

Chapter 8 Enforcing EU Law

Context for this chapter

(Fictitious) Directive 2014/666 provides that all equipment in fitness centres should be thoroughly inspected for technical malfunctioning and other safety hazards at least once a fortnight. Directive 2014/666 set a deadline for implementation by all Member States of 1 September 2016. The Belgian government has not yet implemented the Directive.

(Fictitious) Regulation 135/2015 additionally requires that fitness centres are always staffed by trainers qualified in first aid, and that a basic first aid kit is available in the centre.

Daxina is a member of a local private gym. While doing her usual warm-up run on one of the treadmills at 8am on 31 October 2016, the treadmill spontaneously increased its speed. Daxina hit the 'slower' button repeatedly but the treadmill did not respond; when she could no longer keep up with the rapid pace, she tripped off the back of the treadmill and hit her head.

The gym trainer's shift did not start until 9am. There was a first aid kit behind the reception desk, but the receptionist did not know any first aid. As Daxina was not instructed to stay lying down following her fall, her head injury worsened while she and the receptionist awaited the paramedics. Surgery reduced swelling in her brain, but nonetheless left Daxina with a permanent speech impairment.

It later came to light that the treadmill Daxina was running on had not been inspected for technical malfunctions for over a year.

Discussing the scenario

As Daxina's legal advisor, consider if she has any legally enforceable rights and remedies arising under EU law in the scenario at the start of the chapter.

Approaching the scenario

This scenario takes the form of a fairly standard law exam question at university: it describes a factual scenario that has legal repercussions, and in your answer, you are expected to give 'advice' (in this case to Daxina) on what those legal repercussions are.

What the scenario requires you to do is go through, paragraph by paragraph, find the *facts*, and see what *law* applies to those facts. Assessing the combination of *law* and *facts* will enable you to demonstrate that you not only understand how the law works in the abstract—from having read Chapter 8 in the book—but you are able to apply it to a particular situation that you have not seen before.

The majority of the work you need to do in order to give Daxina accurate advice will have been done as you answered the '**Discussing the scenario**' boxes throughout Chapter 8.

They are addressed here in turn—with a small conclusion at the end on how to summarize this as advice for Daxina.

Discussing the scenario

Can the Commission commence Infringement Proceedings against Belgium in light of what has happened to Daxina in the fitness centre? What steps would it need to take to do so? Would the Infringement Proceedings help Daxina?

A starting point to this question, which is about enforcement of EU law and remedies, is to recount generally what you know about the different ways in which EU law can be enforced: public and private. The first ‘**Discussing the scenario**’ box in the chapter made you consider both how the public enforcement process works, *and* how much use this will be to Daxina.

For completeness, both issues are addressed here—but when you are advising Daxina, the key question is whether or not she would benefit from Commission enforcement.

The chapter demonstrates that the Commission can commence Infringement Proceedings against any Member State for a breach of EU law. The first paragraph of the scenario tells you that Belgium has not implemented an EU directive by its implementation deadline. This is a breach of EU law that can be challenged by the Commission. In terms of steps the Commission can take, this requires setting out a quick sketch of the administrative and the judicial stages of the Infringement Proceedings.

In terms of whether Commission action will help Daxina, the chapter demonstrated that public enforcement does not assist private complainants. It merely attempts to ensure that Member States become compliant with EU law—i.e. that Belgium implements this directive so that there will be no *further* cases like Daxina’s. This does not help Daxina personally, though.

Discussing the scenario

Can Daxina rely before a national court on Regulation 135/2015, which requires that all fitness centres are staffed by trainers qualified in first aid, and that a basic first aid kit needs to be available at the reception desk?

These questions ask you to address how regulations work and when they can be relied upon before national courts. There are two key issues to address here: a) that regulations are **directly applicable**, and so do not need to be implemented and are binding law within the Member States from their date of adoption (which is usually also their date of entry into force). And b) *whether* this particular regulation is **directly effective**.

This requires an assessment of the *Van Gend* criteria: is the relevant provision of this regulation ‘clear, precise and unconditional’?

For the purposes of answering an exam question, *addressing* all three of those concepts, with references to how they have been interpreted in the CJEU’s case law, is more important than giving the answer we anticipate. As such, we may instinctively feel that this is clear, precise, and unconditional when we consider cases like *Sabena* and *Cava*, but

you can make a good argument that the concept of a ‘basic first aid kit’ is not precise enough to be directly effective.

Your factual analysis then needs to finish with a conclusion on the legal consequence: if we think this provision *is* **directly effective**, then Daxina can rely on it before a national court; and if we *do not* think this provision is **directly effective**, she cannot.

Discussing the scenario

Can Daxina derive any rights enforceable before the Belgian courts from Directive 2014/666?

Would your answer change if she had had her fall in a fitness centre run by the local authority?

These questions are prompting you to consider how **direct effect of directives** works. The first question deals with the situation raised in *Marshall*: while directives can be vertically directly effective, they cannot be horizontally directly effective. As such, Daxina cannot rely on an unimplemented directive against a *private gym*.

