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5 ENFORCEMENT IN THE MEMBER STATES

⁸You do not go into detail on the cases. You have made your point and the cases just need to be listed as authority. Adding detail of the cases would not really help to illustrate your argument.

⁹Keep coming back to the question in your analysis. You have dealt with the description and explanation bit and here have the opportunity to remind the examiner that you have the question in the back of your mind and are indeed answering it.

¹⁰You also need to consider the limitations of direct effect – it has its critics – and this section begins to do that.

¹¹Remember this principle is developed entirely by the ECJ, and the ECJ is free to change its mind about what it regards as clear and precise.

¹²This is an important point to remember and one which students often neglect. If the ECJ has not ruled, you can never say with absolute certainty whether or not a provision is directly effective.

individuals were denied the opportunity to rely on them before their national courts (see *Van Duyn* (1974)). The case of *Francovich* suggests that in order to be sufficiently precise directives must identify those entitled to the right and those responsible for providing the right, and ascertain the contents of the right. In addition, the date set for implementation must have passed (*Casa Pubblico Ministero v Ratti* (1979)). The ECJ has further held that directives can only be vertically directly effective and will not be enforceable against individuals (*Marshall v Southampton Health Authority* (1986); *Faccini Dori v Recreb Srl* (1994)).⁸

While the creation of direct effect was undoubtedly a big step in the creation of a new legal order⁹ which differed significantly from the legal frameworks created by other international treaties, the doctrine is not without its problems.¹⁰ First, it is difficult to know whether or not a particular provision has direct effect and the criteria can be difficult to apply in practice. For example, in *Van Duyn* the provisions relating to public policy and public security were held to be sufficiently precise even though the scope of those terms would need interpretation by the courts. Similarly in *Defrenne v Sabena (No. 2)* ‘equal pay for equal work’ was regarded as sufficiently clear. However, there is no guarantee that the ECJ will always take this generous approach.¹¹ Unless a particular provision comes before the ECJ, there is no failsafe way of determining whether or not a provision is directly effective, and the determination of these matters is therefore largely left to the chance of an appropriate case arising.¹²

A further limitation of the doctrine is the distinction drawn between vertical and horizontal relationships. In particular, directives are only vertically directly effective, leaving EU citizens unable to enforce their rights against other individuals who breach their obligations under the directive in question. The ECJ has attempted to address this weakness of the doctrine by applying a very wide definition of what constitutes ‘the state’ for the purposes of vertical direct effect. In *Foster v British Gas* (1990) it therefore concluded that a body was an emanation of the state and thus capable of forming a vertical relationship if it provided a public service, was under state control and had special powers which went beyond those normally associated with individuals.

While a broad interpretation of the state goes some way towards ensuring the widest possible application and enforcement of European law, the ECJ developed the principle of indirect effect to

¹³ The question asks about direct effect. This does not mean that you exclude everything else. Indirect effect addresses some of the weaknesses of direct effect and therefore should be mentioned!

¹⁴ The conclusion relates directly back to the question and follows logically from what went before, which is usually a good sign that you have not gone off track in your answer.

further enhance individuals' ability to enforce their specific rights.¹³ The principle simply states that any national law must be interpreted in accordance with European law, and that it is a principle of statutory interpretation to be used in horizontal situations or in vertical situations where the provision in question is not sufficiently precise. The case of **Marleasing** (1991) confirmed that the principle of indirect effect relates to measures predating the provision in question rather than to implementing legislation which wrongly transposes a European law measure; in such a case traditional infringement proceedings under Article 258 TFEU would have to be brought.

As is evident from the discussion above, the ECJ has been influential in creating a new legal order which is vertically integrated rather than consisting in a simple horizontal relationship between signatory states to an international treaty and the doctrine of direct effect was crucial to this development.¹⁴



Make your answer stand out

- Include a more detailed discussion of indirect effect to show how it addresses the gaps left by direct effect and therefore ensures the legal order as a whole is effective.
- Provide a discussion of state liability as the final piece in the puzzle which ensures direct effect is backed up by sanctions against Member States which also compensate individuals.
- Explain how EU law was originally going to be enforced by the Commission and the pros and cons of that approach.
- Illustrate your further reading by referring to academic commentary to reinforce your argument. See for example Pescatore, P. (2015) The Doctrine of 'Direct Effect': An Infant Disease of Community Law, *EL Rev*, 40, 135–53.



