

BREACH OF EU LAW AS A BASIS FOR RELIEF IN JUDICIAL REVIEW PROCEEDINGS

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This note considers the situations in which EU law can be invoked in judicial review proceedings, and the impact that general principles of EU law can have on judicial review procedure. It also raises the question of when and whether a court should make an Article 267 reference to the CJEU, and considers the circumstances in which liability for Francovich damages may arise.

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INCORPORATION OF EU LAW IN ENGLISH LAW

EU law has been an integral part of the law of the UK since 1973, when the UK acceded to the then European Economic Community (EEC).

The European Communities Act 1972 as amended (ECA 1972) governs the status of EU law in the UK legal order. Section 2(1) of the ECA 1972 provides that:

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

Section 2(2) provides for secondary legislation (such as orders, rules or regulations) to be adopted to implement any EU obligations of the UK, which includes the implementation of directives, even if the effect is to repeal Acts of Parliament (that is, primary legislation). Section 2(4) provides for future legislation to be interpreted in the light of section 2 of the ECA 1972. The domestic courts have relied on this provision to accommodate the EU law principles of supremacy (whereby, in the event of conflict between a provision of EU law and a provision of domestic law, EU law takes precedence, see *A v Chief Constable of West Yorkshire* [2004] UKHL 21 [2004] ICR 806, at paragraph 9) and direct effect (whereby individuals may, in certain circumstances, rely directly on a provision of EU law as giving rise to rights which are enforceable before domestic courts, see *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, (659A-C)), and to curtail the constitutional doctrine of implied repeal (whereby consistently with the doctrine of sovereignty of Parliament, later legislation inconsistent with preceding legislation is deemed to repeal it to the extent of the inconsistency, see *Thoburn v Sunderland City Council* [2002] EWHC 195

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(Admin)). Section 3 provides for questions of EU law to be determined in accordance with decisions of the CJEU. In other words, it gives judgments of the CJEU the force of precedent.

In a series of cases, the English courts have recognised the status accorded to EU law by the ECA 1972. In *R (Factortame) v Secretary of State for Transport (No 2)* [1991] 1 AC 603, 658, Lord Bridge famously said that:

“If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty ... it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.”

The precise legal basis for the supremacy of EU law in the UK remains controversial. In *Thoburn* (the Metric Martyrs case), Laws LJ expressed the view that such supremacy derived ultimately from UK rather than EU constitutional law by reference to four propositions:

“(1) All the specific rights and obligations which EU law creates are by the [ECA 1972] incorporated into our domestic law and rank supreme: that is, anything in our substantive law inconsistent with any of these rights and obligations is abrogated or must be modified to avoid the inconsistency. This is true even where the inconsistent municipal provision is contained in primary legislation.

(2) The [ECA 1972] is a constitutional statute: that is, it cannot be impliedly repealed.

(3) The truth of (2) is derived, not from EU law, but purely from the law of England: the common law recognises a category of constitutional statutes.

(4) The fundamental legal basis of the United Kingdom’s relationship with the EU rests with the domestic, not the European, legal powers” (Paragraph 69.)

A recent judgment *R (HS2 Action Alliance Ltd and others) v Secretary of State for Transport and another* [2014] UKSC 3, has added to the complexities of the relationship between EU and UK law. In *HS2* the issue was whether the “hybrid bill” procedure used to make the decision over HS2 met the requirements of the Environmental Impact Assessment Directive (2011/92/EU). The CJEU had interpreted the Directive as imposing a number of requirements, including that national courts be able to verify that the requirements of the Directive had been satisfied, taking account of the entire legislative process, including the preparatory documents and the parliamentary debates. The Supreme Court held that this interpretation impinged upon constitutional principles governing the relationship between Parliament and the courts, as reflected for example in Article 9 of the Bill of Rights 1689, and authorities concerned with judicial scrutiny of Parliamentary procedure, such as *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & F 710 and other cases concerned with judicial scrutiny of decisions as to whether to introduce a bill in Parliament. The Supreme Court suggested that the concept of supremacy of EU law is limited and may not extend to a situation of conflict between a domestic constitutional principle (such as Article 9 of the Bill of Rights) and EU law (at paragraphs 79 and 206-208). Such a conflict will fall to be resolved by the UK courts, and cannot be remedied simply by reading EU law down in to UK law. The *HS2* judgment suggests that there may be a hierarchy of constitutional statutes, as it should not be assumed that Parliament, in passing one constitutional statute, the ECA 1972, intended to abrogate another constitutional statute, the 1689 Bill of Rights.

