The Transposition and Efficacy of EU Rights. Indirect Effect and a Coming of Age of State Liability?

ABSTRACT

Throughout the duration of the UK's membership of the European Union (EU), non-implementation and incorrect transposition of Directives has been commonplace. Coupled with the Court of Justice of the European Union's refusal to extend the direct effect of Directives to horizontal relationships, and historic difficulties in holding States liable in damages, it has often fallen to the national courts to give effect to EU laws through purposive statutory interpretation. Recent cases involving the collective redundancy of workers in the UK (currently awaiting a ruling from the Court of Justice through the preliminary reference procedure), and the High Court's assessment of State Liability in the insurance sector, raise questions as to the efficacy of the current system of enforcement of EU law domestically. Despite the problems of access to EU rights experienced by workers in the UK, there appears to be hope that the judiciary is becoming more attuned to the relationship between EU and domestic laws, and are willing to take control of granting access to remedies without necessarily waiting for EU institutions to provide express permission or instruction. 2014 was a particularly important year in this regard. However, a systematic review of the UK's transposition of EU law and the impact on individuals of the current suite of enforcement mechanisms is required if private enforcement of EU law is to provide the protection workers need and to which they are entitled.

1 INTRODUCTION

There exists a limited but not insignificant trend of domestic legislators to incorrectly transpose, or fail to implement on time, EU Directives. The UK has a history of such ineffectual transposition, especially in the area of employment/social policy competence, and this negatively affects many workers given the EU's role as a source of protective employment rights. Given the obligations imposed on individuals to follow EU laws, it is a necessary corollary that individuals have access to the rights derived from the EU – particularly when access to the right is dependent upon action by the Member State. Member States are entrusted with transposing, in good faith, EU laws in the form of Directives, and they should be required, not least through effective policing and enforcement, to meet these minimum standards. Member States that do not follow their EU obligations can often benefit economically from the breach, which necessitates an effective system of enforcement. Enforcement at both EU and domestic levels is required because, as demonstrated by Barnett, 'Wrongdoers will be less likely to engage in future illegal acts if the incentive of unjust enrichment is eliminated.'[1]

[1] Kerry Barnett, 'Equitable Trusts: An Effective Remedy in Consumer Class Actions' (1987) 96 *Yale Law Journal* 1591, 1595.

There has been significant comment and critique of the effectiveness of the EU Commission[2] and its role in enforcing EU law (through its infringement proceedings). This is a very complex issue, but, summarizing its shortcomings, the infrastructure of the institution, the increasing competence of the EU generally, the 'political' dimension to its infringement proceedings, and the growing number of Member States over which scrutiny must be exercised, has limited its effectiveness as the 'Guardian of the Treaties.' The Commission's role in enforcing EU law and ensuring Member States follow their obligations is of significance in relation to compelling States' adherence to EU law, but this 'EU level' of enforcement does not explicitly take into account private parties and the effect on individuals' access to EU law. This paper focuses on the rights of private parties, such as workers, to access EU laws and critiques the current structure of domestic enforcement mechanisms in facilitating effective access.[3] Given that the EU has been particularly active in developing a suite of employment rights under its social policy initiative, and most workers in the UK are employed in the private sector, the domestic level of enforcement is pertinent for examination due to cases heard in 2014. Two recent cases at the Employment Appeal Tribunal (EAT) and High Court (both of which are subject to appeal) exemplify the continued problem of the correct transposition of EU laws in the UK, identify a potential problem in full and effective access to EU law and, with the recent decision in *Delaney*,[4] demonstrate perhaps a more enlightened, confident and informed judiciary emerging which is willing to hold the State liable in cases of incorrect transposition of Directives. For workers, who are largely unable to use direct effect of Directives due to the denial of its horizontal effect, and who have traditionally been reluctant to pursue a State Liability claim due to costs, complexity, the limited success of previous damages claims, the need for a separate legal action outside of the sphere of the original complaint, and the prohibitive issue of quantum when successful, the only remedy which has been of any significant force has been indirect effect (adopting a purposive approach to statutory interpretation).[5]

2 NON-IMPLEMENTATION OF DIRECTIVES

[2] Melanie Smith, 'Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process', (2008) 14 *European Law Review* 777 and Carol Harlow, and Richard Rawlings, 'Accountability and Law Enforcement: The Centralised EU Infringement Procedure' (2006) 12 *European Law Review* 447. Further, the lack of transparency in proceedings was raised by the European Parliament in 'Report on the 25th annual report from the Commission on monitoring the application of Community law (2007)' A6-0245/2009 [13].

[3] Individuals were drafted into the enforcement of EU laws in national courts through the suite of enforcement mechanisms created by the Court of Justice. For a discussion of the EU utilizing rights, enforceable by individuals, to establish policy without the associated costs, see R. Daniel Kelemen 'Suing for Europe: Adversarial Legalism and European Governance' (2006) *Comparative Political Studies* 39, 101. 'By establishing EU rights and relying on private parties to enforce them, EU lawmakers can avoid the cost of funding the extensive Eurocracy and large-scale programs that would otherwise be necessary to implement and enforce policy. By presenting policy goals as individual rights that private actors and governments are obliged to respect, the EU can readily shift the costs of compliance to the private sector and member state governments.' 105.

[4] *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB); [2014] WLR (D) 253.

[5] Although see Lisa Schultz Bressman, and Abbe, R, Gluck, 'Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II' (2014) 66 *Stanford Law Review* 725 for an analysis and critique of the theories underpinning the textualist and purposivist approaches to statutory interpretation. The authors conclude that an alternative paradigm is required, adopting a pragmatic approach to interpretation.

Each year, the EU produces data on infringement proceedings initiated by the Commission in reference to the non-transposition or late implementation of Directives.[6] Non-implementation of Directives is a significant problem throughout the EU. The EU establishes a Directive (the parent law) which contains instructions to Member States as to the provisions which must be incorporated (transposed) into national law, and the deadline by which implementation must take effect. The principle of transposition is that the individual (here for example the worker) would access the right bestowed through the Directive by using the domestic transposing law (for example the relevant Regulation / Statutory Instrument etc). Without the timely transposition of the law, individuals who would wish to exercise those rights are denied access through national law and must instead rely on a 'domestic-level' enforcement mechanism to grant either access to the right or compensation in damages for associated losses due to the State's breach. In 2013, the EU published 74 Directives for implementation which led to 478 late transposition notices being issued against Member States.[7] 60 of the notices related to the EU's area of competence in employment/social policy. The UK[8] was subject to two cases (the joint highest total) by the Commission to the Court of Justice under its infringement proceedings authority, with a request for the application of a daily penalty under Article 260(3) Treaty on the Functioning of the European Union (TFEU). Further, in this year, the UK was subject to 53 infringement cases for incorrect transposition and/or the bad application of EU law.[9]

The Commission possesses an ultimate discretion when deciding which cases on which to initiate any enforcement / infringement proceedings,[10] and the Court of Justice has confirmed that it does not intend to publish details, following a request for access to Commission documents, relating to the investigation of a potential infringement of EU law by a Member State.[11] Therefore, in the absence of certainty of effective enforcement via the Commission and Court of Justice, and due to the focus of Arts 258-260 TFEU on Member State compliance rather than individuals' access to rights, it falls on the national courts to enable the access to non-implemented EU laws through an effective system of either purposive statutory interpretation or enforcement through a State Liability damages action.

