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The General Principles of Law in the European Union Legal Order

1.1. Introduction

What is a general principle of law and how can it be distinguished from a specific rule? As a starting point, it may be said that a principle is a general proposition of law of some importance from which concrete rules derive.¹ According to this definition, the constituent elements of a principle are two: it must be general and it must carry added weight. 'General' means that it operates at a level of abstraction that distinguishes it from a specific rule. The term 'general' may have other meanings. It may refer to principles which transcend specific areas of law and underlie the legal system as a whole. It may also refer to the degree of recognition or acceptance. In that sense, an unwritten legal postulate cannot enjoy the status of a general principle unless it can somehow objectively be verified that it enjoys a minimum degree of recognition by a relevant constituency, e.g. the courts, or political actors, or the citizenry, or the constituent members of a supra-national legal order. The second element of the definition is that the principle must be of some importance. It must express a core value of an area of law or the legal system as a whole. There are clearly degrees of importance. Thus, in a narrower sense, the term general principles may be reserved for fundamental propositions of law which underlie a legal system and from which concrete rules or outcomes may be derived. Most of the principles which form the subject-matter of this book can be classified as general principles in the above sense.

General principles may be expressly stated, e.g. in a constitutional text, or deduced by a process of interpretation on the basis of legislative texts, the objectives of legislation, or the underlying values of the legal system. Where reference is made to the general principles of law as a source of law in national or supra-national legal systems, such reference usually connotes principles which are derived by the courts from specific rules or from the legal system as a whole and exist beyond written law. In that sense, the process of discovery of a general principle is *par excellence* a

¹ *The Shorter Oxford Dictionary* (ed 1993) defines the term 'principle' as meaning 'a fundamental . . . proposition on which others depend; a general statement or tenet forming the basis of a system of belief . . . a primary assumption forming the basis of a chain of reasoning'. See also in the same sense, *Oxford Dictionary of English*, Second Ed., 1989, entry 5a.

creative exercise and may involve an inductive process, where a court derives a principle from specific rules or precedent, or a deductive one, where it derives it from the objectives of law and its underlying values, or a combination of the two processes.

Principles provide justification for concrete rules. In his Hague lectures on international law, Sir Gerald Fitzmaurice observed that a principle of law, as opposed to a rule, underlies a rule and explains the reasons for its existence. A rule answers the question 'what' whereas a principle answers the question 'why'.² The importance of general principles as reasons for specific rules is aptly demonstrated in Dworkin's analysis of rights.³ Dworkin remarks that both principles and rules point to particular decisions about legal obligations but differ in the character of the direction that they give.⁴ Rules, because of their specificity and concrete character, stipulate answers. Principles do not set out legal consequences that follow automatically from them. A principle states a reason which gives arguments in one direction but does not necessitate a particular result.⁵ For example, the principle that the burdens imposed on the individual must not exceed what is necessary to achieve their objective (proportionality) does not mean that a penalty imposed on an individual in specific circumstances is necessarily illegal. It does however tell us something about the values which the courts believe underlie the legal system. In short, principles incorporate a minimum substantive content and guide the judicial enquiry on that basis. They provide strong arguments for a certain solution, they may even raise a presumption, but rarely do they dictate results in themselves. It follows that a principle must be judged on the basis of two parameters: the intrinsic value of the right that it embodies, and how well it structures the judicial enquiry.

Academic commentators tend to distinguish various types of general principles in a legal system and make classifications on the basis of diverse criteria. In EU law, the term 'general principles' is manifold.⁶ Depending on the criterion used, one may identify many such principles and draw various distinctions among them.⁷ Schermers and Waelbroeck⁸ identify the following: (a) compelling or constitutional

² Sir Gerald Fitzmaurice, 'The General Principles of International Law' (1957) 92 *Collected Courses of the Hague Academy of International Law*, p. 7.

³ R. Dworkin, *Taking Rights Seriously*, 1994, pp. 24 *et seq.* And see also C. R. Sunstein, *Legal Reasoning and Political Conflict* (OUP, 1996) at 30 and chapter 2 *passim*.

⁴ Dworkin, *ibid.*, p. 24.

⁵ *ibid.*, p. 26.

⁶ For general works on the subject see X. Groussot, *Creation, Development and Impact of the General Principles of Community Law: Towards a jus commune europeum?* (Lund University Press, 2005); U. Bernitz and J. Nergelius (Eds), *General Principles of European Community Law* (Kluwer, 2000); J. A. Usher, *General Principles of EC Law* (Longmans, 1998); R.E. Papadopoulou, *Principes Généraux du Droit et Droit Communautaire* (Bruylant, 1996); J. Schwarze, *European Administrative Law* (Sweet & Maxwell, 1992); A. Arnall, *The General Principles of EEC Law and the Individual* (Leicester University Press, 1990).

⁷ For a detailed discussion of the classification of general principles in EU law, see Groussot, *op. cit.*, pp. 12 *et seq.*

⁸ H.G. Schermers and D. Waelbroeck, *Judicial Protection in the European Union* (Sixth Ed) (Kluwer, 2001) pp. 28–30.

legal principles; (b) regulatory principles common to the laws of the Member States; and (c) general principles native to the Community legal order. The first category encompasses principles which stem from the common European constitutional heritage and are perceived by the authors to form part of natural law, such as the protection of fundamental rights. The second and third category are defined in somewhat vague terms.⁹ On the basis of their origins, Boulouis¹⁰ distinguishes between (a) *principes généraux communs aux droits des Etats membres*; (b) *principes inhérents à tout système juridique organisé*, and (c) *principes dérivés de la nature des Communautés*.¹¹ A similar classification is followed by another author who draws a distinction among the following:¹²

- (a) *Principes axiomatiques*, that is to say, principles which are inherent in the very notion of a legal order and represent ‘les exigences suprêmes du droit et de la conscience collective’.¹³ They are similar to the compelling legal principles referred to above;
- (b) *Principes structurels*, that is to say, principles which derive from the distinct characteristics of a specific legal system. In Community law this category includes, for example, the principles of primacy and direct effect; and
- (c) *Principes communs*. This category is distinct to supra-national legal systems and comprises principles common to the constituent parts of the legal system. The reference to ‘the general principles common to the laws of the Member States’ in Article 288(2) EC and to ‘the general principles of law recognised by civilised nations’ in Article 38(1)(c) of the Statute of the International Court of Justice belong to this category.

The above classifications may be helpful in certain contexts, but overall, their value seems limited. In fact, the term general principle has a relative character and, often, classifications raise more questions than they answer. It may not be easy to agree, for example, on what comes under the category of so-called *principes axiomatiques*. Also, classifications by themselves tell us little about implications and outcomes in concrete cases especially where principles conflict with each other. The importance of general principles cannot be assessed in the abstract but only by reference to

⁹ For example, the third category does not seem to include, as one might expect, the principles of free movement which have their basis in the Treaty and, for that reason, are perceived by the authors to be separate sources of law: see, *op. cit.*, pp. 29–30.

¹⁰ B. J. Boulois, *Droit Institutionnel des Communautés Européennes*, Paris, 4th Ed., (Montcherstein, 1993) p. 208 *et seq.*

¹¹ The first category includes principles developed in the case law of the ECJ on the basis of a comparative analysis of the laws of the Member States and includes, for example, principles of due process. The second includes fundamental principles deriving from the rule of law, such as legal certainty. The distinction between those categories however is not so clear-cut. See further Groussot, *op. cit.*, 12 n. 31.

¹² See Papadopoulou, *op. cit.*, p. 8 where further references are given. See further P. Pescatore, ‘*Les objectifs de la CEE comme principes d’interprétation dans la jurisprudence de la Cour de justice*’, in *Miscellanea Ganshof van der Meersch*, (Brussels, Bruylant, 1972) II, p. 325.

¹³ G. Issac, *Droit Communautaire Général*, 3rd Ed., (Masson, 1992) p. 145.

results reached in concrete cases. It is suggested that the following types of general principles may be distinguished:

- (a) *Principles which derive from the rule of law.* In this category belong, for example, the protection of fundamental rights, equality, proportionality, legal certainty, the protection of legitimate expectations, and the rights of defence. The distinct features of these principles are the following: first, they have been derived by the ECJ from the fundamental premise that the Community legal order is based on the rule of law. This is a concept akin to the German notion of *Rechtsstaat* and it means that the exercise of public power is subject to substantive and procedural limitations.¹⁴ They are therefore quintessentially principles of public law. They refer primarily to the relationship between the individual and the public authorities (both Community and national) but find diverse applications and, because of their all-embracing character, they may also be relied upon by Member States and even Community institutions.¹⁵ Second, given that the EC Treaty did not provide expressly for such principles, they have been derived by the Court of Justice primarily from the laws of the Member States and used by it to supplement and refine the Treaties. They therefore developed, in the first instance, out of necessity to fill the gaps left by written law. As we shall see, the intervention of the ECJ has been creative both in terms of methodology and in terms of outcomes. Third, principles which belong to this category can be said to pre-exist written law in that provisions of the Treaty which expressly provide for them are understood to be their specific expressions.
- (b) *Systemic principles which underlie the constitutional structure of the Community and define the Community legal edifice.* These refer to the relationship between the Community and Member States, and include primacy, attribution of competences,¹⁶ subsidiarity,¹⁷ and the duty of cooperation provided for in Article 10 EC. They may also refer to the legal position of the individual, such as the principle of direct effect, or to relations between the institutions of the Community, such as the principle of institutional balance.¹⁸ It is indicative of the extraordinary influence which the Court of Justice has had on the development of Community law that the main principles which define the constitutional structure of the Community are not provided for expressly in the Treaty but were ‘discovered’ by the Court by an inductive process. This applies in particular to the principles of primacy and direct effect, which in the Court’s own language form the ‘essential characteristics of the Community legal order’.¹⁹

¹⁴ See M. Herdegen, ‘The Origins and Development of the General Principles of Community Law’ in Bernitz and Nergelius (Eds), *op. cit.*, 3–23, at 3.

¹⁵ This applies, for example, in certain contexts to the rights of defence.

¹⁶ Article 5(1) EC. ¹⁷ Article 5(3) EC.

¹⁸ The principle was referred to by the Court in Case C-70/88 *Parliament v Council (Chernobyl)* [1990] ECR I-2041.

¹⁹ Opinion 1/91 on *Draft Agreement relating to the creation of the European Economic Area* [1991] ECR I-6079, para 21.

The two categories mentioned above are so closely intertwined in the context of the Union polity that their separation would be liable to convey a misleading impression. It is through their parallel development that the ECJ set in motion a process towards the ‘constitutionalization’ of the Treaties.²⁰ A prime example is provided here by the so-called principle of effectiveness and State liability in damages for breach of Community law. These principles were developed by the ECJ as an essential attribute of the new EU polity and were perceived in judicial reasoning as the meeting point between the principle of primacy and the fundamental right to judicial protection.

In addition to the above categories, one may distinguish other types of general principle. There are principles of substantive Community law, such as those underlying the fundamental freedoms or specific Community policies, e.g. competition or environmental law. These make up the main body of Community and Union law and are based on written law. The function of the ECJ here is different. It is not based on a process of extrapolation of principles from sources internal or external to the Treaty but on Treaty and statutory interpretation.

This book concentrates primarily on the first category mentioned above, i.e. principles emanating from the rule of law. It also covers selectively the second category, i.e. principles which underlie the constitutional structure of the European Union, although it does not aspire to cover them exhaustively.

1.2. The general principles of law derived from the laws of Member States: An overview

This section seeks to examine in more detail the development and salient features of the rule of law-based principles. Among the sources of Community law, they occupy a distinct position. They are unwritten principles extrapolated by the Court from the laws of the Member States by a process similar to that of the development of the common law by the English courts.²¹ They derive from the legal systems of the

²⁰ The term ‘constitutionalisation’ is used here to signify the process by which the EC Treaties have asserted their normative independence *vis-à-vis* the Member States, who created them in the first place, and evolved into the founding charter of a supranational system of government. Under this process, Community law and national law are no longer viewed as separate legal orders but as tiers of the same order operating under an overarching system of principles and values. Judge Timmermans identifies the following key developments in this process: (a) the characterisation of the Community as an autonomous legal system which is integrated to the national legal systems but retains its own distinct features (see Case 26/62 *Van Gend en Loos* [1963] ECR 1); (b) the establishment of primacy and direct effect; (c) the extrapolation from national laws of general principles of law and fundamental rights which govern both Community and Member State action; and (d) the elaboration of principles and rules governing remedies for the protection of Community rights in the national legal systems. See C. Timmermans, ‘The Constitutionalisation of the European Union’, 21 (2002) YEL 1.

²¹ See S. de Smith, H. Woolf and J. Jowell, *Judicial Review of Administrative Action*, Fifth Ed., (Sweet & Maxwell, 1995) p. 833.

Member States but their content as sources of Community law is determined by the distinct features of the Community polity. Thus, the Court may recognize a general principle as part of Community law although it is not recognized in the laws of all Member States. Also, the scope of a principle as applied by the Court may differ from that which it has in the law of a Member State. In short, the general principles of law are children of national law but, as brought up by the Court, they become *enfants terribles*: they are extended, narrowed, restated, transformed by a creative and eclectic judicial process. Their importance as a source of Community law lies primarily in two elements: in terms of positive law, they pose significant limitations on the policy-making powers of the Community institutions and the Member States; as judicially developed rules, they show eminently the creative function of the Court and, more generally, its contribution to the development of the Community from a supra-national organization to 'a constitutional order of States'.²²

The Court has recognized, among others, the following as general principles of Community law:

- the right to judicial protection;
- the principle of equal treatment or non-discrimination;
- the principle of proportionality;
- the principle of legal certainty;
- the principle of the protection of legitimate expectations;
- the protection of fundamental rights;
- the rights of defence.

These principles have constitutional status. They are binding on the Community institutions and a measure, whether legislative or administrative, which infringes one of them is illegal and may be annulled by the Court. They are also binding on Member States.²³ A common characteristic of the principles referred to above is that they have been derived by the Court from the laws of the Member States, sometimes with little assistance from the text of the Treaty. Respect for human rights was recognized by the Court as a general principle of Community law in the early 1970s²⁴ although there is no express reference in the Treaty to the protection of such rights. Various Treaty provisions prohibit discrimination on certain grounds but, according to the established case law, those provisions are merely specific illustrations of a general principle of non-discrimination which underlies the Community legal order.²⁵ Similarly, although a number of Treaty provisions included in the original Treaty establishing the European Economic Community could be said to incorporate the principle of proportionality, the case law developed

²² The term is used by A. Dashwood, 'The Limits of European Community Power', (1996) 21 ELR 113 at 114.

²⁴ Case 11/70 *Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle Getreide* [1970] ECR 1125.

²⁵ See e.g. Joined Cases 117/76 and 16/77 *Ruckdeschel v Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, para 7.

proportionality to a general principle of law transcending specific provisions. The same is true for the principles of legal certainty and protection of legitimate expectations. Many principles first developed in the case law were incorporated in the Treaties in subsequent amendments.

The principles referred to above are principles of public law. They have been developed by the Court in order to protect the individual and, more generally, to ensure that Community institutions and national authorities act within the remit of the rule of law. It is pertinent to point out at this juncture the dual function of equality and proportionality. Those principles operate both in the sphere of public law and in the sphere of substantive law. As principles of public law, they have been derived by the Court from the rule of law, with a view to protecting the individual *vis-à-vis* Community and national authorities. As principles of substantive law, they underlie the provisions of the Treaty on free movement, their function being to facilitate integration and promote the establishment of the internal market. As we shall see in subsequent chapters, the dual function of equality and proportionality underlies diverse trends in the case law.²⁶

1.3. Origins and development of general principles

Recourse to general principles of law was first made by the Court in early cases decided under the Coal and Steel Community Treaty. The origins of non-discrimination and proportionality are to be found in the case law of the 1950s, where the Court invoked them to control the restrictive effects on economic freedom of market regulation measures introduced by the High Authority.²⁷ In that early case law the Court confronted in an embryonic form some of the problems which it was later to face more acutely in the context of the common agricultural policy. Another area where the general principles were applied at an early stage was staff cases.²⁸ In the early years, disputes between the Communities and their employees accounted for a comparatively high percentage of the case law and provided fruitful ground for the development of Community administrative law.²⁹ As the Community evolved, the application of general principles expanded

²⁶ See below, 2.3, 3.1. and 4.1.

²⁷ See e.g. on proportionality, Case 8/55 *Fédération Charbonnière Belgique v High Authority* [1954–56] ECR 292, and on equality, Case 14/59 *Pont-à-Mousson v High Authority* [1959] ECR 215.

²⁸ See e.g. for the rights of defence, Case 32/62 *Alvis v Council* [1963] ECR 49.

²⁹ As the Community legal order developed and litigation in other areas increased, the importance of staff cases decreased correspondingly. In 1989, jurisdiction to hear staff cases at first instance was transferred to the Court of First Instance (CFI). Since 1994, the judgments of the CFI on staff cases have not been published in the official court reports but separately in the Reports of European Community Staff Cases, the full text of the judgment being available only in the language of the case. In November 2004, the Council decided to establish a judicial panel (the European Union Civil Service Tribunal) attached to the CFI with responsibility to hear staff cases

in other areas. The decade of the 1970s saw a proliferation of cases in a number of areas, including agricultural law. The basic features of equality, proportionality, and protection of legitimate expectations were laid down in the case law of that period. The recognition of fundamental rights as binding on the Community institutions also dates from that time.³⁰

Subsequently, the case law of the 1980s established that the general principles bind not only the Community institutions but also the Member States where they implement Community law.³¹ The application of general principles to national measures further expanded in the 1990s.³² The extension of general principles to action taken by national authorities has had important repercussions as regards the powers of national courts and, more widely, the public laws of the Member States. It enabled national courts, often following a reference to the Court of Justice, to review the compatibility of a wide range of national measures with standards higher than those ordinarily applicable under national administrative law, thus opening the way for reverse discrimination against claims based purely on national law. This is particularly the case with the United Kingdom where the Diceyan tradition and the doctrine of parliamentary supremacy imposed strict limitations on the power of the courts to review the discretion of public authorities. The late 1980s saw a separate but related development in the sphere of constitutional law, namely the gradual transformation of primacy from a general principle of constitutional law to a specific obligation on national courts to provide full and effective protection of Community rights, if necessary, by establishing new remedies.³³ This shift of emphasis from rights to remedies and the gradual inroads of Community law into the national systems of remedies triggered a trend towards convergence of national public laws.³⁴

The most important developments in recent years have been the increased resonance of fundamental rights, the expansion of the application of general principles to national measures and the further colonization of the law of remedies through a broad interpretation of the principle of effectiveness and the right to judicial protection. The most remarkable development is undoubtedly the first. Never in the history of the European Communities has the Court attributed so much importance to the protection of fundamental rights. As we shall see, human rights have expanded both as regards their scope of application and as regards the intensity of review exercised by the ECJ.³⁵

at first instance. See Council Decision 2004/752, OJ 2004, L 333/7. This is a welcome and long overdue move.

³⁰ *Internationale Handelsgesellschaft*, *op. cit.*, n. 24; Case 4/73 *Nold* [1974] ECR 491; Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

³¹ See Joined Cases 201 and 202/85 *Klensch v Secrétaire d'État à l'Agriculture et à la Viticulture* [1986] ECR 3477.

³² See Case C-260/89 *ERT* [1991] ECR I-2925.
³³ See e.g. the obligation of national courts to grant interim measures: Case C-213/89 *Factortame and Others* [1990] ECR I-2433; and the development of Member State liability in damages for breach of Community law first introduced in Joined Cases C-6 and C-9/90 *Franovich* [1991] ECR I-5357. Those developments are discussed in Chapters 9 and 11.

³⁴ See further J. Schwarze (ed.), *European Influences in Administrative Law*, Sweet & Maxwell, 1998.

³⁵ See below Chapter 7.