Substance of EU Law

EU law comprises:

- The treaties establishing the EU (currently, the [Treaty on European Union](http://www.practicallaw.com/9-201-2935) (www.practicallaw.com/9-201-2935) (TEU) and the [Treaty on the Functioning of the European Union](http://www.practicallaw.com/2-107-6192) (www.practicallaw.com/2-107-6192) (TFEU)).

- Legislative Acts of the EU institutions made under the treaties (namely, regulations, directives and decisions).
- Unwritten general principles recognised by the Court of Justice of the EU (CJEU).

EU law is subject to interpretation by the Union Courts, which comprise:

- The CJEU.
- The General Court (formerly known as the Court of First Instance).
- Specialised courts (of which there is currently one, the Civil Service Tribunal).

The *Charter of Fundamental Rights of the European Union* (www.practicallaw.com/6-503-0145) (OJ 2010 C 83/389 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>)) (the Charter) is a recent important addition to the body of EU law, which has an equivalent status to a treaty (Article 6(1), TEU). Since the entry into force of the *Lisbon Treaty* (www.practicallaw.com/1-500-8458) in December 2010, the EU courts have frequently referred to the Charter, both as a source of fundamental rights protection and as an aid in the interpretation of EU legislation (see, for example, *DR and TV2 Danmark A/S v NCB Nordisk Copyright Bureau* [2012] (Case C-510/10), at paragraph 57).

There has been some confusion as to whether the Charter applies to the UK. The Charter was given legally binding status by the Lisbon Treaty in December 2009. When negotiating the Lisbon Treaty, the UK government negotiated and signed Protocol 30. Protocol 30 was widely assumed to be an “opt-out” from the Charter. However, *R (AB) v Secretary of State for the Home Department* [2013] EWHC 3453 (Admin) confirmed that following the CJEU judgment in *NS v Secretary of State for the Home Department* (Case C-411/10) the Charter was directly enforceable in UK courts and did extend to UK law. At present the Charter is directly effective in the UK courts, and has supremacy over any UK law that is inconsistent with EU law. The Charter can be used to both interpret and enforce EU law in UK courts but does not apply to all areas of UK law, only to those areas which fall within scope of EU law. In 2014 a report by the House of Commons European Scrutiny Committee called for the government to introduce primary legislation to disapply the Charter in the UK. Such legislation is unlikely given that it would bring the UK into conflict with EU law, but the UK may seek to implement a higher threshold in establishing whether an issue falls into the ambit of EU law or not.

Those Charter rights that correspond to rights already guaranteed by the European Convention on Human Rights (ECHR) will be given the same meaning and scope as (and no lesser degree of protection than) under the ECHR. Thus, the CJEU has held that where Charter rights mirror ECHR rights, the CJEU should follow any clear and constant jurisprudence of the European Court of Human Rights (*J McB v LE* [2010] (Case C-400/10 PPU), at paragraph 53).

There has however been controversy as to exactly when Charter rights will correspond with Convention rights. In *R (Chester) v Secretary of State for Justice; McGeoch v The Lord President of the Council and others* [2013] UKSC 63, the appellants sought to argue that EU law conferred a directly effective right to vote in European Parliamentary elections (and in McGeoch’s case, Scottish municipal elections). This right existed by virtue of Articles 39, 40 and 52 of the Charter, which corresponded to the right to vote under the Convention, and thus (the appellants submitted) Strasbourg jurisprudence applied. The appellants also relied on Article 20(2)(b) of TFEU. The Supreme Court rejected this argument, finding that Scottish Parliamentary elections were not “municipal elections” for which a right to vote under European Union law may be acquired under the Treaties and that there was an absence of any indication in CJEU case law of the intention to import Strasbourg jurisprudence into the right contained in Article 20 of TFEU. The court found at paragraph 58 that, “There is no sign that the European Commission ever sought to involve itself in or take issue with voting eligibility in Member States or specifically with the restrictions on prisoner voting which apply in a number of such States.” (This judgment must now be read in the light of the subsequent CJEU judgment in *Delvigne* (Case C0650/13), which held that EU law is applicable when restrictions are placed upon the ability of individuals to vote in European Parliament elections.)

