

TABLE OF CONTENTS

Preface	VII
Acknowledgements	IX
Abbreviations	XV
Chapter I – Introduction	1
Chapter II – Effectuating Effectiveness in European Community Law	7
1. The ‘Transformation of Europe’ and a Prior Transformation in Public International Law	9
2. National Courts and ‘National Procedural Autonomy’	14
2.1 A strategy of minimum interference	24
2.2 A growing concern over effectiveness	26
2.2.1 Setting aside national ‘remedies’	27
2.2.2 Creating new remedies	28
2.2.3 Creating new remedies and spelling out minimum conditions for their exercise	31
2.3 A more balanced approach	33
2.4 <i>Critique</i> and conclusion	34
3. State Liability for Judicial Wrongs – Basic Notions	39
3.1 Extension to judicial acts – the problem	39
3.2 <i>Non-compliant</i> courts	41
3.3 Primary and secondary proceedings	43
Chapter III – Three Hypotheses on the Necessity of State Liability for Judicial Acts in the Community Legal Order	45
1. International Law Hypothesis I: State Liability As Refined ‘State Responsibility’ Tailored to the Individualising Nature of the Community Legal Order	49
1.1 Community law refers to public international law	50

1.2	Attribution of courts to the State in public international law	55
1.2.1	From the early days to the twentieth century	55
1.2.2	Contemporary practice	57
1.2.2.1	Separation of attribution from substantive issues	57
1.2.2.2	The ILC's Draft Articles on State Responsibility	58
1.2.2.3	Practice of international courts concerning the attribution of national courts to the State	61
1.2.2.4	Scholarly comment	63
1.2.3	Conclusion	64
1.3	Transferability to Community law?	65
1.4	Conclusion	70
2.	International Law-Hypothesis II: The Imperatives of the Protection of Fundamental Rights Are Such As to Require State Liability for Judicial Acts	71
2.1	Procedural guarantees – Articles 6 and 13 of the ECHR	71
2.2	Substantive guarantees – Article 1 of Protocol No. 1	75
2.3	Conclusion	78
3.	Comparative Law-Hypothesis: State Liability for Judicial Acts Is a General Principle Common to the Legal Traditions of the Member States	79
3.1	Alleging a general principle	80
3.2	Conclusion	84
4.	Conclusion	86
	Chapter IV – Reservations for Community Law	89
1.	Grounds Causing Hesitation	91
1.1	Judicial independence	91
1.2	The doctrine of <i>res judicata</i>	95
1.3	Impartiality of the judiciary	107
1.4	Endangering the spirit of co-operation between the ECJ and national courts?	108
1.5	<i>Litis finiri oportet</i> or endless litigation within 'reasonable time' (Article 6 of the ECHR)?	112
1.6	The parallelism between State liability and the community's extra-contractual liability regime	114
1.7	Undesirable power gain for the ECJ?	118
2.	Conclusion	120

Chapter V – Which Standard of Liability for Judicial Acts?	123
1. The Additional Standard of ‘Manifest Infringement’ of Community Law	126
2. Criteria to Be Taken into Account by National Courts	131
2.1 Breach of the duty to refer pursuant to Article 234(3) of the EC Treaty	132
2.2 Conclusion	135
3. The Application of the Standard of Manifest Infringement in <i>Köbler</i>	136
4. Need to Delimit the Judiciary from the Other State Functions	142
4.1 What is a court for the purposes of State liability?	144
4.1.1 Do only courts of last instance trigger State liability?	144
4.1.2 What is a court of last instance for the purposes of State liability?	146
4.2 Conclusion	150
5. Conclusion	150
Chapter VI – Necessary Institutional Arrangements in the Member States to Facilitate State Liability for Judicial Acts – A Case Study on Austria	153
1. Community Law Background	155
2. State Liability for Judicial Acts under Austrian law	161
2.1 State liability pursuant to the law on official liability (<i>Amtshaftungsgesetz – AHG</i>)	161
2.2 State liability pursuant to Article 137 of the Austrian Federal Constitutional Law	170
2.3 Concluding assessment	171
Chapter VII – Alternative Remedies	177
1. <i>Kühne & Heitz</i> and an Approach of ‘Try Again’?	179
2. The Action for Infringement	181
2.1 Deficiencies	182
2.2 <i>Commission v. Italy</i>	183
2.3 Relationship between <i>Köbler</i> liability and the action for infringement	188
3. The Residuary Role of the ECtHR	189
4. Conclusion	191

Chapter VIII – Epilogue	195
Bibliography	207
Table of Cases	217