These data are included here to demonstrate the continued problems with the non-implementation of Directives, despite the experience which Member States possess in transposing EU law, the softening of the approach of the Court of Justice in relation to accepting preliminary references and ensuring conformity of Member States' legislative endeavours with the EU parent (although examples abound where the UK courts have been so sure that the interpretation provided in cases was

[6] The current annual report is: EU Commission (2014) 'Report from the Commission: 31st Annual Report on Monitoring the Application of EU Law (2013)' Brussels, 1.10.2014 COM(2014) 612 final.
[7] *ibid*, 3. 18 of these cases were against the UK, 4.
[8] One of nine Member States.
[9] n 6, 11.
[10] As confirmed by the Court of Justice in Case 247/87 *Star Fruit v Commission* [1989] ECR 291-302 [11]; Case C-87/89 *Sonito and Others v Commission* [1990] ECR I-1981 [6]; and Case C-111/11 *P Ruipérez Aguirre and ATC Petition v Commission* [2011] ECR I-104 [11 and 12].
[11] Joined Cases C-514/11 P and C-605/11 P *Liga para a Protecção da Natureza (LPN), Republic of Finland v European Commission* [2013] ECLI:EU:C:2013:738.

certain and did not require reference[12] (*acte clair*),[13] only later[14] to be established as an incorrect interpretation in relation to EU law),[15] and the EU's improvements in drafting Directives compared with, for example, the situation in the 1990's.[16] It is important to note that these statistics consider the non-implementation of EU law by the Member State. Another considerable, perhaps arguably more significant problem, occurs with the incorrect transposition of EU law by the Member State due to the inherent nature of delays, obfuscation, and opacity that exists with a seemingly compliant transposition of the law but one which misleads the individuals subject to this law as to its content, scope and effect.

3 INCORRECT TRANSPOSITION OF DIRECTIVES

Directives are the most common EU legislative instrument (which provide for the harmonisation of laws throughout the EU and afford to Member States discretion as to the manner and form which the transposition takes). Compared with legislating through use of Regulations (which adopt a uniformity of approach to the law but in so doing neglect the variances and differing forms of legislative mechanisms in the 28 Member States), Directives provide the benefit of enabling Member States to choose the most appropriate form of law-making at its disposal, select between any available compliance mechanisms[17] or take advantage of derogations when transposing the effects of the Directive into national law. With any element of discretion in taking a legislative document and giving it effect in another form, correct transposition is not necessarily a simple task. Member States recognise that the deliberate non-transposition of a Directive will likely satisfy the test of a sufficiently serious breach of EU law as required under the *Brasserie*[18] criteria to facilitate a successful State Liability claim. Consequently, most Member States attempt some element of transposition (perhaps after the first (non-judicial / administrative) stage of the infringement proceedings), but the form of transposition adopted may be fully

[12] See Veerle Heyvaert, Justine Thornton and Richard Drabble 'With Reference to the Environment: The Preliminary Reference Procedure, Environmental Decisions and the Domestic Judiciary' (2014) 130 *Law Quarterly Review* 413.

[13] Established in Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 341.

[14] Including *Royscot Leasing Ltd and others v Commissioners of Customs and Excise*, Court of Appeal, 5 November 1998, FC3 98/7287/4; *Customs and Excise v First Choice Holidays Plc*, Court of Appeal (Civil Division), 7 March 2001, A3/2000/2534; *Three Rivers District Council and others v The Governor and Company of the Bank of England*, House of Lords, 2000 – particularly concerning here given the opinion to the contrary provided by Auld LJ in in the Court of Appeal (*Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)* [2000] 2 WLR 15).

[15] These examples have been referred to as 'borderline cases' and are commonly not referred to the CJEU under the reference procedure – see Tobias Lock 'Is Private Enforcement of EU Law Through State Liability a Myth? An Assessment 20 Years After Francovich' (2012) 49 *Common Market Law Review* 1675.

[16] See Victor J.J.M. Bekkers, Jacqueline M. Bonnes, and Wim J.M. Voermans 'Succes- en faalfactoren bij de uitvoering van EG-beleid, De uitvoering van EG-richtlijnen kwalitatief bezien' (1993) *Bestuurskunde* 1993/4, 192, 193.

[17] For example, as contained in the Collective Redundancies Directive - Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies. Here the Directive gave Member States a legislative choice between two thresholds (and appropriate calculations) at which the duty to consult over collective redundancies was 'triggered.'

[18] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany* and *R v Secretary of State for Transport, ex p. Factortame (III) [1996] ECR I-1029; [1996] 1 CMLR 889.*

conformable, non-conformable or may involve a mere partial attempt at conformity, and each has significant implications for the access of individuals to the rights therein, and for a Member State's potential liability for breach. König and Mäder's[19] research demonstrates important aspects of the evaluation of conformable transposition of Directives and the limitations to effective analysis of compliance due to a lack of substantial data and information.[20] Further, König and Mäder argue in relation to the motives behind incorrect transposition 'the more a Member State disagrees with a Directive, the more conformable transposition is delayed.'[21] It has been argued that where the Member State contested the nature of the Directive's provisions and faced domestic political disquiet through transposition of an 'unpopular' Directive, the conformable transposition was negatively affected.[22] Member States are required to notify the Commission regarding the mechanism chosen for the transposition of a Directive, and the form that such transposition has taken. This material is published in the Official Journal of the EU and assists in identifying the source Directive and domestic implementing measure. It may be assumed that a Member State establishes, where relevant, a new piece of legislation[23] that transposes the Directive and this occurs once – the measures required to be transposed have been achieved. Of course, in reality, Member States may take several attempts[24] to fully comply with the requirements of the Directive (possibly due to an innocent misunderstanding or misreading of the Directive's provisions) and hence resubmit the notification to the Commission to reflect the changes. This, in particular, poses several problems for the effective regulation of the transposition process. A Member State with a political will not to fully transpose a Directive[25] may choose a 'quick and dirty'[26] mechanism and notify the Commission that transposition has been achieved (when in reality this is non-conformable transposition). It is then incumbent on an affected individual/body or the Commission to identify the incorrect transposition and begin enforcement proceedings following the completion and, unsuccessful resolution, of the administrative stage of enforcement. This problem with transposition and the effective regulation at a

[19] Thomas König, and Lars Mäder, **'**Non-Conformable, Partial and Conformable Transposition: A Competing Risk Analysis of the Transposition Process of Directives in the EU15' (2013) 14 *European Union Politics* 46.

[20] See Miriam Hartlapp, and Gerda Falkner, (2009) 'Problems of Operationalisation and Data in EU Compliance Research' 10 *European Union Politics* 281, 287.

[21] n 19, 49.

[22] See Clifford J. Carrubba, 'Courts and Compliance in International Regulatory Regimes' (2005) 67 *Journal of Politics* 669; Gerda Falkner, Oliver Treib, Miriam Hartlapp, and Simone Leiber, *Complying with Europe*, (2005, Cambridge: Cambridge University Press); and Thomas König and Brooke Luetgert, 'Troubles with Transposition? Explaining Trends in Member State Notification and the Delayed Transposition of EU Directives' (2009) 39 *British Journal of Political Science* 163.

[23] Cleary, depending upon the nature and scope of the Directive's provisions, a new legislative instrument may be required but this is not the situation in each case. Amending existing legislation can be a method adopted by the Member State, but the former action involves far greater uncertainty, costs and risks in conformable transposition than does the latter (see Brooke Luetgert, and Tanya Dannwolf, (2009) 'Mixing methods: A Nested Analysis of EU Transposition Patterns' (2009) 10 *European Union Politics* 307.

[24] See Tanja A. Boerzel, 'Non-Compliance in the European Union: Pathology or Statistical Artifact?' (2001) 8 *Journal of European Public Policy* 803.

[25] See Robert Thompson, 'Opposition Through the Back Door in the Transposition of EU Directives' (2010) 11 *European Union Politics* 577, 591 'In the absence of explicit support for a provision from the Commission, states with incentives to deviate are three times more likely to exhibit protracted non-compliance than are states without incentives to deviate.'

[26] n 19, 65.