WHEN CAN EU LAW ISSUES ARISE IN JUDICIAL REVIEW PROCEEDINGS?

Broadly speaking, EU law may be invoked in three situations in *judicial review* (www.practicallaw.com/4-107-6313) (JR) proceedings:

- Where domestic law or a decision of a public authority is said to be incompatible with EU law.
- Where EU law is relevant to the interpretation of domestic (primary or secondary) law.
- Where domestic law or a decision of a public authority is said to be founded on unlawful EU secondary legislation.

Each of these situations will be outlined in turn, although the first and second overlap to a large extent: it will often be argued by a claimant that a domestic provision is capable of being interpreted consistently with a provision of the treaty or secondary legislation or, if not, must be disapplied to the extent of such inconsistency.

Challenging the validity of domestic law or the lawfulness of public decision-making

EU law may be relied on by a claimant who considers that a decision of a public authority is unlawful because it conflicts with EU law or has been adopted on the basis of domestic legislation which itself is incompatible with EU law. A good example is the litigation in *R (Factortame) v Secretary of State for Transport (No 2)* (Case C-221/89) [1991] ECR I-3905, which concerned (among other things) a challenge by fishermen to provisions of the Merchant Shipping Act 1998 on the basis that they conflicted with Article 52 of the EEC Treaty (now Article 49 of TFEU), which guarantees freedom of establishment within the EU. In *R (Countryside Alliance) v Attorney General* [2007] UKHL 52 the Hunting Act was challenged on the grounds that it interfered with freedom of imports (now Article 34 of TFEU). Another good recent example is *R (Sinclair Collis and another) v Secretary of State for Health* [2011] EWCA Civ 437, which concerned a challenge to the domestic ban on the use of cigarette vending machines, commonly seen in pubs and bars. As the Supreme Court pointed out in *R (Lumsdon and others) v The Legal Services Board* [2015] UKSC 41, at paragraph 37, such challenges often invoke the principle of proportionality, for example whether a member state can justify an interference with one of the internal market free movement rights accorded by the TFEU. In *Lumsdon* the court discussed in detail the principles of proportionality under EU law at paragraphs 50 to 74 and 108. For a national measure to justifiably derogate from fundamental freedom guaranteed by EU law it must:

- Be applied in a non-discriminatory manner.
- Be justified by imperative requirements in the general interest.
- Be suitable for securing the attainment of the objective which they pursue.
- Not go beyond what is necessary in order to attain it.

Such challenges to domestic law and the lawfulness of public decision-making are common in the Administrative Court. Indeed, challenges may be brought which do not seek a traditional JR remedy, such as the quashing of a decision, but rather simply seek a declaration that domestic legislation is incompatible with EU law (see *R v Secretary of State for Employment, ex parte EOC* [1995] 1 AC 1). Such a declaration would, for instance, serve to clarify the legal position and prevent a public authority from acting inconsistently with it in future.

Furthermore, in certain circumstances, the courts have the power to grant interim relief suspending the operation of domestic legislation pending the outcome of a JR challenge to its validity (*R (Factortame) v Secretary of State for Transport (No 1)* (Case C-213/89) [1990] ECR I-2433). In *R v HM Treasury, ex parte British Telecommunications* [1994] 1 CLMR 621, the Court of Appeal explained that while the prima facie strength of the claimant's case and the undesirability of disturbing enacted law were factors for the court to take into account, their importance would depend on the facts of the case.

A claim may also be based on the positive assertion of a right derived from EU law, provided that such a right is sufficiently clear and precise to be relied on in a domestic court (*Van Duyn (Case 41/74) [1974] ECR 1337, at paragraph 6*). In the particular case of an EU directive that has not been implemented into UK domestic law, clear and precise terms of the directive can be relied on as a source of rights against the organs of the UK state (*Becker (Case 8/81) [1982] ECR 53, at paragraph 25 and Gassmayr (Case C-194/08), at paragraph 44*).

