Francovich Follow-Up

Cases on State Liability for Breach of European Community Law

--------New, New, New--------
Some 15 ECJ/CFI cases including A.G.M.-COS.MET Srl, Test Claimants I and II, Gestoras & Segi, Robins, Manfredi, Traghetti, Galileo, FIAMM and Beamglow, and Masdar. Various new judgments by national courts from the UK, France, The Netherlands etc.; pending cases updates.
--------New, New, New--------

This dossier tracks Community and national case law on State liability for breach of Community law, in the wake of the European Court of Justice's landmark Francovich judgment. The site comprehensively monitors pending cases and discusses the ones decided by the ECJ. Selected judgments by the national courts of a number of EU Member States are also covered. The development of a ius commune under 288 EC is discussed. Finally, there is a comparative perspective in terms of EEA law, the European Convention of Human Rights and public international law.

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The Principle of State Liability

In 1991, in Francovich, [1991] ECR I-5357, [1993] 2 C.M.L.R. 66, the Court for the first time fully addressed the question of State liability for breach of Community law and its basis in EC, not national law. It ruled that it is a principle of Community law, inherent in the system of the EC Treaty, ‘that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible’. And that ‘the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage’.

It further indicated what those conditions should be as regards the type of breach in hand, namely the non-transposition of a directive within the required period (a pure omission). The following three prerequisites apply: (i) the result prescribed by the directive should entail the granting of rights to individuals; (ii) the contents of those rights must be identified on the basis of the provisions of that directive; and (iii) ‘the existence of a causal link between the breach of the State’s obligation and the loss and damage suffered by the injured parties’.

The harmonization of State liability by the Court’s case law does not extend beyond the existence of the principle of liability for imputable breaches of Community law and the basic liability conditions. Other aspects of damages claims are governed by the rules of national liability law. For instance, ‘it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules’. Further, according to the ECJ, ‘the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation’.

In the 1996 Brasserie/Factortame judgment the Court has significantly developed its case law. The ECJ has linked the liability of the EU under Article 215 EC Treaty to the matter of State liability for breach of Community law. This approach to questions of liability of both Member States and the EU is likely to determine the course of the Court in the foreseeable future. A ius commune is in the making now that the Court has recognized a general principle common to the legal systems of the Member States that unlawful State conduct gives rise to an obligation to make good the damage caused. On the basis of this principle, a Member State’s breach of a directly effective Treaty provision and its failure to correctly transpose a directive into national law gives rise to liability where (i) the rule of law infringed must have been intended to confer rights on individuals; (ii) a manifest and serious breach is present and (iii) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. It follows that a choice between two sets of requirements had to be made: the Francovich-set and the Brasserie-set.

However, this has changed after Dillenkofer, where the Court held that ‘in substance, the conditions laid down in that group of judgments [i.e. Brasserie, British Telecommunications and Hedley Lomas] are the same as in Francovich, since the condition that there should be a sufficiently serious breach, although not expressly mentioned in the latter, was nevertheless evident from the circumstances of that case’.

It follows that the requirement of a sufficiently serious breach is always applicable. To that extent, the two sets of requirements have been merged. But, in situations of pure omission, a sufficiently serious breach is easily established because there is no requirement of ‘fault or negligence on the part of the organ of the State to which the infringement is attributable’. By contrast, in all other situations, negligence is implicit in the required manifest and grave disregard of the limits on the exercise of a State’s (legislative) powers in order to constitute a sufficiently serious breach of Community law.

The above constitutes the first step in the ECJ’s development of a unified liability regime for both Member States and the Community under Article 288 EC. Following its announcement in Brasserie, the Court firmly established this ius commune in its Bergaderm judgment of 4 July 2000 (Case C-352/98 P, [2000] ECR I-5291). The three requirements for both EC and State liability are now identical. They are: (1) conferral of a right on individuals; (2) a sufficiently serious breach and (3) a direct causal link between the loss and the breach. See the page on EC Liability for a more detailed discussion.
Further reading


On the more theoretical aspects of the case law, see Carol Harlow, ‘Francovich and the Problem of the Disobedient State,’ 2 E.L.J. 199 (1996).

On the specific issue of the allocation of responsibility, see Georgios Anagnostaras ‘The allocation of responsibility in State liability actions for breaches of Community law’ 26 European Law Review 139-158 (2001).


Francovich II


Interpretation of the scope of Directive 80/987/EEC on protection of employees in the event of the insolvency of their employer. Employees whose employer is not subject to procedures to satisfy collectively the claims of creditors are not covered by the Directive. Ironically, those who set off the whole development of State liability as a matter of Community law, eventually were not even covered by the Directive in question at all. Fortunately (?), the ECJ did not deal with this point in the Francovich I reference.

Pending Preliminary Rulings Cases

1. Case C-452/06 Synthon, O.J. 2006 C 326/40

Subject: marketing authorisations for pharmaceuticals under Directive 2001/83/EC.

“Questions referred

[...] 2. If the answer to question 1(a) is no and the answer to question 1(b) is yes, where the concerned Member State rejects the application at the validation stage on the grounds that the Product is not essentially similar to the Reference Product, and thereby fails to recognise the marketing authorisation granted by the reference Member State or to invoke the procedure set out in Articles 29 to 34 of the Directive, does the failure by the concerned Member State to recognise the marketing authorisation granted by the reference Member State in the circumstances referred to above amount to a sufficiently serious breach of Community law within the meaning of the second condition in the judgment in Joined Cases C-46/93 and C-48/93 Brasserie du Pecher and Factortame. Alternatively, what factors ought the national court to take into consideration when it comes to determine whether such failure amounts to a sufficiently serious breach?

3. Where the failure of the concerned Member State to recognise the marketing authorisation granted
by the reference Member State as set out in question 1 above is based on a general policy adopted by
the concerned Member State that different salts of the same active moiety cannot, as a matter of law,
be considered essentially similar, does the failure by the concerned Member State to recognise the
marketing authorisation granted by the reference Member State in the circumstances referred to
above amount to a sufficiently serious breach of Community law within the meaning of the second
condition in the judgment in Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and
Factortame. Alternatively what factors ought the national court to take into consideration when it
comes to determine whether such failure amounts to a sufficiently serious breach?

Post-Francovich judgments by the ECJ


State liability under Francovich to compensate those workers unlawfully excluded from the scope
ratione materiae of Directive 80/987/EEC whenever it is not possible to interpret domestic legislation in
conformity with the Directive. In an obiter dictum, the Court confirms the principles established in
Francovich.


This case mainly concerns lack of horizontal direct effect of a directive, Marshall I followed. ECJ then
'reminds' the national courts of their duty to interpret national law in conformity with EC law. Failing
both direct and indirect effect, the Court recalls, of its own motion, its ruling in Francovich. Albeit obiter,
it reformulates the first Francovich-requirement from 'the result prescribed by the directive should
entail the grant of rights to individuals' (emphasis added, para. 40 of Francovich) into: 'the purpose
of the directive must be to grant rights to individuals' (emphasis added, para. 27 of Faccini Dori). The
second formulation of the rights-requirement is more restrictive than the first.


Similar reference as in Faccini Dori, see para. 22: `Moreover, if the result prescribed by the
directive cannot be achieved by way of interpretation, it should also be borne in mind that, in
terms of [Francovich], Community law requires the Member States to make good damage
cast to individuals through failure to transpose a directive, provided that three conditions
are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it
must be possible to identify the contents of those rights on the basis of the provisions of the
directive. Finally, there must be a causal link between the breach of the state's obligation and
the damage suffered (Faccini Dori, paragraph 27).'  

Liability for Breach of European Community Law in the post-Francovich Era', [1996] 4 Web

In essence the Court ruled: 'Where a breach of Community law by a Member State is
attributable to the national legislature acting in a field in which it has a wide discretion to make
legislative choices, individuals suffering loss or injury thereby are entitled to reparation where
the rule of Community law breached is intended to confer rights upon them, the breach is
sufficiently serious and there is a direct causal link between the breach and the damage
sustained by the individuals.'

Meanwhile, the High Court has rendered its decision after the ECJ's Reference. In its decision in
Regina v Secretary of State for Transport, Ex parte Factortame Ltd and Others (No 5) of 31
July 1997 it held that no punitive or exemplary damages can be given, since these damages
are not awarded for a breach of a national statutory duty either, unless there is an express
statutory provision for such an award, which was not the case here. The High Court does
however consider the breach sufficiently serious 'to give rise to liability that might
subsequently be shown to have been caused to trawler owners and managers precluded from
registering to fish in UK waters'.

There is no sufficiently serious breach of Community law in the present case: no liability. For: 'In the present case, [the Article of the Directive at issue] is imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it by the Court in this judgment, the interpretation given to it by the [UK] in good faith ... That interpretation, which was also shared by other Member States, was not manifestly contrary to the wording of the Directive or to the objective pursued by it. Moreover, no guidance was available to the [UK] from case-law of the Court as to the interpretation of the provision at issue, nor did the Commission raise the matter when the 1992 Regulations were adopted'. It followed that the Member State, when transposing the Directive into national law cannot be regarded as having committed a sufficiently serious breach of Community law of the kind intended by the Court in its judgment in Brasserie du Pêcheur and Factortame.


The Court held: 'A Member State has an obligation to make reparation for the damage caused to an individual by a refusal to issue an export licence in breach of Article 34 of the [EC] Treaty where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals.'


The ECJ ruled: 'Failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose contents are identifiable and a causal link exists between the breach of the State's obligation and the loss and damage suffered.'


Claim for loss of interest; tax law; parent and subsidiary company based in different states; Directive 90/435/EEC; Question 3 refers to Francovich. The A-G proposed no liability. The ECJ agrees. There is no sufficiently serious breach of Community law in the present case, British Telecom applied.


This case concerns the right to repayment of charges levied contrary to Community law. The recovery of sums not due was considered in the light of the obligation imposed by the applicable national law to pass on the charge, i.e. the octroi de mer. The ECJ clarifies the effect of its case-law concerning recovery of charges levied in breach of Community law. In principle the Member States are required to repay them. By way of exception, Member States can only resist repayment where the charges have been passed on and (cumulative requirement) the trader would be unjustly enriched when reimbursed. The Court then refers to Brasserie du Pêcheur and Factortame, pointing out that traders may not be prevented from pursuing a claim for reparation of loss caused by the levying of charges not due, irrespective of whether those charges have been passed on. It follows that such charges must be repaid to traders, unless that would amount to unjust enrichment; in any event, (additional) damage must be compensated according to the principles of Brasserie.


In accordance with the Opinion of A-G Léger, the ECJ ruled that the Directive does not require
that an individual should be able to obtain such interest ... when the delay is the result of discrimination ...' (Marshall I distinguished). In other words, payment of interest on arrears `cannot be regarded as an essential component of the right [to the benefit itself] as so defined' (para. 25), but can only be considered in the context of compensation for loss and damage sustained as a result of discrimination; `amounts paid by way of social security benefit are not compensatory in nature' (para. 27).

As for State liability, the Court, somewhat surprisingly, merely repeats its recognition of the principles developed in Francovich, Brasserie, British Telecommunications, Hedley Lomas and Dillenkofer (para. 31). It then reiterates that it is up to the national court to assess the amount of damage, provided the national law does not treat breaches of EC law less favourable than similar domestic claims nor makes it virtually impossible/excessively difficult to obtain reparation. It follows that not only quantum of damages is a matter for domestic law (not Community law), Also the issue of what type of damage should be compensated (heads of damage) is here relegated to the national courts (again Marshall II distinguished). To a certain extent, this ruling is a retreat from Brasserie where loss of profits was held to be a necessary component, as a matter of Community law, of the damages.


Possibility or otherwise of Member State to limit its obligation to indemnify victims of non-transposed directives; explicit question on para. 43 of Francovich (I): interpretation of scope rights included in Directive 80/987/EEC on protection of employees in the event of insolvency of their employer. This case complements and further develops both Francovich I and Francovich II.

Opinion A-G Cosmas 23 January 1997. The Advocat General takes the view that the right to compensation must at the very least include the minimum protection offered by Article 4(2) of the Directive. This follows from the second Francovich-requirement that the right derived from the Directive be based on its provisions. In addition, because it must be adequate, compensation must include statutory interest, lost profits and, where the domestic law so provides, other heads of damages such as exemplary damages (No. 63).

The ECJ first considers the issue of the limitations to the employees’ guarantee contained in the Directive and the options it includes for Member States to choose from a number of periods limiting in time the claims for unpaid salaries; the Directive further envisages a ceiling of the guarantee. As regards State liability, the Court reiterates that the principle of Member State liability for breach of EC law is inherent in the Treaty (citing Francovich I, Brasserie, British Telecommunications, Hedley Lomas and Dillenkofer (para. 48). Also, the extent of the reparation payable must be commensurate with the loss or damage sustained, that is effective protection of the rights of the individuals must be ensured (adequate not full compensation).

Lastly, it is on the basis of the rules of national liability law that the right to reparation is exercised (national procedural autonomy), subject to the well-known Rewe provisos (Case 33/76, [1976] ECR 1989; equivalence principle and principle of effectiveness).

When is reparation adequate? In principle, retroactive application in full of the properly but belatedly implemented Directive enables the harmful consequences of the breach of Community law to be remedied. The rights from which the workers would have benefited if the Directive had been transposed within the prescribed period are then guaranteed. This necessarily implies that limitations of the workers’ rights as envisaged in the Directive also limit the quantum of damages. However, it is for the national court to ensure, that the reparation is adequate. Retroactive application of the implementing measures suffice for that purpose, unless it is established that complementary loss is sustained by the belated transposition; such damage must also be compensated.

Comment. It would seem to follow from this ruling, read in conjunction with the Opinion of the Advocate General and the Maso judgment, that statutory interest must be made good as a matter of Community law. If this is so, the Court has reconsidered its reluctant approach to this issue in Sutton, where this question was completely remitted to the national level.


Both the facts and the legal issues of this case are virtually identical to Bonifaci. The ECJ's rulings are the same (except that it now also had to consider that rules against aggregation of claims against the guarantee institute are in accordance with the Directive).

The judgment is more specific about the heads of damages claimed by the workers. Apart
from the unpaid remuneration, they include statutory interest (para. 14). According to both the ECJ and A-G Cosmas (Nos. 63-65 of his Opinion) such derived rights must be upheld as complementary loss.


Both the facts and the legal issues of this case are virtually identical to *Bonifaci*. But the main legal question here concerns the application of the first *Rewe* proviso: the national law conditions, in particular time-limits, for the reparation of the damage must not be less favourable than those relating to similar domestic claims (principle of equivalence). The Italian Decree belatedly implementing the Directive contains a time-limit of one year commencing from the date of its entry into force, whereas ordinary actions for damages governed by Article 2043 of the Italian Civil Code are prescribed after five years. Now that the Decree exclusively governs damages claims for loss suffered due to the belated transposition of the Directive, the question of compatibility with *Rewe* arises.

The ECJ ruled that it did not have all the information necessary to determine whether an action for damages pursuant to Article 2043 CC is possible against public authorities in the exercise of their powers. The national court must undertake that examination. If this cause of action is unavailable and no other relevant comparison between the time-limit at issue and the conditions relating to similar domestic claims can be made, than Community law does not preclude the application of the one year limitation period.

It follows, a contrario, that where a tort action is available, there would be less favourable treatment of Community claims compared to similar domestic ones. The ECJ did not review the one year period in the light of the principle of effectiveness. Advocate General Cosmas did and found no incompatibility (No. 35 of his Opinion). The decree was published so that its rules are presumed known by potential claimants, who must exercise due diligence in vindicating their rights in time.


Competition law; levy of charge for use of port; breach of Art. 86 EC Treaty?; burden of proof; Question 7: `... do the persons or undertakings on whom the duty was imposed have any right under Community law to seek reimbursement or compensation?'

Opinion A-G Jacobs : in his view, the principles of *Francovich* and *Brasserie* `are not strictly relevant to the question who must repay a tax levied in contravention of Community law' (No. 169). The reason is that the `concept of reimbursement is inherently simpler than that of compensation for damage' (No. 170). Entitlement to repayment simply follows from the direct effect of the provision(s) in question. No requirement of a sufficiently serious breach applies. See also *Comateb*.

The ECJ agrees with Mr Jacobs. Nonetheless, it cites *Brasserie* in para. 60 in order to emphasize the traders' rights to damages for any additional loss.


State liability is not as such in issue in this case. The main points decided by the ECJ here concern the characterization of court or tribunal within the meaning of Article 234 EC (ex Art. 177) and the consequences of non-transposition of Directive 92/50/EEC on public procurement. In the latter context, the ECJ affirmed its settled approach that, in the absence of direct effect, the national courts must construe their national law in conformity with the Directive, as far as possible, in the light of its wording and purpose so as to achieve its envisaged results (*Marleasing* principle; principle of consistent interpretation or indirect effect). It followed its reference to these two methods of giving effect to EC law in domestic law, by a reminder that where the relevant rules of national law cannot be so construed, those affected may claim compensation for the loss incurred as a result of the non-transposition of the Directive, citing *Dillenkofer*.


Preliminary ruling regarding the freedom of movement for workers, i.e. foreign-language assistants, in particular their eligibility for appointment to teach supplementary courses and to fill temporary teaching vacancies in Italian universities. The national court essentially asked
whether Articles 5 and 48(2) EC-Treaty preclude a national rule which restricts such eligibility to tenured teaching staff and established university researchers, thus excluding foreign-language assistants who are nationals of other Member States.

The ECJ held that the nationality requirement which, until 1994, applied to the competitions for tenured posts was contrary to Community law, but that fact alone does not enable the persons concerned to insist that they must be eligible for appointment to fill temporary teaching vacancies; they must first pass the competition and become tenured teacher or established researcher.

However, the European Court then reminds the national court of the necessary availability of damages:

`That conclusion does not however mean that the persons concerned cannot seek compensation, for the harm suffered as a result of the application of the discriminatory clause at issue, before the competent courts, according to the relevant national procedures and under the conditions laid down in Joined Cases Brasserie du Pêcheur v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame and Others [1996] ECR I-1029'.

No further details are discussed about the liability issue.


Like in Petrie, the ECJ refers to the possibility of State liability where it had first ruled that it did not have to decide the direct effect, or otherwise, of a provision of a directive concerning company law as the case concerned two private parties. As is well known, directives do not produce so-called horizontal effect in any event; therefore possible direct effect was not relevant. The Court then stated that 'this finding is without prejudice to the possible applicability of the principle that Community law requires Member States to make good loss and damage caused to individuals by reason of their failure to transpose a directive or their failure to do so correctly', citing Brasserie and British Telecom.


First the Court rehearsed its case law on the duty, for national courts, to interpret their domestic provisions in conformity with the relevant Directive (consistent interpretation or indirect effect) and recognised that in this case that probably would not be possible. The problem of interpretation here is to decide whether review bodies operating in the field of public procurement regarding public works can be deemed to be competent with respect to specialised areas of public procurement (water, telecom etc.) as well, despite the fact that the relevant national legislation on these areas of procurement expressly excluded them. Without actually saying that it was indeed impossible for national courts to attain a consistent interpretation, the ECJ reminded the national court of the 'last resort remedy': State liability. For it held in the operative part:

"If the provisions of domestic law are incapable of being interpreted in conformity with Directive 92/13, the persons concerned may, in accordance with the appropriate procedures under domestic law, claim compensation for damage suffered as a result of the failure to transpose the directive within the prescribed time-limit."

The case does contain no further consideration of possible liability of the State.


A large number of questions of the Court of Appeal in Northern Ireland had been pending since April 1995 regarding the marketing authorisation for a veterinary medicinal product, including Question 7(a): 'Is a Member State liable as a matter of Community law to compensate an undertaking in damages . . . [where the competent authorities require information of the company which is] . . . (I) incompatible with Directives 81/851 and 81/852; (ii) infringe the principle of proportionality; (iii) are prohibited by Arts. 30 to 36 EC; (iv) are insufficiently reasoned within the meaning of Article 40 of Directive 81/851/EEC? ... If so, under what conditions does such liability arise?

In April 1997 A-G Léger delivered his Opinion. The Court ruled that certain information concerning the origin and the like of relevant
components of the medicine could not be required from the undertaking, whereas certain other data with respect to the production process - in the interests of public health - could be required of the manufacturer.

As for liability, the ECJ held:

'A Member State is required to make good loss and damage caused to an applicant for marketing authorisation as a result of requests for information and requirements which infringe Directives 81/851 and 81/852 where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the damage sustained by the individuals concerned. Subject to that reservation, it is on the basis of rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused by a breach of Community law for which it can be held responsible, with the proviso that the conditions laid down by the applicable national legislation must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation.'

The Court thus reaffirmed the three 'classic' requirements of Francovich, Brasserie and Dillenkofer (paras. 106 and 107). It then checked whether the infringed provisions of the Directives conferred rights on individuals. As the reasons for refusal of a marketing authorisation were found to be - in Norbrook itself - laid down precisely and exhaustively in the Directives, the 'scope of the right conferred on applicants for marketing authorisation may therefore be adequately identified on the basis of those directives' (para. 108). It would seem that in this recital the ECJ confirms the merger of the two Francovich requirements into the first Brasserie requirement: conferral of rights upon individuals.

Regarding the second liability requirement (a sufficiently serious breach of Community law), the Court reiterated that such a breach obtains, in the exercise of legislative powers, where such powers are manifestly and gravely disregarded and in the situation without (or with limited) discretion, 'the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach' (para. 109, citing Hedley Lomas and Dillenkofer.

Question: who decides this? Apparently - now that the ECJ says no more on the matter - it is for the national court to determine whether the breach was sufficiently serious or not. No further guidance is provided by 'Luxembourg'.

This view would seem to be confirmed by the Court's dealing with the remaining liability issues, namely the causal connection between the breach and the damage and the further conditions for liability (in particular heads and quantum of damages). They are to be determined by the applicable national law (and courts), albeit in conformity with the well-known Rewe provisos ('the conditions for reparation of loss and damage laid down by the national legislation must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation', para. 111).


This judgment deals with the erroneous classification by the Danish authorities of a tobacco product manufactured by Brinkmann under Directive 79/32/EEC on taxes other than turnover taxes which affect the consumption of manufactured tobacco, as amended.

Opinion A-G Jacobs 22 January 1998. According to the Advocate General, this case does not involve loss resulting from a situation of non-implementation but from misapplication of the Directive. However, the misapplication does not give rise to liability because no sufficiently serious breach of EC law obtained: there was no clear guidance from the Directive, the interpretation of it was not untenable nor in bad faith. Moreover, other Member States and the Commission shared the same view; indeed, the Council later amended the Directive adopting Denmark's approach.

The Court recalls the settled case law (citing Brasserie, Dillenkofer and Denkavit), establishing the three requirements for liability. Unlike most previous cases, it then went on to decide itself whether the facts in issue constitutes a sufficiently serious breach and whether there is a direct causal link between the breach and the damage (like it had previously done in British Telecommunications and Denkavit).
It held that the key Articles of the relevant Directive, containing definitions of `cigarettes' and `smoking tobacco', was improperly transposed because no definitions had been adopted in Danish law (the relevant Act merely empowered the Minister to enact secondary legislation but the power had not been exercised). The ECJ admitted that non-transposition of a Directive per se amounts to a serious breach of Community law, but as the Danish authorities nonetheless had applied the definitions of the Directive, there was no direct causal connection between this breach and Brinkmann's damage.

The ECJ further stated: `It remains to be determined whether the Danish authorities committed a sufficiently serious breach of the relevant provisions of the Second Directive, having regard to the degree of clarity and precision of those provisions' (para. 30). Referring to the Opinion of the A-G, the Court said that the interpretation given to the definitions in the Directive - neither of which corresponded exactly to Brinkmann's product - by the Danish authorities was not manifestly contrary to the wording of the Directive nor to its purpose. As the Directive was regarded as being `open to a number of perfectly tenable interpretations' (para. 32), the ECJ accordingly held in the operative part of its ruling:

`A Member State whose authorities, in interpreting Articles 3(1) and 4(1) of the Second Directive 79/32/EEC, erroneously classified a product such as that at issue in this case as a cigarette and did not suspend the operation of the decision adopted, is not bound by Community law to compensate the manufacturer for the damage sustained by the latter as a result of that erroneous decision.'

Comment:

it is remarkable - and hard to predict when it will do so - that the ECJ decided to rule itself on both the matter of whether a sufficiently serious breach obtained and whether a direct causal connection was present, instead of leaving this for the national court to decide. Does this mean that the criterion for establishing causality is determined by Community, and not national, law? At least insofar the determination of an absence of a direct causal connection is concerned, the answer must be affirmative; this case sheds no light on the issue of the extent of the liability in the event of a direct causal connection (the question of when damage will be too remote). It would seem that the ECJ applied the doctrine of a conditio sine qua non with the same decision. The Advocate General had not dealt with the issue of causation as elaborately as the Court because he considered the case primarily in the context of misapplication of the Directive; but he too pointed out that any loss by Brinkmann did not result from the non-implementation of the definitions of the Directive anyway because they had been applied by the Danish authorities, albeit wrongly (Opinion A-G Jacobs, No. 30).

As for this transposition matter, the Court does not make it any easier to decide whether a case is one of incorrect or non-transposition. Although it mentioned improper transposition (para. 27), it also refers to Dillenkofer's ruling that non-implementation is per se a serious breach of EC law (para. 28). As can be seen in preliminary question three, the case was argued before the national court on both grounds: non-transposition as well as misapplication of the Directive. In my view, one should not talk about incorrect transposition but of non-transposition as the definitions of the Directive had not been adopted into Danish law at all. But that does not mean there is liability. In order for State liability to arise, the condition of a causal connection must also be fulfilled.

The ECJ agreed with its Advocate-General that the loss of Brinkmann did not result from the non-transposition of the definitions of the Directive. It then assessed whether the case further gave rise to a misapplication of the Directive: it considered the possibility of a sufficiently serious breach. If there could only have been a case of non-transposition here, it would not have been necessary to carry out this analysis as the Court had already decided that there could not be any liability due to lack of causal connection. The Court's assessment of a possible serious breach of Community law is in keeping with previous case law - in particular Denkavit and British Telecom (Case C-392/93) - holding that a Member State is not liable for erroneous interpretations of Community law where the provision in question did not clearly rule out such a reading, taking into account that also other Member States and/or the
Commission had given the same interpretation. Despite a sufficient causal connection between the damage and the misapplication, there is no liability in the present context because the misapplication does not amount to the required sufficiently serious breach.

The question arises whether Court by its ruling in Brinkmann has not weakened the Francovich liability for non-transposition of a directive in that it rejected liability even where it referred to the fact that no measures had been taken to transpose the relevant Articles of the Directive, which, citing Dillenkofer, constitutes per se a sufficiently serious breach of EC law. In my view that is not so. Rather, this case illustrates a point which had not been clarified so far. Namely that liability of a Member State as against a private person in the event of non-transposition of a directive can be prevented by the authorities by actually applying the EC rules at issue to the case in hand. It follows that there is a difference between this liability context and the context of Article 169 EC Treaty proceedings, because the Member State will still be held in breach of Community law for not transposing the Directive. But damage to a private person will not be caused by such non-transposition where the rules of EC law are applied despite their non-implementation in national law. Indeed, even when they are misapplied, as long as the error in law does not amount to a sufficiently serious breach.


In this case the ECJ merely refers to the possibility of State liability where it had first ruled that the relevant provisions of the directives in issue did not have direct effect. In para. 48 it recalled its established case law on interpretation in conformity with Community law. In addition, it reiterated the availability of State liability, citing Facchin Dori, Dillenkofer and Bonifaci (paras. 52-53). The Court did this because the Commission and the Italian government has raised the issue; the national court had not asked a question about it though.


Also in this case the ECJ merely refers to the possibility of State liability. In para. 27 it recalls the right to claim compensation in the context of public procurement, citing Dillenkofer (para. 27).


Preliminary ruling reference from the Landesgericht für Zivilrechtssachen Wien regarding legislation on the acquisition of real property and requirements applying to foreign acquirers only. Assessment of the criterion of a 'sufficiently serious breach of Community law'. Is it compatible with the principle of Member State liability for an infringement of Community law, and Article 5 EC Treaty, where, in a State of a federal type, the breach was committed by a part of the Federation, that the relevant constituent part of the Member State is exclusively liable (and the Federation is not)?

Opinion of A-G La Pergola of 23 February 1999 (full text in French). The Advocate General concludes that the provision of Community law which in this case was allegedly breached by an Austrian Act of the Tirol Region - Article 70 of the Accession Convention (O.J. 1995 L 1/1) - is not so clear and precise as to constitute a basis for a sufficiently serious breach of Community law. Just like in the cases British Telecom, Denkavit Internationaal and Brinkmann, therefore, the Advocate General concludes that Austria is not liable.

The ECJ held that Austria had indeed breached the freedom of movement of capital but did not say anything about the sufficiently seriousness, or otherwise, of this breach. It held that, in principle, it is a matter for the national courts to apply the principles governing State liability for breach of EC law, in accordance with the guidelines laid down by the Court (para. 58, citing Brasserie). In answer to the particular question, cited above, about the liability within a federal State, the Court limited itself to a strict answer of the question. It ruled that Community law does not require that the federal State incurs liability for a breach by one of its constituent parts where the national law provides for liability of that part alone. The ECJ:

"So long as the procedural arrangements in the domestic system enable the rights which individuals derive from the Community legal system to be effectively protected and it is not more difficult to assert those rights than the rights which they derive from the domestic legal system, the requirements of
Community law are fulfilled” (para. 63).


The judgment in Konle does not provide any clear guidance as to the question whether, as a matter of Community law, local or regional authorities are liable for implementation errors regarding directives. For one thing, the Konle case is not concerned with this kind of breach of Community law but with a breach of the EC Treaty (in conjunction with an Accession Treaty); for another, the preliminary question did not as such raise this issue. The Court might nonetheless have provided some guidance in relation to the question posed here, but apparently was not inclined to do so. It follows that, also after Konle, it is an open question whether the Francovich liability is limited to the State as such or whether it also applies to decentralized authorities. Certain national courts have held local authorities liable for damage resulting from incorrect (or non-) implementation of a directive (see, e.g. the Dutch Lubsen case and the Irish Coppinger case). What does seem to follow from Konle is that Community law does not require joint and several liability of both a decentralized authority and the State in the event of a breach of EC law by the former.


Like Dillenkofer, this reference for a preliminary ruling concerns the Package Travel Directive (90/314/EEC). The Landesgericht Linz raises questions about the protective scope of the Directive and asks whether the security provided for by Austrian legislation is sufficient. In the event of incorrect transposition, has a sufficiently serious breach occurred? Finally, it also seeks guidance about the required direct causal link between the alleged failure to transpose the Directive and the loss suffered.

Opinion of A-G Saggio of 25 June 1998. According to the Advocate General, the non-transposition of the relevant provision of the Directive (Article 7) into Austrian law before the prescribed date constitutes a sufficiently serious breach of Community law. It is immaterial that Austria had taken measures with respect to other provisions of the Directive, because it failed to secure the consumers’ guarantee in issue. That guarantee concerns the complete reimbursement of the monies paid in the event of insolvency of the tour operator. This obligation is clearly and precisely laid down in the Directive; therefore, Austria cannot successfully plead that it regarded as a correct implementation of the Directive in good faith, a less than total reimbursement. Finally, the causal link between the breach and the loss is not severed by any unlawful conduct by third parties such as the tour operator, nor by unforeseeable risks. Although it is for the national court to decide this issue, Austria’s argument of lack of causal connection should not be upheld where it is precisely the kind of conduct the Directive intends consumers to protect against which caused them damage in the first place. Had a guarantee fund, or the like, been put in place, they would have been reimbursed.

The ECJ largely agrees with its Advocate General and itself rules on issues which, in most other cases, it left it to the national court to decide them. Citing British Telecommunications, where it was held that one of the factors establishing whether a Member State has manifestly disregarded the limits of its discretion is the clarity and precision of the violated norm of EC law, the Court ruled that the Directive does not allow Member States to limit the temporal effect of the consumer guarantees envisaged by the Directive. Austria had incorrectly transposed the Directive by applying its implementing Act - even though it entered into force on the date of expiry of the transposition period (1 January 1995) - to package tours taking place after 1 May 1995. The Directive, including its consumer guarantees, must apply to all contracts concluded after 1 January 1995. Austria had incorrectly transposed the Directive, as the Court established, but it did not decide whether this also constituted a sufficiently serious breach as the national court had not asked this question.

It follows that the incorrect transposition in this case constitutes a sufficiently serious breach like the non-transposition of the Directive did in Dillenkofer. This may be explained by the fact that in both cases a hard and fast norm laying down an obligation of result in temporal terms was breached. Member States do not have any discretion in postponing the transposition of a Directive (giving rise to a breach per se), neither may they introduce any temporal restrictions after transposition unless the Directive explicitly allows this. Because the temporal element presently relevant in the context of
incorrect (as opposed to late) transposition was decisive, the outcome of Rechberger in this respect is the same as Dillenkofer. Rechberger fits in with the case law so far because the Court did not speak about a breach per se but referred to the element that a precise and clear obligation had been breached.

The national court had asked the ECJ whether a direct causal connection will be present even where the State points out that the tour operator had acted carelessly or unusual or unforeseeable circumstances were present. Citing Brasserie, the Court noted that it is for the national court to decide upon the required causal connection between the loss and the breach. It nonetheless went on to say that unforeseeable circumstances or conduct of the travel agent do not affect the causal connection between the breach by the Member State and the loss suffered when the national court had already decided it is present. Also, the Directive in question prescribes guarantees against insolvency of the organiser regardless of the causes.

It follows that although stopping short of formulating a doctrine of causation at Community law level, the Court apparently does not in all cases leave it entirely up to the national courts to decide this issue. Once a link has been established, any unforeseeable circumstances may not be taken into account where they would not have interfered with the operation of the guarantees had they been in place. In other words, these circumstances or conduct of the agent are to be regarded as irrelevant where they do not break the so-called conditio sine qua non link between the loss and the breach. It would seem to follow that this is a requirement of Community law; a national court is not free to decide otherwise on the basis of its own law.

In addition, like in Andersson, a question with respect to the EEA Agreement was put before the Court. It was argued that Austria might be liable under EEA law as of 1 January 1994, the date of required implementation of the Package Travel Directive under the EEA Agreement (as opposed to 1 January 1995, the date of accession to the EU). Citing Andersson, the ECJ held that it is not competent to rule on the application of the EEA Agreement in connection with Austria before its EU membership. The Court does, however, refer to a ‘judgment’ of the EFTA Court which confirms the possibility of Francovich liability in the EEA context: the Sveinsbjörnsdóttir case, which is discussed in Section 10 of this Web site State Liability under EEA Law.

Comment by Birgit Schoißwohl:

This decision is very welcome because it clarifies certain questions first raised in Francovich and further pursued in Dillenkofer, about uncertainties as to what the law concerning State liability would be in a case, where the objectives of a directive are not realized after expiration of the time prescribed, no matter if this happened due to delayed or incorrect transposition. The ECJ’s decision in British Telecommunications (BT) left some confusion because it indicated that after a formal transposition of a directive the wide formula developed in Brasserie du Pêcheur would be applied when establishing liability.

Although a sufficiently serious breach of Community law has been acknowledged to be a general precondition of liability, the considerations involved in deciding on this matter differ from case to case. In Francovich the ECJ had not yet used the formula of a sufficiently serious breach at all. Liability was established for the manifest breach of Community law. In Brasserie du Pêcheur the ECJ introduced further criteria that should be taken into account by national courts when establishing liability: These criteria take regard of the motivation for the breach of law, for example if there had been intention on the part of the State, e.g. by the persons acting on behalf of the State, concerning the breach of law or the occurrence of damage. These subjective criteria were used again in British Telecommunications. There the ECJ found the UK to have acted in good faith by transposing and applying Directive 90/531/EEC the way it had, and therefore denied liability. This case was used for the argument that subjective criteria should be used once the State has transposed a directive. This view seems to be supported by the later judgement of the ECJ in Dillenkofer. Because Germany had failed to pass any law at all in time, the court refused the recognition of any other criteria apart from the breach of law itself.

It has to be mentioned that the ECJ follows a very peculiar manner when deciding, whether a State is guilty of non-transposition of a directive, which would per se justify liability, or of incorrect transposition, which would leave room for the argument of the motivation that led to the violation of
law. The Wagner Miret case, for instance, has been qualified as a non-transposition case, although Spain had properly transposed Directive 88/987EEC. The ECJ said it concerned non-transposition with respect to the actual plaintiff. Even in Dillenkofer there were in place national laws and a jurisdiction that fulfilled some of the requirements of the Package Travel Directive.

These arguments should show that determining whether or not a directive has been transposed, can be an intricate task. The answer to this question nevertheless seems to be important, because on this the application of strict liability or the wider formula introduced in Brasserie du Pêcheur depends. However, this is only half the story. Because the ECJ attaches the greatest of importance to the protection of individual rights, more attention has to be drawn to the nature of the rights a directive confers on individuals. In this respect Rechberger has been very clear now. Dealing with the substantial correctness of the Austrian transposition measure, the Court stressed that a directive will only be transposed properly if the national law does in its effects ascertain the objectives prescribed in the directive. The question is not whether the measures that have been taken were at that point of time apt to reach the objectives prescribed with reasonable certainty!

This makes obvious that rights conferred by a directive cause an obligation of result and create a guarantee in favour of the protected class of individuals. This qualification must be of consequence for the judgement on liability as well. Liability must be strict, the Brasserie formula will not be applied. Liability in this case is based on the idea of guarantee instead of responsibility for (personal) wrongdoing. The distinguishing fact between BT and Rechberger or Dillenkofer is, that in BT Directive 90/531/EEC did not confer clearly defined rights on the plaintiff. The correct interpretation of these provisions had only been more favourable for the plaintiffs than the one used by the English authorities, but it could not be argued that the breached rule aimed at conferring specific rights on enterprises like BT.

The message Rechberger gives is, that the failure to fulfill an obligation of result prevents the question to be raised, if there had been an excusable error of law! There is no space for examining wether the State was in an error about the appropriate measures that should be taken to reach the prescribed objectives or wether the State erred about the exact scope and content of these objectives. Here the idea of protection of individual rights prevails over the interest that a State may have, to be liable only for careless actions of his servants. After the Rechberger judgment it can truly be argued that there are two different lines of jurisdiction concerning State liability for Breach of Community Law: One was developped in Brasserie de Pêcheur and is based on the idea of sanction for severe wrongdoing, and the other has been started with Francovich, continued in Dillenkofer and is based on the idea of guarantee.


In issue is Directive 89/665/EEC on review procedures regarding public procurement of public supply and works. An Austrian awarding authority queried the compatibility of the Austrian procedure with the Directive given that no review of the awarding decision prior to conclusion of the contract with the successful tenderer is available. Even though the Directive's obligation to provide for review procedures had been fulfilled by Austrian law, special circumstances of the Austrian system of contract awarding entitled it produced no administrative law measure capable of being subjected to judicial review prior to the award of the contract; in addition, the Directive acknowledges Member States' discretion to limit the remedies to be granted by the review body to damages after a contract had been concluded. The ECJ interpreted the Directive as requiring, in the phase before conclusion of the contract, the possibility of review of the decision awarding a contract, in all cases, in addition to damages after the event. It followed that the Directive had not correctly implemented in Austria in the light of the cited system where no separate award decision is visible to third parties. The ECJ rather cursorily dealt with the consequences of this incorrect transposition. It seemed to have accepted that neither direct nor indirect effect can give applicants any solace. For it said that 'where it is doubtful that the national court is in a position to give effect to the right of individuals to obtain review', it somewhat hesitantly referred to Francovich liability: 'it is useful to recall that' where the national rules cannot be interpreted consistently with the Directive, victims may seek compensation (para. 49, citing Dillenkofer).


This case concerns questions from the Landgericht Düsseldorf (Germany), including whether a constitutionally independent body may be liable under Community law, next to the Member State, for a
breach of primary EC law. It therefore raises a similar issue as in Konle where the ECJ was asked to rule upon the liability of a constituent part of a federal State to the exclusion of the federation. It is recalled that the ECJ did not provide a clear rule as to the possible liability under Community law of other public authorities than the central government for defects in implementing directives. It merely held that Community law does not demand liability of the federation where, under domestic law, adequate legal protection is provided by the liability of the constituent part.

In issue is the refusal to enrol the Italian national, Mr. Haim, on a social security register of dental practitioners. His qualification was not awarded by a Member State but by Turkey; therefore, the relevant German authority subjected him to the requirement of an additional training period, a condition not applicable to those with a recognisable Community qualification. Although he was registered following the ECJ's Haim I judgment (Case C-319/92, [1994] ECR I-425), he contended to have suffered loss of income during a six year period for which he sought compensation. Under German law, there is no liability according to the national court as the authority had acted in good faith.

Opinion A-G Mischo of 19 May 1999; full text in French. Regarding the question whether both the State and the lower authority can be held liable, the A-G concluded that Community law neither oppresses nor prescribes any particular solution provided for by the domestic law (a nihil obstat approach), as the issue is within the procedural autonomy of the Member States. As for the question of a sufficiently serious breach, the A-G held that the excusable error obtained. The national law was not evidently violating primary Community law; indeed, clarity was not present before two previous ECJ rulings, one of which prompted an amendment of the relevant directive. An additional complexity in this connection was that the official in applying national law - which proved contrary to EC law - had no discretion within its own legal system. Decisive, however, according to the A-G is whether the violated norm of EC law involves discretion for the Member State (as such and for its organs).

The ECJ rephrased the national court's question as whether EC law precludes liability of an autonomous public authority in addition to the State itself. Citing Konle, it ruled that it is up the legal order of the Member State to allocate liability, provided compliance with the principles of equivalence and effectiveness is ensured.

The second question of the national court was whether the mere fact that the official lacked discretion in applying the 'faulty' domestic law already constitutes a sufficiently serious breach. The ECJ replied - in line with its Advocate General - as follows: “40. The discretion referred to in paragraph 38 above is that enjoyed by the Member State concerned. Its existence and its scope are determined by reference to Community law and not by reference to national law. The discretion which may be conferred by national law on the official or the institution responsible for the breach of Community law is therefore irrelevant in this respect.”

It then recalled the list of factors put forward in Brasserie/Factortame determining whether and when a mere infringement by a Member State will amount to a sufficiently serious breach. It said that the national court must decide this taking into account that the ECJ had held that the violated norm in question (Article EC 43 (ex Art. 52): freedom of establishment) had been directly effective for a long time but that its impact in the particular situation of the present applicant only became clear much later. Both the adoption of the national legislation and the administrative decision refusing Haim's placement on the register took place before the ECJ had handed down these cases.

Comment. The reformulation by the ECJ of the national court's first question demonstrates a reluctance on the part of the ECJ to further develop the Francovich liability as a matter of EC law. I cannot see a good reason other than a deliberate refusal to tackle the issue in question for reformulating a perfectly clear question, i.e. whether an autonomous public body can be held liable under EC law next to the State as such (positive question). 'Essentially', according to the ECJ, this must be read as the negative question whether Community law precludes such joint and several liability. Answering the negative formulation, the ECJ thus effectively denied such liability as a matter of EC law. Like the Advocate General, systematically arguing such a 'nihil obstat approach' as a matter of national procedural autonomy, the ECJ displays a narrow view on the notion of the Community law nature of the right to reparation. After all, EC law does not even decide (at least not on its own) against which bodies, in addition to the State, the right can be exercised. Haim II therefore testifies of a certain retreat on behalf of the ECJ in the Europeanisation of the right to compensation. Also, this negative approach - despite a 'positive' question - would seem to point away from accepting
liability of local authorities in the situation of a directive that had not been (correctly) implemented (Haim II and Konle are concerned with a breach of primary Community law). The development of State liability thus does not run parallel to the development of the concept of direct effect, the reach and scope of which has been systematically extended by the ECJ over the years. Including the possibility to rely on a non-implemented directive against local authorities (Case 103/88 Fratelli Costanzo [1989] ECR 1839).


Concerns VAT Directive: whether one of its provisions confers rights on individuals (direct effect) and, if so, whether the exemption from VAT provided for by Swedish law - if considered incompatible with the Directive - constitutes a sufficiently serious breach of Community law.

As for the matter of direct effect, the ECJ cited Becker as the main reference for its well-established case law and confirmed other case law which had already established that the provisions in issue were sufficiently clear, precise and unconditional. How is this issue linked to State liability?

