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Judicial Enforcement of EC Labour Law: Time limits, burden of proof, ex officio application of EC law

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Judicial Enforcement of EC Labour Law:
*Time limits, burden of proof, ex officio application of EC law**

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1. Private enforcement v Public enforcement of EC Law

It would be hard to deny that the enforcement of Community legislation has up to now proceeded by means of a private enforcement model, as opposed to the public one initially provided for by the EC Treaty. This has been particularly true in the field of social law, where European citizens have been ensured of substantive rights deriving from Community law more by national courts acting on Article 234 preliminary references than by the European Court of Justice acting on Article 226 infringement procedures.

This is not to be seen merely as a result of the inner weaknesses of the centralised public model based on infringement procedures. The absolute prevalence assumed over the years by the private enforcement model is rather to be understood as a corollary of the "twin pillars" of the Community legal order. The progressive consolidation of the doctrines of supremacy and - mostly - direct effect have altered the equilibrium between the public and the private route to the judicial enforcement of Community law, shifting the balance towards the latter.

And indeed, had the Court of Justice not "discovered" supremacy and direct effect¹, the enforcement of EC law would have been entirely left either to the eagerness of the individual Member states to comply with their duties, or to the willingness (or the possibility) of the Commission to activate Article 226 proceedings². In either case, individual "Euro-litigation as an enforcement strategy for European labour law"³ would certainly not have played the role it has actually been playing since the seventies.

It is within this broad framework that (national) remedies and procedures have become a fundamental complement for the effectiveness of (European) substantive rights. The pivotal role of individual litigants claiming enforcement of EC rights before a national court explains the emphasis gained by judicial remedies within the case law of the European Court of Justice. And in fact, once the preponderance of the private enforcement model⁴ was acknowledged, it was unavoidable for the European Court to take into account the national sanctions and rules of procedure to be applied when disputing the effective enforcement of Community law.

¹ For a stimulating overview of the most recent developments of direct effect doctrine, see (Prechal 2000).

² Or of the Member states to activate Article 227 proceedings.

³ As (Bercusson 1996) at 145 explicitly defines it.

⁴ Or, as others prefer to describe it, the "decentralised system of justice" of the Community legal order (Tridimas 2000) at 35.

1.1 Effective judicial protection: a principle born of (but not confined to) direct effect

Reasons of conceptual clarification require a distinction to be made between judicial remedies *for the effective enforcement of rights deriving from Community law* (A), and judicial remedies *for breaches of EC law* (B). Nevertheless, it is also true that - as regards the contents of the general principle of effective judicial protection - the two aspects tend to overlap (§ 1.2).

(A) The first body of judicial remedies - *for the full effectiveness of rights deriving from Community law* - refers to cases in which the relevant EC Directive has been correctly implemented by the national legislation, and yet its full and definite effectiveness requires the availability of both sound rules of procedure and "adequate" or "dissuasive" sanctions. As has been clearly stated, "there is no doubt that the requirements [of effective judicial protection] also apply in the case of infringements of national provisions which implement a directive."⁵ And it is the case to add that this is by no means a surprising situation: it is quite possible that the substantive provisions of a Directive are correctly implemented by a Member state, without any judicial remedy for their violation being available.

The Court of Justice has repeatedly considered this situation as incompatible with the full effectiveness of EC law.

In a first phase, the Luxembourg judges relied upon the specific "enforcement provision" contained in Article 6 of the Equal Treatment Directive. In *Von Colson*,⁶ they declared that - even if the "substantive" part of the 1976 Directive had been implemented in the German legal order by art. 611*bis* BGB - this was not sufficient to ensure that the Directive was "fully effective, in accordance with the objective which it pursues", in the absence of adequate remedies for discrimination. More recently, the European Court stated in *Coote*⁷ that national legislative provisions which were specially introduced in order to implement the Equal Treatment Directive must be reviewed in the light of the principle of effective judicial protection⁸: according to the Court, the absence of remedies would be liable to jeopardise not the implementation of the Directive as such, but rather the "implementation of the aim pursued by the Directive".

⁵ (Prechal 1997) at 5. Italics in the original.

⁶ Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, on which see (Curtin 1985).

⁷ Case C-185/97, *Belinda Jane Coote v Granada Hospitality Ltd.* [1998] ECR I-5199

⁸ Sometimes defined as the principle of "effective judicial control", as in case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

In a second phase - and basing on the duty of co-operation provided for by Article 10 of the Treaty - the Court of Justice extended the scope of its jurisprudence by requiring adequate national remedies to be available for the violation of rights conferred by EC law, even in the absence of any specific "remedies provisions" in the concerned directive. In *Johnston*⁹, for instance, the Court declared that the principle of effective judicial control "underlies the constitutional traditions common to the Member states and is laid down in articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which must be taken into consideration in community law." There should follow from this an extension of effective judicial protection beyond the field in which it was originally formulated, i.e. equal treatment: "if the Court is content to invoke the rule on effective sanctions in claims involving enforcement of the Equal Treatment Directive against private parties, the same should apply to *any directly effective* directive, provided that the *substantive* rights contained therein have been correctly implemented".¹⁰

In a third phase - which is currently under way - the Court's jurisprudence on effective enforcement has been, so to say, positivized in European legislation; sometimes by reproducing within the legislative text the precise wording previously used by the Luxembourg judges. And so it happens that in the proposal for the long-awaited "information and consultation" Directive¹¹ one finds the same "effective-proportionate-dissuasive penalties" formula which appeared in earlier case law¹². In addition, the same formula is adopted in the proposal for the new amending Equal Treatment Directive¹³.

It is worth nothing, anyway, that the last generation of EC social Directives already contains specific "enforcement provisions" similar to that contained in Article 6 of the Equal Treatment Directive. The new 2001 transfers of undertakings directive, for instance, obliges Member States to introduce "such measures as are necessary to enable all employees and representatives of employees who consider themselves wronged by failure to comply with the obligations arising from this

⁹ *Johnston*, see note n. 8.

¹⁰ (Ward 1998) at 70.

¹¹ Article 7.2 of the Proposal for a Directive of the European Parliament and of the Council establishing a general framework for informing and consulting employees in the European Community, COM (2001) def. 296 of 23.05.2001.

¹² Case 68/88, *Commission v Greece* [1989] ECR 2965.

¹³ Considerandum n. 12 and Article 6.2 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, COM (2000) 334 of 7.06.2001.

Directive to pursue their claims by judicial process”¹⁴. Still more explicit is the recent Framework Employment Equality Directive, requiring Member States to “ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended”¹⁵. It is easy to predict that this new generation of enforcement provisions will give fresh impetus to the principle of effective judicial protection intended as a remedy for the full effectiveness of rights that individuals derive from national legislation implementing EC law.

(B) It has been clarified thus far that the need to guarantee effective judicial protection of rights that individuals derive from EC law, does constitute a trouble even in those circumstances where the relevant Community directive has been transposed into the national legislation. However, since “effective enforcement” of Community law is not to be equated with implementation of EC directives, the model of private enforcement has developed beyond implementation and, sometimes, irrespective of implementation.

This is why the principle of effective judicial protection has been primarily handled by the Court of Justice under the guise of a *remedy for the breach of EC law*; by “breach” of EC law meaning those circumstances in which no national implementing legislation had been adopted at the time of the events submitted to the court, even though the national judge was in front of a dispute which, following the direct effect doctrine, should have been regulated by EC law.

It is precisely in this kind of case that the Court of Justice had the opportunity to dwell upon the specific questions of procedure which are the object of this chapter: time limits, burden of proof and *ex officio* application of EC law by national judges. Questions such as those examined in *Johnston*¹⁶, *Emmott*¹⁷ *Marshall II*¹⁸, *Steenhorst-Neerings*¹⁹,

¹⁴ Article 9 Directive 2001/23/EC. A similar provision is present in the 1998 collective redundancies directive (Article 6 Directive 98/59/EC)

¹⁵ Article 9 Directive 2000/78/EC.

¹⁶ See note n. 8.

¹⁷ Case 208/90, *Emmott v Minister for Social Welfare and Attorney General* [1991] ECR I-4269.

¹⁸ Case C-271/91, *Marshall v Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4367, on which see (Fitzpatrick and Szyszczak 1994).

¹⁹ Case C-338/91, *Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhande* [1993] ECR I-5475.

*Johnson*²⁰, *Van Schijndel*²¹, *Magorrian*²², and *Fantask*²³ originated from disputes which at the time of the facts were covered not by national implementing legislation, but rather by Community rules that - due to their being clear, precise, unconditional and not requiring further Member state action - the Court considered as directly applicable.

1.2 A unitary system of remedies for different functions of effective judicial protection

Having described the two possible ways of viewing the function of effective judicial protection within the EC legal order, it should be pointed out that the Court of Justice has been inclined to shape both of them in quite similar, if not identical, terms.

Either in its representation as a remedy for the effective enforcement of transposed EC directives (§ 1.1.A), or in its variation as a remedy connected to the direct effect of non-transposed EC directives (§ 1.1.B), the principle of effective judicial protection has been constructed by the Court of Justice as a unitary system of substantive remedies and procedural issues responding to common requirements aimed at ensuring the full effectiveness of rights deriving from Community law.

In this perspective, effective judicial protection could be depicted as a sort of transversal principle crossing through the three pillars of the Community private enforcement model: direct effect, indirect effect and State liability.

According to European court case law, in fact, national remedies and procedures must be able to accord effective judicial protection, no matter whether the substantive right to be guaranteed derives from the direct effect of clear, precise and unconditional Community rules; or from an interpretation of national law consistent with the purpose of Community law; or from the State liability for failure to transpose Community law. Whichever of the three routes a substantive Community right has followed to reach the national legal order, it must be exercised in the light of a single principle of effective judicial protection: in all of the three cases mentioned above, the sanctions must be adequate and the procedural terms of the action not framed so as to render the exercise of those rights excessively difficult. And it is, in fact, easy to note that the "excessively difficult or practically impossible" test is proclaimed in

²⁰ Case C-410/92, *Johnson v Chief Adjudication Officer* [1994] ECR I-5483.

²¹ Joined cases C-403/93 and C-431/93, *Van Schijndel and Van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705.

²² Case C-246/96, *Magorrian and Cunningham v Eastern Health and Social Service Board and Department of Health and Social Services* [1997] ECR I-7153.

²³ Case C-188/95, *Fantask A/S v Industriministeriet* [1997] ECR I-6783.

exactly the same wording in direct effect cases²⁴ as well as in State liability cases²⁵; and the need for "adequate and proportionate" sanctions is evoked by the Court in direct effect cases²⁶, as well as in indirect effect cases²⁷, and even in infringement cases²⁸.

The broad description of the rationale behind the EC system of remedies, as conducted so far²⁹, is aimed at pointing out two intermediate conclusions, which are essential to introduce the specific analysis that will follow.