Since its establishment in 1989,³⁶ the Court of First Instance also applies the general principles of law within the limits of its jurisdiction.³⁷ Far from being merely a fact-finding tribunal, the CFI has made its own mark in the case law.³⁸ In some areas, it has applied a higher standard of scrutiny than hitherto applied by the Court of Justice, adopting a more critical stance towards the discretion of the Community institutions and requiring more exacting standards in their decision-making.³⁹ Overall, however, in the sphere of general principles, the case law seems balanced. In some cases the Court of Justice has reversed decisions of the CFI taking a more restrictive view of the rights of the individual⁴⁰ but in others it has reversed decisions of the lower court giving a broader definition

³⁶ See Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities, OJ 1988 L 319, p. 1, as amended.

³⁷ Currently, the CFI has jurisdiction to hear in first instance the following actions:

- actions for judicial review and for failure to act brought by individuals (natural persons and companies) under Articles 230 and 232 EC;
- actions based on the non-contractual liability of the Community brought by individuals under Article 235 EC;
- actions in contract brought by individuals against the Community pursuant to an arbitration clause under Article 238 EC;
- staff cases, i.e. disputes between the Community and its staff (Article 236 EC).

In addition, since July 2004, jurisdiction to hear some actions brought by Member States has been transferred to the CFI. In particular, the CFI hears actions for judicial review and for failure to act brought by Member States against:

- acts of the Commission, excluding decisions on further cooperation provided for in Article 11(a)EC;
- decisions of the Council on state aid under Article 88(2) EC;
- acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade under Article 133 EC;
- acts of the Council by which it exercises implementing powers in accordance with the third indent of Article 202 EC.

See Article 51 of the Statute of the ECJ as amended by Council Decision 2004/407 (OJ L 132/5) which came into force on 1 June 2004, and subsequent amendments. This extension of the jurisdiction of the CFI is to be welcomed.

³⁸ For an initial assessment, see N. Brown, 'The First Five Years of the Court of First Instance and Appeals to the Court of Justice: Assessment and Statistics', (1995) 32 CMLRev 743.

³⁹ See e.g. Joined Cases T-163 and T-165/94 *Koyo Seiko v Council* [1995] ECR II-1381 where the CFI annulled an anti-dumping regulation of the Council. Upheld on appeal: Case C-245/95 P [1998] ECR I-401. See also Joined Cases T-79/89 etc. *BASF AG and Others v Commission* [1992] ECR II-315, reversed on appeal: Case C-137/92 *Commission v BASF and Others* [1994] ECR I-2555; Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313; reversed on appeal: Case C-141/02 P *Commission v T-Mobile Austria GmbH*, judgment of 22 February 2005; Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-02365, reversed on appeal: Case C-263/02 P *Commission v Jégo Quééré*, judgment of 1 April 2004.

⁴⁰ See e.g. on the requirement to give reasons, Case T-289/94 *Innamorati v Parliament* [1995] ECR SC II-393; reversed on appeal: Case C-254/95 P *Parliament v Innamorati* [1996] ECR I-3423. For a prime recent example, see Case T-227/95 *AssiDomän Kraft Products and Others v Commission (Woodpulp III)* [1997] ECR II-1185; reversed on appeal: Case C-310/97 P *Commission v AssiDomän Kraft Products aB and Others* [1999] ECR I-5363. Subsequently, however the CFI interpreted the ECJ's judgment restrictively, see Case T-7/99 *Medici Grimm v Council* [2000] ECR II-2671. The cases are discussed at pp. 31 and 262 below.

to general principles.⁴¹ The CFI has contributed not only by applying established principles of law but also by interpreting new principles recognized by the Community legal order such as the citizen's right of access to information held by Community authorities.⁴² An area where the CFI has played a distinct rôle is in determining the requirements of the rights of defence mainly in the context of competition law. The influence of the CFI in applying the general principles of law is aptly demonstrated in *Altmann and Casson v Commission*.⁴³ There, the CFI effectively reversed the earlier judgment of the Court of Justice in *Ainsworth*⁴⁴ and annulled on grounds of incompatibility with the general principle of equal treatment a provision of Community law which the Court of Justice had found to be lawful at the time of its adoption.⁴⁵ *Altmann* demonstrates the considerable impact of the CFI in the application of general principles and more widely its contribution to the development of Community jurisprudence. More recently, the CFI has favoured a more liberal interpretation of the *locus standi* of individuals under Article 230(4) than the ECJ⁴⁶ and a rift has appeared between the two courts as regards the conditions of Community liability in damages under Article 288(2) following the judgment of the ECJ in *Bergaderm*.⁴⁷ In some cases, the two courts differ in their understanding as to the scope and content of general principles but not in the outcomes which they reach.⁴⁸

Two conclusions may perhaps be drawn from this brief historical survey. First, although the general principles of law were initially invoked to cover gaps in the Treaty and the written law of the Community, their importance has not lessened as the Community legal order develops. The proliferation of Community measures and, in some areas of law, the resulting polynomy have made recourse to general principles equally necessary. Second, the application of general principles has

⁴¹ See e.g. in relation to the rights of defence, Case C-294/95 P *Ojha v Commission* [1996] ECR I-5863 reversing the decision of the CFI in T-36/93; Case C-404/92 P, *X v Commission* [1994] ECR I-4737 where the Court of Justice defined more broadly than the CFI the right to medical confidentiality; and more recently, Case C-389/98 P *Gevaert v Commission* [2001] ECR I-65 and Case C-459/98 P *Martinez del Peral Cagigal v Commission* [2001] ECR I-135, where the ECJ annulled Commission decisions on staff cases as being contrary to the principle of equal treatment; Case C-174/98 P *Netherlands v van der Wal* [2000] ECR I-1, where the ECJ interpreted more extensively the right of access to documents.

⁴² Treatment of this right is beyond the scope of this book.

⁴³ Joined Cases T-177 and T-377/94 *Altmann and Casson v Commission* [1996] ECR II-2041.

⁴⁴ Joined Cases 271/83 and 15, 36, 113, 158 and 203/84 and 13/85 *Ainsworth v Commission and Council* [1987] ECR 167.

⁴⁵ The judgments of the Court of Justice do not constitute binding precedent for the CFI except to the extent provided in Article 54 of the Statute of the Court of Justice or where the principle of *res judicata* applies. See also Case T-162/94 *NMB* [1996] ECR II-427.

⁴⁶ See *Jégo-Quéré*, *op. cit.*, n. 39.

⁴⁷ See Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission* [2000] ECR I-5291 and below Chapter 10.

⁴⁸ See e.g. Case C-315/99 P *Iseri Europa v Court of Auditors* [2001] ECR I-5281, where the ECJ expressly held, reversing the CFI, that the right to a hearing can be invoked against the Court of Auditors by individuals or entities which are expressly criticized in its reports. The ECJ however dismissed the appeal on the ground that the illegality committed was not capable of influencing the content of the report.

gradually expanded both with regard to the areas where they apply and with regard to the requirements that they impose. One area of law, for example, where equality, proportionality, and protection of legitimate expectations have increasingly been applied since the 1980s is the external relations law of the Community.⁴⁹ Also, recent years saw moves towards the recognition of a new generation of human rights, both in the political sphere (such as the obligation of transparency and the cognate right of access to information held by public authorities) and the social sphere (such as the rights of trans-sexuals under the notion of sex discrimination).⁵⁰ Such developments are instructive of the general principles as instruments of judicial methodology. They are flexible, lend themselves to an evolutive interpretation of the law, and make for a judiciary more responsive to social change.

1.4. From general principles to constitutional texts: The gradual formalization of EU Law

One of the most striking features in recent years has been the trend towards the formalization of Community law. This refers to the tendency to provide for the express recognition and entrenchment of rights in Treaty texts. There has been an increase in the adoption of legislative instruments, principally of a 'constitutional' nature, outlining the limits of lawful government and asserting rights. As Professor Sunstein has noted in a different context, we are 'in the midst of a period of enormous enthusiasm for rule-bound justice'.⁵¹ The origins of this process can be traced in the Treaty of Maastricht. The TEU enshrined for the first time respect for fundamental rights at Treaty level and provided expressly for fundamental constitutional doctrines, namely the attribution of powers, subsidiarity, and proportionality.⁵² The Treaty of Amsterdam reiterated this tendency. Along with declaring commitment to the principles of liberty, democracy, respect for human rights, and the rule of law,⁵³ it introduced a system for the enforcement of those principles in the event that a Member State failed to respect them.⁵⁴ Further, it accorded constitutional status to the right of access to documents,⁵⁵ a right not traditionally recognised in the constitutions of the Member States, and expanded the principle of non-discrimination.⁵⁶

⁴⁹ See e.g. Case C-24/90 *Werner Faust* [1991] ECR I-4905.

⁵⁰ See Case C-13/91 *P v S and Cornwall County Council* [1996] ECR I-2143.

⁵¹ C. Sunstein, *Legal Reasoning*, *op. cit.*, n. 3 ix.

⁵² See Article 6(2) (formerly Article F(2)) TEU and Article 5 EC.

⁵³ See Article 6(1) TEU as amended by the Treaty of Amsterdam.

⁵⁴ See Article 7 TEU which has now been amended, and further extended, by the Treaty of Nice. ⁵⁵ Article 255 EC.

⁵⁶ Article 13 EC. This all-embracing provision provides the legal basis for adopting measures 'to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

This trend was reiterated by the adoption of the EU Charter of Fundamental Rights in 2000⁵⁷ which sought to enshrine ‘the very essence of European *acquis* regarding fundamental rights’.⁵⁸ It was further followed by the adoption of secondary Community legislation.⁵⁹ The EU Constitution, of which the Charter now forms part, represents the culmination of the process of formalization.⁶⁰

Although the above developments have been based to some extent on diverse political motives and serve a variety of objectives, taken together they illustrate that we live in the era of legislative general principles. To a great extent, statutory recognition of individual and Member State rights illustrates the quest for Union legitimacy in the post-Maastricht era. But its bases may lie deeper. It represents a new political awareness on the part of the politicians and the citizens, a cry for participation in an era of globalization, where sovereignty eludes the nation state and exposes it to new centres of power, leaving it unaided by the veil of national law. In an era of subtle but far-reaching political change, enshrinement of values in constitutional texts seeks to achieve protection, legitimacy, legal certainty and historical continuity. At the heart of this new European constitutionalism lies an aspiration that a new social and political order can be attained and that the transfer of powers to supra-national organizations is acceptable provided that it is accompanied by shared commitment to abstract principles imbued by liberal ideals. Whether such aspirations are justified remains to be seen. The recent referenda on the EU Constitution in France and the Netherlands suggest that the people are not in tune with the politicians and the project of European integration may be going too fast.⁶¹

How do these developments relate to the general principles of law and the Court of Justice? Two points may be made here. The first refers to the interaction between

⁵⁷ The Charter received the unanimous agreement of the Heads of State in the Biarritz European Council held on 13 and 14 October 2000. It has been solemnly proclaimed by, and binds, the Community institutions. Given, however, the strong objections raised by some Member States, it was decided in the Nice summit that the Charter will not have binding effect on the Member States. For a discussion, see p. 356 below.

⁵⁸ See Commission Communication on the Legal Nature of the draft Charter dated 18 October 2000, para 1.

⁵⁹ See e.g. the equality directives: Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 303/16; Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L 180/22; Directive 2002/73 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, OJ 2002, L 269/15. Note also that a number of directives amending previous directives incorporate principles of the existing case law: see e.g. Article 27(2) of Directive 2004/38 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation No 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96, OJ 2004, L 158/77; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002, L 269/15, Article 5(2).

⁶⁰ For the EU Constitution, see 1.5 below.

⁶¹ See n. 72 below.

the Court and the Member States, which as sovereign political actors, are competent to amend the founding treaties. The second relates to the workload of the Court.

Many of the principles which have been entrenched by successive Treaty amendments were first recognized by the Court of Justice. This is true, for example, in relation to fundamental rights and the principle of proportionality. At a more concrete level, it is also true with regard to the iconoclastic judgment in *Chernobyl*.⁶² In that case, led by the Opinion of Advocate General van Gerven, the Court held that the Parliament had *locus standi* to challenge the validity of Community acts although, at that time, Article 173 EEC, the predecessor to Article 230 EC, did not mention the Parliament as a potential plaintiff.⁶³ The *Chernobyl* judgment itself was based on the fundamental right to judicial protection and the principle of institutional balance. The judgment subsequently found express recognition in the Treaty of European Union which amended Article 173 EC in accordance with the pronouncements of the Court. Thus, in relation to the general principles, the Court has followed a pro-active approach. The case law has showed the way, with subsequent Treaty amendments endorsing in many cases judicial developments.⁶⁴ The fact that the case law has prompted law reform in that way is telling of the Court's contribution to the political process and the evolution of the Union. This is not to say that the Member States have always *willingly* endorsed judicial developments nor that the Court is always a step ahead of the legislature. In some cases, the ECJ has anticipated legislative amendments by interpreting existing provisions in the light of forthcoming changes⁶⁵ or has heeded interpretations formally endorsed by the Member States⁶⁶ or has refused to take a step forward, seeking instead guidance from the politicians.⁶⁷ Yet in other areas, Member States have sought to limit the remit of the Court as a *quid pro quo* for allowing Community competence.⁶⁸ The relationship between the ECJ and the other organs of government is a dialectical one and the formalization of Community law has been the result of their interaction.

⁶² *Op. cit.*, n. 18.

⁶³ See also the earlier Opinion of Darmon AG in Case 302/87 *Parliament v Council (Comitology Case)* [1988] ECR 5615.

⁶⁴ For another such example, see Case 294/83 *Partie Ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339. The ruling of the Court in that case was inserted in Article 173(1) (now 230(1)) EC by the TEU.

⁶⁵ See e.g. Case C-361/91 *Parliament v Council (Fourth Lomé Convention Case)* [1994] ECR I-625.

⁶⁶ See e.g. the post-*Barber* case law which interpreted the *Barber* judgment in accordance with the *Barber* Protocol. See Case C-109/91 *Ten Oever* [1993] ECR I-4879, C-110/91 *Moroni* [1993] ECR I-6591, Case C-152/91 *Neath* [1993] ECR I-6935, and Case C-262/88 *Barber* [1990] ECR I-1889.

⁶⁷ See e.g. Opinion 2/94 on the Accession of the EC to the ECHR [1996] ECR I-1759; Case C-249/96 *Grant v South West Trains Ltd* [1998] ECR I-621; Joined Cases C-122/99 P and C-125/99 P *D and Sweden v Council* [2001] ECR I-4319.

⁶⁸ Note in this context the limitations imposed on the Court's jurisdiction by the Treaty of Amsterdam as regards Title IV of the EC Treaty (visas, asylum and immigration, Article 68 EC) and Third Pillar matters (Article 35 TEU).

The second point is the following. The recognition of new rights has profound repercussions for the Court of Justice. It enhances its constitutional jurisdiction. More importantly, it adds to its workload which, in turn, has both quantitative and qualitative consequences. In quantitative terms, it affects the length of the proceedings.⁶⁹ Its qualitative effects are more subtle. Inevitably, an increase in legislation, countenanced by greater awareness of Community law among citizens and successive enlargements, leads to more litigation. In terms of judicial time, new rights compete with existing ones. To give an example, the right of access to documents has already generated considerable case law. The case law itself has a tendency to generate more litigation as a judicial pronouncement which solves one problem may itself give rise to others. Shortly stated, the point is this: excessive workload forces a court to rely on precedent more than it might otherwise do and poses the risk that such reliance may be mechanical. A busy Court favours self-restraint over activism but this is a self-restraint which is the result of neither conviction nor studied deference to the legislature. It is rather one which is liable to hinder conceptual innovation and disadvantage liberal causes.⁷⁰ One could counter-argue that excessive case law produces the opposite effect. The uncontrollable proliferation of judgments may have a liberating effect, in that, faced with too much precedent, the judges may be tempted to ignore it. In such a case, precedent ceases to fulfil its function. The losers are clear, namely coherence and certainty, but the winners are not. Either way, judicial protection may suffer. It is not suggested here that new rights should not be recognized. Nor is there any intention to criticize the Court. In fact, the Court of Justice and the Court of First Instance have coped admirably with the overwhelming increase in their case load and have made a major effort to push forward proposals for reform. The discussion is intended to illustrate precisely the need for reform in the Community judicial architecture so as to enable the Court to perform its function as the Supreme Court of the Union. This reform is currently taking place through the broadening of the jurisdiction of the CFI and the establishment of judicial panels.⁷¹

1.5. The Constitution and its values

The process of formalization of Community law reached its apex with the adoption of the Treaty establishing a Constitution for Europe.⁷² Following its

⁶⁹ See the detailed study of C. Turner and R. Munoz, 'Revisiting the Judicial Architecture of the European Union', (1999–2000) 19 YEL 1.

⁷⁰ See R.A. Posner, *The Federal Courts: Challenge and Reform* (Harvard University Press, 1999), 324 *et seq.*

⁷¹ See Articles 225 and 225a EC.
⁷² The Treaty establishing a Constitution for Europe was adopted by the Convention on the Future of Europe on 13 June and 10 July 2003 and submitted to the President of the European Council in Rome on 18 July 2004. It formed the basis of negotiations in the Inter Governmental Conference, which began under the Italian Presidency on 4 October 2003, but the European

rejection in the French and Dutch referenda, the future of the Constitution is highly uncertain but it is conducive to examine here its values as reflected in Article 2. These values have declaratory character and represent the EU legal order as it currently stands. They have also, to a great extent, been based on the case law of the ECJ on general principles.

Article 2 reflects the values of the Union as follows:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article I-2 is more comprehensive than the provision of Article 6(1) TEU currently in force.⁷³ It operates on three levels: moral, political and legal. It seeks to encapsulate the spirit of liberal democracy and, more generally, 'the cultural, religious and humanist inheritance of Europe'.⁷⁴ It provides ideological continuity with the constitutional traditions of the Member States and defines what the Union stands for.⁷⁵ In doing so, it seeks to forge a common political identity and also serves as a postulate: respect for the values enshrined therein becomes a political and legal imperative both for the Union institutions and the Member States. Article I-2 provides a declaration of nascent nationhood and lays down the underpinnings for the recognition of European citizenship in subsequent provisions of the Constitution. The values of Article I-2 are 'indivisible and universal'.⁷⁶

Council held in Brussels on 12 December 2003 failed to reach agreement on the final text. The major stumbling block proved to be the provisions allocating voting rights in the Council of Ministers. Following some amendments, it was adopted by the European Council on 17/18 June 2004 under the Irish Presidency. Under Article III-447(1) the Constitution cannot come into force unless it is ratified by all Member States in accordance with their respective constitutional requirements. As of the end of June 2005, it has been ratified by ten Member States but France and Netherlands failed to ratify it as it was rejected in referenda held on 29 May and 1 June 2005 respectively. Both countries rejected the Constitution decisively (France by 54.68% and the Netherlands by 62.8%). The European Council of Luxembourg held on 16/17 June 2005 called for a period of reflection. Some Member States have declared their commitment to continue with the ratification process. It is however very difficult to imagine how the Constitutional Treaty could be adopted in its present form. For the text of the Constitutional Treaty, see OJ 2004 C 310 (16 December 2004). For a discussion, see *inter alia*, J. Ziller, *La nouvelle Constitution européenne* (Paris: Editions la Découverte, 2004); D. Triantafyllou, *La Constitution de l'Union européenne* (Brussels: Bruylant, 2005).

⁷³ Article 6(1) TEU states as follows: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'

⁷⁴ See Preamble to the Constitution, recital 1.

⁷⁵ Note also the grand and emotive language used in the Preamble to the Constitution and the Preamble to the EU Charter of Fundamental Rights which is included in Part II of the Constitution. The former at recital 1 refers to the 'universal values of the inviolable and inalienable rights of the human person, democracy, equality, freedom and the rule of law'. The Preamble to the EU Charter on Fundamental Rights, paragraph 2, states that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity'.

