The United Kingdom and the European Union

The European Economic Community was created in 1957, the original six member states being West Germany, France, Italy, Belgium, the Netherlands and Luxembourg. It was not until 1973 that Britain became a member, following the enactment of the European Communities Act 1972. There are now 27 member states of the EU, the number likely to be increased still further as several other candidate countries complete the process of entry.  

From the earliest days membership has caused great constitutional anxiety for some in Britain, despite the fact that the United Kingdom is claimed to have the most flexible and the only unwritten constitution among the member states. Nevertheless, attempts to challenge entry were made on the ground that it constituted an abuse of the prerogative treaty-making power to the extent that it would undermine the sovereignty of Parliament, and on the ground also that the Treaty would breach art 18 of the Treaty of Union of 1707. More recently the renegotiation of the EC Treaty at Maastricht in 1992 led to further challenges in the British courts, an unsuccessful attempt being made to prevent the government from ratifying it.  

But if British membership has caused constitutional concerns, these are overshadowed by the political controversies it has generated. Political parties have been divided, constitutional conventions have been formally and informally suspended, and the only national referendum in the twentieth century was held in 1975 on continued membership of what was then the EEC.  

There is no sign of the controversy abating, with contemporary politics having been dominated by the question whether another referendum should have been held before the United Kingdom ratified the Treaty of Lisbon in 2007. The latter is the latest stage in the evolution of the European Union, with a number of treaty amendments along the way (for example the Single European Act of 1986, the Maastricht treaty in 1992, and the Nice treaty in 2001) having expanded the powers of what were then the ‘Community’ institutions and enabling an expanding volume of what was then ‘Community’ law to be made on the basis of qualified majority voting rather than the agreement of all Member States. The Lisbon Treaty arose from the ashes of ambitious plans for a European Constitution, as designed by the Convention on the Future of Europe in 2003, under the chairmanship of a former French President (Giscard d’Estaing). Although signed by all the member states, the Constitution could only be introduced once formally ratified by each of them. In some cases ratification would require a referendum, and in June 2005 the peoples of

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2 Blackburn v A-G [1971] 1 WLR 1037. See ch 12 D.  
3 Gibson v Lord Advocate 1975 SLT 134. See ch 4 D.  
5 Referendum Act 1975. See also Cmd 5925, 1975 and 6251, 1975.  
7 For a full analysis of the Lisbon treaty, see HL Paper 62-I (2007–08).  
9 A legal challenge to the British government signing the draft Constitution was predictably unsuccessful: R v Foreign Secretary, ex p Southall [2003] 3 CMLR 562.
France and the Netherlands voted to reject the proposals. In rescuing much (though not all) of the substance of the draft Constitution, the Lisbon treaty significantly amended and substantially re-wrote (and re-numbered) the two treaties which provide the legal base on which the EU now stands. One (created at Maastricht in 1992) is the Treaty on European Union (TEU), and the other (created originally in Rome in 1957) is the Treaty on the Functioning of the European Union (TFEU), as the EC Treaty (TEC) was renamed at Lisbon. The European Community and EC law thus no longer exist.

These changes were duly ratified by the British government, and it is with the domestic implications of EU membership that we are principally concerned in this chapter. In the meantime, it is to be noted that guiding principles of the EU are set out in the TEU. This provides by article 2 that the Union ‘is found on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’. These values are said to be ‘common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice solidarity and equality between men and women prevail’. Many constitutional texts and international treaties contain sententious phrases of this kind, though in this case there is a political procedure for holding to account a member state thought to breach these ‘values’. Otherwise, the ambitions of the Union include the removal of internal frontiers (in which the United Kingdom is a reluctant party), the establishment of an internal market based on balanced economic growth and a highly competitive social market economy, and the establishment of economic and monetary union with the euro as its currency (in which the United Kingdom does not participate). However, the Union can act only in accordance with the competences granted to it by the Member States (the principle of ‘conferral’), and even then by virtue of the principle of subsidiarity the Union can only exercise power in areas where it does not have exclusive competence only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the member states.

A. European Union institutions

The TFEU now makes provision for seven different EU institutions: the European Council, the Commission, the Council, the European Parliament, the Court of Justice, the European Central Bank, and the Court of Auditors (though not presented in that order by the Treaty). The difference between the European Council and the Council calls for an explanation. Thus, the European Council consists of heads of state or government and meets at least twice a year to ‘provide the Union with the necessary impetus for its development’, and define the general political directions and priorities of the Union. The Council in contrast consists of ministerial representatives from each member state and has policy making, legislative and budgetary functions, which in the latter cases are exercised jointly with the European Parliament. An important feature of the Lisbon reforms has been the creation of the office of President of the European Council, elected by the Council for a renewable term of two-and-a-half years. It is the responsibility of the President...
to chair and drive forward the work of the Council and to represent the foreign and security
policies of the Union in relations with countries outside the Union.20 In the last case, this is with-
out prejudice to the powers of the EU’s High Representative for Foreign Affairs and Security
Policy, another creation of the Lisbon amendments. This is a position characterised popularly
as corresponding to the position of the US Secretary of State (an office with responsibilities for
foreign affairs).

The Commission

1 Composition. The Commission consists of one member for each member State, though
its numbers are to be reduced in November 2014.21 Before the recent enlargements in 2005
and 2007, the Commission had a membership of 20, the largest of the member states having
two Commissioners each. The practice in the United Kingdom (where nominations are made
by the Prime Minister) has been for Commissioners to be senior political figures, and the
convention was that one should have a record of service in the Labour party and the other
in the Conservative party. Now that Britain has only one Commissioner, new practices have
been established to determine who should be nominated when vacancies arise: recent Labour
governments have nominated members of the Labour party based in the House of Lords
for this role. Each Commissioner has responsibility for a specific area of the Commission’s
activity, with the British nominated Commissioner at the time of writing (Baroness Ashton)
previously having responsibility for trade, before being appointed as the inaugural High
Representative for Foreign Affairs and Security Policy (which also has a seat on the Commission).
The President of the Commission (not to be confused with the President of the Council referred
above) is nominated by the European Council, acting by qualified majority with the approval
of the European Parliament.22 Once nominated both the President and the other members of
the Commission are then ‘subject as a body to a vote of consent by the European Parliament’,
following which they are appointed by the European Council acting by a qualified majority.23
Although the Commission ‘shall be responsible to the Parliament’, the latter has no power
to veto an individual nomination, and no power to remove an individual commissioner.24
Complaints about a breach of duty by a Commissioner may be made by the Council (acting by
a majority) or the Commission to the ECJ, which may require the Commissioner to be com-
pulsorily retired or to be deprived of his or her pension or other benefits.25 They may also
be compulsorily retired by the ECJ on a reference by the Council (again acting by a majority) or
the Commission if they no longer fulfil the conditions required for the performance of their
duties, or if guilty of serious misconduct.26

2 Functions. The Commission – which works under the political guidance of its President – has
two principal functions.27 The first is to initiate proposals for legislation, to be considered by the
Council and the Parliament. In this way the Commission plays a central role in the development
of EU policy in the different areas of its competence and in initiating legislative proposals to give
effect to that policy. However, Commission initiatives are not always endorsed by the Council,

20 Ibid, art 15(6).
21 Ibid, art 17(5).
22 Ibid, art 17(7).
23 Ibid.
24 Ibid.
26 TFEU, art 247 (ex TEC, art 216).
27 For the main functions of the Commission, see TEU, art 17(1); other powers are found elsewhere in the Treaty,
e.g. TFEU, art 45 (ex TEC, art 39).
particularly where the unanimity of the Council is required. The Commission’s second main function is to ensure that the provisions of the Treaties, as well as EU law generally, are implemented and applied. This may mean initiating enforcement proceedings in the Court of Justice against another Community institution, or against any member state which is in breach of the treaties or which has failed to implement directives or regulations.

So in Case C-382/92, Re Business Transfers: EC Commission v UK enforcement proceedings were initiated in respect of failure to implement directives protecting workers in the event of business restructuring; and in Case C-222/94, EC Commission v UK proceedings were initiated in respect of a failure to implement correctly a directive on television broadcasting. The Commission must be ‘completely independent’ in carrying out their responsibilities, which means that Commissioners must ‘neither seek nor take instructions from any government or other institution, body, office or entity’.

The Council

1 Composition and functions. The Council consists of political representatives of the member states, each being represented by a minister who is ‘authorised to commit the government of [that] member state’ and ‘cast its vote’. The Council meets in nine different ‘configurations’, based on a decision as to the nature of these configurations taken by a qualified majority of Council members. The representative at any particular session will depend on the subject of the meeting, so that – for example – on transport matters the United Kingdom representative will be a minister with responsibility for transport. The Presidency of the Council configurations rotates between member states, in accordance with a Council decision adopted by qualified majority.

Under the treaties, the Council has policy making and ‘coordinating’ functions, as well as a pivotal role in the legislative process, in the sense that it must approve Commission initiatives. Indeed, the Council is in a real sense the principal legislative authority within the Union, albeit that this legislative authority must now be shared with the Parliament. Unusually for a ‘legislative’ body, however, the Council’s deliberations were until recently not conducted in public, until changes made by the Lisbon treaty. Council business is now divided into two parts, the first dealing with legislative business to which the public have access, and the second dealing with non-legislative business which continues to be conducted in private.

