

# EU LAW IN JUDICIAL REVIEW

SECOND EDITION

RICHARD GORDON QC

*Visiting Professor in the Faculty of Laws, University College London*

ROWENA MOFFATT

*Barrister, Lamb Building*

OXFORD  
UNIVERSITY PRESS

OXFORD

UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,  
United Kingdom

Oxford University Press is a department of the University of Oxford.  
It furthers the University's objective of excellence in research, scholarship,  
and education by publishing worldwide. Oxford is a registered trade mark of  
Oxford University Press in the UK and in certain other countries

© Richard Gordon and Rowena Moffatt 2014

The moral rights of the authors have been asserted

First Edition published in 2007  
Second Edition published in 2014

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in  
a retrieval system, or transmitted, in any form or by any means, without the  
prior permission in writing of Oxford University Press, or as expressly permitted  
by law, by licence or under terms agreed with the appropriate reprographics  
rights organization. Enquiries concerning reproduction outside the scope of the  
above should be sent to the Rights Department, Oxford University Press, at the  
address above

You must not circulate this work in any other form  
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence  
Number C01P0000148 with the permission of OPSI  
and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press  
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data  
Data available

Library of Congress Control Number: 2014939075

ISBN 978-0-19-967533-3

Printed and bound by  
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and  
for information only. Oxford disclaims any responsibility for the materials  
contained in any third party website referenced in this work.

# 1

## EU LAW IN JUDICIAL REVIEW OVERVIEW

A. Scheme of Book	1.01	International agreements and direct effect	1.85
B. Why EU Law is an Important Part of Domestic Public Law	1.04	Excluding the operation of the direct effect principle	1.89
C. The Development of Public Law in London, Luxembourg, and Strasbourg	1.14	The principle of indirect effect	1.90
D. Resolving Conflicts between the Domestic Public Law Jurisdictions	1.38	State liability and damages	1.95
E. Recognizing the EU Dimension in Domestic Public Law	1.45	National and administrative measures in breach of general principles of EU law and the CFREU	1.97
F. Identifying the Requisite EU Public Law Element	1.57	Identifying an EU public law element—the questions to ask	1.103
Sources of EU law	1.57	G. Can/Must an EU Public Law Case be Brought by Way of Judicial Review?	1.105
National measures or administrative measures based on national legislation that are contrary to an EU obligation	1.60	Procedural classification of EU enforcement—a matter for national rules	1.105
Directly effective provisions of the Treaty and/or Union secondary legislation	1.64	Three possible situations	1.108
Treaty provisions and direct effect	1.69	Where judicial review cannot be brought	1.109
Regulations and direct effect	1.70	Where judicial review may be brought	1.111
Directives and direct effect	1.71	Inherent unsuitability for judicial review	1.116
Directives and horizontal direct effect	1.79	Collateral challenges	1.125
Decisions, recommendations, opinions, and direct effect	1.81	Unclear borderline between public and private law	1.126
		Where judicial review proceedings must be brought	1.131
		H. Public Law Collateral Challenges	1.133

### A. Scheme of Book

The subject of this book is EU law as applied in the national courts by way of judicial review. **1.01** It is not a work concerned with the overall substantive content of EU law<sup>1</sup> or, indeed, with the working of the EU institutions.<sup>2</sup> Nor is it directed to the enforcement of EU law in English courts generally. Its focus is EU law in the context of domestic public law and, in particular, in the context of judicial review proceedings in the Administrative Court and

<sup>1</sup> Save and insofar as substantive EU law has, in particular areas, a relationship with national public law. Part III addresses particular areas of EU law which have given rise to domestic public law issues.

<sup>2</sup> That is, the European Parliament, the European Council, and the European Commission. It is though concerned with the case law of the Court of Justice of the European Union.

appellate courts. It focuses on the ways in which EU and domestic public law principles overlap but are also to be distinguished from each other.

- 1.02** This chapter provides a short introduction to the development of EU law in that context. It outlines how and why EU law fits into domestic public law and now plays such an important role. It also explains the basis for using EU law in domestic public law cases.
- 1.03** The remainder of Part I is concerned with introducing a number of EU law doctrines and showing the relationship between those concepts and domestic public law. Part II is devoted entirely to the general principles of EU law and the Charter of Fundamental Rights of the European Union (CFREU), each of which is now of crucial importance both to interpreting domestic (as well as EU) legislation and in determining the legality of administrative decision-making in public law cases. Part III picks up a number of domestic public law practice areas where EU law is of great significance. Those areas, important in themselves, also illustrate how the national courts increasingly use EU law concepts, often alongside traditional administrative law or human rights grounds to resolve issues in judicial review and other proceedings where public law challenges are raised.

## B. Why EU Law is an Important Part of Domestic Public Law

- 1.04** In general terms, domestic public law (especially judicial review) is concerned with reviewing the decisions and other public functions of public bodies. It is not, at least for most purposes, directed to substantive factual merit but, rather, to legality of process. In the context of EU law the legality of domestic acts and measures (including, uniquely, primary legislation) will fall to be tested in judicial review by reference to whether the act or measure in question is itself compliant with EU law. This will often involve applying the discrete (and additional) protections of EU law. Moreover, in many instances, determination as to whether domestic acts and measures comply with EU law may require a court to examine questions of fact more closely than in a purely domestic judicial review case. A breach of EU law is, therefore, an additional—and potentially very powerful—basis in an increasing number of cases for seeking relief in domestic judicial review proceedings. Where available, it affords a particular basis of challenge. It may arise as a discrete ground of challenge on its own or (more usually) it may arise as a head of complaint in tandem with other grounds based on purely domestic public law principles and/or the case law under the Human Rights Act 1998 (HRA). However, the specific principles pertaining to EU law themselves fashion the way in which an EU public law case may be argued or relief obtained in (especially) the Administrative Court.<sup>3</sup>
- 1.05** It is a central theme of this work that domestic public law cannot, properly, be understood without a knowledge of EU public law principles developed by the Court of Justice of the European Union (CJEU) in Luxembourg and of principles developed in relation to fundamental rights under the European Convention on Human Rights (ECHR) developed by the European Court of Human Rights (ECtHR) in Strasbourg.<sup>4</sup>

---

<sup>3</sup> See para 3.57 for a discussion of the other venues in which public law principles may be ventilated and/or judicial review may take place.

<sup>4</sup> Since the late 1980s there has been ‘explosive growth’ in the practice of, first, EU law and later HRA law in the United Kingdom. See, generally, D Anderson QC, ‘The Law Lords and the European Courts’ in *Building the UK’s New Supreme Court*, A le Sueur (ed) (2004).

This is because both systems of law have been incorporated into UK national law and have in their turn, inevitably, greatly affected domestic public law. 1.06

There are at least two reasons for the considerable impact that EU law has had on domestic public law. First, the constitutional impact of incorporation itself has been profound. For the first time the national courts have been required to apply EU and ECHR jurisprudence in cases with an EU/ECHR element and in respect of those elements.<sup>5</sup> In EU, and to a lesser extent ECHR, law the rulings of the CJEU and Strasbourg courts have a binding (or in the case of ECHR jurisprudence quasi-binding)<sup>6</sup> effect mandated by statute. 1.07

The unique constitutional nature of particular statutes such as those incorporating EU and ECHR rights is now firmly entrenched in domestic law. In his landmark ruling in the *Metric Martyrs* case, Laws LJ put it thus: 1.08

We should recognise a hierarchy of Acts of Parliament: as it were ‘ordinary’ statutes and ‘constitutional’ statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the relationship between the citizen and state in some general, over-arching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights—(a) and (b) are of necessity closely related. . . . The special status of constitutional statutes follows the special status of constitutional rights. Examples are . . . the Human Rights Act 1998 . . . The [European Communities Act 1972] clearly belongs in this family. It incorporated the whole corpus of substantive Community rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law: it may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The [1972 Act] is, by the force of the common law, a constitutional statute.<sup>7</sup>

Laws LJ’s recognition of the existence of ‘constitutional statutes’ in domestic law received subsequent unanimous (*obiter*) endorsement from the Supreme Court in its landmark decision in *R (HS2 Action Alliance Ltd) v the Secretary of State for Transport*.<sup>8</sup> In their judgment, Lords Neuberger and Mance (with whom Lady Hale and Lords Sumption, Reed, and Carnwath agreed) clearly endorsed the existence of constitutional statutes: 1.09

The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. . . .<sup>9</sup>

<sup>5</sup> Further, to the extent that application of separate domestic public law principles would adversely affect the enforcement of EU rights, EU law would prevail (see paras 1.41 et seq).

<sup>6</sup> See the Human Rights Act 1998 (HRA), s 2 which requires the judiciary to take account of the Strasbourg case law. In a series of cases (including *Alconbury* [2001] UKHL 23, *Ullah* [2004] 26, *Pinnock* [2011] UKSC 6), domestic courts had held that they were bound to follow a clear and consistent line of Strasbourg authority. The principle has, however, come under increasing criticism. For a recent critique of the case law on s 2, see Laws LJ, Hamlyn Lectures 2013, Lecture III: ‘The Common Law and Europe’ <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/laws-lj-speech-hamlyn-lecture-2013.pdf>>. See, also, Lord Sumption’s 27th Sultan Azlan Shah Lecture (November 2013) <<http://www.supremecourt.uk/docs/speech-131120.pdf>>.

<sup>7</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195, [2003] QB 151, para 62.

<sup>8</sup> [2014] UKSC 3, [2014] 1 WLR 324.

<sup>9</sup> *R (HS2 Action Alliance Ltd) v the Secretary of State for Transport*, at [207]. Lords Neuberger and Mance continued to recognize the existence of constitutional principles at common law. They said: ‘[t]he common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles,

- 1.10** Importantly, the Supreme Court in *HS2* puts the constitutional statutes incorporating EU and ECHR rights in the context of other constitutional instruments, which date back to the Magna Carta.
- 1.11** Secondly, and unsurprisingly, there has been an enrichment and expansion of traditional administrative law principles to encompass many of the principles contained in these relatively new and sometimes divergent systems of law *even where EU law (or ECHR law) is not engaged*.<sup>10</sup> As Lord Woolf said in *M v Home Office*:<sup>11</sup>
- 1.12** The enrichment and expansion of domestic public law from incorporation of EU law is also exemplified by the wide range of sources taken into account by the CJEU when interpreting and clarifying EU law.<sup>12</sup> These sources include international treaties that have not been incorporated into national law but which the national courts must take account of and follow if and to the extent that they are encompassed as part of the CJEU ruling because of the binding nature of CJEU judgments on the national courts.
- 1.13** As Lord Hoffmann put it in *R v Hertfordshire County Council, ex p Green Environmental Industries Ltd*:<sup>13</sup>

[S]ince the [Environmental Protection Act 1990] gives effect to a Directive it must be interpreted according to principles of Community law, including its doctrines of fundamental rights. For this purpose Community law looks to analogous principles in national laws of member states and the international conventions and covenants to which they are parties . . .

### C. The Development of Public Law in London, Luxembourg, and Strasbourg

- 1.14** Despite this increasing convergence between the relevant public law principles in the respective European legal regimes as between each other and as between those regimes and traditional domestic public law, there remain significant differences. This is explained, to some extent, by the fact that the rationale for each of these regimes was different at least in origin.
- 1.15** At bottom, EU public law rests on a series of economic imperatives. The underlying purpose of the EU Treaties was one of economic integration. That integration was to be established by a common market free of internal restrictions on trade. Central tenets of the Treaties as,

---

whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.’

