fulfilment or realization of those obligations. As the corresponding right of an individual must be ascertainable with sufficient precision, it can only exist as a correlative of the obligation when the latter is sufficiently defined. Whether this is the case will depend on the extent to which the public authority is bound. Thus while some provisions do not as such give rise to an individual right, they may define the conditions in which rights come to be created. The less discretion is left to the authorities concerned, the more probable it is that the requirement of ascertainability will be satisfied.⁴⁸

Also Community law and, in particular, directives may *intend* to create rights for individuals but the further substantiation of the rights, the elaboration of their exact scope, is left to the Member States.⁴⁹ Obviously, a right laid down in a Community law provision in a rudimentary form will make it impossible to determine the content of the right and, subsequently, the loss and damage incurred by the individual. The provision concerned must provide sufficient guidance in this respect. This implies that, when the test for direct effect – which ultimately, as was pointed out above, also concerns the issue of discretion – is satisfied, the provision must be considered as being sufficiently precise with respect to the subject matter of the right.⁵⁰ Indeed, direct effect would be used then to assert a right.

In other situation the things may be less clear. In the *Mundt*-case the plaintiff in national proceedings contested the amount of fees charged for the health inspection of its premises.⁵¹ The standard level of these fees was laid down in a provision of a Council Decision. However, under the same Decision the Member States were allowed to derogate from these standard levels. They could, under certain conditions, reduce or increase the fees. According to the Court, this derogation did not deprive the provision at issue of direct effect since the fulfilment of the conditions could be subject to judicial review. Yet, when a German court was facing the same provision in the context of a State liability proceedings, it found that the provision did not create a right for the individual concerned.⁵² It was, in the court's opinion, the option left to the Member States to increase (or decrease) the fees which made that there was no right to be protected against fees which are higher than the standard levels laid down in the Decision.⁵³

⁴⁸ Cf Case C-127/95 *Norbrook* [1998] ECR I-1531, para 108 and, very explicitly, Case C-216/02, *Österreichischer Zuchtverband für Ponys, Kleinpferde und Spezialrassen*, judgment of 11 November 2004, nyr in ECR, para 36.

⁴⁹ This is, in particular, an important issue in the context of case law on implementation of directives. For a more detailed discussion of this see Prechal, *Directives in EC Law*, Oxford 2005, at p 108–111.

⁵⁰ Indeed, provided that direct effect was used to assert a right.

⁵¹ Case C-156/91 *Mundt* [1992] ECR I-5567.

⁵² Bundesgerichtshof, judgement of 14 December 2000, III ZR 151/99.

⁵³ This reasoning can be criticised, in my view, the more since the Member State concerned did

Also where a provision leaves some choice as to the content to the Member State authorities (and for that reason, cannot be considered as directly effective), it may give *grosso modo* sufficient indications as to the subject matter concerned. It may be considered as creating rights or intend to do so. In the *Carbonari*-case, for instance, the lack of precision resulted in that direct effect was of no avail.⁵⁴ However, the Court went on and recalled the possibility of State liability. Arguably, there were sufficient indications in the directive as to the right the individuals concerned could derive from the directive in the context of State liability. Comparable considerations also hold true in a situation where the person against whom the right may be enforced is not identifiable. Under the State liability regime it is after all the state who 'takes over' in this respect.

In summary, from this brief comparison it follows that there is a certain overlap between the conditions for direct effect, in so far as direct effect is used to assert an individual right, and the requirement of ascertainability used in the context of liability. Finding that a provision is directly effective may also suffice for establishing the existence of a right for the purposes of liability. However, in other cases the conditions will not coincide. They cannot be treated as being the same *a priori*.

5. The Protective Scope of the Provisions Concerned

Were the Court requires, for State liability, that the provision breached must be intended to create rights, it aims at introducing the concept of 'relative unlawfulness'. This is a *Schutznorm*, which is common to the non-contractual liability regimes of several Member States:⁵⁵ Only a breach of a rule creating rights for individuals concerned or intended to create rights or, at least, protecting their interests can give rise to a right to reparation. In other terms, the scope of protection of the infringed norm must include the harmed interest of the claimant. The quintessence of this requirement is to prevent excessive damages by demanding a connection between the infringement of the rule and the interest affected.⁵⁶ It is striking that, in contrast to its case law under Article 288 of the EC Treaty, the Court did not merely require that the provisions of the directive be interpreted to protect the

not issue the necessary implementing measures and therefore did not use its discretion to deviate from the Decision's standards.