Member State / EU level has led to a call 'for a reform of the EU's sanctioning mechanism to prevent disagreeing Member States from strategically early, but non-conformable, transposition notification.'[27] It also justifies the development of the suite of domestic-level mechanisms to allow individuals to enforce EU-rights.

4 PRIVATE / DOMESTIC ENFORCEMENT

In the UK many protective employment/social policy rights are inspired, and their application compelled, through membership of the EU. Various social policy Directives establishing protections from discrimination experienced on the basis of (for example) sexual orientation,[28] beliefs and non-beliefs,[29] because the individual works under a fixed term contract[30] or is a part-time worker,[31] have been incorporated into domestic law on the basis of a parent EU Directive. Further, fundamental protections on the requirements to preserve the rights and conditions of work attributed to employees following the transfer of a business from one owner to the next,[32] and requirements to consult with employees and/or their representatives in the event of collective redundancies and/or transfers of an undertaking[33] are also subject to a parent EU law. In the instances identified above, the UK has been found in breach of its obligations, with the result that individuals have been denied protection to which they were entitled.

As is already very well known (and as such will be dealt here with brevity), the direct effect of EU law allows such laws to be relied upon, and given effect, in the national courts of the Member States. The Court of Justice created direct effect to facilitate access to EU law for individuals in their own national courts and, in relation to its extension to Directives, as this form of law is often drafted in general terms, so as to be given effect in the languages of the Official Journal, it enables harmonised policies to be applied throughout the EU's Member States. The question as to whether EU laws have direct effect and are enforceable in a Member State was

[27] n 19, 65.

[28] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, Art 1, and transposed in the UK through the Disability Discrimination Act 1995 and the Equality Act 2010.

[29] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, Art 1.

[30] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP OJ L 175/43, and transposed in the UK through The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

[31] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC OJ L 14 and transposed in the UK through The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

[32] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 061, and Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82.

[33] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, and transposed in the UK through The Trade Union and Labour Relations (Consolidation) Act 1992, amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 and The Transfer of Undertakings (Protection of Employment) Regulations 1981, amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 and 1999.

decided in cases in the early 1960's[34] in which the foundations of a Community governed by the rule of law were firmly based on the primacy of Community law. Indeed, in relation to access to EU laws and associated rights, Szyszczak[35] identified that direct effect was used not to enforce individual rights from 'legally perfect' Community measures, but rather to interact with national laws in order to provide effective enforcement of substantive Community measures. Direct effect is used, therefore, to ensure that superior Community norms are enforced.[36]

Initially, direct effect was applied, subject to the qualifying criteria,[37] to Treaty Articles, and later to Directives.[38] Given the volume of EU law passed in the form of Directives, this was an important movement towards accessing rights for individuals, but was made problematic due to the denial of the horizontal direct effect of Directives,[39] (despite arguments being presented to the contrary by the Advocates-General)[40] and necessitated the 'remedy'[41] of the extension of the concept of the 'emanation of the State'[42] to facilitate the vertical[43] direct effect of Directives.[44] Either

[34] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR1, [1963] CMLR105; Case 6/64 *Costa (Flaminio) v ENEL* [1964] ECR 585, [1964] CMLR 425, and Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fuer Getreide und Futtermittel* [1970] ECR 1125, [1972] CMLR 255.

[35] Erika Szyszczak,' Making Europe More Relevant to its Citizens: Effective Judicial Process' (1996) 21 *European Law Review* 351.

[36] *ibid* at 358.

[37] The criteria for the direct effect of Community law to be established were: 1. The provision must be clear and unambiguous; 2. The provision must be unconditional; and 3. The provision must not be dependent on further action being taken by the EU or Member State.

[38] Although see Bob Hepple and Angela Byre, 'EEC Labour Law in the United Kingdom - A New Approach' 18 *Industrial Law Journal* (1989), 129, 131 for a critique of the inequalities in the use of the Court of Justice's own criteria for establishing the direct effect of Directives. The article is relatively old, identifying subsequently repealed legislation, but through the following example of the Court of Justice's double standards, demonstrate a problem in consistency of approach and rationale explanation and justification for its decision-making. Article 119 (Case 43/75 *Defrenne v Sabena* [1976] ECR 455, [1976] 2 CMLR 98) and Directive 75/117 (Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women) 'which facilitates the practical application of Article 119' both having been granted with the status of being horizontally directly effective, whilst Directive 76/207 (Council Directive 76/207/EEC of 9 February 1976 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) was only judged to possess vertical direct effect (Case 152/84 *Marshall v Southampton and South-West Hampshire Health Authority* [1986] ECR 723).

[39] Case C-91/92 *Dori (Faccini) v Recreb Srl* [1994] ECR I-3325.

[40] See opinions of A-G Jacobs in Case C-316/93, *Vaneetveld v SA Le Foger* [1994] ECR I-763, 2 CMLR 852 and A-G Lenz in Case 91/92 *Faccini Dori* [1994] ECR I-3325.

[41] Despite the lack of horizontal application of Directives, it has been argued that the *Marleasing* decision was in essence a de facto horizontal application of a Directive. See John, J, Barceló III, 'The Paradox of Excluding WTO Direct and Indirect Effect in U.S. Law' (2006) *Cornell Law Faculty Publications* Paper 9. http://scholarship.law.cornell.edu/facpub/9, 151.

[42] Defined by the Court of Justice as 'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond that which result from the normal rules applicable in relations between individuals.' E.g. a former nationalized utility company - Case C–188/89 *Foster v British Gas plc.* [1990] ECR I–3313; health authorities - Case 152/84 *Marshall v Southampton and South-West Hampshire Health Authority* [1986] ECR 723; local government bodies - Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR I-1839; and a police force – Case C-222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651.

[43] Vertical direct effect was attributed to Directives by the Court of Justice in Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, 1 CMLR 1 [1975].

through intention or by default of Member State pressure, the EU has created a twin track of rights in individuals accessing EU law directly in their national court in the event of its non-implementation or incorrect transposition. The resultant access to the direct effect of Directives, dependent as it is on whether the defendant is a public or private sector entity, required the Court of Justice to establish a second enforcement mechanism – statutory interpretation/indirect effect.

5 INDIRECT EFFECT

Membership of the EU establishes the supremacy of EU law over inconsistent domestic law[45] and obliges Member States to interpret domestic legislation[46] in conformity[47] with the EU parent 'as far as it is possible to do so'.[48] Judgments of the House of Lords in *Duke v GEC Reliance*[49] and *Webb v EMO Air Cargo (UK) Ltd (No. 2)*[50] had determined the judiciary's unwillingness to distort the ordinary meaning of a statute to achieve compliance with a Directive. However, in *Litster v Forth Dry Dock & Engineering Co Ltd*,[51] an exception to this approach was established where the domestic legislation was clearly intended to transpose the Directive. *Ghaidan* also enables the interpretation process to add and remove words to facilitate compliance. Underhill P, in *EBR Attridge LLP v Coleman*[52] found nothing 'impossible'[53] about taking such an approach in relation to the interpretation of EU-based law. Further, safeguards were provided by Lord Nichols and Lord Rodger in *Ghaiden*, where they said, respectively, that indirect effect of the EU law could be achieved where the interpretation was not '(in)compatible with the underlying thrust of the legislation';[54] or 'inconsistent with the scheme of the legislation or with its general principles'.[55] In *EBR Attridge LLP*, Underhill P, continued that the interpretation of domestic law to give effect to EU law was '… an extension of the scope of the legislation as enacted, but it is in no sense repugnant to it.'[56] *Marleasing SA v La*

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[44] However, the Court of Justice has been relatively unhelpful, despite exploring concepts of State and public bodies, on providing detailed guidance on this important issue – see Erika Ssyszczak, 'Foster v British Gas' (1990) 27 *Common Market Law Review* 859.