⁷⁶ See Preambles, *ibid*.

The legal significance of the provision is twofold. Respect for these values is a condition for admission to membership of the European Union.⁷⁷ Also, Article I-2 occupies a distinct position in the Constitutional Treaty and features at the top tier of the hierarchy of norms of EU law. It thus provides a prime point of reference for the interpretation of other provisions of the Constitution and, in effect, enhances the constitutional jurisdiction of the ECJ. There is no doubt that the values listed therein are abstract. However, shared commitment to abstract ideals is a feature of all constitutions. The purpose of Article I-2 is precisely this, i.e. to function as a source of convergence, to lay down a set of parameters within which political conflict can be resolved and social unity achieved.⁷⁸ Whether such idealism will survive the test of time remains to be seen. There is however a clear intention to cultivate the emergence of a European demos by laying down the attributes of a moral identity and a political community. A concept which is of particular relevance in this context is the concept of 'solidarity'. This transcends the relations between the individual and the State and refers to a sense of community. According to Bogdandy, it embodies an aspiration to make life better, 'to create new bonds' and 'the social basis for a broader polity in which the individual acts as a responsible *social being*'.⁷⁹

Article I-2 underwent several revisions in the process of the drafting of the Constitution and the final text is, overall, better than previous versions. It is noteworthy that the reference to the rights of minorities was included in the final text by the Inter Governmental Conference of June 2004. This follows the pattern of many Central and Eastern European constitutions which make express reference to the protection of minority rights separately and in addition to classic human rights.⁸⁰ The reference to human dignity as the first value in Article I-2 is not accidental. Human dignity 'constitutes the real basis of fundamental rights'.⁸¹ It is granted prevalent position in the Constitutions of many Member States,⁸² features in the very first Article of the EU Charter⁸³ and lies at the 'very essence' of the ECHR.⁸⁴ It has also been recognized by the ECJ⁸⁵ and underlies key judgments on

⁷⁷ See Article I-1(2).

⁷⁸ See here the discussion by Sunstein, *op. cit.*, n. 3 above p. 4 and pp. 35 *et seq.*

⁷⁹ A. von Bogdandy, 'The Preamble' in Bruno de Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe* (EUI, 2003), 3–10, at 9.

⁸⁰ See e.g. the Slovakian Constitution of 1992, Articles 33–34.

⁸¹ See Updated Explanations relating to the text of the Charter of Fundamental Rights issued by the Praesidium of the Convention, CONV 828/1/03, p. 4.

⁸² See e.g. Article 2 of the Greek Constitution.

⁸³ See Article II-61 of the Constitution which declares that 'Human dignity is inviolable'. See also the preamble to the 1948 Universal Declaration of Human Rights which states that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.

⁸⁴ See *SW v United Kingdom* and *CR v United Kingdom* (1995) 21 EHRR 363, paras 44 and 42, quoted by S. Millns, 'Bio-Rights, Common Values and Constitutional Strategies' in Tridimas and Nebbia (eds), *EU Law for the 21st Century*, Vol II, (Oxford: Hart Publishing, 2004) 387–402, at 393, n. 20.

⁸⁵ See Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079, paras 70–77.

non-discrimination law.⁸⁶ Some of the values laid down in Article I-2, such as democracy and non-discrimination, are exemplified and elaborated upon by other provisions of the Constitution. In relation to democracy, suffice it here to say that Article I-2 defines the Union as ‘a society of pluralism, tolerance, justice, solidarity and non-discrimination’. This statement, which is reminiscent of the case law of the European Court of Human Rights,⁸⁷ envisages a notion of democracy which extends beyond majoritarianism and incorporates a broad conception of human rights. A further change made by the 2004 Inter Governmental Conference was the express reference to the principle of equal treatment between men and women in the final sentence of Article I-2.

1.6. The general principles as a source of Community law

1.6.1. The gap-filling function of general principles

Recourse to general principles as a source of law may be made by a court either as a result of an express reference contained in a legal text (*renvoi obligatoire*) or spontaneously by the court itself in order to fill a gap in written law (*référé spontané*).⁸⁸ An example of an express reference is provided by Article 38(1)(c) of the International Court of Justice which mandates that court to apply the general principles of law recognized by civilized nations.⁸⁹ The EC Treaty contains two such references, an express one in Article 288(2) and a more oblique one in Article 220. Further references to specific principles have now been included in Articles 6(1) and (2) of the TEU and the EU Constitution.⁹⁰ These provisions are examined elsewhere in this book. For the time being, it is worth looking more closely at the function of general principles in judicial reasoning.

In any system of law a situation may arise where a *lacuna* exists in that a given situation is not governed by a rule of law, statutory or judicial. In such a case, the court having jurisdiction will resolve the case by deducing from the existing rules a rule which is in conformity with the underlying premises on which the legal system is based. This process is by no means peculiar to the Community legal order. It is practised by national courts, including in particular the French Conseil d'État on

⁸⁶ *P v S*, *op. cit.*, n. 50; Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary for Health*, judgment of 7 January 2004.

⁸⁷ The Court of Human Rights has stressed that the hallmarks of a democratic society include ‘pluralism, tolerance and broadmindedness’: see e.g. *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, judgment of 27 September 1999, para 87.

⁸⁸ See D. Simon, ‘Y a-t-il des principes généraux du droit communautaire?’, (1991) 14 *Droits*, 73.

⁸⁹ See below, 1.10.

⁹⁰ See Article 6 TEU, as amended by the Treaty of Amsterdam, and Article I-2 of the EU Constitution.

which the Court was modelled.⁹¹ *Lacunae* are more likely to arise in Community law, especially in the early stages in its development, since it is a new legal order. Community law simply lacks the accumulated judicial experience, buttressed in case law, that national legal systems possess. The need to fill gaps is exacerbated by the distinct characteristics of the Community legal order. Community law is not only a new legal order but also a novel one in the sense that it has no historical precedent or indeed contemporary equivalent.⁹² It represents a new development in the law of international organizations. Also, the EC Treaty is a *traité cadre*. It provides no more than a framework. It is rampant with provisions overpowering in their generality and uses vague terms and expressions which are not defined. It bestows the Court with very broad powers to develop Community law. Further, Community law seeks to supplement rather than to substitute the national legal systems. It is logical for the Court, in filling any gaps which arise, to resort to and gain inspiration from the laws of Member States. Finally, by its nature, the Community is a dynamic entity. The founding and amending treaties are moulded by teleology. The EC Treaty itself sets final objectives and intermediate goals, the notion of incremental integration being inherent in its provisions.⁹³ Recourse to general principles enables the Court to follow an evolutive interpretation and be responsive to changes in the economic and political order.

Those features peculiar to Community law might explain why the Court is more 'active' than some national courts, i.e. why, as it is often said, it engages in judicial law-making.⁹⁴ The need to fill *lacunae* by recourse to national laws was expressly referred to in *Algera*, one of the early cases, where, faced with the problem of revocation of administrative acts granting rights to individuals, the Court stated:⁹⁵

The possibility of withdrawing such measures is a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries.

⁹¹ See, for example, to this effect the comments of commissaire du gouvernement Letourneur, quoted in D. Simon, *op. cit.*, n. 88 above, p. 73: 'à côté des lois écrites existent de grands principes dont la reconnaissance comme règles de droit est indispensable pour compléter le cadre juridique dans lequel doit évoluer la Nation, étant donné les institutions politiques et économiques qui sont les siennes'.

⁹² Even if it is true that specific aspects of the legal and political system of the Community are found in other organizations, no organization combines all those aspects in the way that they are combined in the European Community.

⁹³ In its reasoning the Court sometimes inserts the proviso 'in the present state of Community law'; see e.g. Case 81/87 *The Queen v Treasury and Commissioners of Inland Revenue, ex p Daily Mail and General Trust plc* [1988] ECR 5483. It will be noted, however, that the term 'integration' lacks a specific legal meaning. See further for a discussion of the term, G. Soulier, *L'Europe*, p. 271.

⁹⁴ See T. Tridimas, 'The European Court of Justice and Judicial Activism', (1996) 21 ELR 199.

⁹⁵ Joined Cases 7/56 and 3-7/57 *Algera v Common Assembly* [1957-58] ECR 39 at 55.

Two points may be made at this juncture. First, it must be emphasized that the significance of general principles is not exhausted in their gap-filling function. They express constitutional standards underlying the Community legal order so that recourse to them is an integral part of the Court's methodology. The second point follows from the first. Once it is accepted that the general principles embody constitutional values, they may bear determinative influence on the interpretation of written rules, irrespective of the existence of gaps. In fact, the rational sequence may be reversed. Legislative provisions may be interpreted in the light of the underlying premises of the legal system in such a way as to leave gaps which then need to be filled by recourse to general principles. That is in effect what happened in *Chemobyl* where the Court, in order to avoid an openly *contra legem* interpretation of Article 173 (now 230) EC, established the existence of a procedural gap which it then filled by recourse to the principles of institutional balance and effective judicial protection.⁹⁶

1.6.2. Article 220

Article 220(1) EC gives to the Court responsibility 'to ensure that in the interpretation and application of this Treaty the law is observed'. At first sight, this appears to be a tautology. Is it not, after all, obvious that the function of a court is to uphold the law? In fact, this concise and seemingly innocuous provision is replete with values, and arguably the most important provision of the founding Treaties. It establishes that the Community is bound by the rule of law and recognizes the separation of powers. When the European Communities were established in the 1950s, they were a political experiment. They set in motion a dynamic process projecting economic integration as the best way of enhancing peace and prosperity, as 'the thin entering wedge necessary to begin to dismantle the state's monopoly on authority'.⁹⁷ The postulation of Article 220 EC gave a clear signal that the founders of the EEC intended it to be not simply an international organization but a nascent form of a supra-national order founded on solid liberal credentials. Article 220 grants the Court responsibility to oversee the Community institutions so as to ensure that they do not extend their mandate under the Treaty. At the same time, it requires the Court to supervise the Member States thus releasing the integrative potential of the new entity. Article 220 thus enables the Court to oversee both branches of political authority, i.e. the Community institutions and the Member States, and signals an early transition from 'power-oriented' to 'rule-oriented' politics.⁹⁸

Article 220 however does not provide any substantive standards of review. As has been noted, it assumes the existence of a legal order but tells us nothing about

⁹⁶ *Chemobyl*, *op. cit.*, n. 18 above, discussed below' 1.7.2.

⁹⁷ See J. P. Trachtman, 'L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity', (1992) 33 *Harvard International Law Journal* 459, p. 465.

⁹⁸ The terms paraphrase J. H. Jackson, *The World Trading System* (Boston: MIT Press, 1989), at 85 who uses them in the context of the WTO.

its substantive principles.⁹⁹ Its cardinal importance lies precisely in that it mandates the Court to work out a system of legal principles in accordance with which the legality of Community and Member State action must be determined. In assessing the compatibility of Member State action with the Treaty, the Court is guided by the objectives and scheme of the Treaty, giving preference to a teleological interpretation of Community norms. Where it exercises judicial review of Community measures, the Court has even less guidance. Article 220 establishes the principle of legality as a paramount and overriding principle of Community law. Also, since it contains no substantive principles of its own, it mandates the Court to have recourse to the legal traditions of the Member States and extrapolate principles of law found therein, with a view to developing a notion of the rule of law appropriate to the Community.¹⁰⁰ In effect, Article 220 does no less than grant the Court jurisdiction to create ‘constitutional doctrine by the common law method’,¹⁰¹ drawing inspiration from the liberal constitutional tradition. According to this model, the general principles of law as applied by the Court can be said to represent a common constitutional heritage. As Dutheillet de Lamothe AG put it:¹⁰²

The fundamental principles of national legal systems ... contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges, one of the essential aims of which is to ... ensure the respect for the fundamental rights of the individual.

In conclusion, the fundamental justification of judicial recourse to the general principles of law should be sought in the function which those principles fill in the Community legal order. They enable the Court to develop a notion of the rule of law appropriate to the Community polity and at the same time ensure conceptual and ideological continuity with the legal systems of the Member States.

1.6.3. The Court’s evaluative approach

It has become obvious from the above that the search for principles in the legal systems of Member States is not a mechanical process. The Court does not make a comparative analysis of national laws with a view to identifying and applying a

⁹⁹ See T. Koopmans, ‘The Birth of European Law at the Crossroads of Legal Traditions’, (1991) 39 AJCL 493, at 495.

¹⁰⁰ The Court has certainly understood Article 220 as giving it jurisdiction to gain inspiration from the laws of the Member States: see e.g. Joined Cases C-46 and C-48/93 *Brasserie du Pêcheur v Germany* and *the Queen v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR I-1029, paras 27, 41.

¹⁰¹ See R. Posner, *Law and Legal Theory in the UK and the USA*, (Oxford University Press, 1996) p. 14. The comparatist will find it difficult to resist the temptation to draw parallels with the US Supreme Court. See, *inter alia*, K. Lenaerts, *Le Juge et la Constitution aux États-Unis d’Amérique et dans l’Ordre Juridique Européen*, 1988 and H. Rasmussen, *On Law and Policy in the European Court of Justice*, (Martinus Nijhoff, 1986).

¹⁰² *Internationale Handelsgesellschaft*, *op. cit.*, n. 24 above, at 1146.

common denominator. Such an exercise would be as impractical as it would be futile. Rather, it makes a synthesis seeking the most appropriate solution on the circumstances of the case. The essence of the Court's evaluative approach was expressed by Lagrange AG as follows:¹⁰³

... the case law of the Court, in so far as it invokes national laws (as it does to a large extent) to define the rules of law relating to the application of the Treaty, is not content to draw on more or less arithmetical 'common denominators' between the different national solutions, but chooses from each of the Member States those solutions which, having regard to the objects of the Treaty, appear to be the best or, if one may use the expression, the most progressive. That is the spirit ... which had guided the Court hitherto.

In accordance with the tenor of the above quotation, it has been said that the Court seeks such elements from national laws as will enable it to build a system of rules which will provide 'an appropriate, fair and viable solution'¹⁰⁴ to the legal issues raised, and the judicial enquiry has been referred to as 'free-ranging'.¹⁰⁵ The Court's approach can be illustrated by reference to two cases decided in the 1970s concerning respectively the protection of legitimate expectations and the rights of defence.

In the *Staff Salaries* case,¹⁰⁶ a dispute arose between the Commission and the Council regarding the formula to be used for the increase in the salaries of Community employees. Article 65 of the Staff Regulations provides that the Council shall review annually the remuneration of Community servants taking into account the rise in the cost of living and the increase in the salaries of public servants in the Member States. Following negotiations, the Council, the Commission, and staff representatives agreed a formula for adjusting salaries and by a decision of 21 March 1972 the Council decided to apply it on an experimental basis for a period of three years. Nine months after the adoption of the decision however, when the next salary review occurred, the Council used a different formula. The Commission argued that the Council was bound by its undertaking to use the formula specified in the decision of 21 March. Warner AG made a comparative overview of the laws of the Member States and came to the conclusion that, in the national laws, a public authority may not fetter its discretion for the future where it exercises a legislative power. It may only, in exceptional circumstances, be bound in relation to an individual decision. The Advocate General concluded that, since the contested decision applied generally to all employees of the Communities, legitimate expectations could not arise. The Council's decision 'was, in law, no better than a rope of sand'.¹⁰⁷ The Court took the opposite view. It held that in adopting the decision of 21 March 1972, the Council had gone

¹⁰³ Case 14/61 *Hoogovens v High Authority* [1962] ECR 253, at pp. 283–284.

¹⁰⁴ P. J. G. Kapteyn and P. Verloren van Themaat, *Introduction to the Law of the European Communities*, Third Ed., (Kluwer, 1998) p. 161.

¹⁰⁵ L. Neville Brown & F. G. Jacobs, *The Court of Justice of the European Communities*, Fifth Ed., (by L. Neville Brown and T. Kennedy), Sweet & Maxwell, 2000, p. 175.

¹⁰⁶ Case 81/72 *Commission v Council (Staff Salaries)* [1973] ECR 575.

¹⁰⁷ *ibid.*, p. 595.

beyond the stage of preparatory consideration and had entered into the phase of decision-making.¹⁰⁸ The principle of protection of legitimate expectations required the Council to be bound by its undertaking. The judgment may not be as far reaching as it appears on first sight: the Council considered itself bound by the decision of 21 March 1972 and the decision was not incompatible with the Staff Regulations. It does illustrate however that the content of a general principle of law as recognized by the Court may differ from that recognized in the laws of the Member States. The *Staff Salaries* case established the principle of protection of legitimate expectations as a general principle of Community law which binds the Community not only in relation to administrative acts but also in relation to legislative measures.

In *AM & S v Commission*,¹⁰⁹ the Commission required the applicant company to produce certain documents in the course of its investigation into a suspected violation of competition law. The company raised the objection that the documents in issue were covered by legal professional privilege. The problem was that neither Regulation 17,¹¹⁰ which provides the powers of the Commission to order inspections and carry out investigations, nor any other provision of Community law, recognized the confidentiality of communications between lawyer and client. The Court started by pointing out that Community law derives not only from the economic but also from the legal interpenetration of Member States and must take into account the principles and concepts common to their laws concerning the confidentiality of lawyer–client communications. The rationale for such confidentiality is to ensure that a person is not inhibited from consulting a lawyer and obtaining independent legal advice. The Court noted that, although the confidentiality of lawyer–client communications is protected in all Member States, the scope of protection varies. It identified two tendencies. In some Member States, the protection against disclosure is seen as deriving from the very nature of the legal profession and serving the interests of the rule of law, whilst in others, it is justified on the more specific ground that the rights of defence must be respected. Despite those differences, the Court found that all national laws protect legal professional privilege subject to two criteria, namely, that communications are made in the interests of the client’s rights of defence and that they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment. It concluded that Regulation No 17 must be interpreted as protecting legal professional privilege subject to those conditions and, on the facts, annulled in part the Commission’s request for disclosure.

AM & S, in contrast to the *Staff Salaries* case, suggests a minimalist approach. The Court identified common criteria in the national laws and recognized a principle of Community law subject to those criteria. By contrast, in *Staff Salaries* the Court provided a higher degree of protection for the individual than that recognized in

¹⁰⁸ Para 8. ¹⁰⁹ Case 155/79 [1982] ECR 1575.

¹¹⁰ First Regulation implementing Articles 85 and 86 of the Treaty, OJ, English Special Ed., 1959–62, p. 87. This has now been superseded by Regulation 1/2003 (OJ 2003 L1/1).

national laws. Two points may be made in this context. It is evident that the Court's function is *par excellence* a creative one. It borrows elements from the laws of Member States and may have particular regard to 'the best elaborated national rules'¹¹¹ but principles and solutions suggested by national laws are conditioned by the Community objectives and polity. This is of particular importance in the area of human rights which are protected in Community law but, according to the standard formula used by the Court, may be subject to limits justified by the objectives of the Community provided that their substance is left untouched.¹¹² The second point refers to comparative law as an aid to interpretation. In both cases discussed above, the advocates general made ample references to the laws of Member States.¹¹³ Although recourse to national laws was made more often at earlier stages in the development of Community law, it is by no means an exercise which has exhausted its usefulness.¹¹⁴ More recent examples are provided by *van Schijndel* and *Peterbroeck*,¹¹⁵ where Jacobs AG referred to the laws of the Member States concerning the powers of national courts to raise issues of national law *ex proprio motu*. In fact, a criticism which may be levelled against the Community judiciary is that it does not always take comparative law sufficiently seriously. For example, in the first generation of cases establishing the liability of Member States in damages,¹¹⁶ the Court referred to the laws of the Member States with a view to articulating the conditions of liability, but did not make a serious attempt to derive truly common principles from the national legal systems regarding the right to reparation.¹¹⁷

1.6.4. The influence of national laws

No doubt, the Court's approach is eclectic but the raw material is found, inevitably, in the laws of Member States. Have the laws of any particular State or States proved more influential? Since in most cases it is not possible to trace the origins of Community solutions directly to concepts of national laws, this question can

¹¹¹ Case 5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975, at 989 *per* Roemer AG.