The ECJ starts its answer of the national court's question whether a sufficiently serious breach was constituted by the Swedish general exemption from VAT for certain sports activities whereas the Directive did not provide for one, by raising a preliminary point. It pointed out that it had earlier decided that the VAT Directive's provisions in hand conferred rights on individuals on which they can rely as against the Member State. Thus, "[a]t first sight, ... an action for damages founded on the Court's case-law relating to the liability of Member States for breaches of Community law does not seem necessary" (para. 35). However, the ECJ did proceed with a confirmation of the main points of its liability regime as well as dealing more specifically with the notion of a sufficiently serious breach. Given the clear wording of the Directive, its was evident that the Swedish legislation was contrary to the Directive. Accordingly, the mere infringement was sufficient (or in the Court's words: "may be sufficient", Hedley Lomas, Dillenkofer). Indeed, the Swedish legislature had actually amended the legislation two years after its accession to the EU, reflecting the incompatibility with the Directive.

The ECJ did not further follow up its remark that "at first sight" there is no need for a damages claim at all. Perhaps this must be seen in the light of a possible action for restitution as a corollary of the direct effect of the Directive (comparable to the situation in Metallgesellschaft, cited below, where these two routes were separately considered). Alternatively, the ECJ may not have been convinced about the relevance of the question on direct effect as the main proceedings were for damages; it had been Lindopark's choice to opt for a damages action rather than ask for a retroactive adjustment of its tax duties (see Opinion A-G Jacobs, Nos. 13-15, 47-49). The judgment does not introduce any new angles on the liability regime.


References from the English High Court (Queen's Bench Division) on the interpretation of ex Articles 6, 52, 58 and/or Article 73(b) of the EC Treaty (currently 12, 43, 48 and 56) with regard to national corporation tax legislation; in particular, whether it is compatible with Community law for a certain tax benefit to be granted only where both the parent and the subsidiary company are based within the Member State concerned. As for the liability issue, it is asked, inter alia, whether there is an obligation for the victim to reduce the harm if necessary on the basis of directly applicable Community law. Also, under reference to Sutton, is the national court obliged to award interest even if under national law it cannot do so?

The ECJ rules that the tax legislation in issue is contrary to Article 43 EC Treaty on freedom of establishment (ex Art. 52). The loss in question consisted of interest on advance payments of tax. The national court had asked whether the company is entitled to a sum of money equal to this interest either in an action for restitution or in an action for damages. In the first possibility, the ECJ reiterated well-established case law on restitution of unlawfully levied charges (San Giogio etc.), obliging the Member State to repay them (Comateb). Such repayment is further regulated by the procedural rules of national law, subject to the equally well-established principles of equivalence and effectiveness (Edis, Spac, Aprile and Dilexport); likewise, it is for the national law to settle the issue of interest, its rate and commencement date of calculation. However, the ECJ points out that in this case the interest is not ancillary to a claim for reimbursement but the very object of the whole claim (the lost interest is
the damage); it follows that in such a situation the award of interest is an essential right under the EC Treaty's freedom of establishment provision. The entitlement to claim this interest cannot therefore depend on national law but is inherent in Article 43 (ex 52) EC.

In the second possibility - damages action - the ECJ recalled para. 87 of Brasserie du Pêcheur where it had already established that total exclusion of loss of profit as a head of damage was contrary to the principle of effectiveness. Like with the restitution claim, award of interest was also considered essential as a component of a damages claim. The ECJ recalled that in Marshall II it had ruled that full compensation involves the award of interest; therefore it had distinguished the situation of Sutton where it did not require an award of interest. It followed that its ruling in Sutton did not stand in the way of its present decision to include interest as an essential component.

What was decided with respect to mitigation of loss? The UK had argued as a defence against the Francovich claim that the company should have applied for tax relief even though this was not available under English law in order to challenge any ensuing refusal to do so by the tax authorities and invoke the primacy and direct effect of Community law: it referred to para. 84-85 of Brasserie du Pêcheur - reasonable diligence on the part of the victim to limit the loss - and argued that that implied using all the legal remedies available. In reply to the question by the national court whether it was allowed under Community law to refuse or reduce a damages claim on the sole ground that this route had not been followed by the claimants, the ECJ answered as follows. The UK's argument amounts to "criticising the plaintiffs for complying with national legislation" and for not challenging an inevitably "hopeless" (my words) appeal. The ECJ considers it apparently contrary to the principle of effectiveness to demand of private persons to be aware of and to challenge the incompatibility of domestic law with directly effective Community law. For it ruled:

"106. The exercise of rights conferred on private persons by directly applicable provisions of Community law would, however, be rendered impossible or excessively difficult if their claims for restitution or compensation based on Community law were rejected or reduced solely because the persons concerned had not applied for a tax advantage which national law denied them, with a view to challenging the refusal of the tax authorities by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of Community law."

It therefore ruled that it would be contrary to Community law if national courts refused or reduced a claim on the sole ground that the plaintiffs had failed to make use of all legal remedies, including setting aside unambiguous national tax law.

What is one to make of these passages? To the very least they constitute a mitigation of the mitigation of loss defence, one might say. In Brasserie, the ECJ had ruled that a victim's duty to mitigate the loss - reasonable diligence to limit damage - included to avail himself in time of all legal remedies. One could thus believe that these remedies include a reliance on direct effect and supremacy. On the other hand, it is perhaps asking too much of private persons to ascertain any possible conflict between national law and Community law and to fail to comply with the applicable national rules. It is one thing for citizens to be able to do so if they take such an initiative but quite another to "punish" them for failing to have taken this route. The one Community principle - effectiveness - in this case curtailed not so much the application of domestic remedies but restricted the application of another principle of Community law: the duty to mitigate one's loss. In terms of positioning the remedy of damages in the wider context of other Community mechanisms of legal protection, the ECJ has strengthened the autonomous character of the Francovich liability. In Brasserie itself it had already rejected an attempt by Germany to make the whole damages option secondary to direct effect while recognising a possible connection in the mitigation of loss context; the latter connection has now been 'mitigated' as well.


French reference from the Labour Court Mons on a possible sufficiently serious breach of EC law by the administrative body responsible for the application of Council Regulation 1408/71 on social security entitlements of migrant workers.

The ECJ reaffirmed that it is for each Member State to decide which public body shall be responsible for making reparation for a breach of Community law, provided the individual's right to compensation is ensured (Konle, Haim II). Regarding the requirement of a sufficiently serious breach, the ECJ held that
it is principle for the national court whether the liability conditions are met. Nonetheless, it went ahead to ascertain if a sufficiently serious breach obtains here, because "the situation in the present case is that the Court has all the necessary information to be able to assess whether the facts of the case must be held to constitute a sufficiently serious breach of Community law" (para. 40). The national institution had acted contrary to an earlier judgment of the Court, according to the ECJ (Case C-31/92 Larsy I [1993] ECR I-4543). The breach was therefore sufficiently serious in this respect in the light of one of the factors noted in Brasserie du Pecheur, namely that if it has persisted despite a preliminary ruling from the Court from which it is clear that the conduct in question constituted an infringement.

In addition, the relevant public authority Inasti (Institut National d'Assurances Sociales pour Travailleurs Indépendants) should not have been in any doubt as to the application of another provision of the Regulation as the ECJ considered it clear and precise, also in the light of earlier case law. The Court went on to draw a connection with the principle of supremacy (citing Simmenthal II) in order to refute the argument of Inasti that it was obliged to proceed as it did under national law. For: "to the extent that national procedural rules precluded effective protection of Mr Larsy's rights derived under the direct effect of Community law, Inasti should have disapplied those provisions" (para. 53). The ECJ explicitly ruled in the operative part that the conduct of Inasti did constitute a sufficiently serious breach of Community law.

It is interesting to compare the ECJ's confirmation of the duty to disapply conflicting national law incumbent on public authorities with its ruling in Metalgesellschaft that there is no complementary duty on private persons to raise such a possibility. That is to say, failure to do so cannot affect their right to full compensation whereas a similar failure on the part of relevant public authorities cannot be raised to fend off liability. This outcome is understandable and sensible as these disputes do of course involve a failure by public authorities to respect EU citizens' rights. Noblesse oblige ...

Liability for breach of EC law by highest court. Catchphrase summary: "ECJ has watered down the Francovich liability."

From PRESS RELEASE No. 30/03, 8 April 2003 on the Opinion of the A-G: "For the first time, The Court of Justice is requested to adjudicate on the issue of a Member State's liability for loss or damage caused to individuals as a result of a breach of Community law by a Supreme Court. Advocate General Léger is of the opinion that the Member States are obliged to make reparation for the loss or damage caused to individuals in such a case and that the minimum conditions for entitlement to that reparation are governed by Community law."

NB The same issue - absence of a reference to the ECJ by a national highest court in breach of its obligation under Art. 234 EC - has also given rise to a ruling by the German Federal Constitutional Court, the Bundesverfassungsgericht (1 BvR 1036/99 of 9.1.2001; available online in German at http://www.bverfg.de). It ruled that the non-referral by the Federal Administrative Court (the Bundersverwaltungsgericht) was a breach of the Basic Law's Art. 10(1) on the rule that no one may be deprived of proper access to justice.


Facts summary: "loyalty bonus" for Austrian university professors was only available after 15 years of service in Austria. Judicial review proceedings; followed by a damages action. Breach of 39 EC (free movement of workers) and a Regulation; breach of 234(3) EC: preliminary rulings: failure to comply with duty to refer by highest court.

Liability framework: ECJ confirms applicability of the Francovich liability even where act committed by highest court. The 3 "normal" conditions apply: conferral of rights on individuals; sufficiently serious breach; direct causal link. BUT: SSB only obtained where there is a manifest infringement in light of specific nature of the judicial function. In casu, no liability for the breach was not considered sufficiently serious. The ECJ itself decided this rather than leaving it for the national court.
Critiquing Köbler: The incorrect reading of ECJ cases by the national court was not manifest despite three precedents. ECJ has "read down" the breach of 234(3) EC as a separate tort; the CILFIT criteria were ignored. There are inconsistencies between § 55 and § 123 (yes and no independence of 234 EC). Like in Brinkmann I, the ECJ went some way to shield MS from liability.

Nonetheless, some interesting features of the judgment include:

- the reiteration that under international law, a State is liable as a single entity regardless of whether the breach was committed by the executive, the legislature or the judiciary. This principle applies a fortiori in the Community legal order (para. 32);
- liability of highest courts must not be seen as undermining the authority of courts; on the contrary, "reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary" (para. 43);
- ECJ refers to both comparative law and the European Court of Human Rights to justify its imposing of State liability for acts by highest courts: in one form or another most MS accept liability for erroneous judgments (para. 48); the ECHR's awarding of damages includes breaches by highest national courts (para. 49 citing ECHR, Dulaurans v. France of 21 March 2000, (2001) 33 E.H.R.R. 45);
- relevant factors determining whether a breach is sufficiently serious include - in the present context of a breach by a highest court so that the specific nature of the judicial function as well as legal certainty entail that only in the exceptional circumstances of a manifest breach there can be liability - the non-compliance of the highest court with Art. 234(3) EC (para. 55); however, as noted, this independent value of a breach of 234 was not recognized by the ECJ in Köbler itself because it excused this breach on the ground of its link to the primary breach of the free movement rules which was not sufficiently serious either (see para. 123).

In conclusion, SSB equals manifest breach in the case of breach of EC law by the courts. For further reading, see Marten Breuer, ‘State liability for judicial wrongs and Community law: the case Gerhard Köbler v Austria’ 29 European Law Review 243-254 (2004).

31. Case C-129/00 Commission v Italy, [2003] I-14637 (Judgment of 9 December 2003). Although arising under the infringement procedure and not directly dealing with state liability, this decision nevertheless follows up on and supports’ the Köbler one. Indeed, this is the first case where the ECJ sanctioned a Member State for a failure to comply with Community law resulting from the action of national courts. The full court confirms that a Member State is at fault (and therefore could be liable), in a situation where the national legislative act is compatible with EC law, but national courts’ interpretation of that legislation render a particular remedy (here, the right to reimbursement of taxes contrary to Community law) excessively difficult to obtain.

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The High Court of Justice of England and Wales raised 5 questions on the interpretation of Article 1(4) of Council Directive 84/5/EEC on insurance against civil liability in respect of the use of motor vehicles ("the Second Motor Insurance Directive"). They concern: the body with the task of providing compensation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation has not been satisfied; the justification of that legislation render a particular remedy (here, the right to reimbursement of taxes contrary to Community law) excessively difficult to obtain.

The ECJ does little more than reminding the national courts of the Francovich liability. For it said:
“82. First, as the Court has repeatedly held, the principle of liability on the part of a Member State for
damage caused to individuals as a result of breaches of Community law for which the State is
responsible is inherent in the system of the Treaty (see, in particular, Joined Cases C-6/90 and C-9/90
Francovich and Others [1991] ECR I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93

83. As to the conditions to be satisfied for a Member State to be required to make reparation for loss
and damage caused to individuals as a result of breaches of Community law for which the State is
responsible, the Court has held that these are threefold: the rule of law infringed must be intended to
confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal
link between the breach of the obligation incumbent on the State and the loss or damage sustained by
the injured parties (Haim, cited above, paragraph 36).

84. If in light of the examination to be undertaken by the national court in accordance with the
guidance given by the Court, the compensation system set up in the United Kingdom is found to be
subject to one or more defects of transposition, then it will be incumbent on the national court to
determine whether or not those defects have adversely affected Mr Evans.

85. If they have, it will then be necessary to determine whether the non-fulfilment of the United
Kingdom’s obligation to transpose the Second Directive is sufficiently serious.

86. In that connection, all the factors which characterise the situation must be taken into account.
Those factors include, in particular, the clarity and precision of the rule infringed, whether the
infringement or the damage caused was intentional or involuntary, whether any error of law was
excusable or inexcusable, and the fact that the position taken by a Community institution may have
contributed towards the adoption or maintenance of national measures or practices contrary to
Community law (see Haim, cited above, paragraph 43).

87. Those criteria must in principle be applied by the national courts in accordance with the guidelines
laid down by the Court (see, in particular, Brasserie du Pêcheur and Factortame, cited above,
paragraphs 55 to 58).

88. Accordingly, it is incumbent on the national court, if examination of the existing compensation
system discloses a defect in transposition of the Second Directive and if that defect has adversely
affected Mr Evans, to determine whether the breach of that obligation of transposition is sufficiently
serious.”

Accordingly, only the follow-up before the national courts can tell whether or not the UK will be liable,
i.e. if there has been any defect at all, and if so, whether it is sufficiently serious or not.
33. Case C-201/02 Wells [2004] ECR I-723 (judgment of 7 January 2004); [2004] 1 CMLR 31

Keywords: Directive 85/337/EEC - Assessment of the effects of certain projects on the environment -
National measure granting consent for mining operations without an environmental impact assessment
being carried out - Direct effect of directives - Triangular situation.

On first sight, the case has nothing to do with any liability questions in light of the cited keywords.
However, the ECJ also deals with the issue of what remedy should be made available by national law
in the event of failure to carry out an environmental impact assessment. The Court cites Francovich as
one of the cases clarifying the principle of cooperation in good faith of Article 10 EC, under which
Member States “are required to nullify the unlawful consequences of a breach of Community law”
(para. 64). It then held as follows:

“65. Thus, it is for the competent authorities of a Member State to take, within the sphere of their
competence, all the general or particular measures necessary to ensure that projects are examined in
order to determine whether they are likely to have significant effects on the environment and, if so, to
ensure that they are subject to an impact assessment (see, to this effect, Case C-72/95 Kraaijeveld
Such particular measures include, subject to the limits laid down by the principle of procedural
autonomy of the Member States, the revocation or suspension of a consent already granted, in order
to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.

66. The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.

67. The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see to this effect, inter alia, Case C-312/93 Peterbroeck [1995] ECR I-4599, paragraph 12, and Case C-78/98 Preston and Others [2000] ECR I-3201, paragraph 31).

68. So far as the main proceedings are concerned, if the working of Conygar Quarry should have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 85/337, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment.

69. In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered [emphasis added]."

It follows, that a claim for compensation must be made available, with the agreement of the claimant, where an EIA had not been carried out and the licence granted without having been subject to an EIA cannot be revoked or suspended to, after all, carry out the EIA. Implicitly the ECJ thus acknowledges that a breach of the EIA Directive may generate Francovich liability. It must follow that the Directive thus confers rights on individuals (see casenote Jans in 2004 Tijdschrift voor Milieu en Recht, p. 115).


Deposit Guarantee Schemes under Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, O.J. 1994 L 135/5 (amended by Directive 2005/1/EC). Reference for a preliminary ruling by the Bundesgerichtshof (BGH). Whether the rights conferred on the depositor include a claim for compensation for damage resulting from an alleged lack of supervision by the authorities. Note that this question is comparable to the one dealt with by the English House of Lords in Three Rivers, without making a reference to the ECJ (see section 7 of this Website).

On 25 November 2003 A-G Stix-Hackl delivered her Opinion (not yet available in English - 2/9/05). According to the Advocate General, the Deposit Guarantee Schemes Directive (Dir. 94/19/EC) constitutes an exhaustive set of rules (a lex specialis) for all cases of unavailable funds. A claimant cannot therefore sue a supervisory authority for compensation of lost sums exceeding the amount covered by the Directive (€ 20,000). The Directive does not confer any rights on individuals within the meaning of the Brasserie formula. The same applies to the other relevant banking directives, which have now been codified in Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, O.J. 2000 L 126/1.

In its judgment of 12 October 2004, the ECJ agreed: the claimants failed to satisfy the first liability requirement with respect to the Banking Directives: no conferral of rights. Before looking at that in more detail, there is the issue of the Deposit Guarantee Schemes Directive. The BGH had asked whether certain provision from the Directive would preclude the application of the rule of German law which bars compensation claims for defective supervision because the supervisory function is deemed to be carried out in the public interest only (excluding any private interest; so-called Schutznorm or Normzweck doctrine). The ECJ ruled that the provisions in issue only related to the introduction, the membership by banks and the functioning of the protection schemes. It followed, according to the ECJ, that those rules of the Directive do not confer any rights on depositors to “have the competent
authorities take supervisory measures in their interest” (par. 30).

The crucial passages on the issue of conferral of rights under the Banking Supervision Directives are as follows:

“40. However, contrary to the claims of Paul and others, it does not necessarily follow either from the existence of [supervisory obligations vis-à-vis credit institutions] or from the fact that the objectives pursued by those directives also include the protection of depositors that those directives seek to confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities.

41. In that regard, it should first be observed that Directives 77/780, 89/299 and 89/646 do not contain any express rule granting such rights to depositors.

42. Next, the harmonisation under Directives 77/780, 89/299 and 89/646, since it is based on Article 57(2) of the Treaty, is restricted to that which is essential, necessary and sufficient to secure the mutual recognition of authorisations and of prudential supervision systems, making possible the granting of a single licence recognised throughout the Community and the application of the principle of home Member State prudential supervision.

43. However, the coordination of the national rules on the liability of national authorities in respect of depositors in the event of defective supervision does not appear to be necessary to secure the results described in the preceding paragraph.

44. Moreover, as under German law, it is not possible in a number of Member States for the national authorities responsible for supervising credit institutions to be liable in respect of individuals in the event of defective supervision. It has been submitted in particular that those rules are based on considerations related to the complexity of banking supervision, in the context of which the authorities are under an obligation to protect a plurality of interests, including more specifically the stability of the financial system.

45. Finally, in adopting Directive 94/19 the Community legislature introduced minimal protection of depositors in the event that their deposits are unavailable, which is also guaranteed where the unavailability of the deposits might be the result of defective supervision on the part of the competent authorities.

46. Under those conditions, as pointed out by the Commission and the Member States which submitted observations to the Court, Directives 77/780, 89/299 and 89/646 cannot be interpreted as meaning that they confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent authorities.

47. In the light of the foregoing, the answer to the second question must be that Directives 77/780, 89/299 and 89/646 do not preclude a national rule to the effect that the functions of the national authority responsible for supervising credit institutions are to be fulfilled only in the public interest, which under national law precludes individuals from claiming compensation for damage resulting from defective supervision on the part of that authority.”

Paras. 48-51 contain the answer to the third preliminary question, focusing on the conditions for State liability and citing Brasserie and Dillenkofer. Given the answers to the first and second question the ECJ can suffice with reiterating that the Directives confer no rights on individuals.

Comments (GB). Directive 94/19 (the Deposit Guarantee Directive) provides for a right to compensation for those who lose their deposits as a result of the credit institution becoming insolvent. Deposit protection was introduced as an adjunct to the rules on supervision in the context on completing the single banking market. It was perhaps to be expected that supplemental State liability does not obtain in the context of the Deposit Guarantee Directive as the Directive itself rules it out, albeit not in any of its Articles but in the preamble. For recital 24 of the Preamble reads as follows: ‘Whereas this Directive may not result in the Member States’ or their competent authorities’ being made liable in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognized”.

Having said that, the ECJ did not use this explicit exclusion of State liability as the decisive factor in its reasoning behind its answer to the first question of the BGH. For it said that the cited recital 24 of the
Directive supports an interpretation of the Directive’s relevant provisions it had already determined by reading them in the wider context of the Directive (para. 31). In para. 30, referred to above, the ECJ construed those provisions as not being in the interest of depositors (i.e. they are not a Schutznorm). Effectively, the Directive was therefore interpreted along the same lines as the German rule that supervision takes place in the general interest only – likewise those German rules are not a Schutznorm either. Of course, the Directive, then, does not preclude the national rule: they are of a similar kind.

The approach of the ECJ to construing the Deposit Guarantee Directive apparently was a prelude to its interpretation of the Banking Supervision Directives. The second preliminary question of the BGH is comparable to the first in that it again seeks to ascertain whether certain provisions of (now) Directive 2000/12/EC preclude a German rule preventing claims based on defective supervision as supervising credit institutions is fulfilled solely in the public interest – not (also) in the private interests of the depositors (in other words, as said above: breach of duties to supervise cannot trigger liability as the violated norms are not a Schutznorm), or whether the Deposit Guarantee Directive contains an exhaustive set of special provisions for all situations of unavailable deposits (lex specialis). Again, the ECJ assesses the wider context of the potentially liability triggering provisions of the Directive on supervision and consumer protection (cited above). Despite explicit reference to protection of depositors and a number of supervisory obligations of national authorities vis-à-vis credit institutions, the Court said that the Directives did not confer rights on depositors. First because the Directives do not expressly say so; second because the Directives only harmonise those aspects of banking law which are essential for mutual recognition of authorisations and prudential supervision; coordination of national liability law is not, it said. Thirdly, there is no liability of supervisory authorities in a number of Member States mainly because of the complexity of the subject matter. Fourth and finally, the Deposit Guarantee Directive offers a certain level of protection also when deposits are not available as result of defective supervision.

A number of objections may be made against this reasoning. To start with the last point, the ECJ does not say that the Deposit Guarantee Directive is a lex specialis; it merely says that the € 20,000 level of protection exists. In my view, whether or not Directive 94/19 offers any protection cannot be determinative for the protective scope of the other Directives unless the first one is a genuine lex specialis. Interestingly, although the BGH had raised precisely this issue in its second preliminary question, the ECJ did not rule that Directive 94/19 contains an exhaustive set of protective provisions. The second and third arguments essentially refer to national liability regimes of a number of Member States, including Germany. However, whatever these regimes are, they cannot be decisive for the autonomous system of Community liability post-Francovich. Restricting the scope of the latter by invoking the former is inconsistent with the independent nature of the Community liability.

Does the outcome of Paul and Others also sit uncomfortably with the ruling in Brasserie (paras. 68-72) that a rule of German law which – like here – was not considered to be a Schutznorm, i.e. breach of a higher ranking norm by the legislature cannot be regarded as affecting specific individuals, was deemed contrary to EC law? Perhaps not, because in Brasserie the ECJ had of course first held that the violated Treaty norms did confer rights on individuals; on the other hand, the ECJ there regarded that condition of German law to be contrary to the principle of effectiveness, whereas in Paul and Others that stage of the Francovich agenda was not reached because, in the ECJ’s view, no rights had been conferred in the first place. One might consider this an inconsistency in spirit rather than in the black letter of the Court’s case law.

More problematic, in my view, is the first argument cited in Paul and Others that the Banking Directives “do not contain any express rule granting such rights to depositors” (para. 41). That does seem to backtrack from a less restrictive approach to the requirement of “conferral of rights” when one compares it to Dillenkofer (cited above). For the relevant Directive in issue there, the Package Travel Directive, did not contain any express rights for consumers either. Nonetheless, the ECJ was quite prepared to derive such rights from Article 7 of the Directive which contains an obligation for the organizer of the package trip to have sufficient security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency. The Court focuses on the purpose rather than the express wording of the Directive to conclude that rights had been conferred; moreover, it referred to the preamble of the Directive as evidence of its intention to provide consumer protection entailing the grant of rights in the liability context (in Paul this was dismissed as not decisive).

Another question is whether this judgment in the context of State liability is inconsistent with an earlier judgment on supervisory obligations of the Commission in the context of 288 EC: Francesconi [1989] ECR 2087. It is true that the Court found no unlawful behaviour on the part of the Commission and
therefore there was no Community liability. However, it accepted in principle that the Commission could be liable for defective supervision; on the facts of the case it was not obliged to intervene as the primary duty to supervise was here placed on the authorities of the Member States. In principle, there can be liability if there is evidence that those national bodies are not fulfilling that task properly; the Commission would then have been required to intervene to ensure observance with EC law (see also No. 8, Opinion A-G Lenz). Admittedly, there is no further analysis of the detail of the requirement of conferral of rights – now equally applicable in both the State and the Community liability context after Bergaderm. Still, a firm rejection of the linkage of liability and defective supervision as in Paul, this case is not; on the contrary, Francesconi implies that the Commission owes consumers a duty of care (see Reiner Schulze et al. (eds.), A Casebook on European Consumer Law (Oxford and Portland: Hart 2004), at 240).

Of course one might distinguish these cases by pointing out that in Paul and Others the Court only denied liability after it had made sure that the €20,000 minimum protection under the Deposit Guarantee Directive was available. However, I am still not convinced that such minimum protection can be relied upon as an argument to reject any liability for other losses. For one thing, that Directive spells out that higher or more comprehensive cover for deposits under national law is not precluded and “[i]n particular, deposit-guarantee schemes may, on social considerations, cover certain kinds of deposits in full” (Art. 7(3)). For another, there is no express provision in any of the other Banking Directives that liability for defective supervision is precluded by way of reference to the Deposit Guarantee Directive as a lex specialis.

Finally, this is what the Deposit Guarantee Directive says about supervision and depositor protection: “Whereas deposit protection is an essential element in the completion of the internal market and an indispensable supplement to the system of supervision of credit institutions on account of the solidarity it creates amongst all the institutions in a given financial market in the event of the failure of any of them” (rectal 25). Should not “watchdog liability” be an essential supplement too?


This case is a kind of follow-up to Köbler (above No. 30) in which the Court confirms and specifies the scope of this landmark decision on liability of the State for violations of Community law committed by the judiciary.

Traghetti del Mediterraneo (TDM), a maritime transport company, brought proceedings against a competitor seeking compensation for damage resulting from the low-fare policy of that competitor, allegedly in breach of EC treaty competition and state aid provisions. The domestic courts in first instance and on appeal rejected the action on the ground that the subsidies granted to the competitor were legal. The case was then heard by the Corte di Cassazione, which refused to make a preliminary reference to the ECJ regarding the interpretation of the Treaty rules on State aid, and dismissed the case. TDM then initiated proceedings before the Tribunale di Genova against Italy for compensation of the damage it suffered as a result of the errors of interpretation committed by the Corte di Cassazione. TDM argued that had the Corte di Cassazione made a reference to the ECJ, the outcome of the case would have been different.

Italian law limits state liability for judicial acts. The tribunale di Genova thus referred two questions regarding state liability for judicial breaches to the ECJ. Following the delivery of the Köbler ruling, it maintained only its second question. The Court reformulated that question in the following way: ‘whether Community law and, in particular, the principles laid down by the Court in the Köbler judgment preclude national legislation such as that at issue in the main proceedings which, firstly, excludes all State liability for damage caused to individuals by an infringement of Community law committed by a national court adjudicating at last instance, where that infringement is the result of an interpretation of provisions of law or of an assessment of the facts and evidence carried out by that court, and, secondly, also limits such liability solely to cases of intentional fault and serious misconduct on the part of the court.’

After reference to Köbler, the Court goes on to assess the compatibility of Italian law regarding State
liability with Köbler.

33. Analogous considerations linked to the need to guarantee effective judicial protection to individuals of the rights conferred on them by Community law similarly preclude State liability not being incurred solely because an infringement of Community law attributable to a national court adjudicating at last instance arises from the interpretation of provisions of law made by that court.

34. On the one hand, interpretation of provisions of law forms part of the very essence of judicial activity since, whatever the sphere of activity considered, a court faced with divergent or conflicting arguments must normally interpret the relevant legal rules – of national and/or Community law – in order to resolve the dispute brought before it.

35. On the other hand, it is not inconceivable that a manifest infringement of Community law might be committed precisely in the exercise of such work of interpretation if, for example, the court gives a substantive or procedural rule of Community law a manifestly incorrect meaning, particularly in the light of the relevant case-law of the Court on the subject (see, in that regard, Köbler, paragraph 56), or where it interprets national law in such a way that in practice it leads to an infringement of the applicable Community law.

36. As the Advocate General observed in point 52 of his Opinion, to exclude all State liability in such circumstances on the ground that the infringement of Community law arises from an interpretation of provisions of law made by a court would be tantamount to rendering meaningless the principle laid down by the Court in the Köbler judgment. That remark is even more apposite in the case of courts adjudicating at last instance, which are responsible, at national level, for ensuring that rules of law are given a uniform interpretation.

37. An analogous conclusion must be drawn with regard to legislation which in a general manner excludes all State liability where the infringement attributable to a court of that State arises from its assessment of the facts and evidence.

38. On the one hand, such an assessment constitutes, like the interpretation of provisions of law, another essential aspect of the judicial function since, regardless of the interpretation adopted by the national court seised of a particular case, the application of those provisions to that case will often depend on the assessment which the court has made of the facts and the value and relevance of the evidence adduced for that purpose by the parties to the dispute.

39. On the other hand, such an assessment – which sometimes requires complex analysis – may also lead, in certain cases, to a manifest infringement of the applicable law, whether that assessment is made in the context of the application of specific provisions relating to the burden of proof or the weight or admissibility of the evidence, or in the context of the application of provisions which require a legal characterisation of the facts.

40. To exclude, in such circumstances, any possibility that State liability might be incurred where the infringement allegedly committed by the national court relates to the assessment which it made of facts or evidence would also amount to depriving the principle set out in the Köbler judgment of all practical effect with regard to manifest infringements of Community law for which courts adjudicating at last instance were responsible.

41. As the Advocate General observed in points 87 to 89 of his Opinion, that is especially the case in the State aid sector. To exclude, in that sector, all State liability on the ground that an infringement of Community law committed by a national court is the result of an assessment of the facts is likely to lead to a weakening of the procedural guarantees available to individuals, in that the protection of the rights which they derive from the relevant provisions of the Treaty depends, to a great extent, on successive operations of legal classification of the facts. Were State liability to be wholly excluded by reason of the assessments of facts carried out by a court, those individuals would have no judicial protection if a national court adjudicating at last instance committed a manifest error in its review of the above operations of legal classification of facts.

42. With regard, finally, to the limitation of State liability to cases of intentional fault and serious misconduct on the part of the court, it should be recalled, as was pointed out in paragraph 32 of this judgment, that the Court held, in the Köbler judgment, that State liability for damage caused to individuals by reason of an infringement of Community law attributable to a national court adjudicating at last instance could be incurred in the exceptional case where that court manifestly infringed the applicable law.

43. Such manifest infringement is to be assessed, inter alia, in the light of a number of criteria, such as the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, and the non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC; it is in any event presumed where the decision involved is made in manifest disregard of the case-law of the Court on the subject (Köbler, paragraphs 53 to 56).
44 Accordingly, although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred for an infringement of Community law attributable to a national court adjudicating at last instance, under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law, as set out in paragraphs 53 to 56 of the Köbler judgment. …

46 In the light of the foregoing considerations, the answer to the question referred by the national court for a preliminary ruling, as reformulated in its letter of 13 January 2004, must be that Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court; if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the Köbler judgment.

This result is welcome, for excluding such situations from liability would amount to render the remedy pointless, since it would limit state liability for judicial breaches to procedural mistakes, whilst most of the damage that could be caused by national courts would in fact result from their functions of interpretation and assessment of facts and evidence (effectiveness argument).


Tax case on reference from a Dutch Court of Appeal. Key words are: Freedom of movement for persons –Article 18 EC– Freedom of establishment –Article 43 EC – Direct taxation – Taxation of notional increases in value of substantial shareholdings where tax residence transferred to another Member State.

A Dutch national had to provide security for deferred payment of income tax upon his taking up residence in the UK. He was released from the security after the ECJ’s rulings in Case C-9/02 de Lasteyrie du Saillant [2004] ECR I-2409. N argued before the national courts that some core elements of the Dutch system are contrary to Community law, that the obstacles to freedoms of movement remained in place despite the lifting of the security and that the Dutch “rules providing for flat-rate recovery of costs by a party successful in court is contrary to Community law because it restricts the possibility for Netherlands persons to use the courts effectively” (para. 18). The ECJ examined the preliminary questions solely in the light of Art. 43 EC (freedom of establishment). It found the Dutch rules to be incompatible with the Treaty to the extent the system of deferment of the payment of the tax was conditional on the provision of guarantees without fully taking into account any “reductions in value capable of arising after the transfer of residence by the person concerned and which were not taken into account by the host Member State” (para. 55). The question of State liability was addressed in the context of compensation for the consequential costs and losses of the provision of security. The ECJ found as follows:

“57 As the Advocate General has observed in paragraph 128 of her Opinion, the constitution of guarantees is, generally speaking, not without its related costs. In particular, the deposit of company shares by way of security may reduce confidence in the solvency of their owner, to whom less favourable credit conditions might be applied. Thus, such consequences cannot be made good retroactively merely by releasing the guarantee.

58 It is moreover undisputed that the question concerning the form of the document on the basis of which the guarantee is released is of no relevance here.

59 As for the possibility of obtaining compensation for the damage arising from having to constitute a guarantee in order to be able to benefit from a deferment of payment of the tax in question, it is for the Member States, under the principle of cooperation laid down in Article 10 EC, to ensure the legal protection which individuals derive from the direct effect of Community law. In the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions (principle of equivalence) nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, to that effect, Case 33/76 Rewe v Landwirtschaftskammer für das Saarland [1976] ECR 1989, paragraph 5; Case C-312/93 Peterbroeck [1995] ECR I-4599, paragraph 12; and Joined Cases C-397/98 and C-410/98 Metalgesellschaft and Others [2001] ECR I-1727).

60 The Court of Justice has, furthermore, already held that it is for national law, observing the
principles referred to above, to settle all ancillary questions relating to the reimbursement of charges improperly levied, such as the payment of interest, including the rate of interest and the date from which it must be calculated (Case 26/74 Roquette Frères v Commission [1976] ECR 677, paragraphs 11 and 12; Case 130/79 Express Dairy Foods [1980] ECR 1887, paragraphs 16 and 17; and Metallgesellschaft and Others, paragraph 86).

61 The same must apply to a claim for payment of interest on arrears designed to compensate for costs which may have been incurred in the constitution of guarantees, given the similarities that exist between a restitution of taxes unduly levied and a release of guarantees demanded in breach of Community law.

62 Moreover, damage caused by the constitution of a guarantee demanded in breach of Community law is likely to engage the liability of the Member State which enacted the disputed measure.

63 As for the conditions under which a Member State is liable to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible, the case-law of the Court of Justice shows that there are three, namely that the rule of law infringed must have been intended to confer rights on individuals, that the breach must be sufficiently serious, and that there must be a direct causal link between the breach of the obligation resting on the State and the loss or damage sustained by the injured parties. Those conditions are to be applied according to each type of situation (Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029, paragraph 51; Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 Dillenkofer and Others [1996] ECR I-4845, paragraph 21; and Case C-424/97 Haim [2000] ECR I-5123, paragraph 36).

64 More particularly concerning the second condition, the Court has held that a breach of Community law will be sufficiently serious where, in the exercise of its legislative power, a Member State manifestly and gravely disregarded the limits on its discretion (Factortame, paragraph 55; Dillenkofer, paragraph 25) and that where, at the time when it committed the infringement, the Member State in question had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-5/94 Hedley Lomas [1996] ECR I-2553, paragraph 28).

65 In order to determine whether a breach of Community law is sufficiently serious, the national court hearing a claim for compensation must take account of all the factors which characterise the situation which is brought before it. Those factors include, in particular, the clarity and precision of the rule infringed, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law (Factortame, paragraph 56; Haim, paragraph 43).

66 It should be noted in that respect that the rules of Community law concerned are provisions of the Treaty that were in force and directly applicable well before the facts in the main proceedings. However, at the time when the tax system in question entered into force, namely 1 January 1997, the Court of Justice had not yet given its judgment in de Lasteyrie du Saillant, in which it held for the first time that the obligation to constitute guarantees for the purpose of obtaining a deferment of payment of a tax on increases in the value of securities, in many respects similar to that at issue in the main proceedings, is contrary to the freedom of establishment.

67 The answer to the fourth question must therefore be that an obstacle arising from a requirement, in breach of Community law, that a guarantee be constituted cannot be raised with retroactive effect merely by releasing that guarantee. The form of the document on the basis of which the guarantee was released is immaterial to that assessment. Where a Member State makes provision for the payment of interest on arrears where a guarantee demanded in breach of national law is released, such interest is also due in the case of an infringement of Community law. Moreover, it is for the national court to assess, in accordance with the guidelines provided by the Court of Justice and in compliance with the principles of equivalence and effectiveness, whether the Member State is liable on account of the damage caused by the obligation to constitute such a guarantee.”

The ECJ confined itself to reiterating the main principles of State liability as arising from the leading cases. Somewhat timidly, it considered that State liability “is likely” to be engaged, thus leaving the matter entirely for the national court to deal with. Like in many of the other recent cases, the ECJ signalled that the rules of Community law applicable at the time of the infringement were probably not so clear as to justify a finding of a sufficiently serious breach: in para. 66 it noted that clarity did not obtain until its 2004 Lasteyrie du Saillant judgment. Or, as A-G Kokott put it in her Opinion: “134. Given that the Community law analysis of tax on emigration was largely unclear until the judgment in De Lasteyrie du Saillant was handed down, one could hardly regard an infringement prior to that date as being sufficiently serious.”
Finally, the ECJ gave no ruling on the issue of the compatibility with EC law of the Dutch rules on reimbursement of costs as it considered that part of the preliminary reference to be inadmissible.


The principal issue of this case concerns citizenship and in particular the scope of the Treaty provisions and the role of domestic nationality law in granting citizenship. Residents of the Dutch Antilles, despite having Dutch nationality, were excluded from voting for the European Parliament because they are not resident in the Netherlands. They challenged this in judicial review proceedings but since the elections had already taken place by the time the court dealt with the application, “it is too late for a decision annulling the refusal to enrol the appellants in the main proceedings on the register of electors to enable them to take part in that election. It does not rule out the possibility, however, that compensation (‘rechtsherstel’) should be awarded them under Community law.

18 It was in those circumstances that the Raad van State (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling: […]

[Question] 5. Does Community law impose requirements as to the nature of the legal redress (rechtsherstel) to be provided in the case where the national courts – on the basis of, inter alia, the answers given by the Court of Justice of the European Communities to the above questions – conclude that persons resident or living in the Netherlands Antilles and Aruba and having Netherlands nationality were improperly refused registration for the elections of 10 June 2004?"

The ECJ accepted that it is for domestic law to determine who can vote or stand as a candidate. A residence requirement may be imposed. However, the Court found that the principle of equal treatment had been infringed:

“56. The appellants in the main proceedings and the Commission claim, however, that the Netherlands Electoral Law infringes the principle of equal treatment in that it confers the right to vote and to stand as a candidate in elections to the European Parliament on all Netherlands nationals resident in a non-member country, whereas such a right is not conferred on Netherlands nationals resident in the Netherlands Antilles or Aruba.

57. In that regard, it must be observed that the principle of equal treatment or non-discrimination, which is one of the general principles of Community law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 ABNA and Others [2005] ECR I-10423, paragraph 63, and Case C-344/04 IATA and ELFAA [2006] ECR 1-403, paragraph 95).

58. Here, the relevant comparison is between a Netherlands national resident in the Netherlands Antilles or Aruba and one residing in a non-member country. They have in common that they are Netherlands nationals who do not reside in the Netherlands. Yet there is a difference in treatment between the two, the latter having the right to vote and to stand as a candidate in elections to the European Parliament held in the Netherlands whereas the former has no such right. Such a difference in treatment must be objectively justified.

59. At the hearing, the Netherlands Government stated that the Netherlands Electoral Law’s objective was to enable Netherlands nationals from the Netherlands residing abroad to vote, since those nationals are assumed still to have links with Netherlands society. However, it is also apparent from that Government’s explanations at the hearing that a Netherlands national who transfers his residence from Aruba to a non-member country has the right to vote in the same way as a Netherlands national transferring his residence from the Netherlands to a non-member country, while a Netherlands national resident in Aruba does not have that right.

60. In that regard, the objective pursued by the Netherlands legislature consisting in the conferment of the right to vote and stand for election on Netherlands nationals who have or have had links with the Netherlands falls within that legislature’s discretion as regards the holding of the elections. However, the Netherlands Government has not sufficiently demonstrated that the difference in treatment observed between Netherlands nationals resident in a non-member country and those resident in the
Netherlands Antilles or Aruba is objectively justified and does not therefore constitute an infringement of the principle of equal treatment.

61. Having regard to those matters, the answer to the third question must be that while, in the current state of Community law, there is nothing which precludes the Member States from defining, in compliance with Community law, the conditions of the right to vote and to stand as a candidate in elections to the European Parliament by reference to the criterion of residence in the territory in which the elections are held, the principle of equal treatment prevents, however, the criteria chosen from resulting in different treatment of nationals who are in comparable situations, unless that difference in treatment is objectively justified."

Accordingly, the question of a remedy arises now that a breach of EC law has been found. Starting point for the Court is that in the absence of Community rules about disputes regarding the right to vote and stand for election in the EP it is for national law to govern matters of redress, albeit, of course, subject to the principles of equivalence and effectiveness. It then reminded the national court of the existence of Francovich liability:

"69. In that context, it must also be recalled that the principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty, and that a Member State is thus required to make reparation for the damage caused where the rule of law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029, paragraphs 31 and 51, and Case C-224/01 Köbler [2003] ECR 1-10239, paragraphs 30 and 51), although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law (Brasserie du Pêcheur and Factortame, paragraph 66).

70. Subject to the right of reparation which flows directly from Community law where the conditions referred to in the previous paragraph are satisfied, it is on the basis of rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused, provided that the conditions for reparation of loss and damage laid down by national law are not less favourable than those relating to similar domestic claims and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (Brasserie du Pêcheur and Factortame, paragraph 67).

71. The reply to the fifth question must therefore be that it is for the national law of each Member State to determine the rules allowing legal redress for a person who, because of a national provision that is contrary to Community law, has not been entered on the electoral register for the election of the members of the European Parliament of 10 June 2004 and has therefore been excluded from participation in those elections. Those remedies, which may include compensation for the loss caused by the infringement of Community law for which the State may be held responsible, must comply with the principles of equivalence and effectiveness."

No further guidance about the liability conditions was given. On 21 November 2006, the Dutch Council of state gave its final rulings. See the page "Applications by National Courts" of this Website: www.francovich.eu.