<sup>10</sup> See, eg, *R v Goldstein* [1983] 1 WLR 151, 155B, per Lord Diplock (referring to the EU concept of proportionality).

<sup>11</sup> [1994] 1 AC 377, 422.

<sup>12</sup> The same point may be made as to the wide range of sources deployed by the European Court of Human Rights in Strasbourg which include international treaties which have not been incorporated into domestic law but which become part of the corpus of domestic public law indirectly through the court having to take Strasbourg Court judgments into account under HRA, s 2. Further, important questions may arise as to the extent to which Union secondary legislation must comply with the requirements of public international law. See the recent reference by the Administrative Court in *R (International Association of Independent Tanker Owners) v Secretary of State for Transport* [2006] EWHC 1577.

<sup>13</sup> [2000] 2 AC 412, 422.

for example, the four freedoms (freedom of movement of workers, the right to establish a trade or profession and to provide services, freedom of movement of goods and capital), progressive approximation of economic policies, and creation of a common customs tariff, reflect this fundamental economic purpose. Although undoubtedly the EU's fundamental rights competence has vastly increased since its inception,<sup>14</sup> the primary substantive Treaty obligations are based in economics. This is exemplified in the CJEU's preliminary ruling in *Siragusa*<sup>15</sup> in which it identified the objectives of EU fundamental rights protection as preventing the unity, primacy, and effectiveness of EU law from being undermined. This clearly differs from the objectives of the ECHR which consider the protection of human rights as an end in itself.

There is, though, a tension between economics as a regulating principle of law and the wider constitutional concerns that underpin the protection of fundamental rights. In the words of one commentator: **1.16**

The language of economics and the utilitarian philosophy which underpins it have displaced an older political language in which questions about controlling public power, ensuring accountability and political participation were central.<sup>16</sup>

The rationale for the European Convention on Human Rights is, as might therefore be expected, very different from that in EU law. As is well known, the Convention was negotiated in order to guarantee rights of a type that were jeopardized in the Holocaust. It was intended to cement the moral foundations of any new European order that might emerge after the Second World War. It is a moral as opposed to an economic foundation that is required to provide continuing and effective protection for fundamental rights. **1.17**

However, both the EU and ECHR regimes share one characteristic which is that they are largely indifferent to the tradition of parliamentary sovereignty which underpins domestic public law. In order to guarantee effective protection of EU rights and ECHR rights, parliamentary sovereignty cannot be allowed to operate as a barrier to enforcement of those rights. In that sense, EU and ECHR laws have always been, essentially, supra-national in character. **1.18**

The justification for domestic administrative law is rather different and acknowledges parliamentary sovereignty. As Wade and Forsyth observe: **1.19**

A first approximation to a definition of administrative law is to say that it is the law relating to the control of governmental power. This, at any rate, is the heart of the subject, as viewed by most lawyers. The governmental power in question is not that of Parliament: Parliament as the legislature is sovereign and, subject to one exception, is beyond legal control.<sup>17</sup>

Tellingly, the exception noted by Wade and Forsyth is EU law.<sup>18</sup> In an important sense, parliamentary sovereignty is the bedrock of English domestic administrative law because it is the touchstone for the ultra vires principle. At least in traditional accounts of domestic judicial review the presumed intention of Parliament is what circumscribes the limits of governmental power. **1.20**

---

<sup>14</sup> See, further, 12.10–12.27.

<sup>15</sup> Case C-206/13, judgment of 6 March 2014.

<sup>16</sup> L Siedentop, *Democracy in Europe* (2000) 33.

<sup>17</sup> W Wade and C Forsyth, *Administrative Law* (10th edn, 2009) 4.

<sup>18</sup> Although, ECHR law under the HRA may, perhaps, be regarded as a quasi-exception since under HRA, s 4 the court has power to make a declaration of incompatibility in respect of domestic statutes where the statute

- 1.21** If public law principles under the three legal regimes had remained rooted to the respective justifications for their existence it is unlikely that EU and ECHR law would have been incorporated (certainly successfully incorporated) into national law so as to become part of domestic public law. In the event, however, each of the regimes has had to recognize the existence of the other.
- 1.22** As will be seen in this work, so far as domestic public law is concerned, it is managing with relative success to accommodate both of the European public law traditions as well as many of its own doctrines that pre-dated incorporation. But the process is a continuing one and is, at least in part, dependent on EU and ECHR law being able to live together in harmony since, with the passing of the HRA into national law on 2 October 2000, it is necessary to reconcile two potentially opposing systems of law as part of UK public law. In reality what has happened over the years is that EU, ECHR, and domestic administrative law have moved closer together. The Treaty of Lisbon requires the EU to accede to the ECHR.<sup>19</sup> Once accession has taken place, in theory at least, the Strasbourg court will be the final arbiter of European fundamental rights.
- 1.23** Historically, the CJEU was resistant to the idea that fundamental rights were either intrinsic to the Treaty or part of the general principles of EU law.<sup>20</sup> This position reflected the tension, as between domestic law and EU law, inherent in the then developing concept of EU law supremacy. If a Member State were free to depart from uniform provisions of EU law then, axiomatically, EU law could not be supreme. As the CJEU held in *Costa v ENEL*:<sup>21</sup>

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation on their sovereign rights, against which a subsequent unilateral act incompatible with the concept of Community law cannot prevail.

- 1.24** But such an extreme assertion of Union sovereignty may ignore the true content of what was actually transferred by the Member States when acceding to the Treaty.<sup>22</sup> There are two relevant points. First, it is hardly conceivable that ‘the national parliaments would have ratified a Treaty which was capable of violating the fundamental tenets of their own constitutions’.<sup>23</sup> Secondly, applying the standards of public international law, it is at least arguable that peremptory norms consented to by the United Kingdom include the protection of fundamental human rights so that no international obligations could be separately incurred which were capable of violating those rights.<sup>24</sup>

---

in question is, in the view of the court, incompatible with the ECHR. The difference is, however, that even if a declaration of incompatibility is made, the offending statutory provision continues to have full force and legal effect unless and until repealed (see HRA, s 4(6)). Following *HS2*, discussed at para 1.09 of this chapter, the doctrine of EU supremacy should be read subject to the originating power of Parliament in the European Communities Act 1972.

<sup>19</sup> Article 6(2) TEU. See, further, paras 12.21–12.27.

<sup>20</sup> See, eg, Case 1/58 *Stork v High Authority* [1959] ECR 17; Joined Cases 36–38 and 40/59 *Geitling v High Authority* [1960] ECR 423.

<sup>21</sup> Case 6/64 [1964] ECR 585, 593.

<sup>22</sup> A point not lost on Laddie J in Case C–206/01 *Arsenal Football Club v Reed* [2003] Ch 454 who refused to apply the CJEU’s preliminary ruling under Art 267 TFEU (ex 234 EC) on the basis that the CJEU had exceeded its interpretative jurisdiction! The Court of Appeal reversed this decision holding that the CJEU had not exceeded its interpretative jurisdiction. See, also, *HS2* [2014] UKSC 3, [2014] 1 WLR 324.

<sup>23</sup> F Mancini and D Keeling, ‘Democracy and the European Court of Justice’ (1994) 57 MLR 175, 187.

<sup>24</sup> As to peremptory norms in public international law, see A Cassese, *International Law* (2001).



Thus, if a direct conflict were to emerge between EU law and the protection of fundamental rights in domestic law (including under the HRA) parliamentary sovereignty might hold the key to its resolution. The national courts would, arguably, have to engage in a process of determining the parliamentary intent when entering into the Treaty.<sup>25</sup> **1.25**

In fact, any prospect of direct conflict has receded considerably as a result of the more flexible attitude taken by the CJEU when confronted with objections by the constitutional courts of certain Member States (most notably Germany and Italy) that provisions of EU law could not survive with incompatible domestic law provisions.<sup>26</sup> **1.26**

In a series of cases, culminating in the CJEU's Opinion 2/94, the CJEU authoritatively stated that: **1.27**

It is well settled that fundamental rights form an integral part of the general principles of law whose observance the court ensures. For that purpose, the court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the court has stated that the [European] Convention [on Human Rights] has special significance.

Of course, since the CJEU's Opinion 2/94, the CFREU has now entered into force thereby increasing the prominence of EU fundamental rights. **1.28**

Further, since the 1990s the two bodies of fundamental rights law have drawn closer. In particular, the CFREU requires its rights which have the same scope and meaning as Strasbourg rights to be interpreted in conformity with the Strasbourg jurisprudence. Moreover, when the EU accedes to the ECHR, the final arbiter on the interpretation of rights protected both by the ECHR and the CFREU and general principles will be the Strasbourg Court. **1.29**

For its part, domestic public law has evolved to the point where it now appears to recognize constitutional rights which bear strong affinity to fundamental rights under the ECHR (as incorporated by the HRA into domestic law) as recognized, in practice, in EU law.<sup>27</sup> **1.30**

Such recognition is crystallized in the principle of legality. The best summary of this principle is that of Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, ex p Pierson*.<sup>28</sup> He said this. **1.31**

A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic

---

<sup>25</sup> However, that proposition is not without controversy. Importantly, the issue of *Kompetenz Kompetenz* (the competence to decide on competences) may require the determination of what is within the scope of EU law to be decided by the CJEU rather than by the national court—see Arts 263 TFEU (ex 230 EC) and 267 TFEU (ex 234 EC) and note, generally, M Claes, *The National Courts' Mandate in the European Constitution* (2006) especially 606 et seq. and ch 24. For an exploration of some of the potential for conflict, see A O'Neill QC, 'Fundamental Rights and the Constitutional Supremacy of Community Law in the United Kingdom after Devolution and the Human Rights Act' [2002] PL 724.

<sup>26</sup> For a helpful survey, see A Clapham, *Human Rights and the European Community: A Critical Overview* (1991).

<sup>27</sup> For a more detailed exploration of domestic constitutional rights, see M Fordham, 'Common Law Illegality of Ousting Judicial Review' [2004] JR 86.

<sup>28</sup> [1998] AC 539, 575. The principle had, perhaps, been foreshadowed (albeit not expressly articulated) by Laws J at first instance in *Ex p Fewings* [1995] 1 All ER 513, 523 and endorsed, in the same case, by the Court of Appeal at [1995] 1 WLR 1037, 1042.

principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.

**1.32** In essence, the ‘basic principles’ referred to by Lord Browne-Wilkinson constitute a set of assumptions (or presumptions) that Parliament will legislate in a certain manner even though there can, as a matter of implicitly assumed constitutional theory, be no ‘brake’ on its sovereign power.

**1.33** Lord Steyn, in *Pierson*,<sup>29</sup> put it thus:

The presumption that in the event of ambiguity legislation is presumed not to invade common law rights is inapplicable. A broader principle applies. Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption.

**1.34** Lord Steyn cites, with approval, a passage from Cross on *Statutory Interpretation*.<sup>30</sup> One sees from the extract the kind of assumptions that are sometimes taken to be common sense but which are, as Cross observes, underlying ‘constitutional principles’. These include (but are not limited to) the presumption that discretionary powers must be exercised reasonably and fairly. The principles operate:

... at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text.<sup>31</sup>

**1.35** The central difference between domestic public law and EU public law is that fundamental rights once endorsed by the CJEU are enforceable as EU rights whatever the terms of the domestic statute. In a purely domestic case the national court is constrained to determine the true parliamentary intent.<sup>32</sup>

**1.36** This is exemplified by two cases. In *R v Lord Chancellor, ex p Witham*<sup>33</sup> Laws J, giving the main judgment of a Divisional Court, observed as follows:

In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment in here only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it...