[45] Declaration 17, annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, signed on 13 December 2007, concerning primacy '… in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law'.

[46] The obligation does not extend to nullify the law, but rather '… the national court is, however, obliged to disapply that (incompatible) rule, provided always that this obligation does not restrict the power of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for protecting the individual rights conferred by Community law'. (Cases C-10-22/97 *Ministero delle Finanze v IN.CO.'90 Srl* [1998] ECR I-6307, [21]; Case C-314/08 *Krzysztof Filipiak*, 19 November 2009 [18].

[47] Or, in other words, to fulfill the (doctrine of) consistent interpretation of ALL sources of EU law (cf. Advocate General Tizzano in Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981).

[48] Similar to the duty of interpretation of the Human Rights Act 1998 s. 3 as articulated in *Ghaidan v Godin Mendoza* [2004] 2 AC 557.

[49] [1988] AC 618, HL.

[50] [1995] IRLR 647.

[51] [1990] 1 AC 546, HL.

[52] [2010] ICR 242.

[53] *ibid* [14].

[54] *ibid* [33].

[55] *ibid* [121].

[56] *ibid* [14].

Comercial Internacional de Alimentación SA provided further scope for the effective enforcement of EU law as it permitted courts to insert 'additional words... They could be taken out; they can be moved around'.[57]

Indirect effect has been a particularly effective enforcement mechanism, but this does not mean that it is a panacea for the intransigence of Member States, it does not mean that national courts are free from doubt as to the application of the domestic enforcement mechanisms, nor does it necessarily provide access to the law for all affected individuals.

6 *WOOLWORTHS* AND THE CONTINUED PROBLEMS OF TRANSPOSITION, ENFORCEMENT AND INTERPRETATION

The significance of indirect effect of Directives as a powerful, if not limited, enforcement mechanism can be seen in *USDAW v Ethel Austin Ltd and WW Realisation 1 Ltd*[58] (hereafter referred to as *Woolworths*), a case heard in the EAT (and currently subject to a preliminary reference at the Court of Justice). *Woolworths* related to the construction of s.188 of the Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992[59] and its EU parent – the Collective Redundancies Directive (Directive 98/59/EC).[60]

TULRCA 1992 s.188 reads:

> (1) Where an employer is proposing to dismiss as redundant 20 or more employees *at one establishment* (authors' emphasis) within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives[61] of any of the employees who may be [affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals]… before the first of the dismissals takes effect.

Therefore, an employer, when proposing to make collective redundancies, is required under TULRCA 1992 to consult with representatives of the affected employees before decisions to dismiss, and notices to this effect, are issued. The periods for consultation (at the time of the redundancies being made) were 60 days' notice where between 20-99 employees were subject to redundancy, and 90-days'

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[57] *ibid* [49].

[58] *USDAW v Ethel Austin Ltd (In Administration)* [2013] UKEAT/0547/12/KN, and *USDAW and Wilson v Unite the Union, WW Realisation 1 Ltd and Secretary of State for Business, Innovation & Skills* [2013] UKEAT/0548/12/KN.

[59] The Act gives implementation in the United Kingdom of the 1975 Collective Redundancies Directive and the 1977 Acquired Rights Directive (Council Directive 77/187/EEC).

[60] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

[61] The original wording of s.188, amended following enactment of the Trade Union Reform and Employment Rights Act 1993 and proceedings to the Court of Justice, had restricted the consultation requirements to a single redundant employee who was represented by a recognised independent trade union - Court of Justice of the European Union in cases C382/92 and C383/92, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1994] ICR 664.

notice for situations involving 100+ employees. In the event that the employer fails in this duty, a system of redress (through 'protective awards')[62] is available for the affected employees.

However, the parent Directive (98/59/EC) was (seemingly) much broader in scope. The Directive provided Member States with a choice of two mechanisms for implementation which would trigger the consultation duty. Per Article 1(1):

> (a) collective redundancies means dismissals effected by an employer… where, according to the choice of the Member States, the number of redundancies is:
> (i) either, over a period of 30 days: at least 10 in establishments normally employing more than 20 and less than 100 workers; at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers; at least 30 in establishments normally employing 300 workers or more;
> (ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question.

Whilst many Member States chose the first definition in their transposition of when the consultation duty was effective, the UK used the second.

The key issue for *Woolworths* was the wording of TULRCA 1992 s.188 which triggered the duty to consult where the requisite collective redundancies took effect 'at one establishment'. The consequence of the UK's transposition is employees subject to collective redundancies only have protection through the consultation procedure (and associated protective awards for failure by the employer to comply) where the collective redundancy involving at least 20 employees occurs at one branch/premises rather than across an organization. Branches/shops engaging fewer than 20 employees resulted in no duty to consult applying. In *Woolworths*, nearly 4,500 employees were in this position and they sought a protective award on the basis of TULRCA 1992 being incompatible with EU law. The EAT agreed, re-wording the Act (the EAT[63] referred to *Kükükdeveci v Swedex GmbH & Co KG*[64] when identifying the approach to be taken when the domestic Act and the EU parent law could not be reconciled. It specifically made reference to paragraph 51 of the judgment whereby the instruction for domestic courts was to disapply legislation that was contrary to directly effective EU law.)[65] It considered it possessed authority through the case law of the Court of Justice to take this action, but this point was questioned when the case was referred to the Court of Appeal. The rationale for querying this action is because the UK had a choice between two alternative calculations to reach the trigger point when consultation would be required in the event of a collective redundancy. The UK used clear wording that 'at one establishment' could mean just that – the requirement to consult in collective

[62] Where an employer has failed in the duty established in s.188 to consult regarding collective redundancies, a complaint may be presented and the effect of s.189 is a tribunal must make a declaration and a protective award where it finds the complaint by a trade union or worker(s) or the workers' representatives well founded.
[63] n 58.
[64] [2010] IRLR 346.
[65] As previously stated by Lord Nicholls in *Autologic Holdings v IRC* [2006] 1 AC 118 HL [16].

redundancies was restricted to calculation at each establishment, not across establishments.[66] Given the parliamentary choice of wording, and given that the UK has articulated in more recent guidance that, where possible, it will copy, word-for-word,[67] the provisions of the EU Directive required to be transposed so as to go no further than its legal obligations, it must be considered that the legislators made a positive and calculated decision in the differing wording 'establishments' and 'at one establishment.' This is all the more confusing given that the first option available for the transposition of the Directive is also the only one which articulates a calculation of redundancies as the trigger point at a particular location – the second option available in the Directive (as chosen by the UK) simply identifies a consultation requirement occurring 'whatever the number of workers normally employed in the establishments in question.'

After a finding that the UK had incorrectly transposed the Directive, the EAT felt compelled[68] to interpret TULRCA 1992 s.188 to remove the offending passage 'at one establishment'.[69] It will be a matter for the Court of Appeal[70] (following the reference to the Court of Justice which was heard on 20th November 2014 and will be issued later in 2015) as to whether the EAT was correct in its statutory interpretation. Settled case law prevented the application of the Directive between the individuals and the employer/insolvency practitioners (horizontal effect between private parties), and even though the EAT forwarded the possibility of the vertical direct effect of the Directive due to the State being embroiled in the case,[71] it would be open to question whether the State's involvement in this capacity would satisfy the tests as outlined in *Brasserie du Pêcheur v Germany* and *R v Secretary of State for Transport, ex p. Factortame (III)*.[72] However, returning to the concept of the

[66] Per Barceló III, John J., 'The Paradox of Excluding WTO Direct and Indirect Effect in U.S. Law' (2006) *Cornell Law Faculty Publications* Paper 9. http://scholarship.law.cornell.edu/facpub/9 'In other words, the ECJ would not force national judges to make a mockery of "interpretation" in order to bring national law into conformity. In sum, despite the latent force and importance of indirect effect, it has implicit limits', 152.