¹¹² See e.g. *Nold*, *op. cit.*, n. 30 above, para 14.

¹¹³ The Court incorporates a Research and Documentation Division which is staffed by experts in national laws. One of their tasks is to prepare at the request of the Court comparative accounts of the laws of Member States on specific topics. These are used for internal purposes and are not published. Occasionally, the Court may ask the Commission to produce information regarding the regulation of an economic activity in the Member States: see Joined Cases 60 and 61/84 *Cinéthèque v Fédération Nationale des Cinémas Français* [1985] ECR 2605, para 19.

¹¹⁴ See T. Koopmans, 'Comparative Law and the Courts', (1996) 45 ICLQ 545.

¹¹⁵ Joined Cases C-430 and C-431/93 *van Schijndel and van Veen v SPF* [1995] ECR I-4705 and Case C-312/93 *Peterbroeck v Belgian State* [1995] ECR I-4599.

¹¹⁶ See Joined Cases *Brasserie du Pêcheur and Factortame*, *op. cit.*, n. 100 above, Case C-5/94; *The Queen v Ministry of Agriculture, Fisheries and Food ex p Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553; Joined Cases C-178, C-179, C-188-190/94 *Dillenkofer and others v Federal Republic of Germany* [1996] ECR I-4845.

¹¹⁷ See the criticism of W. van Gerven, 'Taking Article 215 EC Seriously' in J. Beatson and T. Tridimas (eds), *New Directions in European Public Law*, (Hart Publishing, 1998), p. 47.

only be answered in more general terms by reference to principles, trends, and methodology. It may be said that two legal traditions have proved particularly influential in forming Community administrative law: the German and the French tradition. The reasons are, more than anything, historical.

The German influence is prominent in the development of the general principles, such as proportionality, legitimate expectations and protection of fundamental rights.¹¹⁸ Why has German law proved so influential? The analysis of Nolte is here instructive.¹¹⁹ It is arguable that, in the formative years of the Community, the Court of Justice found itself in a position similar to that of the German judiciary in post-war years. In the aftermath of the Second World War, German legal thought experienced a resurgence of natural law thinking. The abuses of the Nazi regime had as a consequence the distrust of executive power and the search for constitutional principles constraining administrative discretion. Prevailing doctrine sought to give the concept of 'Rechtsstaat' a minimum substantive content. The principles of equality, proportionality and protection of legitimate expectations which, in the pre-war era were recognized only in embryonic form and played only a limited scope in judicial reasoning, were developed in the 1950s by the judiciary as constitutionally mandated principles forming part of a wider substantive 'Rechtsstaat'. Those principles, together with the doctrine of limited administrative discretion, gradually led to the establishment of a body of administrative law founded on the new constitutional order. A parallel has been drawn between the emergence of general principles of administrative law in post-war Germany and the elaboration of general principles in the case law of the Court of Justice. In both cases, recourse to general principles has been in search of legitimacy. In the case of post-war Germany, it was imbued by considerations of substantive justice and was the result of a crisis of legitimacy. In Community law, recourse to general principles has been in an effort to assert the legitimacy and supremacy of Community law over conflicting national traditions.¹²⁰

The French tradition has influenced Community law both directly and indirectly. Its direct influence is particularly prominent in the system of legal protection established by the Treaties. It has been decisive as regards the action for annulment, e.g. Articles 33 ECSC and 173 (now 230) EC, and as regards the organization of the Court of Justice which was modelled on the French Conseil d'État. French law also influenced Community law indirectly through its impact on the national laws of other Member States. The French public law tradition is the strongest in Europe and French administrative law provided a model for other continental countries from the nineteenth century onwards.

It should also not be overlooked that the French and the German traditions were represented by the first two Advocates General of the Court, Lagrange AG and

¹¹⁸ See Schwarze, *European Administrative Law*, n. 6 above, esp. Chapters 1, 2 and 8.

¹¹⁹ See G. Nolte, 'General Principles of German and European Administrative law—A Comparison in Historical Perspective', (1994) 57 MLR 191.

¹²⁰ Nolte, *op. cit.*, 200, 205–6.

Roemer AG. They served during the most formative years of Community law fulfilling in effect the role of pathfinders. Their influence has been particularly instrumental in establishing the principles of Community administrative law, and in distilling, through a comparative method of interpretation, the elements of national laws most suitable for transposition in the Community legal order. Notable examples include *ASSIDER v High Authority*,¹²¹ where Lagrange AG made a comparative analysis of the notion of misuse of powers, and *Algera v Common Assembly*¹²² where he considered the national rules governing the revocation of beneficial administrative acts.

English law, by contrast, has had comparatively less influence at least on the development of substantive principles of law. The reasons are not difficult to understand. The United Kingdom and Ireland being late entries, the common law tradition was absent in the early formative years of Community law. More importantly, English administrative law does not share the theoretical underpinnings of its continental counterparts. Bred in a Diceyan tradition, it developed subject to the constraints of Parliamentary supremacy and the *ultra vires* doctrine. But its weakness has also been its strength: preoccupied as it has traditionally been with issues of procedure, it influenced decisively the development of procedural safeguards in the case law of the Court of Justice.¹²³

If any conclusion may be drawn from this short survey it is that no national law can claim overriding influence on the development of Community public law. More importantly, perhaps, one must not be left with the impression that the flow of ideas has been only one way. Even legal systems which have proved particularly influential on the case law, such as the German and the French systems, have themselves been profoundly influenced by jurisprudential developments for which they provided the raw material in the first place.¹²⁴ Rather than dividing the national legal systems in to 'borrowers' and 'lenders', one should celebrate the dialectical development of Community and national laws through which a *jus communae* is steadily and increasingly evolving.

1.6.5. Attributes of general principles

What attributes must a legal proposition present in order to be recognized as a general principle of Community law? The Court will first seek guidance from the text, the aims, and the objectives of the Treaty and the provisions of Community

¹²¹ Case 3/54 [1954–56] ECR 63. ¹²² *Op. cit.*, n. 95 above.

¹²³ See n. 109 above *AM & S* and below Chapter 7.

¹²⁴ For the influence of the Court's case law on general principles on French law, see Y. Galmot, 'L'apport des principes généraux du droit communautaire à la garantie des droits dans l'ordre juridique français', (1997) 33 CDE 67. For its influence on German law, see Nolte, *op. cit.*, n. 119, 206–211. For the inter-relationship between Community law and English law, see D. Wyatt, 'European Community Law and Public law in the United Kingdom', in B. S. Markezinis, *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century*, (Oxford University Press, 1994) 188–201.

law. It will also look at the laws of the Member States and international agreements to which the Community or the Member States are parties. As a general guidance, the principle must incorporate a minimum ascertainable legally binding content. In the absence of guidance by Community written law, it must be widely accepted in one way or another by the Member States. As already stated, the approach of the ECJ is selective and creative. It does not look for a common denominator.¹²⁵ Nonetheless, to be elevated to the status of a general principle, a proposition must enjoy a degree of wide acceptance, i.e. represent 'conventional morality'.¹²⁶ In *D and Sweden v Council* the ECJ felt unable to equate a same sex relation sanctioned by national law to a marriage but hinted that it would have been more adventurous if there had been support in the laws of the Member States.¹²⁷ In *Hautala*,¹²⁸ Léger AG identified three sources of fundamental rights and general principles. First, international instruments, such as the ECHR to which Member States gave access. Second 'the convergence of the constitutional traditions of the Member States' noting that such convergence suffices in itself to establish the existence of a general principle in the absence of its express recognition in the ECHR or another international convention. Further, the Advocate General stated that a general principle may be recognized without first establishing the existence of either constitutional rules common to the Member States or rules laid down in international instruments. It may be sufficient that Member States have a common approach to the right in issue 'demonstrating the same desire to provide protection, even when the level of that protection and the procedure for affording it are provided for differently in the various Member States'. On that basis, the Advocate General concluded that the right of access to documents is a fundamental right in Community law.¹²⁹

A principle may be derived from specific rules of Community law only if it is in accordance with the objectives of the Treaty. Thus, the Court will be reluctant to

¹²⁵ If a principle is common to the laws of most Member States it will be recognized as a general principle of Community law although, as already pointed out, its specific content and limits may be different in Community law. There is an example of a case where the ECJ refused to adopt a solution common to the laws of the Member States. In C-321/95 P *Greenpeace Council and Others v Commission* [1998] ECR I-1651, it refused *locus standi* under Article 230(4) EC to an environmental association despite the fact that, arguably, the applicants would have enjoyed standing in an equivalent case in the national courts of most, if not all, Member States. The judgment was justified by the strict interpretation of the concept of individual concern and the perception that the restricted *locus standi* of individuals under Article 230(4) is compensated by the availability of indirect challenge before national courts. The Court stressed that the environmental rights invoked by Greenpeace 'are fully protected by national courts'. This reasoning however is unconvincing.

¹²⁶ See John Hart Ely, *Democracy and Distrust* (Boston: Harvard University Press, 1980) p. 63, n. 97 and references provided therein.

¹²⁷ *Op. cit.*, n. 67 above, paras 50–51.

¹²⁸ Case C-353/99 P *Council v Hautala* [2001] ECR I-9565 at 9582–3.

¹²⁹ The Advocate General noted that thirteen out of the fifteen countries which were then Member States recognized as a general rule that the public has a right of access to documents held by the administration. In nine of them it was a principle of a constitutional nature or a right founded in the constitution but of a legislative nature. In the remaining four, the right derived from specific laws.

derive a principle from a provision derogating from fundamental rules even if such derogations are contained in many provisions.¹³⁰

In *Jippes*¹³¹ the Court declined the invitation to recognize animal welfare as a general principle of law. It reasoned as follows. It held that ensuring the welfare of animals does not form part of the objectives of the Treaty as defined in Article 2 EC nor is it mentioned as one of the objectives of the common agricultural policy in Article 33 EC. It then referred to the Protocol on the protection and welfare of animals annexed to the EC Treaty by the Treaty of Amsterdam and held that the Protocol does not lay down a well-defined principle which is binding on the Community institutions.¹³² The Court held further that it was not possible to infer a general principle of animal welfare from the European Convention on the Protection of Animals kept for Farming Purposes¹³³ since it does not impose any clear, precise and unqualified obligation. Nor could a general principle be inferred from any other provision of EU law.

The Court's approach was reactive rather than pro-active. It examined Treaty and legislative texts with a view to establishing the existence of a general principle thus employing a deductive reasoning which is in sharp contrast with its approach in the 1960s and 1970s when it recognized general principles of law despite the lack of statutory guidance. It will be noted however that neither the laws of the Member States nor Community law provided the basis for recognizing a general principle of animal welfare. In any event, it is doubtful whether recognition of a principle of animal welfare would have made any difference to the outcome in the circumstances of the case. The Court accepted that the public interest of the Community includes the health and protection of animals and found that the contested measures did take animal welfare into account.

Although the case law makes references to concepts such as equity or fairness and the ECJ has accepted that considerations of fairness may underlie certain Community provisions,¹³⁴ it has held that there is no general principle of fairness in EC

¹³⁰ In Case T-18/97 *Atlantic Container Line and Others v Commission* [2002] ECR II-1125, it was held that there is no general principle in Community law that undertakings which notify anti-competitive agreements enjoy immunity from fines. The fact that Regulations No 17, No 4056/86 (maritime transport) and No 3975/87 (air transport) all contain provisions for immunity from fines in the event of notification does not imply the existence of a general principle. It follows that, since Regulation No 1017/68 (applying rules of competition to transport by rail, road and inland waterway) contains no provision granting immunity from fines, notification of agreements falling within the scope of that regulation does not confer immunity.

¹³¹ Case C-189/01 *Jippes and Others* [2001] ECR I-5689.

¹³² The Court pointed out that although the Protocol provides that full regard must be had to the welfare requirements of animals in the formulation and implementation of Community policy, this obligation is limited to specific spheres of Community activity and is qualified by the need to respect the laws and customs of Member States as regards, in particular, religious rites, cultural traditions and regional heritage.

¹³³ The Convention was adopted within the framework of the Council of Europe on 10 March 1976 and approved by the EC by Council Decision 78/923, OJ 1978, L 323/12.

¹³⁴ See e.g. C-61/98 *de Haan v Inspecteur der Invoerrechten en Accijnzen te Rotterdam* [1999] ECR I-5003; Case C-290/91 *Peter v Hauptzollamt Regensburg* [1993] ECR I-2981, para 11; Case C-366/95

law.¹³⁵ What lies behind those rulings are, to a great extent, considerations of efficiency. The meaning of fairness is so vague that it lacks objective determination. Recognizing such a general principle might encourage undue litigation and hamper legislative discretion. What appears fair to one person may appear unfair to another and, as Jacobs AG pointed out, the individual conception of fairness must be balanced with what appears from the point of view of the Community.¹³⁶ In short, the principle is too abstract to have any autonomous normative concept outside the bounds of other principles such as equality, legitimate expectations, or proportionality.¹³⁷

Despite early cases which may suggest otherwise,¹³⁸ Community preference, according to which preference must be given to Community agricultural products over products from third countries, is not a general principle of Community law. Preference in favour of Community production underlies aspects of the common agricultural policy but there is no general principle of Community preference which transcends written law and on the basis of which the ECJ may invalidate Community legislation.¹³⁹ In any event, such a principle would nowadays run a serious risk of being contrary to the Community's international obligations under the WTO and other international agreements.

By contrast, the ECJ and the CFI have made reference and endorsed in various contexts and for various purposes the principles of democracy,¹⁴⁰ transparency, institutional balance,¹⁴¹ good administration, good faith,¹⁴² and abuse of rights.

Landbrugsministeriet v Steff-Houlberg Export and Others [1998] ECR I-2661. For the distinction drawn in some national laws between subjective and objective equity, see the Opinion of Jacobs AG in *Peter*, at 2993, also Case 5/73 *Balkan Import-Export v Hauptzollamt Berlin-Packhof* [1973] ECR 1091, at 1192.

¹³⁵ See C-174/89 *Hoche v BALM* [1990] ECR I-2681, at 31; Case 299/84 *Newmann v BALM* [1985] ECR I-3663, para 23.

¹³⁶ *De Haan, op. cit.*, 5025.
¹³⁷ The ECJ has also rejected the suggestion that there is a general principle of administrative law requiring continuity in the composition of an administrative body handling a procedure which may lead to a fine: Joined Cases T-305-307, 313-318, 325, 328, 329 & 335/94 *Limburgse Vinyl Maatschappij NV and Others v Commission (Polypropylene cases)* [1999] ECR I-931.

¹³⁸ Case 5/67 *Beus v HZA München* [1968] ECR 83 at 98.

¹³⁹ Case C-353/92 *Greece v Council* [1994] ECR I-3411, para 50. The ECJ however has recognized that, in some circumstances, it may not be unlawful to give preference to Community production: see e.g. *Balkan Import-Export, op. cit.*, n. 134 above, para 15; Case 58/86 *Coopérative Agricole d'Approvisionnement des Avirons v Receveur des Douanes* [1987] ECR 1525, para 9. For further discussion of this principle, see the Opinion of Jacobs AG in *Greece v Council, op. cit.*, at 3432 and Usher, *General principles, op. cit.*, n. 6, pp.13-16. Community preference may be, in certain contexts or at certain times, a political objective. See e.g. a reference in relation to the labour market, Council Resolution of 27 June 1980 on guidelines for a Community labour market policy, OJ 1980, C 168/1.

¹⁴⁰ See e.g. Joined Cases T-222/99, T-327/99 and T-329/99 *Jean Claude Martinez et al v European Parliament* [2001] ECR II-2823; Case T-135/96 *UEAPME v Council and Commission* [1998] ECR II-2335. For a discussion of the notion of democracy in the case law, see K. Lenaerts and T. Corthaut, 'Judicial Review as a Contribution to the Development of European Constitutionalism', in Tridimas and Nebbia, *European Union Law for the Twenty-first century, op. cit.*, Volume 1, pp. 17-64.

¹⁴¹ See *Chernobyl, op. cit.*, n. 18 above; Case C-282/90 *Vreugdenhil v Commission* [1992] ECR I-1937; Case C-58/94 *Netherlands v Council* [1996] ECR I-2169.

¹⁴² See e.g. Case T-115/94 *Opel Austria v Council* [1997] ECR II-39.

In some cases, instead of developing general principles of EU law, the ECJ has been content to allow national courts to rely on general principles recognized by the law of Member States. This has occurred in relation to the principle of protection of legitimate expectations¹⁴³ and the doctrine of abuse of rights¹⁴⁴ in the context of the adjudication of Community rights by national courts. Such selective deference to concepts of national law may be seen as an application of judicial subsidiarity in the field of remedies and legal protection.

1.7. The function of general principles in the Community legal order

In Community law, the general principles perform a threefold function. They operate as aids to interpretation, as grounds for review, and as rules of law breach of which may give rise to tortious liability. Each of those functions will now be examined in turn.

1.7.1. Aid to interpretation

Recourse to the general principles may be made as an aid to the interpretation of written law. According to a general rule of interpretation which derives from the principle of hierarchy of norms, where a Community measure falls to be interpreted, preference must be given as far as possible to the interpretation which renders it compatible with the Treaty and the general principles of law.¹⁴⁵ Thus, the Court has interpreted agricultural regulations and other measures so as to comply with the principle of equal treatment,¹⁴⁶ the principle of protection of legitimate expectations,¹⁴⁷ the freedom to pursue a trade or profession,¹⁴⁸ other fundamental rights,¹⁴⁹ and the principle of proportionality.¹⁵⁰ In the same vein, it has been held that the Staff Regulations must be interpreted in such a way as to ensure that there is no breach of a superior rule of law, such as the principle of equal treatment.¹⁵¹ The rule of consistent interpretation applies of course not only to regulations but to all provisions of secondary Community law.¹⁵² One of its specific expressions is the presumption against the retroactive application of laws.¹⁵³

¹⁴³ See e.g. Joined cases 205–215/82 *Deutsche Milchkontor v Germany* [1983] ECR 2633.

¹⁴⁴ Case C-373/97 *Diamandis v Elliniko Domoio* [2000] ECR I-1705.

¹⁴⁵ See Case 218/82 *Commission v Council* [1983] ECR 4063, para 15; *Klensch, op. cit.*, n. 31 above, para 21; Case C-314/89 *Rauh* [1991] ECR I-1647, para 17.

¹⁴⁶ *Klensch, op. cit.*
¹⁴⁷ *Rauh, op. cit.* See also for legal certainty: Case C-1/94 *Cavarzere Produzioni Industriali v Ministero dell' Agricoltura e delle Foreste* [1995] ECR I-2363, para 30.

¹⁴⁸ Joined Cases C-90 and C-91/90 *Neu and Others* [1991] ECR I-3617.

¹⁴⁹ See e.g. in relation to the rights of defence, Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, para 12.

¹⁵⁰ Case C-206/94 *Brennet v Paletta* [1996] ECR I-2357.

¹⁵¹ See e.g. Case T-93/94 *Becker v Court of Auditors* [1996] ECR II-141.

¹⁵² See e.g. for directives Case C-392/93 *The Queen v HM Treasury ex p British Telecommunications plc* [1996] ECR I-1631, para 28, and for decisions, Case C-135/93 *Spain v Commission* [1995] ECR I-1651, para 37.

¹⁵³ See below 6.3.9.