The interpretation of domestic law

EU law may be relied on by a party who considers that a public authority has misinterpreted domestic law falling within the scope of EU law in reaching a decision. It is clear as a matter of EU law that courts have a duty to interpret national law in accordance with relevant EU law so far as possible, whether or not the provision of EU law at issue has direct effect (that is, confers rights on individuals which they can enforce in their domestic courts) and whether or not the national law preceded the relevant provision of EU law. This is the *Marleasing* principle (see *Marleasing SA v La Comercial Internacional de Alimentacion SA (Case C-106/89) [1990] ECR I-4135*; and see also *Von Colson and Kamann v Land Nordrhein-Westfalen (Case 14/83) [1984] ECR 1891*).

However, in *Assange v The Swedish Prosecution Authority [2012] UKSC 22*, the Supreme Court held that the *Marleasing* interpretative duty does not extend to Framework Decisions adopted under Title VI of the TEU (crime and policing measures), as that Title was not covered by section 2(1) of the ECA 1972, according to the definition of "Treaties" in section 1. (The Framework Decision considered in this case was [Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States \(2002/584/JHA\)](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:HTML) (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:HTML>).

Challenging the validity of underlying EU secondary legislation

EU law may be invoked in JR proceedings where the claimant seeks to challenge a decision or secondary legislation which is based on a provision of EU secondary legislation which itself is unlawful as a matter of EU law. This will involve challenging either domestic implementing legislation (where it is said that a directive is invalid) or a decision based on the EU legislation in question. It is clear that domestic secondary legislation which is based on an unlawful EU measure is *ultra vires* (section 2(2), ECA 1972).

Examples include the challenges to Directive 2002/46/EC on the approximation of the laws of the member states relating to food supplements (Food Supplements Directive) (see *Alliance For Natural Health v Secretary of State for Health (Case 154/04 R) [2005] ECR I-6451*) and Directive 2003/33/EC on the approximation of the laws, regulations and administrative provisions of the member states relating to the advertising and sponsorship of tobacco products (Tobacco Advertising Directive) (see *R v Secretary of State for Health, ex parte Imperial Tobacco [2002] QB 161*). In the Imperial Tobacco case, the Administrative Court made a reference to the CJEU on the question of the validity of the Tobacco Advertising Directive despite the fact that no implementing legislation had at that stage even been adopted (*R v Secretary of State for Health, ex parte Imperial Tobacco [1998] EWHC 1139 (Admin)*).

The CJEU has, however, imposed limits on the extent to which such challenges may be brought and on the powers of domestic courts in such cases.

First, it has held that it is not permissible to challenge the validity of an EU act indirectly in a domestic court where the party making the challenge would have had standing to challenge the Act directly before the General Court in an action for annulment under Article 263 of TFEU (see *TWD Textilwerke Deggendorf (Case C-188/92) [1994] ECR I-833*; *Eurotunnel v SeaFrance (Case C-408/95) [1997] ECR I-6315*). In other words, a party cannot circumvent its own failure to bring a direct action within the strict time limits laid down by the TFEU.

Second, domestic courts are not permitted themselves to declare EU Acts to be unlawful. That is the exclusive preserve of the CJEU. If a national court entertains serious doubts as to the validity of such Acts, it must make a preliminary reference to the CJEU under Article 267 of TFEU. This is known as the *Foto-Frost* doctrine (see *Foto-Frost v Hauptzollamt Emmerich (Case 314/85) [1987] ECR 4199* and *International Air Transport Association (Case C-344/04) [2006] ECR I-403*). National courts are, however, permitted to declare EU Acts to be valid (*Foto-Frost*).

Third, domestic courts may only grant interim relief suspending the operation of an EU measure pending the outcome of the proceedings provided certain conditions are met:

- The court must entertain serious doubts as to the validity of the EU measure.
- There must be urgency. That is, there must be a risk of the applicant suffering grave and irreparable harm if the relief is not given.