The second question asks you to consider how the CJEU’s notion of ‘**emanation of the state**’ might help Daxina. Would a local authority gym count as an ‘emanation of the state’ under the CJEU’s definitions set out in *Foster and Farrell*? Note that it does not matter if you do not know exactly how a local authority is governed. Try not to dwell on the specifics for very long! What matters is that you can cite the criteria in the *Foster/Farrell* test and apply those *the best you can* to the situation of the ‘local authority’. You will be rewarded for correctly applying the CJEU’s case law in your assessment, as there is no obvious ‘incorrect’ answer here.

Discussing the scenario

Imagine that the (fictitious) UK Exercise Safety Regulations 2008 require that all gym equipment be inspected ‘regularly’. Does this help Daxina, and if so, how?

This question is asking you to consider the operation of **indirect effect** in Daxina’s case. Daxina cannot rely on the directive via **direct effect**, as her complaint is directed against another private party (and so horizontal). Nonetheless, *Marleasing* and *Von Colson* tell us that, wherever possible, national courts are obliged to—insofar as they are legally allowed to—interpret existing provisions of national law that correspond to an EU directive *in light of that directive*.

The directive, as the facts of the scenario explain in the first paragraph, requires gym inspections at least ‘once a fortnight’. The UK Regulations, which precede the directive but are clearly on the same subject, require a gym inspection ‘regularly’. Can the concept of ‘regularly’ be interpreted by a court to mean ‘once a fortnight’, do you think? Depending on your answer, Daxina may or may not be able to benefit from the Directive after all. If you think that **indirect effect** requires the Belgian courts to consider ‘regularly’ as meaning ‘once a fortnight’, the private gym failed to comply with the law, and Daxina will be able to claim for a remedy accordingly.

To show that you truly grasp what you have learned in Chapter 8, it may be worth considering if you think that the outcome of applying **indirect effect** to Daxina's scenario is a *just* one. One way of doing this is by comparing what happens in Daxina's case to the outcome of *Dominguez*. (Doing so demonstrates that you understand that there are critics of **indirect effect** and how it transforms the domestic legal system.)

Discussing the scenario

Can Daxina make a claim for damages against the Belgian government in light of the injury she has suffered?

Addressing remedies in an EU law question should make a quick reference to **national procedural autonomy**, which in this case would mean that Daxina would be entitled to an effective and equivalent remedy to those set out in domestic health and safety law. You do not know more details than that, and are not expected to!

The only exception to national procedural autonomy is **state liability**. From *Francovich* and *Factortame/Brasserie* we know this requires demonstrating that an individual gained rights from an EU law provision; that provision of EU law was breached in a way that was 'sufficiently serious'; and there is a direct link between harm an individual suffered and the Member State's breach of EU law.

Applying those conditions to the facts of the scenario, you have to consider:

- Do either the Directive or the Regulation give 'rights' to Daxina? If so, what are those?
- Has Belgium breached its obligations as a Member State in relation to the Directive or the Regulation in a way that is 'sufficiently serious'?
- And, is there a direct link between Belgium's breach of its obligations and the injury Daxina suffered?

Regarding the Regulation, while Daxina has 'rights' stemming from the Regulation (roughly, the right to have a first aid kit at hand if injured at the gym), Belgium has not breached any of its obligations in relation to the Regulation. The breach, here, is on the part of the private gym.

Regarding the Directive, on the other hand, Daxina has a 'right' to safe-to-use gym equipment that is checked for malfunctions once a fortnight. Belgium failed to implement the Directive that would have given effect to that 'right'. And Daxina's injury can definitely be presented as a consequence of the fact that her private gym was not obliged to have the gym equipment inspected every fortnight under Belgian law, because Belgium had failed to implement the Directive requiring those inspections. If Daxina's legal representation does these things effectively before a court, a state liability claim against Belgium could be successful.

Summary

As Daxina's legal advisor, you should be telling her the following:

- She cannot benefit from the EU's public enforcement mechanism—even if the Commission starts **Infringement Proceedings**, this will not help *her* specifically.
- Regarding the Regulation, it will be **directly effective** if clear, precise, and unconditional—so if you think it is, she can bring an action against her gym before the Belgian courts. But if you think it is not, then she cannot.
- Regarding the Directive, it will not be **directly effective** against a private gym; it is likely to be against a local authority gym, which is probably an '**emanation of the state**'. Where it is not directly effective, she cannot bring an action on the basis of the Directive itself.
- However, she *can* bring an action on the basis of the UK Regulations that promise a 'regular' inspection, relying on **indirect effect** of the Directive to ask the Court to interpret the domestic law to give effect to the Directive's 'once a fortnight' condition.
- In general, EU law does not prescribe specific national remedies for breaches of EU law. She will be entitled to an **effective and equivalent remedy** for the gym's failure to comply with the Regulation and for the lack of 'regular', meaning 'fortnightly', gym inspections.
- However, she probably can argue that her injury is a result of a Belgian failure to implement the Directive (without that implementation, no obligation for 'fortnightly' gym inspections existed) under **state liability**, which would result in Belgium itself being liable for damages under EU law.