28 On voting procedures in the Council, see p 000 in this chapter.
29 As in Case C-110/02, European Commission v Council [2004] ECR 1-6333.
30 TFEU, art 258 (ex TEC, art 226). See pp 000 – 000 below.
33 See also Case C-246/89, Commission v UK [1991] ECR 1-4585.
34 TEU, art 17.
35 Ibid.
36 Ibid, art 16.
37 Ibid, art 16(6); TFEU, art 236. At the time of writing (March 2010) the configurations were general affairs and external relations; economic and financial affairs; justice and home affairs; employment, social policy, health and consumer affairs; competitiveness; transport, telecommunications and energy; agriculture and fisheries; environment; and education, youth and culture: Council Decision of 22 March 2004 adopting the Council’s Rules of Procedure (2004/338/EC, Euratom) – Annex I. List of Council configurations, in Official Journal of the European Communities (OJEC), 28 August 2002, No L 230, p 37.
38 TEU, art 16(6), TFEU, art 236.
39 TFEU, art 236.
40 TEU, art 16.
42 TEU, art 16(8).
2 Procedure. In performing its functions, the Council is required to act by a qualified majority vote unless the treaties provide otherwise.43 There are as we have seen circumstances where the Council may act by simple majority, and as we shall see circumstances where unanimity is still required.44 The formula for determining what needs to be secured for the purposes of QMV will change in 2014.45 In the meantime, the votes of each country are weighted broadly by population, with France, Germany, Italy and the United Kingdom each having 29 out of a total of 345 votes, the weightings having changed since the enlargement of the EC in 2005 and again in 2007. Where QMV is required, acts of the Council need the support of at least a majority of the member states and a minimum of 255 votes which represents just under three-quarters of the whole. One of the many protocols to the treaties now also provides that when a decision is to be adopted by the Council by a qualified majority, a member of the Council may request that a check is made to ensure that ‘the Member States constituting the qualified majority represent at least 62 per cent of the total population of the [European] Union’.46 Although there has been an extension of the areas in which the Council can act by QMV, there remain important areas where unanimity is required and where one country does have a power of veto; this problem has arisen in the approximation of laws affecting social policy, where the unanimity of the Council continues to be required for measures on matters such as the social protection of workers and the protection of workers where their contracts of employment are terminated, as well as arrangements relating to the representation and the collective defence of the interests of workers.47 As the EU continues to grow, the likelihood of unanimity being secured for such controversial issues is remote.

European Parliament

1 Composition. The status and powers of the European Parliament have greatly increased since its inception. Now it is elected for periods of five years by direct universal suffrage,48 with the number of representatives elected in each state varying according to the population of the state in question. There are 736 seats in the unicameral Parliament, with the larger member states predictably having more seats than the smaller member states. Thus Germany has 99 seats, with France, Italy and the United Kingdom each having 72. Elections in Great Britain are conducted on the basis of a regional list system, by which the country is divided into 11 electoral regions (the number of members returned varying according to the size of the region), with votes being cast for registered parties rather than candidates. Seats are then allocated to individuals on the party lists (in the order in which they appear on the list) to reflect the votes cast in favour of each party in the region in question. So the more votes cast for a party, the larger the number of seats it will be allocated.49 Although the TEU declares that ‘political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union’,50 there are no European political parties as such. After each election, however, MEPs participate in different political rather than national groupings. Labour party members belong to the Party of European Socialists (PES) along with other socialist and social democratic parties;

43 Ibid, art 16(3).
44 See pp 000–000 above and 000–000 below, respectively.
45 TEU, art 16(5).
46 Protocol No 36.
47 TFEU, art 153 (ex TEC, art 137).
49 Three members are elected from Northern Ireland by single transferable vote. One of the English regions now includes Gibraltar (European Parliament (Representation) Act 2003, Pt 2), following a decision of the European Court of Human Rights that the lack of representation of Gibraltar in the European Parliament was a breach of the ECHR (First Protocol, art 3) (Matthews v UK (1998) 28 EHRR 361).
50 TEU, art 10(4).
the Liberal Democrats are part of the Alliance of Liberals and Democrats for Europe; and the Conservative Party is now associated with the European Conservatives and Reformists, having been previously aligned with the more mainstream European People's Party. Once elected, MEPs enjoy an immunity from liability in damages for opinions expressed in the course of their parliamentary duties, as well as other privileges.

2. Functions. The European Parliament has been said to represent 'the principal form of democratic, political accountability in the Community system'. Its most important functions relate to its role in the legislative process on the one hand, and its powers in relation to the Union’s budget on the other. So far as the former is concerned, the Council has been the principal legislative body of the Community, though the focus in recent years has been not to substitute the Parliament for the Council but to develop a system which would enable the Parliament to play a fuller part in the law-making process. Initially the Parliament enjoyed only a consultative status, but the TEU now provides that legislative functions are to be exercised by the Council and the Parliament jointly. Under the ‘ordinary’ legislative procedure in the TFEU (which does not apply in all cases), legislative instruments (regulations, directives and decisions) require the approval of both the Council and the Parliament, and provision is made in the TFEU for resolving disputes between the two by conciliation. If conciliation fails, so does the instrument concerned. So far as the budget is concerned, this will be prepared on an annual basis by the Commission on the basis of estimates submitted by each of the EU’s institutions. The draft budget is then presented for approval to the Council and the Parliament, with the Council submitting its position on the budget to the Parliament, which then has 42 days to approve or propose amendments to the Council’s position. If the latter, a Conciliation Committee must be convened to resolve the differences between the Council and the Parliament (with equal representation of each), in which the Commission also participates. If this process is unable to secure an agreed outcome, a new draft budget must be submitted by the Commission, and the process will begin again.

The European Court of Justice

1 Composition and jurisdiction. The function of the Court (ECJ) is to ‘ensure that in the interpretation and application of the Treaties the law is observed’. It consists of one judge for each member state and may sit in chambers (normally of 5 judges) or in a Grand Chamber (of 13 judges), as provided by its own statute which is annexed as a protocol to the treaties. The Court is assisted by eight Advocates General, an office without parallel in the United Kingdom.

53 Matthews v UK, above.
55 TEU, arts 14 and 16.
56 TFEU, art 289.
57 Ibid, art 294 (ex TEC, art 251).
58 Ibid, art 294(12).
59 For the work of the ECJ, see D Edward (1995) 20 EL Rev 539. And see generally, Arnell, The European Union and its Court of Justice, and Brown and Kennedy, The Court of Justice of the European Communities.
60 TEU, art 19.
61 TFEU, art 251 (ex TEC, art 221).
of its tasks. These submissions will include an assessment of the legal position in the matter referred for determination, an assessment which will often be endorsed by the Court. The submissions of the Advocates General are reported along with the judgment of the Court. Both judges and Advocates General are appointed from among people who are eligible for the highest judicial offices in their respective countries and appointments are made ‘by common accord of the Governments of the member states for a term of six years’. Every three years there is a partial replacement of both the judges and the Advocates General, although retiring judges and Advocates General are eligible for reappointment. The judges elect the President of the Court from among their number for a period of three years, a retiring President being eligible for re-election. In addition to the Court of Justice, there is a General Court (known previously as the Court of First Instance) which hears and determines a defined class of cases, the aim being to reduce the pressure of work on the ECJ itself, but to which there is a right of appeal on a point of law.

Under TFEU, art 263 (ex TEC, art 230), cases may be brought before the ECJ in a number of ways. First, as already suggested, proceedings may be brought by the Commission against a member state where it considers that the state has failed to comply with a Treaty obligation. If the Commission considers that a member state has failed to fulfil a Treaty obligation, it must first deliver a reasoned opinion on the matter after giving the state concerned an opportunity to submit its observations. It is only if the state does not comply with the opinion that the Commission may bring the matter before the Court. Second, one state may initiate proceedings against another where the former considers that the latter has failed to comply with a Treaty obligation. Before this is done the matter must first be referred to the Commission, which will deliver a reasoned opinion in this situation too. Where the ECJ finds that a state has failed to comply with a Treaty obligation, ‘the state shall be required to take the necessary measures to comply with the judgment of the Court’, and failure to do so could lead to subsequent proceedings before the Court initiated by the Commission with a view to imposing a financial penalty on the state. In Case C-84/94, UK v EU Council the British government unsuccessfully argued that the Working Time Directive (93/104/EC) exceeded the power under what was then TEC, art 118a to make by way of qualified majority measures designed to encourage improvements, especially in the working environment, as regards the health and safety of workers. It was subsequently held that key provisions of the Directive were insufficiently precise for the Directive to have direct effect, thereby preventing workers from recovering holiday pay for the period in which the United Kingdom failed to implement the Directive: Gibson v East Riding Council [2000] ICR 890.
itself bound to give a ruling, and will decline to do so only in exceptional circumstances. 84 A preliminary ruling may be sought by a national court or tribunal where the court or tribunal ‘considers that a decision on the question is necessary to enable it to give judgment’.77 In the case of a court or tribunal ‘against whose decisions there is no judicial remedy under national law’, the court or tribunal must bring before the ECJ for a ruling any question on a matter which is necessary for it to give judgment.78 According to the ECJ, a reference is not required where the question of EU law is irrelevant, or the matter has already been decided by the ECJ, or the position is ‘so obvious as to leave no scope for any reasonable doubt’. 79 A national court or tribunal is not empowered to refer a matter unless it is pending before the Court,80 though a reference may be made at any time during the domestic proceedings at the discretion of the national court.81 Where a reference is made, the court will request an answer to specific questions on the question is necessary to enable [a court] to give judgment, and will decline to do so only in exceptional circumstances.82