38. Case C-446/04 Test Claimants in the FI Group Litigation [2006] ECR nyr (12 December 2006) This reference from the English High Court deals with corporate taxation and in particular a difference in the treatment of dividends received by a parent of subsidiaries based either in the UK or elsewhere. As we concentrate on questions of State liability, may it suffice to merely note that in issue was the alleged incompatibility of UK tax law with the freedom of establishment and the free movement of capital (Arts. 43 and 56 EC) in conjunction with Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. Certain tax exemptions applied only to resident subsidiaries and not to non-resident ones. The claimants seek repayment and/or compensation for losses incurred by them as a result of these tax rules having been applied to them by the Inland Revenue. The national court referred 9 very detailed questions to the ECJ, including whether: "7. In the event that the answer to any part of Question 6 is that the claim is a claim for payment of an
amount representing a benefit unduly denied:  
(a) is such a claim a consequence of, and an adjunct to, the right conferred by the abovementioned Community provisions; or  
(b) must the conditions for recovery laid down in … Brasserie du Pêcheur and Factortame be satisfied; or  
(c) must some other conditions be met?  
8. Does it make any difference to the answers to Questions 6 or 7 whether as a matter of domestic law the claims referred to in Question 6 are brought as restitutionary claims or are brought or have to be brought as claims for damages?  
9. What guidance, if any, does the Court of Justice think it appropriate to provide in the present case as to which circumstances the national court ought to take into consideration when it comes to determine whether there is a sufficiently serious breach within the meaning of the judgment in … Brasserie du Pêcheur and Factortame, in particular as to whether, given the state of the case-law of the Court of Justice on the interpretation of the relevant Community provisions, the breach was excusable or as to whether in any particular case there is a sufficient causal link to constitute a “direct causal link” within the meaning of that judgment?”  
On the matter of whether there has been any breach of Community law at all, the ECJ found that certain aspects of the UK legislation were contrary to Arts. 43 and 56 EC. The question of remedies thus had to be addressed. An important matter is the characterisation of the claims before the domestic court: is it repayment of sums unduly levied (restitution with no need to prove any fault) or damages with the requirement to prove, under Brasserie principles, that a sufficiently serious breach exists. Needless to say the hurdles a claimant has to overcome in the second option are much higher than in the first.  
The Court starts its answer, citing Metallgesellshaft (above No. 28), by confirming that it is not for the ECJ to characterise a claim before a national court. However, the right to repayment is a consequence of the freedoms; national law governs remedies subject to the RECJ to characterise a claim before a national court. However, the right to repayment is a consequence  

“210 It is, in principle, for the national courts to apply the criteria for establishing the liability of Member States for damage caused to individuals by breaches of Community law (Brasserie du Pêcheur and Factortame, paragraph 58, and Köbler, paragraph 100), in accordance with the guidelines laid down by the Court for the application of those criteria (Brasserie du Pêcheur and Factortame, paragraphs 55 to 57; Case C-392/93 British Telecommunications [1996] ECR I-1631, paragraph 41; Denkavit and Others, paragraph 49; and Konle, paragraph 58).  
211 In the main proceedings, the first condition is plainly satisfied as regards Articles 43 EC and 56 EC. Those provisions confer rights on individuals (see, respectively, Brasserie du Pêcheur and Factortame, paragraphs 23 and 54, and Joined Cases C-163/94, C-165/94 and C-250/94 Sanz de Lera and Others [1995] ECR I-4821, paragraph 43).  
212 As regards the second condition, it should be pointed out, first, that a breach of Community law will be sufficiently serious where, in the exercise of its legislative power, a Member State has manifestly and gravely disregarded the limits on its discretion (see Brasserie du Pêcheur and Factortame, paragraph 55; British Telecommunications, paragraph 42; and Case C-424/97 Haim [2000] ECR I-5123, paragraph 38). Secondly, where, at the time when it committed the infringement, the Member State in question had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-5/94 Hedley Lomas [1996] ECR I-2553, paragraph 28, and Haim, paragraph 38).  
213 In order to determine whether a breach of Community law is sufficiently serious, it is necessary to take account of all the factors which characterise the situation brought before the national court. Those factors include, in particular, the clarity and precision of the rule infringed, whether the infringement and the damage caused were intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law (Brasserie du Pêcheur and Factortame, paragraph 56, and Haim, paragraphs 42 and 43).  
214 On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question
constituted an infringement (Brasserie du Pêcheur and Factortame, paragraph 57).

215 In the present case, in order to determine whether a breach of Article 43 EC committed by the Member State concerned was sufficiently serious, the national court must take into account the fact that, in a field such as direct taxation, the consequences arising from the freedoms of movement guaranteed by the Treaty have been only gradually made clear, in particular by the principles identified by the Court since delivering judgment in Case 270/83 Commission v France. Moreover, as regards the taxation of dividends received by resident companies from non-resident companies, it was only in Verkooijen, Lenz and Manninen that the Court had the opportunity to clarify the requirements arising from the freedoms of movement, in particular as regards the free movement of capital.

216 Apart from cases to which Directive 90/435 applied, Community law gave no precise definition of the duty of a Member State to ensure that, as regards mechanisms for the prevention or mitigation of the imposition of a series of charges to tax or economic double taxation, dividends paid to residents by resident companies and those paid by non-resident companies were treated in the same way. It follows that, until delivery of the judgments in Verkooijen, Lenz and Manninen, the issue raised by the order for reference in the present case had not yet been addressed as such in the case-law of the Court.

217 It is in the light of those considerations that the national court should assess the matters referred to in paragraph 213 of this judgment, in particular the clarity and precision of the rules infringed and whether any errors of law were excusable or inexcusable.

218 As regards the third condition, namely the requirement for a causal link between the breach of the obligation resting on the State and the loss or damage sustained by those affected, it is for the national court to assess whether the loss and damage claimed flows sufficiently directly from the breach of Community law to render the State liable to make it good (see, to that effect, as regards the non-contractual liability of the Community, Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 Dumortier frères and Others v Council [1979] ECR 3091, paragraph 21).

219 Subject to the right of reparation which flows directly from Community law where the conditions referred to in the previous paragraph are satisfied, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused, provided that the conditions for reparation of loss and damage laid down by national law are not less favourable than those relating to similar domestic claims and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraphs 41 to 43; Brasserie du Pêcheur and Factortame, paragraph 67; and Köbler, paragraph 58).

220 The answer to Questions 6 to 9 should therefore be that, in the absence of Community legislation, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, including the classification of claims brought by injured parties before the national courts and tribunals. Those courts and tribunals are, however, obliged to ensure that individuals should have an effective legal remedy enabling them to obtain reimbursement of the tax unlawfully levied on them and the amounts paid to that Member State or withheld by it directly against that tax. As regards other loss or damage which a person may have sustained by reason of a breach of Community law for which a Member State is liable, the latter is obligated to make reparation for the loss or damage caused to individuals in the conditions set out in paragraph 51 of the judgment in Brasserie du Pêcheur and Factortame, but that does not preclude the State from being liable under less restrictive conditions, where national law so provides."

Accordingly, the ECJ decisively tackled the aspect of conferral of rights (satisfied here), while on the matter of sufficiently serious breach it hinted to the national court that its own case law had developed over time and was not very detailed at first. It would therefore seem likely that the national court will find that the infringed rules were not so clear that the breach would be sufficiently serious. On causation the ECJ merely cited Dumortier and left everything else up to the national court. Finally, para. 220 (same as the operative part) merits some commentary as it deals with the Community law dimension of the characterisation of the claims by the national courts. EC law obliges MS to ensure repayment; it is only for other loss or damage that the far more restrictive Brasserie requirements apply. The Court follows A-G Geelhoed in this regard who was somewhat more explicit in noting that the very fact that it may be difficult for the claimants to satisfy the sufficiently serious breach requirement should play a role in the characterisation of the claims. See No. 134 of his Opinion, which provides as follows:

"134. In principle, it is for the national court to decide how the various claims brought should be characterised under national law. However, as I observed above, this is subject to the condition that
the characterisation should allow the Test Claimants an effective remedy in order to obtain reimbursement or reparation of the financial loss which they had sustained and from which the authorities of the Member State concerned had benefited as a result of the advance payment of tax. […] This obligation requires the national court, in characterising claims under national law, to take into account the fact that the conditions for damages as set out in Brasserie du Pêcheur may not be made out in a given case and, in such a situation, ensure that an effective remedy is nonetheless provided.”

38.


This ECJ ruling was eagerly awaited by tens of thousands of British contributors to occupational pension schemes, whose pensions entitlement were threatened by UK legislation allegedly in breach of a Community directive. The judgment turns out as a half-victory blessing for both the pension contributors and the UK government. Indeed, the Court considered that the UK did not provide sufficient protection of their financial interests, but it rejected their claims according to which the State itself should pay so as to guarantee them the payment of their full pension entitlements, or alternatively should pay them compensation under Francovich liability. Regarding the latter, the Court followed the Advocate General and considered that the deficient implementation of the Directive by the UK did not constitute a sufficiently serious breach. The case is nevertheless interesting beyond its specific subject-matter, in that it clarifies the use of the various factors to be taken into account in order to establish the existence of a sufficiently serious breach, suggesting a two-stage test in the assessment of such breach.

The Court delivered this preliminary ruling on a reference from the High Court of Justice of England and Wales in a case brought against the Secretary of State for Work and Pensions by Mrs Robins and 835 other members of two occupational pension schemes funded by their formal employer, Allied Steel and Wire Ltd (ASW), which went into liquidation in 2003. These two pension schemes, which took the form of ‘final salary’ / ‘balance of costs’ schemes, according to which a specified percentage of the final salary is promised as a pension and the employer is obliged to make good any difference between the claim covered by the occupational old-age benefit scheme and the entitlements promised, were terminated in 2002. According to valuation, their assets were not sufficient to meet all the claims of its members.

The situation is covered by Directive 80/987 relating to the protection of employees in the event of insolvency of their employer, more particularly its Article 8 which provides:

Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer’s undertaking or business at the date of the onset of the employer’s insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors’ benefits, under supplementary company or inter-company pension schemes outside the national statutory social security schemes.

Under the legal framework provided by the UK which aims at implementing the Directive (Employment Rights Act 1996 and Pension Schemes Act 1993), Mrs Robins would end up with only 20% of her entitlements, and other claimants with sometimes less than half of their entitlements.

The High Court referred to the ECJ three questions seeking clarifications regarding the interpretation of this provision, and the possibility of engaging State liability in such case.

(1) Is Article 8 of [the Directive] to be interpreted as requiring Member States to ensure, by whatever means necessary, that employees' accrued rights under supplementary company or inter-company final salary pension schemes are fully funded by Member States in the event that the employees' private employer becomes insolvent and the assets of their schemes are insufficient to fund those benefits?

(2) If the answer to Question 1 is “no”, are the requirements of Article 8 sufficiently implemented by legislation such as that in force in the United Kingdom as described above?

(3) If the United Kingdom legislative provisions fail to comply with Article 8, what test should be applied by the national court in considering whether the consequent infringement of Community law is sufficiently serious to attract liability in damages? In particular, is the mere infringement enough to establish the existence of a sufficiently serious breach, or must there also have been a manifest and grave disregard by the Member States for the limits on its rule-making powers, or is some other test to be applied and if so which?

On the first question, the Court departed from the position of Advocate General Kokott, who had proposed an interpretation of Article 8 requiring full protection of the employees' interests regarding
their rights to occupational old-age benefits [although not necessarily paid by the State] (paras 70 and 82 of the Opinion), and considered that,
46 … on a proper construction of Article 8 of the Directive, where the employer is insolvent and the assets of the supplementary company or inter-company pension schemes are insufficient, accrued pension rights need not necessarily be funded by the Member States themselves or be funded in full. As to the second question, although the Court agrees that Article 8 and other Directive provisions do not provide a clear indication of what is ‘the minimum level of protection’ required by the Directive, it nevertheless considers that a system like that set up by the UK, which leads to a guarantee limited to 20 or 49% of the benefits to which an employee was entitled, and where about 65 000 members of pension schemes suffered a loss of more than 20% of expected benefits and some 35 000 of them, that is more than half of the total, suffered losses exceeding 50% of those benefits’ cannot be considered to fall within the definition of the word ‘protect’ used in Article 8 of the Directive (para 57). A system such as that established by the United Kingdom does therefore not constitute proper implementation of Article 8 of the Directive (para 59). The Court then turns to the question of State liability. The Court recalls its Brasserie proviso, and focuses on whether the UK breach could be considered as sufficiently serious. The Court’s reasoning seems to suggest a two-stage tests for the assessment of the existence of a sufficiently serious breach.
70. The condition requiring a sufficiently serious breach of Community law implies manifest and grave disregard by the Member State for the limits set on its discretion, the factors to be taken into consideration in this connection being, inter alia, the degree of clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities (Brasserie du Pêcheur and Factortame, paragraphs 55 and 56).
71 If, however, the Member State was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see Hedley Lomas, paragraph 28).
72 The discretion enjoyed by the Member State thus constitutes an important criterion in determining whether there has been a sufficiently serious breach of Community law.
73 That discretion is broadly dependent on the degree of clarity and precision of the rule infringed.
74 It is apparent from consideration of the first question that, on account of the general nature of the wording of Article 8 of the Directive, that provision allows the Member States considerable discretion for the purposes of determining the level of protection of entitlement to benefits.
75 Accordingly, the liability of a Member State by reason of incorrect transposition of that provision is conditional on a finding of manifest and serious disregard by that State for the limits set on its discretion.
76 In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it (Case C-224/01 Köbler [2003] ECR I-10239, paragraph 54).
77 Those factors include, in particular, in addition to the clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law (Brasserie du Pêcheur and Factortame, paragraph 56; Köbler, paragraph 55).
78 In the present case the national court will have to take into account the clarity and precision of Article 8 of the Directive with regard to the level of protection required.
79 In that respect, it is to be emphasised that the parties in the main proceedings, the Member States which have submitted observations and the Commission have none of them been able to suggest with precision the minimum degree of protection that in their view is required by the Directive, if it should be considered that the latter does not impose a full guarantee.
80 Furthermore, as held in paragraph 56 above, neither Article 8 of the Directive nor any other provision therein contains anything that makes it possible to establish with any precision the minimum level required in order to protect entitlement to benefits.
81 The national court may also take into consideration Commission report COM(95) 164 final of 15 June 1995 (not published in the Official Journal of the European Communities), concerning the transposition of the Directive by the Member States, which has been cited in observations submitted to the Court and in which the Commission had then concluded (p. 52): ‘The abovementioned rules [adopted by the United Kingdom] appear to meet the requirements of Article 8 [of the Directive]. As the Advocate General has observed in point 98 of her Opinion, that wording may, although careful, have reinforced the view of the Member State concerned with regard to the transposition of the Directive into domestic law.
Like the Advocate General, the Court suggests to the High Court that no sufficiently serious breach has been committed by the UK, which should therefore not be liable to pay compensation (at least not under Community law).

The case is nevertheless interesting in that it clarifies the two-stage test for assessing whether a breach is sufficiently serious:

- First, one must determine whether the State had discretion or not; in order to determine this, the national court must take into account in particular the clarity and precision of the rule breached.
- Then, two options arise:

  Either the State had no nor limited discretion, then a mere infringement of Community law is sufficient to constitute a sufficiently serious breach;
  Or the State had significant legislative discretion, then its liability by reason of incorrect transposition is 'conditional on a finding of manifest and serious disregard by that State for the limits set on its discretion'; the factors then relevant to assess this are all the Brasserie factors (in addition to the clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law).

Robins is reminiscent of British Telecommunications (1996; above No. 5) in that it also concerns incorrect transposition and State liability was not established as the unlawful conduct did not reach the threshold of sufficiently serious breach. However, there is one important and subtle difference. In the 1996 BT case, the ECJ itself definitively dealt with the question of State liability as a matter of EC law by ruling that Community law does not require the State to make good any loss resulting from the incorrect transposition of the Directive in question (para. 48 and operative part). By contrast, in Robins, the matter is simply referred back to the national court which would therefore have the possibility to come to the conclusion that there was in fact a sufficiently serious breach (cf. Evans, No. 32 above).

Having said that, this is unlikely given the strong hints in the ECJ's judgment to the opposite effect, including the citing of a 1995 Commission Report – not published in the Official Journal! - suggesting that the relevant UK legislation would appear to be in conformity with the Directive. We now know, though, after this very judgment (Robins) that there was an incorrect transposition after all.

Accordingly, had this been an Article 226 EC infringement action, the UK would have been found to be in breach of Community Law. Of course that does not mean there will be State liability as the breach must be sufficiently serious. One could perhaps be somewhat critical of the ECJ's ruling in that it does not give more guidance on the matter to the national court. Notably paras. 78-80 seem merely to restate what must have been fairly obvious to the referring court already, namely that the Directive does not set a precise level of protection. Why does the Court point out that none of the parties involved in the proceedings before it could come up with a clear answer? One would have thought that that is precisely the job of the ECJ itself.

Finally, Robins would seem to be the first application by the ECJ of the last factor cited in para. 56 of Brasserie, the non-exhaustive list of factors determining whether a sufficiently serious breach exists or not:

a) the clarity and precision of the rule breached;
b) the measure of discretion left by that rule to the national or Community authorities;
c) whether the infringement and the damage caused was intentional or involuntary;
d) whether any error of law was excusable or inexcusable;
e) the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.


The legal issues are very similar to the 2006 Test Claimants case (above No. 37) albeit that different UK tax rules are now being questioned (so-called thin capitalisation anti-avoidance rules). They are examined in the light of the freedom of establishment alone. To a certain extent, those UK tax provisions are in breach of Article 43 EC. The part of the judgment about remedies and liability is essentially the same as the rulings in the earlier Test Claimants case: Case C-446/04 Test Claimants in the FII Group Litigation [2006] ECR nyr (12 December 2006). However, a specific feature of this second Test Claimants judgment is the consideration of the claimants’ obligation to mitigate their loss. The Court followed earlier case law by holding that:
“124 It should be made clear that, in order to determine the loss or damage for which reparation may be granted, the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him (Brasserie du Pêcheur and Factortame, paragraph 84).

125 In that regard, the Court held in paragraph 106 of the judgment in Metallgesellschaft and Others, with respect to tax legislation which did not afford the possibility of benefiting from the group taxation regime to resident subsidiaries of non-resident parent companies, that the exercise of rights conferred on private persons by directly applicable provisions of Community law would be rendered impossible or excessively difficult if their claims for restitution or compensation based on infringement of Community law were rejected or reduced solely because the persons concerned had not applied for a tax advantage which national law denied them, with a view to challenging the refusal of the tax authorities by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of Community law.

126 Similarly, the application of the provisions relating to freedom of establishment would be rendered impossible or excessively difficult if claims for restitution or compensation based on infringement of those provisions were rejected or reduced solely because the companies concerned had not applied to the tax authorities to be allowed to pay interest on loans granted by a non-resident parent company without that interest being treated as a distribution when, in the circumstances at issue, national law, combined, where appropriate, with the relevant provisions of the DTCs, provided for such treatment to apply.

127 It is for the national court to determine whether, should it be established that the national legislation at issue in the main proceedings, combined, where appropriate, with the relevant provisions of the DTCs, did not satisfy the conditions set out in paragraph 92 of this judgment and thus constituted an obstacle to the freedom of establishment prohibited by Article 43 EC, the application of that legislation would, on any basis, have led to the failure of the claims of the claimants in the main proceedings before the United Kingdom tax authorities.”


In this case, the question was whether a public statement by a government’s official could constitute an obstacle to the free movement of goods under Article 28 EC, and if so, whether it could engage the State’s liability for breach of Community law.

An official in the Ministry of Social Affairs and Health of the Finnish government made public statements relayed on a national TV channel and regional newspapers identifying a type of vehicle lift manufactured in Italy as defective and unfit for the market. Some of these statements turned out not to reflect the position of the Ministry, a fact for which the official was sanctioned by an administrative procedure. The lift importer brought a joint action against the official and the Finnish State for compensation of the damage suffered, i.e. loss of turnover.

The Court first recalled that where a matter has been subject to exhaustive harmonization, any national measure must be assessed in the light of the harmonizing measure and not Article 28 EC. In the present case, Directive 98/37/EC on the approximation of the laws of the Member States relating to machinery (OJ 1998 L 207, p. 1) provides for exhaustive harmonization and therefore the official’s conduct must be assessed under the Directive and not Article 28 EC.

The Court then held that ‘statements which, by reasons of their form and circumstances, give the persons to whom they are addressed the impression that they are official positions taken by the State, not personal opinions of the official are attributable to the State. The decisive factor for the statement of an official to be attributed to the State is whether the persons to whom those statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office. To the extent that they are attributable to the State, …statements by an official describing machinery certified as conforming to the Directive as contrary to the relevant harmonized standards and dangerous can thus constitute a breach of [the] Directive.’

The Court found the breach to be unjustified.

Regarding the liability conditions, it held that Article 4(1) of the Directive grants rights to individuals, and that since it leaves no discretion to the State, a simple breach of that provision constitutes a sufficiently serious breach. It leaves assessment of the causal link to the referring court.

The Court adds that EC law does neither require nor preclude that the individual civil servant be personally liable in addition to the State.

Pre-Brasserie Applications by the ECJ

State liability under *Francovich* to compensate those workers unlawfully excluded from the scope ratione materiae of Directive 80/987/EEC whenever it is not possible to interpret domestic legislation in conformity with the Directive. In an obiter dictum, the Court confirms the principles established in *Francovich*.


This case mainly concerns lack of horizontal direct effect of a directive, *Marshall I* followed. ECJ then 'reminds' the national courts of their duty to interpret national law in conformity with EC law. Failing both direct and indirect effect, the Court recalls, of its own motion, its ruling in *Francovich*. Albeit obiter, it reformulates the first *Francovich*-requirement from 'the result prescribed by the directive should entail the grant of rights to individuals' (emphasis added, para. 40 of *Francovich*) into: 'the purpose of the directive must be to grant rights to individuals' (emphasis added, para. 27 of *Faccini Dori*). The second formulation of the rights-requirement is more restrictive than the first.


Similar reference as in *Faccini Dori*, see para. 22: 'Moreover, if the result prescribed by the directive cannot be achieved by way of interpretation, it should also be borne in mind that, in terms of [Francovich], Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive, provided that three conditions are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the contents of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the state's obligation and the damage suffered (*Faccini Dori*, paragraph 27).'

**Non-applications by the ECJ**


Question 2: 'Is a Member State which, in order to protect its system (which is not provided for under the Treaty) of regulating the market in vehicles of Asian origin, organizes that market in an anti-competitive manner by favouring an agreement contrary to Article 85, not likely to incur liability, independently of proceedings under Article 169 for failure to fulfil obligations under the Treaty, in particular with regard to undertakings which, because of that State's attitude contrary to the Treaty, have been reduced to filing a petition to be wound up, whereas the national authorities and courts are required to protect the rights which the Treaty confers on individuals?' ECJ: no answer: ECJ had no jurisdiction in this case.


Allegedly discriminatory purchase of coal: what applies, the ECSC Treaty, the EC Treaty or both? For both Treaties: '[D]oes Community law require a remedy in damages for breach of any such duty [see the previous questions] to be available to any person to whom such duty is owed and, if so, on what conditions?' Liability of privatized electricity generators; not the State itself. Banks applied: no direct effect without a Commission recommendation. ECJ: no answer to liability question.


Milk production quota scheme. 'If the answer to question 4 is that the applicant is entitled to damages from the Ministry, on what basis are such damages to be assessed?' ECJ: no answer to liability question.


State aids under Article 92 EC Treaty: allegedly subsidized express courier service; what remedies should, as matter of Community law, national law provide in order to guarantee the effet utile of the prohibition? 'Question 4: If Question 3 is answered in the affirmative, must the damage suffered by the
undertakings competing with the undertaking that receives the aid as a result of the latter's lack of due
diligence also be compensated for in accordance with the rules of national law in order to remedy the
breach of the provisions of Community law at issue? ECJ: no liability of recipient of aid solely on the
basis of Community law.

5. Case C-228/94 Atkins v Wrekin District Council and Department of Transport [1996] ECR I-3633;
[1996] 3 C.M.L.R. 863:
Question 3: ‘If there has been a breach of Directive 79/7/EEC, can the direct effect of that Directive be
relied on to support a claim for damages for periods prior to the date of the Court's judgment by
persons who have not prior to that date brought legal proceedings or made an equivalent claim?’ ECJ:
No answer to liability question.

3 C.M.L.R. 263.
Question 5: Does European Community law recognize liability of the State independently of fault? No
answer by ECJ to liability question because the plaintiff is not covered by the scope ratione personae
of the allegedly infringed provision. According to A-G Ruiz-Jarabo Colomer, however, the defendant,
being on organ of the State, could potentially incur liability vis-à-vis individuals - if and when covered
by the Directive - who have been discriminated against after expiry of the transposition period. The
Advocate General did not examine any details of possible liability.

7. Case C-302/94 R v Secretary of State for Trade and Industry, ex parte British Telecommunications
Question 7: Liability for (primarily) Alleged wrongful implementation by the UK legislature of Articles 3-
10 of Directive 92/44/EEC on the application of open network provision to leased lines and/or
infringement of the principle of equal treatment. According to the Opinion of A-G Tesauro,
transposition of the Directive in the UK is prima facie incorrect; in the final analyses, however, it proved
to be compatible with its aims and therefore correct. Alternatively, there is no manifest and serious

A retired Austrian judge confessed to have shot and killed an Austrian lawyer, but later withdrew his
confession. The preliminary rulings procedure concerns a claim for damages for his unlawful
detention. In previous proceedings, the European Court of Human Rights had ruled that as Mr
Kremzow had not been allowed to defend himself in person before the Oberster Gerichtshof in
accordance with Article 6(3)(c) of the Convention, that Article 6 of the Convention had been violated
and awarded him damages in respect of fees and expenses.
Mr Kremzow argues that the ECJ has jurisdiction to answer the preliminary questions because he is a
citizen of the EU and, as such, enjoys the right to free movement of persons. A State which infringes
that fundamental right guaranteed by Community law by executing an unlawful penalty of
imprisonment must be held liable in damages by virtue of Community law.
The Court, however, held that ‘[w]hilst any deprivation of liberty may impede the person concerned
from exercising his right to free movement, ... a purely hypothetical prospect of exercising that right
does not establish a sufficient connection with Community law to justify the application of Community
provisions.’ It therefore ruled: ‘Where national legislation is concerned with a situation which, as in the
case at issue in the main proceedings, does not fall within the field of application of Community law,
the Court cannot, in a reference for a preliminary ruling, give the interpretive guidance necessary for
the national court to determine whether that national legislation is in conformity with the fundamental
rights whose observance the Court ensures, such as those deriving in particular from the Convention
for the Protection of Human Rights and Fundamental Freedoms.’
It follows that the ECJ did not consider the issue of liability for alleged breach of EC law.

The three preliminary questions of the national court concerned the three requirements for State
liability as formulated by the ECJ in Francovich: whether the directive in issue (Directive 89/49/EEC on
the recognition of higher-education diplomas) granted rights to individuals, whether they can be
determined on the basis of this Directive and whether there is a causal link between the alleged
'infringement of the obligation flowing from the provisions of Article 12 of the Directive by the Greek
State and the damage which the applicant claims to have suffered?'
The ECJ, however, did not go into the matter because it ruled that the situation of the applicants was
purely internal to the Member State Greece (reverse discrimination). Neither of them had obtained a
diploma in another Member State, whereas the Treaty provisions on freedom of movement and
relevant secondary EC law cannot be applied to situations with no connection to other Member States.
It followed that the Directive could not be relied upon at all in casu; no liability questions had to be
considered.
A Swedish court referred questions of interpretation of Article 6 of the EEA Agreement to the ECJ regarding a situation which would involve application of the principles of Francovich if a Member State of the EU were concerned and about the consequences of accession to the EU by a Member State of EFTA (the European Free Trade Association).

Opinion of A-G Cosmas of 19 January 1999. The Advocate General concludes that the Court lacks jurisdiction to answer the first two questions about the interpretation of the EEA Treaty and the application of the Francovich principle in that context. As for the third and final question: the Francovich liability does not apply to situations which occurred before accession of the Member State to the European Union.

The ECJ follows the Opinion of the Advocate General. It pointed out that, in essence, the question is raised of possible Francovich liability of an EFTA State which subsequently became an EU Member State. Andersson c.s. argued that the principle of State liability is applicable in the context of the EEA because the EEA Agreement prescribes that provisions of EEA law which correspond to EC law must be construed in conformity with the relevant judgments of the ECJ, including those on general principles such as Francovich. Although the EEA constitutes an act of one of the institutions of the Community and forms part of the Community legal order, the Court’s jurisdiction to interpret the EEA Agreement is limited to its application within EU Member States. It cannot rule upon the application within the EFTA States. Although a Swedish court was able to refer this question to the ECJ because of Swedish membership of the EU, its question concerns a situation prior to the date of accession. It follows that the ECJ lacks jurisdiction to rule upon the applicability of Francovich liability under EEA law.

The ECJ does, however, in Rechberger, refer to a judgment of the EFTA Court which confirms the view advanced by Andersson c.s. on Francovich liability in the EEA context; the Sveinsbjörnsdóttir case, which is discussed in Section 10 of this Web site State Liability under EEA Law.

This is a reference from the Greek Council of State about the compatibility of Greek charges on imported goods with Community law. Question 7 queries whether procedural provisions of Greek tax law limiting proof through witnesses are contrary to Articles 28 and 90 EC (ex Article 30, free movement of goods, and ex Article 95, tax), `where proceedings are brought before an administrative court seeking to establish the liability of the State with a view to obtaining reparation for damages resulting from the infringement of provisions governing the European Economic Community’. The plaintiff’s claim for damages was upheld by the factual instances albeit not in full; in particular, the award of damages for immaterial loss was reduced on appeal. Dounias, in further appeal proceedings, then argued that the EC Treaty had been breached and that the Treaty entitled him to a higher amount of compensation for immaterial loss than had been awarded. In the absence of any explicit reference to Francovich it would seem that the basis of liability was sought in national (Greek) law, albeit, as said, that it was argued that Community law would entitle Dounias to a higher level of compensation.

According to the Opinion of A-G Jacobs, who does not refer to Francovich liability, the issue here is whether the rules of Greek procedural law restricting evidence by witnesses before an administrative court in a dispute concerning State liability for breach of EC law are in conformity with the well known Rewe provisos: the principle of equality and the principle of effectiveness. He concludes that the witness rule does indeed break the principle of effectiveness in proceedings where such evidence is critical; the rule renders the exercise of Community law rights excessively difficult or virtually impossible.

Citing Case C-312/93 Peterbroeck [1995] ECR I-4599 and Case 199/82 San Giorgio [1983] ECR 3595, the ECJ followed the Advocate-General and ruled that Community law does not preclude a rule restricting evidence by witnesses where it equally applies to comparable breaches of national law and where it does not oppose the exercise of Community law rights.

The fifth preliminary question of the referring court was as follows:
5. If the answer to the preceding questions is that a Bulgarian national who is an illegal entrant may rely upon directly effective rights of establishment under the Agreement, then (a) what factors, under such an Agreement, should the national court take into account in determining whether any breach by the competent authorities of that person’s directly effective rights was
sufficiently serious to give rise to a right to reparation in damages against the Member State concerned; and, in particular,
(b) in the state of Community law at the relevant time (i.e., when the decisions of August/September 1996 to refuse the Applicant's application for leave to remain as a self-employed person, and/or the decision to detain the Applicant, were taken), did the approach adopted by the competent national authorities constitute a grave and manifest disregard of a superior rule of law?
The ECJ gave no answer in view of the replies to the other questions (see para. 92 of the judgment).
To an extent, this is "Francovich III," as the ECJ again deals with interpreting Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23, as amended). It now concludes that in this case there is no separate State liability action at all, as State had already designated itself as the addressee of the obligations under the Directive. The only issue it deals with are: the scope ratione personae and the direct effect of that rule, precluding any restrictions under national law.
The ECJ did not deal with State liability as it found no discrepancy between the national and EC law in issue.
The 3rd preliminary question of the referring court read as follows:
"3. Is the Federal Republic of Germany liable to pay damages to the plaintiff on account of defective implementation of Directive 80/987/EEC?"
The ECJ restated its settled law on the duty for national courts to interpret their laws in conformity with EC law. However:
"37. In this case, the order for reference shows that the national court considers it impossible to give an interpretation of Paragraph 183 of SGB III, concerning the date of the onset of the employer's insolvency, which conforms to Directive 80/987. It considers, however, that, if the expression 'employment relationship' within the meaning of Directive 80/987 were to be interpreted as excluding periods in which that relationship was suspended by reason of child raising leave, the guarantee period would cover the three months before 30 December 1999, the date as from which Mrs Mau benefited from such leave. In that way, it could allow Mrs Mau's application without it being necessary to examine either the question of possible direct applicability of Directive 80/987 or the question of State liability."
Accordingly, the ECJ also re-confirms that State liability is the ultimatum remedium. It concluded that there was indeed no need to consider the liability matter here:
"54. Having regard to the answers given to the first, fourth and sixth questions, there is no need to reply to the third and fifth questions. In particular, as has been adumbrated in paragraph 37 of this judgment, the order for reference shows that the interpretation of the expression 'employment relationship' as given in paragraph 53 of this judgment allows the referring court to resolve the dispute before it."
The ECJ did not consider the issue of liability of the State for an alleged breach of the free movement of goods consisting of the impossibility, during a 30-hour period, for a company to use a motorway as a result of a demonstration. The Court ruled, in balancing the free movement against fundamental rights that there had been no breach of EC law.
The following question was referred by the Dutch Supreme Court:
"Must the question whether, in a case such as this, the State has an obligation towards a citizen who has an interest in it, such as Ten Kate, to make use of the legal remedies available to it under Article 175 of the EC Treaty (Article 232 EC) or Article 173 of the EC Treaty (Article 230 EC) and, in the event of failure to comply with such an obligation, to pay compensation for the damage sustained as a consequence by the citizen concerned, be answered by reference to rules of Netherlands national law or by reference to rules of Community law?" And insofar EC law applies, under what circumstances
and what are the exact applicable rules?

The reference raises the interesting question of possible State liability for failure to institute annulment proceedings in circumstances where individuals cannot do so themselves under the restrictive standing rules of Art. 230 EC. According to A-G Stix-Hackl, however, no such question arises under EC law; it may do so under national law at most. See Opinion of 17 February 2005. In its judgment of 20 October 2005, the ECJ agreed for it held that:

27 So far as the interpretation of Community law is concerned, it must first of all be stated that neither the wording of Article 230 EC nor that of Article 232 EC imposes any obligation on a Member State to bring an action. On the contrary, Article 232 EC indicates that Member States ‘may’ bring an action before the Court of Justice in order to have the latter establish an infringement of the Treaty consisting in the failure by one of the institutions referred to in the first paragraph of Article 232 EC to act.

28 Nor can any such obligation be inferred from Article 10 EC, on which the respondents in the main proceedings rely in support of their contention. The principle to which Article 10 EC gives expression imposes on Member States and on the institutions mutual duties of sincere cooperation (Case 230/81 Luxembourg v Parliament [1983] ECR 255, paragraph 37; order in Case C-2/88 Imm. Zwartveld and Others [1990] ECR I-3365, paragraph 17), but it cannot be construed as meaning that a Member State may be obliged, vis-à-vis one of its citizens, to bring an action for annulment or an action in respect of a failure to act.

29 By contrast, taking into consideration the conditions set out in the Treaties governing admissibility of actions and the right to effective judicial protection, the Court has interpreted that principle of sincere cooperation as meaning that national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act (Case C-50/00 P Unión de Pequeños Agricultores v Council [2002] ECR I-6677, paragraph 42). The same holds true where a natural or legal person invokes a failure to take a decision, within the meaning of Article 232 EC, which it considers to be contrary to Community law. On the point whether EC law might preclude such an obligation under domestic law, the Court first pointed out that that would be difficult to conceive. However, it then referred to Art. 10 EC as a basis for a possible qualification to that main principle:

“31 It is in this connection not apparent how Community law could be infringed if national law contained such an obligation or provided that the Member State would be liable in such a case. A Member State could, however, breach the obligation of sincere cooperation laid down in Article 10 EC if it did not retain a degree of discretion as to the appropriateness of bringing an action, thereby giving rise to a risk that the Community Courts might be inundated with actions, some of which would be patently unfounded, thus jeopardising the proper functioning of the Court of Justice.”

It follows that the ECJ did not deal with the matter of State liability for failure to initiate proceedings against Community institutions in circumstances where private applicants are unable to do so on the ground of lacking standing.

Alleged failure by Italy to implement properly Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. Insofar as State liability is concerned the national court raised the following issue:

“22 However, according to the national court, it is impossible that the Italian legislature intended to implement Directive 1999/70 by means of Legislative Decree No 165/2001. It is uncertain whether the system put into place by Article 36 of that legislative decree includes ‘equivalent legal measures to prevent abuse’ within the meaning of clause 5(1) of the framework agreement. Furthermore, should it become necessary to accept that the Italian Republic failed completely to transpose that directive since it transposed it solely with regard to employment relationships in the private sector, the national court is doubtful whether the directive confers on individuals a specific right to conversion of their employment relationship or whether, taking into account the specific requirements of the organisation of employment in the public sector and, therefore, the fact that it is impossible to apply to it the provisions of Legislative Decree No 368/2001, such a failure may give rise only to rights to compensation against the defaulting Member State, in accordance with the case-law laid down in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357.

23 It is against that background that the Tribunale di Genova decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:
1. In view of the principles of non-discrimination and effectiveness, having regard in particular to the measures taken by Italy in relation to employment relationships with non-public-sector employers, must Council Directive 1999/70/EC of 28 June 1999 (Article 1, and Clauses 1(b) and 5 of the ETUC-UNICE-CEEP framework agreement on fixed-term work set out in the directive) be interpreted as meaning that it precludes national provisions such as those in Article 36 of Legislative Decree No 165 of 30 March 2001 which do not determine “under what conditions fixed-term employment contracts or relationships … shall be deemed to be contracts or relationships of indefinite duration”, and in fact contain an absolute prohibition from the outset on the establishment of employment relationships of indefinite duration resulting from abuse relating to the use of fixed-term contracts and relationships?

2. If the answer to the first question is in the affirmative, in view of the expiry of the time-limit for its implementation, must … Directive 1999/70 … (and in particular Clause 5 of the Annex thereto) and the applicable principles of Community law be considered, also in the light of Legislative Decree No 368/2001 and particularly Article 5 thereof, which provides as a usual consequence of abuse of fixed-term contracts or relationships for conversion to a relationship of indefinite duration, to confer on individuals an actual right, which may be exercised immediately, in accordance with the national law most relevant to the present case (Legislative Decree No 368/2001) to recognition of the existence of an employment relationship of indefinite duration?

3. If the answer to the first question is in the affirmative and the second question in the negative, in view of the expiry of the time-limit for its implementation, must … Directive 1999/70 … (and in particular Clause 5 of the Annex thereto) and the applicable principles of Community law be considered to confer on individuals a right to reparation for any loss or damage caused by the failure of the Italian Republic to adopt appropriate measures to prevent abuse relating to the use of fixed-term contracts and/or relationships with employers in the public sector?”

The ECJ did not address the question of State liability given its answers to the first question, there was no longer any need to answer the second and third questions. Neither did A-G Poiares Maduro in his Opinion of 20 September 2005, available here in French.


This case raises the interesting question of whether either the European Union or the Member States should be liable for damage caused by unlawful EU acts (i.e. adopted under the second or third pillar). This could be seen as yet another attempt to extent the judicial should be liable for damage caused by unlawful EU acts (i.e. adopted under the second or third pillar)...

In 2001, the Council of the European Union adopted a common position on measures to combat terrorism, which included in its annex a list of persons, groups or entities involved in terrorist activities. Gestoras Pro-Amnistía and other Basque organizations and individuals were listed. They brought actions seeking compensation for the harm suffered as a result of their inclusion on the list. The ECJ observes that in the sphere of police and judicial cooperation in criminal matters (i.e. third pillar), the Council may adopt common positions. However, the EU Treaty does not enable national courts to refer questions to the Court for a preliminary ruling about common positions, since these are not meant to produce legal effects in relation to third parties (cf. third pillar decisions and framework decisions, which are intended to produce legal effects in relation to third parties and may be the subject of a reference for a preliminary ruling).

However, since the preliminary rulings procedure is designed to guarantee observance of the law in the interpretation and application of the Treaty, the right to make a reference for a preliminary ruling in the context of the third pillar must nevertheless exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties. Therefore, a national court hearing a dispute which indirectly deals with the validity or interpretation of a common position adopted in the context of the third pillar, and which has serious doubt concerning whether that common position is really intended to produce legal effects in relation to third parties, may ask the Court to give a preliminary ruling. It would then be for the Court to consider the common position’s true nature and assess whether the act is intended to produce legal effects in relation to third parties and to give a preliminary ruling. Consequently, as a reference for a preliminary ruling is considered possible, the appellants are not deprived of effective judicial
protection. In concluding so, the ECJ does no longer need to consider the liability issue. It is nevertheless interesting to examine the Advocate General’s position on the matter, for he provides an attractive alternative to the Court’s solution, in particular to the extent that he argues in favor of allowing and even requiring national courts to hold the EU and/or Member State’s liable for EU acts infringing fundamental rights. This amounts not only to an extension of the scope of Francovich to EU acts, but also to extend the competence of national courts to hold the EU liable to pay compensation. Unlike the Court, the Advocate General does not consider the possibility of a reference for a preliminary ruling an adequate judicial remedy (para. 95-96), and therefore envisages non-contractual liability as a more suitable remedy. The Advocate General argues that ‘[t]he possibility of obtaining compensation for damage sustained as a result of infringement of a right, where a simple finding of infringement or a declaration of the invalidity of the detrimental act is not sufficient adequately to restore the infringed right, is … inherent in judicial protection of the right if such protection is intended to be effective. (…). Considering that it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection and for their courts to interpret and apply the national procedural rules governing the bringing of actions in such a way as to ensure such protection’ (para.133), he explains that judicial protection of individuals under Union law by national courts for the action of the Union in the context of the third pillar ‘is not limited to the mere possibility of indirectly challenging the validity of framework decisions and decisions [but also includes] the right to challenge directly the validity of such acts and of common positions where, despite having no direct effects, they are nevertheless likely of themselves … to cause immediate harm to the legal position of individuals; the purpose of such a challenge is to obtain at least compensation for any damage they may have caused.’ (para. 133)

He argues that the right to obtain compensation is ‘a component of the right to the effective judicial protection of rights’ (para 134), and is ‘inherent in the system of the EU Treaty’, in particular where Union’s fundamental rights are at stake. In addition, the principle of public authorities liability is also recognised by the Council in a declaration concerning the right to compensation, as well as by Articles 38 and 39(2) of the Europol Convention.

He then turns to the delicate questions of who, the Union or the Member States, should be liable (para 144), and which legal system would be competent to hear the damage action (para 145), as well as issue of jurisdictional immunities of State and international organisations. He continues with addressing the conditions under which non-contractual liability for Union’s acts would occur (para 154). Various options are available: (i) the national legislation of the jurisdiction seised is applied in toto, subject to respect for the principles of equivalence and effectiveness; (ii) where liability can be attributed to a single State, the minimum conditions establishing the right to reparation developed by Community case-law on the liability of Member States for breaches of Community law are applied, and otherwise national law applies, subject to respect for the principles of equivalence and effectiveness; (iii) whether liability rests with the State or the Union, the conditions developed by Community case-law on the non-contractual liability of the Community… are applied. He concludes that ‘contrary to what the Court of First Instance gave to understand in the contested orders and what is maintained in the appeals, under Union law the appellants enjoy the right to compensation in the national courts for possible infringement of their (fundamental) rights caused by the abovementioned common positions.’

The CFI was however right to deny its jurisdiction to hear a claim for damages against the Union, since such claim should be brought before national courts. He thus recommends that ‘the Court … should recognise the jurisdiction of the national courts to hear actions of this kind, in the name of respect for fundamental rights and the judicial protection thereof. Recognition of the jurisdiction of the national courts would demonstrate, inter alia, just how unfounded is the suspicion often voiced that the jurisdiction of the Court with regard to respect for fundamental rights as general principles of Community law is inspired not so much by genuine concern for the protection of such rights as by a desire to defend the primacy of Community law and of the Community court in relation to the law and authorities of the Member States.’ (para 180).

He recognises nevertheless that ‘acknowledging the jurisdiction of the national courts for actions for damages such as those brought in the cases before the Court has disadvantages for the uniform application of Union law and hence for legal certainty. Those disadvantages should be eliminated by amending the treaties currently in force in order appropriately to widen the jurisdiction of the Court of Justice, along the lines of the overhaul carried out by the Treaty establishing a Constitution for Europe. In the meantime, with regard to those disadvantages I observe that a little legal ‘uncertainty’ is always preferable to the certainty of ‘no law at
all’, especially when it comes to the protection of fundamental rights.