[67] '… when transposing EU law, the Government will: (d) always use copy-out for transposition where it is available, except where doing so would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts or going beyond the minimum requirements of the measure that is being transposed.' HM Government. Department for Business Innovation & Skills (2013) 'Transposition Guidance: How to implement European Directives effectively' URN 11/775, 3.

[68] The requirement to consistently interpret the law was established throughout case law of the Court of Justice and, given that in Case C-177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* [1990] ECR I-3941 the national law of the Netherlands was interpreted almost *contra legem*, the EAT's interpretation certainly could not be argued to have extend that far.

[69] 'We hold that the words "at one establishment" should be deleted from section 188 as a matter of construction pursuant to our obligations to apply the Directive's purpose.' [53].

[70] September 10 2013 - The EAT gave the Government leave to appeal to the Court of Appeal - despite the fact that the Government did not attend the EAT hearing. In granting leave, Judge McMullen QC remarked reasons for the permission included '… a parallel reference to the Court of Justice, the importance of the legal issue to industry, and the value of the claims.' (Appeal Nos. UKEAT/0547/12/GE and UKEAT/0548/12/GE Directions Hearing). However, a condition of permission being granted was the Secretary of State indemnify the claimants for their reasonable costs in the Court of Appeal nor would he seek costs if successful.

[71] Due to Part XII ss.182 and 189 of the Employment Rights Act 1996 where the Secretary of State underwrites claims from individuals owed wages / payments from their insolvent employer.

[72] See Case C-392/93 *The Queen v HM Treasury, ex parte British Telecommunications* [1996] ECR I-1631. In the matter affecting Woolworths and Ethel Austin, it is questionable whether the incorrect transposition of the Direction in TULRCA 1992 was a justifiable error – differences between joined

doctrine of consistent interpretation of domestic legislation, even had the offending passage from national law not been removed, case law also requires the national court to interpret the domestic law in 'the light of the wording and the purpose of the Directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty.'[73]

The EAT decided to follow precedent[74] and change the wording of TULRCA 1992 to give effect to the Directive, although the issue of whether the national legislation was a consistent transposition of the parent Directive was open to question. Hence, *Woolworths* joined an existing case[75] with a reference to the Court of Justice on the same matter of interpretation of TULRCA 1992 s. 188. On the 5th February 2015, the Advocate-General provided his opinion[76] where, controversially, he opined that the UK's transposition was in conformity with the Directive and:

> '…that directive does not require - nor does it preclude - aggregating the number of dismissals in all the employer's establishments for the purposes of verifying whether the thresholds set in Article 1(1)(a) are met...' Further, 'It is for the Member States to decide, where appropriate, to increase the level of protection… provided that, on every occasion… it would be more favourable to the workers made redundant…'[77]

Such an opinion, which leaves national law as it was prior to the EAT's interpretation, is not binding on the Court of Justice, but it raises the issue of inconsistency of approach between national and EU bodies as to the correct method of interpretation. It also calls into question the consistency of the Court of Justice in relation to protective social policy rights. The Advocate-General's narrow approach to the interpretation of EU law is at odds with the broad, protective approach generally adopted by the Court of Justice (and of course which may be embraced by the Court in its final ruling expected later this year).

Another aspect of confusion as to which enforcement mechanism applies in particular instances was also demonstrated in *Woolworths*. A question referred from the EAT to the Court of Appeal, and then onto the Court of Justice,[78] and one which

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Cases C-283, 291 and 292/94 *Denkavit International BV and others v Bundesamt Fur Finanzen* [1996] ECR I-5063 and s.188 exist.

[73] Judgment of the Court (First Chamber) Case C-456/98 *Centrosteel Srl v Adipol GmbH* [2000] ECR I-6007**,** [16]. Art. 189 now Art. 288 TFEU.

[74] Case C-449/93, *Rockfon A/S v Specialarbejderforbundet i Danmark (Nielsen)* [1995] ECR I-4291 – 'The national court is bound, when applying provisions of domestic law predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive, so that those provisions are applied in a manner consistent with the result pursued by the Directive.' [19].

[75] *Lyttle and others v Bluebird UK Bidco 2 Ltd* [2013] NIIT 00555_12IT.

[76] Case C□182/13.

[77] at [61].

[78] *USDAW and Another v Ethel Austin Ltd and Others* [2014] EWCA Civ 142 LJ Kay remarked 'The submission for the employees on this point, "vertical direct effect", is said to gain support from *Foster v British Gas* [1990] ECR 13313. The EAT accepted this submission, albeit "with slightly less confidence." In my view, it would be appropriate for this question to be the subject of the reference. It is not currently before the CJEU in the *Lyttle* case. The Court may take the view that vertical direct effect does not yet arise in this case, but the point is not free from doubt. Accordingly, if my Lord and

the EAT accepted[79] was presented by the representatives of the workers who argued for the vertical direct effect of the Directive against the Secretary of State (who was joined as defendant to the case due to Employment Rights Act 1996 s.184(2)(d) which provides for the Secretary of State to become liable to satisfy the protective award on the insolvency of an employer/debtor). It was assumed that simply because the Secretary of State has a presence in proceedings, this body must be held as an emanation of the State and/or the Directive may be applied against him (despite the obvious fact that a direct effect action is one against (in employment cases) an employer and a claim against the State is only permitted by a separate public law action for damages in the modified tort of breach of statutory duty). An argument on this point would be likely from prospective claimants, but it should have been dealt with (and answered in the negative) by the EAT. That the EAT entertained the argument, demonstrating a level of misunderstanding by it (and indeed by the Court of Appeal) is quite worrying, despite its protestations that it would be an argument unlikely to succeed. The duty to consult rests with the employer. The obligation to pay a protective award for breach of the consultation duty applies, first, to the employer, and upon his insolvency, to the Secretary of State. Hence, attempting to impose a duty to consult on the Secretary of State through vertical direct effect fails to recognise the nature of the enforcement mechanism, the distinction between the duty and the obligation, and that the Secretary of State cannot owe a responsibility to the claimants in this regard. The Secretary only becomes a party to proceedings *after* the employer's breach of the duty and not until the employer's insolvency has occurred.

The case is used in this paper as it highlights the worrying trend evident throughout the history of the jurisprudence on EU matters in the UK (although by no means limited to this State).[80] First, as with *Bradley, Ball and others v Secretary of State for Employment*,[81] the Government seemingly misinterpreted[82] the Directive to limit the effectiveness of protective employment rights to individuals,[83] although infringement proceedings are no true and accurate measure of compliance,[84] evidence is present to demonstrate this is not an isolated incident,[85] and secondly, why did it take until

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my Lady agree, I would make a reference in relation to the construction of the Directive and the vertical direct effect point.' [12].

[79] Although the EAT stated that it was minded to agree with this argument, albeit 'with slightly less confidence' [62].

[80] See Robert Thompson, 'Opposition Through the Back Door in the Transposition of EU Directives' (2010) 11 *European Union Politics* 577.

[81] *Bradley, Ball and others v Secretary of State for Employment* (1997, unreported).

[82] A generous interpretation of the Government's actions. The case, relating to the incorrect transposition of the ARD in the TUPE Regulations 1981 by excluding the provision of the Regulations to non-commercial undertakings, confirmed that government Ministers had been advised on numerous occasions of the breach of EU law through the transposition, and despite the advice, it intentionally excluded the category of workers engaged in the public sector.

[83] '3.36: The Commission opened 57 infringement procedures against the UK for late transposition of various Directives in 2011.' (Thirty-second Report of Session 2012-13 - European Scrutiny Committee, (34581) 18034/12 COM(12) 714).