In Bulmer Ltd v Bollinger SA,83 Lord Denning gave detailed guidance first on when ‘a decision on the question is necessary to enable [a court] to give judgment’ and, second, when in such a case the Court should exercise its discretion to make a reference. As to the former, (i) the point must be conclusive of the case; while (ii) substantially the same point must not have already been decided by the ECJ, unless (iii) there are reasons to believe that an earlier decision of the ECJ is wrong. Moreover, the Court may decline to make a reference where the point is reasonably clear

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74 TFEU, art 263 (ex TEC, art 230). In some cases the requirement for individual concern may be dispensed with where the challenge is to a regulatory act (not defined) which is of ‘direct concern’ and does not entail ‘implementing measures’ (not defined) (TFEU, art 263(4)). For significant recent challenges by individuals or organisations (not all of which succeeded), see Joined Cases C-402/09 P and 415/09 P, Kadi v Council and Commission, 3 September 2008 (below, pp 000–000); Case T-345/05, Mate v European Parliament, above; Case C-345/06, Heinrich [2009] 3 CMLR 7; Case T-254/08, People’s Mojahedin Organization of Iran v Council of the European Union [2009] 1 CMLR 44; and Case C-335/08 P, WWF-UK v Council and Commission, 5 May 2009.

75 TFEU, art 264 (ex TEC, art 231). See Case C-345/06, Heinrich, above.

76 TFEU, art 267 (ex TEC, art 234). This has been said to be ‘the ideal instrument to define and develop the law of the [Union]’ (Mathiesen, above, p 130), but also ‘an instrument of cooperation between the Court of Justice and national courts’ (Case C-313/07, Kirtuna SL v Red Elite de Electrodomesticos SA [2009] 1 CMLR 14, at para 25).

77 TFEU, art 267 (ex TEC, art 234). On the meaning of a court or tribunal for this purpose, see Case C-416/96, El-Yassini v Home Secretary [1999] ECR 1-1209 (immigration adjudicator a court or tribunal).

78 TFEU, art 267 (ex TEC, art 234). This would apply to the House of Lords and now the Supreme Court of the United Kingdom (but see R v Employment Secretary, ex p EOC [1999] 1 AC 1), and possibly also to bodies whose decisions are protected by a privative clause.

79 Case 283/81, CLFITT v Ministry of Health [1982] ECR 3415.


81 Case C-303/06, Coleman v Attridge Law [2008] IRLR 722. The questions will normally be agreed with the parties in advance: see Marks and Spencer plc v Customs and Excise Commissioners [2005] UKHL 53.

82 The ECJ ‘has consistently held that under [TFEU, art 267, ex TEC art 234] it has no jurisdiction to rule on the compatibility of national measures with Community law’: Case C-458/93, Saddik [1995] ECR I-511.


or free from doubt (acte claire). As to the latter, however, even if a point of EU law is necessary to dispose of the case, there is no obligation to make a reference: ‘The English court has a discretion either to decide the point itself or to refer it to the European court, with a number of prescribed factors to be taken into account in the exercise of that discretion, including the time it will take to get a ruling, the expense in doing so, and the wishes of the parties.’

Although they have been very influential, these guidelines have been replaced in practice by a new formulation by Lord Bingham, who before referring to Bulmer said:

...if the facts have been found and the Community law issue is critical to the court’s final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer.

In McCall v Poulton, the Court of Appeal upheld a reference made by a county court (despite an earlier decision of the House of Lords on the same issue), on the ground that the position had been rendered unclear by an intervening decision of the ECJ in a TEC art 234 (now TFEU, art 267) reference from another country. In OFT v Abbey National plc, in contrast, the Supreme Court of the United Kingdom declined to make a reference in a controversial case where neither party ‘showed any enthusiasm’ for it, and where there was ‘a strong public interest in resolving the matter without further delay’.

B. European Union Law

As we shall see, there is a distinctive EU constitutional law, the fundamentals of which were in place before Britain’s accession in 1973, and the bold claims of which are not easy for the British public lawyer, schooled in the traditions of Dicey and others, to embrace. These claims relate particularly to claims about the supremacy of EU law in its expanding field of competence, as established by the ECJ in several ground-breaking early decisions. While as a practical matter any potential conflict between national constitutional law and the constitutional law of the EU is unlikely to be an issue of day-to-day concern, the possibility of serious disagreement between the British government and the EU institutions at some time in the future ought not to be discounted. It is at this point that unresolved issues of principle may become important, and it as at this point a national government will be faced with the strong claims of the ECJ in Case 26/62, Van Gend en
Loos v Nederlandse Administratie der Belastingen,\(^93\) in which it was noted that what was then the EEC Treaty ‘is more than an agreement which merely creates mutual obligations between the contracting states’. The point was reinforced forcefully in Case 6/64, Costa \(v\) ENEL (considered below),\(^94\) and reflected in the Declaration concerning primacy annexed to the Lisbon treaty (Declaration 17). This provides:

In accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.\(^95\)

which the Court asserted:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The supremacy of EU law

1 The general principle. Within the Community legal order, the ECJ thus claims that EU law takes priority over national law. In the Costa case referred to above, Mr Costa claimed that he was not obliged to pay for electricity supplied to him by ENEL on the ground that the supplier was an entity which had been nationalised in 1962 in breach of provisions of what was then the EEC Treaty. The Italian court (the Giudice Conciliatore of Milan) referred to the ECJ for consideration whether Italian law violated the Treaty in the manner suggested, only to be faced with the argument by the Italian government that the reference was ‘absolutely inadmissible’ inasmuch as ‘a national court which is obliged to apply a national law cannot avail itself of art 177 [now TFEU, art 267]’. In rejecting this argument, the ECJ held:

The integration into the laws of each member state of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty.\(^96\)

The ECJ further asserted that ‘the laws stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law, and without the legal basis of the Community itself being called into question’.\(^97\)

This case thus unequivocally declared the supremacy of Community – and now EU – law over inconsistent domestic law, including in particular domestic law introduced after

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\(^{93}\) [1963] ECR 1.

\(^{94}\) [1964] ECR 585.

\(^{95}\) Ibid, p 593. Attached to the Declaration is an Opinion of the Council Legal Service of 22 June 2007 pointing out that this principle of ‘primacy’ is a result of the case law of the Court of Justice (referring specifically to the Costa case), and is not mentioned in the treaty.

\(^{96}\) Ibid, pp 593–4.

\(^{97}\) Ibid, p 594.
accession. EU law also takes priority over inconsistent provisions of national constitutional law. The leading case, Case 11/70, Internationale Handelsgesellschaft v Einfahrund Vorratsstelle für Getreide and Futtermittel, was concerned with regulations which required applicants for export and import licences to pay a deposit which was forfeited if terms of the licence were violated. The German authorities were of the view that the system of licences violated certain principles of German constitutional law ‘which must be protected within the framework of the German Basic Law’. But the ECJ disagreed and held:

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

Further, ‘the validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure’. Although Community law thus prevails over even fundamental rights guaranteed by national constitutions, the ECJ did, nevertheless, hold that ‘respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice’ and that ‘protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community.’ On the facts it was held that the system of licences in question did not violate any such rights.

The respect for fundamental rights has meant that the ECHR has a special status in EU law. Otherwise, however, EU law takes priority over the international law obligations of the EU and its member states, as in Joined Cases C-402/05P and 415/05P, Kadi v Council and Commission which concerned a regulation authorizing the freezing of the assets of the applicant to comply with UN resolutions. It was held by the ECJ that the regulation in question was ultra vires and it was annulled. This was partly because there was no power in the EC Treaty to make a regulation of this kind, and partly because it was not consistent with respect for fundamental rights drawn ‘from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories’. Here the rights in question related to respect for private property and the right to effective judicial protection (the right to be heard). In the view of the ECJ, ‘an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system’. Although a welcome decision, the subordination of international law to EU law may be less attractive where economic freedoms in the TFEU are accorded priority over fundamental social rights in international and regional treaties to which Member States are party.