A question which defies general answer is what are the limits of consistent interpretation. Clearly, general principles of law do not authorise a *contra legem* interpretation of Community measures¹⁵⁴ and there are dicta to the effect that the Court does not have a general power to supplement or amend legislation which otherwise would be invalid.¹⁵⁵ The provision in issue must be reasonably capable of being interpreted so as to comply with the general principles. However, what is a *contra legem* interpretation is itself an open question. A parallel may be drawn here with the duty of *interpretation conforme* laid down by the Court in *Marleasing*.¹⁵⁶ In both instances, the purpose of consistent interpretation is the same, namely to ensure that in a hierarchical system of norms rules of the lower tier are interpreted in the light of rules in the higher tier.¹⁵⁷ It will be noted that, at least in one case, the Court adopted in the light of general principles a more liberal interpretation of the Treaty itself than it is normally prepared to adopt in relation to measures of secondary Community law.¹⁵⁸

The limits of what can be achieved by interpretation are illustrated by *Mulder I* and *von Deetzen*.¹⁵⁹ In those cases, the Court held that the contested regulation on milk quotas could not be interpreted in such a way as to guarantee a quota to producers who returned to the market after suspending production for a limited period, and found that the regulation was invalid for breach of the principle of protection of legitimate expectations. In borderline cases, there may be disagreement between the Court and the Advocate General. In *Diversinte*,¹⁶⁰ the Advocate General was prepared to follow a liberal interpretation of the provision in issue so as to ensure compliance with the principle of proportionality although he conceded that, in view of the text, such interpretation required 'goodwill'.¹⁶¹ The Court took a different view and annulled the provision. In exceptional circumstances, the need to comply with the general principles may justify the analogical application of Community law.

¹⁵⁴ Case C-37/89 *Weiser* [1990] ECR I- 2395 at p. 2415 *per* Darmon AG.

¹⁵⁵ Case C-85/90 *Dowling* [1992] ECR I-5305 at p. 5319 *per* Jacobs AG.

¹⁵⁶ This view received judicial recognition in Case C-125/97 *Regeling* [1998] ECR I-4493 at 4503 *per* Cosmas AG. In Case C-106/89 *Marleasing* [1990] ECR I-4135, it was held that, in applying national law, a national court is required to interpret it 'as far as possible' in the light of the wording and the purpose of the directive in issue, whether the national law was adopted before or after the directive (para 8).

¹⁵⁷ In his Opinion in *Marleasing*, van Gerven AG emphasised the limits imposed on the duty of national courts to interpret national legislation so as to comply with Community law by the principles of legal certainty and non-retroactivity. Also, in his Opinion in *Barber, op. cit.*, n. 66 above, at p. 1937, he stated that Community law may set limits to certain methods of interpretation applied under national law but it may not compel the national court to give a *contra legem* interpretation. The imperfect character of the interpretative duty laid down in *Marleasing* was implicitly recognized by the Court in Case 334/92 *Wagner Miret* [1993] ECR I-6911. The potential scope and limitations of *Marleasing* are vividly illustrated by the following judgments: Case C-32/93 *Webb v EMO Cargo* [1994] ECR I-3567; Joined Cases C-240 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941; Case C-168/95 *Arcaro* [1996] ECR I-4705.

¹⁵⁸ See *Chernobyl op. cit.*, discussed below 1.7.2.

¹⁵⁹ Case 120/86 *Mulder v Minister van Landbouw en Visserij* [1988] ECR 2321; Case 170/86 *von Deetzen v Hauptzollamt Hamburg-Jonas* [1988] ECR 2355. Discussed below 1.7.2.

¹⁶⁰ Joined Cases C-260 and C-261/91 *Diversinte et Iberlacta* [1993] ECR I-1885.

¹⁶¹ *Op. cit.*, p. 1903 *per* Gulmann AG.

In *Krohn v BALM*¹⁶² it was held that traders may be entitled to rely on the application by analogy of a regulation which is not intended to apply to them if two conditions are satisfied: (a) the rules to which they are subject contain an omission which is incompatible with a general principle of Community law, and (b) those rules are very similar to the rules whose application they seek by analogy.¹⁶³

The general principles of law may be used also as an aid for the interpretation of national measures which implement Community law and, more generally, which fall within the scope of Community law. It follows that a national court must, as far as possible, interpret a provision of national law which falls within the ambit of Community law so as to comply with general principles and, if necessary, make a reference to the Court of Justice in order to ascertain the requirements of Community law in the case in issue.

1.7.2. Grounds for review

Most commonly, the general principles are invoked in order to obtain the annulment of a Community measure in proceedings under Article 230 or under Article 234. As far as the grounds of review are concerned, indirect challenge under Article 234 is equivalent to direct challenge under Article 230.¹⁶⁴ A Community measure which infringes a general principle will be annulled by the Court or the CFI, depending on which court has jurisdiction.¹⁶⁵ It will then be up to the institution concerned to take the measures necessary to comply with the judgment, as provided by Article 233(1) of the Treaty. The Court, or the CFI, does not have jurisdiction to order the institutions to take such measures and may not issue directions to that effect.¹⁶⁶ An interesting illustration of this is provided by *AssiDomän Kraft Products and Others v Commission (Woodpulp III)*.¹⁶⁷ It was held at first instance that where the CFI or the ECJ annuls a Commission decision addressed to several undertakings, the Commission may be required under Article 233 to take measures in relation not only to the successful parties but also to the addressees of the decision who did not bring an action for annulment. Although

¹⁶² Case 165/84 [1985] ECR 3997.

¹⁶³ *Op. cit.*, para. 14. The omission of the regulation in issue infringed the principle of equal treatment. See for the same principle, Case 64/74 *Reich v Hauptzollamt Landau* [1975] ECR 261, Case 6/78 *Union Française de Céréales v Hauptzollamt Hamburg-Jonas* [1978] ECR 1675. Cf Case T-489/93 *Unifruit Hellas v Commission* [1994] ECR II-1201, paras 56 *et seq.*, where the CFI rejected an argument calling for the analogical application of a regulation in order to ensure the protection of legitimate expectations. Confirmed on appeal: Case C-51/95 P, [1997] ECR I-727.

¹⁶⁴ For a detailed discussion of these articles, see T. Hartley, *The Foundations of European Community Law* (Fifth Ed., 2003); Schermers and Waelbroeck, *op. cit.*, Ch. 3.

¹⁶⁵ For the jurisdiction of the CFI, see above.

¹⁶⁶ See e.g. Case T-346/94 *France-Aviation v Commission* [1995] ECR II-2841, paras 41–43; Case T-5/94 *Ź v Commission* [1994] ECR II-391, para 17 and see further Joined Cases 97, 99, 193 and 215/86 *Asteris v Commission* [1988] ECR 2181 and Case T-224/95 *Tremblay v Commission* [1997] ECR II-2215.

¹⁶⁷ Case T-227/95 [1997] ECR II-1185. See also Joined Cases 42 and 59/59 *Snupat v High Authority* [1962] ECR 53.

the circumstances of the case were exceptional and the CFI made its ruling subject to strict conditions being met,¹⁶⁸ the ECJ reversed it on appeal.¹⁶⁹ It held that Article 233 requires the Commission to take the necessary measures to comply with the judgment annulling the measure. The scope of Article 233, however, is limited in two respects. First, in annulling a Community act, the Court may not pronounce further than what is sought by the applicant. Consequently, if an addressee of a decision decides to bring an action for annulment, the matter to be tried by the Court relates only to those aspects of the decision which concern the addressee. Unchallenged aspects concerning other addressees do not form part of the matter to be tried by the Court. Second, an annulling judgment applies *ergo omnes* but cannot go as far as to entail annulment of an act not challenged before the Court but alleged to be vitiated by the same illegality.

The Court also reiterated the principle that a decision which has not been challenged by the addressee within the time limit laid down by Article 230 becomes definitive against him.¹⁷⁰ Otherwise, an applicant would be able to circumvent the time limit provided for in Article 230. The Court concluded that, where a number of similar individual decisions imposing fines have been adopted pursuant to a common procedure and only some addressees have taken legal action against the decisions concerning them and obtained their annulment, the principle of legal certainty means that the institution which adopted the decision does not need to re-examine at the request of other addressees the legality of the unchallenged decisions in the light of the grounds of the annulling judgment.

The judgment of the ECJ in *Woodpulp III* embraces formalism and accepts that legality must give way to legal certainty. The case illustrates that the notion of illegality is relative and celebrates the voidable character of Community acts. It also enhances the risk character of litigation. Although economic considerations were not an express part of its reasoning, the Court accepted in effect the Commission's argument that, if the respondents succeeded, they would derive an unfair advantage by free riding on the success of competitor undertakings who incurred the financial risks of bringing the action for annulment.¹⁷¹

Article 231(2) provides that, in the case of a regulation, the Court shall, if it considers it necessary, state which of the effects of the regulation which it has

¹⁶⁸ In *AssiDomän*, the Court pointed out three material conditions: (a) the previous judgment in *Woodpulp* had annulled an act of the Commission which was made up of a number of individual decisions which were adopted on the completion of the same administrative procedure; (b) the applicants were addressees of the annulled act and had been fined for the alleged violation of Article 81 EC which the Court set aside in the *Woodpulp* judgment; and (c) the individual decisions adopted in relation to the applicants were based on the same findings of fact and the same economic and legal analyses as those declared invalid by that judgment (para 71).

¹⁶⁹ Case C-310/97 P *Commission v AssiDomän Kraft Products aB and Others* [1999] ECR I-5363.

¹⁷⁰ See Case C-188/92 *TWD v Germany* [1994] ECR I-833.

¹⁷¹ The judgment in *Woodpulp III* has subsequently been extended to anti-dumping duties: Case C-239/99 *Nachi Europe GmbH v Hauptzollamt Krefeld* [2001] ECR I-1197; but distinguished by the CFI in relation to other aspects of the anti-dumping procedure: see *Medici Grimm*, *op. cit.*, n. 40 above.

declared void shall be considered as definitive. That provision applies not only to regulations but to any act of general application, including directives.¹⁷² An example is provided by the *Staff Salaries* case.¹⁷³ It will be remembered that the Court annulled the contested decision laying down the method of calculating salary increases on the ground that the Council had not followed the formula which it had undertaken to use in subsequent adjustments. But to avoid a gap in the payment of salaries, the Court declared that the contested decision would continue to have effect until the measures taken to give effect to the judgment came into force. Article 231(2) is used in particular where a measure is annulled on procedural grounds. In the 1990s, the Parliament's tactical litigation policy, where successful, supplied fruitful ground for its application.¹⁷⁴

A ruling in proceedings under Article 234 that a Community provision is invalid produces *vis-à-vis* national courts comparable effects to a declaration of invalidity under Article 230.¹⁷⁵ By analogy with Article 231(2), the effects of the ruling may be restricted in time so as not to affect past transactions.¹⁷⁶ In exceptional cases, a finding of illegality may not lead to a declaration of invalidity. In the *quellmehl* cases,¹⁷⁷ Community regulations granted a subsidy for the manufacture of quellmehl, a product derived from maize, and for the processing of starch. A subsequent regulation provided for the grant of subsidy for starch but not for quellmehl. The Court held that the abolition of the subsidy infringed the principle of non-discrimination on the ground that quellmehl was in a comparable position with starch. It stated however that the finding of illegality did not necessarily involve a declaration of invalidity of the contested regulation. Equal treatment could be restored in several ways and it was for the Community institutions responsible for

¹⁷² Case C-295/90 *Parliament v Council (Students' right of residence)* [1992] ECR I-4193.

¹⁷³ *Op. cit.*, n. 106.

¹⁷⁴ Since the seminal judgment in *Chernobyl*, *op. cit.*, n. 18 above, the Parliament has tended to challenge measures of the other institutions if it considers that its prerogatives are infringed even where it agrees with the substantive provisions of the measure. In cases where the Parliament is successful, the Court usually declares that the annulled measure shall continue to produce effects until a new measure, following the correct procedure, is adopted. See e.g. Case C-65/90 *Parliament v Council (Cabotage)* [1992] ECR I-4593; Case C-271/94 *Parliament v Council (Telematic networks)* [1996] ECR I-1689. In recent years, the extension of the co-decision procedure and the elevation of the Parliament to co-legislature has led to fewer such actions.

¹⁷⁵ This follows from Case 66/80 *International Chemical Corporation v Amministrazione delle Finanze dello Stato* [1981] ECR 1191, para 13 where the Court held that, although a judgment given in proceedings for a preliminary ruling declaring a Community act to be void is directly addressed only to the national court which made the reference, it is sufficient reason for any other national court to regard the act as void for the purposes of a judgment which it has to give. However, the effects of a declaration of invalidity under Article 234 may be different from a finding of invalidity under Article 230 as regards national authorities: see Case C-127/94 *R v MAFF, ex p Croyd* [1996] ECR I-2731, *per Léger* AG at 2753 *et seq.*

¹⁷⁶ See Case 4/79 *Providence Agricole de la Campagne v Office National Interprofessionnel des Céréales* [1980] ECR 2823; Case 109/79 *Maiseries de Beauce v Office National Interprofessionnel des Céréales* [1980] ECR 2883; Case 145/79 *Roquette Frères v France* [1980] ECR 2917.

¹⁷⁷ See *Ruckdeschel*, *op. cit.*, n. 25 above; Joined Cases 124/76 and 20/77 *Moulin Pont-à-Mousson v Office Interprofessionnel des Céréales* [1977] ECR 1795.

administering the common agricultural policy to take into account economic and political considerations and to select the appropriate course of action.¹⁷⁸ The effect of the judgments was to maintain provisionally in force the subsidy but to apply it without discrimination to both products. By contrast, where the Court finds that a measure runs counter to the principle of non-discrimination because it imposes a financial burden on a product, rather than because it denies a financial benefit granted to another product, it will annul the measure even though it may subsequently be possible for the Council to restore equality by spreading the burden equally among all comparable products.¹⁷⁹

An interesting question which arises in this context is this: what are the duties and powers of national authorities responsible for implementing Community law where a Community measure is annulled? In *R v Ministry of Agriculture, Fisheries and Food ex parte Ecroyd*¹⁸⁰ the Court held that the conclusions which may be drawn in the national legal system from a ruling of invalidity delivered under Article 234 depend directly on Community law as it stands in the light of the ruling. In some cases, such consequences will be obvious or arise by necessary implication from the judgment.¹⁸¹ In other cases, the consequences may not be so obvious. As already stated, the Court has no power to order the Community institutions to take the necessary measures and it is for the institutions to do so without undue delay in accordance with the principle of good administration.¹⁸² In *Ecroyd* it was argued that the national authorities were required to grant a milk quota to the applicants, following the previous judgment in *Wehrs*.¹⁸³ In that case, the Court had annulled a Community regulation on the ground that it denied unlawfully a milk quota to a category of producers to which the applicants in *Ecroyd* belonged. The claim of the applicants was that the national authorities should not have waited for the Council to adopt new rules to give effect to the judgment in *Wehrs* because the judgment annulled only a specific provision leaving intact the system governing the allocation of milk quotas. The Court rejected that claim. It held that the state of the law did not permit the allocation of a quota to a producer in the situation of the applicants before the adoption by the Council of measures to give effect to the ruling in *Wehrs*.¹⁸⁴ The Court was influenced by the particular complexity of the milk quota

¹⁷⁸ *Ruckdeschel*, *op. cit.*, paras 11–13; *Moulin Pont-à-Mousson*, *op. cit.*, paras 24–29.

¹⁷⁹ See Joined Cases 103 and 145/77 *Royal Scholten-Honig v Intervention Board for Agricultural Produce* [1978] ECR 2037, para 86.

¹⁸⁰ *Op. cit.*, n. 175 above, para 58.
¹⁸¹ Thus, national authorities must revoke measures adopted on the basis of, or to give effect to, the act declared invalid: *Ecroyd*, *op. cit.*, at I-2754 *per Léger* AG; see also Case 23/75 *Rey Soda* [1975] ECR 1279. On the powers of national authorities to reimburse sums unduly paid on the basis of Community acts declared invalid, see Case 130/79 *Express Dairy Foods v Intervention Board for Agricultural Trade* [1980] ECR 1887; Case C-228/92 *Roquette Frères* [1994] ECR I-1445.

¹⁸² An analogy may be drawn here with the duties of Member States following a judgment in enforcement proceedings finding an infringement of Community law. Under the case law, the necessary action to comply with the judgment must be commenced immediately and be completed as soon as possible: Joined Cases 227–30/85 *Commission v Belgium* [1988] ECR 1.

¹⁸³ C-264/90 *Wehrs v Hauptzollamt Lüneburg* [1992] ECR I-6285.

¹⁸⁴ *Ecroyd*, *op. cit.*, n. 175 above, para 59 and para 65.

system. In other cases national authorities may find themselves in a precarious position. The consequences to be drawn from the illegality of a Community measure may be a matter for Community law but this is not to say that national authorities may not be required to draw them. This is a developing area of law where the case law has not yet laid down clear guidelines. It should be accepted that national authorities are under a duty, founded on Article 10 EC, to give, as far as possible, effect to a ruling of the Court declaring a Community act invalid, without prejudicing the powers of the Community institution which authored the act to take the necessary measures to comply with the ruling. Pursuant to that duty, they must uphold any legally complete rights which ensue from the Court's ruling. A more difficult issue is to what extent national authorities may intervene provisionally as trustees of the Community interest until the Community institution concerned takes the necessary measures.

An individual may attack, by way of incidental challenge, the validity of a Community measure before a national court on grounds of infringement of the general principles.¹⁸⁵ Under Article 234, the national court having jurisdiction may, and in certain circumstances must, make a reference for a preliminary ruling if it considers that such a ruling is necessary for it to give judgment. If the national court considers that the arguments put forward in support of invalidity are unfounded, it may reject them upholding the validity of the Community act. According to a well-established principle however a national court may not declare a Community act invalid.¹⁸⁶ If that were possible, divergences would occur between courts in the Member States as to the validity of Community acts and those divergences would be liable to jeopardize the unity and uniformity of Community law and detract from legal certainty.¹⁸⁷ A national court however may, under certain circumstances, order interim measures.¹⁸⁸

1.7.3. Breach of general principles and liability in damages

The liability of the Community and the Member States is examined elsewhere in this book.¹⁸⁹ Suffice it to say here that breach of a general principle of law by a Community institution may give rise to liability in damages on the part of the Community. This applies in particular to breach of equal treatment, legitimate expectations, proportionality, and fundamental rights. Also, although no case law exists in this area, it should be accepted that a Member State may be liable in damages for failing to observe those principles where it implements or acts within the scope of Community law, provided that the conditions for state liability are met.¹⁹⁰

¹⁸⁵ For an express declaration of this principle, see Case C-27/95 *Woodspring District Council v Bakers of Nailsea Ltd* [1997] ECR I-1847, para 17.

¹⁸⁶ Case 314/85 *Foto-Frost* [1987] ECR 4199.

¹⁸⁷ *Ibid.*, para 15.

¹⁸⁸ See below 9.11. ¹⁸⁹ See below Ch. 10.

¹⁹⁰ See *Brasserie du Pêcheur* and *Factortame*, *op. cit.*, n 100 above; *Hedley Lomas*, *op. cit.*, n 116 above.

1.8. The scope of application of general principles

The ECJ has jurisdiction to apply the general principles in every area where it exercises jurisdiction under Article 46 TEU, including the Third Pillar and the other provisions of the Treaty on European Union within the limits specified therein.¹⁹¹ The general principles of law bind the Community institutions and the Member States. The issue whether they also bind individuals is more controversial.¹⁹² The application of general principles to Community measures does not pose particular problems. Suffice it to say that, as a rule, any Community act which is susceptible to judicial review can be challenged on grounds of breach of a general principle. It is less settled what types of national measures may be so challenged. In recent years, the ECJ has expanded substantially the scope of application of general principles, especially fundamental rights, but the case law does not provide exacting criteria. The following categories may be distinguished:

- implementing measures;
- measures which restrict the fundamental freedoms but come within the ambit of an express derogation provided for in the Treaty;
- other measures falling within the scope of Community law.