---

<sup>29</sup> [1998] AC 539, 587. The full analysis is at 587–90. See, also, per Lord Steyn in *R v Secretary of State for the Home Department, ex p Simms* [2000] AC 115, 130.

<sup>30</sup> 1st edn (1976), (3rd edn, 1995) 142–3.

<sup>31</sup> [1998] AC 539, 588.

<sup>32</sup> A related point is the different effects that the CJEU and ECtHR have on domestic rules of precedent. In *Kay v London Borough Council of Lambeth* [2006] UKHL 10 [2006] 2 AC 465 the House of Lords (as was) held that where subsequent Strasbourg authority directly conflicted with domestic House of Lords case law, a lower court could not follow the Strasbourg authority. Rather, the conflict was required to be resolved through the domestic appeals system. This is not the case as a matter of EU law, which under the doctrine of EU supremacy requires any domestic court or tribunal to remedy a conflicting national judgment.

<sup>33</sup> [1998] QB 575, 581.

In *R v Lord Chancellor, ex p Lightfoot*<sup>34</sup> Simon Brown LJ took, as his premise, that Parliament could abrogate constitutional rights by the use of clear words and considered that it could even do so by necessary implication: **1.37**

. . . if, as Lord Reid stated in the *Westminster Bank* case [1971] AC 508, 529, rights (however fundamental) can be abrogated 'by irresistible inference from the statute read as a whole,' then it would seem to me logically to follow first that a process of construction of provisions which are in themselves unclear must necessarily be embarked upon . . . Clearly the more fundamental the right affected by the regulation, the less likely it is that Parliament will have authorised its impairment and the greater will be the court's need to be satisfied that such indeed was Parliament's true intention. An irresistible inference will not readily be drawn. But there will be circumstances in which to deny it would be to fly in the face of reason. That in my judgment is the case here.

#### D. Resolving Conflicts between the Domestic Public Law Jurisdictions

Differences between EU, ECHR, and domestic public law principles will arise in two broad situations: **1.38**

- (1) Where, on the facts of a particular case, there is no overlap between the three systems because (for example) only domestic public law is engaged. Here, because different principles have been developed it is perfectly possible that in a domestic public law case the Administrative Court would either not be able to use particular EU or ECHR principles (as, for example, proportionality which is still not recognized as a discrete domestic public law principle) or that the relevant principle—if capable of being applied separately—might differ in its application (as, for example, the concept of legitimate expectation).<sup>35</sup>
- (2) Where there is an overlap between one or more of the three systems. Here, a conflict may arise between the relevant principles to be employed or between decisions of different courts which the Administrative Court or other national court will have to resolve.

This book considers both types of situation. However, it should be noted that the space between EU, ECHR, and domestic public law is, in areas where they overlap and conflict, probably more apparent than real and that even where such conflict occurs legislative priority is, almost always, accorded to decisions of the CJEU. **1.39**

To the extent (where both are engaged) that Convention rights afford less protection in a particular case than domestic constitutional rights, the intention of Parliament is contained in HRA, s 11. This provides that: **1.40**

- A person's reliance on a Convention right does not restrict—
- (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or
  - (b) his right to make any claim or bring any proceedings which he could make or bring. . .

More difficult is the potential conflict between domestic constitutional and Convention rights on the one hand and EU law on the other. Assuming that each system of law is **1.41**

<sup>34</sup> [2000] QB 597.

<sup>35</sup> See paras 8.90–8.110.

engaged, cases have arisen where the CJEU has reached a different view of the extent of a right deriving from the ECHR than the Strasbourg Court.<sup>36</sup>

- 1.42** How is the domestic court to resolve the contradiction? The answer may lie in determining, and applying, Parliament's respective intent in passing the European Communities Act 1972 and the HRA.
- 1.43** HRA, s 2 permits judges in domestic courts to give a different interpretation to the ECHR than that given by the European Court of Human Rights. This is because the Strasbourg case law has only to be taken into account by the national court but may be departed from. However, in cases engaging fundamental rights within the scope of EU law, s 3(1) of the 1972 Act requires the national court to determine the question in accordance with EU rulings.
- 1.44** So, where the national court is seeking to decide whether a breach of fundamental rights in EU law has occurred, s 3(1) of the 1972 Act ought to prevail and the CJEU's case law should trump any inconsistent Strasbourg ruling. Section 2 of the 1972 Act which confers supremacy of EU law over (even) inconsistent primary legislation would, in such a case, prevent the HRA from operating to contrary effect *within the sphere of EU law*.<sup>37</sup> This analysis remains sound in the light of the constitutional changes brought by the Lisbon Treaty although they further decrease the potential for conflict. As noted earlier, the general trend is towards greater convergence of ECHR and EU fundamental rights. Although the EU may provide more extensive protection to fundamental rights, those CFREU rights which have ECHR counterparts are to be interpreted to have the same scope and meaning as under the Strasbourg Court's jurisprudence. Upon the EU's accession to the ECHR, the final arbiter of the meaning of ECHR and EU fundamental rights which overlap will be the Strasbourg Court.

## E. Recognizing the EU Dimension in Domestic Public Law

- 1.45** Public law issues usually arise in judicial review proceedings in the Administrative Court using the procedure in CPR Pt 54,<sup>38</sup> although such issues can arise by way of collateral

---

<sup>36</sup> cf, eg, Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685 (Advocate General Van Gerven considered that a prohibition against dissemination of information in Ireland would not be in breach of Art 10 ECHR) with *Open Door Counselling and Dublin Well Women v Ireland* (1993) 15 EHRR 97 (on materially identical facts, the Strasbourg Court came to the opposite conclusion).

<sup>37</sup> This is not accepted by all commentators. See, eg, A O'Neill QC, 'Fundamental Rights and the Constitutional Supremacy of Community Law in the United Kingdom after Devolution and the Human Rights Act' [2002] PL 724, 741-2. In any event, of course, neither the Administrative Court nor any other national court has jurisdiction as a public authority to act incompatibly with the ECHR (see HRA, s 6). Thus, if compliance with EU law triggered a breach of the ECHR there would be an irreconcilable contradiction as between EU law and HRA law *as a matter of domestic law*. Plainly, the Administrative Court would, in such unusual circumstances, be likely to refer the case to the CJEU for a preliminary ruling under Article 267 TFEU (ex 234 EC). However, given the supremacy of EU law over domestic law (which, logically, includes the HRA) it is not easy to see how the Administrative Court could ever give primacy to ECHR Convention rights, as defined by the European Court of Human Rights in Strasbourg, over an CJEU formulation of the content of those rights in a Union law context.

<sup>38</sup> Recent changes now mean that judicial review may, in certain limited circumstances, take place in the Upper Tribunal. See paras 3.57-3.63. Public law principles may also be ventilated in statutory appeal in the First-Tier and Upper Tribunals and statutory review proceedings in the Competition Appeal Tribunal (see paras 13.109-13.123). There is also scope for EU public law issues raised by way of judicial review to be ventilated in the Competition Appeal Tribunal in certain circumstances. See para 3.58.

challenge in proceedings before other national courts.<sup>39</sup> This is as true of EU public law as it is of ECHR and domestic administrative public law issues. It is, therefore, important not merely to identify the EU element of a case but also to decide whether that element requires the issue to be raised by way of judicial review.

The underlying criterion in whether an EU case is suitable for judicial review in the Administrative Court is not merely whether there is an element of EU law. What is also required is that the decision-maker is exercising a 'public function'.<sup>40</sup> Nonetheless, the presence of a relevant EU element may be crucial to whether judicial review proceedings may be instituted at all, how the case is argued, and the relief that may be granted. **1.46**

As modern judicial review has developed it has had to take account of the three distinct but, in practice, often overlapping systems of law referred to above, namely: **1.47**

- (1) The principles of domestic judicial review.
- (2) Fundamental human rights under the European Convention on Human Rights as incorporated into domestic judicial review through the medium of the HRA which came into force on 2 October 2000.
- (3) The principles of EU law, including, since 1 December 2009, fundamental rights under the CFREU.

These regimes overlap both because the principles and remedies governing each are frequently similar and because, in order to rely on any of the three systems of law, a claimant in judicial review proceedings must be able to establish the presence of a necessary 'public function' on the part of a proposed defendant.<sup>41</sup> It is sometimes said that to bring a claim in judicial review a claimant must establish a 'vertical' relationship between himself and the State so as to distinguish judicial review from the 'horizontal' relationship subsisting between private individuals.<sup>42</sup> **1.48**

Importantly, however, the three regimes differ in often crucial respects. Remedially, for example, the doctrine of parliamentary sovereignty has required judges in domestic judicial review challenges to give effect to statutes even, on occasion, where particular statutory provisions offend against established common law principles. Ordinarily, judges may not strike down Acts of Parliament. This is so even where a statute is incompatible with a fundamental right under the European Convention on Human Rights.<sup>43</sup> **1.49**

But the position in EU law is different because of the supremacy of EU law effected by the European Communities Act 1972, s 2. This important doctrine is examined in Chapter 2.<sup>44</sup> Essentially, however, it stipulates that EU law binds both nationals of Member States and the Member States themselves and that provisions of national law that may conflict with EU **1.50**

<sup>39</sup> See paras 1.125 and 1.133–1.139.

<sup>40</sup> *R v Panel on Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815.

<sup>41</sup> But the necessary 'public' element may differ according to whether the proceedings are being brought under conventional domestic public law, under the HRA, or in EU law. See paras 2.20–2.32.

<sup>42</sup> There are circumstances in which public law issues can be litigated outside judicial review (see paras 1.133–1.139). There may also be circumstances in which EU issues (and Convention issues under HRA, s 3) are litigated 'horizontally' between private individuals but where there is a relationship with public law remedies (see paras 5.35–5.39).

<sup>43</sup> The court may only grant a declaration of incompatibility under HRA, s 4.

<sup>44</sup> See, especially, paras 2.65–2.92.

law must be set aside by the domestic courts.<sup>45</sup> Thus, where a statutory provision offends against an enforceable EU law right, the judges are required to disapply the offending provision.<sup>46</sup> Another difference between the regimes is that damages for infringement of rights are awarded on a somewhat different basis in EU law cases to that prevailing in either domestic law or under the HRA.<sup>47</sup>

- 1.51 The three systems also differ in terms of substantive principle. Proportionality, for example, is—at least generally—not applicable in domestic judicial review.<sup>48</sup> However, proportionality is intrinsic to the application of Convention rights under the HRA.<sup>49</sup> It is also an important general principle of EU law which, in a possibly more stringent form, must be applied by the Administrative Court where appropriate.<sup>50</sup>
- 1.52 Further, although fundamental rights are protected by each of the three systems, they are protected in different ways both procedurally and substantively. The content of fundamental rights in EU law is not confined to the European Convention on Human Rights. Whilst the Strasbourg Court's interpretation of rights which exist both in the ECHR and in the CFREU informs the content of the right, this does not prevent the EU from providing enhanced protection.<sup>51</sup>
- 1.53 Standing is also different according to whether a judicial review challenge is brought under ordinary domestic principles, under the HRA, or by way of an EU challenge. The test for standing in a purely domestic case is very broad. Under the HRA, however, a claimant must generally be a 'victim' within the meaning of Article 34 of the Convention.<sup>52</sup> This term is fairly narrowly defined and more restrictive than standing would be to litigate a fundamental rights issue in EU law.<sup>53</sup>
- 1.54 So, identifying an EU case (or a relevant EU element) suitable for judicial review is of great importance because the EU element:
  - (1) may be relevant to issues of standing;
  - (2) is likely to affect the remedy granted by the Administrative Court;
  - (3) will often dictate the substantive principles that the Administrative Court must apply.
- 1.55 When considering judicial review proceedings, and confronted with a potential EU case, practitioners should consider the following questions:

---

<sup>45</sup> See, most appositely, Case 6/64 *Costa v ENEL* [1964] ECR 585, 593; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal Spa* [1978] ECR 629, especially para 21.