[84] See Miriam Hartlapp, and Gerda Falkner, 'Problems of Operationalization and Data in EU Compliance Research' (2009) *European Union Politics* 10, 281.

[85] For example, the UK's transposition of the Acquired Rights Directive (ARD) (Directive 77/187/EC [1977] OJ L61/ 27) was belatedly implemented through The Transfer of Undertakings (Protection of Employment) Regulations 1981. The delay, in part was due to a 'lack of enthusiasm' - comments made by the Minister, David Waddington (14 HC Deb 680, 8 December 1981). Amending legislation to the original ARD (Directive 98/50/EC [1998] OJ L201/ 88) was due to be transposed by 2001, but

2013 for a defect in the transposition of EU law from 1992, but go unquestioned for years,[86] to be brought before the courts? Whether Articles 258-260 TFEU will have the desired effect of further empowering the Commission and Court of Justice to sanction recalcitrant Member States remains to be seen.[87]

Given the 4,500 individuals affected due to the (alleged) incompatibility between the TULRCA 1992 and Directive 98/59/EC, if a judgment is ultimately returned that maintains the UK's transposition is correct and which prevents access to the protection afforded through consultation (and the associated protective awards being granted), each individual may have to raise a State Liability claim personally to recover compensation. Until recently, workers seeking such a remedy would have needed to prepare themselves for a battle through domestic courts, with references to EU institutions along the way, before a remedy was made available by an appeal court. In 2014, case law appeared to have established an easier and more accessible path.

7 *DELANEY* – THE FUTURE OF STATE LIABILITY?

Francovich[88] is where the Court of Justice expressed[89] 'the effectiveness[90] of [EU] rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of [EU] law for which a Member State can be held responsible.'[91] The judgment established that individuals who sustained loss due to a breach of EU law by a Member State (in *Francovich* this was the non-implementation of a Directive) had the right to be compensated by the State (which was obliged to make good any loss / damage[92] sustained by the claimant). In the UK, like many of the Member States, such an action for damages against the State

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the UK did not comply until five years after this deadline (The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006 No.246)).

[86] In *R v Secretary of State for Trade and Industry ex p. Unison* [1996] ICR 1003 CA where a challenge as to the validity of the amendment was raised in the Court of Appeal, the issue as to the 'at one establishment' wording was not raised.

[87] However, as Van Harten and Nauta observe 'Infringement proceedings under art.258 TFEU have not been modelled for the practices of private parties. They are aimed at Member State behaviour'. Herman Van Harten, and Thomas Nauta, 'Towards Horizontal Direct Effect for the Free Movement of Goods? Comment on Fra.bo' 38 *European Law Review* (2013) 677, 692.

[88] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci and others v Italy* [1991] ECR 1-5357.

[89] Although the Court of Justice, had, in Case 6/60 *Humblet v Belgium* [1960] ECR 559, p. 569 established the duty on Member States to make good damage incurred due to national laws conflicting with EU law.

[90] Although, despite arguments as to its success (see e.g. Roberto Caranta, 'Judicial Protection Against Member States: A New Jus Commune Takes Shape', (1995) 32 *Common Market Law Review* 703, 725; Fernand Schockweiler, 'La responsabilité de l'autorité nationale en cas de violation du droit communautaire' (1992) 28 *Revue trimestrielle de droit européen* 27, 42), it is arguable that such effectiveness has never been realised.

[91] Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357 [33].

[92] As quoted in *Francovich*, the Treaty on European Union, Art.4(3) requires 'The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The(y)… shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.' [36].

for a failure to legislate was alien and required the creation[93] of a remedy based on a hybrid fusion of English and EU law in non-contractual / tortious liability.[94] In the UK, this involves actions under a modified breach of statutory duty and is justified on the principles of equivalence[95] and effectiveness.[96]

In *Francovich*, the Court of Justice outlined the tests of which the national court had to be satisfied before holding the State liable for damages, and in *Delaney*, the court referred[97] to *Francovich*, *Brasserie du Pêcheur SA v Federal Republic of Germany*, and *R v Secretary of State for Transport, ex parte Factortame*,[98] which identified the modern application of the tests to be satisfied:

1. The rule of law infringed must have intended to confer the rights of individuals;
2. The breach must be sufficiently serious; and
3. There must exist a direct causal link between the breach of the EU law and the damage sustained by the claimant.

Delaney is, in some respects, a fascinating case where the individual not only successfully met the requirements for the recovery of damages under a State Liability claim, but also managed to achieve this feat in the absence of the Commission and Court of Justice holding the UK in breach of EU law.

Delaney concerned an individual who was involved, as a front seat passenger, in a road traffic accident in 2006. The consequence of the accident left the claimant with significant personal injury. The driver of the vehicle was insured by a company (Tradewise Insurance Services Ltd) which attempted to avoid its contractual obligations under the contract of insurance on two bases - that the policy had been obtained through be nondisclosure of material facts; and secondly that the driver's health and use of a controlled drug (cannabis) was falsely represented to the insurer.

The claimant initially brought proceedings against both the driver and Tradewise in which it was held the claim must fail due to 1) the application of *ex turpi causa non oritur actio*[99] and 2) that the claimant knew/ought to have known that the vehicle was being used in the course or furtherance of a crime which would negate the insurance. It transpires that the driver of the car was, at the time of the crash,

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[93] A national system establishing and facilitating the award of a remedy was required, however, given the unique nature of the effects of *Francovich*, and its adoption by Member States to be lukewarm at best, by 1997, no Member State had introduced any legislative measures to give effect to this development in EU law (SOU 'Det Allmannas Skadestandsansvar vid Overtradelse av EG-regler' 1997, 194).

[94] Although not every breach / infringement of EU law by a Member State constitutes a tort - *Borgouin S. A. and Others v Ministry of Agriculture, Fisheries and Food* [1986] QB 716.

[95] In relation to anti-trust / competition law, the principle requires Member states to sanction breaches of the EU law in the same way, and thereby equivalent to, the application of domestic law.

[96] A national court must not make it impossible of excessively difficult for a party to exercise his or her EU rights – see *Francovich* [33] and [39]. Further, In *Autologic Holdings Plc v Inland Revenue Commissioners* [2004] EWCA Civ 690 [2004] 2 All ER 957 Gibson LJ stated: 'The importance of the principle of effectiveness in Community law cannot be overstated. Any provision of national law which makes the exercise of a right conferred by Community law practically impossible or extremely difficult cannot prevail.' [25].

[97] at [51].

[98] n 18.

[99] From a dishonorable cause an action does not arise.

transporting a quantity of cannabis for the purpose of subsequent supply. The Court of Appeal[100] overturned the findings on the first point whilst upholding the second (although this was based on the application of national implementing law and no consideration was given to the conformity of national law with the EU parent Directive). Hence the liability of Tradewise was excluded.

Delaney's case, significant as it is for the High Court holding the State liable for breach of EU law, was based on the UK's transposition of Directive 2009/103/EC[101] which, in essence, allowed Tradewise to exclude its liability under national law. The Directive required the Member States to take appropriate measures to ensure that civil liability in relation to personal injury and damage to property in respect of the use of motor vehicles was covered by insurance. The Directive also extended responsibility for insurance to passengers in the vehicles and the UK transposed the Directive provisions through Part IV of the Road Traffic Act (RTA) 1988, and within the RTA 1988, s. 152(2) provided insurers with the right to avoid insurance contracts where the contract was obtained on the basis of the non-disclosure/false representation of a material fact. One saving feature of the UK's transposition is by the development of the Uninsured Drivers' Agreement (UDA) whereby the UK's Motor Insurance Bureau (MIB) acts as the 'insurer of last resort' in cases where insurance claims would not be satisfied – for example where a driver has no insurance or, as with *Delaney*, where the insurer avoided the contract of insurance. However, and again notably to *Delaney*, the responsibility of the MIB to satisfy claims in the event of no insurance being available was not applied without reservation, and one such reservation applied to passengers in claims against the driver (contained in clause 6(1)(e)(iii) UDA) – here MIB's liability was excluded in the event that the passenger knew/ought to have known that the vehicle he/she was travelling in was being used in the course or furtherance of a crime (the crime exception).[102]

As Delaney was unable to seek redress against Tradewise or MIB due to the reservation above (as confirmed by the Court of Appeal) a new action was initiated against the Secretary of State for Transport through State Liability.[103] The High Court had to consider two issues - the first dealt with the crime exception to the insurance company and if its existence resulted in the UK being in breach of the EU Directive. Secondly, if that issue was answered in the affirmative, the question then arose whether the Secretary of State was liable to the claimant for losses suffered as a

[100] *Delaney v Picket* [2011] EWCA Civ 1532.