100 Ibid, p 1134.
102 [1970] ECR 1125, 1134. See now TEU, art 6(3). See below, pp 000–000.
103 3 September 2008. On the supremacy of EU law over international law, see also Case C-308/06, R (International Association of Independent Tanker Owners) v Transport Secretary, 3 June 2008, and Case C-122/95, Germany v Council [1998] ECR I-973.
2. EU law and the United Kingdom. The implications of the supremacy of EU law for the United Kingdom were revealed by the *Factortame* series of cases in which the company challenged the Merchant Shipping Act 1988 and regulations made thereunder on the ground that they violated provisions of the EEC Treaty, including arts 7 and 52 (now TFEU, arts 26 and 46 respectively). The Act had been introduced to prevent what was called ‘quota hopping’ and amended the rules relating to the licensing of fishing vessels by providing that only British-owned vessels could be registered, a requirement which excluded the Spanish-owned vessels of the applicants. In judicial review proceedings in *Factortame (No 1)* the Divisional Court made a reference under EEC Treaty, art 177 (now TFEU, art 267) for a preliminary ruling on the issues of Community law raised by the proceedings and ordered by way of interim relief that the application of the 1988 Act should be suspended as regards the applicants. This latter order was set aside by the Court of Appeal on the ground that the court had no power to suspend the application of an Act, since ‘it is fundamental to our (unwritten) constitution that it is for Parliament to legislate and for the judiciary to interpret and apply the fruits of Parliament’s labours’. By the time the case reached the House of Lords, however, the question of parliamentary sovereignty had been diluted, although not completely displaced. Lord Bridge said:

If the applicants fail to establish the rights they claim before the ECJ, the effect of the interim relief granted would be to have conferred upon them rights directly contrary to Parliament’s sovereign will and correspondingly to have deprived British fishing vessels, as defined by Parliament, of the enjoyment of a substantial proportion of the United Kingdom quota of stocks of fish protected by the common fisheries policy. I am clearly of the opinion that, as a matter of English law, the court has no power to make an order which has these consequences.

It was also held that under English law it was not possible (at that time) to grant an interlocutory injunction against the Crown.

In the view of the ECJ, however, ‘the full effectiveness’ of Community law (as it then was) would be impaired ‘if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under community law’. It therefore followed that ‘a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule’. As a result EC law (now EU law) must take priority over domestic legislation, even if this means that the British courts are required to set aside a fundamental constitutional principle. However, there is nothing novel about such a conclusion, the ECJ holding on a number of occasions that the supremacy of Community law (now EU law) applies even in respect of provisions of national constitutional law. The position was reinforced by *Factortame (No 4)* which was concerned with whether the government was liable to the plaintiffs in damages for loss suffered as a result of the legislation.

105 For the *Factortame* litigation, see *R v Transport Secretary, ex p Factortame Ltd (No 1)* [1989] 2 CMLR 353 (CA), [1990] 2 AC 85 (HL); *Case C-213/89, R v Transport Secretary, ex p Factortame Ltd (No 2)* [1991] AC 603 (ECJ and HL); *Case C-221/89, R v Transport Secretary, ex p Factortame Ltd (No 3)* [1992] QB 680 (ECJ); *Case C-48/93, R v Transport Secretary, ex p Factortame Ltd (No 4)* [1996] QB 404 (ECJ); *R v Secretary of State for Transport, ex p Factortame (No 5)* [2000] 1 AC 524. For proceedings by the Commission under art 169 (now 226) see *Case C-246/89, Commission v UK* [1991] ECR I-4585. For the sequel, see Merchant Shipping Act 1988 (Amendment) Order 1989, SI 1989 No 2006. For an account of the costs of the *Factortame* case, see HL Deb, 4 July 2000, WA 132.

106 For the *Factortame* litigation, see *R v Transport Secretary, ex p Factortame Ltd (No 1)* [1989] 2 CMLR 353, 397 (Lord Donaldson MR).

107 For the *Factortame* litigation, see *R v Transport Secretary, ex p Factortame Ltd (No 1)* [1989] 2 CMLR 353, 397 (Lord Donaldson MR).

108 Although the government moved quickly to repair the legislation, losses were sustained from the time the 1988 Act came into force (31 March 1989) until the offending discrimination was removed (2 November 1989).
in damages on the part of a state to a citizen who suffered loss as a result.\textsuperscript{109} In \textit{Factortame (No 4)}, the ECJ held:

The fact that, according to national rules, the breach complained of is attributable to the legislature cannot affect the requirements inherent in the protection of the rights of individuals who rely on Community law and, in this instance, the right to obtain redress in the national courts for damage caused by the breach.\textsuperscript{110}

So not only may an Act of Parliament be ‘disapplied’; the courts may also be called on to make an award of damages for losses suffered as a result of its terms where the conditions for state liability are met. In \textit{Factortame (No 5)}, the House of Lords held that the ‘deliberate adoption of legislation which was clearly discriminatory on the ground of nationality and which inevitably violated [what was then] article 52 of the Treaty’ was a sufficiently serious breach to give rise under Community law to a right to compensatory damages.\textsuperscript{111}

### The sources of EU law

1 \textit{EU Treaty}. EU law takes a number of different forms. The highest form of law are the Treaties (TEU, TFEU) themselves, which not only sets out the constitution of the EU, but also deals with substantive matters, some of which give rise to rights which are directly effective in national courts. Case 26/62, \textit{Van Gend en Loos v Nederlandse Administratie der Belastingen}\textsuperscript{112} was concerned with the interpretation of what was then art 12 of the EEC Treaty, this requiring member states to refrain from introducing between themselves new customs duties, or increasing those already in force, in trade with each other. The question referred by the Dutch tribunal to the ECJ was whether the then art 12 of the EEC Treaty had direct effect in the domestic courts ‘in the sense that nationals of member states may on the basis of [the] article lay claim to rights which the national court must protect’. The ECJ held:

Independently of the legislation of member states, Community law . . . not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community.\textsuperscript{113}

But not all terms of the Treaties have direct effect in the sense that they will be enforceable by individuals in their own national courts.\textsuperscript{114} Much will depend on the nature of the treaty provision in question, it being stated in \textit{Van Gend en Loos} that the then art 12 contained ‘a clear and unconditional prohibition’ which was unqualified ‘by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law’.\textsuperscript{115} This made it ‘ideally adapted to produce direct effects in the legal relationship between member states and their subjects’.

Where a treaty provision does have direct effect, in some cases it may be relied on by one private party against another, in which case it is said to have ‘horizontal’ direct effect. A provision which can be relied upon only against the State is said in contrast to have ‘vertical’ direct effect.

\textsuperscript{109} See below, pp \textit{000–000}.
\textsuperscript{110} [1996] QB 404, 497.
\textsuperscript{111} \textit{R v Secretary of State for Transport, ex p Factortame Ltd (No 1)} [2000] 1 AC 324, at p 545 (Lord Slynn). See A Cygan (2000) 25 EL Rev 452. Article 52 is now TFEU, art 43.
\textsuperscript{112} [1963] ECR 1.
\textsuperscript{113} Ibid, p 12.
\textsuperscript{114} See e.g. \textit{R v Home Secretary, ex p Flynn} [1995] 3 CMLR 397 (EC Treaty, art 7a (now TFEU 26) held not to have direct effect).
\textsuperscript{115} [1963] ECR 1, p 13.
Among the cases in which the ECJ has held that treaty provisions have horizontal direct effect, Case 43/75, Defrenne v Sabena, was concerned with the then art 119 (then art 141, now TFEU, art 257), which provides that ‘each member state shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work’. The article was said to promote a double aim, one economic and the other social, the former seeking to eliminate unfair competition and the latter furthering social objectives of the Community ‘which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of living and working conditions’. The principle of equal pay formed part of ‘the foundations of the Community’, and art 119 was held to have direct effect even though its complete implementation ‘may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level’. The ECJ held that direct effect would apply in particular to ‘those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public’.

2 EU legislation. As we have seen, the Treaties also confer law-making powers on the EU institutions, these taking a number of different forms. By TFEU, art 288 (ex TEC, art 249) the institutions are empowered to ‘adopt regulations, directives, decisions, recommendations and opinions’. These different measures have different legal consequences. Regulations have ‘general application’ in the sense that they are binding in their entirety and directly applicable in all member states.

Case 93/71, Leonesio v Italian Ministry of Agriculture was concerned with an EEC regulation of 1969 providing a subsidy for those who slaughtered milk cows. The question for the ECJ was whether the regulation conferred on farmers a right to payment of the subsidy enforceable in national courts. In holding that it did, the Court held that, as a general principle, ‘because of its nature and its purpose within the system of sources of Community law’, a regulation ‘has direct effect and is, as such, capable of creating individual rights which national courts must protect’. It was no excuse in this case that the national Parliament had not allocated the necessary funds to meet the costs of the subsidy, for to hold otherwise would have the effect of placing Italian farmers in a less favourable position than their counterparts elsewhere ‘in disregard of the fundamental rule requiring the uniform application of regulations throughout the Community’.

Like some provisions of the Treaty, regulations may have horizontal as well as vertical direct effect. It would also be possible in English law for the Attorney General – in his or her capacity as guardian of the public interest – to seek an injunction to restrain a private party from acting in breach of a regulation.