Applications by National Courts

Applications by National Courts


Further reading:

Austria

1. Oberster Gerichtshof, 1 Ob 12/00x (10 June 2000)
A German national wanted to buy a house in Tyrol in July 1997, to use as his principal home. He applied for an authorisation to purchase the property, arguing on the basis of the principles of free movement of persons and freedom of establishment, since he claimed that he had authorisation to pursue business in Austria. The Austrian authorities of first instance (Bezirkshauptmannschaft Schwaz, BS) refused authorisation, pursuant to Tyrolean provincial law, arguing that the business to be pursued by the applicant had no commercial, cultural or social interest for the province. The Oberster Gerichtshof stated that the BS should have known that the conditions put forward were not applicable to EU citizens, as confirmed by a circular from the Tyrolean government. The BS should have observed the freedoms mentioned above, even if national law provided for the opposite. It stated that the government could be held liable if a provincial authority did not apply EC law correctly, and condemned the Tyrol province to pay the appellant's legal costs for unlawful decision.

2. Oberster Gerichtshof, 1 Ob 146/00b (25 July 2000)
This case constitutes a follow-up to the ECJ Konle ruling (C-302/97 Konle [1999] ECR I-3099). The Oberster Gerichtshof had to settle the question of whether it was the province or the federal state that should compensate. Following the Court’s reasoning in Konle, it decided that reparation of the damage did not have to be provided by the federal state, and, by analogy with the Administrative Liability Act, which provides for the liability of a public authority that commits a breach in accordance with ‘operational and management criteria’, only the province can be liable to pay compensation. It therefore dismissed the application, as it was lodged against the State and not the province.

In this decision, the Verfassungsgerichtshof (VGH) applies the conditions of state liability to a situation similar to that of Köbler (see Section 4 ‘Post Francovich’ of this website), faithfully respecting the spirit of moderation deployed by the ECJ in that case. The decision confirms the limits of engaging state liability for damages allegedly resulting from a decision of a national court which failed to make a preliminary reference to the ECJ.

Facts and procedure: The applicant brought an action before the Verwaltungsgerichtshof (VwGH) challenging the refusal to grant her the Notstandhilfe (a special aid aimed at persons in difficult economic circumstances), on the grounds that her partner’s income was above the ceiling set by Austrian law. She argued that this ceiling was incompatible with EC law, and in particular with Articles 3 and 4 of Directive 79/7/EEC. The VwGH rejected the claim, relying on the ECJ case law on non-discrimination between men and women to establish that the Austrian law was not incompatible with EC law. The VwGH considered that, although the ECJ had not decided a similar case, the case law in
The acte clair doctrine was sufficiently clear to enable it to decide on the case. The applicant brought a claim before the VfGH asking for damages from the Austrian State for a manifest violation of EC law by the VwGH.

Decision: The constitutional court first restates that it is not competent to review the decision of the VwGH, but can, nevertheless, examine the nature of the violation (i.e. whether it is manifest or not). It recalls the stricter conditions for state liability resulting from acts committed by national judiciary established by the ECJ in Köbler, and, applying them to the case at hand, rejects the applicant's claim. Indeed, the VfGH considers that the simple non-referral to the ECJ by the VwGH (as provided by Art. 234.3 EC) is not per se sufficient to establish the existence of a manifest violation of EC law [for, indeed, the obligation exists only when EC law is not 'clear', according to the famous CILFIT case]. In the case at hand, even if the question at stake had not been definitely decided upon by the ECJ, the outcome could be easily deduced from its case law, so that the VwGH could reasonably conclude that the correct application of EC law left no doubt as to the solution to be adopted. Moreover, the VwGH had provided a very detailed reasoning on the issue.

Comments: This decision is a reasonable application of Köbler, providing for rather similar circumstances and outcomes. One should, nevertheless, note the importance granted by the VfGH to the quality of the reasoning. Most probably, the care brought by the VwGH played a significant part in the assessment by the VfGH, since it guaranteed that the VwGH had carefully considered the options and simply not ignored its obligation to refer (which would presumably constitute an inexcusable error). To what extent the VfGH carefully examined the 'clarity' of the ECJ case law is, however, unclear (from the report) and if this re-assessment was limited, it could be a problem.

Belgium


These cases deal with tobacco advertising. An important number of local firms and authorities brought actions against the Belgian state requesting the suspension of the 1997 Act prohibiting Tobacco Advertising (10 December 1997), and for authorisation to organise the annual Spa Formula One Grand Prix without being subject to its restrictions and for an order of the State to pay compensation for the loss resulting from the enactment of the act. The actions were dismissed. The Court of Appeal, in an interlocutory order, reiterated the principle of state liability as established by the ECJ in Brasserie, in particular the liability of the state for violation committed by the legislator. Then, it examined the discretionary power enjoyed by the legislator (reference made to BT). The court looked at the proposed EU Directive providing for a general ban on tobacco advertising and sponsoring involving tobacco products and easily concluded that it certainly did not support the existence of a sufficiently serious breach. The TPI of Verviers came to the same conclusions and dismissed applicants' claims based on broader principles of state liability under Belgian law.

Note: The EU Directive, once adopted, was challenged before the ECJ and invalidated, on the basis of a lack of competence and wrong legal basis (C-376/98 Germany v European Parliament and Council [2000] ECR I-8419).


The Brussels TPI held the state liable for late transposition of Directive 86/653 on self-employed commercial agents (OJ L 382, 31 December 1986, p. 17). The Directive imposed on Member States to take the necessary measures to guarantee that commercial agents receive an indemnity or compensation in certain situations. Under Belgian law in force at the time of the facts, no such indemnity was a payable. The applicant, whose contracts as a self-employed commercial agent were terminated after the deadline for transposition of the Directive, but before the national implementing legislation had been adopted, brought an action for damages against the state. The court considered that the Directive entitled him to an indemnity and ordered the state to pay the indemnity to be calculated according to the criteria provided by the Directive.

3. Rechtbank van eerste aanleg Brussel, of 9 September 1999 (Consumentenrecht 1999, p. 305-317) In this decision, the Rechtbank van eerste aanleg Brussel applies the strict Francovich conditions for state liability, usually provided for the situation of non-implementation of a directive, to a situation of incomplete transposition of a directive. Article 7 of Directive 90/314/EEC on package travel, package holidays and package tours provides that a tour organiser must make available 'security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.' (On the lack of
transposition of this provision by the German state, see ECJ judgement in the Dillenkoffer case). The Rechtbank establishes that, when the tour organiser from which the plaintiffs bought their package holidays was declared bankrupt, the Belgian state had not properly, fully and effectively transposed Article 7 of the directive. Indeed, whilst a Law of 16 February 1994 had been adopted, the royal decree which was to provide for the modalities of application of the duty to provide security, had not yet been adopted. The Rechtbank characterises this situation as one of late transposition, and thus applies directly the strict Francovich conditions, since such failure constitutes in itself a sufficiently serious breach of Community law giving rise to a right to compensation for individuals to which it has caused damage, provided that the effects of the measures provided by the directives on individual rights can be identified, and that there is a causal relationship between the breach by the State of its Community obligations and the harm suffered. The Rechtbank, following the ECJ approach concerning the source of the principle of State liability for breaches of Community law, specifies that State liability is founded on Community law, which prevails over domestic law and orders the Belgian State to pay damages to the plaintiffs.

Comments: The Belgian court’s characterisation of the breach as a late transposition rather than an incomplete one triggers the application of the Francovich formula and dispenses of the need to establish the existence of a sufficiently serious breach, since a lack of or late transposition constitutes, per se, a sufficiently serious breach, due to the state’s complete lack of discretion as to whether or when to implement. It thus favours the position of the individuals who suffered the damage, by removing a requirement which is often delicate to establish.


In its decision in a case concerning the technical characteristics of vehicles, the Cassation Court spelt out the conditions determining the liability of the state when it adopts or approves a regulation contrary to a Community provision having direct effect. The Court of Appeal, which had heard the case prior to the Cassation court, had referred and applied the criteria set out in the Brasserie/Factormaé ECJ ruling and did not find a sufficiently serious breach in casu. However, the Cassation Court set aside the ruling of the Court of Appeal, for it considered that acts of the Belgian administrative authorities must be examined in the light of the general criteria of Belgian civil liability, which were wider than those of Community law (Art. 1382 Belgian Civil Code: fault, damage, causal link). It stated that, unless there are grounds for exemption (which the Appeal Court did not elucidate), an administrative authority is at fault when it passes or adopts a regulation which fails to comply with a provision of international law having direct effect, resulting in civil liability for that fault which caused a damage.

Comments: This is an interesting case where the national rules on liability, which are more plaintiff-friendly than the Community ones, are applied to a situation arising under Community law.


By this decision, the highest judicial court confirmed a decision of the Cour d’Appel de Bruxelles (6 September 2000, R.G. No 98/AR/1965, available at http://www.cass.be)

Facts and procedure: In July 1995, a commercial agent requested his contractor to pay a ‘customer indemnity’ following the termination of the agency contract by the latter in April 1994. He argued that the contract clauses, which did not provide for such indemnity, should be interpreted in the light of Directive 86/653, which provided for such compensation. The directive was only transposed in Belgium in April 1995, and entered into force in June 1995, (instead of January 1, 1990). Moreover, it excluded from its scope obligations, the execution of which would have been claimed judicially before its entry into force. The Appeal Court rejected the claim based on the consistent interpretation for the contract clauses were clear and precise [therefore not subject to interpretation] and it would have created obligations between the contracting parties (horizontal effect). However, making reference to Francovich and Wagner Miret, the Appeal Court accepted the damage claim against the state, and condemned the state to pay the agent the equivalent of the indemnity which he would have received had the directive been transposed.

Decision: The Cassation Court confirmed the outcome of this decision, as well as its reasoning.


This decision, although not involving EC law, nevertheless has some implications regarding state liability for violation of Community law resulting from the acts of a state’s legislative organ. Indeed, in this decision, the Cour d’Appel de Bruxelles (CA) confirmed the liability of the Belgian state to compensate the moral damage caused to the organization ‘L’Eglise Universelle du Movement de Dieu’, which resulted from the negligent manner in which a parliamentary commission wrote a report on sects. What is interesting in this ruling, in relation to Francovich case law, is that neither the principle of separation of powers, nor the civil and criminal immunities of the members of parliament,
could prevent state liability, since the State should be considered as a single and indivisible legal person, liable for the faults and negligence of its organs, including those emanating from the legislative power, such as a parliamentary commission.

7. Cour de Cassation, decision of 1 June 2006, No C.05.0494.N, available at www.cass.be. The highest judicial court of Belgian reverses the ruling of the Brussels Appeal Court above, emphasizing that Article 144 of the Constitution, which places civil rights under the protection of the judicial power, does not allow the judge to control, directly or indirectly, either the way in which Parliament exercises its right of enquiry, or the way in which members of parliament express their opinions.

The Cassation court exposes that parliamentary immunity serves a legitimate purpose: the protection of the freedom of expression within Parliament and the preservation of separation of powers between the legislator and the judiciary. To decide that a judge cannot assess whether an opinion expressed by a member of parliament or a parliamentary commission constitutes a fault giving rise to liability does not constitute a disproportionate violation to the right to access to justice. If citizens could bring damages action against the State for opinions expressed by parliamentarians, their freedom of expression would be limited. Whilst Article 58 of the Constitution does not exclude the liability of the state for damaging opinions expressed within the work of a parliamentary commission, the Appeal Court wrongfully limited the scope of guarantee granted to freedom of expression. Although this decision could appear as limiting State liability for breaches committed by the legislator, the following decision proves that the Cassation court is willing to hold the State liable for legislative breaches. The scope of this decision must therefore be limited to the specific circumstances of the case, and based on the concern relating to interference with the freedom of expression of parliamentarians.

8. Cour de Cassation, decision of 28 September 2006, C.02.0570.F/19, available at www.cass.be; Reflets No 1/2007. The Cour de Cassation confirms a first instance and an appeal decision condemning the Belgian state to compensation for damages resulting from the abnormal length of a judicial procedure caused by improper legislation regulating judicial procedures, incompatible with Article 6 para 1 of the European Convention on Human Rights. The court considered here that the principle of separation of powers did not generally imply that the State would not be obliged to compensate for harm caused by state organs, including the legislator. By assessing the faulty nature of the damaging behaviour of the legislator, the judicial power does not impinge on the competence of the legislative power, but fulfils its mission to protect civil rights. Therefore, the judicial power can control whether the legislative power has legislated in a sufficient and adequate manner in order to guarantee the respect of a higher norm. This judgment confirms that the state can be held liable for ‘negligent’ behaviour of the legislator. This outcome seems to suggest that the Belgian judicial courts would be willing to hold the State liable for faulty transposition of directives.

France

1. Arrêt of 30 October 1996, Ste Jacques Dangeville, with conclusions of the commissaire du gouvernement Goulard, RFD adm 1997, 1059 ff and Arrêt of 30 October 1996, Cabinet Revert et Badelon, with conclusions of the commissaire du gouvernement Goulard, RFD adm 1997, 1062 ff. Both cases have their origin in the delayed transposition of the Directive 77/388/EEC on the harmonization relating to turnover taxes by France. In 1979, passed the transposition delay, the French State went on levying taxes that were contrary to the rules laid down in the said directive. The plaintiffs wanted their money back. Both had lodged their claim many years before. The one filed by the society Dangeville was rejected in all instances. After the Conseil d’État had changed its position concerning the direct applicability of Community law in France in the famous decision Nicolo and after the ECJ had acknowledged the principle of State liability for breach of Community law, Dangeville filed another claim founded on this principle.

This claim was again rejected by the Conseil d’État. The Commissaire du Gouvernement Goulard, justified this decision with a rather delicate reasoning about the meaning of the principle of effectiveness and non-discrimination put forth in Francovich. The rejection was based on two principles, res judicata and the allocation of matters between jurisdictions (distinction des contentieux), which form part of the French legal order and prevent a claim from being dealt with again in court once a judgement with binding legal force has been issued. These principles were said to be of such essential importance for legal certainty and, in general, not such as to prevent an effective protection
of rights, since alternative actions are available (although in the Dangeville situation, this alternative did not exist due to earlier jurisprudence. However, Dangeville was victim of that earlier jurisprudence, not of the principle of distinction des contentieux). Therefore, this principle as such cannot infringe the principle of effectiveness.

This hypothesis is supported by the decision in SA R e v e rt et Badel on (Ass. 30 October 1996). The plaintiffs had filed their claims years before, but no decision had been taken until 1996. For this reason, the Conseil d’État could deal with the matter in substance and found in favour of the plaintiffs, because they were seeking taxation exemption from the fiscal judge, and not by means of a tort action. Its decision is one of the rare ones dealing with the interpretation of the principle of effectiveness and non-discrimination in the application of the principle of State liability. Its message cannot be criticised for principles like these exist even in Community law (see Case C-326/96 Levez [1998] ECR I-7835, para. 18; [1999] 2 CMLR 363).

2. Cour de Cassation, Chambre commerciale, 19 October 1999, Directeur Général des impôts v S o l o g e s t S A, No 1560P; Société nationale des Etablissements Piot Pneu SA v S rvices fiscaux de l’Isère, No 1558 P; Directeur général des impôts et Ministère de l’économie, des finances et de l’Industrie V SA Behm, No 1561 D.

In this series of rulings, the Court of Cassation found that Article L.190, para. 3 of the Code of Tax Procedure, which set a time-limit for complaints, was compatible with EC law and could be relied on to refuse applications for reimbursement of registration charges based on some provisions of the Code, which were found partly incompatible with Directive 69/335 (Council Directive concerning indirect taxes on the raising of capital, OJ L 249, 3 October 1969, p. 12) in a judgement of the ECJ (C-197/94 Société Bautiaa [1996] ECR I-505) to be applied ex tunc. The Cour of Cassation, drawing implications from an ECJ ruling on limits to the temporal effects of judgements (C-231/96 EDIS [1998] ECR I-2951) and to a ruling on the principle of national procedural autonomy subject to effectiveness and equivalence (C-188/95 Fantask [1997] ECR I-6783), rejected the claims, even if de facto the expiry of the time limits causes total or partial rejection of the application.

An appeal on the time limits for repayment led the Béthune Regional Court (TGI) to refer a preliminary question on the lawfulness of Art. 190 of the Code. In C-88/99 Roquette Frères v Direction des Services fiscaux, Judgment of 28 November 2000 ECR I-10465, the ECJ confirmed the Court of Cassation approach, since it declared such a rule as compatible with Community law.


In another decision of the same day, the Council of State finally recognised the supremacy of directives over national law. In this parallel case, the highest administrative court was asked whether the State should pay damages to tobacco manufacturers for their loss which resulted from the incompatibility of the national decree of 31 December 1976 regarding the fixing of the tobacco price by the Minister of the Economy and Finances, taken in application of a Law of 24 May 1976, with an EC Directive 72/464 of 19 December 1972 implementing (ex) Article 37 and 30 of the EC Treaty, the correct interpretation of which had been repeatedly clarified by the ECJ in various enforcement actions brought by the Commission. The Conseil d’État considered that the breach was of a nature such as to engage State liability. Although the court does not refer to Francovich, it makes an application of the principle of State liability faithful to the Francovich ruling and condemned the French State to pay 230,000 FF to compensate their financial loss, including interest.


In this case, the TA Rennes (first instance administrative court for the district) held the state liable for late transposition of Art. 5 of Directive 91/676 on the protection of water against nitrates pollution from agricultural (OJ 375/1), since the decree setting the Directive’s programme framework was only adopted in 1996, and its implementing order in 1997. The TA rejected the state’s argument that ‘it should not be liable by reason’s of the applicant’s own fault’, since the applicant did not have the legal and technical means to limit the consequences of the high nitrate content of its water. In a judgement of 27 June 2002, the ECJ condemned France for failure to implement the relevant Directive provision (C-258/00 Commission v. France [2002] ECR I-2753).


In Ministre de la Justice v. Mr Magiera, the French Supreme Administrative Court took a decision which is of particular interest in the light of the recent ECJ decision in Köbler v Austrian Republic (see section 4 of this website). In this decision relating to a breach of a provison of the ECHR (not EC law),
the Conseil d'État follows up on its famous arrêt Darmon of 29 December 1978 (Rec. p. 542) on state liability for breaches of law committed by the judiciary. In that 1978 case, the Conseil d'État, whilst recognising that 'the exercise of the judicial function' could engage the state liability, then went on to limit such liability to situations where a 'faute lourde' could be established, and made it unavailable in situations where the 'faute lourde' would be the result of the actual content of a judgement which would become definitive by reason of res judicata. In Maguiera, the highest administrative court confirms the application of this principle to damages resulting from the breach of international conventions (i.e. the ECHR, but also perhaps EC law).

However, the Conseil withdraws, in some circumstances, the restrictive requirement of a 'faute lourde', which until then constituted a major obstacle to the success of liability claims for judicial mismanagement. It stated indeed that '(...) it results from these provisions [Articles 6, paragraph 1 and 13 ECHR], that when a dispute falls within their scope of application, and in any other cases from the general principles governing the functioning of administrative jurisdictions, that litigants are entitled to their actions being decided within reasonable delays' and that 'they should be compensated when a breach of such right has caused them a damage.' (see also Conseil D'État Ministre de la Justice v M.X, of the same day, No 239575). The principle of state liability for breaches committed by the judiciary is therefore based on both the ECHR and national general principles, which avoids the creation of two different liability regimes, depending on whether the case would fall under the scope of the ECHR or not, thereby guaranteeing equality between litigants (see concerns of Commissaire du Gouvernement Lamy).

Yet, while significantly relaxing the conditions when it comes to situations of judicial mismanagement, the Conseil d'État maintains demanding liability conditions in situations which touch at 'the heart of the judicial activity'. First, it recalls that the duty to decide cases within reasonable delay does not affect the validity of the judicial decision and therefore, state liability is still not available when the damage results from the content of a judicial decision itself which has become definitive. Besides, in order to preserve the specific nature of the judicial activity, if the activity touches at 'the heart of the judicial activity', state liability can be engaged only for a 'faute lourde'. It is only when it comes to the daily administration of justice that a 'faute simple' appears sufficient to engage state liability.

This decision goes against the recent case of the ECJ. Indeed, in Köbler the ECJ established that Member States are obliged to make good damage caused to individuals by infringements of Community law attributable to national courts adjudicating at last instance, provided that the rule of Community law infringed is intended to confer rights on individuals, that the breach is sufficiently serious and that there is a causal link between the breach and the damage. Regarding the second condition, the Court added that 'regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the Member States which submitted observations in this case have also contended' and that 'State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.' By strictly limiting state liability where the breach results from the actual content of a judicial decision, the case law of the Conseil d'État does not appear in conformity with the ECJ's approach. However, one must say that, at the time where the French Court released its decision, the Köbler case had not yet been decided and that there were speculations as to whether state liability could be engaged for breaches of Community law by the judicial branch.

6.. Cour de Cassation (Chambre commerciale, financière et économique), 22 October 2002, Sté Primistères Reynoird/Direction générale des douanes et droits indirects de la Guadeloupe

The Cour de Cassation held the first claim inadmissible in relation to repayment of charge paid before July 16, 1992, since the ECJ had limited the effect in time of its Legros judgement (ex nunc). Neither the applicant nor the Cour de Cassation made any reference to ECJ case law on state liability. The Cour de Cassation nevertheless, and this is worth noting, accepted the principle of state liability for loss caused by the levying of charges undue, but dismissed the action in the case at hand because, at the time when the offending dues were charged, there was no sufficiently serious breach, due to 'the
uncertainty as to the legitimacy of the dues... in relation to Community law’ reflected in the attitude taken in the Council in Decision 89/688/EEV of 22 December 1989, authorising the maintaining of the dock dues until December 1992.

To the extent that the ECJ case law itself recognises the position taken by Community institutions as a factor relevant for establishing a sufficiently serious breach (Brasserie), this judgement appears in line with Community case. One could nevertheless criticise the strict interpretation of the concept of sufficiently serious which it entails.

In this decision, the Conseil d’Etat for the first time explicitly recognises the principle of State responsibility for damage resulting from a violation by the legislator of an international convention. Until then, State liability for legislative breaches could only be engaged under the regime ‘rupture d’égalité devant les charges publiques’, in exceptional circumstances.

Mr X. brought an action before the Social Security Affairs Tribunal (TASS) to be reimbursed for contributions he had paid to the dentist-surgeons pension scheme, for the decree that provided for these contributions had been declared illegal. However, these decrees had then been ‘validated’ by means of a legislative act, which led the tribunal to reject Mr X. claim. Mr X. thus brought an action before the administrative court seeking compensation of the damage caused by the validating legislation, which, he argued, was contrary to Article 6 para 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on the right to a fair trial.

The Conseil d’Etat considers that

‘State responsibility for legislative acts can be engaged, on the one hand, on the basis of the equality of citizens before public burdens, in order to ensure the compensation of damage resulting from the adoption of a law, providing that this law did not intent to exclude liability, and that the damage for which compensation is sought, has a serious and special nature, and could therefore not be considered as a burden normally placed on the persons involved, on the other hand, by reason of its obligations to guarantee the respect of international conventions by public authorities, to compensate for damage resulting of the intervention of a law adopted in violation of international commitments of France.’ (author’s unofficial translation)

The Conseil d’Etat considers that the validation law, which did not rely on imperative reasons relating to the national interest, as required by the ECHR case law, was contrary to Article 6 para 1 ECHR, and condemns the State to compensate Mr X. for the damage resulting from the intervention of the validation law (i.e. the payment of the contributions which, without the validating law, would have been paid back to him, plus interests).

Germany
This is the follow-up judgement of the ECJ's ruling in Case C-46/93, cited above. The BGH held that, regarding the two types of wrongs the Federal Republic of Germany was alleged to have committed, in one situation there was no sufficiently serious breach, whereas in the other no direct causal connection between the loss suffered and the breach of Community law was established. End of story: no liability.

No liability following Dillenkofer for non-implementation of the Package Travel Directive by Germany, because, in this case, the relevant contract regarding the trip was concluded before the end of the transposition period.

Summary by Stöhr, ‘Schadenersatzansprüche wegen verspäteter Umsetzung der EG-Pauschalreiserichtlinie’, Neue Juristische Wochenschrift 1999, 1063-1067:
Although the plaintiff in Dillenkofer did not succeed with his claim, this judgement made compensation possible for many other plaintiffs. Within the period of delay of the transposition of the Package Travel Directive (90/314/EEC) in Germany, 120 travel agencies went bankrupt. Altogether until today, more than 9,000 suits have been filed against Germany with claims exceeding 20 million DM. Approximately half of these claims have finally been satisfied. Like the plaintiff in Dillenkofer, in many cases no compensation was awarded because the contract between the travel agency and the consumer had been concluded before the end of the transposition period of the Package Travel Directive. This consideration concerns all cases where a package had in fact been booked before 1st January 1993, even though payments and travelling took place after that date. Some other plaintiffs did not succeed because they did not book a trip within the meaning of Art. 2(1) of the Directive. Basically, conditions
of the German law of State liability have been applied, but modified. This is true for the principle of subsidiarity of State liability and for the law of limitation.


An investor who suffered loss as a result of Germany’s failure to set up the deposit—guaranteed scheme provided by Directive 94/19 (OJ L 135, 31 May 1994, p. 5) brought an action for damages against the state. Germany argued that the action for annulment of the Directive brought before the ECJ suspended its obligation to transpose it. The Landgericht rejected the argument, referring to ex-Art. 189 EC and to the ECJ ruling Dillenkofer, without feeling the need to refer the question to the ECJ, since only application of Community law, and not its interpretation, was at stake.


The Federal Court of Justice, the Bundesgerichtshof, unlike lower courts in the same case, ruled (after having reviewed in detail ECJ case law) that no Francovich liability could be obtained where some states - Länder - had charged fees for health inspections of meat allegedly contrary to a Council Decision, since the federal legislation (FIHG) transposing the Decision, which gave competence to the Länder to determine the fees, was itself compatible with the Decision. The case had to be remitted to the appeal court for an assessment of the Länders’ liability under domestic law, and not Community law.

Comment: The compatibility of this ruling with ECJ case law is doubtful, since the ECJ ruled that the state should be held liable under Community law for a wrongful act committed by any of its organs, including local authorities (Costanzo). The fact that the violation results from a mistaken application by the Länder and not from legislation should not exclude the State's liability under Community law, although the ECJ accepts that under domestic law, the liability can be passed on to the organ responsible for the breach.


In this decision, the Federal Court condemned a public law body to pay damages to an individual for violation of Community law.

After having established that the immobilisation of the applicant's ship was contrary to Community law, the court examined the question of who should pay compensation. Referring to the Konle and Haim decisions of the ECJ, the court considered that they did not imply that the duty to compensate fell necessarily on the state itself, but, on the contrary, that decision on the allocation of responsibility was for national law to determine. It stressed that when an individual has suffered damage as a result of the action of the public law body, German law provides that it belongs to the public law body to compensate for the damage caused, in this case to the body responsible for harbour management.


This decision, which draws fully on the consequences of ECJ state liability case law, is particularly interesting, not only because it comes from a German court, usually reluctant to grant liability, but also because it tackles the thorny issue of prescription, which has the potential to significantly undermine the exercise of individuals' right to compensation, in the situation of old but continuous violations of Community law. It clarifies the rights to compensation of individuals who suffered damage resulting from such violations.

Facts and procedure: In a decision C-102/96 Commission v. Germany [1998] ECR I-6871, the ECJ established that Germany had failed to fulfil the obligations imposed by Directive 64/433/EEC on health problems affecting intra-Community trade in fresh meat, as modified by Directive 91/497/EEC. Germany brought its legislation into line with this Directive in 1999. The applicant, a Danish organisation defending the interests of Danish pig breeders and slaughter-houses, claimed that the German legislation in place from 1993 until 1999 constituted an effective prohibition of the marketing in Germany of non-castrated male pigs from Denmark, and asked for compensation for the damage suffered by the breeders and slaughter-houses for the whole of that period. The first instance court only partially accepted the applicant's claim, by reason of the prescription of three years affecting a substantial part of the claim. The case was appealed to the Oberlandgericht Köln.

Decision: The Oberlandgericht characterises the breach as sufficiently serious, since the German government consciously ignored the requirements imposed by the directive. It then applies the criteria
for state liability established by Germany law (Art. 839, al. 3 Bürgerliches Gesetzbuch, hereinafter BGB), which provides that the duty to compensate does not exist where, intentionally or negligently, the party which suffered the damage has omitted to avoid the damage by means of bringing an action. From this negative formulation, the Oberlandsgericht concludes that a right to compensation is not excluded in the case at hand, since such actions could, in any case, not have been successful. Indeed, German courts could only have declared the incompatibility of German law with EC law in an incidental manner and could not have remedied it. Even a preliminary reference could not have modified the legal situation in Germany. The only reasonable claim realistically available would have been to complain to the Danish government which could then have asked the Commission to start an infringement procedure [the outcome of which was far from certain by reason of the Commission’s discretion to bring such action]. Furthermore, the Oberlandsgericht finds that the right of the applicant is not prescribed, as it considers Germany’s action as one single continuous act, and not repeated violations. Finally, regarding the time at which the applicant had knowledge of the damage and of the ‘person’ responsible for such damage, the Oberlandsgericht is of the opinion that, even if the applicant had known the existence of a damage from 1993, it was not reasonable to have expected from her to introduce a claim against Germany, since at the time, many uncertainties remained regarding the conditions of state liability for breaches of EC law, as Brasserie/Factortame had not yet been decided. Only after 1996, the date of this ruling, could the applicant have presumed of the existence of a duty of the German state to compensate. The Oberlandsgericht therefore allows the petition for revision before the Bundesgerichtshof.

Comments: By characterising the German breach as a continuous breach, the national court cleverly neutralises the prescription clause, so as to open the way for full compensation for individuals who suffered from a lengthy violation of Community law by a state. Moreover, the argument of legal uncertainty is used to undermine the potentially restrictive conditions attached to the discovery of the damage and the obligation to mitigate it. This decision illustrates the ability and willingness of national courts to undermine or even set aside some of the constraining requirements imposed by national law on the engagement of state liability, so as to guarantee a more effective exercise of their Community rights by individuals rights, as requested by the ECJ.

Greece
   In this case which blatantly defies ECJ case law, the Council of State, without any reference to Community case law, despite the argument to that effect of the appellant, as well as a ruling of the ECJ against Greece (C-365/93 [1995] ECR I-499) for failure to transpose Directive 89/48 on the general system for the recognition of the higher education diplomas awarded on completion of professional education and training in at least three years duration (OJ L 19, 24 January 1989, p. 16), considered that it was for the legislative and executive to choose the appropriate means of fulfilling the obligation imposed by the directive and that courts had no jurisdiction to intervene in the matter, in particular by engaging the state’s civil liability. This decision completely ignores Francovich case law and goes against the basic principles that it set out. It echoes another judgement of the same court on the same topic which indirectly challenged the principle of supremacy of Community law (see Maganaris, Emmanuel, ‘The Principle of supremacy of Community law in Greece – From direct challenge to non-application’ (1999) 24 European Law Review 426-432).

Ireland
1. High Court 3 February 1995 Tate v Minister for Social Welfare, [1995] 1 C.M.L.R. 825. The State was held to be in breach of its obligation under Community law to implement Directive 79/7/EEC on the principle of equal treatment between men and women in social security; the plaintiffs were awarded substantial damages but no punitive damages, which were also considered by the court.
   A local authority was held liable in damages as an emanation of the State for personal injury (partly) as a result of non-transposition of a directive on rear under-run protection devices for motor vehicles.
The court referred in particular to Case 103/88 Fratelli Costanzo [1989] ECR 1839, extending this direct effect case to the context of damage claims. Mr Coppinger suffered serious injuries in a traffic accident with a Council tipper truck, lawfully stopped at the side of the road. Had the truck been fitted with rear under-run protection in conformity with the Directive, his injuries would have been minor; presently the plaintiff is nearly totally paralysed. On the basis of the tort ‘actionable breach of a directive’, the defendant was found to be 25% responsible for the plaintiff's damage. Including pain and suffering, the court assessed the damages as around IRL € 250,000. Ms Coppinger was awarded IRL € 60,000 for loss of consortium.

3. Circuit Court, Dublin Bus v Motor Insurers’ Bureau of Ireland (MIBI), 29 October 1999, Macmahon J. Ireland transposed Directive 84/5 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ L 8, 15 Feb. 1984), p. 17) through an agreement with the defendant, a private law association operating in the field. This agreement provided for wider exemption than in the directive concerning cover for damage by unidentified vehicles, extending it to situations where the driver could not be identified. The ECJ rules that the Directive had been incorrectly transposed. According to the Circuit Court, because of the method of transposition chosen, the MIBI, as a partner of the State, should be associated with the State, since it was an offshoot of the State, the liability of which could be established. The MIBI was aware that the exemption provided by the agreement was too wide and had stated that it would not use it in other cases. The court held that the Francovich and BT conditions were fulfilled and ordered MIBI to pay damages to the party injured by the incorrect transposition.

Comments: This case extends the application of state liability to a private law legal person, to the extent that it was involved in the faulty transposition of the Directive. This application may not be fully in line with the spirit of Francovich, for it seems to allow the state to pass its liability onto private parties in which it had entered into agreement, although ultimately it should be responsible for checking the legality of agreement it enters with.

In this decision, the High Court developed the condition of causality between the breach and the damage.

Facts and Procedure: Directive 78/52 provided for Member States to take measures to calculate compensation to breeders for the culling of their animals imposed by veterinary instructions, in the framework of the fight against bovine tuberculosis. At the material time of the occurrence of the facts, Ireland had not formally transposed the Directive but had only set up an extra statutory reactor grant scheme. Rooney, a cow breeder, already had some of his cows culled and refused, when a new one showed signs of infection, to hand it over for culling, as long as the Minister had not established a statutory regime. The authorities therefore imposed restrictions on the movement and sales of cows coming from his farm. Rooney brought an action for damages based on both the Irish constitution and Community law.

Decision: The High Court first established that the first two conditions under Community law, i.e. the conferral of rights on individuals and the identification of these on the basis of the directive, were fulfilled. However, it considered that the causal link condition was not, and therefore rejected the claim. Indeed, the court, applying the but for test, found the applicant’s argument according to which, had the directive been correctly transposed, every other thing equal, his behaviour would have been different, unfounded. It then moved on to the duty, accepted by Community law (Dillenkoffer), which can be imposed by national law on plaintiffs to have mitigated the damage, and considered that if the applicant had complied with the regime then in place, he would have avoided the damage completely. Therefore the causal link is missing.

Comment: Although the application of the but for test and the duty to mitigate are provided for by Community law, their use in this particular case appears controversial, at least in relation to the national court ending up deciding on what would have been the conduct of the applicant, had the directive been formally implemented. Such assessment does not appear to fulfil basic criteria of objectivity.

Italy
Like in Francovich, this case deals with the late transposition of Directive 80/987 on the protection of workers in the event of the employer’s insolvency (OJ L 283, 20 October 1980, p. 23). The Social
Division of the Court of Cassation had in earlier decisions affirmed that although the loss sustained by a failure to transpose a directive created a right to compensation, it did not flow from the unlawful act by the State (sez. Lav., 10 February 1998, No 1366, Giust.c civ. 1998, I, 1942. Mass., 1997, 14 and sez. Lav.m 9 Januar7 1997, No 133, Foro it.), but in this decision, it declared that compensation ‘flows directly and immediately from the civil liability of the State within the meaning of section 2043 of the Civil Act (unlawful acts as a source of obligations). However, the criteria for calculating interest and assessing the amounts of indemnity are to be calculated from the date of the declaration of the employers’ insolvency.


Directive 77/187/EEC deals with the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of businesses. An Italian worker employed by a company which had been the object of such transfer brought an action for damage against the Italian state, seeking compensation for the loss of benefits which he would have received from the transferor, had the directive been transposed in time in Italy. This failure resulted in the plaintiff having been made redundant instead of being entitled to the safeguarding of his rights as provided by the directive. Taking into account the failure of the Italian State to transpose the directives within the required period, and its subsequent failure to correctly implement the directive, the Pretura di Milano condemns the Italian state to pay the compensation claimed by the plaintiff. In doing so, the Italian court did not explicitly base its conclusions on the Francovich case law on state liability for non-transposition of a Directive, but only noted that the Directive had not been transposed at the time of the events and that the national law was incompatible with the directive.


In this case, the Italian Cassation Court blatantly defied the ECJ. M. Della Minola bought books via door-to-door selling. Two days later, he asked for the possibility to terminate the contract, as provided by Articles 4 and 5 of Door-Step Selling Directive No 85/577 (OJ No 372, 31.12.1985 p.31). The seller refused and M. Della Minola brought an action before the Pretore, who rejected his request, because the Directive has not been transposed in Italy (despite the fact that the deadline for transposition had expired). The applicant finally paid 750,000 lira to the seller, but brought an action before the Peace Judge asking for the Italian state to pay him damages (2,000,000 lira) for non-transposition of the Directive, which caused him a financial loss. The Peace Judge gave right to his request, but the Cassation Court quashed the decision, on the basis of the Italian constitutional principle which grants government and parliament free legislative power, which cannot be subjected to judicial control. This decision is clearly contrary to ECJ case law on state liability, which considers that a state is liable before domestic courts for actions of its executive, legislative and even judiciary which are contrary to Community law and cause harm to individuals, and to the doctrine of supremacy (C-6/64 Costa v ENEL [1964] ECR 585 and C-106/77 Simmenthal [1978] ECR 629), which requires Member States’ courts to set aside national rules, even constitutional ones, which conflict with Community law (here, the principle of State liability). But see next decision for further developments.


In this decision, taken six weeks after the previous one (see above), the same chamber of the Cassation Court took a position completely at odds with the one it adopted in the previous affair. M. Gronchi, a medical graduate, brought an action for damages, claiming 48 450,000 lira, against the Italian state for having been deprived of the possibility to take part in specialisation courses against remuneration, as provided by Directive 75/363, modified by Directive 32/76, on medical activities, due to the late transposition of the Directive by Italy. The Florence Tribunal rejected the claim, but the Court of Appeal quashed the lower court decision and accepted the claim, which was then confirmed by the Cassation court, with lengthy references to the case law of the ECJ on state liability and national remedies. The court recognised the right to compensation as inherent to Community law and that its conditions of application at national level are subject to the Community case law on the effectiveness and equivalence of national remedies. It specified that the right to reparation must be recognised for both violation of subjective rights but also for that of legitimate interests. What a change
of mood! Did the Italian Court suddenly become aware of the existence of substantial case law on the matter?

This case involves facts similar to the one above, but the conclusions of the tribunal are not as 'plaintiff friendly', far from it! Doctors, who had been prevented from taking specialisation courses whilst being remunerated asked for recovery of the amount of remuneration or, alternatively, for damages based on late transposition of the Directives 75/363 and 82/76. Regarding the main claim, the court rejected it, on the basis that the plaintiffs had brought their claim beyond the time-limit of five years provided by Italian law, which the court, referring to the ECJ Levez case law, considered as compatible with Community case law on effectiveness and equivalence of national remedies. Regarding the damage claim, the court also rejected it, due to the lack of causal link between the late transposition and the lost remuneration, since retroactive application of national provisions implementing the directives would be sufficient to repair the damages suffered by the applicants.

In a case also concerning a damage claim for the late transposition of the Directives 75/363 and 82/76, the Italian court reached the same outcome, whilst reasoning differently.
Dambone asked for a retroactive payment, by the University and the Education Ministry, of the remuneration for the specialisation courses, or, alternatively, for damages caused by Italy’s violation of Community law. The court rejected the main claim, on the basis that before transposition, there was no obligation under national law to remunerate, and also rejected the damage claim, because it was brought against the wrong person! Indeed, according to this court, the action should have been brought against the Italian state in the name of the President of the Council of Ministers, since the transposition of the Directive was the responsibility of the legislator, and not of the individual administration.
Whether this decision conforms with Community law depends on whether such tort action against the President of the Council is still available to the applicant, for if that was not the case, it would infringe the principle of effectiveness imposed on national remedies by EC case law.
These last two cases decided by lower courts appear at odds with the Cassation court decision of 2003, which found in favour of the plaintiff. However, one should not rush to conclusions, and it is fair to say that some of these unfavourable decisions are due to mistakes made by applicants in the choice of jurisdiction or regarding the timing of their claim. Probably the publicity surrounding the Cassation Court decision led to many subsequent claims from frustrated doctors who had not benefited from this possibility receive remuneration for courses, and did not pay enough consideration to the procedural aspects of their claims.

Netherlands, The


As one of a series of cases, this judgement concerns the definition of ‘building land’ in the context of the 6th VAT Directive (77/388/EEC). The case predates Emmen, where the ECJ ruled that defining this concept is a matter for the Member States. The relevant Francovich issue in casu is the first requirement for liability: does the violated norm grant rights to individuals? The court ruled that the provision in issue - Article 4(3)b - does not confer any rights; it only obliges Member States to define ‘building lan’.


A successful damages claim for lost interest as a result of late implementation of Directive 79/7/EEC. Joint and several liability of the State and local authority; the defendants’ plea of lack of causal connection because Ms Lubsen should have invoked the direct effect of the Directive was not accepted on the basis of Emmont: citizens are unable to know their rights sufficiently clearly when a directive has not been (correctly) transposed. Referring to Marshall II, the court ruled that lost interest was a necessary component of the entitlement to compensation. The rule of the old Dutch Civil Code which limited the retrospective scope of this claim was consequently set aside (applying the principle
of effectiveness: Rewe, Comet, San Giorgio).

3. District Court of The Hague 14 February 1996 Shapiro v Netherlands State, published in Dutch in Rechtspraak Algemene wet bestuursrecht 1996, 90 note by R. De Lange. The Netherlands had not transposed Directive 84/466/Euratom within the prescribed period. Its aim is to protect persons against radiation when medically treated; the Directive requires the presence of a clinical physicist. One of them, Mr Shapiro, argued that he could not find work - lack of demand - due to the belated transposition of the Directive (seven and a half years too late). He claimed damages, mainly for loss of income, relying on Dutch tort law, and not on Francovich. The court rejected his claim solely on the basis of Dutch law. Francovich was regarded as a non-exclusive basis for the plaintiff's claim. The court held that the Directive in issue did not intend to protect the plaintiff against the kind of loss suffered.

4. District Court of Amsterdam 11 September 1996, Acciardi v City of Amsterdam and City of Amsterdam v Netherlands State, published in Dutch in Jurisprudentie Bestuursrecht 1996, 237 note by Claes (at No. 226) and Rechtspraak Algemene wet bestuursrecht 1997, 23 note by R. De Lange. This is a civil suit involving a claim for compensation for lost interest and the costs of legal advice in the wake of case C-66/92 Acciardi [1993] ECR I-4567, brought by Acciardi against Amsterdam, which in turn sued the State in third party proceedings. The court held that the State had committed a tort as against the local authority by adopting the relevant social security Act in breach of EC law. Without explicitly referring to the Brasserie criterion of a sufficiently serious breach, the State was held to have acted negligently. This ruling seems problematic, in the light of British Telecommunications, to the extent that the State may have adopted the domestic law on the basis of an interpretation in good faith of the relevant Community law provisions. There is no appeal.

5. Hoge Raad, 29 March 2000, Beslissingen in belastingszaken 2000, 342. A tax payer claimed compensation in the Hoge Raad for expenditure incurred in bringing an action for the recovery of a tax ordered by the tax authorities in breach of a provision of the Law on VAT, which was in accordance with the sixth VAT Directive (Directive 77/388), as he had obtained only a lump sum repayment. The court held that there was no infringement of Community law and thus no duty to pay compensation for the legal costs.