<sup>46</sup> Case C-213/89 *R v Secretary of State for Transport, ex p Factortame* [1990] ECR I-2433 para 21. See paras 2.71–2.72.

<sup>47</sup> See paras 5.93–5.208.

<sup>48</sup> *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696. See, especially, 751 per Lord Templeman, 759 per Lord Ackner, 762 and 766–767 per Lord Lowry.

<sup>49</sup> See, eg, *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532.

<sup>50</sup> See, eg, *Thomas v Chief Adjudication Officer* [1991] 2 QB 164. The extent to which EU proportionality differs from the proportionality exercise under the HRA and analogous domestic law principles is discussed at paras 11.100–11.114.

<sup>51</sup> See paras 12.41–12.46.

<sup>52</sup> Though this is not necessarily the case when seeking a declaration of incompatibility under HRA, s 4; *Rushbridger v Attorney General* [2003] UKHL 38, [2004] 1 AC 357. cf *Taylor v Lancashire CC* [2005] EWCA Civ 284, [2005] HRLR 17.

<sup>53</sup> See para 3.64.

- (1) Is the matter within the scope of EU law (in other words, is the EU element of the case sufficient to enable the Administrative Court to apply substantive principles of EU law)?
- (2) If so, is the case one that *can* be brought by way of judicial review?
- (3) If so, is the case one that *must* be brought by way of judicial review?

Some of these questions raise quite complex issues, some of which are explored later in this chapter and in more depth in subsequent chapters. **1.56**

## F. Identifying the Requisite EU Public Law Element

### Sources of EU law

As outlined earlier, identifying the presence of an EU law dimension in a particular case is not determinative of whether a case must be brought by way of judicial review or even whether judicial review proceedings are, in fact, appropriate. Nevertheless, the existence of a relevant EU public law element is likely to have a significant effect on the nature of the proceedings, who can bring the claim, the legal argument, and the remedies obtainable. It may also sometimes be decisive as to whether particular proceedings should be commenced by way of judicial review given the need, in many instances, for the existence of the State or emanation of the State for a relevant Union public law obligation to be created.<sup>54</sup> **1.57**

The content of EU law is, essentially, derived from: **1.58**

- (1) The Treaties (Treaty on the Functioning of the European Union (TFEU) and Treaty on European Union (TEU)),<sup>55</sup> together with the secondary legislation and administrative acts as adopted by the institutions of the Union in the form of regulations, directives, decisions, recommendations, and opinions<sup>56</sup> and the CFREU.<sup>57</sup>
- (2) The case law of the Court of Justice of the European Union (CJEU)<sup>58</sup> and the General Court<sup>59</sup> including the general principles of EU law which will, in appropriate cases,

---

<sup>54</sup> This is predominantly the case where one is concerned with the doctrine of direct effect and directives/decisions outlined at paras 1.71–1.84.

<sup>55</sup> Henceforth, references to ‘the Treaties’ are to the TFEU and the TEU. The Treaty of Lisbon, which entered into force on 1 December 2009, replaced the former EC Treaty with the TFEU and substantially amended the TEU. Of particular constitutional importance, it abolished the former three pillar structure and increased the jurisdiction of the CJEU over matters formerly contained in the Third Pillar.

<sup>56</sup> The Treaty, by Art 216(2) TFEU (ex 300(7) EC), also makes provision for international treaties concluded by the Union to be binding on the Union institutions and the Member States. Article 351 TFEU (ex 307 EC) preserves the validity of international agreements concluded by Member States prior to the coming into force of the Treaty but imposes an obligation on Member States to seek to eliminate incompatibility between such pre-existing treaties and the Treaty. For present purposes the relevance of international treaties is that—whether concluded by the Union or the Member State—their legal status as a matter of EU law is regulated by the Treaty and not by the CJEU or General Court. For the position in respect of direct effect and international agreements, see paras 1.85–1.88.

<sup>57</sup> The CFREU is legally binding and has the same legal value as the Treaties. As with the general principles, however, the CFREU does not create discrete legal obligations on public authorities who are not otherwise acting within the scope of EU law. See, further, Chapter 6.

<sup>58</sup> Formerly, the European Court of Justice (ECJ).

<sup>59</sup> Formerly, the Court of First Instance (CFI).

encompass standards commonly accepted by the Member States by reference to public international law<sup>60</sup> and to fundamental rights.<sup>61</sup>

**1.59** In examining whether the requisite EU public law element is present in order to seek to apply substantive principles of EU law in domestic public law it is necessary to consider a number of different situations. These include the following:

- (1) National legislative measures or omissions based on national legislation the legality of which is dependent upon a relevant EU obligation that derives from the Treaty or Union secondary legislation.
- (2) Acts or omissions of a domestic public body by reason of a Treaty or Union secondary legislative provision.
- (3) National legislative measures/omissions and administrative acts or omissions that do not obviously fall into either of the above categories but which are, nonetheless, alleged to contravene general principles of EU law.

**National measures or administrative measures based on national legislation that are contrary to an EU obligation**

**1.60** Member States must act in accordance with, so as to give effect to, obligations imposed by the EU Treaty or Union secondary legislation. For the most part such obligations are required to be 'directly effective' for individuals to be able to rely on them although (see para 1.64) this is not always the case. The meaning of the term 'directly effective' is discussed at paras 1.68–1.89 but the concept is linked to judicial review because, where direct effect is relied on against the State or an emanation of the State, the proceedings will be more likely to sound in public rather than private law.<sup>62</sup>

**1.61** National legislation passed so as to implement EU obligations is susceptible to challenge by judicial review where it is contended that the legislation fails to implement the EU obligation correctly or where legislation mandated by a directive to transpose EU obligations into national law has simply not been passed.<sup>63</sup> It is the EU obligation that is relevant so that, exceptionally, if domestic legislation is dependent for its validity on underlying EU secondary legislation<sup>64</sup> that is itself contended to be unlawful, a challenge to domestic legislation will also involve an indirect challenge to the contingent EU secondary legislation.<sup>65</sup> In those circumstances the domestic court cannot itself declare EU legislation to be invalid<sup>66</sup> but will be likely to refer the case to the CJEU under Article 267 (ex 234) TFEU for a preliminary ruling.<sup>67</sup> Administrative acts or omissions founded on domestic EU legislation will also be amenable to judicial review where the administrative act in question deviates impermissibly from EU compliant domestic legislation.

---

<sup>60</sup> Including unincorporated as well as incorporated treaties which will, in turn, become a source of law at least to the extent that they are relied on by the CJEU. Of the increasing number of cases see, eg, Case C-148/02 *Carlo Garcia Avello v Belgian State* [2003] ECR I-11613 (UN Convention on the Rights of the Child referred to by Advocate General Jacobs). See, generally, S Fatima, *Using International Law in Domestic Courts* (2006).

<sup>61</sup> See Chapter 12.

<sup>62</sup> See, though, the discussion at paras 1.116–1.139.

<sup>63</sup> *R v Customs and Excise, ex p Eurotunnel* [1995] CLC 392. See, also, paras 1.71–1.78.

<sup>64</sup> A Treaty provision cannot, by definition, be incompatible with EU law.

<sup>65</sup> See, eg, *R (ABNA Ltd) v Secretary of State for Health and Food Standards Agency* [2004] Eu LR 88.

<sup>66</sup> Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1990] ECR I-307.

<sup>67</sup> See Chapter 4.



National measures or administrative acts or omissions founded on national legislation may also be challenged in judicial review proceedings where, although the acts or omissions are derived from domestic law, the domestic legislation (or absence of any legislation) is contrary to an obligation imposed by the EU Treaty or Union secondary legislation.<sup>68</sup> **1.62**

Finally, it is well established that whenever a relevant EU obligation is correctly transposed into national law its effects reach individuals through the relevant national measures. In such cases a claimant to judicial review should challenge the particular administrative act or omission said to contravene the EU obligation by reference to the national provisions.<sup>69</sup> **1.63**

### Directly effective provisions of the Treaty and/or Union secondary legislation

Individuals may also rely on EU obligations that are directly effective, that is obligations enforceable by an individual that are directly created in domestic law by certain provisions of the Treaty or by Union secondary legislation (usually a directive) even where there is no transposing national legislation. This includes the situation where there ought to have been transposing legislation in respect of the particular obligation but none has been passed.<sup>70</sup> **1.64**

Statutory recognition of this is accorded by s 2(1) of the European Communities Act 1972 which provides as follows: **1.65**

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.

This appears to encompass the doctrine of direct effect.<sup>71</sup> Not all EU provisions have direct effect. Some provisions are enforceable by Member States alone. Other provisions are not directly effective because of their vagueness or contingent nature. As will be seen, certain measures—principally directives—only create direct effect against the State or an emanation of the State<sup>72</sup> and cannot be relied on as against private parties. This has obvious significance **1.66**

<sup>68</sup> Joined Cases C-92/92 and C-326/92 *Phil Collins* [1993] ECR I-5145; *R v MAFF, ex p First City Trading* [1997] 1 CMLR 250, para 39.

<sup>69</sup> See, eg, Case 270/81 *Felicitas Rickmers-Linie KG & Co v Finanzamt für Verkehrssteuern* [1982] ECR 2771, para 24; *Marks & Spencer plc v Commissioners of Customs & Excise* [1999] 1 CMLR 1152, 1160, per Moses J and in the Court of Appeal [2000] 1 CMLR 256, 257.

<sup>70</sup> For a case in point see *R v North Yorkshire County Council, ex p Brown* [1998] Env LR 385. There, the relevant obligation in the Environment Impact Assessment (EIA) Directive had not been transposed into domestic law by the relevant regulations. The case proceeded on the basis that the claimants could challenge the legality of the administrative decision not to require EIA which was found to be in breach of the directly effective rights created by the EIA Directive. This case is further referred to at para 14.68.

<sup>71</sup> Importantly, the fact that EU legislation has direct effect does not necessarily mean that EU secondary legislation complies with the Treaty. Secondary EU legislation may itself be unlawful and may, as explained earlier, be indirectly challenged in domestic judicial review proceedings where the domestic measure complained of depends for its validity upon the underlying validity of EU secondary legislation. The domestic court is likely to refer an indirect challenge to EU secondary legislation to the CJEU for a preliminary ruling under Article 267 (ex 234 EC) since only the CJEU may declare EU secondary legislation to be invalid. See para 1.61 and Chapter 4.

<sup>72</sup> The relevant case law is discussed at paras 1.79–1.80 and at paras 5.80–5.88.

for judicial review since, at least in general, such claims against the State will be brought in public and not in private law and usually by way of judicial review.

- 1.67** In many instances the cases have clarified whether a particular provision is directly effective or not. Where, however, the position has not been clarified it will be necessary to construe the provision in question so as to determine whether or not it is directly effective.
- 1.68** Certain tests have been developed for determining whether or not a particular provision is or is not directly effective. In essence the relevant criteria are that the identified provision must be:<sup>73</sup>
- (1) sufficiently clear and precise;<sup>74</sup>
  - (2) unconditional;<sup>75</sup> and
  - (3) one that leaves no scope for discretion as to its implementation.

