

Post-Francovich judgments by the ECJ

1. [Case C-334/92 Wagner Miret v Fondo de Garantia Salarial](#), [1993] ECR I-6911.

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](#)

2. [Case C-91/92 Faccini Dori v Recreb](#) [1994] ECR I-3325, [1995] 1 C.M.L.R. 665.

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.

3. [Case C-192/94 El Corte Inglés v Blázquez Rivero](#) [1996] ECR I-1281; [1996] 2 C.M.L.R. 507. 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).'

4. Joined Cases C-46/93 & C-48/93 [Brasserie du Pêcheur and Factortame III](#) [1996] ECR I1029; [1996] 1 C.M.L.R. 889. 'Cybernote' by Gerrit Betlem, '[The King Can Do Wrong. State Liability for Breach of European Community Law in the post-Francovich Era](#)', [1996] 4 [Web Journal of Current Legal Issues](#).

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'.

5. Case C-392/93 [R v HM Treasury, ex parte British Telecommunications](#) [1996] ECR I-1631; [1996] 2 C.M.L.R. 217.

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](#).

6. Case C-5/94 [Hedley Lomas](#) [1996] ECR I-2553; [1996] 2 C.M.L.R. 391.

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.'

Joined Cases C-178, 179 and 188-190/94 [Dillenkofer and Others](#) [1996] ECR I-4845; [1996] 3

C.M.L.R. 469.

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.'

8. Joined Cases C-283/94, C-291 and C-292/94 [Denkavit Internationaal and Others v Bundesamt für Finanzen](#) [1996] ECR I-5063; [1996] 3 C.M.L.R. 504.

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.

Joined Cases C-192/95 to C-218/95 [Comateb and Others](#) [1997] ECR I-165; [1997] 2

C.M.L.R. 649.

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](#).

10. Case C-66/95 [Sutton v Secretary of State for Social Security](#) [1997] ECR I-2163; [1997] 2 C.M.L.R. 382.

Preliminary ruling on the interpretation of [Directive 79/7/EEC on equal treatment of men and women in social security](#). The case concerns calculation of interest on arrears of benefits. Under reference to [Francovich](#), Ms. Sutton alternatively claims compensation, calculated as interest due on late payment. 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 II 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.

11. Joined Cases C-94 and C-95/95 [Bonifaci and Others](#) [1997] ECR I-3969; [1998] 1 C.M.L.R. 257.

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 Advocate 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.

12. Case C-373/95 [Maso](#) v *INPS* [1997] ECR I-4051; [1997] 3 C.M.L.R. 1244.

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.

13. Case C-261/95 [Palmisani](#) v *INPS* [1997] ECR I-4025; [1997] 3 C.M.L.R. 1356.

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.

Case C-242/95 [GT-Link A/S v Danske Statsbaner DSB](#) [1997] ECR I-4449; [1997] 5 C.M.L.R.

601. 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.

15. Case C-54/96 [Dorsch Consult Ingenieurgesellschaft](#) [1997] ECR I-4961; [1998] 2 C.M.L.R. 237.

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*.

16. Case C-90/96 [Petrie and Others v Università degli studi di Verona et Camilla Bettoni](#) [1997] ECR I-6527; [1998] 1 C.M.L.R. 711.

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.

17. Case C-97/96 [Daihatsu](#) [1997] ECR I-6843. 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](#). Case C-111/97 [Evobus](#) [1998] I-5411.

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.

19. Case C-127/95 [Norbrook Laboratories](#) v MAFF [1998] ECR I-1531; [1998] 3 C.M.L.R. 809.

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).

20. Case C-319/96 [Brinkmann Tabakfabriken](#) v Skatteministeriet [1998] ECR I-5255; [1998] 3 C.M.L.R. 673.

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 constitute 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 the presence 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*-connection as the criterion for (primary) causal connection: the breach of Community law in the form of non-transposition of the Directive was not material to the damage, because with or without it, the authorities would have taken 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.

21. Case C-131/97 [Carbonari](#) [1999] ECR I-1103.

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 *Faccini 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.

22. Case C-258/97 [Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft](#) [1999] ECR I1405.

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).

23. Case C-302/97 [Konle v Austria](#) [1999] ECR I-3099; [2000] 2 C.M.L.R. 963.

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).