Each of these categories will now be examined in turn. This section discusses in general the application of general principles to national measures. The application of fundamental rights to Member State action is examined in more detail in chapter 6.¹⁹³

1.8.1. Implementing measures

Where national authorities implement Community law, they act as agents of the Community and must observe the general principles of law. A national measure must respect general principles whether it was adopted specifically in order to implement a Community act or whether it pre-existed the Community act but gives effect to it upon its coming into force. The application of general principles to national implementing measures was recognized in passing in *Eridania* in 1979,¹⁹⁴ but was expressly declared by the Court some years later in cases concerning the milk quota regime. In *Klensch*,¹⁹⁵ decided in 1986, Community regulations

¹⁹¹ Note that most recently in Case C-105/03 *Pupino*, judgment of 16 June 2005, the ECJ understood its jurisdiction under the Third Pillar broadly holding that individuals may invoke a framework decision adopted under Article 34(2) TEU to procure a consistent interpretation of national law. For the application of general principles in the Third Pillar, see S. Peers, 'Who's Judging the Watchmen? The Judicial System of the "Area of Freedom Security and Justice"', 18 (1998) YEL 337, at 376.

¹⁹³ See below, 7.3.

¹⁹⁴ Case 230/78 *Eridania v Minister for Agriculture and Forestry* [1979] ECR 2749, para 31. See also Case 77/81 *Zuckerfabrik Franken v Germany* [1982] ECR 681; *Deutsche Milchkontor*, *op. cit.*, n. 143 above.

¹⁹² See below 1.8.6.

¹⁹⁵ *Klensch*, *op. cit.*, n. 31 above.

provided for the imposition of a levy on quantities of milk produced beyond quotas allocated to producers. Regulation No 857/84¹⁹⁶ provided that the quota was to be calculated on the basis of milk production in the calendar year 1981 but granted Member States the option to calculate it instead on the basis of production in the year 1982 or 1983. Luxembourg opted for the 1981 calendar year. The applicants argued that the adoption of that year favoured the largest dairy in Luxembourg which had links with the state to the detriment of other producers. The Court held that, where Community rules leave Member States free to choose among various methods of implementation, the Member States must comply with the principle of equal treatment. A Member State may not choose an option whose implementation in its territory would be liable to create, directly or indirectly, discrimination between producers, having regard to the specific conditions in its market and, in particular, the structure of agricultural activities.¹⁹⁷

Subsequently, in its leading judgment in *Wachauf* the Court declared that, in implementing Community law, Member States must respect fundamental rights.¹⁹⁸ Although *Wachauf* concerned national measures implementing a regulation, recent case law has made it clear that fundamental rights and general principles bind the national authorities also where they implement directives.¹⁹⁹ The application of general principles to directives however gives rise to some problems which will be discussed below.²⁰⁰ A Member State must respect the general principles of Community law not only as regards the content of the implementing measures but also as regards the procedure for their adoption.²⁰¹

The overwhelming majority of cases relating to the application of general principles to national implementing measures concerns the principles of equality,²⁰² respect for fundamental rights,²⁰³ and respect for legitimate expectations.²⁰⁴

¹⁹⁶ OJ 1984 L 90/13.

¹⁹⁷ *Klensch*, *op. cit.*, paras 10–11. The Court held that Article 40(3) (now 34(2)) covers all measures relating to the common organization of the market, irrespective of the authority which lays them down, and is therefore binding on Member States. Previous case law was not clear as to whether Article 40(3) itself bound national authorities: see e.g. Case 51/74 *van der Hulst* [1975] ECR 79, Case 52/76 *Benedetti v Munari* [1977] ECR 163 at 187 *per* Reischl AG; Case 139/77 *Denkavit v Finanzamt Warendorf* [1978] ECR 1317, at 1342 *per* Reischl AG. In *Klensch* Slynn AG took the view that Article 40(3) was directed to the law-making function of the Community institutions and not to implementing measures taken by Member States. He considered however that Member States were required to observe the general principle of non-discrimination: *op. cit.*, p. 3500.

¹⁹⁸ Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609. See also Case C-2/92 *Bostock* [1994] ECR I-955; Case C-186/96 *Demand* [1998] ECR I-8529.

¹⁹⁹ Joined Cases C-20 and C-64/00 *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v The Scottish Minister*, judgment of 10 July 2003. ²⁰⁰ See below 7.3.1.

²⁰¹ Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, para 48.

²⁰² See e.g. *Klensch*, *op. cit.*, n. 31 above; Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737.

²⁰³ See e.g. *Wachauf*, *op. cit.*, *Bostock*, *op. cit.*, *Booker Aquaculture*, *op. cit.* Discussed in detail below, 7.3.

²⁰⁴ For cases concerning the protection of legitimate expectations, see e.g. Case C-459/02 *Gerevens and Association agricole pour la promotion de la commercialisation laitière Procola v Luxembourg*,

The principle of proportionality has also been litigated.²⁰⁵ Suffice it here to give a few examples concerning the principle of equality. In one case,²⁰⁶ the Court reiterated that implementing legislation must respect the principle of equality and held that the national authorities may treat differently different forms of associations formed by milk producers without infringing the principle where such different treatment is in accordance with the objectives of the milk quota regime. Also, the Court has accepted that the Member States may differentiate among milk producers using social criteria, for example, in order to accord some priority to small producers.²⁰⁷

Whether national implementing legislation leads to a breach of a general principle is a matter for the national court to decide on the basis of guidance given by the Court of Justice under Article 234 proceedings. Depending on the circumstances of the case, such guidance may be very specific, leaving effectively no discretion to the national court,²⁰⁸ or more general.²⁰⁹ It should be stressed however that the national court is bound to apply the general principles as their content is determined by Community law and not as they are recognized by national law.

1.8.2. Measures adopted under an express Treaty derogation

In its seminal judgment in *ERT*²¹⁰ the Court held that national measures which are adopted on the basis of an express derogation provided for in the Treaty must respect fundamental rights. The justification and ramifications of the judgment are examined elsewhere in this book.²¹¹ For the purposes of the present discussion, it suffices to point out that the Court's finding applies not only to fundamental rights but, more widely, to all general principles of law.

In *ERT* the Greek Government sought to justify a State television monopoly by recourse to Articles 46 and 55 EC which permit derogations from the freedom to provide services on grounds of public policy, public security and public health. The issue was raised whether the monopoly, by prohibiting other broadcasters from entering the field, might contravene freedom of expression. The Court held that, where a Member State relies on Articles 46 and 55 EC in order to justify rules which are likely to obstruct the exercise of freedom to provide services, such justification must be interpreted in the light of the general principles of law and the fundamental rights. Thus the national rules in issue could fall within Articles 46 and

judgment of 15 July 2004; *Mulligan*, *op. cit.*, n. 201 above; Case C-16/89 *Spronk* [1990] ECR I-3185; Joined Cases 196–8/88 *Comée and others v Copall and others* [1989] ECR 2309; and, earlier, *Zuckerfabrik Franken*, *op. cit.*, n. 194 above.

²⁰⁵ See Joined Cases 41, 121 and 796/79 *Testa v Bundesanstalt für Arbeit* [1980] ECR I-1979, para 21.

²⁰⁶ Case C-15/95 *EARL de Kerlast v Unicopa* [1997] ECR I-1961. See further Case C-351/92 *Graff* [1994] ECR I-3361.

²⁰⁷ *Comée op. cit.*, para 16. See also *Spronk*, *op. cit.*

²⁰⁸ See e.g. *Booker Aquaculture*, *op. cit.*

²⁰⁹ See e.g. *Mulligan*, *op. cit.*, paras 53–54.

²¹⁰ Case C-260/89 [1991] ECR I-2925.

²¹¹ See below, 7.3.2.

55 only if they were compatible with the fundamental rights the observance of which is guaranteed by the Court.²¹² The Court held that it was for the national court, and if necessary, for the Court itself to appraise the application of those Articles having regard to the general principle of freedom of expression embodied in Article 10 of the European Convention of Human Rights.²¹³

Subsequent case law has extended the application of general principles beyond national measures based on express derogations to cover measures which are based on mandatory requirements and overriding requirements in the public interest and even national measures which may potentially restrict free movement.²¹⁴

1.8.3. Measures which fall within the scope of Community law

Although on the facts *ERT* concerned a measure which a Member State sought to justify under an express derogation of the Treaty, the language used by the Court was broader. It held that it has jurisdiction to determine the compatibility of national rules with fundamental rights where such rules ‘fall within the scope of Community law’.²¹⁵ That begs the question what other national measures may be covered. So far, the case law has not positively ascertained any other category of such measures. There is however a clear and, indeed, remarkable tendency towards the broad application of general principles, in particular, fundamental rights.²¹⁶ Further, the case law has understood European citizenship as an autonomous source of rights thus bringing within the scope of application of Community law a range of situations not directly linked with free movement.²¹⁷ In addition to those developments, which are examined elsewhere in this book, the following comments may be made.

A purely hypothetical prospect of exercising the right to free movement does not establish a sufficient connection with Community law to trigger the application of the general principles.²¹⁸ More recently, however, in *Karner*²¹⁹ the Court seemed to accept that where a measure is likely to constitute a potential impediment to intra-Community trade and its compatibility falls to be examined under

²¹² *Op. cit.*, para 43. ²¹³ *Op. cit.*, paras 44–45.

²¹⁴ See Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Bauer Verlag* [1997] ECR I-3689 and Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*, judgment of 25 March 2004; discussed below 7.3.2 and 7.3.5.2 (respectively).

²¹⁵ *ERT*, *op. cit.*, para 42. See also Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 28; Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v Grogan* [1991] ECR I-4685.

²¹⁶ Note in particular: *Karner*, *op. cit.*; Case C-112/00 *Schmidberger v Austria*, judgment of 12 June 2003; Case C-60/00 *Carpenter v Secretary of State for the Home Department*, ECR I-6279 2002; Case C-101/01 *Lindqvist*, judgment of 6 November 2003; Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof v Österreichischer Rundfunk*, judgment of 20 May 2003.

²¹⁷ See e.g. Case C-148/02 *Garcia Avello v Etat Belge*, judgment of 2 October 2003.

²¹⁸ Case C-361/97 *Nour* [1998] ECR I-3101, para 19; Case 180/83 *Moser* [1984] ECR 2539, para 18; Case C-299/95 *Kremzow v Republik Österreich* [1997] ECR I-2629, para 16.

²¹⁹ *Op. cit.*

the provisions of the Treaty on free movement, the Court has jurisdiction to determine whether it respects fundamental rights, even if it falls neither within the scope of free movement of goods nor within the scope of the free movement of services. This is a significant, albeit unprincipled, expansion of the scope of application of general principles.

In the few areas where the Community enjoys exclusive competence by virtue of a Treaty provision, it is accepted that, in principle, Member States may not enact legislation on their own initiative even in the absence of Community measures. Community law occupies the field and pre-empted Member State action.²²⁰ Member States may only intervene as trustees of the Community interest subject to strict conditions.²²¹ Therefore, national measures in such an area, where permitted, are subject to review on the grounds of breach of a general principle. This is however a fairly exceptional case which affects only a limited range of national measures.

The binding effect of general principles does not extend to national measures in areas which fall within the potential non-exclusive competence of the Community, i.e. areas where the Community has competence but has not exercised it. For example, the fact that the Community has competence to adopt measures relating to the environment does not mean that a national measure in that field, which does not affect Community legislation, must comply with the principle of proportionality. The application of general principles in such a case is not warranted by the authorities. In *Maurin*,²²² a trader who was charged with selling food products after the expiry of their use-by date contrary to French law, sought the assistance of Community law with a view to overturning the conviction on the ground that his rights of defence had been infringed. The Court referred to Directive 797/112 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer,²²³ which was the applicable measure of Community law at the time. The Directive provides that the use-by date of a product must be indicated on the labelling and requires Member States to prohibit trade in products which do not comply with its provisions. The Court pointed out that the Directive imposed only labelling requirements and did not intend to regulate the sale of products which complied with those requirements but whose sell-by date had expired. It followed that the offence with which the accused was charged involved national legislation falling outside the scope of Community law.²²⁴ The Court has also stated that the fact that a measure which pursues objectives laid down by national law might

²²⁰ For the areas where the Community enjoys exclusive competence, see T. Tridimas and P. Eeckhout, 'The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism', (1994) 14 YEL 143. See also at 1.5 above the discussion of the EU Constitution.

²²¹ Case 804/79 *Commission v United Kingdom* [1981] ECR 1045.

²²² Case C-144/95 [1996] ECR I-2909.

²²³ OJ 1979, L 33/1 as amended by Council Directive 89/395, OJ 1989 L 186/17.

²²⁴ See also *Kremzow*, *op. cit.*, n. 218 above, para 16; C-177/94 *Perfili* [1996] ECR I-161.

indirectly affect the common organization of an agricultural market is not sufficient to bring the measure within the scope of application of general principles.²²⁵

Where, however, national legislation affects interests protected by Community law or pertains to an area where there is Community legislation, the general principles apply. Thus, where Member States are required to give effect to a Community act, all national measures which are necessary for the application of that act fall within the scope of Community law even if they are not expressly required by it. Also, any national measure which is capable of undermining or affecting the objectives of the Community act in issue is reviewable on grounds of compatibility with the general principles.²²⁶ Similarly, national legislation which affects interests whose protection falls within the ambit of Community legislation, e.g. a common organization of the market, comes within the scope of Community law.²²⁷

In *Booker Aquaculture Ltd v The Scottish Minister*²²⁸ the ECJ reviewed the compatibility with fundamental rights of national legislation which went beyond the minimum requirements of a directive. The case suggests that national implementing legislation is reviewable on grounds of violation of general principles of law even if it imposes additional or more stringent provisions than those required by a directive. The ambit of the judgment in *Booker Aquaculture* is unclear and, potentially, far-reaching. It seems that, at the very least, a national measure is caught if (a) it has been adopted in order to give effect to a directive and (b) pursues the same objectives as the directive.

Further, it is submitted that a national measure falls within the scope of application of Community law if its legal basis is a Community measure. If that is correct, a national act may need to observe the general principles even though its adoption is not required by Community law.²²⁹ That will be the case for example where a Member State chooses to implement by measures capable of producing legal effects a Community recommendation which in itself, under Article 249 EC, has no binding force. The duty of the national authorities to observe the general principles in such a case flows from Article 10 of the Treaty.

Penalties adopted by Member States for failure to respect requirements of Community law must respect the general principles even if the adoption of such penalties is not expressly required by the Community measures in issue. This is because Member States are under a general obligation to provide sufficient penalties for breach of Community law and therefore such penalties can be said to fall within the scope of its application.²³⁰

²²⁵ Case C-309/96 *Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio*, [1997] ECR I-7493.

²²⁶ See Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Garage Molenheide BVBA and Others v Belgian State* [1997] ECR I-7281.

²²⁷ Case 207/86 *Apesco v Commission* [1988] ECR 2151.

²²⁸ *Op. cit.* See also Case C-28/99 *Verbonck and Others* [2001] ECR I-3399.

²²⁹ See above, *Booker Aquaculture*, *op. cit.*, n. 199.

²³⁰ See *Zuckerfabrik Franken*, *op. cit.*, n. 194 above.

Where Community legislation confers an option on Member States to introduce special provisions in order to take into account the specific interests of a certain class of persons, and a Member State chooses to exercise that option, it must do so in accordance with the general principles of Community law.²³¹ Is it however possible that those principles will require a Member State to exercise the option given to it by the Community rules, i.e. remove its discretion by imposing an obligation to act? In cases arising from the Community milk quota regime there are dicta to the effect that general principles bind the institutions and the Member States in exactly the same manner. Thus, where those principles do not impose an obligation on the Community legislature to allocate special quotas to producers who have implemented a development plan, they may not be relied upon to impose such an obligation on Member States.²³² Those dicta however must be read in the context in which they were made. They do not exclude the possibility that, in appropriate circumstances, the general principles may be relied upon not only to review the manner in which Member States exercise their discretion but also to review the failure to exercise that discretion.²³³

1.8.4. The reaction of English courts

The scope of application of general principles has given rise to litigation also at national level. The issue first arose in the High Court in *R v Ministry of Agriculture, Fisheries and Food, ex p First City Trading Limited*.²³⁴ Following the BSE crisis and the imposition of a world-wide ban on the export of British beef by the Commission, the United Kingdom Government adopted the Beef Stock Transfer Scheme granting emergency aid to undertakings operating slaughterhouses and cutting premises. The applicants were exporters of beef who did not have their own slaughtering and cutting facilities and were therefore not entitled to aid. They argued that the aid scheme infringed the general principle of equal treatment as recognized in Community law. Laws J held that the aid scheme was not reviewable on grounds of compatibility with the principle of equality. In his view, the contextual scope of the general principles of law is narrower than that of the Treaty provisions. Laws J drew a distinction between, on the one hand, measures which a Member State adopts by virtue of domestic law and, on the other hand, measures which a Member State is authorised or required to take under Community law. The first type of measure is a matter for national law. It is constrained by Community law in that it must not conflict with the Treaty or other provisions of

²³¹ See *Klensch, op. cit.*; *Wachauf, op. cit.*

²³² See Case C-63/93 *Duff and Others v Minister for Agriculture and Food, Ireland, and the Attorney General* [1996] ECR I-569, per Cosmas AG at 583. See also *Corné, op. cit.*, n. 204 above; *Spronk, op. cit.*, n. 204 above.

²³³ But see below *The Queen v Ministry of Agriculture, Fisheries and Food ex p British Pig Industry* [2000] EuLR 724 where the High Court of England and Wales rejected such a claim.

²³⁴ [1997] 1 CMLR 250.

written Community law but need not comply with unwritten principles developed by the Court of Justice since the Court does not enjoy original jurisdiction. The second type of measure, by contrast, is a creature of Community law and must comply not only with written Community norms but also with the general principles of law. In accordance with this distinction, Laws J concluded that the scope of the principle of equal treatment as an unwritten principle developed by the Court of Justice is narrower than the principle of non-discrimination enshrined in Article 12 EC.²³⁵

According to the test enunciated by Laws J, a national measure is not subject to the general principles of Community law unless either (a) it has been adopted in order to implement a Community provision or (b) in enacting it, the Member State must rely on a permission or derogation granted by Community legislation.²³⁶ The applicants proposed a different, more extensive, test. They argued that the Beef Regulations were enacted as a direct consequence of the Commission's decision banning the export of British beef and thus fell within the scope of Community law because their *fons et origo* was a Community act. This test however was rejected by Laws J.²³⁷

First City Trading was followed in *R v Customs and Excise Commissioners, ex p Lunn Poly Limited*²³⁸ but received a cold reception in *The Queen v Ministry of Agriculture, Fisheries and Food ex parte British Pig Industry*.²³⁹ The applicants contended that the British authorities had provided substantial financial assistance to the beef and sheep industries to overcome the difficulties caused by the outbreak of BSE, but had failed to provide equivalent assistance to the pig industry despite the fact that it was in a comparable situation. They challenged the Minister's decision not to apply to the Commission for authorisation for aid and argued that the failure to do so was contrary to the general principle of equal treatment. Richards J expressed misgivings about the distinction drawn by Laws J between Community written law and Community common law as to their respective scope of application. He took the view that the grant of state aid by a Member State is a measure which falls within the scope of Community law and can be reviewed on grounds of compatibility with the general principle of non-discrimination but proceeded to dismiss the claim on other grounds.²⁴⁰

²³⁵ *Ibid.*, at 267.

²³⁶ *Ibid.*, at 271.

²³⁷ His view finds support in the Opinion of Gulmann AG in *Bostock*, *op. cit.*, n. 198 above.

²³⁸ [1998] 2 CMLR 560; [1998] EuLR 438. In that case, it was argued that the higher rate of tax applied by English law on travel insurance premiums was contrary to the principle of non-discrimination. The Divisional Court held that the general principles of law could not create a new jurisdiction and did not apply to a domestic measure which was neither required nor permitted by virtue of Community law. The Divisional Court found, however, that the differential rate of tax was state aid and unlawful for lack of notification under the state aid provisions of the Treaty. The latter part of the judgment was confirmed by the Court of Appeal: [1999] 1 CMLR 1357.