[101] The law in the UK relating to insurance had been largely the same since the Road Traffic Act 1930 (as amended in 1934), with only minor amendments incorporated following each Directive. Whilst the UK did not transpose the effects of the Directive through the Road Traffic Act 1988, Delaney's case against the State was justified on the existence of the effects of three Directives (Directive 72/166/EEC, Directive 84/5/EEC and Directive 90/232/EEC) - subsequently replaced by Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability.

[102] The Uninsured Drivers' Agreement England, Scotland and Wales 1999 introduced the criminality exclusion, seemingly at the confusion of commentators at the time. EU law did not permit it, its inclusion was hence in violation of the UK's EU obligations, and it appeared a matter of time before either the UK would have to change national law to comply with the Directives through choice, enforcement through proceedings brought by the Commission, or through a private claim through indirect effect or State Liability.

[103] *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB); [2014] WLR (D) 253.

consequence of this breach. The first issue was answered in the affirmative on the basis that the Directive required a national body to cover claims of victims of road traffic accidents in circumstances where such claims were not covered by insurers - but this was limited to cases where no insurance policy existed. However the High Court[104] held that this did not mean that Member States' obligations were limited to situations where the contract of insurance never existed. Decisions of the Court of Justice previously referred to situations where an insurer's avoidance of liability, which results in the victim being left without a remedy, could not exist. So, the interpretation of the text of the Directive and the UK's interpretation of such was rejected as being adopted on an 'overly punctilious textual approach',[105] as was the extension of the crime exception permitted in the Directive and enacted in national law.[106]

7.1 A SUFFICIENTLY SERIOUS BREACH?

Having held[107] that the UK was in 'plain breach' of its EU obligations, the second issue regarding the seriousness of this breach was assessed. In so doing, the Court referred[108] to the *Francovich*, *Brasserie*, and *Factortame* tests. That the Directive intended to confer rights on individuals (test 1) and the existence of a direct causal link between the breach and the damage sustained (test 3) were satisfied without need for anything other than an application of these legal principles to the facts of the case. The issue considered in depth was the second test – as historically it has been the most problematic issue as it rests with the claimant to demonstrate that the State's breach of EU law was 'sufficiently serious.'[109]

In the first 20 years of the availability of redress through State Liability, a mere 22 cases were heard before English courts,[110] and of these, a total of 9 were successful

[104] at [60].
[105] at [65-68].
[106] at [68-71].
[107] at [72].
[108] at [51].
[109] The Court of Justice has provided guidance as to the factors to be taken into consideration when assessing the existence of a sufficiently serious breach – 'Those factors include, in particular, in addition to the clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law.' Case C-278/05 *Robins v Secretary of State for Work and Pensions* [2007] ECR I-1053 [77].
[110] *R v Secretary of State for the Home Department ex p. Gallagher* [1996] 2 CMLR 951; *Bowden v South West Water Services Ltd* [1998] 3 CMLR 330; *R v Ministry of Agriculture, Fisheries and Food ex p. Lay and Gage* [1998] COD 387; *Boyd Line Management Services Ltd v Ministry of Agriculture, Fisheries and Food (No.1)* [1999] Eu. L.R. 44; *R v Department of Social Security Ex p. Scullion* [1999] 3 CMLR. 798; *R v Secretary of State for Transport ex p. Factortame Ltd (No.5)* [2000] 1 AC 524; *Evans v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 32*; R v Secretary of State for Transport ex p. Factortame Ltd (No.6)* [2001] 1 WLR 942; *Three Rivers DC v Bank of England (No.3)* [2003] 2 AC 1; *Phonographic Performance Ltd v Department of Trade and Industry* [2004] EWHC 1795 (Ch); *Sayers v Cambridgeshire CC* [2006] EWHC 2029 (QB); *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34; *Byrne v Motor Insurers' Bureau* [2008] EWCA Civ 574; *Moore v Secretary of State for Work and Transport* [2008] EWCA Civ 750; *Spencer v Secretary of State for Work and Pensions* [2008] EWCA Civ 750; *FJ Chalke Ltd v Revenue and Customs Commissioners* [2009] EWHC 952 (Ch); *Cooper v*

in obtaining a remedy for the claimant. These figures paint a picture of selective and frequent non-implementation and incorrect transposition of EU law, necessitating claimants' attempts to recover losses associated with the breach. The peculiarity and uncommon nature of State Liability as a remedy had led to a general lack of accessibility or success. Many actions for State Liability involved the State's incorrect transposition of EU law, and, whilst discretion and interpretation are natural aspects of many Directives, this did not mean that the State would have an unquestioning defence when arguing about 'possible' implementation strategies/techniques. In one of the successful damages actions, Sullivan J remarked:

> 'Whilst the mere breach of Community law will not be enough to fix the State with liability, the mere fact that the State is able to advance an arguable case in litigation does not mean that the breach is not 'sufficiently serious'. Given the lack of precision in many Directives it will not be too difficult for a Government to construct some argument in favour of a particular interpretation…'[111] Further 'The justification, as it emerged during the course of litigation, was arguable, but it should have been realised that it did not have a realistic, much less a good, prospect of success before the ECJ.'[112]

It also is important to consider that simply because the State has obtained independent advice prior to enactment of a national law does not render an impossibility of a finding of a sufficiently serious breach. In *R v Secretary of State for Transport ex p. Factortame Ltd (No.5)* the Government had sought independent legal advice as to its interpretation of the EU law in its transposition. However, this argument was not accepted by the House of Lords in establishing a defence against the State's liability as it was clear the provisions of the UK's law were discriminatory on the basis of nationality, a point expressed by the Commission to the UK prior to the UK's Act receiving Royal Assent. Ignoring such advice is within the remit of the transposing State, but in so doing the State runs the risk that it will have breached EU law, and to an extent that makes the breach 'manifest and grave' (per Lord Slynn – although disagreed with by Hoffmann and Clyde). Similarly in *Byrne v Motor Insurers' Bureau*[113] (and *Evans v Secretary of State for the Environment, Transport and the Regions*), like *Delaney*, claims in the insurance sector, the UK was held liable for damages to the claimant as it was aware of the Court of Justice's interpretation[114] of the Directive and this should have prompted the Government of the risk it was running in applying national law which was contrary to the Directive.

Despite these successful claims, the majority of State Liability actions have failed. In *R v Secretary of State for the Home Department ex p. Gallagher*, Gallagher's action for damages against the UK was unsuccessful as the UK's incorrect transposition of

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Attorney General [2010] EWCA Civ 464; *R (on the application of MK (Iran)) v Secretary of State for the Home Department* [2010] EWCA Civ 115; *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2010] EWCA Civ 103; *R (on the application of Negassi) v Secretary of State for the Home Department* [2011] EWHC 386 (Admin); *Test Claimants in Thin Cap Group Litigation v Revenue and Customs Commissioners* [2011] EWCA Civ 127; *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* [1999] 67 Con. LR 1.