First, a preliminary analysis of ECJ jurisprudence substantiates those views according to which "the requirement of judicial protection as an overriding principle of Community law has its origin in the far-reaching doctrine of direct effect"³⁰. This explains why procedural questions largely connected with the application of the direct effect doctrine - such as those relating to time limits - have gained greater magnitude in the case law of the Court of Justice. Nonetheless, it is also true that the Court's jurisprudence on remedies has developed beyond its "direct effect" origin, embracing profiles of effective judicial protection not necessarily linked to direct effect and, hence, to non-implementation of Community directives. In this sense, it may be said that enforcement questions may arise *irrespective* of implementation/non-implementation of the EC rules involved. And this is why in the subsequent sections all kinds of cases - whether connected to implemented or a non-implemented Community legislation - will be taken into consideration.

Second, the focus on indirect effect underlying the origins of the ECJ's jurisprudence on remedies is also useful to make clear why the vast majority of remedy cases are equality cases. This did not happen by chance. To the extent that the chronicle of ECJ jurisprudence reveals a clear connection between effective remedies and direct effect, it is hardly surprising that the principle of effective judicial protection has been stated in disputes which originated from the non-transposition of directly effective Community provisions: i.e., and typically, equal treatment provisions, also due to the presence of art. 141 (ex art. 119).

²⁴ Case 199/92, *San Giorgio* [1983] ECR 3595, para. 12.

²⁵ Cases C-6/90 and C-9/90, *Francovich and others v Italy* [1991] ECR I-5357, para. 43.

²⁶ *Marshall II*, see note n. 18.

²⁷ *Von Colson*, see note n. 6.

²⁸ *Commission v Greece*, see note n. 12.

²⁹ For a complete analysis see the chapter by B. Fitzpatrick in this volume.

³⁰ (Van Gerven 2000a) at 440.

1.3 The specific questions of procedure

The principle (and - to the extent that they are expressly provided - the specific provisions) of effective judicial protection requires that individuals claiming a Community right should be entitled to a "judicial remedy" before the courts. According to the European Court, a judicial remedy essentially consists of three things: access to judicial protection and sound rules of procedure, availability of interim measures, and adequate reparation for the infringement of these rights. As the last two are developed in other chapters in this volume³¹, it is possible here to restrict the relevant facets of ECJ jurisprudence to the following areas of procedural law: time limits, burden of proof, and *ex officio* application of Community law; the first being more extensively discussed than the others, as suggested by analysis of the most recent European jurisprudence.³²

Probably because of their very same nature, these questions have been submitted to the attention of the European Court quite frequently; certainly more than other "enforcement" questions analysed in this volume (for example: more than those related to the administrative sphere). This is why investigation of these subjects cannot but heavily rely on European court case law, primarily developed through a series of Article 234 (ex 177) procedures giving rise to a number of quite technical questions that increasingly fill the agenda of European law debate. At the same time, it is precisely in the light of this intense judicial dialogue that a comparative analysis of the rules of procedural enforcement should be conducted. This is indeed one of the fields of legal integration where European rules are destined to "cohabit" with national assets, as is unmistakably and typically revealed by the "comparability" or "equivalence" principle, according to which national procedural rules governing the enforcement of EC law must not be less favourable than those governing similar domestic actions³³.

³¹ For which see, respectively, the chapters by Jonas Malmberg and Michael Gotthardt in this volume.

³² In the last decade, the portion of case law devoted to time limits (§. 2) has certainly been much more significant than those related to burden of proof (§. 3) and *ex officio* application of Community law (§. 4).

³³ The necessity to couple the "Community" and the "comparative" approach in the study of judicial remedies is emphasized by (Van Gerven 2000a). On the whole, the study of EC/Comparative law dynamics is increasingly referred to in the current debate as an unavoidable methodological stance in the future development of legal research. In connection with this, see the essays collected in (Sciarra, ed. by 2001) and the concluding remarks by S. Simitis in the same volume.

2. Time limits

One of the main elements to be taken into consideration when substantiating a judicial remedy is undoubtedly related to a series of restrictions having to do with "time." Indeed, this is precisely one of the profiles that have been repeatedly submitted to the attention of the European Court. In defining the essence of a judicial remedy, there can be three kinds of time-related questions: a) How much time does one have at his/her disposal in order to claim a right before a court? b) When does this amount of time begin to run? c) What are the retroactive effects of the claim brought into the judicial proceeding? Obviously, the three profiles are often interrelated within a single dispute; but for reasons of conceptual clarity, it seems appropriate here to deal with them separately.

2.1 Time limits for bringing action

The first question - determining the period of time individuals have at their disposal to bring a judicial claim - is neither new nor peculiar to the enforcement of rights conferred by EC law. On the contrary, all national systems have always had such limitation periods with a view to safeguarding legal certainty requirements. And the European Court also basically shared this view by asserting, in application of the principle of national procedural autonomy³⁴, that the laying down of reasonable time limits for the judicial enforcement of rights conferred by EC law, is not in and of itself contrary to their full effectiveness³⁵.

This is not to mean that Community law has nothing to say in this regard. One of the two counter-limits of national procedural autonomy requires that national procedural remedies should not be less favourable than those relating to similar actions of a domestic nature nor framed so as to render the exercise of a Community right excessively difficult. An EC/comparative law exercise to review national time limits should therefore ascertain whether national time limits to bring action for the protection of Community rights - however dissimilar they may be between the member states - are able to satisfy the above-mentioned requirements of effectiveness.

In this connection - and without any claim to exhaustiveness - some of the judicial developments that have taken place within domestic legal

³⁴ See the chapter by B. Fitzpatrick in this volume.

³⁵ See, among many others, cases C-279/96, C-280/96 and C-281/96, *Ansaldo Energia and others v Amministrazione delle Finanze dello Stato* [1998] ECR I-5025; C-231/96, *EDIS v Ministero delle Finanze* [1998] ECR I-4951; C-326/96, *Levez v T.H. Jennings* [1998] ECR I-7835.

orders are worth mentioning to the extent that they may confirm or contradict some aspects of that process of communitarization of national remedies perceived (or perhaps recommended) by some authors³⁶.

It is interesting, for instance, to note that in some cases national time limits to challenge before a court the validity of a dismissal have been somehow "communitarized" by national judges. In Germany and the Netherlands, for instance, the *Bundesarbeitsgericht* and the *Hoge Raad* have been ready to extend the time limits laid down in ordinary dismissal cases³⁷, when the contested dismissal is allegedly grounded on a transfer of undertaking, contrary to what Community law prescribes. The Dutch Supreme Court, in particular, set aside the six months' limitation period usually applied to judicial claim in dismissal cases. Based on the uniform interpretation principle, it asserted that the national time limit provision was to be interpreted in conformity with the 1977 Transfers of Undertakings Directive, which does not allow for a term of limitation³⁸. It is worth mentioning that on that occasion the Supreme Court came to its conclusion in spite of the fact that the time limit in Community-related actions was not different from the limit provided for in similar actions of a domestic nature.

Ultimately, what this kind of jurisprudence reveals is that, in some cases, national judges have gone even beyond what the non-discrimination principle would have required: in the above-mentioned Dutch case law, a Community-related action was placed in a *more* favourable position than a merely domestic action would have been, thus suggesting that a sort of "procedural added value" could sometimes be found when a Community right is claimed in front of a national court.

However, it would be difficult to invoke this peculiar case law as an expression of a deliberate and overall inclination to secure the effective enforcement of EC labour law. In the very same Dutch legal order, for instance, the two-month time limit laid down for the annulment of dismissals based on sex discrimination is, without any apparent reason, shorter than the six-month limit laid down for other kinds of dismissal, and therefore - contrary to what the equivalence principle would require - definitely less favourable than the one governing similar domestic actions.

In general terms, there is no doubt that the national time limits for the judicial enforcement of Community rights do not correspond to any sort of uniformity, either among or within the Member states. Just to give a

³⁶ See (Van Gerven 1995 and 2000a)

³⁷ Respectively three weeks and six months

³⁸ HR 29-12-1995, NJ 1996, 418

few examples, judicial actions brought before national courts in order to enforce the same fundamental sex equality principle are governed by a series of extremely varying limitation periods whose rationality would be difficult, if not impossible, to ascertain. Limitation periods vary not only from Member state to Member state³⁹, but also within a single Member state, from equal pay to equal treatment claims, and, within a single Member State and a single kind of claim, even from court to court⁴⁰.

As a sort of preliminary conclusion on the first "time-related" question, it is therefore possible to say that it wholly falls into the realm of national procedural autonomy, without any counter-limit of effectiveness or equivalence having narrowed it. Hardly ever, and possibly never, has the Court of Justice made use of the two counter-limits to declare that the *length* of a national time limit was framed so as to render the exercise of rights conferred by Community law virtually impossible; and seldom has it engaged in detecting whether a national time limit laid down for Community-related actions differs from that relating to similar actions of a domestic nature. If not else, this is because the investigation proves to be a very difficult task, since it is "often far from clear whether a purely domestic issue can be equated with a Community one"⁴¹.

Where the European court has certainly been most active and willing to develop effective enforcement jurisprudence - at least up to a certain stage - is rather in the second time-related question, which will be dealt with in the following section.

2.2 When does the limitation period begin to run?

If the respectful tribute paid to national procedural autonomy has avoided the Court to scrutinise the duration of national time limits, usually considered as "reasonable", the second time-related question in the enforcement of EC labour law has certainly been more "Community-influenced".

³⁹ The time limit to challenge the discriminatory refusal of social security benefits, for instance, is six weeks in the Netherlands and six months in the UK.

⁴⁰ See, for instance, the *Levez* case (note n. 35), concerning the two-year limit on arrears of remuneration provided for by the UK Equal Pay Act; a provision operating in effect as a limitation to bringing action. According to the observation presented to the European Court by the UK government, the limit in question would not have been applied if the applicant had brought the action before an ordinary County Court instead of an Employment Tribunal.

⁴¹ (Craufurd Smith 1999) at 294. The quotation refers to the first "national" (British) phase of the *Preston* case, which later arrived in Luxembourg following a preliminary reference raised by the House of Lords (case C-78/98, *Shirley Preston and others v Wolverhampton Healthcare NHS Trust and others* [2000] ECR I-3201). For an analysis of *Preston*, and of its second national phase, see *infra* §§. 2.2 and 2.3.

Fixing the starting date of a limitation period is actually no less important than fixing the very extent of it; particularly when - as happens with the application of Community law - the identification of the date at which the individual right can be claimed may not be so clear an issue. With regard to the very important *Preston* case⁴², for instance, it has been written that: "the central issue regarding the six-month limitation was not the imposition of the limit *per se*, but rather the date from which it should apply".⁴³

When dealing with time limits of this kind, in other terms, the source attributing the rights that are claimed in the judicial action should not be underestimated. In the case of Community derived rights, indeed, the normative source conferring the substantive right (usually a directive) presents some specific peculiarities as to the determination of its "coming into force", i.e. as to determination of the moment at which the rights conferred by it become "effective" and therefore justiciable for the individuals concerned.