⁵⁴ Case C-131/97 *Carbonari* [1999] ECR I-1103.

⁵⁵ Cf Simon, 'Droit communautaire et responsabilité de la puissance publique. Glissements progressifs ou révolution tranquille', AJDA 1993, p 235, at p 237, Van Gerven, 'Non-Contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law of Europe', (1994) MJ 6, at p 16. Cf also Ross ('Beyond Francovich', (1993) MLR 55) who points out that in English law the norm violated must impose a duty which is owed to the plaintiff (at p 62).

⁵⁶ Cf Priëß, Die Haftung der EG-Mitgliedstaaten bei Verstößen gegen das Gemeinschaftsrecht, (1993) NVwZ 118, at p 121. See also the opinion of A-G Darmon in Case C-282/90 *Vreugdenhil* [1992] ECR 1992, p I-1937, para 53-58.

individual.⁵⁷ On the contrary, it has imported the requirement of ‘a right’ into the Community liability regime and, arguably, made this more stringent.⁵⁸

To what extent there is a difference between a ‘right’ and a mere protection of interests in Community law is not at all clear, all the less since the latter seems an element of the former. Linking a right to interest, in the sense that rights are considered to serve the protection of individual interests, goes back to Jhering and still is a common thesis.⁵⁹ This implies that in a concrete case it must be established whether the legal rules which are at the source of the alleged right exist to protect specific or individual interest and not merely to protect the general (or public) interest.⁶⁰ In terms of the addressee of the norm, this translates into the question whether his or her obligation exists vis-à-vis to the general public or also specifically with regards to a certain person. In addition to this ‘personal’ scope of the protection one may also distinguish a substantive scope: not only whose interests are protected but also which interests are protected and to what extent.

As to the personal scope, the problem is that the distinction between general and individual interest is not black and white but rather a matter of degree. How strict – in Community law – this requirement of protection of individual interest is, is far from clear and it seems to depend on the different context in which until now the cases have been decided.⁶¹ The discussion about this has been rather complicated by a number of dicta about environmental directives, which were said – in the context of infringement proceedings – to create rights for individuals.⁶² In any case, on the basis of the Courts case law it was submitted that the latter’s approach is less strict than, for instance, German or Austrian law.⁶³ In particular in German legal writing it is often pointed out that the Court of Justice is more readily satisfied that a provision is also aiming at the protection of individual interest than a German court would be under the application of the German ‘*Schutznormtheorie*’.⁶⁴ Until recently, it seemed that the very fact that the protective scope of a Community law rule includes individual interest is sufficient. Individual interest as a specific aim of protection was not necessary.

⁵⁷ Cf Bebr, ‘Comment on Joined Cases C-6/90 and C-9/90 *Francovich*’, (1992) CMLRev 557, at p 575.

⁵⁸ Cf Case C-352/98P *Bergaderm* [2000] ECR I-5291.

⁵⁹ Cf for instance Eilmansberger, op cit note 27, at p 1236–1245.

⁶⁰ Cf on this also Case C-253/00 *Muñoz* [2002] ECR I-7289 and, in particular, the Opinion of A-G Geelhoed, who deals more explicitly with this issue than the Court does.

⁶¹ For an excellent discussion of the flaws in the case law see Eilmansberger, op cit note 27, at p 1231 *et ff.*

⁶² For a more detailed discussion see Prechal, *Directives in EC Law*, op cit note 13, at p 108–111.

⁶³ Cf for a discussion, for instance, Jarass and Beljin, *Casebook Grundlagen des EG-Rechts*, (Nomos, Baden-Baden 2003), p 176–190.

⁶⁴ Cf Hölscheidt, ‘Abschied vom subjektiv-öffentlichen Recht?’ (2001) EuR 376, at p 386–389. For a rather reserved position of an English court see *eg Bowden v South West Water Services LTD*. [1999] 3 CMLR 180 (Bathing Water Directive, Shellfish Waters Directive and Waste Water Directive did not entail the grant of rights to shell-fishermen).