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117 Ibid, p 472.
118 Defrenne was relied upon by the ECJ in the controversial decision in Case C-438/05, International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line, above, in holding that a company can proceed against a trade union where the right to freedom of establishment of the former is impeded by industrial action of the latter. See K Apps (2009) 34 E L Rev 141 for some of the important remedial implications of this decision.
119 TFEU, art 288 (ex TEC, art 249).
121 See also Case 128/78, Re Tachographs: Commission v UK [1979] ECR 419.
122 Case C-253/00, Antonio Muñoz y Cía SA v Frumar Ltd [2003] Ch 328.
Chapter 8 · The United Kingdom and the European Union

Directives generally require implementing legislation by a member state before they give rise to enforceable obligations in the Member State in question, the TFEU providing that directive are binding ‘as to the result to be achieved’, the national authorities being left ‘the choice of form and methods’.124 So ‘where different options are available for and effective to achieve the objects of the Directive it is for Member States to choose between them’.125 This gives member states ‘considerable flexibility’ in implementation.126 But directives also may have vertical direct effect,127 the point having been established in Case 41/74, Van Duyn v Home Office where the ECJ said that it would be ‘incompatible with the binding effect attributed to a directive by art 189 [then art 249, now TFEU, art 288] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned’.128 According to one line of authority, ‘wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the state where that state fails to implement the directive in national law by the end of the prescribed period or where it fails to implement the directive correctly’.129 As a general rule, however, Directives do not have horizontal direct effect (though they may sometimes have what has been termed ‘incidental effect’).130

In Case 152/84, Marshall v Southampton and South West Hampshire AHA,131 it was held that art 5(1) of the Equal Treatment Directive (76/207/EEC) was directly effective, thereby allowing a woman (who had been dismissed at the age of 62 in circumstances where men would not have been dismissed until the age of 65) to bring proceedings in domestic law for sex discrimination on an issue to which domestic legislation did not then apply. It was held that although directives have only ‘vertical’ rather than ‘horizontal’ direct effect, a directive may nevertheless may be relied on against the state ‘regardless of the capacity in which the latter is acting, whether employer or public authority’.132

Decisions are binding in their entirety on those to whom they are addressed, while recommendations and opinions have no binding force.133

124 TFEU, art 288 (ex TEC, art 249). For a full account, see S Prechal, Directives in EC Law.
127 On which, see P P Craig (2009) 34 E L Rev 349 on the complex position now emerging on the legal status of directives.
132 Marshall, at p 749. The Area Health Authority was a public authority (or emanation of the State) for this purpose. See further Case C-222/84, Johnston v Chief Constable of the RUC [1987] QB 129 (police authority); Case 188/91, Foster v British Gas [1991] 2 AC 306 (nationalised industry); and Griffin v South West Water [1995] IRLR 15 (privatised water company). It has also been said that a directive may be ‘relied on against organisations 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, such as local or regional authorities or other bodies which, irrespective of their legal form, have been given responsibility, by the public authorities and under their supervision, for providing a public service’. Joined Cases C-213/96 to C-258/96, Kampelmann v Landschaftsverband Westfalen-Lippe [1997] ECR 6907. However, a private company (the Motor Insurance Bureau) was held not to be an emanation of the State for the purposes of direct effect, even though it was the party to an agreement with the government by which a directive was to be implemented: Byrne v MIB [2008] 2 WLR 234. But see now McCull v Poulton [2008] EWCA Civ 1263; [2009] 1 CMLR 45 (below, pp 000–000).
The EU, the ECHR and fundamental rights

An issue of growing interest is the extent to which fundamental rights play a part in the developing law of the EU. It is, of course, the case that many national constitutions include protection for fundamental rights, the nature of the protection varying from state to state. All member states have ratified the European Convention on Human Rights as well as the Council of Europe’s Social Charter of 18 October 1961 or its Revised Social Charter of 3 May 1996. Fundamental rights (as guaranteed by the ECHR) are deemed to ‘constitute general principles of the Union’s law’, the TEU, Art 6(3) now giving effect expressly to an initiative to this end by the ECJ. In this way the Court has been willing in a developing line of jurisprudence to construe Community legal instruments in a manner which is consistent with fundamental rights; and to set aside or annul decisions by Community institutions which are in breach of fundamental rights.

National courts have also been called upon to deal with fundamental rights when deciding matters of what is now EU law. But the EU is not yet a party to the ECHR so complaints cannot be taken to the Strasbourg court claiming that the Union is in breach of the ECHR, though it would be possible for a complaint to be made to the Strasbourg Court from a member state where it is claimed that the implementation of EU law in the State in question constitutes a breach of Convention rights. Following the Lisbon amendments, the TEU now requires the EU to accede to the ECHR, with the caveat that any accession ‘shall make provision for preserving the specific characteristics of the Union and Union law’. But this has yet to take place, and despite the mandatory provisions of TEU, art 6, any decision concluding accession will first need the agreement of the Council (acting unanimously) as well as the consent of the Parliament, before being approved by all member states ‘in accordance with their respective constitutional requirements’.

An important initiative in reinforcing the role of fundamental rights in EU law was the EU Charter of Fundamental Rights, adopted at Nice in December 2000. This is a wide-ranging document which is particularly important for its commitment to ‘the indivisible, universal values of human dignity, freedom, equality and solidarity’. A document of 54 articles, it is divided into seven chapters, entitled respectively dignity (articles 1–5); freedoms (articles 6–19); equality

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134 See Betten and Grief, EU Law and Human Rights.
137 See Case C-134/98, Booker Aquaculture Ltd v Secretary of State for Scotland 2000 SC 9.
138 Indeed prior to the Lisbon amendments, the EU had no power under the treaties then in force to accede to the ECHR (Opinion 2/94, Re the Accession of the Community to the European Human Rights Convention [1996] ECR I-1739), as some had proposed (House of Lords, Select Committee on European Union, 8th Report (1999–2000), for discussion of this issue).
140 See TFEU, art 218.
141PE, art 218.
142 Protocol No 8. It is also provided that the ‘accession of the Union shall not affect the competences of the Union or the powers of its institutions’, nor is it to affect the right of member states to derogate from the ECHR or to accept certain provisions with reservations.
(articles 20–26); solidarity (articles 27–38); citizens’ rights (articles 39–46); justice (articles 47–50); and general provisions (articles 51–54). The Charter draws freely on other texts for its contents, including the ECHR and the Council of Europe’s Social Charter, as well as the Community’s Charter of the Fundamental Social Rights of Workers of 1989. The Nice Charter is addressed to the institutions and bodies of the Union and to the member states only when they are implementing Union law. Where the Charter includes rights which are also to be found in the ECHR, ‘the meaning and scope of those rights shall be the same as those laid down’ by the Convention, minimising the possibility of conflicting interpretations of Convention rights by the two highest courts in the European legal order. The legal status of the Charter was transformed by the Lisbon treaty, with the TEU, art 6 now also providing that the Charter ‘shall have the same legal value as the Treaties’, albeit not integrated into the treaties. In the case of the United Kingdom (and Poland) however, Protocol No 30 provides that the Charter does not extend the ability of the ECJ (or of any domestic court) to find that any provision of domestic law is inconsistent with its terms; the Protocol also provides for ‘for the avoidance of doubt’ that nothing in title IV of the Charter (dealing with certain trade union freedoms and employment rights) creates justiciable rights applicable to the United Kingdom.

C. EU law and British constitutional law

We have seen so far that the EU treaties have created a new legal order, that the ECJ has asserted the supremacy of EU law over national law and that EU law may have direct effect in national legal systems. In each of these respects EU law presents a challenge to traditional English (but perhaps not Scottish) constitutional law, in so far as this is deeply rooted in parliamentary supremacy and in the obligation of the courts to give effect to legislation passed by Parliament. Britain is not alone in experiencing difficulties in reconciling EU law with the principles of national constitutional law. But the question of legislative supremacy is not the only potential flashpoint, with the courts being presented with difficulties of a more practical nature which some see as a challenge to their authority. Apart from the differences of style in the drafting of English and EU law, there is the more serious point that British judges must determine questions of EU law in accordance with the principles laid down by and in accordance with any relevant decisions of the European Court of Justice. Before considering the response of the courts, it is necessary to consider in some detail the constitutional issues presented by EU membership.