This is what the ECJ has been willing to take into consideration in its famous, albeit much disputed and by now revised, *Emmott* jurisprudence⁴⁴. In that case - labelled by commentators as "devastating" and "revolutionary"⁴⁵ - the Court clearly stated what should be considered a natural precondition of any effective judicial protection mechanism: "so long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights". This state of uncertainty exists - according to the *Emmott* doctrine - precisely with regard to directives that, by being directly effective, would be capable of attributing individual rights even in the absence of any State intervention. To the extent that it is not acknowledged in due time by the applicant, however, even a directly effective directive may risk remaining ineffective, should the national time limit elapse without the individual having brought any judicial proceeding. This situation - the Court dared to assume in *Emmot* - would not be compatible with the full effectiveness of Community law: it would not be fair to allow a defaulting Member state to rely on (unaware) individuals' delays in initiating proceedings in order to oppose claims based on Community law.

This kind of procedural limitation usually arises in cases where a financial claim is brought - as far as labour law is concerned, typically, social security benefits. It is, however, also possible to imagine the

⁴² See the preceding note.

⁴³ (Busby 2001) at 493.

⁴⁴ See note n. 17.

⁴⁵ Respectively, (Szyszczak 1997) at 109 and (Flynn 2000) at 51. For earlier comments on the *Emmott* case, see (Szyszczak 1992), (Barnard 1993).

effects of the issues discussed above on different kinds of claims. For example, in a situation where the Working Time Directive has not been properly implemented, and an employer's⁴⁶ negation of the directly effective right to annual paid leave has been disputed in court⁴⁷, it is one thing to make the time limit for the judicial action run from the day of the employer's refusal - which would probably make the action impossible due to the expiry of the national time limit to bring judicial action; and it is quite another thing to make it run from the date on which the Working Time Directive was properly implemented into national law. This is why the European Court affirmed in *Emmott* that a limitation period laid down by national law cannot begin to run before a directive has been properly transposed: "only the proper transposition of the directive will bring that state of uncertainty to an end".

It is easy to understand, at this point, the reasons why *Emmott* was immediately disputed by many commentators laying emphasis on the serious consequences it was capable of having. As has been written, "Emmott meant that, by definition, actions based upon directly effective rights under directives could be brought *at any time, regardless of national limitation periods*"⁴⁸. An outcome whose (financial) importance becomes immediately manifest when one realises that most of the time limit restrictions apply to cases concerning either benefits which have been unlawfully denied (mainly in the field of social security law), or charges which have been unduly paid (mainly in the field of tax law).

As already mentioned, however, the *Emmott* jurisprudence was quite promptly curtailed by the very Court of Justice in its successive case law; so it would be possible to say that the Emmott principle - albeit never formally repudiated - is now considered in Luxembourg as "a moment of judicial madness".⁴⁹

⁴⁶ In view of the fact that the direct effect of clear, precise and unconditional Community rules is still confined to vertical relationships, the term "employer" is here to be read as any "emanation of the State" or any "body having special powers beyond those which result from the normal rules applicable to relations between individuals" (case C-188/89, *Foster v British Gas* [1990] ECR I-3313).

⁴⁷ On the direct effect of Article 7 of the Directive 93/104/CE, see the recent *BECTU* case (case C-173/99, *The Queen and Secretary of State for Trade and Industry ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union*, 26th June 2001, not yet reported in the ECR. In the UK, the direct effect of the annual paid leave provision had been declared by an Employment Appeal Tribunal in the *Gibson v East Riding of Yorkshire Council*, 3rd January 1999, in 631 *IDS Brief* 7. This decision was afterwards revised by the Court of Appeal on 21st June 2000 in *East Riding of Yorkshire Council v Gibson*, in 665 *IDS Brief* 8.

⁴⁸ (Coppel, 1996) at 153. Emphasis added

⁴⁹ (Flynn 2000) at 55.

It would not be accurate to say that the revisionist approach to *Emmott* has been linear and consistent. On the contrary, a number of different solutions have been experimented before arriving at the final and present stage.

In *Texaco*⁵⁰, for instance, a quite problematic diversity between the direct applicability of the Treaty and the direct effect of Directives was drawn, in order to restrict the *Emmott* principle only to the latter and to conclude that it is not contrary to Community law that a national time limit applicable to claims for repayment of duties levied in breach of Article 95 TCE could run from an earlier point in time than that from which the duties were discontinued. In this way, an opposite solution was given to a situation very similar, if not identical, to the issues discussed in *Emmott*. In both cases, the expiry of a national time limit precluded the exercise of a Community right not to pay or to receive a sum of money; but the right not to pay unlawful charges under the Treaty was considered in different terms than the right to receive the financial benefits made available by Directive 79/7/EEC. A diversity of solutions that is, indeed, hardly justifiable.

Another way of escaping *Emmott* has been that of emphasising the peculiar events that had induced Mrs. Emmott to delay her judicial action. She had actually been ready to bring a proceeding in due time, but the Irish authorities advised her to wait until the judgement of the Irish High Court on another related dispute had been settled. When that moment arrived, however, the limitation period for bringing action had elapsed and Mrs. Emmott found herself deprived of any possibility of claiming her rights. This was sufficient for the Court to state that when the behaviour of national authorities is not as misleading as that of the Irish Ministry towards Mrs. Emmott, Community law does not exclude that a national time limit may begin to run even before a directive has been properly transposed.⁵¹

The starting date of a national time limit for bringing an action was also among the (many) issues disputed in the highly debated *Preston* case⁵². Many of the claims submitted by British part-time workers discriminated against in access to occupational pension schemes risked being time-barred following application of sec. 2(4) of the Equal Pay Act, according to which no claim on equal pay may be brought later than six

⁵⁰ Cases C-114/95 and 115/95, *Texaco A/S v Middelfart Havn and others* [1997] ECR I-4263.

⁵¹ So the Court stated, among others, in *Fantask*, see note n. 23; case C-290/96, *Ministero delle Finanze v Spac Spa* [1998] ECR I-4997, and in case C-228/96, *Aprile Srl v Amministrazione delle Finanze dello Stato* [1998] ECR I-7141.

⁵² See note n. 41.

months after the termination of employment⁵³. According to the applicants, such a time limit should have begun to run only from the date when UK law started to comply with Community law by banning all forms of indirect discrimination as far as membership in pension schemes was concerned; that is, from the coming into force of the Occupational Pension Schemes (Equal Access to Membership) Amendment Regulations 1995.

As was quite predictable, the European Court, called to declare its opinion following a preliminary procedure raised by the House of Lords, did not take any position on the matter, and it passed the hot potato back into the hands of the House of Lords, who were simply supposed to verify - in the light of the equivalence principle - whether the time limit in question was less favourable than those applying to similar domestic actions. The long-awaited response of the House of Lords arrived in early 2001⁵⁴. The Lords found that a sufficiently similar comparator to the procedural rule in question was to be detected in the time limits applicable to claims for breach of contract. Since this time limit is six years and the time limit applicable to equal pay claims is six months, one could have expected the latter to be deemed as definitively less favourable than the former, and therefore set aside in the name of the equivalence principle⁵⁵. However, this was not the case for Lord Slynn of Hudley, whose subtle argumentation deserves to be entirely quoted: "there are thus factors to be set against the difference in limitation periods. As has already been seen the claim under a contract can only go back six years from the date of the claim whereas a claim brought within six months of the termination of employment can go back to the beginning of employment or 8 April 1976 (the date of the judgement in *Defrenne v Sabena*)⁵⁶, whichever is the later. Moreover the claimant can wait until the employment is over, thus avoiding the possibility of friction with the employer if proceedings to protect her position are brought during the period of employment, as will be necessary since the six-year limitation runs from the accrual of a

⁵³ "No claim in respect of the operation of an equality clause relating to a woman's employment shall be referred to an industrial tribunal [...] if she has not been employed in the employment within the six months preceding the date of the reference".

⁵⁴ House of Lords, 8th February 2001. The judgement may be read at www.publications.parliament.uk/pa/ld200001/ldjudgmt/jd010208/presto-1.htm.

⁵⁵ This was also the consideration which was put forward by (Ryan 2001) in footnote 84. According to the Author "it is arguable that the fact that time limits in other areas of labour law are longer than six months (six years in the case of breach of contract claims to a county court), or can be extended by a tribunal, means that sec. 2(4) fails the test of equivalence".

⁵⁶ On the different problem regarding the retroactive effect of the claims submitted in *Preston*, see *infra*, §. 2.3.

completed cause of action. It is in my view also relevant to have regard to the lower costs involved in the claim before an Employment Tribunal and if proceedings finish there the shorter time-scale involved. The period of six months itself is not an unreasonably short period for a claim to be referred to an Employment Tribunal. The informality of the proceedings is also a relevant factor. I am not satisfied that in these cases it can be said that the rules of procedure for a claim under section 2(4) are less favourable than those applying to a claim in contract. I therefore hold that section 2(4) does not breach the principle of equivalence⁵⁷. The only admitted withdrawal of national procedural autonomy in front of the principle of effectiveness of Community law was carried out in application of the "practically impossible" test, and it was represented by the particular solution offered by the House of Lords with regard to employment relationships resulting from a succession of fixed-term or temporary contracts. In such cases, strict application of the six-month time limit would have required a number of separate actions to be brought at the end of each period of service. This, according to the Court of Justice's judgement, could not pass the "excessively difficult or practically impossible test": "in the case of successive short-term contracts [...] setting the starting point of the limitation period at the end of each contract renders the exercise of the right conferred by article 119 of the Treaty excessively difficult"⁵⁸. This very reasonable argument was accepted by the Lords, who stated that in the case of "a succession of short-term contracts concluded at regular intervals in respect of the same employment"⁵⁹ the limitation period runs from the end of the last contract forming part of that relationship.

The very instructive story of *Preston*, from UK to Luxembourg and back, tells us how an interpretation of the equivalence principle entirely left to national courts may very closely resemble full recognition of national procedural autonomy.

There is no doubt, indeed, that the recovery of national procedural autonomy has been the guiding star of post-*Emmott* jurisprudence in the field of time limits. Moreover, it seems quite clear that the restriction of *Emmott* to its own facts is to be seen as a sort of *a-posteriori* validation constructed by the Court in support of its politically (or financially) driven choice to leave *Emmott* aside. Anyway, if it is true that the uniqueness of *Emmott* is represented by the Court as definitively and explicitly linked to the peculiarity of the events giving rise to it, it is also true that this would

⁵⁷ Para 30-31.

⁵⁸ *Preston*, para. 68.

⁵⁹ Something that, by the way, may raise a number of interpretative problems.

not have been such a refined legal argument. Therefore much more subtle and interesting, from a systematic point of view, are the other ways followed by the Court of Justice in order to draw a distinction between *Emmot* and the subsequent case law adopted in the field of time limits.