*Treaty provisions and direct effect*

- 1.69** That Treaty provisions themselves are at least capable of creating direct effect was clarified by the CJEU in *Van Gend en Loos v Netherlands*.<sup>76</sup> It is now clear that a great many provisions of the Treaty are directly effective<sup>77</sup> and that these even include provisions such as Article 110 TFEU (ex 90 EC) which contain a time limit for the Member State to adopt implementing measures—the relevant Treaty provision becomes directly effective once the time limit has expired and the Member State has failed to enact the requisite national legislative measures.<sup>78</sup>

*Regulations and direct effect*

- 1.70** EU regulations will, almost invariably, be directly effective.<sup>79</sup> Article 288 TFEU (ex 249 EC) categorizes a regulation as being of ‘general application . . . binding in its entirety and directly applicable in all Member States’. The phrase ‘directly applicable’ is not, though, synonymous with ‘directly effective’ because it simply means that regulations will have legal effect in the Member States without the need for implementing legislation. It does not necessarily connote that the regulation in question will be sufficiently precise for it to contain legal rights that may be relied upon by individuals.

*Directives and direct effect*

- 1.71** Article 288(3) TFEU provides that a directive is:
- . . . binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
- 1.72** Although a directive is binding in substance on Member States it is not directly applicable. This does not, however, mean that it is incapable of producing direct effect. This was finally clarified by

---

<sup>73</sup> See, generally, Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825.

<sup>74</sup> This does not, necessarily, mean unambiguous since many ‘ambiguous’ legislative provisions do create individual rights the scope of which the court has to resolve: see, eg, *R v Secretary of State for Home Affairs, ex p Santillo* [1980] ECR 1585, 1611.

<sup>75</sup> In essence this has the consequence that the relevant provision does not require—for the obligation to be imposed—any further measures to be taken.

<sup>76</sup> Case 26/62 [1963] ECR 1.

<sup>77</sup> For further consideration of direct effect in relation to judicial review, see paras 2.159–2.179.

<sup>78</sup> Case 57/65 *Alfons Lutticke GmbH v Hauptzollamt Saarlouis* (judgment 16 June 1966).

<sup>79</sup> For an example in domestic law see, eg, *In Re G (Children) (Foreign Contact Order: Enforcement)* [2003] EWCA Civ 1607, [2004] 1 WLR 521.

the CJEU in *Van Duyn v Home Office*.<sup>80</sup> There, a Dutch national was, on public policy grounds, refused leave to enter the United Kingdom in order to take up employment as a secretary with the Church of Scientology. She sought to rely on a Council directive which restricted grounds of refusal to matters relating to personal conduct. The CJEU held that Mrs Van Duyn was entitled to rely on the directive by reason of the doctrine of direct effect. It is, as explained, entirely possible for certain provisions of a directive to be directly effective but for others not to be.<sup>81</sup>

The criteria for determining whether a provision is directly effective, referred to in para 1.68, are equally as applicable to directives as they are to Treaty provisions or regulations. But, because of the nature of directives, they are more elaborate and there are additional factors to be borne in mind. **1.73**

The requirements that a particular provision be sufficiently precise and unconditional mean, ordinarily, that for the directly effective obligation to be imposed the obligation must be clearly expressed and no further measures need to be taken whether by the Union institutions or by the Member State. Directives, however (see Article 288 TFEU), stipulate that the Member State has discretion as to the form and methods of implementation although not as to the result to be achieved. In the case of directives it is, therefore, the result that constitutes the relevant obligation so that the result must be expressed in unequivocal terms.<sup>82</sup> As Advocate General Fennelly warned in *Garage Molenhide BVBA v Belgium*<sup>83</sup> to deny direct effect merely because of the alternatives (however various) in transposition is to confuse direct effect with discretion in the manner of transposing the directly effective obligation.<sup>84</sup> **1.74**

However, a directive does not, ordinarily, create directly effective rights unless and until the implementation date has passed.<sup>85</sup> Such rights may be created even later if the directive provides for a later date than the implementation date for its application.<sup>86</sup> It is, nonetheless, at least arguable that where national legislation is introduced prior to the implementation date purporting to implement the directive, the directive may be relied upon as having direct effect at that stage.<sup>87</sup> **1.75**

It has sometimes been suggested that there is a separate definitional criterion for directives in the context of 'direct effect'. This is that the relevant provision is intended to create rights for individuals.<sup>88</sup> **1.76**

<sup>80</sup> Case 41/74 [1974] ECR 1337, paras 9–15. It had, though, been foreshadowed in Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825.

<sup>81</sup> See, eg, Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53, paras 29–30.

<sup>82</sup> See, eg, Case C-389/95 *Klattner v Greece* [1997] ECR I-2719, para 33.

<sup>83</sup> Joined Cases C-286/94, C-340 and 401/95, and C-47/96 [1997] ECR I-7821, 7299–7300.

<sup>84</sup> Note, too, that the fact that a directive permits derogations does not preclude the creation of direct effect since the legality of the derogations may be reviewed: see Joined Cases C-358/93 and C-416/93 *Bordessa* [1995] ECR I-361, paras 17–18 and 32–35.

<sup>85</sup> See, eg, Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR 1629, especially para 24.

<sup>86</sup> Case C-316/93 *Vannetveld v Le Foyer SA* [1994] ECR I-763, para 19.

<sup>87</sup> cf Case 80/86 *Officier van Justitie v Kolpinghuis Nijmegen BV* [1987] ECR 3969 and Case 129/96 *Inter-Environment Wallonie ASBL v Region Wallonie* [1998] 1 CMLR 1057 (*effet utile* operates to prevent Member States within the implementation period from seriously compromising the intended result of the directive) with Case C-156/91 *Hansa Fleisch v Landrat des Kreises Schleswig-Flensburg* [1992] ECR I-5567 where Advocate General Jacobs doubted whether direct effect could be created at all during the implementation period.

<sup>88</sup> See, eg, *Twynford Parish Council v Secretary of State for the Environment* [1992] 1 CMLR 276, per McCullough J. cf *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1.

**1.77** However, in *Becker v Finanzamt Münster-Innenstadt*<sup>89</sup> the CJEU said:

... wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, 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.

**1.78** This formulation, although potentially ambiguous,<sup>90</sup> appears to suggest that it is not always necessary to the creation of direct effect for a directive to be intended to create, or have the effect of creating, rights for individuals but that the latter requirement is necessary where the Member State is not seeking to apply a national law against an individual but the individual is relying upon the State's failure to comply with a positive obligation imposed by the directive. So, for example, a pressure group with sufficient standing to seek judicial review<sup>91</sup> might be able to rely upon the provisions of a directive so as to challenge allegedly incompatible national legislation by way of judicial review and would not (further) have to establish that the directive was intended to create individual rights.

*Directives and horizontal direct effect*

**1.79** There is another important potential restriction, flowing from the doctrine of direct effect, on utilizing directives in judicial review proceedings. The restriction does not apply to either Treaty provisions or to regulations. This is the often cited rule that directives do not have 'horizontal direct effect'. What it means is that individuals cannot rely on directives as against other individuals in private actions.<sup>92</sup>

**1.80** It might be thought that a restriction of this kind, though significant, could have little relevance to judicial review which, by definition, sounds in public rather than private law. In fact, however, the prohibition against directives having horizontal direct effect can be highly relevant to judicial review for the following reasons:

- (1) It requires careful selection of an appropriate defendant to the proceedings since only the State or an emanation of the State may be proceeded against by reference to a directive that is said to be directly effective. This is not necessarily the same as identifying a public body that is susceptible to judicial review.<sup>93</sup>
- (2) In some cases there are consequences for private individuals in a claimant in judicial review proceedings relying on a directive against the State or State emanation. The question then becomes whether such consequences are permissible or not. If they are not permissible then the judicial review proceedings will fail because the effect of the proceedings will have been to create, under the guise of a public law claim, direct horizontal effect. But in many, if not most, instances the presence of a public law claim is likely to

---

<sup>89</sup> Case 8/81 [1982] ECR 53, para 25.

<sup>90</sup> *Twyford Parish Council v Secretary of State for the Environment* [1992] 1 CMLR 276 rejected this interpretation. But see, now, *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1.

<sup>91</sup> See paras 3.64–3.68.

<sup>92</sup> For an example of the CJEU confirming this principle, see Case C-176/12 *Association de Médiation Sociale v Union Locale de Syndicats CGT* judgment of 15 January 2014, paras 36–40. In that case the CJEU refused to find the principle of the worker's right to information and consultation enshrined in Article 27 CFREU read together with Directive (EC) 2002/14 as applying between private parties. cf Case C-555/07 *Kücükdeveci* [2010] ECR I-365.

<sup>93</sup> See paras 2.20–2.32.

prevail over incidental consequences to a private third party, especially where the third party is not in any legal relationship with the judicial review claimant.<sup>94</sup>

*Decisions, recommendations, opinions, and direct effect*

Under Article 288 TFEU a decision is 'binding in its entirety upon those to whom it is addressed'. It is capable of having direct effect.<sup>95</sup> **1.81**

So, where a decision is addressed to a Member State it may be relied on in judicial review proceedings where the State fails to comply with the obligation contained in the decision. However, as with directives, some decisions may not be capable of creating rights for individuals.<sup>96</sup> **1.82**

Neither recommendations nor opinions are binding. It follows that they are not capable of being directly effective. **1.83**

However, even non-binding measures such as these are still able to produce legal effects in the national proceedings of Member States. In *Grimaldi v Fonds des Maladies Professionnelles*<sup>97</sup> the CJEU observed that national courts were: **1.84**

bound to take Community recommendations into consideration in deciding disputes submitted to them, in particular where they clarify the interpretation of national provisions adopted in order to implement them or where they are designed to supplement binding EEC measures.

*International agreements and direct effect*

International agreements concluded between the EU and one or more third countries take a variety of forms. They may, for example, be agreements: **1.85**

- (1) concluded between the Union and third countries under the treaty-making powers of the EU;
- (2) such as World Trade Organization (WTO) agreements, where the subject matter overlaps with the EU law; or
- (3) concluded prior to the EU Treaty coming into force.

In some cases, international agreements are specifically given direct effect by secondary EU legislation.<sup>98</sup> **1.86**

By contrast, where the agreement provides that one or more of its provisions is not intended to be directly effective, that is conclusive. **1.87**

But where the agreement is silent the question becomes, as with other sources of Union obligations, outlined earlier, one of construction. Consistently with the rationale underlying the principle of direct effect, the CJEU has held that particular provisions of international agreements will be directly effective where the provision in question is clear and precise and does not depend on the adoption of any subsequent measure.<sup>99</sup> It follows that failure by the contracting State or States to incorporate an international **1.88**

---

<sup>94</sup> See *R v Durham County Council, ex p Huddleston* [2000] 1 WLR 148. See, also, paras 5.88–5.93.

<sup>95</sup> Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825, paras 3–5.

<sup>96</sup> See, eg, Case 174/84 *Bulk Oil (Zug) v Sun International* [1986] ECR 559, paras 61–2.

<sup>97</sup> Case C–322/88 [1989] ECR 4407, paras 16–19.

<sup>98</sup> As, eg, the Dublin Convention to determine the Member State responsible for examining an application for asylum is made directly effective by Regulation (EU) 604/2014.

<sup>99</sup> See, eg, Case C–277/94 *Taflan-Met* [1996] ECR I–4085, para 24; Case C–37/98 *R (Abdulnasser Savas) v Secretary of State for the Home Department* [2000] ECR I–2927.

obligation of this kind would not operate to prevent such agreement from being directly effective.<sup>100</sup>

*Excluding the operation of the direct effect principle*

- 1.89** Prior to the Treaty of Lisbon, direct effect or CJEU jurisdiction had been expressly excluded from certain sources of EU jurisdiction, such as matters relating to decisions in respect of political and judicial co-operation in criminal matters taken under Title VI TEU.<sup>101</sup> The changes brought by Lisbon in removing the pillar structure and broadening the jurisdiction of the CJEU has the effect that many more provisions may be directly effective if they satisfy the requirements (sufficient clarity etc) set out in para 1.68.