The constitutional implications of UK membership of the EC/EU

The constitutional implications of what was then EC membership were canvassed in a white paper published by the Labour government in 1967 which formed an important basis for the European Communities Act 1972. It was pointed out that complex legislation would need to
be introduced to implement measures which did not have direct effect and that further legislation would be needed to give effect to subsequent Community instruments. Legislation would also be required in the case of those provisions of Community law which are ‘intended to take direct internal effect within the member states’:

This legislation would be needed, because, under our constitutional law, adherence to a treaty does not of itself have the effect of changing our internal law even where provisions of the treaty are intended to have direct internal effect as law within the participating states.\(^{153}\)

The white paper further pointed out that ‘the legislation would have to cover both provisions in force when we joined and those coming into force subsequently as a result of instruments issued by the Community institutions’. Although ‘no new problem would be created by the provisions which were in force at the time we became a member of the Communities’, a constitutional innovation would lie ‘in the acceptance in advance as part of the law of the United Kingdom of provisions to be made in the future by instruments issued by the Community institutions – a situation for which there is no precedent in this country’. These instruments were said like ordinary delegated legislation to ‘derive their force under the law of the United Kingdom from the original enactment passed by Parliament’.\(^{154}\)

Quite whether this constitutional innovation could be successfully implemented is a question which was not resolved before the introduction of the 1972 Act. The 1967 white paper noted:

The Community law having direct internal effect is designed to take precedence over the domestic law of the member states. From this it follows that the legislation of the Parliament of the United Kingdom giving effect to that law would have to do so in such a way as to override existing national law so far as inconsistent with it.\(^{155}\)

But this merely rehearses rather than resolves the question: what happens if Parliament should legislate in a manner inconsistent with the directly effective terms of the Treaty? The answer it seemed was that ‘within the fields occupied by Community law Parliament would have to refrain from passing fresh legislation inconsistent with that law as for the time being in force’, although this ‘would not however involve any constitutional innovation’, for ‘many of our treaty obligations already impose such restraints – for example, the Charter of the United Nations, the European Convention on Human Rights and GATT’.\(^{156}\) But this did not provide an answer either: what would be the position of a post-accession statute which is incompatible with a subsequently introduced regulation having direct effect or a statute introduced to comply with the Treaty the terms of which are expanded in a novel and unpredictable way by the ECJ? In this context, the examples of the UN Charter or the ECHR are beside the point, for unlike what was then the EC Treaty these provisions do not seek to create directly effective obligations, but rely instead on implementing legislation for any obligations they generate.

**The European Communities Act 1972**

Britain’s application for membership was made in 1967. The Treaty of Accession was signed on 22 January 1972 and was implemented by the European Communities Act 1972.\(^{157}\) This deals

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\(^{153}\) Para 22.

\(^{154}\) Ibid. Today this analogy is seen to be badly misconceived. Delegated legislation (see ch 28) does not give rise to an autonomous body of law claiming supremacy over the source of its legal authority in domestic law.

\(^{155}\) Para 23.

\(^{156}\) Ibid.

with two central questions which were said to be ‘fundamental to the structure and contents’ of
the Act,158 the first being those provisions intended to embody in domestic law the provisions
of Community (now EU) law designed to have direct effect and the second being the provisions
which did not have direct effect but where action was necessary for their implementation. So far
as the former is concerned, s 2(1) of the 1972 Act, said to be ‘at the heart of the Bill’,159 provides:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising
by or under the Treaties, and all such remedies and procedures from time to time provided for by
or under the Treaties, as in accordance with the Treaties are without further enactment to be given
legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced,
allowed and followed accordingly.

What this does is to provide that in so far as EC/EU law has direct effect, it shall be enforceable
in the UK courts. It is also designed to ensure that directly effective EEC/EC/EU obligations
take precedence over national law. But it does not address the question of what should happen
where there is a statute which is inconsistent with directly effective EEC/EC/EU obligations.
This, however, is addressed by s 2(4) which provides (inter alia):

any enactment passed or to be passed [i.e. by the Westminster Parliament], other than one con-
tained in this part of this Act, shall be construed and have effect subject to the foregoing provisions
of this section.

Together with s 2(1), this is expressly designed to mean that ‘the directly applicable provisions
ought to prevail over future Acts of Parliament in so far as they might be inconsistent with them’.160
As such, s 2 is an attempt by one Parliament to fetter the continuing supremacy of another by
providing that, while future Parliaments may legislate in breach of Community (now EU) law, the
courts must (to the extent of any inconsistency) deny it any effect.161

The provisions of Community (now EU) law which do not have direct effect were addressed
in two ways by the 1972 Act. The first was by making a number of amendments to existing
legislation to bring it into line with Community (now EU) law; and the second was by introduc-
ing a general power to make subordinate legislation to cover future as well as some existing
Community instruments. Although there was concern about the new power to make subordinate
legislation, the government did not expect the power to be frequently used,162 an expectation
which was clearly unfulfilled. By s 2(2) of the 1972 Act, regulations may be introduced by a
designated minister for the purpose of implementing any Community obligation. This is sub-
ject to Sched 2 which provides that regulations may not be used for a number of purposes,
these being (i) an imposition of or increase in taxation; (ii) a provision having retrospective effect;
(iii) a power delegating legislative authority; and (iv) a measure creating a new criminal offence
punishable with imprisonment for more than two years, or punishable on summary conviction
with imprisonment for more than three months or with a fine of more than level 5 on the
standard scale. The power to make regulations under these provisions is exercisable by statutory
instrument which, if not made following a draft being approved by resolution of each House
of Parliament, is subject to annulment by either House.163 Fresh obligations under Community
(now EU) law continue to be implemented by both primary and secondary legislation.164 Although

158 HC Deb, 15 February 1972, col 271.
159 Ibid, col 650.
160 Ibid, col 278.
161 See S A de Smith (1971) 34 MLR 597, H W R Wade (1972) 88 LQR 1, J D B Mitchell et al. (1972) 9 CML
162 HC Deb, 15 February 1972, col 282.
163 For parliamentary scrutiny of delegated legislation, see ch 28.
164 See e.g. Trade Union Reform and Employment Rights Act 1993 and SI 1995 No 2587.
the power to make subordinate legislation has been widely construed, 165 the government must indicate in clear terms what primary legislation is being repealed or amended when this procedure is invoked. 166

Parliamentary scrutiny of EU legislation

In addition to the need to give effect to Community (now EU) law, there was also a need to put in place procedures for ensuring the accountability of ministers who were engaged in the making of new Community (now EU) law, in particular where the Community (now EU) instruments would have direct effect without the need for implementing legislation or other intervention by Parliament. The government expressed the view that ‘Parliament should be informed about and have an opportunity to consider at the formative stage those Community instruments which, when made by the Council, will be binding in this country’. 167 Traditional parliamentary procedures, such as questions, adjournment debates and (the now discontinued) supply days, would continue to apply and an undertaking was given that ‘no Government would proceed on a matter of major policy in the Council unless they knew that they had the approval of the House’. 168 Nevertheless, the government expressed the view that the traditional means of parliamentary accountability needed to be strengthened and that ‘special arrangements’ should be made under which the House would be ‘apprised of draft regulations and directives before they go to the Council of Ministers for decision’. 169 In 1974 special committees were set up by both Houses of Parliament, now the European Scrutiny Committee in the case of the Commons, and the European Union Committee in the case of the Lords. The Commons committee (which may appoint sub-committees) is empowered to examine European Community documents (a term defined to include proposed legislation) and to report its opinion on the legal and political importance of each and to consider any issue arising on any such document. 170 There are now over 1,100 documents considered by the Committee each year. The revised terms of reference of the highly respected Lords committee enable it to ‘consider European Union documents and other matters relating to the European Union’. The Lords committee also has the power to appoint sub-committees, of which there are in fact seven, and it is mainly through the medium of these seven sub-committees that business is conducted. 171 Debates on matters identified by the Commons Scrutiny Committee now take place in one of three European Standing Committees where ministers may make a statement and be questioned. 172 In recent years steps have been taken at both EU and national level to help overcome some of the formidable political obstacles to effective scrutiny of EU legislation. 173 Attempts to enhance the role of national Parliaments are to be found in the TEU which provides that

165 See R v Trade and Industry Secretary, ex p UNISON [1997] 1 CMLR 459.
166 R (Orange Personal Communications Ltd) v Trade and Industry Secretary [2001] 3 CMLR 36.
167 HC Deb, 15 February 1972, col 274.
168 Ibid.
170 HC SO 143. The committee has 16 members.
171 The sub-committees deal with Economic and Financial Affairs, and International Trade (A), Internal Market (B), Foreign Affairs, Defence and Development Policy (C), Environment and Agriculture (D), Law and Institutions (E), Home Affairs (F), and Social Policy and Consumer Affairs (G).
172 HC SO 119. See generally, Cygan, The United Kingdom Parliament and European Union Legislation. A valuable guide to the Commons procedure is also produced by the Department of the Clerk of the House, The European Scrutiny System in the House of Commons (June 2005). There is also now a European and External Relations Committee of the Scottish Parliament with wide-ranging scrutiny functions.
173 HC 588-I (1977–8), para 4.1. It was also said that ‘the nature of the Community is such that it is inherently difficult to make Community decision makers accountable to any Parliament, national or European’ (D Marquand (1981) 19 Journal of Common Market Studies 223). For proposals to improve scrutiny, see HC 465 (2004–5).
national Parliaments should be better informed and be sent draft legislation in good time so that they may consider it properly.\textsuperscript{174} By Protocol 1, legislative proposals from the Commission should be sent to national Parliaments at the same time as they are sent to the Council and the European Parliament, while a period of eight weeks must elapse between the sending of legislative proposals to national Parliaments and the date when it is placed on the provisional agenda of the Council for consideration as a legislative instrument, unless the matter is urgent.\textsuperscript{175} Moreover, by a Commons resolution of 17 November 1998 (the ‘scrutiny reserve resolution’), no Minister of the Crown should give ‘agreement’ to any ‘proposal for European Community legislation’, (a) which is still subject to scrutiny (that is, on which the European Scrutiny Committee has not completed its scrutiny) or (b) which is awaiting consideration by the House (that is, which has been recommended by the European Scrutiny Committee for consideration).\textsuperscript{176} However, these obligations may be waived in the case of a proposal which is confidential, routine, or trivial, or is substantially the same as a proposal on which scrutiny has been completed. The minister may also give agreement before scrutiny is complete with the agreement of the Committee or if there are ‘special reasons’, although the minister should explain the reasons to the Scrutiny Committee and in some cases the House itself. It is uncertain to what extent a minister is bound by a resolution of one of the European Standing Committees and views predictably differ between government and Parliament. But while ministers are unlikely to accept any formal constraint, departure from a Committee resolution is a decision that is unlikely to be taken lightly without the involvement of other ministers, thereby raising the possibility that the matter would become one of collective rather than individual responsibility.\textsuperscript{177}