Recalling the threefold partition of time-related questions announced at the beginning of §. 2, it is now possible to say that the distinction between time limits to bring action (§. 2.1) and temporary restriction on back payments (§. 2.3) - however artful it may seem - was precisely the legal construction elaborated by the Court of Justice in order to justify the validity of its jurisprudential *révirement* as regards identification of the date on which the limitation periods begin to run (§. 2.2). This is what the final part of this section will be about.

2.3 Time limits on the retroactivity of the claim

The third time-related question arising in the effective enforcement of EC labour law deals with the retroactive effects of judicial claims brought in order to obtain a Community-derived right. This third question presupposes that the first two procedural limitations have been somehow overcome: i.e. that the judicial action has been brought within the national limitation periods, whenever they are considered to run from, and that a proceeding has therefore commenced.

Just as happens when disputing about the starting date of a limitation period, so what is usually involved when talking about the retroactivity of a claim is a financial benefit; quite frequently a social security one. In these kinds of cases, retroactivity questions occur when the judicial action is brought by the employee long after the right came into existence - for instance, once the employment relationship has terminated - and when national provisions exist such as those providing that "no person shall be entitled [...] to any benefit in respect of any period more than twelve months before the date on which the claim is made"⁶⁰; or those providing that "benefits for incapacity for work are payable not earlier than one year before either the date on which they are claimed"⁶¹.

Now - just to stick to the latter proviso - what if the circumstances brought into the proceeding date back more than twelve months and at that time they were already covered by a directly effective EC provision?

⁶⁰ The norm of the British Social Security Act 1975 disputed in the *Johnson* case, see note n. 20.

⁶¹ The norm of the *Dutch Algemene Arbeidsongeschiktheidswet* (General Law on Incapacity for Work) disputed in *Steenhorst-Neerings*, note n. 19.

In *Steenhorst-Neerings*⁶² - often described as the beginning of the removal of *Emmott* - a female employee was claiming a social security benefit based on the 1979 equal treatment in social security directive. Mrs. Steenhorst-Neerings claimed her rights before the national court in May 1988. The Court recognised that the direct effect of that directive had to be backdated to December 1984, i.e. the deadline assigned to Member states for transposition of the directive in question. Nonetheless, Dutch procedural law prescribed that the applicant could obtain the benefit only as from twelve months before the action was brought, i.e. May 1987. The question addressed to the European court was therefore whether a situation in which a directly effective EC rule was left deprived of any effect whatsoever for a whole two and a half years (from December 1984 to May 1987) was acceptable for Community law.

In cases like this, it should be noted, what is disputed is not a time limit similar to that affecting Mrs. Emmott's claim. Unlike *Emmott*, the employee was not entirely barred from bringing an action; she was rather prevented from obtaining the full amount of benefits she could have received had the directive been transposed in due time. Is this a good reason to allow Member states to maintain national time limits depriving (for a certain period) Community law of any effectiveness?

According to the Court of Justice's post-*Emmott* jurisprudence, the answer to the question above is a definite yes. Once it had distinguished between procedural rules affecting the right to rely on Directives against a defaulting Member State, and procedural rules merely limiting the retroactive effect of claims made for the purpose of obtaining the relevant benefits⁶³, the Court had no difficulty in disallowing the former and accepting the latter. Nor is the application of national retroactive limits to claims aimed at obtaining either arrears of benefit or restitution of charges excluded by the principle of equivalence. As explicitly stated by the Court in *EDIS*⁶⁴, the principle of equivalence does not oblige a member state to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law⁶⁵.

⁶² See note n. 19. For a comment see (Sohrab 1994).

⁶³ *Steenhorst-Neerings*, para. 21. Similar wording is used in *Johnson*, para. 30 ("the national rule does not constitute a bar to proceedings; it merely limits the period prior to the bringing of the claim in respect of which arrears of benefit are payable").

⁶⁴ See note n. 35.

⁶⁵ In *EDIS* the Court was asked whether Community law permitted actions for the reimbursement of charges paid in breach of a Community law to be subject to a time limit of three years, a period which differed from the limitation period (10 years) which Italian law laid down for actions for the recovery of sums paid between individuals when they were not due.

In a perspective aimed at verifying the effective enforcement of EC labour law, the solution adopted by the Court is far from satisfactory; to the extent that accepting time limitations on the retroactivity of the claim could produce effects vastly similar to those deriving from the application of time limits for bringing the claim.

By conceptually distinguishing between two kinds of time limit whose application often determined the same result of leaving employees dispossessed of their Community rights, indeed, the Court of Justice undoubtedly sacrificed the requirements of effectiveness on the altar of legal certainty and, most of all, of financial compatibility⁶⁶; as had already happened in the celebrated *Barber* case⁶⁷. It is the very same wording used by the Court that confirms this kind of interpretation: a national rule restricting the retroactive effect of claims for benefits "serves the requirements of sound administration, in particular as regards the need to preserve financial equilibrium in a scheme in which claims submitted by insured persons in the course of a year must in principle be covered by the contributions collected during that same year"⁶⁸ Even a rapid review of the case law which developed after *Emmott*, on the other hand, proves that almost all the *grands arrêts* of the Court of Justice in the field of time limits are the result of preliminary references raised from countries such as Ireland, the United Kingdom, the Netherlands and Italy; that is to say, the countries where the application of *Emmott* would probably have determined the largest financial problems: either for the financial equilibrium of the social security schemes as far as the first three countries are concerned⁶⁹, or for the tax administration in the latter case⁷⁰.

Leaving aside the quite anomalous *Deutsche Telekom* case,⁷¹ the line of reasoning inaugurated with *Steenhorst-Neerings* - explicitly and

⁶⁶ As regards *Steenhorst-Neerings*, for instance, (Sohrab 1994) at 884 openly observes that "the ECJ allowed financial considerations to counterbalance - and defeat - the full remedy for past discrimination".

⁶⁷ In *Barber*, the limitations on the retroactive effect of the judgement was clearly not due to a national procedural rule, but rather to a sort of brand new "Community time limit". The effect, however - and, most of all, the financial motivation of the judgement - was quite similar to the one subtending the post-*Emmott* case law.

⁶⁸ *Steenhorst-Neerings*, para. 23.

⁶⁹ The disputes were social security related in the UK cases *Johnson*, see note n. 20; *Levez*, see note n. 35; *Preston*, see note n. 41; in the Irish case *Magorrian*, see note n. 22; in the Dutch case *Steenhorst-Neerings*, see note n. 19.

⁷⁰ The disputes were tax related in the Italian cases *Ansaldo* and *EDIS* see note n. 35; *Aprile* and *Spac*, see note n. 51; and in case C-343/96, *Dilexport v Amministrazione delle finanze dello Stato*, [1999] ECR I-399.

⁷¹ In a burst of Europeanism probably unparalleled in any other Member state, the German legislation excludes whatsoever limitations on the retroactivity of claims brought for the

effusively confirmed in *Fantask*⁷² - could still be deemed to be the guiding star of the most recent ECJ jurisprudence, notwithstanding some judgements apparently contradicting it.

In *Magorrian*⁷³, for instance, the occupational scheme applicable to mental health nurses awarded more favourable pensions to employees having a minimum scheme membership of twenty years of full-time work. This proviso - clearly and undisputedly sex discriminatory⁷⁴ - had to be coupled with the Irish procedural rules concerning access to membership of occupational pension schemes⁷⁵, stating that the right to be admitted to a scheme is to have effect from a date no earlier than two years before the institution of proceedings. In the two years prior to the bringing of the claim, Mrs. Magorrian worked on a part-time contract, so it was doubted whether her access to the most favourable pension scheme could be excluded, either partially or totally.

Having again evoked the seminal distinction between national rules limiting the period in respect of which backdated benefits could be obtained, and national rules thoroughly preventing access to a benefit, the Court considered the Irish time limit as falling within the latter

application of Community legislation on equal treatment. This applies even with regard to cases - such as those related to part-time discrimination in pension schemes - which may be more problematic as far as the retroactivity of the claim is concerned. The situation was so sensationally compliant with the full effectiveness of Community law that a German court wondered whether this was not too much. In particular, the Landesarbeitsgericht of Hamburg asked the European Court whether the prohibition of retroactivity contained in the "Barber Protocol" could prevail over the German constitution which specifically precludes a prohibition of retroactivity of equality claims. The apprehensions of the Landesarbeitsgericht had, of course, a financial ground. Specifically, the German court asked the Court whether the unlimited retroactivity permitted pursuant to the German Grundgesetz constituted a breach of Community law from the standpoint of disproportionate discrimination against nationals, such as the German pension funds affected by the claims. The answer of the Court of Justice - accustomed to dealing with diametrically opposed cases, concerning the compatibility of a national limitation of retroactivity rather than an unlimited retroactivity - was that the limitation in time of the possibility of relying on the direct effect of Article 119 TCE, resulting from the judgment in *Defrenne II*, was to be intended only as a minimum requirement. Where national rules do not pose specific problems on the retroactivity of claims, in other terms, Community law imposes that retroactivity should go back, *at least*, to 8th April 1986 (the date of *Defrenne II*). It follows that Community law does not preclude national provisions by virtue of which part-time workers are entitled to retroactive membership in occupational pension schemes even beyond that date. (case C-50/96, *Deutsche Telekom AG v Schröder* [2000] ECR I-743).

⁷² See note n. 23.

⁷³ See note n. 22.

⁷⁴ The clear-cut jurisprudence on the matter dates back to Case 43/75, *Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

⁷⁵ Regulation 12 of the Occupational Pension Schemes (Equal Access to Membership) Regulations 1976 n. 238.

typology, even if this was not the only possible understanding of the case⁷⁶.

Anyway, even though the national time limit was set aside in *Magorrian*, this is not to be seen as a return to *Emmott*, since the "great divide" emerging from *Steenhorst-Neerings* and *Fantask* - inadmissibility of time limits excluding access to a Community right/admissibility of time limits reducing the amount of the benefits to be given or of the charges to be refunded - was still fully applied in the case.

Also in the other case in which a national time limit was set aside - *Levez*⁷⁷ - the result was not dictated by a Court's will to return to *Emmott*. On the contrary, the Court made all possible efforts in order to exclude any "return-to-*Emmott*" appraisal of its judgement. In the case of Mrs. Levez, once more, an equal pay claim was at issue, and again one whose full achievement was endangered by the notorious section 2(5) of the British Equal Pay Act 1970, according to which "no arrears of remuneration may be awarded in respect of a period more than two years prior to the date of commencement of proceedings". The Court's statement that "Community law precludes the application of a rule of national law which limits an employee's entitlement to arrears of remuneration for breach of the principle of equal pay to a period of two years prior to the date on which the proceedings were instituted", does not mean that the Court resuscitated *Emmott*. On the contrary, the Court openly affirmed that the two-year limit on back payments "is not in itself open to criticism"⁷⁸, to the extent that it does not prevent access, but just limits the amount of the equal pay claim. How could it then be that the Court found the same national time limit inapplicable to the claim brought by Mrs. Levez? The fact is that Mrs. Levez's claim had been delayed as a result of deception by her employer having falsely declared to her the amount of salary paid to her male predecessor. It was therefore the misconduct of the employer and not the time limit in itself which was reprobated by the European Court, thus leaving wholly untouched the validity of the by now well-established "great divide" carved in cases such as *Steenhorst-Neerings* and *Fantask*.