[111] *R v Department of Social Security Ex p. Scullion,* Para 64.

[112] at [66].

[113] [2008] EWCA Civ 574.

[114] See Case C-63/01 *Evans v Secretary of State for the Environment, Transport and the Regions* [2003] ECR I-14447; [2005] All ER (EC) 763.

Directive 64/221 on the free movement of persons was not sufficiently serious. The Court held that the UK did not willfully deprive individuals of rights conferred by the Directive and whilst there was evidence of a manifest departure from the content of the Directive in the UK's transposition, this was not considered to be 'grave.'[115] In *R v Ministry of Agriculture, Fisheries and Food ex p. Lay and Gage*, a similar conclusion was drawn as the UK's interpretation was not 'untenable.' In comparison, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd,*[116] the Court considered that where a Member State possessed a reduced discretion, or particularly where no discretion existed in the requirement for transposition, such an infringement may, of itself, amount to a sufficiently serious breach.[117] Therefore, when determining a sufficiently serious breach of EU law, the Court held that the UK did possess legislative choice, and whilst the transposition was wrong, it was not 'obviously wrong' in substance, nor was there a 'blatant' breach of EU law.[118] The action for damages failed, although, as with the EAT's assessment of the application of EU law in *Woolworths*, here the English Court appeared to misunderstand the extent or application of EU law (a point made by the Court of Justice).

The reason for its complexity in successfully holding the State liable in damages for breach of EU law lies in the discretion that is provided in Directives. Returning to *Delaney*, the Court referred to the jurisprudence of the Court of Justice and compared and contrasted those cases where the Member State enjoyed wide discretion in implementing EU law and those where the margin of discretion was constrained. Instances of wide discretion involved assessment as to whether a 'manifest and grave disregard' for the limit of the Member States' discretion had been committed. In instances were there is little discretion open to the Member State, or where there is no discretion at all granted, it is significantly easier to establish a sufficiently serious breach. This involves the application of Lord Clyde's non-exhaustive list of factors to be taken into account.[119] Here, no one factor will be decisive or conclusive, although seriousness of the breach is demonstrably easier to establish in situations of minimal or no discretion granted to the State.[120] It is also relevant to understand that the term 'manifest and grave disregard' does not depend on the State committing an act of egregious conduct, nor does it require the finding of fault on the part of the State, rather it involves blameworthiness and should not be elevated to a search for moral culpability. Further, whilst previous cases have involved the judiciary in the UK attempting to adopt a very thorough analysis of the variances and minutiae of the administrative failure on the part of the State, this is not needed. Indeed, it probably harks back to the judges applying rules to prevent a finding of public authorities being liable in tort. 'Mere' illegality is all that is required to hold the State in breach of its EU obligations.[121]

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[115] at [26].
[116] Case C-5/94 [1996] ECR I-2553, All ER (EC) 493.
[117] at [28].
[118] at [29].
[119] Per *Factortame* [2000] 1 AC 524.
[120] at [81-84].
[121] See Marie-Pierre F. Granger, 'National Applications of Francovich and the Construction of a European Administrative ius commune' (2007) 32 *European Law Review* 157.

The application of the 'sufficiently serious' test in *Delaney* was interesting in that here, no wide discretion existed in the enactment of the 'crime exception' provision of the national law. The Court considered that no legislative choice was available as a defence by the State[122] - it even went as far as to identify that the State enjoyed no discretion at all in the transposition.[123] The language of the Directive was clear and obvious, the State's attempted defence to rely on textual gymnastics to avoid liability was tortuous and unarguable, no degree of excuseability existed, and whilst the judge held that the Secretary of State did not deliberately intend to breach EU law, he was satisfied that by taking no advice on the matter, the Secretary had deliberately run the risk of infringement. This has to be compared with *Recall Support Services Limited and others v Secretary of State for Culture, Media and Sport*[124] where the State Liability claim failed. In *Recall*, the UK was held to be in breach of its obligations under EU telecommunications law, the Directive at issue did not attempt to define an exhaustive list of grounds upon which the Member State could restrict the use of equipment known as a GSM gateway. The Directive enabled legislative action to be taken 'as defined by Member States in conformity with EU law'.[125] This, by definition, involved the Member State possessing a broad discretion in transposition which made the claimant's job of establishing a sufficiently serious breach significantly more difficult than that in *Delaney*.

Delaney points to a change in the judiciary's approach to matters of State Liability. First, the case involves the infringement of what are known as 'second order' principles of EU law - it relates to a Directive rather than the application of a fundamental Treaty provision. Secondly, it is again worth noting that this judgment was provided in the absence of any finding of the Court of Justice that the UK was in breach of its EU obligations. This significantly speeds up the process of a claimant obtaining damages for the consequences of the State's breach of EU law, and considerably reduces the costs incurred. Third, given the lack of discretion between the Directive and the required transposition into national law being so fundamental to the Court's finding that the UK was in breach to a sufficiently serious degree as to warrant the award of damages, this is particularly pertinent to *Woolworths* and the issue relating to collective redundancies and the requirement for consultation. The Collective Redundancies Directive required consultation in relation to 'establishments' whilst the UK's transposing legislation referred to 'at one establishment'. Following the reasoning in *Delaney*, it would not be difficult for the courts, if so minded, to hold the UK in breach due to the lack of discretion. *Delaney* and a case heard earlier in 2014 - *Barco de Vapor BV and others v Thanet District's, Council*,[126] have both established successful State Liability claims. The hope must be that the judiciary in the UK no longer feel required to wait for direction and instruction from the Court of Justice in order to determine where the UK has fallen below the standard required when transposing EU provisions.

8 CONCLUSIONS

[122] at 104.
[123] at 105.
[124] [2013] EWHC 3091 (Ch).
[125] Per Rose J [178].
[126] [2014] EWHC 490 (Ch).

This paper has centred around two cases heard by domestic courts in 2014. In *Woolworths*, the EAT adopted a purposive approach to the interpretation of TULRCA 1992 to give effect to a parent Directive, although it appeared to misunderstand the access to EU rights through vertical direct effect. In *Delaney*, the High Court followed a similar approach to a previous 2014 judgment when holding the UK liable in damages for losses incurred by a claimant due to the incorrect transposition of a Directive. Significantly, the High Court made this decision without the need for a finding of liability on the part of the UK by the Court of Justice, and made this decision on the basis of secondary EU law. A key aspect of the ruling and rationale presented in the judgment of *Delaney* was the lack of discretion available to the UK in the transposition which, held the Court, was decisive in satisfying a sufficiently serious breach of EU law (the second and arguably most difficult of the tests outlined in *Brasserie*). Whilst this judgment is subject to appeal, the two cases demonstrate a differing approach to enforcement of EU law in national courts.

Individuals who are denied rights granted through the membership of the EU must have an appropriately accessible and transparent system of redress available. Many individuals lack the social and economic power to secure their EU rights, and were this not the case, the system of EU law reporting and education, in the UK at least, makes awareness of laws and existing sources of help limited, disjointed and prohibitory. Individuals are also affected in their daily lives by EU rights (perhaps most visible to them through social policy initiatives) which, when denied to them through inadequate action on behalf of the State, profoundly and adversely affect their lives, but are difficult to quantify financially. This makes the system of redress through State Liability as a mere damages action restrictive and largely inappropriate. National procedural rules and systems contribute to limiting State Liability's help in achieving access to EU rights, but the change in approach through *Delaney*, and the High Court taking a lead in providing judgments against the State independent of an EU institution's action or reference to an appeal court, is a very positive movement. 2015 will host the next developments in these cases and promises to confirm the increasingly viability and vitality of the power of the domestic enforcement of EU laws for individuals.