The court must also take into account the EU interest, notably, the harm to the regime instituted by the EU measure in question if interim relief were to be granted (see *Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt fuer Ernährung und Forstwirtschaft (Acts of the institutions)* (Case C-465/93) [1995] ECR I-3761).

The Administrative Court has only rarely granted such interim relief. An example is *R (ABNA) v Food Standards Agency and Secretary of State for Health* [2004] Eu LR 88, in which the court granted interim relief to suspend the operation of domestic legislation which implemented a directive requiring manufacturers of compound feeds to indicate the percentage of constituent ingredients by weight.

APPLICATION OF EU LAW TO DOMESTIC JUDICIAL REVIEW PROCEDURE

In general, procedural rules relating to claims based on EU law are matters for the law of each *member state* (www.practicallaw.com/1-107-6833) to determine. This is, however, subject to important general principles of EU law, notably the principles of equivalence and effectiveness. According to those principles, national procedural rules must not:

- Impose conditions governing actions based on EU law less favourable than those governing similar actions of a domestic nature (principle of equivalence).
- Render excessively difficult or practically impossible the vindication of rights under EU law (principle of effectiveness).

Other general principles of EU law may also have an impact on national procedural rules, in particular, the principles of non-discrimination on grounds of nationality, proportionality, legal certainty and legitimate expectation. For instance, a national rule requiring a non-national to give security for costs in circumstances where a national would not be under such a requirement would be directly discriminatory on nationality grounds and hence unlawful (see *Hubbard v Hamburger* (Case C-20/90) [1993] ECR I-3777).

Delay in judicial review procedure

The issue of delay in JR procedure, in particular, is potentially affected by general principles of EU law.

The well-known and long-standing rule is that JR claims must be brought “promptly and in any event within three months” (CPR 54.5 (<http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54>)). The court does, however, have the power to extend the time limit if there is a good reason to do so and provided that the granting of the relief sought would not be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or be detrimental to good administration (CPR 3.2(1)(a) (<http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03>) and section 31(6), SCA 1981).

At least in a commercial context, the domestic courts have frequently adopted a stringent approach to issues of delay, on the basis that claimants should act very quickly where the effect of their claim could jeopardise commercial transactions entered into in reliance on the validity of the challenged act of the public authorities. This approach has also been applied in the context of challenges based on EU law. For example, in *R (Cukurova) v HM Treasury* [2008] EWHC 2567 (Admin), time was held to run from the date of entry into force of domestic regulations adopted in 2003, without regard to the question of whether the claimant knew or ought to have known of that fact or whether it would have had any standing to bring public law proceedings at that time.

Such cases must now be considered by reference to the CJEU's judgment in *Uniplex (UK) Ltd v NHS Business Services Authority (Case C-406/08)*. The *Uniplex* case concerned an analogous provision to CPR 54.5 contained in the (then applicable) Public Contracts Regulations 2006 (*SI 2006/5*). The provision governed the period within which economic operators may make challenges to certain public procurement decisions. The CJEU held that the time limits were insufficiently certain and therefore contrary to the principle of legal certainty, which is part of the broader principle of effectiveness.

The CJEU found that:

- The principle of effectiveness required that time should not run until the claimant knew or ought to have known of the grounds on which he relies.
- The alternative requirement that a claim should be brought promptly was incompatible with the principle of legal certainty.

The High Court has confirmed that the effect of *Uniplex* is not narrowly confined to the application of time limits in the procurement context, but applies generally to any time limits imposed on those seeking to enforce their rights arising under an EU directive in an English court (see *R (Buglife) v Medway Council [2011] EWHC 746 (Admin)*, at paragraph 63 and *R (U & Partners (East Anglia) Ltd) v Broads Authority [2011] EWHC 1824 (Admin)*, at paragraph 44).

In *R (Berky) v Newport City Council and others [2012] EWCA Civ 378*, *Uniplex* was considered again, in the context of its application to planning cases. The interpretation of *Uniplex* varied however between the judges. Carnwath LJ was of the view that *Uniplex* probably did apply to planning cases but considered the position sufficiently uncertain that he would have made a reference had the case turned on delay; if *Uniplex* applied it would not have affected the promptness requirement in respect of the domestic law grounds in the case only the EIA ground. In contrast Sir Richard Buxton said that assuming *Uniplex* applies to planning then it disapplies the time limits in respect of all the grounds domestic and European so long as one of the grounds raised was an EU point and not "plainly unarguable". At present the position appears to be that where claims raise principles of EU law, *Uniplex* would seem to apply. For those cases which do not, *Uniplex* does not apply, and the promptness requirement remains.