⁷⁶ In a very careful analysis of the ECJ remedies jurisprudence in the field of equality, (Kilpatrick 2001) strongly contests the interpretation given by the Court. According to the author, the Irish rule of procedure was to be classified precisely among those limiting the *amount* of a benefit, and not *access* to it. "Some doubts" on the accuracy of the understanding of the national rule in question are also cast by (Coppel 1998) at 259.

⁷⁷ See note n. 35.

⁷⁸ *Levez*, para 20.

And it is precisely such a “great divide” that was again applied by the Court in one of the most awaited judgements of the last few years: *Preston*.

The answer given by the Court in *Levez* had led some commentators to foresee - with some degree of good reason - that “The respondents in *Preston* will be encouraged by the ECJ’s ruling in relation to the principle of effectiveness that, absent deceit by the employer, there is nothing unlawful about a two year limitation period”⁷⁹.

Rather surprisingly, however, the Court’s judgement in *Preston* found precisely that there was indeed something wrong in a limitation period excluding any payment in respect of a time earlier than two years before the date on which the proceedings were instituted⁸⁰. Something which patently concerned the great number of UK part-timers that had long been excluded from occupational pension schemes⁸¹. Following *Preston*, more than sixty thousand employees involved in the case obtained calculation of their part-time employment in their pensionable service as of 8th April 1986⁸², provided they are ready to pay the contributions relating to the period of membership concerned⁸³.

The conceptual foundation of the solution adopted by the Court in *Preston* should be clear from what has repeatedly been said above: the “great divide” was again invoked by the Luxembourg judges assuming that “the object here was to claim retroactive membership of the scheme rather than retroactive arrears of benefit under the scheme”⁸⁴. According to the Court, the two-year limit in question “would *deprive* the persons concerned of the additional benefits under the scheme to which they were entitled to be affiliated”⁸⁵. Whether this was really the case, as a matter

⁷⁹ Coppel J., *The Decision of the ECJ in Levez v Jennings (Harlow Pools) Ltd*, November 2000, www.11kbw.com/Articles/Employment%20Law/jco_levieczj.htm

⁸⁰ This is the same sec. 2(5) of the Equal Pay Act already disputed in *Levez*. More precisely, the rule disputed in *Preston* was regulation 12(1) of the Occupational Pension Schemes (Equal Access to Membership) Regulations 1976, according to which the two-year limit was also to be applied to actions to secure equal treatment regarding entitlement to membership of an occupational pension scheme.

⁸¹ In fact, until the Occupational Pension Schemes (Equal Access to Membership) (Amendment) Regulations 1995 prohibited, as from 31 May 1995, all direct or indirect discrimination on grounds of sex regarding membership of any occupational pension scheme.

⁸² The date of *Defrenne II*, see note n. 74, by which the direct effect of art. 119 was clearly stated.

⁸³ Something which, according to (Busby 2001) at 497 will probably diminish the practical impact of *Preston*: “Given the passage of time relevant to some of the claims it is, thus, unlikely that many of the women involved will have access to the necessary funds”.

⁸⁴ (Kilpatrick 2001) at 28 of the manuscript.

⁸⁵ *Preston*, para. 40. Emphasis added.

of fact, is not at all certain, since it does not seem that difficult to argue that the application of the national rule would have just *limited*, not excluded, membership to the occupational scheme⁸⁶. The more is true, that in the same *Preston* judgement the Court recognised - in a somewhat inexplicable paragraph contradicting what had been written some lines before - that "the procedural rule at issue does not totally deprive the claimants of access to membership"⁸⁷.

Be it as it may, it is not the concrete outcomes of the ECJ jurisprudence that are interesting to note here, but rather the strengthening of the conceptual tools progressively elaborated by the European court as regards the problem of time limits. By elaborating the "great divide" theory, the Court has somehow rationalised the way of looking at the different effects of different time limits in the judicial enforcement of Community law. Those procedural limits supposed to prevent any possibility of exercising a Community right are promptly set aside in application of the general "practical impossibility" test⁸⁸. On the contrary, those supposed to limit merely the "measure" of the right are still considered as invulnerable bastions of legal certainty.

It is thus in the above-described terms that the juridical conceptualisation leading Court of Justice case law in the field of time-limits is to be represented. And it is a construction that - in the search for a balance between national procedural autonomy and effectiveness of Community law - could not but be accepted as reasonable⁸⁹. The material classification of the different time limits in one or other of the two conceptual categories just mentioned is, however, another matter. Here the Court of Justice has perhaps demonstrated less lucidity, letting its choices be guided by contingent evaluations leading it "into a set of *ad hoc*, and often factually tenuous distinctions which disposed of the cases before it without providing any satisfying, long term coherence".⁹⁰

3. Burden of proof

Matters related to the allocation of burden of proof in employment disputes have always been considered as a cornerstone of effective judicial protection, being one of those fields of law where procedures come very close to the substance itself of the rights conferred.

⁸⁶ (Kilpatrick 2001).

⁸⁷ *Preston*, para. 43.

⁸⁸ See *supra*, § 1.2.

⁸⁹ From another perspective, the ECJ's "great divide" is not at all considered as reasonable by (Sohrab 1994) at 882, who asks "why should partial enjoyment of a right be seen as a lesser denial of a person's rights under a Directive?".

⁹⁰ (Kilpatrick 2001) at 29 of the manuscript.

The sensitivity of the different Member states' procedural traditions towards the crucial role of burden of proof as a way of strengthening the effectiveness of substantive labour law rules has undoubtedly not been homogeneous. Certainly no Member state, for instance, could match the extremely careful attention devoted to these issues by the Swedish legal order since 1937. At that time, the Swedish Labour Court established a quite advanced rule to be applied to disputes concerning right of association. According to this rule, the burden of proof is divided in such a way that the employee has to contend that a violation of the right of association has occurred, following which the employer has to prove that a particular reason existed for his action quite apart from the question of the right of association⁹¹. As can be seen, something very close to the rules prescribed in the Burden of Proof Directive.

On the opposite extreme, other countries have not demonstrated an analogous sensitivity toward the issues in question. As concerns France – a country where litigation on equality issues is traditionally scarce – a recent Community Report has underlined that “the burden of proof in discrimination cases poses considerable obstacles. The courts do not seem to be willing to follow the Community case law in this respect”⁹².

The reference to discrimination cases as a battlefield where the affirmation of an “effective” version of burden of proof is ascertained is by no means fortuitous or unintended. In fact, in a similar - and probably still more marked - way to what happened with the questions scrutinised in §. 2, the issues related to the role of evidential rules in the effective judicial enforcement of EC labour law have been primarily submitted to the attention of the European Court with specific reference to one particular substantive area of EC labour law: i.e. equal treatment between men and women.

After a decade of jurisprudential intervention on the matter (§. 3.1), the “equal treatment” origin of the Community principles on burden of proof encountered a coherent legislative achievement through the 1997 Burden of Proof Directive. This “positivisation” of the Community evidential rules constitutes a peculiarity in respect of the time limit issues: whereas the latter - as has already been said above - are almost entirely left to jurisprudential interpretation, the former did in the end find a legislative source of regulation in what is probably the first and only piece of Community legislation entirely devoted to regulation of the

⁹¹ See (Schmidt 1977) at 73.

⁹² See the Report *Monitoring, implementation and application of Community Equality Law*, by the Legal Experts' Group on Equal Treatment of Men and Women, European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs, Unit V/D.5, 1999.

procedural aspects of judicial enforcement of employment right (§. 3.1). More recently, other references to the burden of proof regulation are to be found in the two "equality" Directives: the so-called "Article 13 TCE Directive" implementing the principle of equal treatment between persons irrespective of racial or ethnic origin⁹³, and the other Directive, more specifically related to employment, establishing a general framework for equal treatment in employment and occupation.⁹⁴ Both of the Directives - coming into force in 2003 - provide for specific burden of proof provisions, having the peculiarity of one being a photocopy of the other.⁹⁵

This being said about the equal treatment characterisation of all the Community legislation concerning burden of proof, it should also be added that, since the early 1990s, Community rules on burden of proof in employment matters "emancipated" themselves from their equal treatment origin, trying to give rise to a (potentially) more general application of the effectiveness principle, as will be outlined in §. 3.2.

3.1 Evidential rules built from equal treatment directives

The first time the Court of Justice had to deal with a national evidential rule, it had to "condemn" a quite "tough" Irish rule giving a State certificate the value of conclusive and insuperable proof. It was absolutely clear to the Court that such a rule could not be considered as compatible with an even minimal understanding of effective judicial protection. And indeed this is precisely what the Court stated: "The principle of effective judicial control [...] does not allow a certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment [...] are satisfied to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts"⁹⁶

Following this first statement, the principle of effective judicial protection has been invoked by the Court several other times, in cases in which the violation of the effective enforcement of Community equality law was not so blatant as in *Johnston*. This second - and very well-known - strain of judgements may be condensed in the triptych of judgements

⁹³ Directive 2000/43/EC of 29 June 2000

⁹⁴ Directive 2000/78/EC of 27 November 2000

⁹⁵ Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment (Article 8 of 2000/43/EC and Article 10 of the 2000/78/EC Directives).

⁹⁶ *Johnston*, see note n. 8, para 21.

usually referred to when talking of burden of proof in the Community legal order: *Danfoss*, *Dekker* and *Enderby*⁹⁷. In the first case, the essential correlation between evidential rules and the effectiveness of Community law was drawn from an interpretation of the Equal Pay Directive; in the second case, from an interpretation of the Equal Treatment Directive; in the third, from an interpretation of Article 119 (now Article 141) of the Treaty.

In both *Danfoss* and *Enderby*, what was affirmed by the European Court was the need to shift the burden of proof from the employee to the employer when discussing alleged wage discriminations. In the first case, however, shifting the burden of proof was not affirmed as a general unconditional principle to be applied in *any* equal pay case. Rather, the Court related the application of the rule to the specificity of the pay system adopted in the particular undertaking concerned. It was stated, indeed, that it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes that the average pay for women is less than that for men. However, this applies only in so far as "an undertaking applies a system of pay which is totally lacking in transparency".⁹⁸

Definitely more capable of general application - beyond the peculiarities of the case concerned - was the statement put forward in *Enderby*. In this case, the Court paid special attention in not limiting the need to shift the burden of proof only to the specific circumstances of the dispute⁹⁹. It is true that in *Enderby* too the "normal" principle - according to which *onus probandi incumbit ei qui dicit* - is clearly reaffirmed as the general rule to be applied to discrimination cases¹⁰⁰. However, the principle of effective judicial protection did allow - or, better, required - the Court to state that the *onus probandi* has to shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. For this situation to occur, it suffices, according to the European Court, that two elements arise from the analysis of the case: a) an indirect discrimination alleged through b) statistical *prima facie* evidence. "Where significant statistics disclose an appreciable difference in pay

⁹⁷ Case 109/88, *Handels-og Kontorfunktionaerernes Forbunf I Danmark v Dansk Arbejdsgiverforening for Danfoss* [1989] ECR 3199; case 177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen Plus* [1990] ECR I-3941; case 127-92, *Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535.