*The principle of indirect effect*

- 1.90** The concept of *indirect* effect was first developed in the important CJEU ruling in *Von Colson*.<sup>102</sup> The claim was, in part, brought in private law. It concerned the meaning to be given to a provision of a directive for the purpose of arguing that the amount of compensation in German law in cases of discrimination was too small and contravened Article 6 of the Equal Treatment Directive.<sup>103</sup>
- 1.91** The CJEU rejected the claim in terms of the direct effect doctrine. But it went on to hold that national courts had an obligation to interpret national law so as to conform to the terms of the Directive. This obligation was derived from the terms of the then Article 5 EC (now, in substance, Article 4(3) TEU) which requires Member States to ‘take all appropriate measures’ to ensure fulfilment of their EU obligations.
- 1.92** Building on its decision in *Von Colson* the CJEU held in the private law contractual claim in *Marleasing*<sup>104</sup> that a directive could not, of itself, create binding obligations on individuals. However, it also held that Member States and the authorities acting on behalf of the State were obliged to give effect to the results prescribed by a particular directive. That obligation was binding on the national court and extended to the interpretation of domestic legislation whether coming into force before or after the directive. This interpretative obligation, similar to that contained in HRA, s 3,<sup>105</sup> required the national court to interpret national law in every way possible so as to be in conformity with the directive.
- 1.93** So, although a particular Union provision may not be directly effective it may still be capable of creating *indirect* legal effect by virtue of the interpretative duty placed upon the national courts. Indirect legal effect may thus be an important doctrine in domestic EU public law proceedings and have an effect on the way in which the court decides the EU compliance of primary and secondary legislation and/or the legality of public law administrative acts and omissions even where a claimant cannot claim the benefit of a directly effective EU right.
- 1.94** Its wider significance lies in the fact that the national court may be required to interpret a provision of national law so as to accord with EU obligations even in proceedings between purely private parties. In this fashion it has, for example, become possible to give

---

<sup>100</sup> Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641, para 17.

<sup>101</sup> Ex Article 34(2) TEU. This Article has been repealed by the Treaty of Lisbon.

<sup>102</sup> Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

<sup>103</sup> Directive (EEC) 76/207. For further background on the Equal Treatment Directive, see paras 18.32 et seq.

<sup>104</sup> Case C-106/89 *Marleasing SA v La Comercial Internacional De Alimentacion SA* [1990] ECR 4135.

<sup>105</sup> See paras 2.138–2.148.

effect to directives and regulations in private litigation thereby overcoming some of the obstacles caused by impermissible horizontal effect. This development in EU law is paralleled in HRA cases by the increasing use of HRA, s 3 which requires the court to interpret legislative provisions, so far as possible, compatibly with the ECHR. This, too, has led to a degree of horizontal application of the HRA in that even in disputes between private parties statutes are now required to be interpreted by reference to ECHR considerations.

### State liability and damages

Article 4(3) TEU (ex 10 EC) which requires Member States to ‘take any appropriate measure’ to ensure fulfilment of their EU obligations<sup>106</sup> also underpins the notion of State liability which is another means by which, in certain circumstances, the State (or emanation of the State) may be held to be liable in damages for violations of EU law even in circumstances where directly effective rights have not been conferred. **1.95**

The law on EU damages is now fairly extensive and is separately considered.<sup>107</sup> If, and to the extent that, damages are claimed, judicial review rather than an ordinary action will often be the appropriate procedure because of the fact that the rationale for damages is the violation by the State of an EU obligation and because of the frequently close connection between a claim founded on damages and one relying on the creation of directly effective rights against the State under a directive. However, this may not always be so. The various considerations in selection of procedure are considered later.<sup>108</sup> **1.96**

### National and administrative measures in breach of general principles of EU law and the CFREU

There has been held to be an important difference, so far as the application of domestic law is concerned, between EU obligations arising, ultimately, under the Treaty and obligations said to derive from EU general principles of law. EU general principles of law (such as proportionality, equal treatment, and fundamental rights) are of great importance in the way in which both EU domestic and the EU Treaty and EU secondary legislation is interpreted and enforced. For this reason, Part II of this book is devoted to general principles of EU law and the relationship between such principles and domestic public law. However, the fact that State activity takes place in an EU context is not necessarily the same as State activity being undertaken pursuant to a Treaty obligation and, hence, subject to application of the general principles of EU law. **1.97**

This difficult issue was considered in *R v MAFF, ex p First City Trading Ltd*<sup>109</sup> where the Administrative Court was concerned with the legality of the Beef Stocks Transfer Scheme. The claimant company submitted that the legality of a national measure is subject to the general principles of EU law, as articulated by the European courts, in circumstances where that measure affects Union trade in goods or services. **1.98**

Laws J rejected the submission. He distinguished between the respective sources of EU law and held that general principles have a narrower effect than Treaty provisions. **1.99**

---

<sup>106</sup> See, also, since the Treaty of Lisbon, Article 291 TFEU which requires Member States to ‘adopt all measures of national law necessary to implement legally binding Union acts’.

<sup>107</sup> See paras 5.93–5.208.

<sup>108</sup> See, also, paras 1.105–1.132.

<sup>109</sup> [1997] 1 CMLR 250.

**1.100** He observed:<sup>110</sup>

These fundamental principles . . . are not provided for on the face of the Treaty of Rome. They have been developed by the Court of Justice . . . out of the Administrative law of the Member States. They are part of what may perhaps be called the common law of the Community. That being so, it is to my mind by no means self-evident that their contextual scope must be the same as that of Treaty provisions relating to discrimination or equal treatment which are statute law taking effect according to their express terms . . .

Like any statute law containing orders or prohibitions, the Treaty is dirigiste; it is . . . to be sharply distinguished from law which is made by a court of limited jurisdiction, such as the Court of Justice.

The power of the Court of Justice . . . to apply . . . principles of public law which it had itself evolved cannot be deployed in a case where the measure in question, taken by a Member State, is not a function of Community law at all . . . Where action is taken, albeit under domestic law, which falls within the scope of the Treaty's application, then of course the Court has the power and duty to require that the Treaty be adhered to. But no more: precisely because the fundamental principles elaborated by the Court of Justice are not vouchsafed by the Treaty, there is no legal space for their application to any measure or decision taken otherwise than in pursuance of Treaty rights or obligations.

**1.101** Laws J's reasoning is, however, open to question. In *R v MAFF, ex p British Pig Industry Support Group*<sup>111</sup> Richards J expressed 'real doubts' about its correctness. It has, however, since been applied.<sup>112</sup> This issue is complex and is separately analysed.<sup>113</sup> If, however, Laws J is right it means that great care must be taken in identifying the basis of a contended EU element. If the case is dependent solely on general principles developed by the CJEU/General Court that are not anchored to a clear and enforceable Treaty obligation, then there may be no basis for the application of EU law at all in domestic public law proceedings.

**1.102** In relation to the CFREU, the position appears clearer: the CFREU operates only within the scope of EU law such that the infringement of a CFREU right in and of itself cannot bring a matter within the scope of EU law. The matter is examined in more detail in Chapters 6 and 12.

**Identifying an EU public law element—the questions to ask**

**1.103** When considering whether a case has the requisite EU element for the application of substantive EU public law principles the following questions are relevant:

- (1) What is the nature of the EU obligation said to arise?
- (2) Does the obligation derive from a Treaty provision or under Union secondary legislation? If the latter, what is the nature of the secondary legislation?
- (3) Is the obligation directly effective?
- (4) Alternatively, is the obligation indirectly effective or otherwise enforceable and against whom is it enforceable?
- (5) Even if otherwise satisfying the criteria for enforceability, is there (in the case of a directive) any impermissible horizontal direct effect?
- (6) Is any relevant EU obligation against a private body or individual as opposed to an emanation of the State?

---

<sup>110</sup> *R v MAFF, ex p First City Trading Ltd* [1997] 1 CMLR 250, paras 39–42.

<sup>111</sup> [1999] EWHC Admin 826.

<sup>112</sup> *R (Preston)* [2011] EWHC 3174 (Admin) [2012] 2 WLR 1134.

<sup>113</sup> See paras 6.34–6.120.



- (7) Are damages being claimed against the State or against an emanation of the State?
- (8) What is the intended object of the proceedings—is it primarily to challenge a provision of EU domestic legislation or an administrative act or omission directly through the medium of EU law or is it to bring a claim against a private body and/or by means of a private law mechanism such as contract or tort?
- (9) Is there any bar against invoking general principles of EU law: in particular, is the claim solely dependent on general principles of EU law without a discrete EU obligation arising?

The answers to these questions ought, in principle, to suggest whether there is a substantive EU claim at all and, if there is, whether it should be brought in public law by way of judicial review or in private law. But, as suggested later, theory does not always equate with practice. There will be instances where, despite there being an EU public law issue, that issue may be ventilated as well, or even better, in a private as opposed to a public law forum. **1.104**

### G. Can/Must an EU Public Law Case be Brought by Way of Judicial Review?

#### Procedural classification of EU enforcement—a matter for national rules

The enforcement of EU rights in a domestic legal system is entirely a matter for national rules. EU law is indifferent to a distinction between public and private law subject, always, to two essential principles that the national rules must: (1) be equally favourable to similar claims brought under national law and that (2) national rules must not make it impossible, in practice, for EU rights to be exercised.<sup>114</sup> **1.105**

In theory at least, the general rule as a matter of domestic law is one of procedural exclusivity. Public law claims must be brought by way of judicial review and not in private law proceedings. Although judicial review has, as a procedure, changed over the years the rationale for requiring general resort to judicial review is that it contains important procedural safeguards for public authorities. In *O'Reilly v Mackman*<sup>115</sup> Lord Diplock observed that as a 'general rule' it would be contrary to public policy and an abuse of process to allow a claimant to ventilate public law claims in an ordinary action and, thereby, to 'evade' the safeguards (still) contained in the judicial review procedure to protect public authorities from vexatious or protracted litigation. The most notable of these safeguards is the restricted limitation period for bringing a claim in judicial review. This limitation is, at least generally, applicable to EU claims.<sup>116</sup> **1.106**

The so-called procedural exclusivity rule has, however, been greatly relaxed in the years following *O'Reilly v Mackman*.<sup>117</sup> Nonetheless, taking procedural exclusivity as a starting point is a useful guide as to the situations in which—provided that the case has the necessary EU public law element and that the claimant has sufficient standing to bring the claim<sup>118</sup>—proceedings ought to be commenced in judicial review rather than in private law and even **1.107**

---

<sup>114</sup> For consideration of the principles of equivalence and effectiveness in EU law so far as they affect procedural rules in domestic courts, see paras 3.04–3.33.

<sup>115</sup> [1983] 2 AC 237.

<sup>116</sup> See paras 3.97–3.115.

<sup>117</sup> See, especially, *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988.