D. Response of the courts

As we have seen, the questions of parliamentary supremacy presented by Britain’s membership were identified but not resolved in the pre-accession era. It would clearly be possible in principle for the United Kingdom to leave the EU,\textsuperscript{178} and to that extent the supremacy of Parliament is preserved. But this is a theoretical point which bears no relationship to contemporary reality, any more than do claims in another context that Parliament could legislate to regain sovereignty over former colonies.\textsuperscript{179} The real problem is whether Parliament can legislate in a manner which is expressly in defiance of EU law. Should that happen, how should the United Kingdom courts respond? It is on this question that the politicians abdicated all responsibility in the pre-accession debates. The point was made by the Lord Chancellor in 1967:

There is in theory no constitutional means available to us to make it certain that no future Parliament would enact legislation in conflict with Community law. It would, however, be unprofitable to speculate on the academic possibility of a future Parliament enacting legislation expressly designed to have that effect. Some risk of inadvertent contradiction between United Kingdom legislation and Community law could not be ruled out.\textsuperscript{180}

\textsuperscript{174} TFEU, art 12(a).
\textsuperscript{175} Under Art 3 of this Protocol, national Parliaments may send to the Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act is consistent with the principle of subsidiarity.
\textsuperscript{176} HC Deb, 17 November 1998, col 778. Also HL Deb, 6 December 1999, col 1019. The European and External Relations Committee of the Scottish Parliament considers and reports on proposed European Communities legislation and EU issues.
\textsuperscript{177} For further discussion, see Cygan (note 000 above).
\textsuperscript{178} See TUE, art 50: ‘Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements’.
\textsuperscript{179} See ch 4 above.
\textsuperscript{180} HL Deb, 8 May 1967, col 1203.
EU law and parliamentary supremacy

For the first decade after the passing of the 1972 Act, the courts vacillated between mutually conflicting positions. In *Felixstowe Dock and Railway Co v British Transport Docks Board* 181 Lord Denning commented that once a Bill ‘is passed by Parliament and becomes a statute, that will dispose of all discussion about the Treaty. These courts will then have to abide by the statute without regard to the ‘Treaty at all’. 182 Only three years later, Lord Denning appeared to change his mind. In *Macarthys Ltd v Smith*183 the question was whether the Equal Pay Act 1970 permitted a woman to claim equal pay only with men currently in the employment of the employer or whether she could use as a comparator her male predecessor. The Court of Appeal was divided on the question: the majority (Lawton and Cumming Bruce LJJ) were of the view that domestic law did not permit such claims, but that EC law (now EU law) was unclear. They were therefore minded to make a reference under art 177 (now TFEU, art 267) to determine whether equal pay for equal work under art 119 (now TFEU, art 157) was ‘confined to situations in which men and women are contemporaneously doing equal work for their employer’. Lord Denning was of the view that EC law (now EU law) permitted the woman’s claim and that domestic law should be construed accordingly, saying:

> In construing our statute, we are entitled to look at the Treaty as an aid to its construction: and even more, not only as an aid but as an overriding force. If on close investigation it should appear that our legislation is deficient – or is inconsistent with Community law – by some oversight of our draftsmen – then it is our bounden duty to give priority to Community law. Such is the result of section 2(1) and (4) of the European Communities Act 1972.184

The ECJ confirmed the interpretation of art 119 (now TFEU, art 157) which had been suggested by Lord Denning185 following which the Court of Appeal sought to make it plain that the provisions of the Treaty ‘take priority over anything in our English statute on equal pay which is inconsistent with art 119 (now TFEU, art 157)’, this priority having been ‘given by our own law’. According to Lord Denning:

> Community law is now part of our law: and, whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it.186

Although Lord Denning appeared thus to have changed his mind, he also observed:

> Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act – with the intention of repudiating the Treaty or any provision in it – or intentionally of acting inconsistently with it – and says so in express terms – then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.187

On this basis the European Communities Act 1972, s 2, effected only a limited form of entrenchment: it would have the effect that Community law (now EU law) will apply in preference to any post-1972 statute and to that extent Parliament would have bound its successors. In these cases the courts would assume that Parliament had not intended to depart from Community (now EU) obligations. But Lord Denning left open the possibility that Parliament might wish to assert its

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182 Ibid, p 663.
184 Ibid, p 789.
186 [1981] 1 QB 180, 200. See also Cumming Bruce LJ, at p 201.
supremacy by stating clearly that a domestic statute is to apply notwithstanding Community law (now EU law). In this case the domestic statute would displace to that extent s 2 of the 1972 Act. Further support in the early cases for the view that s 2 of the 1972 Act had only qualified the supremacy of Parliament was provided by Case 12/81, Garland v British Rail Engineering Ltd. In an important passage which potentially goes further than Lord Denning in preserving the priority to be given to domestic legislation, Lord Diplock raised the question whether:

having regard to the express direction as to the construction of enactments ‘to be passed’ . . . contained in section 2(4), anything short of an express positive statement in an Act of Parliament passed after January 1, 1973, that a particular provision is intended to be made in breach of an obligation assumed by the United Kingdom under a Community treaty, would justify an English court in construing that provision in a manner inconsistent with a Community treaty obligation of the United Kingdom.

Factortame

The most recent and authoritative view is that expressed in the Factortame series of cases. In Factortame (No 1) it was said by Lord Bridge (in upholding the Court of Appeal’s refusal to grant interim relief to restrain the operation of the Merchant Shipping Act 1988 pending the outcome of the art 177 (now TFEU, art 267) reference) that s 2(4) was to be regarded as having precisely the same effect as if a section were incorporated in Part II of the Act of 1988 which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC.

As we have seen, however, the House of Lords held that they had no jurisdiction to grant the interim relief sought; on a reference under art 177 (now TFEU, art 267), the ECJ ruled that a national court must set aside a rule of national law which precludes it from granting interim relief in a case concerning Community law (now EU law). When the matter returned to the House of Lords, relief was granted, thereby restraining the operation of the Merchant Shipping Act 1988 in relation to the plaintiffs pending the final resolution of the case. In a much quoted passage in Factortame (No 2), Lord Bridge said:

Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the UK Parliament. But such comments are based on a misconception. If the supremacy . . . of Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the European Court of Justice long before the UK joined the Community. . . . Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a UK court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of UK statute law which failed to implement Council directives, Parliament has always loyally

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189 Ibid, p 771.
191 [1990] 2 AC 85, 140.
accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.\textsuperscript{193}

In this way, the House of Lords appears to have effected a form of entrenchment of s 2(4) of the 1972 Act which thereby does what no statute has done before, namely fetter the continuing supremacy of Parliament.\textsuperscript{194} The late Sir William Wade referred to this as a constitutional revolution: ‘The Parliament of 1972 had succeeded in binding the Parliament of 1988 and restricting its sovereignty, something that was supposed to be constitutionally impossible.’\textsuperscript{195} But although this may be necessary as a matter of European integration, it is unclear whether the House of Lords in \textit{Factortame (Nos 1 and 2)} satisfactorily dealt with the issue as a matter of domestic constitutional law; nor is it clear that the decision answers all the questions which arise. Indeed, it is open to question whether the decisions advance the matter much beyond the Court of Appeal decision in \textit{Macarthys Ltd v Smith}\.\textsuperscript{196} It is unfortunate that in a case of such constitutional significance, the full range of constitutional authorities was not addressed in the course of argument, even if it would have been difficult for the defendants to have mounted a full frontal attack on the constitutional implications of s 2(4). But in terms of unanswered questions, what would be the position in the (admittedly unlikely) event that Parliament should say expressly (or by clear implication) that a statutory provision should apply notwithstanding any EU obligation to the contrary? Wade argued that: ‘If there had been any such provision in the Act of 1988 we can be sure that the European Court of Justice would hold that it was contrary to Community law to which by the Act of 1972 the Act of 1988 is held to be subject.’\textsuperscript{197} But does it follow that in such a case national courts would be required to give effect to the 1972 Act rather than the 1988 Act? As a matter of British constitutional law (and regardless of what the ECJ might say), it would appear in such an eventuality that Parliament had repudiated the ‘voluntary’ ‘limitation of its sovereignty’ which it accepted when it enacted the 1972 Act (at least insofar as the 1988 Act is concerned).\textsuperscript{198}

Some of these matters were considered in \textit{Thoburn v Sunderland City Council} (the so called ‘Metric Martyrs’ case) where the appellant had been convicted for breaching the Weights and Measures Act 1985 by selling fruit in imperial rather than metric measurements. As originally enacted the 1985 Act had permitted fruit to be sold in either measure, but the Act had been amended by regulations and now required fruit to be sold in metric measures only. These regulations, made partially under the authority of the European Communities Act 1972, s 2(2), had been introduced in order to comply with the EC Metrication Directive. The appeal failed, with the Administrative Court rejecting on a number of grounds the argument that the Weights and Measures Act 1985 impliedly repealed the European Communities Act 1972, s 2(2), to the extent of any inconsistency. But in the course of his judgment Laws LJ made a number of important observations about the relationship between British and EC law.