6. District Court of The Hague 24 November 1999, Waterpakt, published in Dutch in Tijdschrift voor Milieu en Recht 2000, No. 24 note by Jans and Verschuuren. The plaintiffs are various public interest groups (NGOs), environmental protection organisations and a consumer protection group, as well as individuals, who have sued the Dutch State under Dutch tort law, alleging a breach of Community law consisting in incorrect implementation of the Nitrates Directive (Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, O.J. 1991 L 375/1). They seek declarations that the State has acted unlawfully as against them, as well as an injunction ordering the State to take the necessary measures to fully comply with the Directive's obligations as to limiting values and the adoption of action programs. Parallel to these proceedings, the European Commission initiated infringement proceedings against The Netherlands pursuant to Article 226 EC (ex Art. 169). The judgement contains no references to ECJ case law on State liability. As no claim for damages was concerned but declaratory and injunctive relief. This is perhaps not surprising. The question of liability for breach of EC law was entirely dealt with within Dutch liability law. The case is an illustration of the role of national tort law as an instrument of enforcement of EC environmental law, as considered in the European Commission's White Paper on Environmental Liability. However, the ruling is relevant from the perspective of Francovich liability in terms of the similarity of the requirements for liability. The court accepted that one of the obligations contained in the Directive had direct effect and conferred rights on both individuals and on NGOs who have environmental protection as their object and purpose; it would seem to follow that this obligation also fulfils the first requirement for liability under EC law principles (conferral of rights on individuals). The norm in issue provides that each farm shall not deposit on its land manure containing more than x kg Nitrate within a certain period. Taking into account that the effectiveness of this norm would be seriously impaired if only a declaration of unlawfulness was issued, the district court granted an order that the State must take appropriate steps to comply with the cited norm as from 1st January 2001, subject to any possible changes granted by
the European Commission. The court considered that this order does not prescribe the adoption of any formal legislation but leaves the State to choose how to reach the prescribed result.

It ruled against possible direct effect of the obligation to prevent eutrophication and the duty to draw up action plans. As Jans and Verschuuren argue, a distinction should be made between the mere obligation to draw up a program and prescribing its content. Under ECJ principles, the former would be capable of producing direct effect as being sufficiently precise and clear and leaving no discretion as to the very fact of adoption; with respect to the latter, the Directive does leave the content largely to the Member States and thus has no direct effect. In terms of Francovich liability, it would still have to be decided whether the obligation to adopt action programs is intended to create rights for individuals. In any event, these are obiter dicta of the court as an action program had been adopted (but it was queried whether it was consistent with the Directive).

On 2 August 2001 the Hague Court of Appeal quashed the judgement of the lower court. In particular, it disagreed with the injunction the District Court had imposed upon the State. Academic commentators have been critical of the Court of Appeal’s reasoning on matters of Community law, see casenote by Jans and De Jong in Tijdschrift voor Milieu en Recht.

Nonetheless, on 21 March 2003 the Dutch Supreme Court rejected the appeal in cassation against the judgement of the Court of Appeal (available in Dutch on www.rechtspraak.nl). It held that courts, under Dutch constitutional law, have no power to issue injunctions to adopt legislation; it is immaterial that there is an obligation to legislate under EC law. See: Waterpakt, Hoge Raad 21 March 2003.

According to the Dutch Supreme Court, under Dutch constitutional law, a court may not issue an injunction to the State to adopt an Act of Parliament. It is immaterial whether the State is obliged to do so to transpose a Directive. Judicial protection of individuals was not compromised because courts, where appropriate, must give direct effect to the Directive, or interpret Dutch law consistent with it or hold the State liable for compensation of any damage. EC law does not preclude Dutch law from adopting this position because, according to the Hoge Raad, the Dutch courts must operate within their constitutional powers. Also, under 228 EC, the ECJ has no power to order a MS to adopt legislation; it can ‘merely’ impose penalties. No question was referred to the ECJ.

Meanwhile, but prior to this Hoge Raad ruling, there cannot be any doubt as to the unlawfulness of the transposition defect as the ECJ confirmed that the Dutch State had indeed failed to comply with its obligation to correctly and timely implement the Nitrates Directive, see Case C-322/00 Commission v. Netherlands [2003] ECR I-nyr (judgement of 2 October 2003).

The Dutch Hoge Raad did not follow the Opinion of its Advocate General Langemeier who thought that a referral to the ECJ would be needed on the matter of whether Community law requires national courts to set aside any limitations as to their powers to order the legislature to adopt primary legislation in the wake of Factortame I (C-213/98, [1990] ECR I-2433), if and when, under Dutch law, the courts would have no power to oblige the legislature to comply with the requirements of 249 EC and the relevant Directive. However, the Advocate General took the view, contrary to the Hoge Raad, that the Dutch Constitution does not bar this possibility. In addition, A-G Langemeier argued, on the basis of the Francovich principles, that the Dutch supreme court could rule that an injunction to adopt primary legislation may be granted only where there is a sufficiently serious breach, or when the ECJ had already declared the State to be in breach of EC law. Unfortunately, the ECJ has not been enabled to deal with this interesting and important possible extension of the Francovich principles. Further reading: casenote by Besselink in 41 Common Market Law Review 1429-1455 (2004).

7. [Dutch Supreme Court HR 1 October 2004, Stichting de Faunabescherming v. Provincie Fryslân, C03/118HR, JOL 2004, 501]

Basiclly, this case is a straightforward application of the principles adopted in the just cited Waterpakt case. There is only one difference: the relevant legislative measure at the domestic level now concerns a measure of general application of a regional authority rather than the Dutch State as such. The form of order sought by the applicants, an animal protection charity, against the Province of Friesland was an order to repeal that piece of legislation on the grounds it were contrary to EC law.

In issue is a limit on the recovery of costs of legal services under Dutch law, both in the context of civil and administrative law procedures. Although the rule is that costs follow the event, the looser pays for the costs of the other party, in practice, the compensation is fixed and does not amount to 100%. This case is a liability consequence of an earlier ECJ tax judgment: Case C-107/94 Asscher [1996] ECR I-3089. A higher income tax rate was applied to self-employed workers for activities carried out in another MS than their own, which was held to be in breach of Community law. The tax was reimbursed but the claimant’s legal costs were not covered in full.

The same question was put before the ECJ in Case C-470/04 N v Inspecteur van de Belastingdienst Oost/kantoor Almelo [2006] ECR nr (7 September 2006), discussed on the page “Post-Francovich judgments by the ECJ” of this Website (at No 37; www.francovich.eu); there was no answer from the ECJ. Also in Den Haan, the ECJ will not deal with the matter because no reference to it was made. According to the Dutch Supreme Court, the matter of costs is fully within the sphere of national law, subject to the principles of equivalence and effectiveness (Rewe). It cited without any further examination the following ECJ cases: Metalgesellschaft, Clean Car Autoservice and Evans. The two Rewe principles were considered not to have been breached – explicitly, only effectiveness was considered - by the system of fixed costs recovery. Apparently, there was no need for a reference as it must have deemed the matter clear (doctrine of acte clair/éclairé): the Supreme Court does not say a word about it.

It did not follow the Opinion of (Dutch) Advocate General Wattèl, who had proposed a reference to the ECJ and also thought that since the cost recovery is the main issue in the present Francovich liability case, the matter is governed by Community law rather than national law; alternatively, he argued that even if the issue is covered by national procedural autonomy, the full legal costs should be reimbursed. Interestingly, A-G Ruiz-Jarabo Colomer in his opinion in C-376/03 D v. Inspecteur van de Belastingdienst [2005] ECR I-5821, 2005] 3 C.M.L.R. 19, came to a similar conclusion. The same Dutch rules were in issue and as a result the claimants only recovered about €2,000 out of their costs of €12,500, which “may infringe the principle of the effectiveness of Community law, since it is liable to render recourse to legal proceedings fruitless and to deter the holders of rights under Community law from defending them” (at No. 112). Again the ECJ did not rule on the matter.

Further reading in Dutch: R. Meier, “Toelaatbaarheid van een forfaitaire proceskostenvergoeding bij from defending them” (at No. 112). Again the ECJ did not rule on the matter.

As noted in the Non-Application section of this dossier (www.francovich.eu), in Case C-511/03 Ten Kate Holding Musselkanaal and Others [2005] ECR I-8979 (judgment of 20 October 2005); [2006] 1 C.M.L.R. 50, the following question was referred by the Dutch Supreme Court:

"Must the question whether, in such a case as this, the State has an obligation towards a citizen who has an interest in it, such as Ten Kate, to make use of the legal remedies available to it under Article 175 of the EC Treaty (Article 232 EC) or Article 173 of the EC Treaty (Article 230 EC) and, in the event of failure to comply with such an obligation, to pay compensation for the damage sustained as a consequence by the citizen concerned, be answered by reference to rules of Netherlands national law or by reference to rules of Community law?” And insofar EC law applies, under what circumstances and what are the exact applicable rules?

The reference raises the interesting question of possible State liability for failure to institute annulment proceedings in circumstances where individuals cannot do so themselves under the restrictive standing rules of Art. 230 EC. The ECJ ruled that no such question arises under EC law but that it may do so under national law at most. However, it referred to Art. 10 EC as a basis for a possible limit on any such duty under national law. Perhaps surprisingly, the duty of loyal cooperation was applied here to prevent a Member State from referring cases to the ECJ for it said:

“31 ... A Member State could [...] breach the obligation of sincere cooperation laid down in Article 10 EC if it did not retain a degree of discretion as to the appropriateness of bringing an action, thereby giving rise to a risk that the Community Courts might be inundated with actions, some of which would be patently unfounded, thus jeopardising the proper functioning of the Court of Justice.”

It followed that the ECJ did not deal with the matter of State liability for failure to initiate proceedings against Community institutions in circumstances where private applicants are unable to do so on the ground of lacking standing. So what happened to the case after its return to the domestic court? Please note the specific context of the cassation proceedings which deal with a review of a court of appeal judgment on points of law only. Interestingly, the Dutch court of appeal had ruled that in the
specific circumstances of the facts of this case (dealing with the aftermath of the BSE crisis) the Dutch State should have made use, as a matter of Dutch law, of the EC action of failure to act (175 EC) or at the very least should have prompted the Commission to do more; i.e. its discretion had not allowed it to refrain from such attempts. The Supreme Court, despite the “hint” of the ECJ to be reluctant with imposing such obligations, did not quash the appeal court’s rulings in this regard. It did quash the judgment for other reasons though and sent the case to another court of appeal. To be continued.

10. [Dutch Council of State] Raad van State 21 November 2006, Eman and Sevinger, case numbers 200404446/1b en 200404450/1b, available in Dutch on www.raadvanstate.nl
Having received a reply from the ECJ to its reference in the case Eman and Sevinger (see this Website's “Post-Francovich Judgments by the ECJ” page at www.francovich.eu), the national court considered the question of redress for a breach of Community law. It considered that legislative action would be necessary for future elections whereas retroactively granting the right to vote would not be feasible. It confined itself by instructing the electoral authorities to examine how the breach can be made good with an order to pay the applicants’ costs.

Spain

This case concerns a series of applications seeking recognition of medical diplomas obtained in France. The plaintiffs invoked Article 8 of Directive 93/16/EEC of 5 April 1993 on the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications. Article 8 could not be applied since the Directive had not been implemented in due time and Article 8 did not have, according to the Spanish court, direct effect. The claim was rejected. As no claim for damages was made by the plaintiffs, the Court could not award them. The judgement remarks, however, that it would be possible for the plaintiffs to file a new claim in order to obtain compensation for damages caused by the delayed implementation. In this connection, the judgement makes a direct reference to the Francovich case.


Some Dutch and German companies presented a claim to obtain compensation from the Spanish State. In particular, they argued that the Spanish authorities had caused damages to them by adopting, on 15 and 16 February 1991, certain measures restricting intra-Community trade of pigs coming from Germany and the Netherlands. The Spanish Administration argued that these measures were justified under article 36 EC Treaty (now, article 30) and under article 10 of Directive 90/425/EEC, of 26 June 1990, on the grounds of protecting public health (they were adopted after a new pig epidemic disease had been detected). The plaintiffs alleged that the aforementioned measures were contrary to Community law because, in a meeting of the Permanent Veterinary Committee held on 12 and 13 February 1991, Member States decided that unilateral measures would not be adopted. The Spanish Court rejected the plaintiff's arguments and held that the Declaration lacked binding force. There was no infringement of Community law, accordingly, no damages were awarded to the plaintiffs.


The plaintiffs, a group of companies ("Cenargo Internacionl Ltd.", "Cenargo Navigation Ltd." y "Cenargo España, S.L.") sought compensation for loss suffered because of the infringement, by the Spanish State, of articles 5 (now, article 10), 56.1 (now, article 46.1) and 59.1 (now, article 49.1) of the EC Treaty and article 1.1 of Regulation 4055/86, 22 December 1986. According to the plaintiffs, the untimely modification of the bilateral Treaty between Spain and Morocco of 29 December 1979 was a breach of Community law. The modification took effect with a year of delay; as a result, the plaintiffs could not provide the services. According to the Spanish court, there is no breach of Community law. The case concerned trans-boundary relations with non Member States, which is a competence of the State (not of the EU). Member States may conclude trans-boundary accords and impose certain restrictions on the grounds of public security or immigration policies. In particular, Regulation 4055/86 contained some exceptions that allowed the Spanish Administration to deny the docking of ships.

This case originates in the delayed implementation of Directive 80/987/ECC of 20 October 1980 on the approximation of the laws of Member States relating to the protection of employees in the event of the insolvency of their employer. Due to this lack of transposition, the plaintiff was excluded of the Spanish Wage Guarantee Institution's coverage. Now, this judgement finds that the State must be held to be in breach of his Community obligations and, subsequently, damages are awarded to the plaintiff.


This is an interesting case relating to a movement towards a European ius commune on State liability for breach of Community law, although the facts do not include any Community element. Nonetheless, the plaintiff remarked that damages should be awarded to him under Francovich doctrine. According to him, it would not be reasonable that compensation be awarded for breach of Community law and not for breach of national law. Unfortunately, the judgement contains no references to the ECJ case law on State liability. The Spanish Supreme Court lost an opportunity for bringing national law in line with the Community concept (but see 2004 case for a reversal of this position).

6. Supreme Court, 13 February 2001

This case is one of a series that concern complaints aiming at compensation for damages suffered as a consequence of the infringement of the Spanish Constitution by the Spanish legislature. Although these cases do not refer in fact to violations of Community law, the plaintiffs include direct references to Community case law in the sense of the above 29 February 2000 Supreme Court Judgement. Once again, the Spanish Supreme Court does not make references to Community case law.

This case concerns the delayed implementation of Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. On 18 February 1999, a group of consumers and several consumer organisations from Belgium, Italy, Spain and The Netherlands brought a claim before the Spanish Ministry of Justice in order to obtain reparation of damages caused by the delayed implementation of the Directive. This claim was rejected and the claimants appealed before the Audiencia Nacional. The plaintiffs held that the contracts they had signed were in breach of some rights that the Directive intended to confer on consumers.

After finding that Spanish legislation confers locus standi on those legal persons which, like the consumers associations, could be regarded as directly concerned or are legally entitled to defend collective rights or interests, the Spanish Court declared, first of all, that there was a breach of Community law attributable to the Spanish State and examined, then, if the conditions under which a Member States is required to make reparation of damages caused as a result of a breach of Community law were met. First of all, the Directive intends to confer rights on particulars. Secondly, as it is clear from Dillenkofer, the breach attributable to Spain is sufficiently serious. And finally, the Audiencia Nacional affirms that there is a causal link between the breach of the State's obligation and the loss and damages suffered by the injured parties.

As Spanish legislation provided that the action for reparation might be brought within a period of one year, running from the date in which the damages appeared, some of the plaintiffs had lost the right to obtain compensation. Indeed, the Spanish Court held that only in seven cases (out of twenty-five), had the action been brought within the legal period. The other appeals were dismissed. Thus, the Audiencia Nacional declared the obligation of the Spanish State of making good the losses suffered by seven plaintiffs and damages for 24,000 Euros were awarded to them.

The Spanish court also rejected the plea according to which liability should be shared between the state and the sellers, since the purpose of the directive was exactly to prevent sellers from being able to demand advanced payment from buyers. Finally, it addressed the question of what constitutes appropriate compensation, and applied the traditional rule governing state liability which provides for restitutio in integrum.

Comment: The compatibility of this judgement with the ECJ case on the acceptability of time limits is doubtful, as a one year time limit for liability action appears as a very short period compared to European standards (i.e. 5 years for Community liability claims).


The two rulings deal with the transfer of civil servants pension entitlement to the Community scheme. In the first case, Spanish Community officials had requested the Council of Ministers to transfer their pension rights (derechos pasivos) on the basis of Art. 11(2) of Annex VIII of the Staff Regulations (No 259/68 of 29 February 1968 (OJ L 56/1). Their request was rejected and they brought a judicial action asking for such a transfer, or alternatively, engaging the state liability to obtain compensation for the loss resulting from the failure to transfer their pension rights. The ECJ had delivered a ruling against Spain declaring its failure to take necessary measures to allow transfers (C-52/96 Commission v Spain [1997] ECR I-4637). The Tribunal accepted the main claim (i.e. the right to transfer), but rejected the liability claim, on the basis that, in the meanwhile, legislation required for the transfer had been adopted and the delay in enacting legislation did not make these transfers impossible and therefore did not constitute actionable omission. However, if the delay in transfer would cause future loss of payable pension, then state liability could be engaged.

In the second case, the Tribunal dismissed an action challenging the legality of a royal decree approving the transfer system and the related liability claim, on the basis of its previous ruling in cases dealing with the same issue (Tribunal Supremo, Sala de le contencioso administrativo, Sección 7a, 23 July 2001, recursos contencioso-administrativos No 551/1997, 593/1997 and 223/1998, joined, RJA 2001/8922).

In a landmark ruling delivered on June 12, 2003, the Spanish Tribunal Supremo, hereinafter TS, awarded the digital satellite television operator Canal Satélite Digital (CSD), 26.4 million in damages for its loss suffered as a consequence of legislation enacted in violation of Community law. The judgement is one of the few instances in which a national court has actually awarded damages to an individual under the principle of Community law according to which Member States are liable to make good the damages caused as a consequence of the state’s breach of EC law. This ruling is also noteworthy, because the TS delivered its judgement without recourse to a preliminary reference to the European Court of Justice.

The facts: CSD launched a completely new digital satellite television service in Spain. One day after its commercial launch, the Spanish Government enacted emergency legislation in order to urgently transpose Council Directive 95/47 into Spanish law. The implemented legislation regulated the technical specifications for conditional-access systems used in decoders for digital television and provided for a national type-approval procedure for such decoders. The new legislation basically established an obligation on operators of digital conditional access television services to register with the Spanish telecommunications regulatory authority, TMC*, with the object of submitting its decoders to a system of type-approval and obtaining the necessary “prior certification” to market these products. Registration in the TMC’s register was subject to an administrative procedure in which compliance with the technical and other specifications of the new legislation was verified by the Administration. The marketing of decoders without prior certification of compliance qualified as a “very serious” offence under the Telecommunications Act. The day after the new Act entered into force, the Ministry competent for telecommunications sent out inspectors to several hypermarkets in which CSD’s new service was being sold and initiated administrative infringement proceedings after finding that CSD’s decoders lacked the above-mentioned certification. Although these proceedings were eventually never pursued, their effect was devastating because all hypermarkets, which were the main channels of distribution for CSD, declined to further commercialise CSD’s new service until the legal situation surrounding its decoders had been clarified. This situation created a significant degree of uncertainty on the market in respect of the legality of CSD’s operations, which ultimately led consumers to refrain from taking out subscriptions to CSD’s new digital television platform.

Although CSD was certain about the Law’s incompatibility with Community Law, it nevertheless applied for registration of its decoders, which were manufactured in Belgium and the United Kingdom. The TMC, however, dismissed CSD’s application, holding that the decoders did not comply with the technical specifications of the new legislation.

Considering that the above-mentioned rules constituted a manifest breach of Arts 28 and 49 of the EC Treaty by impeding the commercialisation of decoders lawfully manufactured and marketed in other Member States, CSD filed a complaint against Spain before the European Commission claiming that Spain had breached these two fundamental freedoms as well as Directive 83/189.

After several informal contacts with the Government, the Commissioner in charge of industry sent a letter to the Spanish Minister responsible for telecommunications, outlining the Commission’s serious objections to the type-approval procedure introduced by the new legislation due to its incompatibility
with Art.28 EC and the breach of Directive 83/189. In view of the Government’s failure to react, the Commission formally initiated infringement proceedings under Art.226 EC, by sending a Letter of Formal Notice to the Kingdom of Spain on June 27. Upon receipt of Spain’s observations, the Commission sent its Reasoned Opinion on July 23, in which it stated in full detail that the above-mentioned rules were contrary to Arts 28 and 49 of the Treaty and affirmed an infringement of Art.8 of Directive 83/189 for failure to notify the Commission of the technical regulation in question as well as of Art.4(c) of Directive 95/47. The Government reacted by partially modifying Law No.17/1997 by means of a Royal Decree-Law. This legislative amendment led the Commission to close the infringement procedure against Spain. See for further analyses of the Spanish Tribunal Supremo decision, notably on whether the breach was sufficiently serious: Santiago Martinez Lage and Helmut Brokelmann, “The liability of the Spanish State for breach of EC law: the landmark ruling of the Spanish Tribunal Supremo in the Canal Satelite Digital case,” 29 E.L.Rev 530-545 (2004) and the casenote in 41 CMLRev. 1717 (2004) by Fernando Castillo de la Torre.

10. Juzgado de lo Social No 1 de Granada, 7 October 2003, procedimiento
The social judge considered himself incompetent to hear a damage claim brought against the state for violation of directive 93/104. Referring to EC case law, he considered that it is for national law to decide on the competent jurisdictions to hear such a claim. In the situation at hand, the claim should have been brought before the administrative court.

11. Tribunal Supremo, Sala de lo Civil, 23.01.04, No51/2004; Tribunal Constitucional, Acuerdo, 03.02.04
The Tribunal Supremo’s rather amazing decision provided for potentially significant developments in relation to tort actions against Member States for acts of their judicial organ, in the wake of the Köbler case (see section 4 of this website). Although the Tribunal Supremo’s decision does not deal with issues of Community law, it is nevertheless worth noting that by relying partially on the Köbler case law, the national court extends the reach of the case law of the ECJ on state liability to purely domestic situations and to situations involving judges of even the highest court (here the constitutional court)! Indeed, for the first time in Spanish legal history, the judges of the Tribunal Constitucional have been held liable for damages caused to an individual, and this revolutionary outcome may well have been influenced by developments in ECJ case law.

Facts and Procedure: The applicant, a practising lawyer, brought two actions before the administrative litigation chamber of the Tribunal Supremo (Spanish Supreme Court). He challenged the requirements for the recruitment of legal assistants at the Tribunal Constitucional, and called for the opening of a selection procedure for vacant positions through a competition (as provided by Article 97.1 of the organic law of the Tribunal Constitucional). As his claims were rejected, the applicant asked for the protection of his fundamental rights through the recurso de amparo, addressed not to the Tribunal Constitucional, but to the ‘Tribunal Constitucional replaced by the formation guaranteeing impartial examination’. In other words, he called for all the members of the constitutional court to abstain from sitting by reason of their direct interest in the affair and requested the adoption of an organic law setting up an ad hoc Tribunal Constitucional to decide on his case. The judges of the Tribunal Constitucional unanimously declared these requests inadmissible, on the basis that these were not addressed to the Tribunal Constitucional, and that they were not clear and precise enough (art. 49 of the organic law of the Tribunal Constitucional). Following this rejection, the applicant brought a tort action before the Tribunal Supremo, asking for the condemnation of all 11 judges of the Tribunal Constitucional, for either civil fraud or ‘faute lourde.’

Decision: The Tribunal Supremo notes that the liability of the judges of the Tribunal Constitucional cannot be engaged under the special regime of judges’ and courts’ liability which do not apply to the Tribunal Constitucional. It can therefore only be engaged under the common regime of tort liability provided for by Art. 1902 of the civil code. It then applies the three conditions provided by this provision. First, it considers that the judges’ behaviour was contrary to the law, for their rejection of the recurso de amparo constitutes a déni de justice, contrary to Art. 1.7 of the Civil Code. It accuses them of serious professional negligence involving ‘inexcusable’ (note the emphasis on the same factor than the AG in Köbler, para. 139) ignorance. Second, the Tribunal Supremo establishes the existence of a moral damage, as the decision of the Tribunal constitucional was capable of upsetting the opinions of the applicant as a citizen of a social and democratic state, which protects justice as a superior value (Art. 1.1 Constitution). Third, it considers that the causal link between the breach and the damage is clearly established and obvious. In support of its argumentation in favour of applying the common tort
liability in this case, the Tribunal Supremo, significantly, makes a special reference to the Köbler case of the ECJ, although the affair in question is completely unconnected with EC law. The Tribunal Supremo finally condemned each of the judges of the Tribunal constitucional to a 500 euros fine. Follow-up: The full court of Tribunal constitucional unanimously adopted a decision underlining that first, the resolutions delivered by the Tribunal constitucional in the framework of the recurso de amparo cannot by judged by any judicial organ, since only the Tribunal constitucional is competent to decide on such a case, and second that the revision of decisions relating to such recurso by means of tort actions constitutes a jurisdictional intrusion reserved to the Tribunal constitucional. Cleverly or naively, the latest position of the Tribunal constitucional is not directly a denial of the possibility of bringing tort actions against decisions of the constitutional court. The core of this reaction lies in the jurisdictional issue. According to the Tribunal constitucional, the only competent jurisdiction to hear such cases would be the Tribunal constitucional itself (for a similar attitude, see recent judgements of the French courts). However, there would be a procedural avenue for this court to hear such a claim. This is not commented upon... Affaire à suivre!

In any case, the Tribunal Supremo’s decision shows that some national courts are ready to hear tort actions against other courts, and even the highest ones. This is definitely encouraging for the practical enforcement of EC law by domestic courts, and lifts some of the ‘impunity’ which usually protects final decisions of the highest courts of the land. The Supreme Court even goes further than the ECJ case law on the nature of damages that should be compensated, since it awarded compensation for moral damage, whilst the ECJ case law does not impose compensation for such kind of damage.

United Kingdom


This litigation is related to ECJ 28 April 1988, Case 120/86 Mulder I [1988] ECR 2321 about milk quotas (the SLOM litigation). First, proceedings were brought before the national court against the Agriculture Ministry (MAFF) about the transfer of milk quotas to the applicants. After a reference to the ECJ, it became apparent that MAFF’s interpretation of the relevant legislation was contrary to Community law (see Case C-165/95 Gage and Gage [1997] ECR I-5543). Accordingly, the UK had breached Community law. Does the breach warrant a remedy in damages?

The legal arguments focused on whether the breach was sufficiently serious. Lathan J. examined the post-Brasserie case law, notably case C-392/93 R v HM Treasury, ex parte British Telecommunications [1996] ECR I-1631 and case C-5/94 Hedley Lomas [1996] ECR I-2553. All “Factortame factors” were considered potentially relevant in this case (clarity of the infringed rule etc.) He then said:
The respondent acted bona fide, and made an excusable mistake as to the interpretation of a legislative provision which was not clear or precise. I do not consider that the respondents failure to recognise the legitimate expectation discerned by the Advocate General and the Court amounted to a failure to recognise a clear and obvious principle in the circumstances of this case. ... The United Kingdom argued that therefore, where a transfer of part takes place, there could be no legitimate expectation to more than the proportion that the transferred part bore to the whole farm. Although the Advocate General and the Court did not accept this argument, it was not an untenable argument. In my view, the legitimate expectation of the applicants was not so clear and obvious as to mean that the respondents’ failure to recognise it amounted to a serious breach of Community law. For these reasons the applicants do not have any rights to claim damages for the breach of Community law which has been committed by the respondent in these cases.


Depositors in BCCI, which had been placed in liquidation, sued the Bank of England for damages for lack of supervision of BCCI in breach of the first Banking Directive (Dir. 77/780). Their claim was based on Francovich or, alternatively, on the English law tort of misfeasance in public office, to be suitably amended, the plaintiffs argued. The Court held that the Directive did not impose a supervisory duty capable of founding a damages claim for breach of Community law. Assessing the first Brasserie requirement - conferral of rights on individuals - the Court found that the Banking Directive in issue constitutes a first step towards harmonisation of the systems of supervision of credit institutions. It had not conferred rights on savers or other creditors, nor a right of action in damages against the supervising authority. As the plaintiffs could not establish a sufficient right or interest in relying upon a
directly effective provision of the Directive, they could not rely upon Francovich liability either, as that required the same type of right, according to the High Court. See Christos Hadjiemmanuil, ‘Civil liability of regulatory authorities after the Three Rivers case’, [1997] Public Law 32.

The ruling to the effect that the Directive does not confer rights on individuals vis-à-vis the supervisory body was affirmed by the majority of the Court of Appeal as well as by the House of Lords’ judgement of 18 May 2000, [2003] 2 A.C. 1; [2000] 2 W.L.R. 1220; [2000] 3 All ER 1; [2000] 3 CMLR 205 (full text in PDF). This is the final judgement insofar as the claim based on Community law is concerned (the alternative cause of action "misfeasance in public office" has not been finally resolved). According to the House of Lords itself, it regarded the matter of depositors’ rights under Francovich liability as an acte clair; it therefore abstained from making a reference for a preliminary ruling.

However, according to the dissenting opinion of Auld L.J. in the Court of Appeal, the First Banking Directive did impose clearly defined obligations on both Member States and supervisory bodies, giving rise to Community law based rights in damages for the benefit of depositaries in order to enforce those obligations, see Three Rivers District Council and others v Governor and Company of the Bank of England (No 3) [2000] 2 W.L.R. 15; [2000] 3 CMLR 1; [1999] 4 All ER 800 (CA).


The case concerns administrative law remedies available to aliens against expulsion in the context of an incorrectly transposed Directive. As for State liability, the C.A. considers that the law is still in a formative stage. It held that there was no sufficiently serious breach within the meaning of British Telecom. Also, the issue of causation was considered. The C.A. ruled that the plaintiff was not entitled to be compensated for a lost chance. The present case constitutes one where the Member State enjoys a margin of discretion unlike Hedley Lomas which was held to be 'a blatant breach of the Treaty' (para. 29).


The Court of Appeal ruled, among other things, on whether there had been a breach of the Insolvency Protection Directive (80/987) and whether a Francovich claim can be entertained by the Industrial Tribunals. The court held that there was no requirement under the Directive to make the kind of payments the claimants wanted; accordingly, there was no need for a 234 EC reference, nor was there any breach of EC law. Industrial tribunals do not have jurisdiction to entertain Francovich claims; they are pursued in the ordinary courts like any other damages claim.


This case deals with the application of the Francovich principle in the environment sector. A mussel fisherman claimed that he had been driven out of business because his fishing waters had been classified under a Directive and because of pollution of the waters. One of the grounds for his claim was a breach of statutory duty consisting in the non-implementation of the following directives: Directive 76/160 (bathing waters), Directive 79/923 (shellfish waters), Directive 91/492 (bi-valve molluscs) and Directive 91/271 (urban waste waters). According to the High Court, no Francovich liability arises from the incorrect or non-implementation of any of these directives as they do not confer any rights upon individuals.

In para. 55, it is said somewhat cryptically that ‘improvements in water quality for bathers, and in the treatment standards of waste water, may assist other interest groups, but that is not enough to give them a right of action’. Does this mean that a specific interest group, not any person harmed by the breach of EC law, may have a right of action? Probably it means that no member of the public can sue because in para. 58 the court states a breach of Directive 91/271 ‘would be a breach of an obligation owed to the public in general. There is nothing which could tie it to the specific rights of individuals, or which would enable the content of those rights to be ascertained’.

Under reference to Dillenkofer, it was held that two of the directives did not protect shellfishermen. As for the Shellfish Waters Directive, rights for mollusc fishermen could be derived from it. Accordingly, if it is established that this directive had not been implemented (properly), a right to compensation does exist. It was not for the Court of Appeal to decide this issues at this stage of the proceedings, but for the court finally hearing the case (at first instance, this part of the claim had been struck out and must now be restored).


Fisheries; quota of British fisherman in Norwegian waters. MAFF divides the British quota under various groups of fishermen. Boyd Line Management (BLM) was unable to use up its allocated quotum after the EC announced that the total quota for that area had been used up. BLM sued MAFF for damages in lost catches. According to Holman J., the focus of the debate should be on whether BLM had an arguable case under the principle of legitimate expectations. In addition, Dillenkofer was considered in detail in regard to the requirement of a sufficiently serious breach. The appeal against the striking out of the claim at first instance was upheld.

However, in the judgement of 30 March 1999, unreported, Lexis, the Court of Appeal, ultimately concluded that there was no breach of the relevant fisheries Regulations because those rules were not concerned with the internal division of quota within the UK.


Ms Burns' private employer refused to let her work day shifts after she claimed to have become ill from working night shifts only. In an application for judicial review and sought declarations that she had suffered loss as a result of the UK’s late transposition of the Working Time Directive; that this amounted to a sufficiently serious breach. She also claimed exemplary (punitive) damages. The claim failed because of a lack of causal link. The court did accept, however, that there had been a sufficiently serious breach of Community law. The transposition deadline was 23 November 1996 whilst the UK law came into force on 1 October 1998. The court cited Dillenkofer and considered as follows: “28. I consider that this passage is clear in its effect. If a member state does not transpose a directive within the proscribed period, it is in automatic and serious breach of Community law and, therefore, liable for an injury suffered by an individual who suffers loss and damage in consequence.” However, as noted, the claim for compensation failed because the court also ruled: “Has the applicant suffered loss as a consequence of the failure to transpose the Directive? 29. The applicant claims that, if she had been able to have recourse to domestic legislation which enshrined the rights provided for in the Directive, she would have been able to require her employer to transfer her to day work and that she would thereby have been able to maintain her employment. 30. I am not persuaded, on the evidence currently available, that the applicant could have secured this objective. The medical evidence in relation to her avowed inability to undertake night work is far from unequivocal. Moreover, the capacity of her employer to relocate her in day work would have to be examined before one could say that she would have been sure of a transfer to that form of work.”


This sex discrimination case is about the failure to implementDirective 79/7 on equal treatment of men and women in social security and the different retirement age for men and women under the then applicable rules of English law (65 for men, 60 for women). This difference in pensionable age also affected Ms Scullion’s entitlement to Invalid Care Allowance for looking after her invalid daughter. After legal proceedings, she was awarded arrears of the benefit but not the interest over the period she did not receive the benefit at first. The Francovich claim of Scullion is for damages in the form of this lost interest. Four factors were taken into account when the court assessed whether there had been a sufficiently serious breach of Community law: (i) the absence of legal advice sought by the government, (ii) the fundamental nature of the principle of equal treatment, (iii) the fact that particularly vulnerable members of society were foreseeably and gravely affected and (iv) absence of consultation of the European Commission. Besides the discretion left to the state related only to the determination of pensionable age and not to other benefits. As for the clarity of the Directive, even though the rules in issue were unclear, a number of ECJ judgements had clarified the position. Accordingly, the breach
had been sufficiently serious; also, the other conditions were satisfied. Damages in the form of lost interest were awarded.

Curiously, Scullion is a kind of follow-up to the ECJ's ruling in Sutton, discussed on the Post-Francovich judgements page. For the High Court (Sullivan J.) said: 'Mrs Sutton had died by the time of the Court's judgement, so this Court is required to answer the question left open in para. 34 of the Court's judgement in the context of Mrs Scullion's claim for interest.' It is recalled that the ECJ ruled that it is for the national court to decide whether reparation should be awarded in the form of lost interest. As a matter of Community law, the ECJ thus did not rule that compensation for such loss must be available. The High Court in Scullion makes no explicit statement whether its award of damages in the form of interest is based on Community or English law. Presumably - in keeping with the ECJ's rulings in Sutton - the matter is decided by English law. However, in para. 9 of Sutton it is said that under English law no interest is payable on arrears of social security benefits. This judgement had major financial implications due to the number of persons concerned.


This is the follow-up of the ECJ's ruling in Case C-48/93 Factortame III. The judgement of the High Court (first instance) was given on 31 July 1997, Factortame 5, [1998] 1 C.M.L.R. 1353, [1998] 1 All ER 736. The High Court held that the breach was sufficiently serious to entitle the applicants – the Spanish owners and operators of fishing vessels - to compensation for the damage suffered. However, no punitive or exemplary damages could be awarded, since these damages are not awarded for a breach of a national statutory duty either, unless there is an express statutory provision for such an award, which was not the case here. The claim for exemplary damages was not pursued in appeals before the Court of Appeal and the House of Lords. The Court of Appeal (8 April 1998, [1998] 3 C.M.L.R. 192, [1999] 2 All ER 640) upheld the High Court's ruling. In particular, it made reference to the opposition of the Commission to the Bill (C-246/89 Commission v UK [1991] ECR I-4585), and the government's clear intentions to go against the Treaty and to try to shield its action from the court's interference through the use of a statutory instrument. The House of Lords confirmed the judgement. An interesting possible future development from the point of view of a Europeanius commune is the Court of Appeal's remark that it leaves for consideration on a future occasion whether compensation for harm caused by the legislature would be available under English law (as opposed to Community law). Traditionally the remedy of damages is not available. It then said: 'Now that it is undoubtedly available in circumstances which contain a Community element it may be right on some future occasion to re-examine that tradition' (para. 34). The House of Lords confirmed the judgements of the lower courts; both the judgements of the C.A. and the H.L. were unanimous. It held that the test for deciding whether or not a breach of EC law is sufficiently serious is whether the Member State in question had gravely and manifestly disregarded the limits on the exercise of its powers. Lord Slynn and Lord Clyde took into account the case law of the ECJ on the liability of the Community under Article 288 EC (ex Art. 215); in particular they referred to Joined Cases 83 and 94/76, 4, 15, and 40/77 Bayerische HNL [1978] ECR 1209 and Joined Cases C-104/89 and C-37/90 Mulder and others [1992] ECR I-3061. In the present case, the UK had introduced legislation in breach of the EC Treaty's prohibition of discrimination on grounds of nationality. Relevant factors determining the seriousness of this breach were the clear and unambiguous nature of the Treaty rule and the view of the Commission regarding its unlawfulness. The parties agreed that the relevant rules of EC law create rights for the Spanish owners and operators of fishing vessels - to compensation for the damage suffered. However, the court found that a breach of the EC Treaty (in conjunction with the European Communities Act 1972) is to be characterised as a breach of statutory duty. This classification determined what period of limitation would apply (six or twelve years) and, accordingly, whether any additional parties and any
additional loss by existing parties could be added to the proceedings.

In addition, the Court ruled out any possibility to claim compensation for injury to feelings (distress) and aggravated damages; only economic loss would be recoverable. The reasons for this position are that damages for distress can only be awarded where the claimants’ self-esteem was an important part of the damage (in contrast to economic loss of a business) and that this head of compensation can only be claimed in an action against a public authority where the loss could have been inflicted by a private person. The latter is not the case here as the tort was committed by the legislature.


Mr Evans was injured by a hit and run driver. He brought proceedings against the relevant fund (the MIB) for compensation; his appeal on the issue of interest was dismissed. He subsequently brought a damages claim against the State for incorrect transposition of the relevant Directive. This judgement of the Court of appeal is concerned only with an appeal against two questions referred to the ECJ for a preliminary ruling by the lower court. The appeal was dismissed as the Court of Appeal ruled that the references were necessary to determine any possible State liability. More particularly, the interpretation of the Directive, and its consequences in relation to the incorrect transposition are relevant to the issue of a sufficiently serious breach. It was thus held: ‘Despite the disproportion between the costs expended on litigation arising from a simple road traffic accident in 1991 and the sums originally in issue when litigation began in the High Court, the reference cannot be stigmatised as merely theoretical, or hypothetical.’

The reference for interpretation of the Directive has been dealt with by the ECJ as Case C-63/01, judgement of 4 December 2003, see the post-Francovich cases section of this Website: Evans.


This decision is another follow up to the Factortame litigation. The C.A. confirms the lower court decision which required applicants to pay part of the litigation costs for the period elapsed between the deadline for submitting an offer regarding the amount of damages by the UK and the date of acceptance of the amount by applicants. The rule in force in the UK goes as follows: if applicants accept the amount before the deadline, the defendant (the UK) would have to pay the costs. However, if the applicants do not accept it within the deadline, and the damages awarded are lower than the amount of damages offered, the applicants have to pay the difference. Considering that some of the delay in accepting the amount was due to delay in the UK government’s communication of the amount, the lower court had condemned the applicant to pay only some of these additional costs, an outcome which they challenged before the C.A., which nevertheless confirmed it, on the grounds that this outcome fell within the first instance judges’ discretionary assessment of the factual circumstances leading to the delayed acceptance.


In this other follow up to Factortame, the CA had to decide whether an agreement which unusually provided for remuneration of public accounts to consist of a percentage of the damages awarded in a tort action was invalid. Lord Phillips, Masters of the Rolls, explained that

\[ \text{[t]he Claimants had been brought low by the initial wrong done to them and by the costs and stress of prolonged litigation in which no quarter was given. They were faced with an extraordinarily complicated task in proving the damage that they had suffered and there was a real risk that lack of funds might result in their losing the fruits of their litigation.} \]

The court thus concluded that the agreement was valid, and rejected the argument of public policy normally used to invalidate such type of agreement in modern English law.


No striking out of claim even though the claimant’s chances of recovering damages look ‘distinctly unpromising.’ Issues to be judged during the trial are complex matters of competition law and notably causation between the loss alleged and the breach of EC law. The case concerns imported lager from Germany and a rule of English law on the limited allowance of so-called guest beers in pubs linked to
specific breweries. The claimant argued that that rule constitutes a measure having an equivalent effect to a quantitative restriction contrary to Art. 28 EC. According to Tomlinson J.:

It is common ground that in order to establish liability against the defendant the claimant has to establish: (1) that the Guest Beer Provisions constitute a breach of Art 28 and/or Art 12; (2) that such breach was sufficiently serious to give rise to liability and damages; (3) that the claimants have suffered loss and damage; and (4) that there was a direct causal link between the breach by the defendant and the loss and damage suffered by the claimant. It is accepted for the purposes of this application that the claimants can arguably satisfy the first three requirements. Both counsels have directed a certain amount of argument, both orally and on paper, to the question whether the claimants’ prospects in that regard should be regarded as weak or strong or indeed, I suppose, somewhere in between. However, it seems wholly unnecessary for me to enter into that debate, bearing in mind that for present purposes it is conceded that the claimants have an arguable case. In such circumstances nothing is to be gained by my expressing any opinion on the strength of that case.

What, however, is in issue, and which has formed the subject matter of the application, is the fourth requirement, that the claimants must establish that there was a direct causal link between the breach by the defendant and the loss and damage which they say has been suffered by them in the shape of the loss of the profits which they anticipated they would make in the period following their incorporation in 1992.

The defendant for its part contends that the claimants cannot demonstrate that they have what broadly I will for the moment call an arguable case to the effect that there is a direct causal link between the assumed breach and the loss and damage. There is no dispute between the parties as to the test of causation which I should apply. A certain amount of authority has been referred to on that point, but I do not think that I need to refer to it in any particular detail. Broadly it is accepted that the test of causation which may be derived both from Community and from English law can be described as a ‘but for test’ and a test of ‘effective and dominant cause’.

Despite the complexities surrounding causation, they do not warrant striking out:

That notwithstanding, it has to be recognised that the question whether or not in circumstances such as the present a causal link can be established between loss and conduct which is assumed to be unlawful is a highly complex question. In my judgement, it must be very rare that a court will be justified in striking out or in deciding at an interlocutory stage that a claimant does not have a real prospect of succeeding in demonstrating the causal link. ...I cannot regard it as very likely that the claimants in this action will succeed in establishing a causal link, but I cannot say that they have no prospect. The test which has to be applied is whether they have a real prospect and, of course, a prospect can be real, notwithstanding that it is a small prospect or one that does not seem terribly likely to eventuate.


Alleged breach of Art. 12 EC (discrimination on the ground of nationality) because of Swedish students not receiving a full grant from a local authority towards their education fees in the UK. Although awarded the full grant at a later stage, they sued for damages for the initial refusal. As the local authority had acted under the Education (Mandatory) Regulations 1997, it brought third party proceedings against the Secretary of State (this was not further pursued at the appeal level). The claimants argued they are entitled to damages under the Race Relations Act 1976, to be partly dis-applied insofar as obstructing an effective remedy as contrary to Community law. The claim was deliberately not made under Francovich principles as that would require a sufficiently serious breach. As Norbrook was then the latest ECJ case, the Court of Appeal referred to Norbrook damages as opposed to the basis of the claim raised by Nabadda and others: the 1976 race Relations Act. Effectively, the judgement is not a Francovich follow-up case properly so-called but a State liability claim for breach of Art. 12 EC founded on domestic law (albeit ‘adjusted’ under the principle of effectiveness). That claim was found to have no basis in either English or Community law.