⁹⁸ *Danfoss*, para. 13.

⁹⁹ As the lack of transparency was in *Danfoss*.

¹⁰⁰ "In principle, the burden of proving the existence of sex discrimination as to pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to removing the discrimination", para 13.

between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex¹⁰¹. A plain application of the "impossible in practice" component of the effectiveness principle guided the pronouncement of the Court on that occasion: "Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory"¹⁰².

Still connected to evidential rules, and yet related to a slightly different profile was the case submitted in *Dekker*¹⁰³. In that case, the issue at stake was whether it was contrary to the 1976 Equal Treatment Directive that a claim based on it could succeed only on condition that the employee also proved his employer's fault. It is quite a recurrent phenomenon, in fact, for national systems to provide for procedural exemptions according to which the employer's liability for discriminatory treatment is subject to proof of a fault attributable to him (at least this was the case as far as the Dutch legislation in *Dekker* was concerned). The position of the Court towards these procedural exemptions was clear-cut¹⁰⁴. Furthermore, its judgement is to be considered as eminently significant in a more general perspective, since it was not that common - in a context still pervaded by the procedural autonomy doctrine - for a national procedural rule to be clearly considered as incompatible¹⁰⁵ with the effective enforcement of EC law.

As has already been said above, the regulation of burden of proof in sex discrimination cases is the only procedural issue whose regulation has been positivized through a piece of Community legislation. In fact, Directive 97/80/EC takes its place along the path indicated by the Court of Justice's jurisprudence. In the Consideranda of the Directive, the tribute paid to the Court's authority is explicit¹⁰⁶ and its legislative

¹⁰¹ *Enderby*, para. 19.

¹⁰² *Enderby*, para. 18.

¹⁰³ See note n. 97.

¹⁰⁴ "When the sanction chosen by the Member State is contained within the rules governing an employer's civil liability, any breach of the prohibition of discrimination must, in itself, be sufficient to make the employer liable", *Dekker*, para. 25.

¹⁰⁵ Clearly, the term "incompatible" is technically wrong, but it is used here in order to stress the unequivocal firmness of the principle affirmed by the ECJ.

¹⁰⁶ "The Court of Justice has held that the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought" (n. 18).

content follows the same line. When persons who consider themselves wronged "establish facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment".¹⁰⁷

Undoubtedly, it would not be possible to assert that the Burden of Proof Directive matches up to all the expectations many had placed on it.¹⁰⁸ Furthermore, its scope is framed in such a way as to exclude the possibility for it to "cross" the boundaries of equal treatment within which the legislative provisions are confined. In fact, Article 3 explicitly states that the Directive shall apply (only) "to the situations covered by Article 119 of the Treaty and by Directives 75/117/EEC, 76/207/EEC and, insofar as discrimination based on sex is concerned, 92/85/EEC and 96/34/EC".

Unlike what one could presume them to be with regard to the jurisprudential principles proclaimed in cases such as *Von Colson*, *Johnston*, *Steenhorst-Neerings*, *Fantask*, *Magorrian*, *Preston*, the Directive's provisions do not seem open to an extensive interpretation which could allow them to be applied to other areas of Community labour law as well. Whereas those principles do answer to requirements which are common to enforcement of the whole of Community social legislation, the legislative provisions of the Burden of Proof Directive - meagre as they are - are to be considered as confined to the field of equal treatment.

3.2 Evidential rules built from the 91/533/EEC Directive

Certainly less debated than the 'equal treatment' applications of the burden of proof issues, but probably more meaningful, at least as to their potentially wide-ranging extension, are other European developments in the field of burden of proof in employment-related matters.

These developments - quite recent if compared to those analysed in the preceding section - date back to a piece of Community social legislation which was considered as not particularly relevant at the moment of its adoption, and which was later revalued by jurisprudential developments. The Directive in question is 91/533/EEC on employers'

¹⁰⁷ Article 4.1 Burden of Proof Directive.

¹⁰⁸ Almost four years after its adoption, an opportunity to prove or to disprove the scepticism surrounding the real impact of the Directive was missed due to a lack of time. Called upon to decide on a burden of proof question in a sex discrimination case, the Court of Justice did not even mention the Directive in its judgement (case 381/99, *Brunnhöfer v Bank der österreichischen Postsparkasse AG*, 26th June 2001, not yet reported in the ECR). This was due to the fact that the 1997 Directive could not be considered applicable to the events submitted in the case, dating back to the period 1994-97.

obligation to inform employees of the conditions applicable to the contract or employment relationship¹⁰⁹; the ECJ judgements referred to here are those delivered in the *Kampelmann* and *Lange*¹¹⁰ cases, both arising from preliminary rulings referred by German courts.

By obliging employers to provide employees with written information of the conditions applicable to their contract of employment¹¹¹, Article 2 of the 1991 Directive raises the question of the probative value to be given to the information provided by the employer "not later than two months after the commencement of employment" (Article 3.1).

In the *Kampelmann* case two German employees had applied for promotion to a higher grade but their applications were refused on the ground that the previous written assessment of their category had been incorrect and that their work corresponded to a lower category that did not qualify them for higher grading.

The question posed by the Hamm Landesarbeitsgericht was whether the 1991 Community Directive implied a reversal of the burden of proof, requiring the employer to prove that his previous written notification of grading was incorrect. In particular, the question was framed as follows: "is it the purpose of Article 2 of the Directive to modify the burden of proof in the employee's favour, in that the list of minimum requirements in Article 2(2) is intended to ensure that the employee does not

¹⁰⁹ "Cinderella Directive" was the label coined by (Clark and Hall 1992). (Kenner 1999) at 205 talks of a Directive that was "obscure and unheralded at the time of its adoption".

¹¹⁰ Cases C-253/96, C-254/96, C-255/96, C-256/96, C-257/96 and C-258/96, *Kampelmann and Others v Landschaftsverband Westfalen-Lippe, Stadtwerke Witten GmbH v Schade, Haseley v Stadtwerke Altena GmbH* [1997] ECR I-6907; case C-350/99, *Lange v. Georg Schünemann GmbH* [2001] ECR I-1061.

¹¹¹ The information given by the employer shall cover, at least:

"a) the identities of the parties; b) the place of work; where there is no fixed or main place of work, the principle that the employee is employed at various places and the registered place of business or, where appropriate, the domicile of the employer; c) (i) the title, grade, nature or category of the work for which the employee is employed; or (ii) a brief specification or description of the work; d) the date of commencement of the contract or employment relationship; e) in the case of a temporary contract or employment relationship, the expected duration thereof; f) the amount of paid leave to which the employee is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave; g) the length of the periods of notice to be observed by the employer and the employee should their contract or employment relationship be terminated or, where this cannot be indicated when the information is given, the method for determining such periods of notice; h) the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled; i) the length of the employee's normal working day or week; j) where appropriate (i) the collective agreements governing the employee's conditions of work, or (ii) in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of the competent body or joint institution within which the agreements were concluded."

encounter difficulties of proof regarding the listed points when enforcing his contractual rights in employment law disputes?"

Far from being a technical question related to a marginal piece of Community legislation, the question submitted to the European Court was a very momentous and potentially far-reaching one. Just to give a few examples, the right of a night worker to the free health assessment provided by Article 9.1.a of the Working Time Directive could be enforced more easily, to the extent that he will not be obliged to prove that he is a night-worker when the written statement so certifies. Still in the field of working time, an employee could profit from the probative value of the written statement if he chose to enforce his right not to modify his working hours unilaterally: in this case, he could indeed prove more easily that the agreed working time was different from the time claimed by his employer. In general terms, employees will always have the possibility of easier judicial enforcement of their rights to the extent that they can prove more easily the terms and conditions applicable to their employment relationship.

Before dealing with the answer given by the Court in *Kampelmann*, it is worth noting that the burden of proof questions being scrutinised in this section differ conceptually from those treated in the previous one. In the "equal treatment" line of judgements, ECJ intervention was aimed at providing employees with adequate procedural means to give full effectiveness to substantive rights conferred by the same directives the Court was called to interpret. On the contrary, what was considered in *Kampelmann*, was the need to provide employees with adequate procedural means to give full effectiveness to a broader body of substantive rights, not restricted to one particular field of employment legislation. In fact, an interpretation of the written statement imposed by the Directive in terms of a document of proof against the employer could help to enforce substantive rights that are not conferred by EC law but are of national origin. As regards the field of employment law not covered by Community legislation, for instance, an employee would not need to prove that he or she is entitled to a certain remuneration to the extent that the initial basic amount and the other component elements of pay is one of the elements to be notified according to the 91/533 directive. Alternatively, still more significant, it would not be necessary for an employee to prove that his or her employment relationship is covered by the collective agreement referred to in the employer's written statement.

This is why the preliminary question submitted in *Kampelmann* could have represented a decisive step in the effective judicial enforcement of substantive employment rights, putting forward a sort of "general EC

procedural right" aimed at improving the enforcement of employees' rights, whatever the source of those rights.

The answers given by the Court in *Kampelmann* and more recently in *Lange* are not without implications as far as the above issues are concerned, and they would probably have deserved a greater doctrinal echo than they actually had¹¹². As a matter of fact, these were the only occasions on which the Court has dealt with burden of proof issues in regard to employment matters not exclusively connected to equal treatment.

Although the Court was well aware of the fact that the 1991 Directive was "without prejudice to national law and practice concerning proof,"¹¹³ this did not prevent it from asserting tenets assuming a certain significance in the perspective of effective judicial protection of substantive employment rights. In fact, assuming - as the Court did - that the information contained in the written statement enjoyed a "presumption of correctness"¹¹⁴ is just a different - smoother - way to recognise that the written statement *does* actually affect national rules concerning burden of proof.

It is true that a careful application of the equivalence principle pushed the European Court to make it clear that the written statement considered by the Directive should (only) enjoy the same presumption of correctness that "any similar document drawn up by the employer and communicated to the employee" would have in domestic law.¹¹⁵ In this perspective, for instance, a similar or "equivalent" presumption of correctness was already recognised within the Dutch legal order¹¹⁶ and, only as far as pay was concerned, within the French system. In this sense, it could be said that the *Kampelmann* interpretation of the Directive is not that sensational, since it restricts itself to recognising the "Directive" written statement as having the same probative value that existing "national" written statements already had.