In *Dillenkofer*,⁶⁵ the Court relied on the fact that the preamble repeatedly refers to the purpose of protecting consumers. Moreover, also the aim and wording of the particular provision, which the court had to interpret, Article 7 of the Directive, was to protect consumers. The fact that the Directive intended to ensure other additional objectives (freedom to provide services and fair competition) could not detract from this finding. In Case *C-144/99* the Court deduced from one of the aims of Directive 93/13 (unfair terms in consumer contracts), set out in the preamble, namely ‘to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of member States other than his own’, that the Directive intended to accord rights to individuals.⁶⁶ In Case *C-478/99* the Court also accepted that the same Directive aims at creating rights for individuals, but this time on the basis of a number of specific provisions.⁶⁷ In the area of public procurement, the Court stressed that Directive 92/50 (public procurement – service contracts)⁶⁸ was adopted with a view to eliminating barriers to the freedom to provide services and therefore is intended to protect the interests of traders who wish to offer services to contracting authorities in other Member States.⁶⁹ This too would point in the direction of individual rights, despite the main objective, the removal of barriers in the field of free movement of services.

However, the judgement of the Court in *Peter Paul* suggests that the Court is going to tighten the individual interest requirement.⁷⁰ This case is also interesting because it illustrates the relevance of ‘rights’ and individual interest for the purposes of the national law context. Briefly put, the central issue was whether certain banking directives had to be interpreted as containing a right for depositors to have national ‘supervisors’ take supervisory measures in their interest. If that would be the case, a national rule, according to which the supervision of credit institutions was a matter of public interest only and which precluded individuals to claim damages in case of defective supervision, had to be set aside.

The Court denied the existence of such a right. The objective of the directives was harmonisation, necessary to secure the mutual recognition of authorisations and prudential supervision systems. Although according to the preambles the protection of depositors was one of the objectives of the harmonisation and the relevant directives laid down a number of supervisory obligations of the national authorities vis-à-vis credit institutions, this was not enough to establish the existence of the right sought by the depositors. The court stated:

“... it does not necessarily follow either from the existence of such obligations or from the fact that the objectives pursued by those directives also include the

⁶⁵ Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 [1996] ECR I-4845.

⁶⁶ Case C-144/99 *Commission v The Netherlands* [2001] ECR I-3541.

⁶⁷ Case C-478/99 *Commission v Sweden* [2002] ECR I-4147.

⁶⁸ OJ 1992, L 209/1

⁶⁹ Joined Cases C-20/01 and C-28/01 *Commission v Germany*, [2003] ECR I-3609.

⁷⁰ Case C-222/02 *Peter Paul*, judgment of 12 October 2004, nyr in ECR.

protection of depositors that those directives seek to confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities.⁷¹

The main arguments were that there was no express rule granting such rights, coordination of the rules on liability in case of defective supervision was not necessary for the purpose of the harmonisation and, in one of the directives, there was already provided for minimal protection of depositors in the event that their deposits were unavailable.

The finding that, under the directives, the depositors had no right to compensation which went beyond the minimum protection mentioned above was also decisive for the next question, namely State liability under Community law in the event of defective supervision on the part of the supervisory authorities. The Court was brief on that: as there was no such right conferred on depositors, the first condition for State liability was not met.

The judgment in *Peter Paul* illustrates that, at the end of the day, for the purposes of the question whether certain legal rules, like a directive, create rights for individuals, more specific provisions are necessary in addition to general dicta in the preamble, which make it possible to identify the particular interests and the class of persons protected under the rules at issue.

A special category of cases relate to obligations of a procedural character. It is somewhat difficult to imagine how, for instance a breach of an obligation of notification could give rise to a right of individuals and therefore to reparation.⁷² However, it is not entirely self-evident that liability must be excluded *a priori* for this type of breaches. Whether or not there should be such a liability may depend on the legal consequences of such a notification and its objective, such as whether the procedure also serves the protection of the individuals interest of the person concerned. In some cases, there can hardly be any doubt. The most obvious examples of this are in the public procurement directives.⁷³ Similarly, in *Wells* the Court has accepted liability for a breach of an essentially procedural obligation, namely the failure to carry out an environmental impact assessment. This would suggest that the Environmental Impact Assessment Directive confers rights upon individuals.⁷⁴ On the other hand, in relation to Directive 83/189 (notification of technical standards),⁷⁵ the Court pointed out that this Directive does not ‘define the substantive scope of the legal rule on the basis of

⁷¹ Para 40 of the judgment.

⁷² Cf Case 380/87 *Enichem* [1989] ECR 2491 or Case C-159/00 *Sapod* [2002] ECR I-5031.

⁷³ Cf also Case C-19/00 *SIAC* [2001] ECR I-7725, Case C-243/89 *University of Cambridge* [2000] ECR I-8035 and Case C-433/93 *Commission v Germany* [1995] ECR I-2303, where the Court held that the rules regarding participation and advertising in public procurement directives are intended to protect tenderers against arbitrariness on the part of the contract-awarding authority.