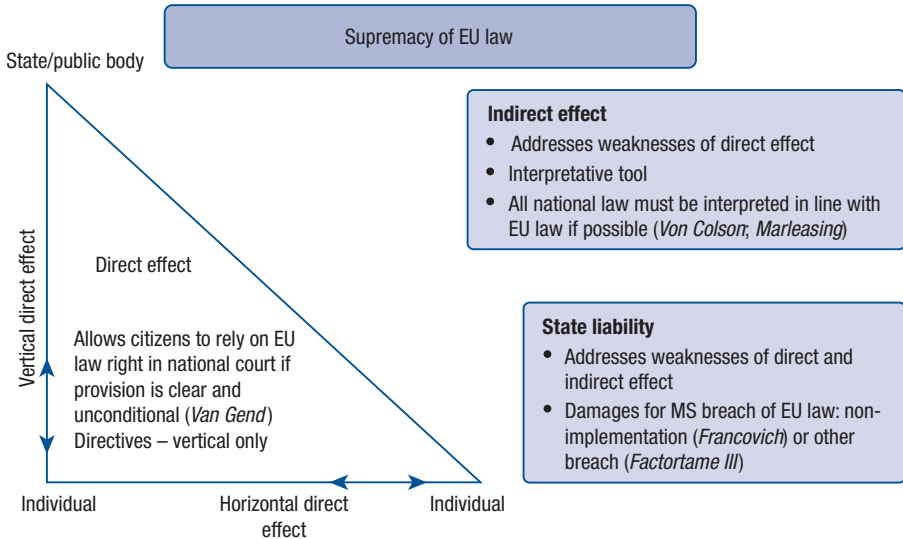
Don't be tempted to . . .

- Launch into a long explanation of direct effect; focus on the question asked.
- List lots of case examples; one or two will do to illustrate your point.
- Give the facts of cases unless you think they really help illustrate your argument.
- Ignore indirect effect completely; it's part of the analysis even if you just have time to mention it briefly.

Question 3

The ECJ has developed a number of principles to help protect individuals' EU law rights in national courts. Critically assess these principles.

Diagram plan



A printable version of this diagram plan is available from www.pearsoned.co.uk/lawexpressqa

Answer plan

- ➔ Introduction: identify the principles: supremacy, direct effect, indirect effect and state liability.
- ➔ Use the supremacy of EU law as a starting point: the principles are a way of ensuring supremacy and giving individuals access to their rights directly.
- ➔ Direct effect: explain its development by the ECJ, pointing out the distinctions between vertical and horizontal and the issues regarding directives.
- ➔ Indirect effect: a way of overcoming the weaknesses of direct effect; essentially a tool of interpretation.
- ➔ State liability: the final piece in the puzzle, giving access to damages where individuals suffer loss due to a Member State breach of EU obligations.

Answer

¹ The introduction here is little more than a restatement of the question but it gets you going and tells the reader how you plan to tackle the question. If you don't know how to start in an exam, restating the question in a slightly different way can break that blank-page block.

² We have paraphrased here; if you can remember the exact wording from the case you can also use that, but, unless you have a good memory for quotations, do not worry too much about memorising them.

³ There is no need to give further detail about the cases: you are only giving background here.

⁴ You just need to highlight that you know that there are infringement proceedings which were set in place as the method of enforcement. Do not be tempted to write about these in detail: you will run out of time.

⁵ Restating a legal provision or principle shows that you really understand the provision and haven't just learned it off by heart.

This question requires a consideration of three principles of EU law which have been developed by the European Court of Justice (ECJ) and together ensure the functioning of the 'new legal order' (**Van Gend en Loos** (1963)) and the supremacy of EU law. This essay traces the development of the principles of direct effect, indirect effect and state liability in order to assess their importance for the protection of individuals' EU law rights in national courts.¹

In **Van Gend en Loos** the ECJ famously proclaimed that the Community constitutes a new legal order for which Member States had limited their sovereign rights.² As a result, EU law takes primacy over national law, as has been established in a line of case law (**Costa v ENEL** (1964); **Internationale Handelsgesellschaft** (1970); **Simmenthal** (1978); **Factortame II** (1991)).³ This primacy of EU law provides the basis for the development of the three principles under discussion here.

The doctrine of direct effect was first articulated by the ECJ in **Van Gend en Loos** where it held that Community law imposes rights and obligations on individuals and thus should be enforceable directly in the national courts. This method of enforcement was to be in addition to the then accepted methods of Commission-issued infraction procedures.⁴ However, the ECJ did recognise that, in order for the doctrine to work effectively in practice, some limitations and guidelines would need to be provided. It therefore set out the criteria which provisions have to meet in order to be directly effective. The provision must be clear and unambiguous and its operation must not depend on further Member State action. In other words, the legal provision in question must be one that is precise and unconditional.⁵

A further distinction was drawn between vertical and horizontal direct effect, the former relating to a relationship between individuals and state institutions and the latter to a relationship existing between two individuals. While **Van Gend en Loos** dealt with vertical direct effect, the question of whether provisions could also be horizontally directly effective was not answered until the case of **Defrenne v Sabena (No. 2)** (1976) in which the ECJ's judgment clarifies that European law provisions are enforceable by individuals against other individuals.

