

## EU Constitutional Law: X. EU law enforcement and remedies

**Source:** Professor Herwig Hofmann, University of Luxembourg. herwig.hofmann@uni.lu.

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# X. Enforcement and remedies

1. Damages for non-compliance
2. Member States' reactions to direct effect
3. National remedies for non-compliance with EU law

# 1. Direct effect – damages

- The possibility of enforcing the direct effect of directives has been increased by the ECJ.
- It has developed case-law on damages since Case C-6/90 *Francovich* [1991] ECR I-5357: a Member State may be liable to damages in the case of non-transposition of a directive which does not qualify as having direct effect. There are three conditions (paragraphs 40-43):
  - ‘The result prescribed by the directive should entail the grant of rights to individuals.’
  - ‘It should be possible to identify the content of those rights on the basis of the provisions of the directive.’
  - ‘The existence of a causal link between the breach of the State’s obligation and the loss and damage suffered.’

# Direct effect – damages

- Consequences:
  - The right to obtain reparation is founded directly on EU law(!).
  - The procedures for obtaining damages are subject to national law.
  - The substance and procedures for obtaining reparation may not be ‘less favourable than those relating to similar domestic claims’ (paragraph 43).
- The *Francovich* doctrine is also applicable in cases of incomplete transposition or partial transposition by a Member State.

# Direct effect – damages

Joined Cases C-46 and 48/93 *Brasserie du pêcheur* [1996] ECR I-1029 extend the possibility of claims for damages against a Member State. Damages may also be claimed against a Member State for violation of primary law obligations which have direct effect, as well as for violation of secondary law obligations (directives).

However, according to ECJ case-law relating to Article 340 TFEU (*Schöppenstedt* formula), the ECJ requires a ‘sufficiently serious’ breach of the rule of law which confers rights on individuals. (In this case, Germany had simply wrongly assumed that it had broad discretion to implement its obligations under Articles 34-36 TFEU)

# Direct effect – damages

- The violation of EU law in decisions taken by a national court can also lead to claims for damages. See C-224/01 *Köbler* [2003] ECR I-239, para 32:

‘In international law a State (...) is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply *a fortiori* in the Community [EU] legal order since all State authorities (...) are bound in performing their tasks to comply with the rules laid down by Community [EU] law which directly govern the situation of individuals.’

## 2. Member States' reactions to direct effect and the supremacy of EU law

- How do Member States and Member States' courts react to the claim of direct effect and supremacy of EU law, especially since any form of EU law has the power to override Member States' constitutional law?
- Illustrative cases:
  - *Maastricht* (German Constitutional Court, BVerfG) Case 2 BvR 2134/92 of 12 October 1993 and *Zustimmungsgesetz zum Vertrag von Lissabon* (German Constitutional Court, BVerfG of 30 June 2009).
  - *SPUC v. Grogan* (Irish Supreme Court) [1989] IR 753 of 19 December 1989

## 3. National remedies against non-compliance

- Generally, decisions taken at European level are implemented at national level. However, under Articles 290 and 291 TFEU, the Commission, (and exceptionally the Council under 291), does have some executive responsibilities.
- Under the principle of sincere cooperation under Article 4.3 TEU, Member States are obliged to ‘take all appropriate measures, general or particular, to ensure fulfilment of the obligations arising out of’ EU law. This includes the provision of full judicial protection of EU law.



# National remedies against non-compliance

For an example of the obligations, see C-453/99 *Courage* of 20 September 2001:

(Paragraph 25): ‘As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community [EU] law in areas within their jurisdiction must ensure that those rules **take full effect** and must protect the rights which they confer on individuals (see *inter alia* Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 16, and in Case C-213/89, *Factortame* [1990] ECR I-2433, paragraph 19).’

# National remedies against non-compliance

*Courage* continued: (Para 29):

‘However, in the absence of Community [EU] rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community [EU] law, **provided that such rules are not less favorable** than those governing similar domestic actions (*principle of equivalence*) and that they do **not render practically impossible or excessively difficult** the exercise of rights conferred by Community [EU] law (*principle of effectiveness*) (see case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27).’