⁷⁴ Case C-201/02 *Wells*, judgment of 7 January 2004, nyr. in ECR, para’s. 66–69.

⁷⁵ OJ 1983, L 109/8.

which the national court must decide the case before it. It creates neither rights nor obligations for individuals.⁷⁶

This discussion of procedural provisions and, in particular, of Directive 83/189 brings me to the issue of protection of individual interest in the context of direct effect. As long as direct effect is understood as a creation of rights, it should not come as too much of a surprise that, for instance, in Germany it was not unusual to find arguments to the effect that the creation of an individual right is another (implicit) condition for direct effect.⁷⁷ Similarly, a sort of *Schutznorm* requirement has slipped into the discussion about the question who may rely on the provisions of a directive in the aftermath of the *CIA-Security* judgement.⁷⁸ According to some,⁷⁹ only those persons whose interests are intended to be protected by the provisions at issue may rely on them before the courts.

In my opinion, introducing an interest requirement of this type for the 'invocability' of Community law provisions amounts to an unnecessary restriction, adding a new condition for direct effect. The same holds indeed true for imposing the creation of rights as another condition of direct effect. The creation of rights is a consequence of (not a condition for) direct effect. Since Community law provisions are relied upon within the context of national proceedings and, under the broader concept of direct effect, for various purposes, it is a matter of national law to define the individual's position. 'Invocability' may result in the creation of rights but not necessarily so. The classification is a matter of national law and therefore the question whether a right is created or not is a matter of national law in the first place. At the same time, this indeed should not exclude that a national court may ask preliminary questions about the possible interpretation of the Community law rules if the issue of rights is relevant for the case before it.⁸⁰ However, here we are dealing with the content of the measures and not with their direct effect as such.

The matter of individual interest may play a role in the context of proceedings in which Community law provisions are relied upon. It does so at the national (procedural) level. The interest requirement plays, for instance, a part in relation to *locus standi*, as a condition in action for damages and as a condition for the '*recevabilité*

⁷⁶ Case C-443/98 *Unilever* [2000] ECR I-7535, para 51.

⁷⁷ Cf, however, Winter, 'Die Dogmatik der Direktwirkung von EG-Richtlinien und ihre Bedeutung für das EG-Naturschutzrecht', (2002) *Zeitschrift für Umweltrecht* 313, at p 314, referring to a judgment of the Federal Administrative Court, which seems to accept that the creation of rights is a consequence of direct effect.

⁷⁸ Case C-194/94 [1996] ECR I-2201.

⁷⁹ For instance the Dutch government before the ECJ and Advocate General Fennelly in Case C-227/97 *Lemmens* [1998] ECR I-3711. See also Hilson and Downes, 'Making sense of Rights: Community Rights in E.C. Law', (1999) *ELR* 121, at p 131 *eff.*, who are also 'smuggling' an interest requirement into the concept of direct effect.

⁸⁰ As was the case in, for instance, in Case C-222/02 *Peter Paul*, judgment of 12 October 2004, *nyr* in ECR and Case C-216/02, *Österreichischer Zuchtverband für Ponys, Kleinpferde und Spezialrassen*, judgment of 11 November 2004, *nyr* in ECR.

des moyens'.⁸¹ These are matters which are governed by provisions of national (procedural) law. From a Community law point of view, these national procedural provisions are subject to the well-known principles of equivalence and effectiveness or, where appropriate, effective judicial protection.⁸² As these national provisions limit already as such either the access to the courts or the admissibility of certain submissions, I see no need to introduce an additional limitation at the level of direct effect. Moreover, direct effect pertains to the provision at issue and not to the persons relying on it.

A confirmation that the application of a *Schutznorm* requirement is not allowed to deny interested parties the right to rely on directly effective provisions of Community law can be found in the judgement in *Streekgewest Westelijk Noord-Brabant*.⁸³ In this case, the Dutch Supreme Court asked the following: 'May only an individual who is affected by a distortion of cross-border competition as a result of an aid measure rely on the last sentence of Article 93(3) of the EC Treaty ...?'

The Court recalled that rules relating to the determination of an individual's standing and legal interest in bringing proceedings may not undermine the right to effective judicial protection.⁸⁴ Next it held that '[a]n individual may have an interest in relying before the national court, on the direct effect of the prohibition on implementation referred to in the last sentence of Article 93(3) of the Treaty, not only in order to erase the negative effects of the distortion of competition created by the grant of unlawful aid, but also in order to obtain a refund of a tax levied in breach of that provision. In the latter case, the question whether an individual has been affected by the distortion of competition arising from the aid measure is irrelevant to the assessment of his interest in bringing proceedings. The only fact to be taken into consideration is that the individual is subject to a tax which is an integral part of a measure implemented in breach of the prohibition referred to in that provision.'