The issue is the Transfer of Undertakings Directive (77/187), or Acquired Rights Directive, transposed
into English law by the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) and its applicability to the transferring of a non-commercial refuse collection service by a local authority to a profit-making company. In a damages claim against the Secretary of State for Trade and Industry it was argued that TUPE erroneously excluded from its scope non-commercial ventures contrary to the broader definition of the "undertaking" of the Directive. The claim for damages was dismissed as TUPE was read consistently with the Directive under the Marleasing formula to cover the transfer in issue. Interestingly, this judgement illustrates the capacity of the doctrine of consistent interpretation to prevent a State liability claim from arising. The CA revamped this test case into one of statutory construction only (at an earlier stage of the proceedings the entitlement to claim under Brasserie was recognised). It ruled:

[25] ... The court is under an obligation, in so far as the language of TUPE permits, to construe TUPE in a manner which accords with the Acquired Rights directive. If it is not possible to give the two the same scope, the court must go as far towards this as is possible.

[26] An example of just how far this purposive approach can legitimately go is provided by the decision of the House of Lords in Litster v Forth Dry Dock and Engineering Co Ltd [1989] 1 All ER 1134, [1990] 1 AC 546. In that case the House implied into a clause which defined a person protected by TUPE as 'a person so employed immediately before the transfer' the additional words 'or would have been so employed if he had not been unfairly dismissed in the circumstances described by reg 8(1)'.

[27] The jurisprudence of the ECJ has led to 'undertaking' in the acquired rights directive acquiring the definition of 'an organised grouping of resources which has the objective of pursuing an economic activity' (see art 1(1)(b) of Council Directive (EC) 2001/23). The question that has concerned us is whether it is not possible, without stretching the meaning of the phrase to breaking point, to give an undertaking 'in the nature of a commercial venture' precisely the same meaning. If so, it is the duty of the court to do so. It does not seem to us that the concession that appears to have been made in the enforcement proceedings that the words in italics meant 'non-profit-making' can preclude such an approach.

[28] Our conclusion is that the words 'in the nature of a commercial venture' are sufficiently imprecise and elastic to enable TUPE in its original form to be construed as having the same scope as the acquired rights directive. We do not, however, have to go this far in order to decide this appeal.

See generally on the interrelationships between the "holy trinity" of EC law (direct effect, consistent interpretation and Francovich liability) in Dutch: Jolande M. Prinsen, Doorwerking van Europees recht. De verhouding tussen directe werking, conforme interpretatie en overheidsaansprakelijkheid (Deventer: Kluwer 2004).


Alleged belated and incorrect transposition of the Rental Rights and Related Copyrights Directive and the Copyright and Related Rights in the Information Society Directive (2001/29). Infringement proceedings by the Commission against the UK were pending at the material time. PPL represent rights holding record companies who missed out on remuneration for certain broadcasts. PPL contacted the UK government with a view to repealing certain provisions of the Copyright, Designs and Patent Act 1988 on the grounds of their incompatibility with the Directives. The government disagreed and no amendments to the Act were made. PPL decided neither to complain to the Commission nor to apply for judicial review.

Subsequently, PPL instituted damages proceedings based on breach of EC law. The defendant first and foremost argued that PPL's claim was time barred by the Limitation Act 1980 and/or an abuse of process. Accordingly, at this stage of the litigation, the court adjudicated on this preliminary issue only:

9. Whether, or the extent to which, the claims made in [these actions] are barred by limitation, and/or whether, or the extent to which, in all the circumstances, the pursuit of those claims constitutes an abuse of process and/or is barred by estoppel and/or laches.
Assessment takes place on the assumption that PPL has established liability of the UK. As the court ruled that PPL's claim was neither time-barred nor an abuse of process, PPL must now substantiate its claim, notably whether there is a sufficiently serious breach of Community law. Noteworthy is how a Francovich claim is being integrated into English law:

[12] The nature of such a claim in English law was considered by Hobhouse LJ in Factortame V [1998] 1 CMLR 1353. In that case, the Divisional Court concluded that liability had been established and went on to consider whether exemplary damages could and should be awarded. It was in this context that Hobhouse LJ considered (para 173) that the liability was best understood as a breach of statutory duty. In so doing he relied on the dictum to the same effect of Lord Diplock in Garden Cottage Foods v MMB [1984] AC 130, [1983] 2 All ER 770, 141 and the conclusion of Mann J in Bourgoin v MAFF [1986] QB 716, [1985] 3 All ER 585, 733 that the duty was imposed by the relevant article and sections 2(1) European Communities Act 1972. Transposed to the facts of this case the duty for the breach of which the Crown is sued is that imposed by art 8.2 of the Rental Directive and section 2(1) European Communities Act 1972.

[13] Thus there is no dispute that the claim is one “founded on tort” for which s.2 Limitation Act 1980 prescribes a limitation period of six years “from the date on which the cause of action accrued”. Factortame (No 7): [2001] 1 WLR 942. Similarly it is clear, and not disputed, that a cause of action accrued on 2 July 1994 when the date by which the Rental Directive was to be given effect had passed. The issue which divides the parties is whether that is the only cause of action. The Crown contends that it is so that it is now barred by s 2 of the Limitation Act 1980. PPL submits that it is not. It submits that the breach of duty imposed by art 8.2 is a continuing one and, not being actionable per se, gives rise to a fresh cause of action on each occasion when PPL suffers consequential damage. On that basis PPL claims to be entitled to recover damage sustained within the six years immediately preceding the issue of proceedings on 10 March 2003.

The court agreed with PPL that there is a continuing breach. On possible abuse of process, it was noted that:

[36] Each side accepts that this claim could have been brought by an application for judicial review or by ordinary action; they differ in the appropriateness of one type of proceeding over another. In my view it was to just this situation that the judgements of Lord Woolf and Sedley LJ in [Clark v Humberside University [2000] 3 All ER 752, [2000] 1 WLR 1988] were directed. I conclude that the jurisdiction to which they referred exists where the remedies both of judicial review and of ordinary action are available. The choice of either may be an abuse of the process. How to exercise that jurisdiction will depend on all the relevant circumstances including matters occurring before the proceedings were instituted and which remedy is in the circumstances the more appropriate.

[37] Accordingly, I would reject the extreme position taken by each party. The claims instituted by PPL may be an abuse of process notwithstanding that the Crown does not rely on any event occurring after their institution. But it cannot be predicated that they are an abuse just because they involve a consideration of the duties of the Crown under European law and might have been brought by an application for judicial review.

Sir Andrew Morrit VC held that pursuing the claim is not an abuse of process of the court.


This is the referring judgment in Case C-452/06, Synthon. After an initial refusal to market Synthon’s medicinal product containing paroxetine in the UK, it was granted a licence after judicial review. Claimant also sought declaratory relief and damages based on Brasserie. Allegedly, the Licencing Authority had failed to comply with its EC law obligations when refusing the authorisation so that the loss of sales during the relevant period when Synthon could not market its products in the UK should be compensated. The questions of EC law are about the fact that Synthon had already obtained a licence from the Danish authorities entitling it to recognition in the UK. Following an earlier ECJ ruling, the Licencing Authority admitted that its refusal had been based an a policy contrary to Community law; in addition, there was likely to be a second breach on the ground of the non-recognition of the Danish licence. Key point: is there a sufficiently serious breach?

Very long judgment that can only be briefly summarized here. The case is similar to Three Rivers (House of Lords) and Paul and Others (ECJ) in that is a Francovich damages claim against the UK supervisory authority (watchdog), alleging breach of a Directive for lack of enforcement action against a financial institution. In fact, those cases are relied upon to dismiss the claim on the same ground: no conferral of rights.

In issue was the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance, O.J. L 228/3 of 16 August 1973. Failure to implement the Directive by July 1976 was relied upon to make the case that insufficient regulation had lead to subsequent losses of the claimants. Please note that the claimant is a member of the largely self-regulated Lloyd’s syndicate and not a policy-holder; a right to a properly regulated insurance market as insurers is being invoked. Mr Poole argued that had the government properly supervised Lloyd’s, substantial liabilities would have been revealed enabling him to discontinue his membership. In no uncertain terms Langley, J., dismissed the claim. He noted that had the Directive conferred any rights on Mr Poole, his claim would have been time-barred. But it was obvious to him that there is no such conferral at all:

“192. Nor do I think it sustainable, simply on an appreciation of the terms of the Insurance Directive, to contend that it was intended to bestow, let alone necessarily did bestow, rights upon the Names as reinsureds or the beneficiaries of policies designed to limit their exposures as insurers. The Directive assumes regulation is in place and assumes its purpose is indeed to protect insureds and third parties (in the sense I have indicated: paragraph 35). But, whether or not any rights are necessarily granted to insureds (and, as will be seen, I think not) and whatever the technicalities of the meaning of “reinsurance”, I think it fanciful to suggest that rights are necessarily granted by the Directive to insurers who seek cover for their exposures as such, nor is that the basis of the claims which are for losses resulting from the Claimants’ own underwriting.

193. It would also, to my mind, be a surprising conclusion that a directive granted the same rights to insurers and insureds to have insurers regulated. As the Claimants’ submissions were developed they were revealed to be a claim to a right to be regulated or to equality of regulation. The loss claimed arose from losses in the syndicates of which the Names were members. In my judgment regulation of others is of no relevance (nor indeed is there any suggestion that some syndicates or Names were regulated differently from others) and, as I have already said, the notion of a grant of a right to be regulated is, as Mr Plender QC acknowledged, an abuse of language or “nonsensical”. The purpose of regulation is not to protect the regulated but those to whom they supply their services or products. It is, of course, conceivable that different rights might be granted to insurers (say, to establish) and to insurers (say, to compensation for failure of an insurer), but that is of no relevance in this case.

Authority

194. I have been referred to a mass of authority. It is agreed that the answer to the question whether there is a grant of rights is to be determined having regard to the wording of the relevant provisions of the directive in their context, and having regard to their nature and purpose. The purpose of the Insurance Directive, is not, as I have said (paragraph 56), hard to divine. It was to facilitate the development of an open market in the provision of direct insurance and, in that context, to harmonise (so far as then achievable) existing national supervisory provisions. That purpose, or those purposes, have nothing to do with the complaint the Names seek to pursue in these proceedings. It was in that context that it was necessary that regulation should not prevent, save to the extent permitted by the Directive, the establishment of an insurer in a Member State.

195. Despite the extensive citation of authority, there are two leading decisions, one national and the other Community, which I think provide conclusive support for the general comments I have made and so for Mr Friedman QC’s submissions. They are the decisions of the House of Lords in Three Rivers D.C. v Bank of England (No 3) [2003] 2 AC 1 and of the ECJ in Peter Paul and Others v Germany [2004] ECR I-9425. Both decisions concern regulation of banking or credit institutions. They are therefore in the same general area with which this case is concerned, and they raised similar issues in the sense that in question were the rights (if any) of depositors for whose benefit regulatory regimes existed. There is an obvious analogy between depositors and insureds.”

Liability of Private Actors
Questions about the liability of private persons for the breach of Articles 81, 82 EC (competition law) were put before the ECJ during the end of 2003. Unfortunately, by Order of the Court of 11 February 2004 the references in the relevant four cases were declared inadmissible due to a lack of information about the factual and legal context of the questions. See Joined Cases C-438/03, C-439/03, C-509/03 and C-2/04 Cannito and Others [2004] ECR nyr.


The Advocate General argues that individuals are also liable as a matter of Community law for breach of directly effective provisions which impose a duty upon them, such as Articles 85, 86 EC Treaty. But the ECJ ruled that the Article in issue had no direct effect. It therefore did not answer the liability question which was conditional on a positive answer to previous questions. See also Walter van Gerven, `Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe', (1994) 1 Maastricht Journal of European and Comparative Law 6.


Like Van Gerven in Banks I, Advocate General Jacobs takes the view that private actors are liable for breach of EC competition law as a matter of Community law; he extends the reasoning on damages to include injunctive relief. See:

"The possibility under Community law of obtaining damages or an injunction against the sickness funds"

103. There only remains to consider the third question posed by the Bundesgerichtshof, as to whether remedial relief might be obtained against the appellants in respect of a determination setting fixed amounts if they acted pursuant to a statutory direction, notwithstanding that national law does not impose any penalty for refusal to assist in the making of such a determination.

104. If the appellants could be shown to have acted autonomously in setting fixed amounts, in such a way as to breach Article 81 EC, and if they did not succeed in defending their conduct under Article 86(2), I have no doubt that both damages and injunctive relief would as a matter of Community law be available to anyone suffering loss as a consequence of that conduct, subject to such national procedural rules as were compatible with the principles of equivalence and effectiveness. As the Court has held, the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition of Article 81(1) would be put at risk if it were not open to any individual in proceedings before a national court to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[Fn] The same analysis would in my view apply equally to injunctive relief." [Fn: Case C-453/99 Courage and Crehan [2001] ECR I-6297, at paragraph 26 of the judgment.]

The ECJ did not deal with the matter as there was no need to answer these questions as it had ruled that the sickness funds did not constitute undertakings within the meaning of Art. 81 EC (see paras. 65.66).

As far as the cited Case C-453/99 Courage v. Crehan [2001] ECR I-6297, [2001] 5 C.M.L.R. 28, is concerned, it may be noted here although it deals with contractual liability for breach of EC competition law. Whilst it could have done so, the ECJ did not recognize a contractual counterpart of Francovich liability as a matter of Community law. It cited Francovich but not on the liability point. The legal basis for reliance on a violation of Art. 81 EC before national courts is the "effet utile" of Art. 81 itself; in addition, the principles of equivalence and effectiveness were used.

Further on the possible liability of individuals for breach of EC law, an English case may be referred to:
Betws Anthracite Ltd v DSK Anthrazit Ibbenburen GmbH, [2003] EWHC 2403 (Comm), [2004] 1 All ER (Comm) 289 (QBD, Commercial Court)

Here it was argued that by way of analogy with Courage and Crehan on competition law, there should be a Francovich type liability between private actors for breach of EC State aid law. Claimant alleged that the defendant had unlawfully used State aid to the detriment of its competitors; there was a Commission Decision address to its Member State, Germany, to this effect. Morision J. was not convinced:

"[37] In my view there is no cause of action in Community law for the claim advanced by Betws. Specifically, there is no cause of action by Betws against Preussag on the ground that Preussag has used unlawful state aid to the detriment of their competitors including Betws. The aid decision was directed not to Preussag but to the German state. At best, Betws would have a claim against Germany: ...

"[38] ... The problem for Betws is that there is no wrong in law, in my judgment. The position seems to me to be acte clair in the light of the SFEI case. And I can understand the policy reason behind that decision. The structure of the Coal Aid Code is to ensure that the commission must determine whether there has been an infringement with regard to the granting of the aid. Such a decision is a prerequisite to a viable action. (The position would be different if there was a claim under art 4(b) [of the ECSC Treaty] which has direct effect.) If the commission makes a decision directed to the state, then I can see reasons why an action against the state by an injured competitor should not be viable. But to create a Community law tort which enabled a competitor to sue the recipient of unlawful aid would be to open a potential floodgate."

In the court's view, the ruling by the ECJ and the Opinion of A-G Jacobs in Case C-39/94 SFEI [1996] ECR I-3547 clearly rule out the possibility of the proposed damages action against a recipient of unlawful aid by a competitor; see also the section on Non-Applications by the ECJ on this Website. The relevant passages quoted by Morison J. are as follows:

"[32] 'Contrary to SFEI's view, the Court's existing case law does not impose on recipients of aid the obligations to make good loss or damage incurred by competitors as the result of unlawful implementation. As already noted, it merely states that recovery of aid cannot be resisted on grounds of the recipient's legitimate expectations . . . Moreover, I do not think that the Court should extend its case law so as to confer on competitors a remedy in damages against recipients of aid. As the French Government points out, Article 93 lays down a procedure to be followed by the Commission and the Member States. It is upon the latter that the obligation to notify aid to the Commission rests. I do not, moreover, share SFEI's view that such a remedy is necessary in order to ensure the effectiveness of the prohibition in Article 93(3). The various remedies outlined above, including where appropriate, an order for recovery and possibly an award of damages against the Member State are capable of providing an effective response to a breach of that prohibition.' Accordingly Advocate General Jacobs answered (at para 85) the question at issue:

'While Community law may make a member state or public body which unlawfully grants aid liable in damages, it does not oblige the recipient of such aid to make good loss or damage sustained by a competitor as a result of the unlawful grant of aid, unless the receipt of such an unlawful payment in corresponding circumstances gives rise under national law to liability in damages to third parties.'

In its judgment, the court noted (paras 73-75) that the machinery for reviewing and examining state aids established by art 93 of the Treaty 'does not impose any specific obligations on the recipient of aid'. First, the notification requirement and the prior prohibition on implementing planned aid laid down in art 93(3) are directed to the member state. Second, the member state is also the addressee of the decision by which the commission finds that aid is incompatible with the common market and requests the member state to abolish the aid within the period determined by the commission. That being so, Community law does not provide a sufficient basis for the recipient to incur liability where he has failed to verify that the aid received was duly notified to the commission. That does not, however, prejudice the possible
application of national law concerning non-contractual liability. If, according to national law, the acceptance by an economic operator of unlawful assistance of a nature such as to occasion damage to other economic operators may in certain circumstances cause him to incur liability, the principle of non-discrimination may lead the national court to find the recipient of aid paid in breach of art 93(3) of the Treaty liable. Therefore, the court concluded that the recipient of aid which was unlawful because of non-notification.


This case is relevant as it deals with the questions of punitive damages, loss of profits and interest. The Court recalls that, according to the principle of equivalence, if specific damages such as exemplary or punitive damages are available for national actions similar to actions based on Community law, then they must be available for the latter too. However, Community law does not prevent national jurisdictions from ensuring that the protection of Community rights does not lead to unjust enrichment. The Court also states that the principle of effectiveness requires that persons who have suffered a loss resulting from a breach of competition law should obtain compensation for not only the actual damage (damnum emergens) but also loss of profits (lucrum cessans) and payment of interests (paras 98-100). It remains to be seen whether this unconditional inclusion of interest amongst the compensatable damage only holds for ‘private’ competition cases, or should apply beyond that, to State liability.

In terms of the basis of the liability for breach of EC competition law, this judgment reiterates the approach first taken in Courage v. Crehan (cited above) which deals with contractual liability and does not extend the autonomous Francovich liability to this context. The basis for the liability is domestic law not Community law. It would seem that in Manfredi again only liability in contract is at stake despite the references being made to third parties and damages. The case at the national level concerns the repayment by insurance companies to their insured of the unlawful increase – being contrary to Art. 81 EC - in premiums for compulsory motor insurance. However, the reference by the Italian court is broad enough to cover non-contractual liability too as it talks about “any third party” (see para. 17 of the judgment). The following considerations confirm the ECJ’s earlier approach but presumably now also cover non-contractual claims (albeit that the actual claimants in the main action are consumers and seek repayment of premiums):

“58 Further, as was noted in paragraph 39 of this judgment, Article 81(1) EC produces direct effects in relations between individuals and creates rights for the individuals concerned which the national courts must safeguard.

59 It follows that any individual can rely on a breach of Article 81 EC before a national court (see Courage and Crehan, cited above, paragraph 24) and therefore rely on the invalidity of an agreement or practice prohibited under that article.

60 Next, as regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be recalled that the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (Courage and Crehan, cited above, paragraph 26).

61 It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC."

Finally, also Advocate General Geelhoed’s Opinion points to the domestic procedural and private law as the basis for damages claims. He firmly places the issue in the context of private enforcement (Nos. 27-31, 54-57 and 62-70), notably by consumers as in Manfredi itself, with reference to the Commission’s interest in encouraging the use of damages claims as a matter of private enforcement. See Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty and the following page on D-G.
Tort liability of the European Community

Article 288 EC contains the basis for the non-contractual liability of the European Community. It is recalled that in Brasserie the ECJ brought its regime on State liability in line with the system of Community liability. Any developments in the one context are thus relevant for the requirements in the other. This section will monitor those cases under art. 288 EC where the courts consider the linkage between the two contexts and thus explicitly develop the ius commune of State and EC liability, on the basis of the general principles common to the Member States.

In issue here was the liability of the Community for a Commission Directive restricting the use of certain substances in sun tan lotion. The claimant Bergaderm, manufacturer of the cosmetic product Bergasol, was put into liquidation allegedly as a result of this measure. Bergaderm contended that the Commission had acted unlawfully in adopting its Directive. Both the CFI and the ECJ dismissed the application for damages.

For the first time, as far as I know, the Court has explicitly referred to the case law on State liability in the context of liability of the Community. The linking of these two regimes as proclaimed by the ECJ in paras. 40-42 of Brasserie has now been put into practice. That is to say, it cited Brasserie as authority for the position that in the context of Art. 288 (liability of the EC), a system of rules had been worked out including the margin of discretion available to the body adopting an act as a relevant factor in determining whether a breach of Community law had occurred or not. This is not spectacular in itself, as the introduction of this factor into the State liability regime in Brasserie was of course based on the case law under Art. 288 (ex 215) EC. Nonetheless, the ECJ confirmed, in the context of liability of the EC, that the conditions for liability of both the State and the EC are and should be the same in like circumstances. In particular, in both contexts, the requirement of a sufficiently serious breach must be satisfied. In turn, this will depend on the margin of discretion within which the body adopting the act - in this case of a legislative nature - must remain. The ECJ reviewed the applicant's appeal in the light of the three Brasserie conditions (conferral of rights, sufficiently serious breach and direct casual link).

2. Case C-312/00 P Camar and Tico [2002] ECR I-11355 (10/12/02)
The CFI had given judgment for the claimants and held the Community liable for a manifest and grave error of appraisal by the Commission. This is yet another "European Banana Law" case, dealing with Commission regulations adopted after damage caused to banana plantations in Martinique, St Lucia and other Caribbean islands by the tropical storms Debbie, Iris, Luis and Marilyn. Applicant Camar imported Somali bananas into Italy and claimed to have suffered loss in this business as a result of the Commission's failure to adopt Regulations such as the ones regarding the Caribbean bananas. The CFI gave judgment for Camar on the liability point.

The Commission's appeal against the CFI's liability ruling was rejected by the ECJ. Interestingly, this case sheds light on the liability conditions for administrative action. The CFI had held the Commission liable on the ground "that any infringement of law constitutes illegality which may give rise to liability on the part of the Community" (para. 21 ECJ's judgment). Quite explicitly, the fact that the administrative action was exercised in a context of a broad discretion was deemed irrelevant:

"21. ... the [Commission] Decision [in issue] was to be regarded as an administrative act, even if it was based on Article 30 of Regulation No. 404/93, which gives the Commission broad discretionary power, and that, therefore, since the decision had been taken in breach of that provision, the first condition required to render the Commission liable was satisfied.

22. After holding that the other conditions in that regard were also satisfied and that, therefore, the liability of the Community was incurred by virtue of the Commission's action, the Court of First Instance stated, at paragraph 212 of the contested judgment, that there was no need to adjudicate on the liability of the Council, which Camar had alleged in the alternative."

On appeal, what did the ECJ say about the CFI's approach to liability for administrative action?
52. As for the Council's ground of appeal complaining that the Court of First Instance based itself, in
order to hold the Commission liable, on its case-law according to which, in the field of administrative
action, any infringement of the law constitutes illegality that is capable of rendering the Community
liable, it is appropriate to point out that the system of rules which the Court has worked out in relation
to the non-contractual liability of the Community takes into account, inter alia, the complexity of the
situations to be regulated, difficulties in the application or interpretation of the texts and, more
particularly, the margin of discretion available to the author of the act in question (see Joined Cases C-
46/93 and C-48/93 Brasserie du pêcheur and Factortame [1996] ECR I-1029, paragraph 43, and
Bergaderm and Goupil v Commission, cited above, paragraph 40).

53. It is appropriate to point out also that, Community law confers a right to reparation where three
conditions are met: the rule of law infringed must be intended to confer rights on individuals; the
breach must be sufficiently serious; and there must be a direct causal link between the breach of the
obligation resting on the author of the act and the damage sustained by the injured parties (see the
judgments cited above Brasserie du pêcheur and Factortame, paragraph 51, and Bergaderm and
Goupil v Commission, paragraphs 41 and 42).

54. As to the second condition, the decisive test for finding that a breach of Community law is
sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded
the limits on its discretion (see the judgments cited above Brasserie du pêcheur and Factortame,
paragraph 55, and Bergaderm and Goupil v Commission, paragraph 43). Where that institution has
only considerably reduced, or even no, discretion, the mere infringement of Community law may be
sufficient to establish the existence of a sufficiently serious breach (Case C-5/94 Hedley Lomas [1996]
ECR I-2553, paragraph 28; Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 Dillenkofer
1531, paragraph 108; Case C-424/97 Haim [2000] ECR I-5123, paragraph 38, and Bergaderm and
Goupil v Commission, cited above, paragraph 44).

55. It follows from the foregoing that the decisive test for determining whether there has been such an
infringement is not the individual nature of the act in question, but the discretion available to the
institution when it was adopted.

56. In those circumstances, it must be held that the Court of First Instance made an error of law when
it held that the Commission's liability could arise from the mere illegality of the Decision on 17 July
1997, without taking account of the discretion which the Commission enjoyed in the adoption of that
measure.

Accordingly, there can no longer be any doubt about the applicability of the SSB-requirement across
the board: it applies to both legislative and administrative action. See also the Opinion of A-G Stix-
Hackl of 16 April 2002, Nos. 133-140. But despite the doctrinal importance of these considerations, the
victory were the applicant in the case in hand was pyrrhic:

57. However, it should be pointed out that where the grounds of a judgment of the Court of First
Instance disclose an infringement of Community law but the operative part of the judgment is shown to
be well founded for other legal reasons, the appeal must be dismissed (see Case C-30/91 P Lestelle v
ECR I-5843, paragraph 58).

58. At paragraph 145 of the contested judgment, the Court of First Instance held that, as the Court of
Justice pointed out in paragraph 38 of its judgment in T. Port, cited above, the Commission has a
broad discretion when assessing whether transitional measures are necessary on the basis of Article
30 of Regulation No. 404/93.

59. Furthermore, as is apparent from paragraph 18 of this judgment, the Court of First Instance
concluded, at paragraph 149 of the contested judgment, both that the Commission had committed a
manifest error of appraisal in considering that Camar was capable of overcoming the difficulties
carried by the transition from the Italian national arrangements to the Community system by relying on
the operation of the market, and that the only way that Camar could deal with the difficulties it faced
was for the Commission to adopt transitional measures as provided for in Article 30 of Regulation No.
404/93.
60. Such manifest and grave disregard, by the Commission, of the limits placed on its discretion is a sufficiently serious infringement of Community law, within the meaning of the case-law cited at paragraphs 53 and 54 of this judgment, and is therefore such as to render the Community liable.

61. Since it has not been disputed that the other conditions essential to the non-contractual liability of the Community are satisfied in this case, the Court of First Instance correctly upheld the claim for compensation against the Commission in Case T-260/97.

62. As a result, the claim that the contested judgment should be set aside, in so far as it orders the Commission to compensate Camar for the damage pleaded in this case, must be dismissed.”

Camar thus confirms that post-Bergaderm, the conditions for liability of the EC and an MS are identical. Or, in the words of A-G Stix-Hackl, Opinion of 16 April 2002, No. 128 (not yet available in English):

“On peut tirer de l’arrêt [Bergaderm] que la Cour souligne les parallèles entre la responsabilité des États membres et celle de la Communauté. Cela se traduit par une identité de critères instrumentaux dans l’un et l’autre cas.”


Key words: Appeal; Bananas; Common organisation of the markets; Export licence scheme; Action for damages; Proof of damage and causal link.

The German banana importer sued the Community for the costs of having had to obtain licences to import bananas from Costa Rica under contracts with exporters, whilst a pertinent requirement under Regulation 478/95 had been declared invalid in an earlier judgment by the ECJ (Joined Cases C-364/95 and C-365/95, [1998] ECR I-1023). In essence, this 2003 T. Port case concerns proof of damage, which can only be reviewed on appeal to a limited extent. The CFI’s ruling that the claimant had failed to sufficiently establish the existence and extent of the alleged damage was upheld. Consequently the Community could not incur liability. The ECJ reiterates the cumulative nature of the conditions for the 288 EC liability:

“30. According to settled case-law recalled by the Court of First Instance in paragraph 42 of the contested judgment, the Community’s non-contractual liability depends on the coincidence of a set of conditions as regards the unlawfulness of the acts alleged against the Community institutions, the fact of damage and a causal link between the conduct of the institution and the damage complained of (Joined Cases C-258/90 and C-259/90 Pesquerias De Bermeo et Naviera Laida v Commission [1992] ECR I 2901, paragraph 42). The cumulative nature of those conditions means that if one of them is not satisfied, the Community cannot incur non-contractual liability (see, to that effect, inter alia Case C-257/98 P Lucaccioni v Commission [1999] ECR I-5251, paragraphs 63 and 64, and Case C-237/98 P Dorsch Consult v Council and Commission [2000] ECR I-4549, paragraph 54).”


Provisional antidumping and countervailing duties imposed on imports of farmed Atlantic salmon originating in Norway by the Commission. Errors in the assessment of compliance with undertakings made by Fresh Marine. FM sued for damages for lost profits. ECJ does not have jurisdiction to review the assessment of facts by the CFI in appeal proceedings. About the components of the applicable liability regime, notably the conditions for EC liability, the ECJ said:

“24 In that regard, the system of rules which the Court of Justice has worked out in relation to the non-contractual liability of the Community takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question (see Brasserie du Pêcheur and Factortame, cited above, paragraph 43; Bergaderm and Goupil, cited above, paragraph 40; and Case C-312/00 P Commission v Camar and Tico [2002] ECR I-0000, paragraph 52).

25 According to settled case-law, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be
sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (see Brasserie du Pêcheur and Factortame, paragraph 51, Bergaderm and Goupil, paragraphs 41 and 42, and Commission v Camar and Tico, paragraph 53).

26 As regards the second condition, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see, inter alia, Bergaderm and Goupil, paragraphs 43 and 44, and Commission v Camar and Tico, paragraph 54).

27 Therefore, the determining factor in deciding whether there has been such an infringement is not the general or individual nature of the act in question but the discretion available to the institution concerned (see, to that effect, Bergaderm and Goupil, paragraph 46, and Commission v Camar and Tico, paragraph 55). V

28 Since the provisional anti-dumping and countervailing duties were imposed on the basis of Article 8(10) of Regulation No 384/96 and Article 13(10) of Regulation No 2026/97 respectively, the limits to which the Commission's discretion was subject in this case must be determined.

It follows that the requirement of an SSB applies at all times, but whether one obtains depends on the discretion available to the EC body in question - not the kind of act, i.e. a legislative or a non-legislative one. The ECJ concluded that the Commission clearly had not complied "with its obligation to impose provisional [anti-dumping] duties only where there is reason to believe that the undertaking has been breached" (para. 31). Accordingly, in the circumstances of the present case, it had committed a sufficiently serious breach. The ECJ also held there to have been a direct causal link between the conduct and the damage: it was immaterial that the CFI had partly come to a different conclusion as it had correctly applied all the other conditions for liability.

Finally, the ECJ approved the CFI's recognition of contributory negligence of the importer estimated as 50% (as a result, it could only claim 50% of its loss). This is settled case law since Mulder II and Brasserie.


This appeal from a CFI ruling concerns the liability of the Community for unlawful conduct of the European Ombudsman. The ECJ confirms that the EC is liable for any wrongdoing by the Ombudsman. The case is of little practical value as the Ombudsman limited scope of powers is not likely to generate much litigation. However, the judgment is important doctrinally as there can now no longer be any doubt that the Brasserie test of a "sufficiently serious breach" (SSB) applies not only to legislative acts but to individual administrative acts as well (ECJ cites Fresh Marine in this regard; see also Camar, discussed above). Before Bergaderm, there was a dichotomy in the liability regime of the EC: SSB applied to legislative conduct only. Any other conduct by the Community was not subject to the requirement of a sufficiently serious breach; but proof of fault did apply. Likewise, the requirement of a Schutznorm, i.e. violation of a norm protecting the claimant in the interests harmed, does (implicitly) apply, see Cases 19, 20, 25, 30/69 Richez Parise [1970] ECR 325 and Case 145/83 Adams v Commission [1985] ECR 3539 (liability for administrative acts); Case 9/69 Sayag v. Leduc [1969] ECR 329 and Cases 169/83 and 136/84 Leussink-Brummelhuis v. Commission [1986] ECR 2801 (liability for factual acts).

However, the dichotomy between legislative and non-legislative acts for the purposes of liability is no longer relevant in the light of the complete merger of the State liability with the EC liability regimes post-Bergaderm, see also Case C-472/00 P Fresh Marine [2003] ECR I-7541, [2003] 3 C.M.L.R. 39, Casenote by Jill Wakefield, 41 C.M.L.Rev. 235 (2004).

According to the ECJ in Re Ombudsman, it is settled case-law that the liability of the Community is subject to 3 conditions: the violated norm must be intended to confer rights on individuals; the breach is sufficiently serious (SSB); and a direct causal link between the loss and the breach. The decisive test for the SSB is whether the Community body has manifestly and gravely disregarded the limits on its discretion (para. 49). As far as the Ombudsman is concerned, regard must be had to the specific
nature of its function. That is, the Ombudsman "is merely under an obligation to use his best
endeavours and that he enjoys wide discretion" (para. 50). Put differently, there is a duty of best efforts
not an obligation of result.

In addition, the crucial element within the test of SSB is, again, confirmed: the scope of discretion
within which the body can operate. Like in Kobler, dealing with liability of courts, the liability of the
Ombudsman is very limited due to its specific nature as Ombudsman (and as courts in Kobler). The
ECJ thus concluded that the CFI was right to declare admissible in principle an action for damages
allegedly caused by the mishandling of a complaint by the Ombudsman; according to A-G Geelhoed,
the same applies to similar conduct by the European Parliament (No. 110). Not surprisingly, the action
was declared unfounded as there was no breach of a "duty of care" by the Ombudsman. Indeed, the
ECJ explicitly states: "it is possible that in very exceptional circumstances a citizen may be able to
demonstrate that the Ombudsman has committed a sufficiently serious breach of Community law in
the performance of his duties likely to cause damage to the citizen concerned" (para. 52). Very
exceptional circumstances: cf., as said, the liability of national courts under Kobler.

Notable is that the ECJ applied its SSB test without more to the handling of a complaint by the
Ombudsman: a non-legislative act. This confirms again, in my view, that the Brasserie test applies
across the board to any kind of conduct by a Community body or institution. Whether any breach of a
protective norm is sufficiently serious, depends on the level of discretion enjoyed by the body in issue.
The merger of the Francovich liability with the 288 EC liability is thus complete.

There are numerous judgments by the CFI applying the Bergaderm/Brasserie merged liability criteria,
including the irrelevance of the distinction between legislative and administrative acts. See e.g. the
series of cases about the impossibility of relying on WTO rules, focusing on the requirement that the
rule of law infringed must be intended to confer rights on individuals, where the CFI concluded that the
provisions in issue, the WTO agreement, did not, so that the Community could not incur liability for any
infringement of those rules:


See also Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 Comafrika SpA and
Dole Fresh Fruit Europa [2001] ECR II-1975;

and II-47; Joined cases T-94/00, T-110/00 and T-159/00, and Joined Cases 332/00 and 350/00 Rica
2003).

In Joined Cases T-344/00 and T-345/00 CEVA Santé Animale and Pharmacia Entreprises v
Commission [2003] ECR II-229 (judgment of 26 February 2003) the CFI did not refer to Bergaderm on
the liability point. The case deals with the inability of CEVA to market a pharmaceutical product,
progesterone, during a 1,5 year period because the Commission had failed to adopt relevant
legislation authorising it to do so (so-called MRLs: maximum residue limits). Instead of applying
Bergaderm, it held that:

"103. That being so, the inaction of the Commission between 1 January 2000 and 25 July 2001
constitutes a clear and serious breach of the principle of sound administration giving rise, in principle,
to liability on the Community's part. There is therefore no need in the present case to establish
whether the Commission's inaction was administrative or legislative in nature, or to determine the
exact scope of its discretion in setting MRLs."

In my view, post-Bergaderm, there can never be any need any more to decide whether the conduct is
administrative or legislative as the same criterion for liability, SSB, applies to both in any event.
Decisive is, as of course applied here by the CFI, whether the body in question had committed a
sufficiently serious breach. Of course, a clear and serious breach of the principle of sound
administration will qualify as such.
The CFI then considered “[t]he damage sustained and the causal link between the unlawful conduct and the damage” and found the damage to be attributable to the Commission's inaction.

"108. In view of the fact that it is not yet possible to fix the amount of damages, it is appropriate, for reasons of economy of procedure, to give an initial interlocutory ruling on the liability of the Community and defer to a subsequent stage of the proceedings the question of assessing the damage attributable to the Commission's inaction between 1 January 2000 and 25 July 2001 (see, to that effect, Joined Cases C-104/89 and C-37/90 Mulder and Others v Council and Commission [1992] ECR I-3061, paragraph 37, and Case T-76/94 Jansma v Council and Commission [2001] ECR II-243, paragraph 102)."

In the Operative part of the judgment, it ruled as follows:

"... 2. The Commission's inaction between 1 January 2000 and 25 July 2001 is such as to render the Community liable. 3. Within six months of the date of delivery of the present judgment the parties shall inform the Court of the amount of damages which they claim, as agreed with the Commission. 4. In the event of failure to agree the amount, the parties shall submit to the Court, within the same period, their calculations of the amount of damages attributable to the Commission's inaction between 1 January 2000 and 25 July 2001. 5. The costs are reserved."

However, on appeal the CFI's ruling was set aside, see: Case C-198/03 P Commission v. CEVA Santé Animale [2005] ECR I-6357; [2005] 3 CMLR 30

The ECJ ruled that the CFI had failed to give proper reasons for disregarding some of the relevant (conflicting) scientific evidence and had misconstrued the broad scope of the Commission's discretion in taking measures for the protection of public health. The ECJ also explicitly referred to the merged ius commune liability regime by citing Brasserie and Bergaderm. See in particular the following passages:

"61. The second paragraph of Article 288 EC requires the Community, in the case of non-contractual liability, to make good, in accordance with the general principles common to the laws of the Member States, any damage caused by its institutions or servants in the performance of their duties. 62. The system of rules which the Court has worked out with regard to that provision takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question (Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029, paragraph 43; Case C-352/98 P Bergaderm and Goupil v Commission [2000] ECR I-5291, paragraph 40; Case C-312/00 P Commission v Camar and Tico [2002] ECR I-11355, paragraph 52; and Case C-472/00 P Commission v Fresh Marine [2003] ECR I-7541, paragraph 24).

63. The Court has ruled that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and, finally, there must be a direct causal link between the breach of the obligation devolving on the institution and the damage sustained by the injured parties ( Brasserie du Pêcheur and Factortame , paragraph 51; Bergaderm and Goupil v Commission , paragraphs 41 and 42; Commission v Camar and Tico , paragraph 53; and Commission v Fresh Marine , paragraph 25, all cited above).

64. With regard to the second condition, the Court has stated that the decisive test for determining whether a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion ( Brasserie du Pêcheur and Factortame , paragraph 55; Bergaderm and Goupil v Commission , paragraph 43; Commission v Camar and Tico , paragraph 54; and Commission v Fresh Marine , paragraph 26).

65. Where that institution has only a considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach ( Bergaderm and Goupil v Commission , paragraph 44; Commission v Camar and Tico , paragraph 54; and Commission v Fresh Marine , paragraph 26).

66. The determining factor in deciding whether there has been such an infringement is therefore the discretion available to the institution concerned ( Bergaderm and Goupil v Commission , paragraph 46; Commission v Camar and Tico , paragraph 55; and Commission v Fresh Marine , paragraph 27).

67. While the question as to the scope of the Commission's discretion in establishing MRLs had been the subject of discussion between the parties, with the applicants at the time arguing that the Commission did not have any discretion and the Commission, on the contrary, arguing that it had a broad discretion (see paragraphs 61, 64 and 65 of the judgment under appeal), the Court of First Instance did not at any point in the judgment under appeal explain in detail the discretion which the Commission enjoys in establishing MRLs.

68. Nor did the Court of First Instance set out adequately for legal purposes the reasons or
circumstances which might exceptionally have explained why such an analysis would serve no purpose (for the inadequacy of the reasoning given in paragraph 101 of the judgment under appeal, see above paragraphs 52 to 54 of the present judgment).

69. It must for those reasons be concluded that the Court of First Instance erred in law in holding in paragraph 103 of the judgment under appeal, without having established the scope of the discretion enjoyed by the Commission, that the Commission's inaction between 1 January 2000 and 25 July 2001 constituted a clear and serious breach of Community law giving rise to liability on the part of the Community.

70. The ground of appeal must therefore be upheld.

71. In those circumstances, without it being necessary to rule on the other grounds adduced in support of the appeal, in particular that alleging misinterpretation and incorrect application of the principle of sound administration to the facts of the present case, the appeal must be upheld and the judgment under appeal set aside to the extent to which it found that there had been inaction on the part of the Commission between 1 January 2000 and 25 July 2001 of such kind as to give rise to liability on the part of the Community."

The ECJ found there not to have been a sufficiently serious breach by the Commission in the light of its broad discretion.

See also the somewhat curious case about liability of the Community for alleged trademark infringement by the adoption of the official euro sign, Case 195/00 Travelex [2003] ECR II-1677.

In Travelex, the applicants, among other things, pleaded breach of the principle of equality of public burdens (in French: principe d'égalité devant les charges publiques; in German: Sonderopfer). The CFI deals with this argument under the heading no-fault liability. I understand this to mean liability for lawful acts (as in the leading case of Dorsch Consult (Case C-237/98 P Dorsch Consult v Council and Commission [2000] ECR I-4549); indeed, this is also how the applicants formulate this basis of liability:

"155. The applicants allege that liability may be incurred under Article 288 EC even where the conduct of the Community institution in question is not unlawful, provided that the burden of that conduct falls disproportionately and unfairly on certain individuals and constitutes unequal discharge of public burdens."

What did the CFI think about this cause of action?

"161. It should be noted that, if the principle of no-fault liability were recognised in Community law, a precondition for such liability would in any event be the cumulative satisfaction of three conditions, namely the reality of the damage allegedly suffered, the causal link between it and the act on the part of the Community institutions, and the special and unusual nature of that damage (Case C-237/98 P Dorsch Consult v Council and Commission [2000] ECR I-4549, paragraphs 17 to 19, and Case T-196/99 Area Cova and Others v Council and Commission [2001] ECR II-3597, paragraph 171)."

The CFI found no evidence of the existence of actual and certain damage attributable to the Commission. See the page on liability of the Community for lawful acts for more details on the requirements for liability in this situation.


This is a successful damages claim in the context of a tendering procedure managed by the European Commission. AFCon was not awarded a contract but a competitor (the GFA Consortium) was whilst one of their staff (Mr A) had also been involved in the selection process; there was therefore a conflict of interests. The CFI ruled as follows:

"90. It follows from the foregoing that the Commission, in failing to investigate the relations between Mr A and the GFA consortium, made a manifest error of assessment. In infringing the principle of sound administration in that way, the Commission also violated the principle of equal treatment as between tenderers, which requires it to examine each tender impartially and objectively in the light of the requirements and general principles governing the tendering procedure, in order to ensure that all the tenderers are afforded the same opportunities.

91. The principle of equal treatment prohibits comparable situations from being treated differently and different situations from being treated alike, unless such treatment is objectively justified. In this instance, there were serious doubts as to the lawfulness of GFA's tender. As long as those doubts
subsisted, the consortium’s situation was different from that of all the other tenderers. By failing to open an inquiry aimed at putting an end to that situation, the Commission treated GFA in the same way as all the other tenderers, even though such treatment was not objectively justified. In infringing the principle of equal treatment in that way, the Commission violated a rule of law whose purpose is to confer rights on individuals.

92. However, since it has been established that the Commission failed to act with due diligence to take the steps needed to continue with the tendering procedure, the legality of the decision not to exclude GFA from the remainder of the procedure cannot be assessed. Whether the decision is lawful is directly dependent on the result of the inquiry which the Commission should have undertaken in order to satisfy itself that there was no collusion. Since the factual aspects of the case-file do not support a finding of such collusion, the Court must reject the complaints by which the applicants seek to show that the Commission should have excluded GFA from the tendering procedure.