It might be added that the same criticisms could apparently be made of the Scottish law concepts of "mora, taciturnity and acquiescence" and the equitable doctrine of laches applied to public law proceedings in the Isle of Man (among other jurisdictions). It appears to follow from the reasoning in *Uniplex* that such inherently vague concepts are insufficiently certain to satisfy the EU principle of legal certainty.

ARTICLE 267 REFERENCES TO THE CJEU

Article 267 of TFEU provides a mechanism for any court or tribunal to make a preliminary reference to the CJEU to the extent that the court or tribunal considers that a decision on the question of EU law raised is "necessary to enable it to give judgment". For most courts and tribunals, this is merely a power at their disposal, but courts "against whose decisions there is no judicial remedy" are required to make such references unless it is considered that the matter is *acte clair*, that is, the correct application of EU law is so obvious that the CJEU's interpretative assistance is not needed (see *CILFIT (Case 283/81) [1982] ECR 3415*; see also the recent discussion by the Supreme Court in *X v Mid-Sussex Citizens Advice Bureau and another [2012] UKSC 59*).

The question whether a court should make a reference has been raised in numerous cases. In the leading case of *R v International Stock Exchange, ex p Else (1982) Ltd [1993] 1 QB 534, 545*, Sir Thomas Bingham said:

"I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar

field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer.”

In practice no clear pattern has emerged of the circumstances in which a reference will be made. In this regard, the Opinion of Advocate General (AG) Jacobs in *Wiener v Hauptzollamt Emmerich (Case C-338/95) [1997] ECR I-6495* has been relied on as a counterbalance to the approach approved in *Else*. There, AG Jacobs opined that a reference was most appropriate “where the question is one of general importance and where the ruling is likely to promote the uniform application of the law throughout the European Union” (*paragraph 20*). Where the question turns on a very narrow point set in a specific factual context, a reference is unlikely to be appropriate.

Other factors which the courts have taken into account include:

- The difficulty of the point.
- The court best placed to decide the point.
- The importance of the point both for the dispute at hand and generally.
- The length of time which is likely to elapse before a ruling will be obtained.
- The desirability of not overloading the CJEU.
- Whether the same or similar question is pending before the CJEU already.
- The wishes of the parties.

Examples of references include *Ofcom v Information Commissioner [2010] UKSC 3* (reference to the balancing of different protective public interest reasons in the context of access to environmental information) and *FA (Iraq) v Secretary of State for the Home Department [2011] UKSC 22* (reference as to the effect of EU principle of equivalence in relation to asylum appeals).

A further question is when a reference should be made. Should the Administrative Court do so or leave it to the Court of Appeal (or Supreme Court)? Some of the other factors that courts consider are relevant to this issue (see above). The Administrative Court is likely to take into account whether a reference is likely to be made at some stage in any event. If so, it is likely to take the view that an early reference is desirable from the perspectives of both cost and delay. Where the sole issue at stake is an issue of EU law, the Administrative Court has, on occasion, made a reference at the permission stage (for example, *R (Alliance For Natural Health) v Secretary of State for Health (Case 154/04) [2005] ECR I-6451, at paragraph 22*).

FRANCOVICH DAMAGES

It is well established that, in certain limited circumstances, member states may be liable in damages for breaches of EU law committed by an organ of the state. The CJEU has held that, for such liability to be established, it must be shown that:

- The EU law provision breached by the member state was intended to confer rights on individuals.
- The breach complained of was “sufficiently serious”.
- There is a causal link between the breach complained of and the loss suffered.

(See *Francoovich (Case C-6/90) [1991] ECR I-5357* and *Brasserie du Pecheur and R (Factortame) v Secretary of State for Transport (No 3) (Joined Cases C-46 and 48/93) [1996] ECR I-1029*; for a recent example of consideration by the

Supreme Court of these conditions, see *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, at paragraphs 75-83.)