While direct effect and individual interest should not be tied up, there is a close connection between the existence of a right (and thus protection of individual interests) in the sense that there should also exist a court action. In other terms, where it can be established that under Community law a right is conferred upon individuals

⁸¹ To be understood as the requirement that, if somebody in a proceeding relies on a provision in order, for instance, to defend himself, the provision at issue should also aim at protecting his interests.

⁸² Cf also on a comparable problem A-G Geelhoed, Opinion of 4 March 2004, in Case C-174/02 and C-175/02 *Streekgewest Westelijk Noord-Brabant*, paras 51–61 and A-G Kokott, Opinion in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee*, of 29 January 2004, paras 138–143. On the other hand, see also Case C-157/02 *Rieser*, judgment of 5 February 2004, nyr in ECR, para 43 and 44, which seems to limit the circle of persons who may rely on the directive at issue.

⁸³ Case C-174/02, judgment of 13 January 2005, not yet published in the ECR.

⁸⁴ Under reference to Joined Cases C-87/90 to C-89/90 *Verholen* [1991] ECR I-3757 and Case C-13/01 *Safalero* [2003] ECR I-8679. In fact this reference is a bit peculiar since *Streekgewest* was not concerned with standing or bringing proceedings but with the question whether a certain argument could be relied upon.

or, the provision has the intention to do so, an appropriate remedy must exist and this may imply that the person must be given standing. However, this is not a matter of direct effect but of national procedural autonomy and therefore, the principles of equivalence, effectiveness and effective judicial protection.⁸⁵

6. Conclusions

State liability and direct effect are different matters, by their nature and function. However, they have also some features in common. The most important ‘passerelle’ between the two is the notion of rights. The creation of rights is one of the three Community law conditions for State liability. Directly effective provisions may confer rights upon individuals. But, this is not necessarily always the case. The creation of rights and direct effect should not be conflated.

Where directly effective provisions are used in order to claim the existence of a right the link will lie in the requirement that rights – more precisely, their content and the beneficiaries of the rights – must be determinable with sufficient precision, *ie* they must be ascertainable. Here, the test for direct effect and the ascertainability may coincide. An affirmative answer to the question whether the test for direct effect, *ie* the conditions of clarity, sufficient precision and unconditionality is satisfied, will usually also indicate that there is a right conferred upon individuals, provided that the questions is indeed raised in a context where a person asserts a positive claim, often a right.⁸⁶

However, again, the conditions for direct effect and for the ascertainability of rights for the purposes of State liability should not be *a priori* equated. A provision may be sufficiently precise as to be directly effective *and* to create individual rights, but is not necessarily always so. Once it has been established that the provisions at issue are not directly effective, one has to proceed with the question whether the content of the rights is ascertainable on the basis of the directive of the provisions concerned. Arguably, this condition is different from the precision and unconditionality required for direct effect and seems to be less restrictive. There exists a gradation: for rights in the case of direct effect, the requirements of ascertainability are rather strict. In the case of State liability the test of ascertainability of the right is more lenient.

A question central to the creation of rights is the protective scope of the provi-

⁸⁵ Cf A-G Kokott, Opinion in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee*, of 29 January 2004, in particular points 138–143. However, it must also be pointed out that the Court’s case law is rather ‘drifting’ in this respect. In some cases it relies heavily on the full effectiveness of Community law rather than on effective judicial protection. Cf, for instance, Case C-253/00 *Muñoz* [2002] ECR I-7289.

⁸⁶ The situation may be different where a person uses Community law provisions in the context of a legality review. Cf the Opinion of A-G Léger of 11 January 2000 in Case C-287/98, *Linster*, [2000] ECR I-6917.

sions at issue, is at the moment one of the most uncertain elements in the case law. Not surprisingly, it plays a role in both State liability and in cases where for other – national law – purposes it has to be established that the Community law provision confers a right upon an individual. However, in spite of what has been suggested by some, no *Schutznorm* requirement in the sense of ‘individual interest requirement’ applies in relation to direct effect as such. Whether such a requirement is imposed or not, is a matter of national law. It has to be judged in the light of the principles of equivalence, effectiveness and effective judicial protection.