Nevertheless, it should not be forgotten that, before the Directive was adopted, not all Member state legislation posed an employer's *obligation* to provide employees with such a document. In addition, even where a

¹¹² See (Kenner 1999) and (Rivara 1999)

¹¹³ Article 6 Directive 91/533/EEC and *Kampelmann*, para 30

¹¹⁴ *Kampelmann*, see note n. 110, para. 33.

¹¹⁵ *Kampelmann*, para. 33.

¹¹⁶ According to Article 184 of the Dutch code of civil procedure, a declaration by one party in a written document must be held to be true, unless the contrary is proven. This implies that the worker can rely on this information insofar as the employer cannot prove it to be wrong.

similar obligation existed,¹¹⁷ probably no national legislation at all obliged employers to provide such a *detailed* statement¹¹⁸.

As has been recognised by commentators¹¹⁹, the *Kampelmann* judgement is therefore to be seen as an important step towards effective judicial protection. With all the caution imposed by the explicit obstacle of Article 6,¹²⁰ the Court could not help realising that a strict interpretation of that proviso would have deprived the Community intent to “provide employees with improved protection against possible infringements of their rights and to create greater transparency on the labour market” of any effectiveness.¹²¹ Consequently, it declared that the “objective [of the directive] would not be achieved if the employee were unable in any way to use the information contained in the notification referred to in Article 2(1) as evidence before the national courts”.¹²² The obstacle of Article 6 was then circumvented by retaining that “the Directive does not itself lay down any rules of evidence”¹²³, but at the same by requiring the national courts to “apply and interpret their national rules on the burden of proof in the light of the purpose of the Directive”.¹²⁴

What has been illustrated so far is certainly not sufficient to affirm that the effect of the 1991 Directive was to reverse the burden of proof in the employee’s favour with regard to the contractual terms contained in the employer’s written statement¹²⁵. Nevertheless, it is just as certain that with the judgements delivered in *Kampelmann* and *Lange*¹²⁶ the Court of Justice placed “a heavy burden of rebuttal on the employer seeking to disprove his own statement”.¹²⁷ Using wording very close to plain recognition of a reversal of the burden of proof, the Court stated that “The employer must be allowed to bring any evidence to the contrary, by showing that the information in the notification is either

¹¹⁷ For instance, in the UK, since the 1963 Contract of Employment Act..

¹¹⁸ See note n. 111.

¹¹⁹ (Kenner 1999) and, with more emphasis, (Rivara 1999).

¹²⁰ “This Directive shall be without prejudice to national law and practice concerning:

- the form of the contract or employment relationship,
- proof as regards the existence and content of a contract or employment relationship,
- the relevant procedural rules”.

¹²¹ Considerandum n. 2 Directive 91/533/EEC.

¹²² *Kampelmann*, para. 32.

¹²³ *Kampelmann*, para. 34.

¹²⁴ *Kampelmann*, para. 33.

¹²⁵ As was the case in the original Commission proposal - explicitly talking of a proof of employment Directive. See the complete reconstruction of the decision-making process leading to the 1991 Directive in (Kenner 1999).

¹²⁶ All the references and quotations are taken from the *Kampelmann* case. In *Lange*, they were entirely confirmed.

¹²⁷ (Kenner 1999) at 228.

inherently incorrect or has been shown to be so in fact"¹²⁸. If the employer is to be allowed to bring any evidence to the contrary, one could add, it is implicitly affirmed that the written notification does have probative value, even though it would not be technically correct to talk of a full reversal of the burden of proof in the employee's favour.

4. Ex officio application of Community law

The last issue that will be taken into consideration in this review of the "effective judicial protection" cases that have come before the European Court of Justice is the ex officio application of EC law; i.e. the possibility, or the duty, for a national court to examine of its own motion whether national legislation complies with Community law, had not the individual relied upon it¹²⁹.

4.1 The power of national courts to apply Community law of their own motion and their duty to do so

The first time the ex officio issue was raised in front of the Court of Justice was in *Verholen*¹³⁰. In that case, a Dutch court asked the ECJ whether "Community law precludes the national courts from reviewing (of their own motion) a national legal provision in the light of an EEC directive, if an individual (possibly through ignorance) has not relied on the directive". The answer of the Court of Justice was that "Community law does not preclude a national court from examining of its own motion whether national rules are in conformity with the precise and unconditional provisions of a directive, the period for whose implementation has elapsed, where the individual has not relied on that directive before the national court"¹³¹. The answer was certainly not surprising: as no national procedural limitation hindered the ex officio application of Community law, the European Court could not but reiterate that the full effectiveness of Community law does certainly not prevent national judges from applying EC rules of their own motion.

¹²⁸ *Kampelmann*, para. 34.

¹²⁹ It has been held – that such an obligation – to the extent that it exists – could not be limited to directly effective provisions, but should rather be understood in such a way as to oblige national courts to provide a interpretation of national law of their own motion consistent with Community law (Prechal 1998).

¹³⁰ Joined cases C-87/90, C-88/90 and C-89/90, *Verholen and others v Sociale Verzekeringsbank Amsterdam* [1991] ECR I-3757.

¹³¹ *Verholen*, para. 16.

Things were not that simple and straightforward in two following judgements¹³², where the effectiveness problem was brought about by the fact that there did exist national procedural rules hindering ex officio application of Community law.

In *van Schijndel*, the questions raised by the Hoge Raad were manifold and extremely significant in their substantive content, since the dispute concerned compulsory membership in occupational pension schemes, which some years later was to be the object of the celebrated *Albany* case¹³³. However, as far as effective judicial protection is directly concerned, the issue in question in *van Schijndel* can be summed up in two points.

First - in a very similar way to what was asked in *Verholen* - the national judge asked whether a domestic court has the duty to apply EC provisions where the party to the proceedings with an interest in application of those provisions has not relied upon them. The only difference between the two preliminary rulings was therefore that in *Verholen* the Court was asked whether Community law *precludes* national courts from applying EC law of their own motion; whereas in *van Schijndel* it was asked whether Community law *obliges* national courts to do so.

The answer to the second question was that Community law obliges national judges to apply EC rules of their own motion, but only to the extent that with a similar obligation exists in domestic law. The issue was therefore resolved through a plain application of the general principle of equivalence. When national courts *have the power* to raise of their own motion points of law which have not been raised by the parties, the same discretion exists as far as the ex officio application of Community law is concerned. Where, on the contrary, by virtue of domestic law, courts or tribunals *must* raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists as far as binding Community rules are concerned.

In other terms, what *Verholen* and *van Schijndel* stated is that both the possible and the obligatory nature of ex officio application of Community law, subsist to the extent that they are provided for by national law. As for the concrete modalities whereby ex officio application of Community law may be carried out, the Court made it

¹³² Joined case C-430/93 and C-431/93, *van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705; case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] I-4599. The two somewhat conflicting judgements were given on the same day, 14th December 1995.

¹³³ Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

clear that it may occur either through an application of direct effect or through the adoption of a Community-law-consistent interpretation of national legislation¹³⁴.

As for this first facet of the ex officio question, *van Schijndel* differs from *Verholen* in that it brings in - albeit in a somewhat incidental way - the concept of "binding Community rules". The duty for national judges to apply of their own motion Community law - provided such an obligation exists under national law - subsists only as far as the binding rules are concerned¹³⁵.

On the interpretation of what is to be considered as an EC binding rule, however, the debate is open. It has always been difficult, within the national legal system, to identify which rules may be considered as an expression of public policy or *d'ordre public*. It is still more difficult to do so in a legal system such as that of the Community, where the concept of public policy may be harder to grasp.

Recently, however, the notion of a Community rule of public policy seems to have been implied in a judgement where the duty of national courts to apply Community law of their own motion was affirmed without making it depend on any similar domestic rule. In *Océano Grupo Editorial*,¹³⁶ the Court boldly affirmed that the effectiveness of Community consumer protection legislation requires national courts to determine of their own motion whether a term of a contract is unfair with regard to Directive 93/13/EC. Unlike *van Schijndel*, the Court of Justice did not submit the obligation of national courts to raise of their own motion points of law based on binding Community rules on condition that such an obligation also existed for binding domestic rules. On the contrary, it disregarded any consideration of equivalence in favour of a strong affirmation of the need to secure the full effectiveness of Community rules evidently considered as "binding": "Effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion"¹³⁷.

¹³⁴ As the Court recently stated in *Fazenda Pública* (case C-446/98, *Fazenda Pública v Câmara Municipal do Porto*, 14th December 2000, not yet reported), "The power to raise of its own motion a question of Community law presupposes that the national court considers either that Community law must be applied and, if necessary, national law disapplied or that national law must be interpreted in a way that conforms with Community law" (para. 48).

¹³⁵ *van Schijndel*, para. 13.

¹³⁶ Joined cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v Roció Murciano* [2000] ECR I-4941.

¹³⁷ *Océano Grupo Editorial*, para. 26. On this judgement, and on the problems it is supposed to determine to the traditional approach of common law where "it is for the parties to advance the legal authorities on which they base their claims as well as the facts which give rise to their dispute", see (Whittaker 2001).

In *Eco Swiss*¹³⁸, the Court was still more explicit in qualifying a Treaty proviso (Article 85) as a rule of public policy. According to the Opinion of the Advocate General Saggio, national courts should regard the Community rules on competition as matters of “public policy” to the extent that the interests those rules tend to satisfy extends beyond private parties to other undertakings, potential competitors and consumers¹³⁹. It follows that, as a public policy rule, the application of Article 85 may justify the judicial annulment of an arbitration award even in those legal systems whose national rules of procedure allow an award to be annulled only on the grounds that it is contrary to public policy¹⁴⁰. As the Advocate General suggested and the Court then agreed, the need to supervise arbitration awards to ensure that they are compatible with Community law is particularly felt in an area such as competition, where there is a general interest in observance of the rules to ensure the smooth functioning of the common market¹⁴¹.

Océano Grupo Editorial and *Eco Swiss* are two of those cases where the uncertain notion of a binding Community rule as an expression of Community public policy laboriously begins to emerge. Yet one cannot but agree with those commentators who note that sooner or later the Community legislator and/or the Court of Justice “will have to decide which provisions of Community law are *d’ordre public*”.¹⁴² It does not seem not odd to argue that in this demanding task they can now find a concrete reference in the EU Charter of fundamental rights, “since the public policy character is often linked to the fundamental nature of the provision at issue”.¹⁴³

4.2 Procedural rules hindering the ex officio application of Community law by national courts

If the first issue which arose in *van Schijndel* may be considered as the physiology - or the normal functioning - of the ex officio application of Community law, the second issue relates to its pathology, that is to say, those situations in which national procedural rules prevent national

¹³⁸ Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] I-3055.