93. As regards whether the illegality found is such as to cause the Community to incur liability, it is necessary to bear in mind that the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion (see Brasserie du Pêcheur and Factortame, cited above, paragraph 55, and Bergaderm and Goupil v Commission, cited above, paragraph 43). The Court therefore holds that, on account of the abovementioned circumstances of the conflict of interests and of the risk of fraud which it entails, the Commission’s omission is of a manifest and serious nature and is thus such as to cause the Community to incur liability. […] Damages were awarded for losses sustained in the tender procedure as well as interest. Accordingly: “On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Orders the Commission to pay AFCon the sum of EUR 48 605, together with interest thereon from delivery of this judgment until full payment. The rate of interest to be applied is to be calculated on the basis of the European Central Bank’s rate for its main refinancing operations, in force during the period concerned, plus two percentage points. The amount of interest is to be calculated on the basis of compound interest”.


This case concerns the Common Fisheries Policy, and in particular the allocation of fishing quotas per Member State, which limits catches (we will recall that fishing quota considerations were the trigger for the British Act limiting the registration of foreign-own vessels which led to the Factortame saga). Spanish vessels owners and associations of owners brought an action for annulment of Council Regulations allowing the Portuguese fleet to fish in a particular ICES area, which was rejected as inadmissible by the CFI. However, Spain brought, successfully, an action for annulment against these Regulations before the ECJ. Then 98 shipowners and 11 fishermen associations brought an action for damages under Article 235 EC.

The case evolves around the ‘conferral of rights’ issue. The CFI considers whether the ‘principle of relative stability’ and Article 161(1)(f) of the Act of Accession may be regarded as being intended to confer rights. It recalled the fixed case law by reference to many of the above cases:

“34. It should be noted that, according to settled case-law, as regards the Community’s non-contractual liability for the unlawful conduct of its institutions, a right to reparation is recognised where three conditions are met: the rule of law infringed must be intended to confer rights on individuals and the breach must be sufficiently serious; actual damage must be shown to have occurred and there must be a direct causal link between the infringement attributable to the Community and the damage sustained by the injured parties (see Joined Cases T-332/00 and T-350/00 Ríca Foods and Free Trade Foods v Commission [2002] ECR II-4755, paragraph 222, and Case T-195/00 Travelex Global and Financial Services and Interpayment Services v Commission [2003] ECR II-1677, paragraph 54; see also, to that effect, Case C-352/98 P Bergadermand Goupil v Commission [2000] ECR II-5291, paragraph 42; Case C-312/00 P Commission v Camar and Tico [2002] ECR I-11355, paragraph 53; and Case C-472/00 P Commission v Fresh Marine [2003] ECR I-7541, paragraph 25).”

As for the requirement of “conferral of rights on individuals (so-called Schutznorm requirement), the CFI applied a two-step approach: did the Council breach a rule of law (step 1), if so, whether that rule is intended to confer rights on individuals (step 2). In this case, the Council was held to have acted contrary to the principle of relative stability in EC fisheries law as well as provisions from the applicable Act of Accession of Portugal and Spain. Step 1 was therefore satisfied. The CFI accordingly proceeded with step 2. It noted that it is not a requirement of “conferral of rights” that the violated norm
is a higher ranking one:

"85. In that regard, it must be noted at the outset that, contrary to the Council’s submissions, it is unimportant whether or not the rule of law infringed constitutes a higher-ranking rule of law (see, to that effect, Bergaderm and Goupil v Commission, supra, paragraphs 41, 42 and 62). The arguments put forward by the parties on this point are therefore invalid."

So what is the test? The CFI elaborated as follows:

"86. Further, it has been held in case-law that a rule of law is intended to confer rights on individuals where the infringement concerns a provision which gives rise to rights for individuals which the national courts must protect, so that it has direct effect (Joined Cases C-46/93 and C-48/93 Brasserie du pêcheur and Factortame [1996] ECR I-1029, paragraph 54), a provision which creates an advantage which could be defined as a vested right (see, to that effect, Case T-113/96 Dubois et Fils v Council and Commission [1998] ECR II-125, paragraphs 63 to 65), a provision which is designed for the protection of the interests of individuals (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 HNL and Others v Council and Commission [1978] ECR 1209, paragraph 5), or a provision which entails the grant of rights to individuals, the content of those rights being sufficiently identifiable (Joined Cases C-178/94, C179/94, C-188/94 to C-190/94 HNL and Others v Council and Commission [1996] ECR I-4845, paragraph 22)."

A non-exhaustive list may be drawn up from this passage. A violated norm constitutes a Schutznorm in the following circumstances:

1. when it has direct effect;
2. when it creates an advantage in the form of a vested right;
3. when it protects individuals’ interests;
4. when the right is implicit but sufficiently identifiable.

It would seem that the CFI has herewith reformulated the rule of the Kampffmeyer case and merged it with the ECJ’s rulings under State liability. The CFI recalls that the principle of relative stability concerns only relations between Member States, as it reflects a criterion for the distribution between MS fishing opportunities. It does ‘not confer on fishermen any guarantee that they can catch a fixed quantity of fish’ (para 89). Moreover, the CFI notes the possibility offered to MS to exchange quotas. As to the Accession Act, its sole purpose is to apportion the quota for anchovies in a particular area, and does not make reference to the situation of anchovies fishermen in the two countries who may fish in this area or to any obligation of the Council to take account of their situation (para 91). The Member States are thus the ‘holders’ of the fishing rights, with the result that the rules are not intended to confer rights on individuals (para 93). The claim is thus rejected.


This case concerns a claim for compensation brought by an importer of handbags produced in China, who had been required to pay anti-dumping duties of 38% pending anti-dumping investigations by the Commission. A Council Regulation then cleared the applicant from involvement in dumping and grants it a 0% rate. However, the Regulation rejects retroactive application of the 0% rate. This element of the regulation was declared unlawful by a Court’s judgment (Medici Grimm I: Case T-7/99, [2000] ECR II-2671).

The CFI notes that such judicial declaration of illegality is not sufficient in itself, for ‘the case law requires a sufficiently serious breach of a rule of law intended to confer rights on individuals (ref. to Bergaderm). The CFI considers a 2-stage approach is required: first, it needs to examine whether the breach is sufficiently serious, then what is the nature of rule of law.

Regarding the sufficiently serious breach, the CFI, after having repeated the Bergaderm proviso, recalls the objective test spelt out in Comafrica and Dole: ‘the finding of an irregularity which in comparable circumstances would not have been committed by a normally prudent and diligent administration permits the conclusion that the conduct of the institution constituted an illegality of such kind as to give rise to the liability of the Community under Article 288 EC.’ (para 79). It then refers to Brasserie and Camar and Tico to recall that the Community rules on the non-contractual liability of the Community ‘take account of the complexity of the situations to be regulated and the difficulties in the application and interpretation of the legislation.’ (para 80). It also pointed out that there must be no difference between State and EC liability:

"81 Furthermore, the protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage (Bergaderm and Goupil v Commission, paragraph 41). It must therefore be recognised that, as with proceedings relating to the liability of Member States for infringement of Community law, in order to determine whether an infringement of Community law committed by a Community institution constitutes a sufficiently serious breach, the Community Court hearing a claim for compensation must take account of all the factors which characterise the situation put before it, and those factors include,
in particular, the clarity and precision of the rule infringed, and whether any error of law was inexcusable or intentional (see, by analogy, Case C-424/97 Haim [2000] ECR I-5123, paragraph 43, and Case C-63/01 Evans [2003] ECR I-14447, paragraph 86)."

The CFI examined the Council’s discretion regarding the retroactive application. It considered that the Council was faced with a “difficult legal question, without any precedent in case law, which was only resolved” by the CFI judgment in Medici Grimm I (para 92) and therefore had substantial discretion. It refused the applicant’s argument that the Council misused its power in refusing to give retroactive effect to the Regulation, for the Council had looked at the nature of the investigation, to conclude that it should have only prospective effects. The first condition for Community liability not being fulfilled, the CFI does not examine the second one.


Action for compensation of non-material damage and damage to employment prospects caused to Mr Camos Grau, a Commission official, by an OLAF investigation. Question on the admissibility of the action; connection with annulment actions considered. The claim is admissible:

“78 Individuals who, by reasons of the conditions as to admissibility laid down under the fourth paragraph of Article 230 EC, cannot contest directly certain Community acts or measures, none the less have the opportunity of putting in issue conduct lacking the features of a decision, which accordingly cannot be challenged by way of an action for annulment, by bringing an action for non-contractual liability under Article 235 EC and the second paragraph of Article 288 EC, where such conduct is of such a nature as to entail liability for the Community (Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 Philip Morris International and Others v Commission [2003] ECR II-1, paragraph 123). It is open to individuals in an action for damages of that kind to put forward unlawful acts which have been committed when an administrative report is drawn up and adopted, even though that report is not a decision directly affecting the rights of the persons mentioned therein (Case C-315/99 P Ismeri Europa v Court of Auditors [2001] ECR I-5261, paragraphs 29 and 30).

79 Moreover, the action for damages is an independent form of action, with a particular function to fulfill within the system of legal remedies and subject to conditions for its use conceived with a view to its specific purpose (see Case C-234/02 P Ombudsman v Lamberts [2004] ECR I-2803, paragraph 59, and the case-law cited there).”

On the merits, the CFI focussed on “conferral of rights” and “sufficiently serious breach”. It stated: “101 In order to give a ruling on the non-contractual liability of the Community, it is necessary in the present case to consider first of all whether the rules of law which are alleged to have been infringed are intended to confer rights on individuals. The applicant relies on infringements of the principles of impartiality, natural justice and objectivity, of the protection of legitimate expectations and of sound administration. He also argues that the right to a fair hearing, the procedural requirements relating to the drawing up of reports by OLAF and the obligation to provide adequate reasons were contravened. 102 It is sufficient to hold in that regard that at least the requirement of impartiality, to which the institutions are subject in carrying out investigative tasks of the kind which are entrusted to OLAF, is intended, as well as ensuring that the public interest is respected, to protect the persons concerned and confers on them a right as individuals to see that the corresponding guarantees are complied with (see, to that effect, Case C-269/90 Technische Universität München [1991] ECR I-5469, paragraph 14).

103 It must accordingly be held that the applicant is alleging the infringement of a rule which is intended to confer rights on individuals.”

In other words: the principle of impartiality is a Schutznorm. Assessing OLAF’s conduct, the CFI found a conflict of interests with respect to one of its officials. The CFI is quite firm in its criticism of OLAF: “128 The one-sided, and therefore biased, attitude to the Commission’s involvement, which is methodologically suspect given the essential role of the financial monitoring function, could lead only, by omission, to an erroneous appraisal of the precise responsibility of the relevant services of the institution and, accordingly, of their members. …

131 It follows from the above that the content and the conclusions of the OLAF report fail to satisfy the requirement of impartiality. Such an infringement by OLAF of the rule of law concerned represents an infringement which is all the more serious since OLAF was set up in order to carry out investigations into all unlawful activities that might damage the interests of the Communities and against which administrative or criminal proceedings may lie and was established as an autonomous service of the Commission in order to give it the functional independence judged necessary for it to carry out its duties. Furthermore, in the light of the knowledge of the conflict of interest on Mr P.’s part, which OLAF moreover accepted in removing that investigator, the confirmation in the final report of the bias given to the investigation under Mr P.’s influence means that the infringement of the requirement of impartiality is manifest in its nature.”
In addition, the requirements of loss suffered and causation were also satisfied. That is, regarding the claimant’s honour and professional reputation; not for the alleged pecuniary losses. Accordingly, he was awarded €10,000 as non-pecuniary damages.


A case which confirms the Commission’s discretion in the infringement procedure (Art. 226 EC), which makes it impossible to claim compensation from the Community for failure by the Commission to start infringement proceedings against a Member State. The Community cannot be held responsible for lack of financial support to Turkey resulting from the opposition of a Member State. Even if this could constitute a violation of its obligations by a Member State, that does not oblige the Commission to start a 226 EC infringement procedure (para. 51). Therefore, the fact that the Commission did not engage an infringement procedure cannot constitute an illegal act giving rise to non-contractual liability of the Community.


The case raises new points in the context of tortious liability as well as for Community liability in the absence of unlawfulness. No English version was available in April 07. New for liability in tort, and presumably not relevant in the context of liability for lawful acts as it is linked to prohibiting future unlawful conduct, is the ruling that the CFI has the power to order the Commission to do or not to do something. Despite well-established case-law that the Community courts cannot issue any injunctions to the other institutions – see inter alia Case C-63/89 Les Assurances du Crédit v Council and Commission [1991] ECR I-1799, para. 30 – the CFI recognised that it can nonetheless give orders to the Commission as a matter of reparation in kind (para. 63). It noted that Galileo concerns the alleged infringement of a trade mark and that apart from financial compensation the holder of the right is entitled to immediate cessation of any infringements. On the facts, however, no infringement by the Commission of any trademark owned by the claimants was established. Likewise, as noted on our page regarding “EC Liability for Lawful Acts” (see www.francovich.eu), the claimants also failed to make out the case that they had suffered any unusual damage (i.e. going beyond the regular entrepreneurial risks of doing business).

An appeal against the CFI’s judgment is pending before the ECJ under Case No. C-325/06P, O.J. 2006 C 224/28.

Case T-193/04 Tillack [2006] nyr (4 October 2006)

German journalist sues for compensation for damage to his reputation after OLAF had alleged he had bribed a Commission official to obtain information about irregularities. Action dismissed on the ground that no causation was proven with respect to one particular claim and that there was no sufficiently serious breach regarding the other. The judgment clarifies that the principle of sound administration as such is no Schutznorm, i.e. does not confer rights on individuals:

“127 In that regard, first, the principle of sound administration, which is the only principle alleged to have been breached in this context, does not, in itself, confer rights upon individuals (Case T-196/99 Area Cova and Others v Council and Commission [2001] ECR II-3597, paragraph 43), except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (O.J. 2000 C 364, p. 1), which is not the case here.

128 For the sake of completeness, the classification as an ‘act of maladministration’ by the Ombudsman does not mean, in itself, that OLAF’s conduct constitutes a sufficiently serious breach of a rule of law within the meaning of the case-law. In the institution of the Ombudsman, the Treaty has given citizens of the Union, and more particularly officials and other servants of the Community, an alternative remedy to that of an action before the Community Courts in order to protect their interests. That alternative non-judicial remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings (Case T-209/00 Lamberts v Ombudsman [2002] ECR II-2203, paragraph 65).

129 Also, in view of the autonomy granted to OLAF by Regulation No 1073/1999 and of the general objective of press releases of providing information to the public, OLAF enjoys discretion as regards the appropriateness and content of its press releases in respect of its investigatory activities.”

In summary, what is the position regarding “conferral of rights” after these 2006 CFI judgments? Reading Tillack in conjunction with Camos Grau a distinction must be made between the principles of equal treatment – does confer rights as such (see AFC, cited above) – and of sound administration: does not. However, more concrete manifestations of the latter do satisfy the requirement of conferral
of rights on individuals for the purposes of EC liability (following Brassrie and Bergaderm). They are – and as constituting specific rights:

- the right to have affairs handled impartially, fairly and within a reasonable time (Tillack and Camos Grau);
- the right to be heard;
- the right to have access to files;
- the duty to give reasons.

The CFI cited, and was clearly inspired by Art. 41 of the EU Charter of fundamental rights entitled “Right to good administration:”

“1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:
   - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
   - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
   - the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.”

The same provisions may be found in Art. II-101 of the Constitution. How does this approach fit into the CFI’s overarching formulation in San Pedro (cited above) of “conferral of rights?” Presumably, the specific rights are classified as vested rights, like the principles conferring rights; whereas the right to good administration as such features under none of the groupings listed by the CFI. It may be argued that another approach would have been possible, namely to hold that also the right to good administration as such confers rights as it protects individuals’ interests. Future case law might shed some light on the matter.

Finally, it follows from Dolianova, that the general principle of the prohibition of unjust enrichment does satisfy the “conferral of rights” test; in other words: this is a Schutznorm, see this Website “EC Liability for Lawful Acts” (www.francovich.eu).

Further reading

Takis Tridimas, "Liability for breach of Community law: growing up and mellowing down?,” 38 Common Market Law Review 301 (2001)


EC Liability for Lawful Acts

For the first time, with reference to the principle of equality of public burdens (in French: principe d'égalité devant les charges publiques; in German: Sonderopfer), the possibility of Community liability for lawful acts (frequently termed no-fault or strict liability) was considered by the ECJ in 1984, in Case 59/83 Biovilac [1984] ECR 4057. Less detailed, more cursory, consideration to liability for lawful acts was given in Joined Cases 9/71 and 11/71 Compagnie d'Appr. et Grands Moulins de Paris v Commission [1972] ECR 391; in Case 54/76 Lohaec [1977] ECR 645, para. 19; in Case 267/82 Développement and Olemessy v Commission [1986] ECR 1907, para. 33: no need in the present case to consider whether such a principle exists; and in Case 265/85 Van den Bergh en Jurgens [1987] ECR 1155, para. 46.

Without referring to any possible liability in the absence of unlawful conduct but firmly remaining within the confines of tortious liability, the ECJ considered the concept of a disproportionate impact of a licensing scheme on particular operators in Case 81/86 De Boer Buizen [1987] ECR 3677, para. 17 where it held that “[I]t would be for the Community institutions to provide a remedy by adopting the appropriate measures. However, the documents before the Court do not indicate that those conditions were satisfied in this case.”

It was not until 2000 that it explicitly considered this cause of action in the context of Art. 288 EC.

Specific conditions linked - but not identical to - the liability conditions for unlawful conduct were
formulated. See:


Claimant sued the Council and Commission for damages allegedly resulting from the Community trade embargo on Iraq following the invasion of Kuwait in 1990. It alleged that Iraq's refusal to pay debts arising out of an earlier engineering consultancy contract resulted from the embargo and should thus be compensated for by the Community. Dorsch Consult relied on liability for lawful acts which are equivalent to expropriation or, alternatively, for unlawful acts in that the Community should not have adopted the Regulation imposing the embargo without compensatory measures for economic operators affected.

The CFI had dismissed the claim on the grounds of lack of evidence of relevant loss and, in any event, a lack of causation; it did so without forming a view on whether in principle a liability for lawful acts exists or not (see Opinion of A-G La Pergola at No. 6, and a subsequent CFI judgment in T-220/96 EVO v Council and Commission [2002] ECR II-2265).

On appeal, the ECJ, in Dorsch Consult, considered the possibility of liability for lawful acts. It said:

"Preliminary observations

17. It should be pointed out at the outset that the Court of First Instance has rightly pointed out, in paragraph 59 of the contested judgment, that it is settled law of the Court of Justice that if the Community is to incur non-contractual liability as a result of a lawful or unlawful act, it is necessary in any event to prove that the alleged damage is real and that a causal link exists between that act and the alleged damage (Case 26/81 Oleifici Mediterranei v European Economic Community [1982] ECR 3057, paragraph 16, Joined Cases C-258/90 and C-259/90 Pesquerias De Bermeo and Naviera Laida v Commission [1992] ECR I-2901, paragraph 42).

18. The Court of First Instance also rightly considered that it is clear from the relevant case-law that, in the event of the principle of Community liability for a lawful act being recognised in Community law, a precondition for such liability would in any event be the existence of unusual and special damage (see Joined Cases 9/71 and 11/71 Compagnie d'Approvisionnement, de Transport et de Crédit et Grands Moulins de Paris v Commission [1972] ECR 391, paragraphs 45 and 46, and Case 59/83 Biovilac v European Economic Community [1984] ECR 4057, paragraph 28).

19. It follows that the Community cannot incur non-contractual liability in respect of a lawful act, as in the present case, unless the three conditions referred to in the two preceding paragraphs, namely the reality of the damage allegedly suffered, the causal link between it and the act on the part of the Community institutions, and the unusual and special nature of that damage, are all fulfilled."

It can be argued that it follows implicitly from para. 19 that had the applicant managed to prove the requisite form of damage and causation the Community would have been liable for a lawful act. If no such form of liability could exist in Community law there would be no need to consider causation and damage at all. The applicant failed to furnish sufficient evidence of its loss (see para. 24) so the claim was dismissed. The crucial recognition of liability for lawful acts, however, is confirmed by paras. 53 and 54, where the ECJ said:

"53. As has already been held in paragraph 19 of this judgment, the Community can incur non-contractual liability in respect of unlawful acts [see below], as in this case, only if three cumulative conditions are satisfied, namely that the alleged damage was actually suffered, there is a causal link between the damage and the act by the Community institutions, and the damage alleged was unusual and special.

54. The cumulative nature of those conditions means that if one of them is not satisfied, the Community cannot incur non-contractual liability in respect of a lawful act of its institutions. In the present case, it is clear from the whole of the foregoing that the appeal must be rejected in that regard and that it is not necessary to examine the 4th to 17th pleas submitted in it."

(In the 17th plea, the appellant talked about the right to compensation for damage suffered as a result
of a lawful act).

NB Para. 53 of the English version of the judgment erroneously refers to unlawful act. This is clear from paras. 19 and 54 which do refer to lawful acts (see also the French and CMLR versions of the judgment).

The requirements for this liability are distinct from those for liability for unlawful act; they are as follows:

- actual damage, which must also be special and unusual;
- special damage, i.e. disproportionate impact on a particular circle of economic operators;
- unusual damage, i.e. going beyond the limits of the normal (entrepreneurial) economic risks inherent in operating in the sector concerned (cf. Mulder II in the context of liability for legislative acts involving choices of economic policy).

These requirements differ in one respect from those applied by the CFI. The CFI included, in addition to the three listed above that the legislative measure that gave rise to the alleged damage cannot be justified by a general economic interest. The ECJ did not include this factor in its list of requirements.

Subsequent to Dorsch Consult, the CFI considered liability for lawful acts in the following cases. It should be noted, however, that until now (April 07) no single award of damages has been made in this context. This is mainly because the applicants could not prove they had suffered any loss as a result of Community action: simply no relevant damage, and/or no causal link, or the damage would not be special/unusual: see in particular the CFI's Dorsch Consult judgment which goes through all these steps.


It held that the applicant had failed to make the case of unusual damage going beyond the normal economic risks. Perhaps surprisingly, the CFI still talks about a potential recognition of the principle of liability for lawful acts, see:

"171 It should be recalled that, in the event of the principle of such liability being recognised in Community law, a precondition for such liability would in any event be the cumulative satisfaction of three conditions, namely the reality of the damage allegedly suffered, the causal link between it and the act on the part of the Community institutions, and the unusual and special nature of that damage (Case C-237/98 P Dorsch Consult v Council and Commission [2000] ECR I-4549, paragraphs 17 to 19)."

The CFI said the same thing in T- 99/98 Hameico [2003] ECR nyr (judgment of 2 July 2003) at para. 60. Indeed, after it found the applicants had failed to provide any evidence about relevant loss, the CFI explicitly talks about "possible" liability for lawful acts:

"79. The application must therefore be rejected in any event as unfounded and there is no need to rule on the other conditions for the Community to incur liability as a result of an unlawful act or on the conditions for possible liability on the part of the Community as a result of a lawful act [emphasis added]."

I think it can be argued that it follows from Dorsch Consult that the ECJ does recognise the principle as an alternative form of obtaining compensation under Art. 288 EC without there being any unlawfulness. Alternatively, it had simply left the matter open. Apparently, this is the CFI's reading of Dorsch Consult.


Keywords include: "Non-contractual liability - Conditions - Abolition by the Community legislature of tax exemption arrangements for products supplied in the context of the transport of passengers between the Member States - Lawful act - Lack of unusual and special damage - Community liability - Not incurred."

Under the heading "Liability of the Community for a lawful act," the CFI again talks about "in the event
of the principle of Community liability for a lawful act being recognised in Community law” (para. 56),
as in Area Cova. Also like in Area Cova, the conditions of special and unusual damage are not met. In
the formulation of the CFI, they read as follows: “special damage is that which affects a particular
class of economic operators in a disproportionate manner by comparison with other operators and
unusual damage is that which exceeds the limits of the economic risks inherent in operating in the
sector concerned, the legislative measure that gave rise to the damage pleaded not being justified by
a general economic interest” (para. 56).


Bananas case. Yet another reiteration of the then hypothetical liability for lawful acts. See paras. 150-
152, including the statement that the two conditions were not met on the facts:

“150. It should be recalled that, in the event of the principle of non-contractual liability as a result of a
lawful act being recognised in Community law, a precondition for such liability would in any event be
the cumulative satisfaction of three conditions: the reality of the damage allegedly suffered, the causal
link between it and the act on the part of the Community institutions, and the unusual and special
nature of that damage (Case C-237/98 P Dorsch Consult v Council and Commission [2000] ECR I-
4549, paragraphs 17 to 19; and Case T-196/99 Area Cova and Others v Council and Commission

151. In its judgment in Case T-184/95 Dorsch Consult v Council and Commission, cited above, the
Court of First Instance stated that damage is special when it affects a particular class of economic
operators in a disproportionate manner by comparison with other operators, and unusual when it
exceeds the limits of the economic risks inherent in operating in the sector concerned, the legislative
measure that gave rise to the damage pleaded not being justified by a general economic interest
(paragraph 80).

152. Those two conditions are clearly not satisfied in this case.”

(14 December 2005), [2006] 2 CMLR 10

This is one of the numerous claims following from the incompatibility of the EC banana import regime
with WTO rules. It concerns the possibility to bring an action for damages for breach of WTO norms,
but also raises important questions related to liability for lawful acts and the notion of ‘unusual and
special damage’.

The claim is brought by a Community based exporter to the US of paper folding cartons, boxes and
cases, who suffered from the 100% custom duty on these products imposed by the US in retaliation
against the illegal nature of the EC banana regime.

The Court recalls that WTO norms, because of their nature and ‘economie’ can usually not be used to
control the legality of Community acts. Therefore, in principle, their violation cannot engage
Community non-contractual liability (ref. to Cordis and Bocchi Foods). It is only where the Community
intends to implement a particular obligation assumed in the context of WTO or where the Community
measure refers expressly to specific provisions of the WTO agreement that the Court can review the
legality of the conduct of the defendant institutions in the light of WTO rules (ref. to Nakajima) and
WTO agreements (ref. to Biret), which is not the case here (para 131).

The CFI then turns to the possibility of liability for lawful acts. After having referred to De Boer Buizen
(1987) for the existence of such possibility, the CFI recalls the conditions set out in Dorsch Consult.
‘When damage is caused by conduct of the Community institutions not shown to be unlawful the
Community can incur non-contractual liability if the conditions as to sustaining actual damage, to the
causal link between the damage and the conduct of the Community institution and to the unusual and
special nature of the damage in question are all met.’ (para 174).

The CFI confirms the existence of the damage, and provides for an interesting evaluation of the causal
link. The CFI, although it considered that the US only had the possibility, and was not obliged to adopt
retaliation measures, considered that the causal link between the breach by the Community
institutions and the damage was not broken, for the increased custom duties must be ‘regarded as a consequences resulting objectively, in accordance with the normal and foreseeable operation of the TP dispute settlement system .... from the retention in force by the defendant institutions of the bananas import regime incompatible with the WTO agreements.’ (para 198). ‘The conduct of the defendant institutions necessarily led to the adoption of retaliatory measures...so that their conduct must be regarded as the immediate cause of the damage suffered by the applicant’ (para 200).

The next point for examination is thus the ‘unusual and special nature of the damage suffered.’ The CFI recalls that a damage of economic operators is unusual when ‘it exceeds the limits of the economic risks inherent in operating in the sector concerned and special when it affects a particular circle of economic operators in a disproportionate manner by comparison with other operators’ (ref. to Dorsch Consult and Afrikanische Frucht Compagnie). Here the CFI is not convinced that the applicant has suffered such damage in excess of the limits of the risks inherent in its export business. Indeed, it felt that ‘the possibility of tariff concessions being suspended ...is amongst the vicissitudes inherent in the current system of international trade’ and this risk ‘has to be borne by every operator who decides to sell his products on the market of one of the WTO members.’ (para. 211). Since the condition of usual damage is not fulfilled, the CFI does not consider whether the damage is special.


Essentially the same ruling as in Beamglow was given in FIAMM on the same day. Because this is the first time the CFI has actually recognized liability for lawful acts as forming part of the legal landscape, some more detailed analysis is given below. It is recalled that in Dorsch Consult, both the CFI and the ECJ only hypothetically considered the possibility of Community liability for damaging lawful acts. In four judgments of 14 December 2005 (see further below) the CFI has now done just that: ruling that there is such a thing as liability for lawful acts within the meaning of Art. 288 EC. The factual and legal context of FIAMM is very similar to the one obtaining in Beamglow and set out above: loss suffered by traders in the context of retaliatory measures by third States for the breach of WTO law by the EC’s banana regime. After it had rejected the availability of a remedy for unlawful conduct, the CFI held as follows:

“157 Where, as in the present case, it has not been established that conduct attributed to the Community institutions is unlawful, that does not mean that undertakings which, as a category of economic operators, are required to bear a disproportionate part of the burden resulting from a restriction of access to export markets can in no circumstances obtain compensation by virtue of the Community’s non-contractual liability (see, to this effect, Case 81/86 De Boer Buizen v Council and Commission[1987] ECR 3677, paragraph 17).

158 The second paragraph of Article 288 EC bases the obligation which it imposes on the Community to make good any damage caused by its institutions on the ‘general principles common to the laws of the Member States’ and therefore does not restrict the ambit of those principles solely to the rules governing non-contractual Community liability for unlawful conduct of those institutions.

159 National laws on non-contractual liability allow individuals, albeit to varying degrees, in specific fields and in accordance with differing rules, to obtain compensation in legal proceedings for certain kinds of damage, even in the absence of unlawful action by the perpetrator of the damage.

160 When damage is caused by conduct of the Community institution not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution and to the unusual and special nature of the damage in question are all met (Case C-237/98 P Dorsch Consult v Council and Commission, cited in paragraph 155 above, paragraph 19). ...

202 In the case of damage which economic operators may sustain as a result of the activities of the Community institutions, damage is, first, unusual when it exceeds the limits of the economic risks inherent in operating in the sector concerned and, second, special when it affects a particular circle of economic operators in a disproportionate manner by comparison with other operators (see Case T-184/95 Dorsch Consult v Council and Commission, cited in paragraph 155 above, paragraph 80, and Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert v Council and
203 It has not been established in the present case that the applicants suffered, as a result of the incompatibility of the Community regime governing the import of bananas with the WTO agreements, damage in excess of the limits of the risks inherent in their export operations. …

209 It follows that the risks to which the marketing by the applicants of their batteries on the United States market could thereby be exposed are not to be regarded as beyond the normal hazards of international trade as currently organised.”

So, even if the claimant was not successful in the case in hand due to a lack of unusual damage, an important precedent has been set: EC liability in the absence of unlawful conduct. The requirements for this liability are distinct from those for liability for unlawful act; they are as follows:

1. actual damage;
2. causal link between the damage and the conduct of the defendant;
3. this damage must also be both unusual and special: i.e.
   a) unusual damage, i.e. going beyond the limits of the normal (entrepreneurial) economic risks inherent in operating in the sector concerned;
   b) special damage, i.e. disproportionate impact on a particular circle of economic operators in comparison with the other operators.

No award of damages was made despite the presence of actual damage and a direct causal link with the conduct of Community institutions because the requirement of unusual damage was not satisfied. An appeal before the ECJ is pending under Case C-120/06P, O.J. 2006 C 108/6.

Identical rulings to the passages cited above (para. 157 et seq. FIAMM) were handed down on the same date in two judgments not yet available in English (April 07): Case T-151/00 Laboratoire du Bain [2005] ECR nyr and Case T-135/01 Fedon & Figli and Others [2005] ECR nyr. An appeal in the latter case is pending before the ECJ under Case C-125/06P, O.J. 2006 C 108/7.

Case T-279/03 Galileo [2006] ECR nyr (judgment of 10 May 2006); French version may be accessed here.

The case raises new points in the context of tortious liability as well as for Community liability in the absence of unlawfulness. No English version was available in April 07. This is the first application of the now existing liability for lawful acts as first recognised in Beamglow and FIAMM. The CFI confirms the three requirements noted above: actual, unusual and special damage. The applicants were unable to establish the following requirements: causation and unusual damage.

T-333/03 Masdar, nyr, CFI 16 November 2006.

This case makes it clear that 288 EC also covers two other “classic” - at least in continental European legal systems – sources of obligations: unjust enrichment (de in rem verso) and negotiorum gestio.

The CFI cites the ECJ’s Dorsch Consult to confirm the two requirements for liability in the absence of unlawfulness: special and unusual damage, para. 65. Having first recalled the requirements for liability for unlawful conduct, citing Bergaderm, the CFI noted the following:

“63 It should be added that the second paragraph of Article 288 EC bases the obligation which it imposes on the Community to make good any damage caused by its institutions on ‘the general principles common to the laws of the Member States’ and therefore does not restrict the ambit of those principles solely to the rules governing the non-contractual liability of the Community for the unlawful conduct of those institutions.

64 National laws on non-contractual liability enable individuals, albeit in varying degrees, in specific fields and in accordance with differing rules, to obtain compensation in legal proceedings for certain kinds of damage, even in the absence of unlawful action on the part of the perpetrator of the damage.
When damage is caused by conduct of the Community institutions not shown to be unlawful, the Community can incur non-contractual liability if the conditions relating to actual damage, the causal link between that damage and the conduct of the Community institutions, and the unusual and special nature of the damage in question are all met (see, to that effect, Case C-237/98 P Dorsch Consult v Council and Commission [2000] ECR I-4549, paragraph 19).

As regards those two terms, damage is ‘unusual’ when it exceeds the limits of the economic risks inherent in operating in the sector concerned, and ‘special’ when it affects a particular class of economic operators in a disproportionate manner by comparison with other operators (Förde-Reederei v Council and Commission, paragraph 56, and Joined Cases T-64/01 and T-65/01 Afrikanische Frucht-Compagnieand Internationale Fruchtimport Gesellschaft Weichert v Council and Commission [2004] ECR II-521, paragraph 151).

It is in the light of those observations that the applicant’s claim for compensation must be examined.

The applicant claims that its action is well founded since the Commission infringed principles of non-contractual liability recognised in many of the Member States. It refers in that regard to the following actions:

– the civil law action based on the principle of the prohibition of unjust enrichment (de in rem verso);

– the civil law action based on negotiorum gestio;

– the action based on breach of the Community law principle of the protection of legitimate expectations;

– the civil law action based on the fact that the acts of the Commission constitute fault (faute) or negligence which has caused loss.

The Court of First Instance notes that the applicant’s claim for compensation is based, first, on rules on non-contractual liability which do not entail unlawful conduct on the part of the Community institutions or its agents in carrying out their task (unjust enrichment and negotiorum gestio) and, secondly, on the body of rules on the non-contractual liability of the Community for the unlawful conduct of its institutions and agents in carrying out their task (breach of the principle of the protection of legitimate expectations and fault or negligence of the Commission).

Please note the last two entries are of course straightforward tortious liability: unlawful act but the fist two are new. Are these now part of the system? Yes: after it reiterated the possibility of liability based on special and unusual damages, the CFI considered as additional grounds for liability under 288 EC the two cited traditional civil law sources of non-contractual obligations, to wit unjust enrichment and negotiorum gestio:

As set out in paragraphs 63 to 66 above, the second paragraph of Article 288 EC founds an obligation for the Community to make good any damage caused by its institutions, without restricting the rules governing the non-contractual liability of the Community solely to unlawful conduct on the part of those institutions. An act or conduct of an institution of the Community, although lawful, can in fact cause unusual and special damage which the Community is required to make good pursuant to the case-law cited above.

Further, the Community courts have already had the opportunity to apply certain principles in respect of recovery of undue payments, including in relation to unjust enrichment, the prohibition of which is a general principle of Community law (Case C-259/87 Greece v Commission [1990] ECR I-2845, summary publication, paragraph 26; Case T-171/99 Corus UK v Commission [2001] ECR II-2967, paragraph 55; and Joined Cases T-44/01, T-119/01 and T-126/01 Vieira and Others v Commission [2003] ECR II-1209, paragraph 86).

In order to determine whether those principles apply, it must therefore be examined whether the conditions governing the action de in rem verso [unjust enrichment] or the action based on negotiorum gestio are satisfied in this case.
In that regard it is clear, as the Commission submits, that in the factual and legal context of this case actions based on unjust enrichment or negotiorum gestio cannot succeed.

According to the general principles common to the laws of the Member States, those actions cannot succeed where the justification for the advantage gained by the enriched party or the principal derives from a contract or legal obligation. Further, in accordance with those same principles, it is generally possible to plead such actions only in the alternative, that is to say where the injured party has no other action available to obtain what it is owed.”

Accordingly, since there was a contract in this case, the requirement that unjust enrichment must be a subsidiary remedy, i.e. only available when there cannot be a claim based on tort or contract, was not met. However, the possibility of claiming compensation from a public authority such as the European Commission on such grounds, albeit exceptionally, does exist within the framework of Article 288 EC. The CFI noted that there was no enrichment nor an impoverishment without cause since there was a contract:

“It follows that any enrichment of the Commission or impoverishment of the applicant, as it arose from the contractual framework in place, cannot be described as being without cause.

Similar reasoning may also be used to rule out the application of the principles of the negotiorum gestio civil action which, according to the general principles common to the laws of the Member States, lends itself only very exceptionally as a means to establish liability on the part of the public authorities in general, and more particularly in the factual and legal context of this action. The conditions governing the civil action based on negotiorum gestio are manifestly not satisfied for the following reasons.

Performance by the applicant of its contractual obligations with regard to Helmico cannot reasonably be described as benevolent intervention in another’s affairs which it is imperative to manage, as required by the action in question. Before undertaking to continue the Russian project and the Moldova project, the applicant contacted the Commission’s services in October 1998, which precludes its action from being benevolent in nature. Next, the conclusion which the applicant draws from the letter of 5 October 1998 that the Commission was not able to manage the projects in question appears to be wrong in the light of the content of that letter, in which the Commission expressly refers to the possibility that it would ‘explore alternative means for safeguarding the completion of the project’. Finally, the applicant’s argument is also in conflict with the principles of negotiorum gestio as regards the principal’s awareness of the manager’s action. The manager’s action is generally carried out without the knowledge of the principal, or at least without the latter being aware of the need to act immediately. Yet the applicant itself submits that its choice to continue with the work in October 1998 was induced by the Commission.”

It follows that the requirements for a successful claim based on negotiorum gestio were not met on the facts. The conditions include:

- benevolent intervention in others’ affairs, i.e. without having contacted them
- impossibility of the principals to manage their own affairs, i.e. persons whose affairs are managed by the intervener/manager
- absence of knowledge by principal or unawareness of principal of the manager’s action.

The CFI referred to the “principles of negotiorum gestio” as its source of inspiration for drawing up these conditions. They are recognised as general principles of law within the meaning of Art. 288 EC and based on civil law traditions.

Finally, the CFI considered whether the applicant had suffered any special and unusual damage as required under the Dorsch Consult principles. Examination of “unusual damage” revealed that that was not the case:

“103. It has not been established that the applicant suffered unusual and special damage going beyond the limits of the economic and commercial risks inherent in its operations. In all contractual relationships there is a certain risk that a party will not perform the contract satisfactorily or will even
become insolvent. It is for the contracting parties to mitigate that risk in a suitable manner in the contract itself. The applicant was not unaware that Helmico was not fulfilling its contractual obligations, but knowingly chose to continue to fulfill its own obligations rather than to take formal action. In so doing it ran a commercial risk which could be described as normal. Whether that choice was induced by the Commission and/or was in whole or in part motivated by the belief that the Commission would ensure that it was paid for its services if Helmico was not in a position to do so therefore falls within the scope of the plea relating to infringement of the principle of the protection of legitimate expectations.

104. It follows from the foregoing that the first two pleas, regarding the general principles common to the laws of the Member States on non-contractual liability in the absence of fault, must be dismissed as unfounded."

The applicants also failed to convince the CFI that the conditions for liability based on breach of the principle of legitimate expectations had been met nor could the CFI find any negligent conduct by the Commission.

The CFI does not refer in Masdar to its own 2004 rulings in Case T-166/98 Dolianova [2004] ECR II-3991. This is remarkable as it had there ruled that the notion of unjust enrichment may be equally relevant in the context of liability for unlawful conduct: “regular” tort liability of the Community. It would seem to follow that there would be no need for any consideration of unjust enrichment as a matter of liability for lawful acts. It declared that the Commission was to make good the damage sustained by the applicants in part based on the finding that the principle of prohibition of unjust enrichment had been infringed. The factual and legal context of this case is complex but may it suffice, for the purpose of liability, to point out that the claimants had paid deposits for aid in the wine sector and they had fully complied with all the requirements and had supplied their products to another actor in the supply chain who had gone bankrupt.

“159 In those circumstances, the Community obtained unjust enrichment as a result of the absence of full payment of the aid concerned to the applicants, whilst the security, provided by DAI [the approved distiller] – in order to guarantee that preventive distillation was carried out lawfully and to obtain payment of that aid by way of an advance – and redeemed by AIMA [the intervention agency], had been entered by the latter in the EAGGF accounts in 1991.


161 The conclusion that must be drawn is that the system of indirect payment of aid introduced by Article 9 of Regulation No 2499/82 manifestly infringes the general principle prohibiting unjust enrichment, since that system was not accompanied by any procedure to ensure payment of Community aid to producers, in the event of the insolvency of the distiller, where all the conditions for granting aid were none the less met.

162 Regulation No 2499/82 is therefore vitiated by a sufficiently serious breach of the principle prohibiting unjust enrichment, the purpose of which is to confer rights on individuals."

There is no doubt that this judgment - Dolianova - does not concern a claim for unjust enrichment as such, i.e. as a cause of action in its own right for this is what the CFI said in response to the form of order sought by the claimants who had requested the Court to order the Commission to pay them “also on the ground of unjust enrichment and/or by way of compensation for damage within the meaning of Article [288] of the EC Treaty:”

“B – The action for damages and the claim for reimbursement of unjust enrichment
Admissibility of the claim for reimbursement of unjust enrichment

84 The alternative forms of order sought by the applicants, namely that the Commission should be ordered to pay them the Community aid in question by way of reimbursement of unjust enrichment, must be rejected at the outset as inadmissible, since the Treaty makes no provision among the remedies it puts in place for bringing an action for unjust enrichment. That does not however
determine the validity of the plea alleging infringement of the rule prohibiting unjust enrichment, since the abovementioned alternative forms of order can be interpreted as meaning that the applicants are relying in particular on this rule in support of their claim for compensation (see paragraphs 159 to 164 below [cited above, GB])."

The interrelationship between these two cases needs clarification because it would seem to follow that after Masdar, the same claim for unjust enrichment can be based on two different causes of action with differing requirements for liability. Despite the high threshold for tort liability, it is easier to obtain "compensation" than to claim for "unjust enrichment": the latter requiring that the claimant has suffered special and unusual damage.

**Fundamental Rights**

During the 1998 Intergovernmental Conference which led to the Treaty of Amsterdam, the UK had proposed to include in the EC Treaty a provision on Member State liability for breach of Community law; it was so formulated as to significantly reduce the Member States' exposure to liability. The draft Article on damages claims met with little support. As the Treaty does not contain any rules on State liability, its development in the foreseeable future remains a matter for the courts.

See for a political science point of view on the negotiations during the pre-Amsterdam IGC: Jonas Tallberg, "Supranational influence in EU enforcement: the ECJ and the principle of state liability", 7 Journal of European Public Policy 104-121 (2000).

To date, there is still no written law, i.e. no codification of the Francovich principles, in any of the Treaties. There is, however, a constitutional dimension to the liability of public authorities for damage resulting from a breach of Community law in the form of fundamental rights guarantees. The most visible linkage of non-contractual liability to human rights concerns the as yet non-binding Charter of Fundamental Rights of the European Union, O.J. 2000 C 364/1. Actually, this Charter is not directly dealing with State liability but with liability of the European Community only. But given the ECJ's uniform approach to State and EC liability the constitutional dimension of liability as such affects both (see on developments in the latter context this Website's section on "Tort Liability of the European Community").

The Charter of Fundamental Rights refers to liability of the Community as part of Chapter 5 Citizens’ Rights. Article 41, Right to Good Administration, is broadly formulated as the right of every citizen to have their affairs handled timely, impartially and fairly; procedural rights are further specified such as the right to be heard. In addition section 3 reads:

"Every person has the right to have the Community make good damage caused by its institutions or by its servants in the performance of their duties, in accordance with general principles common to the laws of the Member States."