\textsuperscript{193} Ibid, pp 658–9.
\textsuperscript{194} See also \textit{R v Employment Secretary, ex p EOC [1995] 1 AC 1} where declarations were made that provisions of the Employment Protection (Consolidation) Act 1978 were incompatible with art 119 (now art 141) of the EEC Treaty and Council Directive 75/117/EEC and that other provisions of the Act were incompatible with the latter. For subsequent developments see D Nicol [1996] PL 579.
\textsuperscript{195} (1996) 112 LQR 568.
\textsuperscript{196} (1979) ICR 785.
\textsuperscript{197} (1996) 112 LQR 568, p 570.
\textsuperscript{198} This is not to deny that such a decision would give rise to serious political and constitutional problems at EU level. But it would be for the Commission to take appropriate action by way of enforcement proceedings or otherwise, and it is perhaps in that way that any problems should be resolved rather than in the British courts.
According to Laws LJ, the House of Lords in Factortame (No 1) (above) had effectively accepted that s 2(4) of the 1972 Act could not be impliedly repealed (‘albeit the point was not argued’). In this way the common law had created an exception to the doctrine of implied repeal (an exception which in the view of Laws LJ should be extended to all ‘constitutional statutes’, of which the European Communities Act 1972 was an example). This did not mean that the 1972 Act could not be repealed or modified. But it did mean that repeal or modification could be achieved only by ‘express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible’. By these means the courts were said to ‘have found their way through the impasse seemingly created by two supremacies, the supremacy of European law and the supremacy of Parliament’.

Parliamentary supremacy and the principle of indirect effect

Questions about parliamentary supremacy also arise, although rather less acutely, in the context of the interpretation of domestic legislation where questions are raised about its compatibility with directives. This presents problems of what is sometimes referred to as the indirect effect of directives, a matter which has given rise to a degree of inconsistency on the part of the ECJ. In one case (Von Colson), in a question arose about the relationship between German national law and the Equal Treatment Directive (76/207/EEC). According to the ECJ, ‘in applying the national law and in particular the provisions of a national law specifically introduced in order to implement [a directive], national courts are required to interpret their national law in the light of the wording and the purpose of the directive’. In a more recent case (Marleasing), the ECJ took a wider view of the application of directives, concluding now that ‘in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter’. Domestic courts are thus required to construe domestic law in line with the requirements of a directive, regardless of whether the legislation pre-dates or post-dates the directive. But there is no overriding obligation to construe legislation in this way, so that – for example – where a directive is implemented at national level after its prescribed commencement date, domestic courts are not required to construe the implementing legislation retrospectively to cover the period of the delay. Any such obligation would conflict with ‘general principles of law, particularly those of legal certainty and non retroactivity’. Under the Francovich principle, however, it may be possible in appropriate cases to bring an action against a national government for damages where an individual has suffered loss as a result of a failure properly to implement a directive which neither has direct not indirect effect. Any such action would be brought in the national courts.

200 See ch 4 C above on this aspect of the case.
203 Case C-268/06, IMPACT v Minister for Agriculture and Food, above.
204 Ibid, para 100.
Part I · General principles of constitutional law

So far as the response of domestic courts to these questions is concerned, the issue first arose for consideration by the House of Lords in *Duke v Reliance Systems Ltd*,207 concerned with the differential retirement ages for men and women which were permitted by UK law but which were in breach of the Equal Treatment Directive. As we have seen, however, the directive does not have horizontal direct effect and so could not be enforced in the domestic courts by someone who was not employed by a public authority. It was argued, nevertheless, that the Sex Discrimination Act 1975 should be construed so as to conform to the directive, a contention which drew the following response from Lord Templeman:

>a British court will always be willing and anxious to conclude that United Kingdom law is consistent with Community law. Where an Act is passed for the purpose of giving effect to an obligation imposed by a directive or other instrument a British court will seldom encounter difficulty in concluding that the language of the Act is effective for the intended purpose.208

In the *Duke* case, however, the Act in question was not passed to give effect to the directive. Indeed, it was expressly intended to preserve discriminatory retirement ages and was not reasonably capable of bearing any construction to the contrary. In these circumstances, it was held that s 2(4) of the 1972 Act does not ‘enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community directive which has no direct effect between individuals’. In more recent decisions, however, the House of Lords has adopted a radically different approach in cases where statutory instruments had been introduced quite clearly to give effect to a directive. Indeed, in two cases the House was prepared to take the extraordinary step of implying words into the legislation quite consciously to change its literal meaning,209 for fear that the measures would otherwise have ‘failed their object and the United Kingdom would have been in breach of its treaty obligations to give effect to directives’.210 The courts now freely refer to directives to discover ‘the correct application’ of domestic law,211 and in the course of doing so accept that ‘as between [a] directive and the domestic implementing regulations, the former is the dominant text’.212 But what about legislation (primary and secondary) which covers the field occupied by a directive but which was not passed necessarily in order to implement it? The approach in *Duke* no longer appears to be followed, it now being accepted in *Webb v EMO Air Cargo (UK) Ltd*213 (following *Marleasing*) that an English court should construe a statute to comply with a directive regardless of whether the statute was passed before or after the directive was made. However, the following case reveals that there may be other obstacles to indirect effect

*White v Motor Insurers’ Bureau*214 was concerned with the implementation of the Motor Insurance Directive, which requires each member state to set up a body to provide compensation for the victims of uninsured drivers. Rather than establish a statutory body, the government made an agreement with the MIB, a company limited by guarantee whose members are motor insurance companies for compensation to be administered by the Bureau. The House of Lords held that

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208 Ibid, p 638.
210 Litster, ibid, at p 558.
212 Director General of Fair Trading v First National Bank, above, per Lord Steyn.
the *Marleasing* principle cannot be stretched to require contracts of this kind to be interpreted in a manner which would impose obligations which the contract did not impose. This was so even though the government was one of the parties to the contract, and the contract was the chosen means for implementing the Directive. Although on the facts the agreement was found to be consistent with the requirements of the directive, this is nevertheless a highly unsatisfactory decision, which means that the rights under domestic law of the insured third party in this case are left to depend on the manner by which the government elects to implement a directive, the *Marleasing* principle being held to apply only to legislation (primary and secondary).

This latter restriction was called into question as a result of the *Pfeiffer* decision,215 where the ECJ said that ‘a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, *to consider the whole body of rules of national law* and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive’. In the light of these remarks, the Court of Appeal dismissed an appeal from a county court decision in which a TEC, art 234 (now TFEU, art 267) reference was made, effectively to clarify whether the restriction in *White* was consistent with EU law.216 At the time of writing the decision had not been made. Although previously accepting that directives may be implemented by agreements of this kind, the ECJ had also emphasised that any such agreement should be capable of interpretation and applied so that bodies such as the MIB are required to meet the full requirements of the directive.217

**E. Conclusion**

Whether or not the late Sir William Wade was correct in his assertion that a revolution has taken place,218 British membership of the European Union continues to generate political controversy and legal uncertainty. At least three issues of constitutional law continue to be of interest. The first is the impact of ever closer political union in Europe and with it an enhancement of the role of the EU institutions.219 Constitutional law has a role to play in this process, as political demands for more popular involvement as a prelude to closer union have so far been largely ignored. Although the government was committed to holding a referendum before ratifying the draft European Constitution that was concluded in 2003, this commitment was avoided with the collapse of the Constitution and its reconstruction in a different guise in the form of the Lisbon Treaty. Second, there is the concern about what some refer to as the democratic deficit in the EU, which takes a number of forms. But at its heart is a legislative process in which the dominant part (the Council) is at best only indirectly elected and whose activities have been in need of greater transparency. Although it has been said that ‘neither the Council nor Parliament is capable, on its own, of assuring a satisfactory level of democratic accountability, in the complex political nexus of a constitutional order of States’,220 it remains to be seen how far the important Lisbon reforms will in practice extend the principles of liberal democracy into this important arena, while at the same time ensuring a greater degree of parliamentary accountability on the part of those who represent the United Kingdom in the process. Third, there is the matter of the constitutional

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base on which the whole enterprise is constructed. Although constitutional dogma has been shaken, the problem of sovereignty has not been adequately resolved; it is, however, unlikely that everyone would agree now with the view expressed in 1972 that ‘the ultimate supremacy of Parliament will not be affected, and it will not be affected because it cannot be affected’. The problem has been fudged rather than resolved, though it has yet to be established whether these are problems of any practical significance and, if so, whether closer European union can continue to be built on such foundations.

221 See Thoburn v Sunderland City Council, pp 000–000 above.
222 HC Deb, 5 July 1972, col 627. See also HL Deb, 7 August 1972, col 911.