In *Brasserie du Pecheur and Factortame (No 3)*, the CJEU explained that the factors to be taken into account when determining whether a breach was sufficiently serious include:

- The clarity and precision of the rule breached.
- The measure of discretion left by the rule to the national or EU authorities.
- Whether the infringement and the damage caused was intentional or involuntary.
- Whether any error of law was excusable or inexcusable.
- Whether the position adopted by an EU institution may have contributed to the breach.

The types of act that could in principle give rise to such liability are not limited to breaches of directly applicable provisions of the EU treaties and the difficulty of establishing a sufficiently serious breach will vary, depending on the scope of the discretion left to the national decision maker. For example, it is clear that the failure to implement a directive within the time limit stipulated is itself a sufficiently serious breach (*Dillenkofer v Germany* (Cases C-178/94) [1996] ECR I-4845).

By contrast, in *Kobler* (Case C-224/01) [2003] ECR I-10239, the CJEU controversially extended the *Francovich* liability principle to infringements of EU law by national courts:

“the principle that Member States are obliged to make good damage caused to individuals by infringements of [EU] law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of [EU] law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.” (Paragraph 59.)

In such cases, the question of a sufficiently serious breach raises quite different issues from a simple failure to act in a way required by EU law. In *Traghetti del Mediterraneo* (Case C-173-03) [2006] ECR I-5177, the CJEU found that the imposition of such liability was not confined to cases where there had been an intentional breach of EU law or serious misconduct on the part of the court. However, in the first such claim brought in the UK courts, *Cooper v HM Attorney General* [2010] EWCA Civ 464, the Court of Appeal gave the following cautious guidance on the issue of “manifest” infringement:

“a breach is not manifest if the answer to the question before the court is not evident in the sense just given. It will also not be manifest if it represents the answer to which the court has come through undertaking a normal judicial function. Interpretation of [EU] legislation is part of the normal judicial function and liability would no longer be exceptional if it could arise whenever the interpretation was shown to be wrong - if only because the Court of Justice often adopts an innovative interpretation or one motivated by policy insights that would not be necessarily be available to the national court ...

a failure to make a reference where a question is not acte clair does not automatically lead to *Kobler* liability, nor does the interpretation of prior case law result in the incurring of such liability, unless there is an obvious answer and there are no other mitigating circumstances. It must follow that the failure to make a reference because the court did not appreciate that the issue before it raised a question of [EU] law does not automatically result in *Kobler* liability unless it is obvious from [EU] law that there is [an EU] issue and an absence of mitigating circumstances.” (Paragraphs 70-71.)

In addition, the Court of Appeal found that a decision of a national court which is inconsistent with a **later** decision of the CJEU is unlikely to give rise to *Kobler* liability unless the development in the case law of the CJEU could have been predicted (*Cooper*, at paragraph 129). Overall, it seems clear that liability based on the *Kobler* principle will only rarely be established.

As a matter of procedure, claims for damages on the basis of the Francovich principle may be brought by way of JR, if they are brought as part of a challenge to the decision or secondary legislation itself (section 31(4), *Supreme Court Act 1981* and *CPR 54.3(2)*). In the *Factortame* litigation, for example, the claimants sought damages for loss suffered as a result of the violation by the UK of the claimants' rights under Article 49 of TFEU (*R v Secretary of State for Transport, ex p Factortame (No 5)* [2000] 1 AC 524). However, the JR procedure may not be the most appropriate mechanism for the resolution of damages claims, especially where resolution of the claim will require detailed disclosure and examination of witnesses. Furthermore, damages may only be awarded if they could have been awarded in an ordinary claim, that is, under an ordinary private law cause of action (or a claim under the Human Rights Act 1998) (see, for example, *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673).

For further information on the CJEU, see [Practice note, Seeking a reference to the CJEU \(www.practicallaw.com/6-385-3324\)](http://www.practicallaw.com/6-385-3324).

For further information on JR, see, for example, [Practice note, An introduction to judicial review \(www.practicallaw.com/1-376-4820\)](http://www.practicallaw.com/1-376-4820).