The Charter has been incorporated into the EU Constitution as its Part II. No changes have been made to the cited provision (newly numbered as Article II-101). A Treaty establishing a Constitution for Europe was adopted and signed in Rome, 29 October 2004, O.J. 2004 C 310 (16 December 2004). However, entry into force of the Constitution remains uncertain after the June 2005 European Council decided to introduce a period of reflection until mid 2006 in the wake of the French and Dutch referenda rejecting the Constitution. See further the Website on the Constitution.

In substance, this provision copies the current liability provision in the EC Treaty, Article 288, which also proclaims in broad terms a right to compensation based on the general principles common to Member States. Nothing is added in terms of a specification of liability requirements. However, the 'fundamentalisation' of the right to compensation would limit both the Community legislature and the judiciary in laying down rules and decisions restricting citizens’ claims for compensation. More particularly and already relevant under current law, they have to remain within the boundaries set by the European Convention of Human rights. Although of course not bound by the European Court of Human Rights' judgments as such, these rulings are still an important source, indeed the pre-eminent source, for the European Court of Justice in ascertaining what impact provisions such as Arts. 6 and
This case law reflects, in terms of current Treaty provisions, Article 46 of the Treaty of European Union (ex Article L) and Article 6(2) TEU. Art. 46 TEU declares applicable to the TEU the provisions on the powers of the ECJ under the EC, ECSC and the EAEC Treaties to the extent as provided for in this Article 46 itself. Included is Article 6(2) TEU (ex article F) on the respect for human rights, but only 'with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty'. Article 6(2) TEU reads as follows:

'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

The Court therefore has jurisdiction to review the compatibility of Community acts with the ECHR. However, this power merely confirms that the ECJ already reviewed Community acts for compatibility with human rights as general principles of EC law. Nonetheless, explicit Treaty recognition of this power legitimises the Court's role and may provide an impetus for future rulings. This is relevant, as said, in the context of an Article 288 EC (ex Article 215) damages action, and can thus, under the Brasserie principle of ius commune, indirectly affect the liability of Member States, as certain limitations to the right to compensation may constitute a violation of human rights.

Accordingly, an examination of the requirements imposed by the ECHR on the availability of a right to compensation is called for. There are a number of "Strasbourg judgments" (European Court of Human Rights) on the fundamental rights dimension of non-contractual liability.

Pressos Compania Naviera

In this case, the European Court of Human Rights ruled that a claim for compensation of loss suffered, based on tort, is an 'asset' and therefore constitutes a 'possession' within the meaning of Article 1 of Protocol No. 1 to the European Convention of Human Rights; Article 6(1) ECHR was not examined by the Court because the complaint overlapped with the one regarding Protocol 1 (Pressos Compania Naviera and Others v Belgium, Series A, Vol. 332; 21 E.H.R.R. 301 (1996), judgment of 20 November 1995).

Osman


This case concerned a restriction of the possibility to sue the police under English law. An action based on the tort of negligence failed on the ground of public policy, i.e. that the police should be immune from liability with respect to the investigation and suppression of crime. According to the Court, although the exclusionary rule is not an absolute bar to civil action, in the instant case no examination of the merits had taken place; the dismissal of the action by the English courts was tantamount to granting immunity to the police; the police was shielded from any liability in the context of exercising its powers of investigation. Accordingly, the Human Rights Court declared unanimously, there had been a disproportionate interference with the applicants' right of access to a court (breach of Article 6 ECHR). Because of this infringement of Art. 6, there was no need to deal with Article 13 (effective remedy), the requirements of which are less strict and were here absorbed by Art. 6.

Further reading

The requirements of Article 13, right to an effective remedy, are considered in this case. These vary depending on the kind of violation in issue, albeit that any remedy must be effective in practice as well as in law. In Keenan, the Court found an infringement of the right to life (Article 2). Given the fundamental importance of Article 2, Art. 13 requires, in this context, not only payment of compensation but also an investigation capable of leading to punishment, including access for the complainant to this procedure. More particularly, it was held that in the circumstances of this case - a mother bringing proceedings after her son had committed suicide in prison - where both Articles 2 (right to life) and 3 (inhuman treatment) had been breached, compensation for non-pecuniary must be available as part of the range of possible remedies. "The Court concludes that the applicant should have been able to apply for compensation for her non-pecuniary damage and that suffered by her son before his death" (para. 130).

In this case, the ECtHR admits that its ruling in Osman was based on a misunderstanding of the English law of negligence. It acknowledges that the approach by the HoL in Bedfordshire to liability of public authorities in the exercise of their statutory duties to protect children from abuse did not constitute, on second thought, an immunity from suit altogether. Rather, the House of Lords had decided not to extend liability in negligence to situations where it didn't exist before. Also, the ECtHR admitted that the English striking out procedure does not hamper access to justice:

97. ... there is no reason to consider the striking out procedure which rules on the existence of sustainable causes of action as per se offending the principle of access to court. In such a procedure, the plaintiff is generally able to submit to the court the arguments supporting his or her claims on the law and the court will rule on those issues at the conclusion of an adversarial procedure (see paragraphs 66 to 68 above)."

It now held:

"98. ... that decision [Bedfordshire] concerned only one aspect of the exercise of local authorities' powers and duties and cannot be regarded as an arbitrary removal of the courts' jurisdiction to determine a whole range of civil claims (see Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294, pp. 49-50, § 65). As it has recalled above in paragraph 87 it is a principle of Convention case-law that Article 6 does not in itself guarantee any particular content for civil rights and obligations in national law, although other Articles such as those protecting the right to respect for family life (Article 8) and the right to property (Article 1 of Protocol No. 1) may do so. It is not enough to bring Article 6 § 1 into play that the non-existence of a cause of action under domestic law may be described as having the same effect as an immunity, in the sense of not enabling the applicant to sue for a given category of harm." And:

"100. ... the Court is satisfied that the law of negligence as developed in the domestic courts since the case of Caparo (cited above, paragraph 58) and as recently analysed in the case of Barrett v. Enfield LBC (loc. cit.) includes the fair, just and reasonable criterion as an intrinsic element of the duty of care and that the ruling of law concerning that element in this case does not disclose the operation of an immunity. In the present case, the Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law. There was no restriction on access to court of the kind contemplated in the Ashingdane judgment (cited above, loc. cit.)."

Accordingly, there was no breach of Art. 6 (fair trial). The issue, properly defined is whether there has been a breach of Art. 13 (effective remedy) in the wake of the already acknowledged violation of Art. 3 (inhuman treatment). The ECtHR confirmed its earlier case law on the role and scope of Art. 13 and, applied to this instance, involving a breach of Art. 3, concluded that it had indeed been breached. It said:

"109. ... There should however be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their
rights under the Convention. Furthermore, in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress.

110. The applicants have argued that in their case an effective remedy could only be provided by adversarial court proceedings against the public body responsible for the breach. The Court notes that the Government have conceded that the range of remedies at the disposal of the applicants was insufficiently effective. They have pointed out that in the future under the Human Rights Act 1998 victims of human rights breaches will be able to bring proceedings in courts empowered to award damages. The Court does not consider it appropriate in this case to make any findings as to whether only court proceedings could have furnished effective redress, though judicial remedies indeed furnish strong guarantees of independence, access for the victim and family and enforceability of awards in compliance with the requirements of Article 13 (see, mutatis mutandis, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, § 67).

111. The Court finds that in this case the applicants did not have available to them an appropriate means of obtaining a determination of their allegations that the local authority failed to protect them from inhuman and degrading treatment and the possibility of obtaining an enforceable award of compensation for the damage suffered thereby. Consequently, they were not afforded an effective remedy in respect of the breach of Article 3 and there has, accordingly, been a violation of Article 13 of the Convention."


The matter of an effective remedy was considered here in the context of English family law. K.M., the daughter, alleged that she had been separated from her mother, T.P. and taken into care without having any access to a court. The national law context concerns the liability of local authorities in respect of child care; the applicants claimed damages on the basis of the torts of breach of statutory duty and negligence. What requirements does the Convention lay down with respect to the possibility to rely on these torts? Unlike in Osman, the Court notes that in this case there was no question of the applicant's claim not being assessed due to an exclusionary rule, a blanket immunity from liability. It found no breach of Art. 6 as their claims had been properly and fairly examined in the light of the applicable law on negligence; there was no denial of access to a court in this respect.

As for Art. 13 (effective remedy), the Court outlined that where there is an arguable breach of a Convention right, a mechanism for establishing any State liability must be available, including compensation for immaterial loss. The Court found that in this case the applicants had been deprived of an appropriate means for obtaining a determination of allegations that the local authority had breached their right to family life and compensation for loss resulting from this breach. Although court proceedings are not necessarily the only means of redress, "judicial remedies indeed furnish strong guarantees of independence, access to the victim and family and enforceability of awards in compliance with the requirements of Article 13" (para. 109).

ECHR 16 April 2002 Dangeville (No. 36677/97), (2004) 38 EHRR 32

State liability in the context of VAT; violation of Art. 1 of Protocol 1 (protection of property). Claimant sought reimbursement/compensation for VAT levied contrary to EC law. No claims met with any success. The ECtHR notes that Dangeville had a valid claim against the State for VAT paid in error. Such a claim constitutes an asset and therefore a possession within the meaning of Art. 1 Protocol 1. Two Conseil d'Etat judgments were held to entail an interference with the claimant's entitlement under Community law; see for more details the National Courts section of this Website. Specifically on the tort remedy, the ECtHR held as follows:

"56. With regard to the judgments of the Conseil d'État, the Court notes that the Government's case is based on the application of an established jurisprudential principle, namely the "classification of remedies" or "classification of proceedings" rule. The rule prevents a claim being brought under the general law of tort for a remedy that has previously been refused in a special form of action. According
to the Government, the Conseil d'État had merely applied that rule when it held that the first judgment of 1986 gave rise to an estoppel by record.

With regard to the argument concerning the application of the "classification of remedies" rule, the Court need only refer to its preceding observations (see paragraph 47 above) and sees no reason to adopt a different approach when assessing the "general interest". Furthermore, in the circumstances of the present case the Conseil d'État's particularly strict interpretation of that procedural rule deprived the applicant company of the sole domestic procedure that was capable of affording it a sufficient remedy to ensure compliance with the provisions of Article 1 of Protocol No. 1 (see, mutatis mutandis, Miragall Escolano and Others v. Spain, 25 January 2000, § 38).

The Court can discern no other reason that could serve to justify on general-interest grounds the Conseil d'État's refusal to give effect to a directly applicable provision of Community law. As to the ECJ's Fantask judgment cited by the Government (see paragraph 54 above), the Court fails to see why it should offer any justification either, since it deals with time-limits for appeals and reliance on limitation periods under national law to resist actions for repayment of charges when they become payable, and not, as in the instant case, a refusal to take the right to reimbursement itself into account (see paragraph 36 above)."

Please note that the ECtHR regarded a claim under general tort law as the only sufficient remedy in this case; its non-availability violated Art. 1 Protocol 1 (possession of property rights).


Deals with deaths and destruction of property caused by methane gas explosion of a rubbish tip. Insufficient redress at national level contrary to the procedural obligations included in Article 2 ECHR (right to life). The Court held that it was not necessary to consider Arts. 6 and 13 given the breach of Art. 2 and the special circumstances of the case.


Substantive restrictions of Finnish State liability law found to be contrary to Art. 6. The case concerns the impact of fishing limitation measures to protect stocks on contractual fishing rights. The restrictions were legitimate in the general interest of stock preservation but the claimant had been unable to effectively litigate the case before the national courts. As far as the tort dimension is concerned, after it had noted that judicial review was unavailable, the ECtHR said:

"63. Neither has the evidence adduced convinced the Court that the applicants were required by the terms of Article 35 § 1 of the Convention to lodge a claim for damages under the Tort Liability Act so as to obtain compensation from the State for the effects of the 1996 and the 1998 decrees on their livelihood. It is true that the courts would have been competent in constitutional terms - and even required - to refrain from applying the decrees had they found them incompatible with the Constitution or ordinary law such as the Act no. 438/1990 incorporating the Convention. Even so, the State could have been held vicariously liable only if the applicants had succeeded in establishing that a representative of the executive branch had failed in his or her duty to take a measure or perform a task that could reasonably have been required in light of the nature and purpose of the activity in question. It has not been convincingly demonstrated that the applicants could have expected with any reasonable degree of likelihood to obtain damages from the State on the basis of its liability for such mistakes or omissions in the use of public authority - even less so as the impugned decrees were undoubtedly based on formally correct statutory law, namely the Fishing Act."

It follows that the requirement to identify a failure to perform a duty by a member of the executive constituted a barrier to access to justice.


No cause of action for damages in negligence or breach of statutory duty against a local authority for alleged failure to protect children in its area under English tort law, i.e. the leading case of X and Others v. Bedfordshire County Council [1995] 2 A.C. 633, [1995] 3 All. E.R. 353 (HoL). In the instant case the ECtHR found no violations of Arts. 3 and 8 by the public authorities as there was no evidence
of possible sexual abuse. Neither was there a breach of Art. 6. Nonetheless, the ECtHR ruled that Art. 13 had been breached:

"136. The Court has not found it established in this case that there has been a violation of Article 3, or Article 8, of the Convention in respect of the applicants' claims that the authorities failed in a positive obligation to protect them from the abuse of their stepfather, N.C. This does not however mean, for the purposes of Article 13, that their complaints fall outside the scope of its protection. These complaints were not declared inadmissible as manifestly ill-founded and necessitated an examination on the merits. It is not disputed that the applicants did suffer appalling abuse at a time when they were under the supervision of the local authorities. The issue as to whether the local authority should have been aware of what was going on and taken steps to safeguard the applicants required consideration of documentary records going back over thirty years. While the Court was not persuaded on the materials available before it that these disclosed a situation where the local authorities knew of, or had reason to suspect, the sexual abuse, this Court's role is essentially subsidiary to that of the domestic courts who are better placed and equipped as fact-finding tribunals. An effective domestic procedure of enquiry would have offered more prospect of establishing the facts and throwing light on the conduct reasonably to be expected from the social services in a situation where the applicants demonstrated long-term and serious problems that arguably might have called for additional efforts of investigation to uncover the reality of the family dynamics.

137. The Court is satisfied therefore that the applicants' complaints raised arguable claims of violations of the Convention for the purposes of Article 13 of the Convention.

138. The applicants did not however have available to them an appropriate means of obtaining a determination of their allegations that the local authority failed to protect them from serious ill-treatment or the possibility of obtaining an enforceable award of compensation for the damage suffered thereby. Consequently, they were not afforded an effective remedy in respect of their claims of a breach of Articles 3 or 8 and there has, accordingly, been a violation of Article 13 of the Convention."


Disclosure of CCTV footage of applicant on national television by local authority contrary to Art. 8 Privacy. No effective remedy under English law? The ECtHR notes that various avenues of redress are not relevant in this case:

"103. The Court notes in this regard that the applicant did not complain about malicious acts on the part of the Council, about untrue reports or, at least directly, about an attack on his reputation. It is not disputed that issues of trespass, harassment, nuisance, copyright, breach of contract or secret surveillance by security services have no relevance to the applicant's complaints. Similarly, the Government did not suggest that the Data Protection Act, the Sexual Offences (Amendment) Act 1976, the Children and Young Persons Act 1933 had any relevance to the facts of the present case. The Human Rights Act 1998 did not come into force until October 2000 after the relevant facts of the applicants' case."

It then assessed remedies such as judicial review, the Media Commissioners and a civil action in breach of confidence: they were inadequate. Consequently, there was a breach of Art. 13 (right to an effective remedy).


Action for damages for death in prison under the Fatal Accidents Act 1976. The Court ruled that inhuman treatment within the meaning of Art. 3 ECHR had taken place. As for effective remedy under Art. 13, the Court confirmed its ruling in Z v. UK that breach of Arts. 2 and 3 require compensation for non-pecuniary loss. It then ruled:

"65. While the Government referred to internal prison remedies as being available to Judith McGlinchey to complain about any ill-treatment prior to her death, the Court observes that they would not provide any right to compensation for any suffering already experienced. The Court has already
found, in its decision on admissibility, that no action in negligence could be pursued in the civil courts where the impugned conduct fell short of causing physical or psychological injury. It is not apparent that, in an action for judicial review, which Judith McGlinchey could have brought alleging that the prison had failed in its duty to take reasonable care of her in custody and which could have provided a means of examining the way in which the prison authorities carried out their responsibilities, damages could have been awarded on a different basis. Though the Government argued that this inability to pursue a claim for damages flowed from the facts of the situation and not from any omission in the law, it remains the case that no compensation is available under English law for the suffering and distress which has been found above to disclose a breach of Article 3 of the Convention.

66. The question arises whether Article 13 in this context requires that compensation be made available. The Court itself will often award just satisfaction, recognising pain, stress, anxiety and frustration as rendering appropriate compensation for non-pecuniary damage. In the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies.

67. In this case therefore, the Court concludes that Judith McGlinchey, or the applicants acting on her behalf after her death, should have been able to apply for compensation for the non-pecuniary damage suffered by her. As there was no remedy which provided a mechanism to examine the standard of care given to Judith McGlinchey in prison and the possibility of obtaining damages, there has, accordingly, been a breach of Article 13 of the Convention.”

It follows that any breach of Arts. 2 and 3 require the availability of a tort (tort like) remedy even where under national law, the requirements as to actionable damages were not met, with the result that no judicial consideration of the standard of care by the prison service could take place.


Right to privacy and effective remedy in the context of criminal law: police electronic surveillance equipment in applicant's home. Like in Khan (ECHR 12 May 2000, No. 35394/97) there was a breach of Art. 8 as there was no statutory system to regulate the use of this equipment (not in accordance with the law).

“27. The Government accepting that the applicant did not enjoy an effective remedy in domestic law at the relevant time in respect of the violation of his right to private life under Article 8, the Court finds that there has been a violation of Article 13 in this regard.”

See also ECHR 25 September 2001, P.G. and J.H. v. UK (No. 44787/98).


A police officer used lethal force against the applicant's brother. As the policeman genuinely believed to have been under a mortal threat, the use of force was proportionate; there was no breach of art. 2 ECHR (right to life). However, the ECtHR did find a breach of Art. 13 (effective remedy) for it ruled as follows:

“170. According to the Court's case-law, Article 13 applies only where an individual has an “arguable claim” to be the victim of a violation of a Convention right (see Boyle and Rice v. the United Kingdom, judgment of 27 April 1988, Series A no. 131, § 52, Douglas-Williams v. the United Kingdom (dec.), no. 56413/00, 8 January 2002). Although it has found that there has been no breach of Article 2 in this case, that does not prevent the applicant's complaint under that Article from being “arguable” for the purposes of Article 13 (see Kaya, cited above, § 107). It notes in this connection that although the inquest procedure provided in the circumstances an effective mechanism for subjecting the circumstances surrounding the killing of Michael Fitzgerald to public and searching scrutiny, and thereby satisfied the respondent State's procedural obligations under Article 2, no judicial determination has ever been made on the liability in damages, if any, of the police on account of the manner in which the incident was handled and concluded. It is true that the Coroner's jury returned a verdict of lawful killing at the close of the inquest. However, that finding cannot be taken to be dispositive of the issue of whether or not any civil liability attached to the police, a matter which has to be resolved in a different domestic fact-finding forum and according to different principles of law and in
application of a different standard of proof. Moreover, the Court's own finding on the basis of the materials before it that there has been no substantive breach of the right to life was reached in the light of the relevant principles derived from its case-law in this area, and in particular from the standpoint of the authorities' Convention liability (see paragraphs 134-136 above).

171. The Court recalls in this connection that it has already had occasion to declare that in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should, in principle, be available as part of the range of redress (see Z and Others v. the United Kingdom [GC], no. 29392/95, § 109, ECHR 2001-V, Keenan v. the United Kingdom, no. 27229/95, § 129, ECHR 2001-III, Paul and Audrey Edwards v. the United Kingdom, no. 46477/99, §§ 97-98, ECHR 2002-II).

172. In the instant case, it is to be noted that the applicant is excluded from the scope of the Fatal Accidents Act 1976 since she is not a "dependant". Furthermore, the most that could be recovered under the Law Reform (Miscellaneous Provisions) Act 1934 on behalf of the deceased's estate would have been funeral expenses. It must be concluded that the applicant had no prospect of obtaining compensation for non-pecuniary damage suffered by her if, ultimately, a court were to rule in her favour. The Court would add that the impossibility to recover compensation for non-pecuniary damage would almost certainly have had a negative bearing on any application by her for legal aid to take civil proceedings against the police.

173. For the above reasons, the Court concludes that there has been a breach of Article 13 of the Convention. [Six votes to one; Judge Zagrebelsky partly dissenting.]

ECHR 6 October 2005 Maurice v. France (Application No. 11810/03), see also Draon v. France (Application No. 1513/03) of the same date

Citing Pressos Compania Naviera, the ECtHR held a French Act of Parliament to be contrary to Article 1 Protocol 1 (protection of property) on the grounds that it retrospectively restricted a claim for damages against State institutions, which, under the previously applicable non-contractual liability regimes, would have been liable to provide full compensation for any negligence.

This case concerns the controversial French law of March 2002 which effectively overruled case law by both the Conseil d'Etat and the Cour de Cassation in so-called wrongful birth and wrongful life claims. Put shortly, that case law recognised the compensation of all loss (pecuniary as well as non-pecuniary) in situations where doctors had negligently advised pregnant women that their foetuses were healthy. After birth, it turned out that the babies were severely handicapped whereas it was not disputed that the pregnancies would have been (lawfully) terminated had the right information been provided. In issue in particular are compensation for the costs of upbringing of the unplanned child and the extra measures of care relating to the handicap (e.g. building work to the home etc.)

The European Court ruled that the absence of any transitional measures respecting pending claims breached the Convention. The regime as such was not held to be contrary to the Convention in the light of the wide margin of appreciation States enjoy in this sensitive policy area. After the Court had concluded that the claim for damages based on tort was a possession within the meaning of the Convention and that there had been an interference with the right to peaceful enjoyment of this possession, the Court assessed whether that interference could be justified. The test involves the following three elements: whether it was provided by law, whether in the public interest and the proportionality of the interference. It ruled as follows:

"90. In the present case, however, section 1 of the Law of 4 March 2002 abolished purely and simply, with retrospective effect, one of the essential heads of damage, relating to very large sums of money, in respect of which the parents of children whose disabilities had not been detected before birth, like the applicants, could have claimed compensation from the hospital held to be liable. The French legislature thereby deprived the applicants of an existing "asset" which they previously possessed, namely an established claim to recovery of damages which they could legitimately expect to be determined in accordance with the decided case-law of the highest courts of the land. 91. The Court cannot accept the Government's argument that the principle of proportionality was respected, provision having been made for an appropriate amount of compensation, which would thus constitute a satisfactory alternative, to be paid to the applicants. It does not consider that what the
applicants could receive by virtue of the Law of 4 March 2002 as the sole form of compensation for the special burdens arising from the disability of their child was, or is, capable of providing them with payment of an amount reasonably related to the value of their lost asset. The applicants are admittedly entitled to benefits under the system now in force, but the amount concerned is considerably less than the sum payable under the previous liability rules and is clearly inadequate, as the Government and the legislature themselves admit, since these benefits were extended recently by new provisions introduced for that purpose by the Law of 11 February 2005. Moreover, neither the sums to be paid to the applicants under that law nor the date of its entry into force for disabled children have been definitively fixed (see paragraphs 57 to 59 above). That situation leaves the applicants, even now, in considerable uncertainty, and in any event prevents them from obtaining sufficient compensation for the damage they have already sustained since the birth of their child. Thus, both the very limited nature of the existing compensation payable by way of national solidarity and the uncertainty surrounding the compensation which might result from application of the 2005 Act rule out the conclusion that this important head of damage may be regarded as having been reasonably compensated in the period since enactment of the Law of 4 March 2002.

The Court notes that it covers non-pecuniary damage and disruption to the applicants’ lives, but not the special burdens arising from the child’s disability throughout her life. On this point, the Court is led to the inescapable conclusion that the amount of compensation awarded by the Paris Administrative Court was very much lower than the applicants could legitimately have expected and that, in any case, it cannot be considered to have been definitively secured, since the award was made in a first-instance judgment against which an appeal is pending. The compensation thus awarded to the applicants cannot therefore compensate for the claims now lost.

Lastly, the Court considers that the grounds relating to ethical considerations, equitable treatment and the proper organisation of the health service mentioned by the Conseil d’Etat in its opinion of 6 December 2002 and relied on by the Government could not, in the instant case, legitimise retrospective action whose result was to deprive the applicants, without sufficient compensation, of a substantial portion of the damages they had claimed, thus making them bear an individual and excessive burden.

Such a radical interference with the applicants’ rights upset the fair balance to be maintained between the demands of the general interest on the one hand and protection of the right to peaceful enjoyment of possessions on the other.

In so far as it concerned proceedings pending on 7 March 2002, the date of its entry into force, section 1 of the Law of 4 March 2002 therefore breached Article 1 of Protocol No. 1 to the Convention.”

As said, the legality of the regime itself was unaffected. The new regime as such survived Strasbourg’s scrutiny:

“123. However, in deciding that the costs of caring for disabled children should be borne by reliance on national solidarity, the French legislature took the view that it was better to deal with the matter through the legislation laying down the conditions for obtaining compensation for disability than to leave to the courts the task of ruling on actions under the ordinary law of liability. Moreover, the Court notes that the previous legal dispensation, which had obtained since 1975, was thoroughly overhauled by the Law of 11 February 2005 (see paragraphs 54 to 59 above). It is certainly not for the Court to take the place of the national authorities in assessing the advisability of such a system or in determining what might be the best policy in this difficult social sphere. This is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation (see, mutatis mutandis, Powell and Rayner v. the United Kingdom, cited above, § 44).”

Finally, the Separate Opinion of Judge Bonello is noteworthy:

5. Before 2002 all doctors in France were equal before the law. Like all other professionals (lawyers, architects etc.) they were fully liable in negligence. By virtue of the 2002 Law, those who practice pre-natal detection are now less equal than others. Their negligence carries a considerably lighter price tag than that of all other professionals. In my book, unequal disposal of equal guilt is no less pernicious than equal disposal of unequal guilt.

6. The internationally accepted norm remains the principle of liability. Every person who has, through malice or negligence, caused harm to others is bound to make good all damage occasioned. The 2002 Law has derogated from this principle. All medical practitioners remain subject to the principle
and consequences of liability, except those working in one particular branch of medicine. The latter the 2002 Law has protected in an eminently privileged fortress, totally immune from suits in material damages. I see this discriminatory immunity not so much in the light of Article 14, but rather as another element to factor in when assessing the proportionality of the interference.

7. The 2002 Law not only improperly thwarted the applicants' Convention rights, but did this through the medium of an improper agency: the creation of a total immunity from the risk of material damages. Immunity, detestable by nature, appears doubly so when wielded to maim fundamental rights.

8. Some immunities, like diplomatic immunity, judicial immunity and partial parliamentary immunity, are the result of historical imperatives and functional necessities. They enjoy the legitimation of long-standing acceptance and tradition, and a proven advantageousness that somehow neutralises the odium of a protection that is unequal between the immune and the non-immune.

9. But to ring in, pace the 21st century, a new immunity tailored to the comfort of one handpicked class of one handpicked profession was, to my way of thinking, the most efficient way of achieving a disagreeable disturbance of Convention rights.

10. The creation of brand-new immunities from suit, as in the present case, automatically brings into play a new suspect classification, which should have had the double effect of shifting the onus of justification onto the Government and of burdening the Court with a duty of more stringent scrutiny.

11. The impunity engineered by the 2002 Law was intended to salvage some medical practitioners from the consequences of their own deficit of diligence, while abandoning all others to full responsibility in negligence and tort. This has nothing to do with other so-called acceptable "immunities", like the capping of the liability of air carriers. That limitation comes into being by prior international agreement and is contractually accepted beforehand by the eventual victim of damage through the mere purchase of an air ticket publicising that limitation.

12. The Government, which lost no opportunity of re-crafting the law to their own financial advantage, have lost the opportunity of justifying, by compelling reasons, the creation of a suspect unequal protection; and the Court has not scrutinized all the more stringently the emergence of this "parvenu" immunity.

It would seem to follow that an unduly restrictive approach to Francovich liability could give rise to similar criticisms.

State Liability under EEA law

Introduction

In its judgment in Rechberger, the European Court of Justice cites a ruling by the Court of the European Free Trade Association (EFTA Court) which establishes the principle of State liability for breach of the Agreement creating the European Economic Area (EEA, O.J. 1994, L 1/3) by EFTA States (see below, No. 1). The EFTA Court was established instead of an EEA Court because the latter was held to be incompatible with Community law by the ECJ in Opinion 1/91, [1991] ECR I-6079, [1992] 1 C.M.L.R. 245. The arrangement of the judicial control under the final version of the EEA Agreement was declared compatible with the EC Treaty by the ECJ in Opinion 1/92, [1992] ECR I-2821. A crucial feature of the judicial architecture and its modus operandi of the EEA is the linkage with the case law of the ECJ. The EEA Agreement declares applicable a large part of the acquis communautaire, such as consumer protection directives, in the EEA. Such provisions of EEA law are identical to their EC law counterparts. It is an aim of the EEA Agreement that both sets of rules are interpreted and applied as uniformly as achievable (homogeneity of interpretation).

A number of mechanisms have been put in place to achieve this homogeneity, such as a system of exchange of information between the ECJ, the EFTA Court and the highest courts of the EFTA States about their case law relevant to the EEA. According to Article 6 EEA 'the provisions of this Agreement [the EEA Agreement], in so far as they are identical in substance to corresponding rules of the [EC and the ECSC] Treaty and to relevant secondary Community law must be interpreted 'in conformity with the relevant rulings of the' ECJ 'given prior to the date of signature' of the EEA. In addition, a Joint Committee has been established to accomodate the reception of ECJ case law given after the signing of the EEA. Also, a Protocol to the EEA empowers EFTA States to confer on their courts the right to request the ECJ to give a preliminary ruling on the interpretation of EEA rules corresponding to EC rules. However, no EFTA State has given this power to their courts. By contrast, they are entitled to
request the EFTA Court to give so-called advisory opinions on the interpretation of the EEA Agreement.

EFTA Court Decisions

In Sveinsbjörnsdóttir the EFTA Court ruled on the failure to (correctly) implement Directive 80/987/EEC on the protection of employees against insolvent employers by Iceland and the liability of an EFTA State (it is recalled that Francovich itself involved the same Directive). The EFTA Court noted that there is no explicit provision of EEA law laying down State liability for `incorrect adaptation of national law' (para. 48). But is such a principle implicit in the EEA Agreement, in the light of its stated purpose and legal structure?

The EFTA Court notes the requirement of a homogeneous interpretation and application of EEA law with EC law and the acknowledgement of judicial protection of individual rights conferred by EEA law. In a passage well worth quoting it said:

"59. The Court concludes from the foregoing considerations that the EEA Agreement is an international treaty sui generis which contains a distinct legal order of its own. The EEA Agreement does not establish a customs union but an enhanced free trade area, see the judgment in Case E-2/97 Maglite [1997] EFTA Court Report 127. The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law."

In this passage the EFTA Court gives a ruling analogous to the ECJ's Van Gend en Loos case (Case 26/62 [1963] ECR 1), recognising a new legal order rather than a mere intergovernmental cooperation, albeit, apparently, of a less far reaching kind than the EC legal order. With this approach, in accordance with the homogeneity principle, the EFTA Court follows the rulings of the ECJ in Francovich. By the same token, the EFTA Court refers to Article 3 EEA (equivalent of Article 10 EC Treaty (ex Article 5): Community good faith) as a further basis for State liability. The conditions for liability as recognized by the EFTA Court under EEA law faithfully reflect the ECJ's case law, in particular its post-Francovich developments in Brasserie and Dillenkofer (three conditions, including a sufficiently serious breach).

The principle of EFTA State liability itself is laid down in equally broad terms as under Community law. The EFTA Court: "It follows from all the foregoing that it is a principle of the EEA Agreement that the Contracting Parties are obliged to provide for compensation for loss and damage caused to individuals by breaches of the obligations under the EEA Agreement for which the EFTA States can be held responsible" (para. 62). But a specific feature of EFTA State liability under EEA law, as opposed to Member State liability under EC law, is the absence of a transfer of legislative powers by the EFTA States to supranational organs. The EFTA Court thus added that - the principle of State liability being an integral part of the EEA Agreement - "it is natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of State liability" (para. 63). Apparently, the EFTA Court does not recognize a form of direct effect of the principle inherent in the Agreement but insists on construing the national implementing laws accordingly.

It follows from this ruling that the principle of State liability for breach of EC law has been extended to the Contracting States of the EEA Agreement, i.e. Iceland, Liechtenstein and Norway (Switzerland, although a Member State of EFTA does not participate in the EEA). The ius commune in Europe is expanding.
Case E-4/01 Karlsson [2002] EFTA Court Reports 240; [2002] 2 CMLR 60

This judgment confirms the Court's recognition of State liability in Sveinbjornsdottir as part of EFTA law. The EFTA Court itself, in its 10th anniversary publication "The EFTA Court - Legal Framework, Case Law, and Composition 1994-2003 (2004 www.eftacourt.lu)", summarizes the case as follows:

"The Court rejected the argument put forward by the Government of Norway that the principle of state liability is in any way contingent upon recognition of a principle of direct effect of EEA rules. And it did not accept the contention that the concept of state liability under the EEA Agreement must be limited
to incorrect implementation of directives. An EEA State may be liable to a prospective importer of alcoholic beverages for loss or damage incurred as a result of the maintenance of such a State alcohol monopoly.

The Court reiterated that compensation is due if the infringed rule of EEA law confers rights upon individuals, if the breach of EEA law by the respective government is sufficiently serious, and if there is a causal link between the infringement and the damage sustained. From 1 January 1994, the date of entry into force of the EEA Agreement, until 1 December 1995, when the Icelandic State monopoly on the import and wholesale distribution of alcoholic beverages was abolished, Karlsson was prohibited from importing into Iceland the alcoholic beverages for which it was the agent and from distributing such products to retailers.

The EFTA Court held that Iceland had infringed the EEA Main Agreement because it had not abolished its alcohol import monopoly by 1 January 1994. The Court found that the rule in question - Article 16 EEA, the provision mirroring Article 31(1) EC - did in fact confer rights upon individuals and that Iceland's breach of that provision was sufficiently serious to trigger liability. With regard to the latter, the EFTA Court held that the breach had persisted despite settled case law of the Court of Justice of the European Communities and the EFTA Court. It was clear long before the entry into force of the EEA Agreement that an import monopoly could not be maintained.

The Court found that the Icelandic State, having negotiated, drafted, signed, and ratified the EEA Agreement, was in the best position to assess the legislative amendments required to comply with the Agreement and had an obligation to do so before the entry into force on 1 January 1994. The time available was also considered sufficient. Whether there was a causal link between the infringement and the damage sustained was left to the national court to decide.

National courts decisions
Sweden (pre-accession)


These two decisions of the Supreme Court of Sweden deal not with the obligation for a state to compensate individuals for damage resulting from a breach of Community law by a Member States, but for damage resulting from a breach of the European Economic Area (EEA) agreement by a state of the European Free Trade Association (EFTA). One of the questions asked is whether the principle of state liability, developed on the basis of the specific nature of Community law, can see its application extended to the EEA agreement, which is of a different nature.

Facts and procedure: At the time of the facts, in 1994, Sweden was still a member of the EFTA and not a member of the EU, but had committed itself to integrate some EC directives within the framework of the EEA agreement. Two women, who were respectively the wife and mother of the owner of the small company in which they worked, were refused the guarantee of payment of salaries when the company went bankrupt. Indeed, the Swedish legislation in force then did not recognise such guarantee to, inter alia, relatives of the owner of the company. This was in breach of Directive 80/987 on the approximation of Member States legislation relating to the protection of employees in the case of insolvency of the employer, which the Swedish state had committed itself to transpose. The two women therefore claimed damages against the Swedish states on the basis of the Francovich jurisprudence. The Stockholm tribunal admitted their action, but the Swedish state had appealed the decision to the Court of Appeal, which judged that there were fundamental differences between the EEA agreement and EC law, and therefore the ECJ case law, based on the peculiarities of EC law, could not create rights for individuals in EFTA states. The two women challenged this decision before the Supreme Court, which accepted to decide on it.

Decision: The Supreme Court first examined whether the EEA agreement could confer on an EFTA state a duty to compensate, and more particularly whether the Francovich case law constitutes relevant case law as mentioned in Article 6 EEA. The Supreme Court considers that the simple fact that the ECJ did not interpret a specific provision of the Treaty but decided the case on the basis of a principle inherent to the Treaty implies that Francovich does not constitute relevant legislation referred to in Article 6 and cannot therefore be applied in the case at hand. The Supreme Court adds that the
EEA agreement does not possess any of the specific features of the EC legal order, such as direct effect, and therefore neither Article 6 EEA nor the Francovich case can create a duty of an EFTA state to compensate. However, the Supreme Court then turns to the EFTA court and asks whether the case law of this court, which recognised an obligation to compensate as inherent to the EEA agreement (E-9/97 Sveinbjörnsdóttir/Island and E-4/01 Karlsson/Island), should be taken into account. Although the decisions of this court are not binding and only have consultative value, they are nevertheless of significant value, as confirmed by the preamble of the EEA agreement. Therefore, one could only depart from them if there are particularly important reasons for doing so.

Comments: The decision, taken with a small majority of three against two, remains ambiguous (at least from its summary report in Reflets). It is not clear whether, in the case at hand, the principle of state liability should apply, if not by reason of the ECJ case law, at least on the basis of the EFTA court case law. The court seemed to suggest that such a principle should apply, unless there are serious grounds against it. The question of the nature of these serious grounds is, however, left open.

Norway

This is the first Norwegian case concerning State liability for breaches of EEA law, in that case the wrongful transposition of a directive.

In Finanger I (16 November 2000, Storebrand Skadesforsikring AS/Veronika Finanger), the Norwegian Supreme Court had established that the Norwegian legislation, which excluded the possibility for a person injured in a car accident to claim damages if he or she knew or should have known that the driver was drunk when he or she got into the car, and that the accident was caused by such state of the driver, was contrary to EEA law, and in particular Directive 72/166, 84/5 and 90/232 on car insurance. However, the court considered that the directives' provisions were not directly effective and that the Norwegian legislation could not be interpreted in conformity as the national legislation, non unambiguous, left no such margin of interpretation. It therefore rejected Mrs Finanger's claim for damages.

The Oslo Tingrett, the first instance court, must now decide on whether the Norwegian state should be liable to pay damages to Mrs Finanger for erroneous transposition of the motor insurance directives.

The decision of that court is remarkable, not only because of its Euro-friendly stand, but also by the quality of its reasoning, which reflects a significant understanding of the case law on State liability, but also of the nature of interactions between the domestic and European legal orders within the context of legal pluralism, and the duties that it imposes on domestic courts.

The Oslo first instance court decided that the State was under a duty to pay compensation, based on EEA law, and independently of domestic public tort law. To reach this outcome, the court first considered the objective and structure of the EEA agreement and the law transposing it (i.e. common rules providing for identical effects in case of violation); then it referred to the EFTA court’s case law which decided that parties to the EEA agreement were obliged to compensate for erroneous transposition of a directive.

Following this, the court applied the conditions for State liability provided by the EFTA court, which correspond to three criteria proposed by the ECJ in Francovich and Brasserie. The parties in the case all agreed on the fact that the directives conferred rights and that the causal link existed. However, they disagreed on the seriousness of the breach. The court considered that the breach was sufficiently serious. In order to support this finding, the court relied on the following elements:
- the directives were clear and left no doubt regarding the wrongful nature of the Norwegian implementation;
- according to the ECJ Francovich and Dillenkofer rulings, the decisive criteria is that of manifest and grave disregard by the state of the limits of its discretion; this applies were directives leave a margin of discretion to the state, which is not the case here;
- the Justice Ministry was aware of the incompatibility of the Norwegian legislation with the directives. In any case, the intentional or negligent nature of the breach is not decisive;
- State liability aims at guaranteeing the effectiveness of EEA law, necessary to the creation of a
dynamic and homogenous market;
according to ECJ ruling Lomas, a simple breach can be sufficient to establish the existence of a
sufficiently serious breach, where a State did not have to make normative choice and have a very
limited margin of manoeuvre; according to the EFTA court Karlsson decision, the conditions of
application of State liability under EEA law may not be the same as under EU law; however,
differences must be justified.
account should be taken of the case law of other member States; the court refers to the decision of the
Islandic Supreme Court which condemn Iceland to damages for erroneous transposition of a Directive,
which suggests that a simple erroneous transposition may suffice to engage State liability.
The financial damage suffered by Mrs Finanger is significant;
There is no major difference between non-transposition and delayed transposition on one side, and
erroneous transposition on the other. According to EFTA decision in Karlsson, the three conditions of
State liability apply, notwithstanding whether the damage results from omission or adoption of
measures contrary to EEA law.

2. Høyesterett, 28 October 2005, Veronika Finanger/Staten v/ Justitsdepartment (Finanger II), Norsk

The Norwegian Supreme Court confirmed the Oslo court decision in first instance. In relation to the
existence of a sufficiently serious breach, the Supreme Court refers to the Karlsson decision of the
EFTA court which provides for the factors which must be taken into account in order to assess
whether a breach is sufficiently serious (i.e. clarity and precision of the rule breached, measure of
discretion, etc.); it then refers to the ECJ Brasserie ruling (paras 45-47) which brings together State
and Community liability. The Supreme Court concludes that where states have a wide margin of
discretion, the threshold for liability is higher (manifest and grave violation); however, where states do
not have such margin, the threshold is lower. The margin of discretion is one elements amongst
others. Moreover, the liability threshold must not be so high as to make the availability of the remedy
purely hypothetical.

The majority in the Supreme Court decided that there was a sufficiently serious breach for two
reasons:
the three directives left no margin of discretion to the state, for they did not allow exceptions in case of
drunk driving;
the national legislation provides for a gap in the insurance cover of the driver, which is contrary to the
directives; this lacuna results from a legislative fault.

In this decision, the Supreme Court, whilst confirming the first instance decision, departs from its
reasoning. In many respect, the reasoning of the first instance court is more conform to European
legal reasoning in relation to State liability, than that of the Supreme Court. Indeed, the focus of the
first instance court on the degree of discretion follows the ECJ paradigm, whilst that of the Supreme
Court relies on a notion of fault, rejected by EC law.

Further reading
John Forman, "The EEA Agreement Five Years On: Dynamic Homogeneity in Practice and its
Carl Baudenbacher, "The EFTA Court - An Example of the Judicialisation of International economic

State Liability under Public International Law

The UN's International Law Commission adopted Draft Articles on the Responsibility of States for
internationally wrongful acts in 2001. By Resolution 56/83 of 12 December 2001, the UN General
Assembly took note of them and "commen[ed] them to the attention of Governments without prejudice
to the question of their future adoption or other appropriate action". The ILC suggested the UNGA
consider the Draft Articles with a view to concluding a Convention on the topic at a later stage.
The Articles detail the various elements of a comprehensive State liability regime, including the autonomous nature of the regime under international law, the definition of this "tort" as a wrongful act or omission attributable to the State and exemptions from liability.

A comprehensive dossier on the ILC Articles is available at Cambridge University's Lauterpacht Research Centre for International Law: State Responsibility Project.

Further reading

Bodansky, Cook and Crawford, "The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: a Retrospect," 96 American Journal of International Law 874 (2002);


Political responses to Francovich

In 2005, a group of MPs proposed a Private Member Bill aimed at facilitating the adoption of national measures incompatible with EC law. The European Community Act 1972 (Disapplication) Bill provides for the legislator to insert, in legislative or regulatory acts, a provision for the non-application of the EC Act (on which the binding nature of Community law in the UK is based). Where invoked, this provision would limit the obligation to comply with Community law to the extent that it does not conflict with the provisions of the legislative or regulatory act at stake.

Section 1 of the Bill provides:
(1) Community treaties, Community instruments and Community obligations shall be binding in legal proceedings in the United Kingdom only insofar as they do not conflict with an enactment to which subsection (2) applies.
(2) This subsection applies to any enactment which includes the words: “The provisions of this enactment shall take effect notwithstanding the provisions of the European Communities Act 1972.”.

This Bill was adopted in first reading by the House of Commons on June 22, 2005, and a second reading was planned for June 16, 2006. However, the Bill has now been dropped.

The text is available at www.publications.parliament.uk/pa/cm200506/cmbills/029/2006029.pdf