5 ENFORCEMENT IN THE MEMBER STATES

⁶This is a really succinct way of highlighting that you understand how the doctrine of direct effect applies to different types of secondary legislation. It also signposts that you are going to concentrate on the controversial issues and makes your structure really clear.

⁷The main case establishing this area of law was *Francovich*, so that is stated at the beginning of the sentence. You can then highlight extensions to those principles or cases which have consolidated it by listing them in brackets. There is no need to say more about them.

⁸The last two paragraphs may sound very familiar if you have read the answer to the previous question in this chapter. This section is pretty much identical because it deals with exactly the same material.

⁹This paragraph relates back to the question directly by specifically highlighting how direct effect leads to the protection of individual rights. While the explanation and, to a point, analysis of direct effect will be the same in most essay questions, the conclusions you draw from that explanation and analysis will vary depending on the question set.

¹⁰You have just recognised the limitations of direct effect, so it makes sense to start your examination of indirect effect with the idea that it addresses some of those limitations.

While the direct effect of directly applicable EU law such as treaty articles and regulations has been relatively uncontroversial, the application of the doctrine to directives has been more problematic.⁶ The requirement for the provision to be unconditional seems to exclude directives from the scope of direct effect as they rely on Member State implementation and only the objective or result of them is binding. However, the ECJ considered the possibility of directly effective directives early on in its case law and concluded that the usefulness of directives as a legal measure would be considerably weakened if individuals were denied the opportunity to rely on them before their national courts (see *Van Duyn*). The case of *Francovich* (1991) suggests that in order to be sufficiently precise directives must identify those entitled to the right and those responsible for providing the right, and ascertain the contents of the right. In addition, the date set for implementation must have passed (*Casa Pubblico Ministero v Ratti* (1974)).⁷ The ECJ has further held that directives can only be vertically directly effective and will not be enforceable against individuals (*Marshall v Southampton Health Authority* (1986); *Faccini Dori v Recreb Srl* (1994)).⁸

For the protection of individuals' rights, this means that, where direct effect can be established, EU law rights are directly enforceable in national courts. However, direct effect also has its weaknesses. Until the ECJ has ruled on a particular provision, it is difficult to know whether or not it has direct effect, and directives in particular are limited to vertical direct effect, leaving those wishing to enforce their rights against another individual without a remedy.⁹

While a broad interpretation of 'the state' (*Foster*) goes some way towards ensuring the widest possible application and enforcement of European law under direct effect, the ECJ developed the principle of indirect effect to further enhance individuals' ability to enforce their specific rights.¹⁰ The principle simply states that any national law must be interpreted in accordance with European law (*Von Colson*), and that it is a principle of statutory interpretation to be used in horizontal situations or in vertical situations where the provision in question is not sufficiently precise. The case of *Marleasing* confirmed all national law must be interpreted in line with EU law, but only 'so far as possible'. As this may not always be possible (*Wagner Miret*

¹¹ This section is quite short but don't be tempted to expand it just for the sake of it.

¹² This recognises how the principles are all linked and together tries to give as wide a scope as possible for individuals to enforce their rights – something we then come back to in the conclusion.

¹³ Cases are used here simply as examples. The examples are the important part but it helps if you can cite your authority. If you can't remember a case, you should still get some marks for listing the examples.

(1993)), the principle has its limitations but does go some way to ensuring EU rights are protected.¹¹

The final piece of the puzzle is that of state liability, which is a further means of overcoming the limitations of direct and indirect effect (Ward, 2009).¹² In **Francovich** the ECJ considered damages for loss incurred as a result of a state's failure to implement a directive. It held that, where the directive entails the grant of rights to individuals, it is possible to identify the content of those rights, and a causal link exists between the state's failure and the loss, damages will be payable. The doctrine was developed further in **Factortame III** where the conditions for awarding damages for other kinds of breach were set out: the breach infringes a rule of law intended to confer rights on individuals; the breach is sufficiently serious; there is a direct causal link between the breach of the state's obligation and the damage to the applicant. The ECJ went further and considered these factors to determine whether the breach would be sufficiently serious: the clarity and precision of the rule breached; the extent of any discretion left to the Member State; whether the breach was intentional or involuntary; whether the error of law was excusable or inexcusable; whether the position taken by a Community institution had contributed towards the Member State's action. The law relating to state liability has been applied in a variety of situations, such as legislation infringing Community law (**Factortame III**); incorrect implementation of a directive (**BT** (1996)); administrative breaches (**Hedley Lomas** (1996)) and incorrect interpretation of Community law by a national court of last instance (**Köbler** (2003)).¹³

In conclusion, therefore, the principles of direct effect, indirect effect and state liability which have been developed by the ECJ are crucially important for the protection of individuals' Community law rights in national courts as they provide a framework within which claims to enforce such rights can be brought.