¹³⁹ *Eco Swiss*, Opinion of the Advocate General, para. 34-39.

¹⁴⁰ *Eco Swiss*, para.41.

¹⁴¹ *Eco Swiss*, Opinion of the Advocate General, para. 35, who then continued: “When the problem arises within national legal orders of balancing potentially conflicting requirements, such as the requirement to observe national procedural rules, on the one hand, and the functioning of a competitive market, on the other, the prime importance accorded to the competition rules in the Community legal order must always be taken into account in seeking that balance” (para 38).

¹⁴² (Prechal 1998) at 705.

¹⁴³ (Prechal 1998) at 705.

judges from complying with their duty to apply on their own motion a point of Community law not required by the parties.

In the first two phases of the dispute taking place in the lower courts, Mr. Van Schijndel's claim to be exempted from compulsory membership of an occupational pension scheme had not been grounded on the compatibility of such a compulsory membership with Community competition law. When the case finally arrived before the *Hoge Raad*,¹⁴⁴ Mr. Van Schijndel's barristers realised that Community law could be of some help in supporting the application of their client. Accordingly, they founded their Cassation plea on the contention that the Court of Appeal should have considered of its own motion the question of the compatibility of compulsory membership with Articles 85 and 86 and 90 of the Treaty.¹⁴⁵ Too late?

The Hoge Raad judges found that the applicants were actually bringing into the proceedings "new" facts and circumstances, not previously raised before the lower courts; something that is not allowed by Dutch procedural law. Moreover - and leaving the "new facts and circumstances" issue aside - they doubted whether the lower court should have considered the Community point of law of its own motion, since Dutch procedural law is governed by the principle of judicial passivity, requiring courts not to go beyond the ambit of the dispute as defined by the parties themselves.

In short, what was discussed in *van Schijndel* was a conflict between the principles of effective judicial protection (under its guise of ex officio application of Community law), and national procedural autonomy (under the guise of the obligation for the courts to limit themselves to the ambit of the dispute as defined by the parties).

The conflict was resolved by the European Court through application of the "practically impossible-excessively difficult" test. Inaugurating a series of ad hoc assessments about the reasonableness of various national procedural rules hindering the effectiveness of Community law, the Court stated that in order to ascertain whether or not national procedural law renders the application of Community law impossible or excessively difficult, reference must be made "to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper

¹⁴⁴ The Dutch Court of Cassation.

¹⁴⁵ At present, Articles 81, 82 and 86.

conduct of procedure, must, where appropriate, be taken into consideration".¹⁴⁶

The application of this kind of balanced consideration led the Court of Justice to assert that the national court's obligation to base its decision only on the facts put before it by the parties is justified to the extent that such a principle "reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas".¹⁴⁷ It follows, according to the European Court, that the passive role assigned to judges in resolving national disputes concerned with the application of Community law does not jeopardise the effectiveness of Community law; or, rather, that this kind of risk should be accepted in the name of national procedural autonomy.

Anyway, as always happens when a case-by-case approach is adopted, things are not predictable. They are so unpredictable, in fact, that a different conclusion on a similar case was given by the Court on the very same day *van Schijndel* was decided.

In *Peterbroeck*,¹⁴⁸ the impossibility for a national court to raise points of Community law of its own motion had again been submitted to the attention of the European Court. In a very similar way to *van Schijndel*, that impossibility was due to a "new plea" kind of obstacle. The only difference was that in *van Schijndel* the national procedural rule obstructing a new plea was constituted by the fact that Netherlands law excludes pleas in Cassation requiring a new examination of the facts. Whereas in *Peterbroeck* the national procedural rule obstructing a new plea was constituted by the fact that Belgian law prevents applicants from raising in the trial points of law not included in the complaint document as initially lodged or subsequently (within sixty days) modified.

Although the procedural causes preventing a new plea were different, the substantive effect was identical: that of preventing national courts from raising of their own motion a point of Community law not raised by

¹⁴⁶ *van Schijndel*, para. 19. With regard to the slightly different question concerning the identification of the less favourable procedural rule, a very similar ad hoc approach was adopted in *Levez*, note 35, where the Court stated that whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts" (para. 44). The same reply was given by the Court in *Preston*, note 41, para. 61. This kind of approach, modulated on a case-by-case basis, is defined by (Prechal 1998) as a "procedural rule of reason test".

¹⁴⁷ *van Schijndel*, para. 21.

¹⁴⁸ See note n. 132.

the parties. Notwithstanding the evident analogies, the two "twin" judgements had opposite conclusions¹⁴⁹: whereas in *van Schijndel* the Dutch procedural limitation was considered as compatible with the effectiveness of Community law, in *Peterbroeck* the Belgian procedural limitation was set aside¹⁵⁰.

The apparent contradiction was explained by referring to a factor - present in *Peterbroeck* and absent in *van Schijndel* - that the Court considered as decisive. According to the Luxembourg judges, the maintenance of the Belgian procedural limitation would have prevented the national judiciary from any possibility of raising Article 177 (now 234) preliminary reference¹⁵¹. The ECJ noted that the referring Brussels Cour d'Appel was the first court which could have made a reference, since in the Belgian system the first complaints of taxpayers are made to a fiscal authority which is not a court within the meaning of Article 177. Moreover, the ECJ considered that the same Cour d'Appel could also have been the last court having the possibility to refer a preliminary question, since no other national court in subsequent proceedings would have been able to consider the question of its own motion. This is why the Court deemed that in this case it was necessary to set aside the national procedural limitation preventing the Cour d'Appel from raising of its own motion the point of Community law and, therefore, raising a preliminary procedure before the Court of Justice.

According to some commentators, the preliminary reference argument was not an adequate justification for differentiating between the conflicting solutions given by the Court in *van Schijndel* and *Peterbroeck*. In fact, if the preclusion from referring preliminary rulings was the reason that induced the Court to set aside the national procedural rule which excluded an ex officio application of Community law, exactly the same could have been said in *van Schijndel*, where, on the contrary, a similar kind of national limitation was maintained.

In addition, another justification of the different solutions given in the two cases cannot be considered acceptable. With a view to strengthening

¹⁴⁹ The problematic coupling of *van Schijndel* and *Peterbroeck* as regards the uniform application of EC law is stigmatised by (De Búrca 1997).

¹⁵⁰ The Court stated that Community law precludes application of a domestic procedural rule whose effect is to prevent the national court from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period (*Peterbroeck*, para. 21).

¹⁵¹ Obviously, what was alluded to was the possibility of referring a "substantive" preliminary ruling, aimed at verifying the compatibility of national tax law - and not merely of national procedural rules - with Community law. The Belgian Cour d'Appel, actually, did raise the preliminary reference the ECJ was answering.

further the argument concerning the impossibility to refer, the Court of Justice underlined that the first national authority dealing with the *Peterbroeck* case - a Regional Director of the Belgian tax office - was not a tribunal for the purposes of Article 177. Yet another reason for giving the Cour d'Appel the opportunity to make a reference, according to the Court of Justice¹⁵².

This argument, already challenged by critical commentators,¹⁵³ was however discharged by the same Court of Justice in a later case.

In the already mentioned *Eco Swiss* case,¹⁵⁴ a situation very similar to that of *Peterbroeck* had come about. The first "court" dealing with the *Eco Swiss* case was an arbitration tribunal, and therefore - according to consolidated jurisprudence¹⁵⁵ - not in a position to make any preliminary ruling. The second court was indeed an "Article 177 court", but its faculty to raise a preliminary ruling was prevented by the elapse of the three-month time limit provided for claiming the judicial annulment of the award given by the arbitrators. The result of the two circumstances was that - precisely as had occurred in *Peterbroeck* - the possibility of raising a preliminary ruling was totally lost for that dispute.

The question submitted in *Eco Swiss* was therefore whether Community law required the rules of national procedural law to be set aside if this was necessary in order to judicially review an arbitration award supposed to conflict with (public policy rules of¹⁵⁶) Community law.

The answer given by the Court of Justice in *Eco Swiss* openly contradicted the one given in the similar *Peterbroeck* case. Whereas in

¹⁵² According to (Hoskins 1996) at 375, the different result reached in the two cases may be explained by the fact that the lower court in *van Schijndel* had the power to raise a Community point of its motion but did not exercise it, whereas in *Peterbroeck* the lower "court" did not have any such power at all. This opinion seems to disregard the fact that in *van Schijndel* the lower court too was "presumably equally as bound by its passive role" and could not therefore raise any point of Community law (De Búrca 1997) at 44. Anyway, it was not the impossibility of raising of its own a Community point *as such* that drove the Court to set the national limitation aside in *Peterbroeck*. Rather, it was the consequent impossibility of raising a preliminary procedure; in this regard, the facts of the two cases were quite similar. *Contra*, (Van Gerven 2000b) at 532 considers that "in *van Schijndel* the domestic law provision in issue was not depriving Article 234 (ex 177) of its substance, whereas in *Peterbroeck* the domestic law provision, as it was understood by the Court, did have that effect".

¹⁵³ "Why should the issue of whether or not the lower court had power to refer be relevant to the issue of whether the parties ought to have raised the point of EC law, or to the issue of whether the Court on appeal should subsequently be entitled to raise the point of EC law of its own motion? (De Búrca 1997) at 44.

¹⁵⁴ See note n. 138.

¹⁵⁵ Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond* [1982] ECR 1095.

¹⁵⁶ For an illustration of the *Eco Swiss* case, see § 4.1

the latter case the Court had deemed that the non-judicial nature of the first "court" determined the impossibility of referring when the second court was also prevented from doing so by a national procedural limitation, in the former case its judgement was opposite. According to *Eco Swiss*, domestic procedural rules which restrict the possibility of applying for annulment of an arbitration award are fully justified by the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of the *res judicata*¹⁵⁷, no matter whether maintaining the national procedural limitation makes it totally impossible to raise a preliminary ruling for the dispute concerned.

Leaving aside the merits of the single questions, a more general evaluation of effective judicial protection jurisprudence cannot be omitted at the end of this chapter. Just as was the case with the issues regarding time limits (§. 2), with regard to ex officio application of Community law it is difficult to avoid noting a lack of uniformity in the judicial developments relating to effectiveness. Whereas the lack of *external* uniformity *among* national procedures and remedies is an understandable result of a Community policy which has never been keen on procedural harmonisation, or at least always aware of its difficulties¹⁵⁸, the lack of *internal* uniformity *within* the Court of Justice jurisprudence seems on the contrary much less comprehensible or justifiable.

It is not only national procedural limitations as such that may render the exercise of Community rights "excessively difficult". An ever-changing understanding of their compatibility with Community law may also render effective judicial protection less than easy.

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¹⁵⁷ *Eco Swiss*, see note n. 138, para. 46.

¹⁵⁸ Probably not utilizable in this connection is the new Article 65 of the Treaty, providing that measures in the field of judicial cooperation shall include, among others, the elimination of "obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States". See (van Gerven 2000b) at 523.

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