²³⁹ *Op. cit.*
²⁴⁰ Richards J held that pig producers were not in a comparable situation to cattle and sheep producers. He also held that, even if there was a breach of the principle of equal treatment, the applicant's challenge would fail. Their argument was not that the various measures giving aid to beef producers were unlawful but rather that, although they were lawful at the time, they had

In *ex p British Pig Industry*, the connecting factors which triggered the application of the principle of equality were that the government's support measures were in an area of regulation which was covered by a common organization of the market, they were liable to be state aid contrary to Community law, and, most importantly, the alleged discrimination arose as a result of the side-effects of both national and Community measures. The judgment in *British Pig Industry* suggests that the test laid down in *First City Trading* is no longer good law but does not clarify the wider picture nor does it propose a general test for ascertaining in what situations a national measure is reviewable on grounds of compatibility with general principles.²⁴¹

The case however remains that the general principles of Community law are not by themselves capable of bringing a certain field of activity within the scope of Community law if that field is not otherwise so covered. If that were the case, all aspects of national law would be reviewable on grounds of compatibility with the general principles of the EU. This is not accepted by the case law of the ECJ²⁴² although the recent judgment in *Karner* has somewhat muddied the waters.²⁴³

1.8.5. Public authorities bound by the general principles

The general principles bind, first and foremost, public authorities. The issues which arise in this context are the following. First, which public authorities are so bound and, second, are there any circumstances under which general principles may also be said to bind private individuals?

Authorities which are considered as emanations of the State for the purposes of direct effect are bound to respect the general principles where they act within the scope of application of Community law. It is clear that the notion of the State includes central government, local and regional authorities,²⁴⁴ and other

resulted in unlawful side-effects and the government was under a duty to remove those side-effects. Richards J did not accept that a series of lawful measures could produce by way of side-effects a state of affairs that was in breach of the principle of equal treatment. Even if that were the case, he took the view that, where incidental discrimination arises as a result of both national and Community support measures, the duty to rectify those measures cannot rest solely on the Member States but also on the Community institutions.

²⁴¹ Note that neither Laws J nor Richards J thought it appropriate to make a reference for a preliminary ruling. Laws J decided not to make a reference since, in any event, he took the view that the scheme did not infringe the principle of equal treatment as provided for in Article 34(2) of the Treaty. His reasoning was that aid to undertakings operating their own slaughterhouses and premises was vital to maintain supply of fresh meat to the domestic market and meet consumer demand. Those aims did not justify granting aid to exporters. Similarly, Richards J thought it unnecessary since he found that the applicants' claim failed on the facts.

²⁴² Note *Kremzow*, *op. cit.*; *Annibaldi*, *op. cit.* Note also Case C-249/96 *Grant v South-West Trains Ltd* [1998] ECR I-621. The Court declared at para. 45 that, although respect for fundamental rights is a condition for the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of Treaty provisions beyond the competences of the Community.

²⁴³ See 1.8.3 above.

²⁴⁴ Case 103/88 *Fratelli Constanzo v Comune di Milano* [1989] ECR 1839; Case 31/87 *Beentjes BV v Netherlands* [1988] ECR 4635.

constitutionally independent public authorities, such as a Chief Constable.²⁴⁵ In *Foster v British Gas*,²⁴⁶ the issue was whether the plaintiff female employees could invoke the Equal Treatment Directive against British Gas prior to privatization. The Court held, at paragraph 18 of the judgment, that unconditional and sufficiently precise provisions of directives may be relied on against organizations or bodies which are 'subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals' (emphasis added). If one were to interpret this formula literally, it would seem that the tests laid down in that paragraph are not cumulative and it suffices for a body to be under the control of the State in order to be considered as a State authority for the purposes of direct effect.²⁴⁷ In *Kampelmann* the Court reiterated the disjunctive 'or' and confirmed that directives may be invoked against bodies which, irrespective of their legal form, have been given responsibility, by the public authorities and under their supervision, for providing a public service.²⁴⁸ In that case, Tesaro AG took the view that municipal undertakings providing utilities for provincial cities were under the control of the municipal authorities and, by virtue of that fact alone, subject to the direct effect of directives.²⁴⁹

The definition of State however has given rise to problems in English courts. Following the Court's ruling in *Foster*, the House of Lords held that British Gas was a State authority because it met all the criteria laid down in paragraph 18. It was based on a statutory footing, it provided services under the control of the State, and had a monopoly on the supply of gas.²⁵⁰ Subsequently, in *Doughty v Rolls Royce*²⁵¹ the Court of Appeal took the view that the criterion of State control was not in itself sufficient. It held that the fact that the share capital of Rolls Royce was wholly owned by the Crown did not suffice to make it an emanation of the State since the company had not been made responsible for providing a public service nor did it have any special powers beyond those which result from the normal rules applicable to relations between individuals. Rolls Royce was merely a commercial undertaking competing in the open market.

More recent cases suggest that English courts are prepared to accept a more liberal, functional, definition of the State. In *Griffin v South West Water Services Ltd*,²⁵² the High Court held that a privatized water company is a State authority against which directives can be enforced directly. Blackburn J stated that the

²⁴⁵ Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

²⁴⁶ Case C-188/89 *Foster and Others* [1990] ECR I-3313, para. 18. See also in this context the comments of van Gerven AG at 3339–40.

²⁴⁷ Uncertainty arose because, although at paragraph 18 of the judgment the Court used the disjunctive 'or', at paragraph 22 it used 'and' thus giving the impression that the tests may be cumulative.

²⁴⁸ Joined Cases C-253–8/96 *Kampelmann and Others v Landschaftsverband Westfalen-Lippe and Others* [1997] ECR I-6907, para 46. ²⁴⁹ *Ibid.*, at 6918.

²⁵⁰ See V. Kvjatkovski, 'What is an "Emanation of the State"? An Educated Guess', (1997) 3 EPL 329.

²⁵¹ *Rolls-Royce v Doughty* [1987] IRLR 447.

²⁵² [1995] IRLR 15.

material criterion for the purposes of direct effect is not whether the body in question is under the control of the State but whether the public service which it performs is under State control. In *NUT & Others v Governing Body of St Mary's Church of England (Aided) Junior School*²⁵³ the Court of Appeal held that the governing body of a voluntary-aided school was an emanation of the State, and therefore subject to the provisions of the Acquired Rights Directive, because it was under the authority and control of the State even though it did not have any special powers beyond those applicable to relations between individuals. The judgment is important because the Court of Appeal departed from the cumulative test laid down in *Doughty* and also because it adopted a functional approach to State control. Shiemann LJ acknowledged that the criteria laid down by the Court of Justice in paragraph 22 of *Foster*, and applied literally by the House of Lords in that case, did not lay down an exclusive formula for the definition of the State. The Court of Appeal distinguished the case from *Foster* and *Doughty* on the ground that those cases involved commercial undertakings in which the government had a stake rather than the provision of a public service like education. On the issue of State control, it noted that, although voluntary schools chose, rather than were obliged, to come within the State system, they were subject to a considerable degree of State control and influence by the both the local education authorities and the Secretary of State for Education. They could therefore be considered to be under the control of the State.

It is submitted therefore that, in order to be regarded as an emanation of the State, it suffices for a body to have been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State. This definition seems sufficiently wide to encompass private bodies which have been entrusted with the performance of functions traditionally reserved to the State and over which the State retains residual control. It should also be accepted that self-regulatory bodies, namely authorities which exercise public power without being based on a statutory footing, are also bound by directives in so far as such bodies implement Community law²⁵⁴ or their actions affect fundamental freedoms. The issue is of importance in sports²⁵⁵ but also in other sectors where self-regulation plays a significant role, for example, the financial services industry in the United Kingdom.

The definition of State authority was recently revisited by the CFI in *Salamander*.²⁵⁶ Una Film, a private company, argued that it should be considered as an emanation

²⁵³ [1997] IRLR 242. Cf. *Turpie v University of Glasgow*, decision of the Scottish Industrial Tribunal of 23 September 1986, unreported (University not a public authority for the purposes of applying the Equal Treatment Directive). Following *NUT*, the decision is an unreliable authority.

²⁵⁴ The possibility of self-regulatory bodies being responsible for the implementation of Community law was left open by the judgment in Case 29/84 *Commission v Germany* [1985] ECR 1661. In any event, self-regulatory bodies may be delegated powers by official bodies which are designated by national law as the competent authorities to implement Community obligations.

²⁵⁵ See e.g. *Wilander and Novacek v Tobin and Jude*, [1997] 2 CMLR 346, judgment of Lightman J (Chancery Division), 13 June 1996; see also Case C-415/93 *Bosman* [1995] ECR I-4921.

²⁵⁶ Case T-172/98, 27 June 2000.

of the State because it had a de facto monopoly in the market for the advertising of tobacco products in Austrian cinemas. It derived its monopoly from being the sole contractual partner of Austria Tabak. This latter company formerly had a statutory monopoly in the import and sale of tobacco products. Since Austria's accession to the EC, it had been privatized but operated under State control and continued to have a dominant position in the tobacco market. The CFI did not accept those submissions. It held that, even if, following its privatization, Austria Tabak could be regarded as a State authority within the meaning of the *Foster* judgment, that was not decisive. Una Film's commercial activity, i.e. the distribution of advertising films for tobacco products in cinemas, was not a public service, was carried on under private law contracts and not under measures adopted by the state, and Una Film did not have any special powers beyond those resulting from the normal rules applicable in relations between individuals.²⁵⁷

It follows from *Salamander* that a private company to whom exclusive rights have been transferred by a public undertaking or a state authority will not qualify as an emanation of the State if it does perform a public service and is bound only by a private law relationship to the public undertaking. However, one may need to approach *Salamander* with caution. It was a case where the definition of the emanation of the State was not examined in proceedings where an individual sought to rely on a directive against a public entity but in the context of annulment proceedings brought under Article 230(4), and the circumstances of the case may have led the CFI to take a more restrictive view.

1.8.6. The application of general principles against individuals

So far the case law has not pronounced on the issue whether the general principles of law may give rise to obligations against private parties. The issue acquires particular importance in relation to fundamental rights.²⁵⁸ It may be argued that the historical origins and purpose of general principles, which is to protect the individual against public authorities, suggests a negative reply. But that argument is not conclusive. In the modern pluralist State, the traditional public–private dichotomy is no longer valid. It may be said that in certain cases fundamental rights deserve to be protected as much against private entities as against public authorities so that failure to protect them against the former may run counter to their objectives.

In general, where the case law establishes obligations going beyond the text of the founding Treaties, it does so against the State. In the absence of written provisions, the case law seems reluctant to impose obligations on individuals. An interesting example is provided by *Bostock*.²⁵⁹ Under the Community milk quota regime, upon the termination of a farm tenancy, the milk quota is returned to the

²⁵⁷ *Ibid.*, para 60.

²⁵⁸ See in general A. Clapham, *Human Rights in the Private Sphere* (Oxford University Press, 1993); D. Spielmann, *L'effet potentiel de la Convention européenne des droits de l'homme entre personnes privées* (Brussels: Bruylant, 1995).

²⁵⁹ *Op. cit.*, n. 198 above.

landlord.²⁶⁰ In *Bostock*, it was argued that the general principles of Community law required Member States to introduce a scheme for payment of compensation by a landlord to the outgoing tenant or conferred directly on the tenant a right to compensation from the landlord. Earlier in *Wachauf*²⁶¹ the Court had accepted that the protection of fundamental rights may require that the departing tenant must be entitled to compensation where that is justified by the extent of his contribution to the building up of the milk production on the holding. But in *Bostock* the Court was not willing to disrupt relations between private parties by giving a right to the tenant against the landlord. The applicant argued that he was treated unequally *vis-à-vis* tenants whose leases had expired after a subsequent date in relation to which the UK had introduced a compensation scheme. After pointing out that the principle of equal treatment is a general principle of Community law, the Court held:²⁶²

However, the principle of equality of treatment cannot bring about retroactive modification of the relations between the parties to a lease to the detriment of the lessor by imposing on him an obligation to compensate the outgoing lessee, whether under national provisions which the Member State in question might be required to adopt, or by means of direct effect.

The applicant also argued that, since his labour and his investments had contributed to the acquisition or the increase of the quota which reverted to his landlord on the expiry of the lease, the landlord was under an obligation to pay compensation in respect of his unjust enrichment. The Court however rejected that argument stating that legal relations between lessees and lessors, in particular on the expiry of a lease, are, as Community law now stands, still governed by the law of the Member State in question. Any consequences of unjust enrichment of the lessor on the expiry of a lease are therefore not a matter for Community law.

The judgment in *Bostock* must be read in the light of the peculiarities of the milk quota regime and it is difficult to draw general conclusions. The existing authorities do suggest however that the Court is reluctant to accept that the general principles may by themselves impose obligations on individuals.²⁶³

Despite this, in some cases a horizontal or quasi-horizontal effect may be present. Thus, the obligation to respect the fundamental rights of an individual or a group may by reflection give rise to incidental obligations or the worsening of the legal position of another individual or group, such as for example where the freedoms of assembly and expression conflict with the freedom to inter-state trade.²⁶⁴ Also, specific directives may protect fundamental rights not only against state authorities but also against individuals. This is for example the case with the Race Directive, the framework Directive on equal treatment, and the Directive on the processing

²⁶⁰ The milk quota regime is discussed in more detail below at 6.4.2. and 7.3.1.

²⁶¹ *Op. cit.*, n. 198 above. ²⁶² *Bostock*, *op. cit.*, para 14.

²⁶³ See also Case C-60/92 *Otto v Postbank NV* [1993] ECR I-5683.

²⁶⁴ See e.g. *Schmidberger*, *op. cit.*, n. 216 above.

of personal data.²⁶⁵ The wider such directives are interpreted, the wider the obligations imposed on individuals.²⁶⁶ Such norms however will impose obligations on individuals only through national law, i.e. through implementing legislation or through the obligation of consistent interpretation, since directives may not by themselves produce horizontal effect.²⁶⁷

The case law accepts that certain provisions of the EC Treaty may produce horizontal effect. In *Defrenne v Sabena*²⁶⁸ it was held that Article 119 (now 141), which provides for the principle of equal pay between men and women for equal work, establishes a right to equal pay which can be relied on in national courts against both public and private employees. In *Walrave and Koch v Association Union Cycliste Internationale*²⁶⁹ it was held that the prohibition of discrimination on grounds of nationality, as incorporated in Articles 12, 34 and 49 of the Treaty, does not apply only to the actions of public authorities but extends also to rules of private organizations which aim at regulating in a collective manner gainful employment and the provision of services.

Subsequently, in *Bosman*²⁷⁰ the Court reiterated that Article 39 EC, which provides for the free movement of workers, applied to the football transfer rules of the international football federations FIFA and UEFA. Both in *Walrave* and *Bosman*, however, the provisions of the Treaty on free movement were applied against private associations which exercised some type of regulatory action and had therefore a quasi-public law character. More recently, in *Angonese v Cassa di Risparmio di Bolzano SpA*,²⁷¹ the Court unequivocally held that Article 39 has horizontal direct effect and binds private employers also. It pointed out that the principle of non-discrimination in Article 39 is drafted in general terms and is not specifically addressed to the Member States. It then referred to its reasoning in *Defrenne* and held that it applied *a fortiori* in the case of Article 39 which lays down a fundamental freedom. The extension of Article 39 to cover fully-fledged horizontal situations has been criticised mainly on two grounds.²⁷² First, on the ground that the Court intervenes in the sphere of private autonomy and creates legal uncertainty, and second, on the ground that it upsets the balance of competence

²⁶⁵ See respectively Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L 180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16; Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995, L 281/31.

²⁶⁶ See e.g. in relation to the data processing Directive, *Lindqvist, op. cit.*, n. 216 above.

²⁶⁷ Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325.

²⁶⁸ Case 43/75 [1976] ECR 455.

²⁶⁹ Case 36/74 [1974] ECR 1405. See also Case 13/76 *Doná v Mantero* [1976] ECR 1333.

²⁷⁰ *Bosman, op. cit.*, n. 255 above; see also Case C-176/96 *Lehtonen and Castors Canada Dry Namur-Braine ASBL v FRBSB*, [2000] ECR I-2681, para 35.

²⁷¹ Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139, para 36.

²⁷² See S. van den Bogert, 'Horizontality: Rowing with Square or Feathered Blades?' paper delivered in the conference on 'Unpacking the Internal Market', organized in CELS, Cambridge, 2001.

between the Community and the Member States by intervening in the sphere of private law which falls within the remit of the latter. This however does not appear a persuasive criticism. The judicial arguments underlying the progressive extension of horizontality are the need to ensure the effectiveness of fundamental freedoms and, as the Court put it in *Angonese*, to avoid discrimination in the labour market.²⁷³ Within the European polity, the prohibition of discrimination on grounds of nationality and the free movement of workers can best be viewed as norms of constitutional status whose value and effects are not exhausted in vertical situations. Also, the competence of the Community to harmonize key areas of national private law, such as contract law, is well settled. Against this background, it would be the denial of horizontal effect of Article 39 against a private employer that could be viewed as an aberration rather than its acceptance. This is not to say that horizontality is without problems. Once it is accepted that Article 39 binds private employers, it should also be accepted that the latter have available to them the derogations from the free movement of workers recognized in the Treaty and the case law.²⁷⁴ These however have been designed as defences for public and not private action. Inevitably, those derogations will need to be tailored to the defence of private parties and, in some contexts, interpreted more broadly.

The Court has not unequivocally pronounced on the horizontality of the other fundamental freedoms, but the reasoning of *Angonese* may apply also, at least in some respects, to the freedom to provide services and the right of establishment.²⁷⁵ Notably, in a recent case, the Queen's Bench Division held that a maritime company could rely on the right of establishment, as guaranteed by Article 43 EC, to obtain an injunction against trade unions threatening strike action.²⁷⁶ Such uncompromising application of Article 43 raises fundamental issues pertaining to the scope and objectives of free movement.

1.9. The general principles of law and the EC Treaty

1.9.1. The general principles in the hierarchy of Community rules

The Community legal order is based on a system of hierarchy of rules under which rules of a lower tier derive their validity from, and are bound to respect, the rules of the higher tiers. What is the position of the general principles of law in that order of hierarchy? It is clear that those principles which are accorded constitutional status

²⁷³ *Angonese*, *op. cit.*, para 35.

²⁷⁴ This was acknowledged in *Bosman*, *op. cit.*, para 86.

²⁷⁵ For the free movement of goods, see the dicta in Case 58/80 *Dansk Supermarked v Imerco* [1981] ECR I-18, para 17.

²⁷⁶ *Viking Line Abp v International Transport Workers' Federation and Finnish Seamen's Union*, The Times, 23 June 2005.

are superior to Community legislation since acts adopted by the institutions are subject to review on grounds of compatibility with them. Their position *vis-à-vis* primary Community law may be summarised as follows. Since their origins lie in the EC Treaty, they have equivalent status with the founding Treaties. Their equal ranking derives from their character as constitutional principles emanating from the rule of law. This applies in particular to the principles of respect for fundamental rights, equality, proportionality and legal certainty.