<sup>118</sup> See paras 3.64–3.96.

if a claim started in private law proceedings when it should have been brought by way of judicial review is allowed to proceed, the safeguards applicable to judicial review will still be applied.<sup>119</sup>

### Three possible situations

**1.108** There are three scenarios which need to be considered:

- (1) The case is not one within the scope of EU law although the general context is one with which EU law is concerned. From an EU perspective (though there may be other domestic or HRA reasons why judicial review is a possible option) there is no basis for seeking judicial review on an EU public law ground.
- (2) The case has a relevant EU element but its features sound only in private law because there is no relevant EU public law element.<sup>120</sup> Again, subject to the case possessing public law elements, under either domestic law or HRA, there is no sensible point in instituting proceedings for judicial review.
- (3) The case has the requisite EU public law element. Here, judicial review is appropriate although there are instances where the EU public law element can be raised by way of collateral challenge in either private law proceedings or as a defence to a criminal prosecution.

### Where judicial review cannot be brought

**1.109** From the earlier analysis it can be seen that there are a number of situations in which the requisite EU element is likely to be absent altogether. Although there may sometimes be arguments as to why the court should entertain the claim<sup>121</sup> the following situations, in the present state of the law, appear to exclude EU law being used in any proceedings (ie whether brought in public or private law), namely where:

- (1) No relevant EU obligation can be identified. This may be so, following the decision in *First City Trading*, even where there is an EU context but where there is no EU obligation deriving from the Treaties or from Union secondary legislation.
- (2) There is a Union directive which has impermissible horizontal direct effect. However, care needs to be taken in this situation in case there are arguments suggesting that the measure in question may have indirect effect or that State EU liability in damages may be involved.<sup>122</sup>

**1.110** Other cases will arise where, although there is an EU element, the claim can only be one in private law and where, therefore, judicial review is not an available option. This will

---

<sup>119</sup> In *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, paras 35–9 the Court of Appeal gave examples of how although strict procedural exclusivity will not be applied in the sense that the court will not be over concerned as to the *form* of the proceedings, the court will take steps to ensure that there is no abuse of process in starting public law proceedings other than by judicial review (as, eg, by refusing discretionary remedies such as declaratory or injunctive relief outside the time period permitted for judicial review even if the claim is begun as a private law action).

<sup>120</sup> As, eg, where there is no State emanation involved and where the EU element of the case affects private parties. The doctrine of indirect effect discussed at paras 1.90–1.94 would be relevant to such a case.

<sup>121</sup> As, eg, the argument that contrary to the decision of the High Court in *First City Trading* general principles of EU law should be used to resolve at least certain disputes having an EU context: see paras 1.97–1.101 and paras 6.34–6.120.

<sup>122</sup> See paras 2.159–2.179 and 5.93–5.208.

obviously be so where the purpose of the claim is to enforce a right against a private party rather than an emanation of the State.

### Where judicial review may be brought

The class of case where judicial review can certainly be used and (see para 1.112) in many instances must be used involves the assertion by the claimant of a violation by the State or an emanation of the State of an EU public law obligation. The foundation for judicial review is established because such violation plainly involves the exercise of public functions by a public body amenable to review. **1.111**

Violations of this kind may take many forms. They will (for example) include the following: **1.112**

- (1) National legislation that fails lawfully to transpose a directly effective EU obligation.
- (2) A failure to legislate at all where a directly effective EU obligation is required to be transposed into domestic law.
- (3) An administrative act or omission that is founded on defective national legislation.
- (4) An administrative act or omission where there is no transposing national legislation but the legality of which falls to be tested by reference to a directly effective EU obligation.
- (5) Legislative or administrative acts or omissions that violate EU obligations which, although not directly effective, are enforceable under either the principle of indirect effect or the principle of State liability in damages.

Importantly, it is no longer crucial for there to be a particular decision before judicial review proceedings can be commenced. It is sufficient for there to be a justiciable issue of law (such as the compatibility of legislation or an existing state of affairs with EU obligations). This was clarified by the House of Lords in Lord Browne-Wilkinson's speech in *R v Secretary of State for Employment, ex p Equal Opportunities Commission*.<sup>123</sup> He said:<sup>124</sup> **1.113**

Under Order 53 any declaration as to public rights which could formerly be obtained in civil proceedings in the High Court can now also be obtained in judicial review proceedings. If this were not so . . . the purely procedural decision in *O'Reilly v. Mackman*, requiring all public law cases to be brought by way of judicial review, would have had the effect of thenceforward preventing a plaintiff who previously had *locus standi* to bring civil proceedings for a declaration as to public rights (even though there was no decision which could be the subject of a prerogative order) from bringing any proceedings for such a declaration.

Although—in the absence of a specific decision—it is not possible to obtain a quashing order in judicial review proceedings, this does not matter given the wide ambit of the declaration. Judicial review is a discretionary remedy and there may be particular reasons why relief will not be granted where there is no decision. For example, the claim may be considered to be academic or hypothetical. However, the court's discretionary power to refuse relief in judicial review proceedings may require modification in an EU context.<sup>125</sup> Nonetheless, provided that there are relevant issues to be decided, the compatibility of EU obligations may be ventilated by way of judicial review without there being any identifiable decision. **1.114**

---

<sup>123</sup> [1995] 1 AC 1.

<sup>124</sup> *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1, 36.

<sup>125</sup> For examples of the difficulties, see paras 14.107–14.114.

**1.115** There are three areas where, as the case law has developed since *O'Reilly v Mackman*, the courts will allow proceedings to be commenced other than by judicial review albeit that the issues could have been litigated in such proceedings. These are where:

- (1) the case is inherently unsuitable for judicial review; and/or
- (2) the public law issues arise collaterally in other proceedings; and/or
- (3) the borderline between public and private law is unclear.

*Inherent unsuitability for judicial review*

**1.116** There are cases where, although it is possible—at least in principle—to institute judicial review proceedings, the Administrative Court is not the most suitable forum. In such instances there are dicta to the effect that the proceedings were appropriately brought despite their not having been brought by way of judicial review.

**1.117** Care should, however, be taken in relating these dicta to the particular issues involved in an EU context where fact finding is often more necessary than in other public law arenas. There is, for example, a difference between the general proposition that judicial review is unsuitable for resolving issues of fact because factual error rarely affords a basis for relief and the separate proposition that, where it does, the judicial review procedure may have to accommodate itself to investigating questions of fact.

**1.118** Nonetheless, in large measure where resolution of the public law issues depends upon disputed issues of fact, the Administrative Court can resolve the issues on the witness statements alone. So, in *R v Commissioners of Customs and Excise, ex p Lunn Poly Ltd*,<sup>126</sup> an EU judicial review concerning State aid,<sup>127</sup> Lord Woolf MR, in the Court of Appeal, said:<sup>128</sup>

Where the issue is one of precedent fact, then sometimes it is necessary for there to be oral evidence and cross-examination. . . . In this case there was sensibly no application for cross-examination. While the task may be difficult, the Divisional Court, and this court on appeal, is usually well able to decide the relevant facts without the need for cross-examination of the evidence which was given by affidavit.

**1.119** It was on this basis, for example, that Forbes J granted judicial review against the Ministry of Agriculture, Fisheries, and Food in respect of its designation of authorized places of entry for import of dairy goods both on the domestic law footing of irrationality and also (on precedent fact) as being in breach of (the then) Articles 30 and 36 EC.<sup>129</sup>

**1.120** But there will be some cases where, even though judicial review is technically available and relevant as a process to determine the factual issues, the process of investigation is too protracted to merit such proceedings.

**1.121** Thus, in *R v Derbyshire County Council, ex p Noble*<sup>130</sup> Woolf LJ observed as follows:<sup>131</sup>

[T]he present application is one which is unsuitable for disposal on an application for judicial review—unsuitable because it clearly involves a conflict of fact and a conflict of evidence

---

<sup>126</sup> The substantive public law relating to State aid is examined in Chapter 13.

<sup>127</sup> [1999] Eu LR 653.

<sup>128</sup> [1999] Eu LR 653, 662.

<sup>129</sup> *R v MAFF, ex p Bell Lines Ltd* [1984] 2 CMLR 502.

<sup>130</sup> [1990] ICR 808.

<sup>131</sup> *R v Derbyshire County Council, ex p Noble* [1990] ICR 808, 813.

which would require [disclosure] and cross-examination. Cross-examination and [disclosure] can take place on applications for judicial review, but in the ordinary way judicial review is designed to deal with matters which can be resolved without resorting to these procedures.

And in *Roy v Kensington & Chelsea & Westminster Family Practitioner Committee*<sup>132</sup> Lord Lowry, referring to Woolf LJ's observation in *Ex p Noble*, stated that it:

reminds us that oral evidence and [disclosure], although catered for by the rules, are not part of the ordinary stock-in-trade of the prerogative jurisdiction.<sup>133</sup>

In an EU context there may be some large damages claims against the State where the taking of oral evidence would be too unwieldy for judicial review proceedings. So, too, the detail of determining whether a public body has breached EU competition rules may raise similar difficulties. **1.123**

There may also, in particular EU cases, be reasons other than disputed issues of fact why the Administrative Court is an inappropriate forum. For example, in *Woolwich Equitable Building Society v Inland Revenue Commissioners*<sup>134</sup> the fact that a restitutionary remedy was sought was considered to render the case unsuitable for judicial review.<sup>135</sup> Similarly, in *R v Secretary of State for Employment, ex p Equal Opportunities Commission*<sup>135</sup> the House of Lords observed that a claim for redundancy pay, the refusal of which was argued to contravene what is now Article 157 (ex 141 EC), should proceed in the industrial tribunal. Again, though, these cases need to be examined in their particular context. There may, for example, be EU cases where a declaration is claimed as to the State's liability to make reparation in a number of alternative forms for an alleged violation of EU public law. On its face a declaration of this kind would not have the effect that the proceedings should be commenced in a private as opposed to a public law forum. **1.124**

#### *Collateral challenges*

Since the House of Lords' decision in *O'Reilly v Mackman* (see para 1.106) the rigour of procedural exclusivity has been relaxed in a number of decisions. It is now well established that, in a great many instances, public law issues may be ventilated outside judicial review. Raising public issues in this way is known as the 'collateral challenge' exception to procedural exclusivity. Collateral challenges are examined in more detail at paras 1.133 et seq. **1.125**

#### *Unclear borderline between public and private law*

The courts are now also unlikely to insist on proceedings being commenced by judicial review where there is overlap or lack of clarity so as to make it obvious that the case should be commenced in the Administrative Court. **1.126**

In *Mercury Ltd v Director General of Telecommunications*<sup>137</sup> the House of Lords approved the bringing of proceedings by originating summons seeking a declaration in private law **1.127**

---

<sup>132</sup> [1992] 1 AC 624.

<sup>133</sup> *Roy v Kensington & Chelsea & Westminster Family Practitioner Committee* [1992] 1 AC 624, 647. See, also, eg, *R v IRC, ex p Rosminster* [1980] AC 952, per Lord Scarman.

<sup>134</sup> [1993] AC 70.

<sup>135</sup> *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, especially 200, per Lord Slynn.

<sup>136</sup> [1995] 1 AC 1.

<sup>137</sup> [1996] 1 WLR 48.

proceedings, rather than judicial review, as to whether the Director General of Fair Trading had acted lawfully in the matters that he took into account when resolving a pricing issue between two parties to a contract who had, under the contract, made a reference to the Director.

**1.128** Lord Slynn of Hadley observed that it was:<sup>138</sup>

of particular importance to retain some flexibility, as the precise limits of what is called 'public law' and what is called 'private law' are by no means worked out . . . It has to be borne in mind that the overriding question is whether the proceedings constitute an abuse of process.

**1.129** This flexibility has been emphasized in subsequent cases where, as explained earlier, the emphasis has been directed towards the consequences as opposed to the formalism of having commenced proceedings in the wrong forum.<sup>139</sup>

**1.130** In the EU context this may be especially apposite. For example, in *Bourgoin v MAFF*<sup>140</sup> Oliver LJ observed that the question of whether a directly effective provision created rights in public or in private law bordered on the 'metaphysical'.<sup>141</sup>

#### Where judicial review proceedings must be brought

**1.131** It is, nonetheless, important to recognize that most cases that are brought to establish that the State or an emanation of the State has violated EU law should be brought by way of judicial review. Although the court is unlikely to penalize a claimant for the wrong choice of procedure alone,<sup>142</sup> it will be astute to ensure that no procedural advantage has been obtained by proceeding outside judicial review.

**1.132** The close connection between many grounds for quashing a decision in EU law, under the HRA, and in domestic public law<sup>143</sup> make it all the more important that they are resolved by specialist judges and in the most appropriate forum. This will usually be the Administrative Court.

## H. Public Law Collateral Challenges

**1.133** EU public law issues often arise in the course of proceedings outside domestic judicial review in the Administrative Court or other public law proceedings. As will be explained in the context of damages claims involving allegations of State liability for breaches of EU law,<sup>144</sup> although a challenge to the validity of a legislative or administrative act might have been brought *directly* by way of judicial review, there is no general jurisdictional bar preventing an EU (or any other public law) challenge to such act being raised *indirectly* in the course of other court proceedings.<sup>145</sup>

<sup>138</sup> *Mercury Ltd v Director General of Telecommunications* [1996] 1 WLR 48, 57.

<sup>139</sup> See, also, *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1997] 4 All ER 747 which confirms that, if necessary, it seems that the private law court will apply public law safeguards if proceedings are unnecessarily commenced in the wrong forum.

<sup>140</sup> [1986] 1 QB 716.

<sup>141</sup> *Bourgoin v MAFF* [1986] 1 QB 716, 767.

<sup>142</sup> See para 1.105.

<sup>143</sup> See para 2.33.

<sup>144</sup> See paras 5.93–5.208.

<sup>145</sup> EU law, of course, also raises numerous issues in the course of *private* law proceedings. This is not the same as collateral challenge as understood in the public law context but it can raise similar issues as, eg, whether

Indirect challenges of this nature are often referred to as collateral challenges<sup>146</sup> as opposed to the direct challenge that would be involved in proceedings for judicial review or other public law form of direct challenge.<sup>147</sup> Nonetheless, the issues that arise in such challenges are identical to those that could have been raised in judicial review proceedings. **1.134**

Collateral challenges in this sense should be distinguished from a different form of indirect challenge that takes place in the course of some Administrative Court proceedings. As addressed elsewhere<sup>148</sup> a situation may arise where the validity of an EU measure is challenged. This can only be achieved by indirect rather than by direct challenge because only the CJEU can declare an EU measure to be invalid. This situation will most commonly arise where the validity of a domestic legislative or administrative act is challenged (whether directly or indirectly) but where, in turn, the validity of that legislative or administrative act is itself dependent for its validity on the validity of an EU measure. In such circumstances judicial review proceedings will themselves constitute a form of indirect challenge because—whatever the nature of the proceedings in question—the domestic court will, in practice, have to refer the question of validity to the CJEU under Article 267 TFEU (ex 234 EC). However, that is not the same as the expression ‘collateral challenge’ as commonly understood. **1.135**

It is useful to distinguish between the different types of true collateral challenge that may be brought. **1.136**

The most common forms of collateral challenge involving potential EU public law issues are those where: **1.137**

- (1) A claimant brings a private law claim for damages against a public authority. An EU collateral challenge by the claimant may arise in respect of the contended illegality of a legislative or administrative act including the case where the public authority relies on purported compliance with EU law by reference (for example) to primary or subordinate legislation said to be required by, or to be consistent with, EU law.<sup>149</sup> It may, depending on the circumstances, be an abuse of process for the claimant not to have commenced proceedings by way of judicial review as opposed to bringing a private law claim (or, more usually, to have brought the claim long after the normal time limit for judicial review proceedings) but that will depend upon the entirety of the facts.<sup>150</sup> However, if the claim sounds in domestic law

---

Art 101 TFEU [ex 81 EC] can be used as a shield as well as a sword in a trade mark dispute between private parties: *Sportswear SpA v Stonestyle Ltd* [2006] EWCA Civ 380.

<sup>146</sup> See, eg, *Dwr Cymru Cyfyngedig (Welsh Water) v Corus UK Ltd and Director-General of Water Services* [2006] EWHC 1183 (Ch) (*held*: it was not an abuse of process for the defendant in private law proceedings brought by the claimant water undertaker for payment of outstanding water supply charges to mount a public law challenge to the validity of the water supply charges scheme fixed by the water undertaker).

<sup>147</sup> As, eg, a statutory appeal or statutory review procedure. See, generally, R Gordon, *Judicial Review and Crown Office Proceedings* (1999).

<sup>148</sup> See, eg, paras 5.64–5.67.

<sup>149</sup> See per Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237, 285. Lord Diplock's formulation referred to challenging the invalidity of a 'decision' where it arises collaterally but this needs to be amended slightly so as to encompass the *ratio* of the *EOC* case: see at para 1.124. Note, too, that in *Roy v Kensington & Chelsea & Westminster Family Practitioner Committee* [1992] 1 AC 624 the House of Lords gave a strong hint that it would take a generous or 'broad' approach to the collateral challenge exception under this head: see, especially, per Lord Lowry, 653E–H.

<sup>150</sup> In any event, the modern tendency is not to decline to hear the claim but, rather, to take into account the special features of the judicial review jurisdiction so that a claimant may not always be able to rely on the normal limitation periods.

and the EU issue arises in the course of seeking to rebut an EU defence advanced by the defendant public body, the claimant would, almost inevitably, be permitted to argue the EU issue in the course of the private law proceedings. Even if the claim could have been brought by way of judicial review rather than by a private law action, the fundamental question is whether or not bringing it outside judicial review constitutes an abuse of process.<sup>151</sup>

- (2) A defendant defends a claim brought by a public authority on, amongst other grounds, a breach by that public body of EU law. Here, the defendant will be permitted to advance any EU law defences (including public law points) that may be available.<sup>152</sup>
- (3) A defendant to a criminal prosecution may usually, even as a matter of domestic administrative law, raise a defence involving an indirect challenge to the validity of a legislative or administrative act.<sup>153</sup> Such defence may well involve arguments to the effect that the act in question violates EU law either directly or because the underlying EU legislation is invalid.<sup>154</sup> It may involve an indirect challenge to primary and/or subordinate legislation governing the substantive content of the prosecution or it may involve the contention that the decision to prosecute and/or maintenance of the prosecution is itself an abuse of process as violating EU law (including the general principles of EU law).<sup>155</sup> There is no abuse of process involved in raising a defence of this nature<sup>156</sup> and, indeed, where a criminal prosecution has been brought it is more likely than not that a court would decline to entertain an application for judicial review leaving the points in issue to be ventilated in the trial process.<sup>157</sup> Whether such a collateral challenge will be successful will depend upon the true construction of the statute in question. As Lord Hoffmann observed in *R v Wicks*:<sup>158</sup>

The question must depend entirely upon the construction of the statute under which the prosecution is brought. The statute may require the prosecution to prove that the act in question is not open to challenge on any ground available in public law, or it may be a defence to show that it is. In such a case, the justices will have to rule upon the validity of the act. On the other hand, the statute may upon its true construction merely require an act which appears formally valid and has not been quashed by judicial review. In such an act nothing but the formal validity of the act will be relevant to an issue before the justices.

<sup>151</sup> *Mercury Communications Ltd v Director-General of Telecommunications* [1996] 1 WLR 48, 57.

<sup>152</sup> See, eg, *Wandsworth London Borough Council v Winder* [1985] AC 461, especially 509D, per Lord Fraser: the 'arguments for protecting public authorities against unmeritorious or dilatory challenges to their decisions have to be set against the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims'.

<sup>153</sup> See, eg, *R v Reading Crown Court, ex p Hutchinson* [1988] Q B 384; *Boddington v British Transport Police* [1998] 2 WLR 639.

<sup>154</sup> See, eg, Case 121/85 *Conegate* [1986] ECR 1007; *R v Bossom* [2006] EWCA Crim 1489. Similarly, a collateral challenge may be made on EC grounds to exercise of particular powers by the court itself. See, eg, *R v Crown Court at Harrow, ex p UNIC Centre Sarl* [2000] 1 WLR 2112 (judicial review of Crown Court preliminary ruling on appeal against the making of a forfeiture order by the magistrates).

<sup>155</sup> The position in EU law should, here, be contrasted with a defence involving a fundamental rights challenge to primary legislation under the HRA where the jurisdiction to grant relief—a declaration of incompatibility—is not conferred on, eg, a magistrates' court and where it is, therefore, at least questionable whether the magistrate has jurisdiction to determine (see *R (Paul Rackham Ltd) v Swaffham Magistrates' Court* [2004] EWHC 1417). In an EU collateral challenge no such difficulty arises because all courts have the power and duty to disapply EU incompatible primary legislation: see paras 2.65 et seq.

<sup>156</sup> It is, in fact, entirely consistent with the EU general principle of effectiveness discussed earlier and with the provisions of the EU Treaty whereby under Art 277 TFEU (ex 241 EC) a plea of illegality may be raised outside the strict two-month time limit for bringing direct actions.

<sup>157</sup> See *R (Paul Rackham Ltd) v Swaffham Magistrates' Court* [2004] EWHC 1417.

<sup>158</sup> [1998] AC 92, 112.



- (4) A convicted person wishes to advance arguments as to why a particular penalty, ostensibly allowed by law, is contrary to EU law,<sup>159</sup> or why consequential action following conviction such as a recommendation for deportation<sup>160</sup> is contrary to EU law. Defences or arguments of this nature are always available to a defendant in or following criminal proceedings.

In all the above instances, if a claimant or defendant succeeds in establishing a breach of EU law in a private (or criminal) law forum, the remedies available are—for the most part—very similar and will be discussed in detail in Chapter 5.<sup>161</sup> They are of potentially wide ambit and, in certain cases, somewhat wider than in domestic (including HRA) law. In addition, the court hearing argument on the public law issue may also make a reference to the CJEU under Article 267 TFEU (ex 234 EC) on identical principles to those discussed in Chapter 4. **1.138**

In EU law cases there will be considerable scope for application of collateral public law challenges. Defences to environmental and other prosecutions brought to secure compliance with EU obligations, damages claims and defences,<sup>162</sup> and—in such proceedings—the compatibility of legislative or administrative acts or omissions with relevant EU obligations may all raise important public law issues capable, in this fashion, of being litigated outside judicial review. **1.139**

---

<sup>159</sup> See, eg, Case 63/83 *R v Kirk* [1984] ECR 2689 (illegality of retroactive penalty). This case is also referred to at paras 9.21 and 9.66–9.67. EU law is strict in its application of the general principle of legality and looks solely to national law as the determinant of penalty. Thus, a directive cannot, of itself, determine penalty and if national law is defective in implementing the requirement of a penalty the national court cannot correct the deficiency. Of the many cases see, eg, Case C–168/95 *Arcaro* [1996] ECR I–4705, para 36. See, also, paras 1.63 et seq.

<sup>160</sup> See, eg, Case 30/77 *Bouchereau* [1977] ECR 1999.

<sup>161</sup> Save that a private law or inferior court does not have the same power as the Administrative Court to quash administrative decisions or secondary legislation.

<sup>162</sup> For a case in point see *An Bord Bainne Cooperative Ltd (Irish Dairy Board) v Milk Marketing Board* [1984] 2 CMLR 584.