One of the consequences which flow from this is that those principles bind the Community in the exercise of its treaty-making power. They form part of the rules of law, compliance with which the Court ensures in the exercise of its jurisdiction under Article 300(6). It follows that a proposed international agreement which the Court has found to infringe a general principle of law may not enter into force unless the procedure for the amendment of the Union Treaties provided for in Article 48 of the Treaty on European Union is followed.²⁷⁷ Furthermore, an international agreement already concluded by the Community which runs counter to a general principle is incompatible with Community law. In *Germany v Council*,²⁷⁸ the Court found that an agreement on bananas concluded with countries of South and Central America infringed the principle of non-discrimination because it discriminated against certain categories of Community banana producers. As a consequence, the Court annulled the decision of the Council by which the latter approved the agreement on behalf of the Community.²⁷⁹

1.9.2. The general principles as rules of Treaty interpretation

The relationship between the general principles and primary Community law requires further analysis. Since the founding and the amending treaties are at the top of the Community law edifice, they are *ex hypothesi* valid. No provision in the founding treaties grants the Court jurisdiction to rule on their validity. Nor is it possible for the Community to be liable to an individual for loss arising from primary legislation.²⁸⁰

The Court however has jurisdiction to interpret Treaty provisions and may do so in the light of the general principles of law. The interpretative function of general principles acquires particular importance in this context precisely because it is the only function which they may fill. Where courts are called upon to interpret

²⁷⁷ See Opinion 1/91 *on the Draft Agreement relating to the creation of the European Economic Area* [1991] ECR I-6079, paras 61–64. In its ruling, the Court found that the judicial system set up by the draft agreement was incompatible with the Treaty, *inter alia*, on grounds of incompatibility with the principle of legal certainty.

²⁷⁸ Case C-122/95 *Germany v Council* [1998] ECR I-973. Cf. C-149/96 *Portugal v Council* [1999] ECR I-8395.

²⁷⁹ The Court followed the same reasoning in Joined Cases C-364 and C-365/95 *T. Port* [1998] ECR I-1023. For the ensuing (unsuccessful) action in damages see Case T-1/99 *T. Port v Commission* [2001] ECR II-465, confirmed on appeal: C-122/01 *P T. Port v Commission*, judgment of 8 May 2003.

²⁸⁰ Case T-113/96 *Dubois et Fils v Council and Commission* [1998] ECR II-125.

rules which they have no jurisdiction to annul, interpretation becomes the primary means by which they can influence their effectiveness. Interpretation in that context becomes particularly instructive as the expression of judicial policy: it tells us what the court perceives to be its function, what it considers to be the underpinnings of the legal system, and how it prioritizes its rules. Needless to say, interpretation is a creative exercise. Even where a court gives to the words of a statute what appears to be their literal or natural meaning, it does not apply the statute mechanically. What appears to be the natural meaning of a rule to one judge may not appear to be the natural meaning to another.²⁸¹ Also, the very fact that a court follows a literal interpretation as opposed to a more liberal one is in itself significant as an indication of judicial policy.

The case law suggests that, in the light of the general principles, the Court of Justice has interpreted Treaty provisions more liberally than acts of the institutions. In particular, it has understood its own jurisdiction widely in order to ensure respect for the fundamental right to judicial protection, which has a defining character in the Community legal order.²⁸² This approach is illustrated by the judgments in *les Verts* and *Chernobyl*.

In *les Verts*,²⁸³ decided in 1986, the Court held that, although at that time the Parliament was not mentioned as a possible defendant in Article 173 (now 230 EC), binding measures adopted by it were subject to judicial review. The rationale of the judgment was as follows. First, the Court made a general declaration of the principle of legality. In the Court's peremptory language,²⁸⁴

It must be emphasised . . . that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.

Then, the Court stated that by Articles 173, 184 and 177 (now 230, 241, and 234 EC respectively) the Treaty intended to establish a complete system of legal remedies. The Court justified the absence of an express reference to the Parliament as a possible defendant in Article 173 (now 230) on the ground that, under the original version of the Treaty, the Parliament only had powers of consultation and political control and no power to adopt acts intended to have legal effects *vis-à-vis* third parties. It referred to Article 38 of the ECSC Treaty, which expressly stated that the Court may declare an act of the Parliament void, as evidence that where the Parliament was given power to adopt binding measures *ab initio* by one of the founding Treaties,²⁸⁵ such measures were subject to annulment. *Les Verts* is a prime example of dynamic interpretation, an approach typical of the interpretation

²⁸¹ See for a classic example the House of Lords in *Liversidge v Anderson* [1942] AC 206.

²⁸² See further A. Arnall, 'Does the Court of Justice have inherent jurisdiction?' (1990) 27 CML Rev 683.

²⁸⁴ *Ibid.*, para 23.

²⁸⁵ The Parliament had power to adopt binding acts under Article 95 ECSC. Note that the ECSC Treaty has now expired and is no longer in force.

of a constitutional text, by which the Court sought to meet the requirements of the rule of law.

In *Chernobyl*,²⁸⁶ decided in 1990, the Court went one step further. It held that the Parliament may bring an action for annulment against acts of the Council or of the Commission in order to safeguard its prerogatives, although at that time Article 173 (now 230) did not mention the Parliament as a possible plaintiff.²⁸⁷ The Court's reasoning stands on two pillars: the need to ensure that the provisions of the Treaty concerning the institutional balance are fully applied; and the need to ensure that the Parliament's prerogatives, like those of the other institutions, cannot be breached without it having available a legal remedy which may be exercised in a certain and effective manner.²⁸⁸ The Court stated that the absence in the Treaties of any provision giving the Parliament the right to bring an action constitutes a procedural gap which cannot prevail 'over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities'.²⁸⁹

Those cases illustrate that, although unwritten general principles of law do not technically take priority over the Treaty, they may influence decisively its interpretation.²⁹⁰ This is particularly evident in the judgment in *Chernobyl* where the Court adopted what was in effect a *contra legem* interpretation of Article 173 (now 230). It is important to point out that *les Verts* and *Chernobyl* concerned essentially the fundamental right to judicial protection. Both cases raised issues relating to the admissibility of the action and therefore pertaining to procedure. One may take the view that judicial activism can easier be justified in procedural matters, which fall *par excellence* in the judicial province, than in issues of substance. But that appears to be a false distinction. The boundaries between substance and procedure are not clear-cut and, in any event, procedural requirements may be as influential in forming political processes as substantive ones. There can be little doubt that in *Chernobyl* the Court intervened as a political actor. The judgments in *les Verts* and *Chernobyl* are based on the premise that access to judicial remedies is an integral part of the rule of law. Their rationale seems to be that the Community is by its nature a dynamic organization. As the Community develops, the ensuing increase in the powers of the institutions has to be accompanied by adequate control mechanisms, if the rule of law is to be observed.

²⁸⁶ *Op. cit.*, n. 18 above, para 26. Cf the *Comitology* case, *op. cit.*, n. 63 above.

²⁸⁷ See now Article 230(3) as amended by the TEU.

²⁸⁸ *Chernobyl*, *op. cit.*, para 25. ²⁸⁹ *Ibid.*, para 26.

²⁹⁰ It has been argued that certain human rights may take priority even over primary Community legislation. See M. Dausès, 'The Protection of Human Rights in the Community Legal Order', (1985) ELR 398 at 412. The author draws a distinction between 'the substratum of supra-positive principles of law' incorporated in the ECHR and 'their substantive legal form'. The former are sources of law independent of the Treaties and take precedence even over primary Community law. The latter, by contrast, are superior to secondary Community law but take second place to the Treaties.

The same dynamism was illustrated by the seminal judgment in *Schmidberger*²⁹¹ where, for the first time, the ECJ held that the need to protect fundamental rights may justify derogations from the fundamental freedoms. The judgment is particularly important because the ECJ viewed fundamental rights as being at the top of the Community legal edifice and suggested by implication that they could justify even discriminatory restrictions on the free movement of goods.²⁹²

The judgments in *les Verts* and *Chernobyl* can be contrasted with *Laisa v Council*.²⁹³ Spanish producers sought the annulment of certain provisions of the Act of Accession of Spain and Portugal which amended a previous agricultural regulation of the Council. They argued that the contested provisions were acts of the Council subject to review under Article 230. They relied on Article 8 of the Act of Accession which states that provisions of that Act the purpose or effect of which is to repeal or amend acts adopted by the Community institutions 'shall have the same status in law as the provisions which they repeal or amend and shall be subject to the same rules as those provisions'. The Court did not accept the submissions of the applicants. It held that provisions of the Act of Accession which amend existing Community measures are nonetheless rules of primary law, and cannot therefore be the subject of annulment proceedings under Article 230. The Court pointed out that Article 8 fulfils a different purpose. It enables the Community institutions to amend provisions of the Act of Accession amending acts of secondary Community legislation without the need to follow the procedure for the amendment of the Treaties which, under Article 6, is normally applicable for the amendment of provisions of the Act of Accession.

The judgment establishes that adaptations to secondary Community legislation deriving directly from the Act of Accession enjoy entrenched value in that they are not subject to review of legality. This results in a gap in judicial protection but the Court accepted it as an inevitable consequence of the status of the contested rules as primary law. The Court was guided by the intention of the authors of the Act of Accession who, by dealing with certain issues in the Act itself rather than leaving them to be dealt with by consequential Community acts, intended those issues not to be justiciable. The Act of Accession incorporated the outcome of political negotiations and as such it expressed a certain balance of powers which the Court was keen not to disturb. In the words of the judgment, the interpretation of the Act of Accession given by the Court 'is rendered all the more compelling by the fact that the provisions of the Act of Accession affirm the results of Accession negotiations which constitute a totality intended to resolve difficulties which accession entails either for the Community or for the applicant State'.²⁹⁴

²⁹¹ *Op. cit.*, n. 216 above. ²⁹² For a discussion, see below, Chapter 7.4.

²⁹³ Joined Cases 31 and 35/86 *Laisa v Council* [1988] ECR 2285. See also Case 40/64 *Sgarlata and Others v Commission* [1965] ECR 215 and note, more recently, Case C-321/95 *Greenpeace and Others v Commission* [1998] ECR I-1651. Cf Case C-309/89 *Codomiu v Council* [1994] ECR I-1853.

²⁹⁴ *Op. cit.*, para 15. Cf the Opinion of Lenz AG who held that the action was admissible.

A final issue which arises in this context is the following. Are all the provisions of the founding Treaties of equal rank in law? Can it be said that some of them take priority over others and, if so, what does such priority mean?²⁹⁵ As a general rule, it is not unreasonable to consider that, in the light of the objectives of the Community, certain rules of the Treaty are more fundamental than others. If that is so, the higher value of the more fundamental rules may express itself in two ways: a rule which is considered to be more fundamental will be important for the interpretation of other rules which are not perceived to be as fundamental. Also, the more fundamental that a rule is, the clearer the expression that the Court may require before accepting that this rule is amended. The Court therefore may have difficulty in accepting that a fundamental rule is repealed or amended impliedly as a result of the express amendment of another, less important, rule. The ruling in Opinion 1/91 on the *Draft Agreement relating to the creation of the European Economic Area*²⁹⁶ may provide some guidance as to the Court's views on the hierarchy of the provisions of the EC Treaty. In 1990 the Community entered into formal negotiations with the countries of the European Free Trade Area (EFTA) with a view to concluding an agreement on the establishment of a European Economic Area (EEA). The aim was to replace existing bilateral free trade agreements with the EEA agreement and to establish a homogeneous economic area subject to a legal framework substantially identical to that laid down by Community law. The Commission requested the opinion of the Court with regard to the compatibility of the judicial system provided for by the draft EEA Agreement with the Treaty under the procedure of Article 300(6) EC. In Opinion 1/91 the Court held that the judicial system of the draft EEA Agreement was not compatible with the Treaty.²⁹⁷ In its request for an Opinion, the Commission also asked the Court whether Article 238 (now 310) of the Treaty, which deals with the conclusion by the Community of association agreements, authorized the establishment of a system of courts such as that provided in the draft EEA Agreement and if not whether Article 238 could be amended so as to permit such a system to be set up. The Court held as follows:²⁹⁸

... Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with Article 164 [now Article 220] of the EEC Treaty and, more generally, with the very foundations of the Community.

²⁹⁵ In his Opinion in *Laisa v Council Lenz* AG suggested that not all rules of primary Community law may be of the same rank: *Op. cit.*, p. 2307.

²⁹⁶ [1991] ECR I-6079.
²⁹⁷ The Court gave the following reasons: (a) the jurisdiction of the EEA Court established under the draft Agreement affected adversely the autonomy of Community law (paras 35–36); (b) the judicial system established by the draft Agreement would condition the future interpretation of the Community rules on free movement and competition (paras 45–46); (c) the draft Agreement enabled courts of EFTA States to seek rulings from the Court of Justice on the interpretation of the draft Agreement but such rulings would be advisory and have no binding effect. That would change the nature of the Court's function (paras 61–64); (d) the Court expressed doubts regarding the compatibility with the Treaty of the composition of the EEA Court (paras 52–53).
²⁹⁸ Paras 71–72.

For the same reasons, an amendment of Article 238 in the way indicated by the Commission could not cure the incompatibility with Community law of the system of courts to be set up by the agreement.

The brevity of the Court's reasoning has given rise to difficulties as to the exact meaning of the above statements. Some commentators have interpreted those dicta as meaning that the Community's judicial system may not be altered by an amendment of the Treaty and have criticized the Court for taking that view.²⁹⁹ It is submitted that such reading of the judgment is not correct. The true meaning of the Court's statements must be ascertained in the light of the ruling as a whole. The Court took the view that the judicial system of the draft EEA Agreement would alter fundamentally the judicial system of the Community itself, which in turn would have far-reaching repercussions for the nature of the Community legal order. There can be no doubt that Member States remain free to make such fundamental changes to the nature of the Community by entering into an international agreement with third States but their intention to that effect must be expressed clearly and unequivocally. In declaring that an amendment of Article 310 of the Treaty could not cure the incompatibility of the draft Agreement with the Treaty, the Court employed, in effect, a presumption of legislative intention: a fundamental constitutional change will not be recognized by the Court unless it is supported by the clearest of expressions³⁰⁰ The Opinion on the draft EEA Agreement illustrates the importance that the Court attaches to Article 220 and the judicial structure of the Community.³⁰¹

1.10. The general principles as sources of international law

Article 38(1)(c) of the Statute of the International Court of Justice lists among the rules which that court applies 'the general principles of law recognized by civilized

²⁹⁹ See Sir Patrick Neil QC, 'The European Court of Justice: a Case Study in Judicial Activism', Evidence submitted to the House of Lords Select Committee on the European Communities, Sub-committee on the 1996 Inter Governmental Conference, 1996 *Inter Governmental Conference, Minutes of Evidence, House of Lords, Session 1994-95, 18th Report*, p. 218 at 238. See also T. Hartley, 'The European Court and the EEA', (1992) 41 ICLQ 841 at 846 who states that the Court's view is 'plainly wrong'.

³⁰⁰ Hartley, *op. cit.*, at 846 states an adverse opinion by the Court under Article 300(6) [228(6)] can be overridden by an amendment to the Treaty and that 'it makes little difference which precise Article of the EEC Treaty is amended'. It should be recognized however that the provisions of the Treaty which the draft Agreement was found to infringe occupy a cardinal position in the Community legal order and their amendment cannot be the incidental result of amending Article 310 [238]. It is a different matter whether in Opinion 1/91 the Court was correct in concluding that the judicial system of the proposed EEA Agreement posed such a fundamental threat to the Community legal order. Arguably, the Court exaggerated the adverse repercussions of concluding the draft Agreement.

³⁰¹ As a result of the ruling the draft EEA agreement was amended and subsequently in Opinion 1/92 [1992] ECR I-2821 the Court held that, subject to certain conditions, the amended version was compatible with the Treaty.

nations'. The reference to general principles has been associated with concepts of natural law,³⁰² but objections have been expressed regarding the term 'civilized nations'.³⁰³ It has been suggested that in terms of methodology, the mandate given to the International Court is similar to that of the European Court of Justice. It requires a synthesis of principles found in domestic legal systems rather than the mechanical application of the statistically predominant rules. As Professor Brownlie notes: 'An international tribunal chooses, edits and adapts elements from better developed systems: the result is a new element of international law the content of which is influenced historically and logically by domestic law'.³⁰⁴ There are however significant differences between the application of general principles by the International Court and by the European Court. Although general principles are referred to by individual judges, it is notable that so far no majority decision of the International Court has been based expressly upon a general principle of law.³⁰⁵ Such principles are rarely cited by the parties and, when they are, it is by way of supplementary argument.³⁰⁶ A second difference is that in international law the general principles perform a gap-filling function, whereas in Community law their function goes further. They are, as already stated, an integral part of judicial methodology. A consequential difference is that the process of discovering general principles in European law is more eclectic: as shown in the *Staff Salaries* case the European Court may apply a principle creatively going significantly further than national laws. By contrast, a principle will not be recognized as a general principle of international law within the meaning of Article 38(1)(c) of the Statute unless it is adopted consistently as the solution to a specific legal problem by the various systems of municipal law.³⁰⁷ It has to be specific and ubiquitous or near ubiquitous in municipal legal systems.³⁰⁸ Those differences are accounted for by the different functions which the two courts perform in their respective legal orders. The International Court does not act as a constitutional court. It seems that the intention of the committee of jurists which prepared the Statute was to authorize the International Court of Justice to apply the general principles of law found in national, especially private, laws insofar as they could be transposed to relations between States.³⁰⁹ This contrasts with the European Court of Justice which in its case law has developed primarily principles of public law.

The International Court of Justice has drawn on municipal systems of law, in particular, on issues of procedure. It has referred for example to the rules of *lis pendens*³¹⁰ and *res judicata*,³¹¹ the rule that no one should be judge of his own

³⁰² E.g. by Judge Tanaka in the *South West Africa* cases, ICJ Reports (1966) 6 at 294–299.

³⁰³ See the Opinion of Judge Ammoun in the *North Sea Continental Shelf* cases, ICJ Reports 1969, p. 132–133.

³⁰⁴ I. Brownlie, *Principles of Public International Law*, Fourth Ed., Oxford University Press, 1990, p. 15.

³⁰⁵ See H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989', (1990) 61 BYIL 1 at 110.

³⁰⁶ *Ibid.*, 114, 119. ³⁰⁸ *Ibid.*, 119.

³⁰⁹ Brownlie, *op. cit.*, p. 16 where further references are made.

³¹⁰ *German Interests in Polish Upper Silesia* case, PICJ, Series A, no.6, 1925, p. 20.

³¹¹ *Administrative Tribunal* cases, ICJ Reports, 1954, p. 53.

cause³¹² and to rules pertaining to the admission of evidence.³¹³ Among the principles relied on one also finds the principle of acquiescence,³¹⁴ the principle that breach of an engagement involves an obligation to make reparation,³¹⁵ abuse of right and good faith,³¹⁶ and the principle of equality of States. Certain principles, such as the principle of non-discrimination on grounds of race, religion and sex, are recognized as part of *jus cogens* and could, as a result, override the effect of ordinary rules.³¹⁷

³¹² *Mosul Boundary case*, PICJ, Series B, no.12, 1925, pp. 31–32.

³¹³ See the *Cofu Channel case*, ICJ Reports, 1949, pp. 4, 18.

³¹⁴ *Temple case*, ICJ Reports, 1962, pp. 6, 23, 31–32.

³¹⁵ *Chorzow Factory case*, PICJ, Series A, no. 17, 1928, p. 29.

³¹⁶ *German Interests in Polish Upper Silesia case*, PICJ, Series A, no. 7, 1926, p. 30; the *Free Zones case*, PICJ, Series A, no. 30, 1930, p. 12 and no. 46, 1932, p.167.

³¹⁷ See W. McKean, *Equality and Discrimination under International Law* (Oxford University Press, 1983), p. 283; Brownlie, *op. cit.*, p. 513. Most recently the CFI had the opportunity to consider the interaction among international law, EC law, and the protection of fundamental rights in Case T-315/01 *Kadi v Council and Commission* and Case T-306/01 *Yusuf v Council and Commission*, judgments delivered on 21 September 2005. The CFI held that the European Community is competent to adopt regulations imposing economic sanctions against private organizations in pursuance of UN Security Council Resolutions seeking to restrict terrorism; that although the EU is not bound directly by the UN Charter, it is bound pursuant to the EC Treaty to respect international law and give effect to Security Council Resolutions; and that the CFI has jurisdiction to examine the compatibility of UN Security Council Resolution with fundamental rights not as protected by the EU but by *jus cogens*. These are the most important judgments delivered so far on the relationship between EC law and international law and are currently under appeal to the ECJ.