In this last passage the Court implicitly refers to the well known *Rewe* provisos: in the terms of the ECJ itself: the principle of equivalence and the principle of effectiveness (see, in particular, Case C-326/96 *Levez* [1998] ECR I-7835; [1999] 2 CMLR 363 (judgment of 1 December 1998, para. 18).

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. 24Case C-140/97 *Rechberger and Others v Austria* [1999] ECR I-3499; [2000] 2 C.M.L.R. 1.

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: the end of the transposition period. This incorrect implementation by Austria constitutes a sufficiently serious breach of Community law, according to the Court (para. 53). There was also a second way in which 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 *Francoovich* 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 88/987/EEC. 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 whether the State was in an error about the appropriate measures that should be taken to reach the prescribed objectives or whether 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 developed 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.

25. Case C-81/98 [Alcatel Austria](#) [1999] ECR I-7671.

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 entailed 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 been 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*).

26. Case C-424/97 [Haim v Kassenzahnärztliche Vereinigung Nordrhein \(Haim II\)](#) [2000] ECR I-5123.

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 opposes 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 an 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 to 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). 27. Case C-150/99 [Stockholm Lindöpark](#)[2001] ECR I-493 (judgment of 18 January 2001); [2001] 2 C.M.L.R. 16 (p. 319).

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, it 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.

28. Joined Cases C-397/98 and C-410/98 [Metallgesellschaft and Others](#) [2001] ECR I-1727, [2001] C.M.L.R. 32 (p. 700), judgment of 8 March 2001.

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 Giorgio* 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.

29. Case C-118/00 [Larsy](#) [2001] ECR I-5063 (judgment of 28 June 2001).

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 *Metallgesellschaft* 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 ... 30Case C-224/01 in *Köbler v Republic of Austria* [2003] ECR I-10239 (judgment of 30 September 2003); [2003] 3 C.M.L.R. 28 (p. 1003)

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 Bundesverwaltungsgericht) 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.

Source: "Annex VI Application of Community Law by national courts: A Survey," 19th Annual Report on Monitoring the Application of Community Law (2001), COM(2002)324, 28/6/2002, available online at the Commission's Website: http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm.

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 *Kobler* 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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32. Case C-63/01 [Evans v Secretary of State for the Environment, Transport and the Regions, Motor Insurers' Bureau](#) [2003] ECR I-4447 (judgment of 4 December 2004); [2004] 1 CMLR 47.

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 definition of compensation; the inclusion of interest and costs, including its basis for calculation. These questions arose in a claim for damages against the State for failure to implement the Directive correctly. The outcome of this reference is decisive for the existence and nature of any breaches

of EC law giving rise to a right to compensation. See the judgment of the Court of Appeal in the national Courts Section dismissing the State's appeal against the High Court's references to the ECJ in this case: *Evans* (CA).

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 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31, and Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 26).

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).

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.

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.

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).

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).

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 and Others* [1996] ECR I-5403, paragraph 61, and WWF and Others, cited above, paragraph 70). 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.

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

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).

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.

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).

34. Case C-222/02 [Paul and Others](#) v. *Germany* [2004] ECR I-9425 (judgment of 12 October 2004); [2006] 2 CMLR 62.

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.

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.

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.

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.

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.

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.

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 national authorities.

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 of 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-*Franovich*. 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 *Franovich* 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” (recital 25). Should not “watchdog liability” be an essential supplement too?

Further reading: Michel Tison, “Do not attack the watchdog! Banking supervisor’s liability after *Peter Paul*,” 42 CMLRev. 639 (2005) and in Dutch: [Agnes van Rossum](#), *Civielrechtelijke aansprakelijkheid voor overheidstoezicht*, preadvies NJV (Deventer: Kluwer 2005).

35. C-173/03 [Traghetti del Mediterraneo SpA v Repubblica Italiana](#) [2006] ECR I-5177 (13 June 2006); [2006] 3 C.M.L.R. 19

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). is 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).

36. Case C-470/04 [N v Inspecteur van de Belastingdienst Oost/kantoor Almelo](#) [2006] ECR I-7409 (7 September 2006) 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 *Metallgesellschaft 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.

37. Case C-300/04 [Eman and Sevinger](#) [2006] ECR I-8055 (judgment of 12 September 2006)

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 nonmember country, whereas such a right is not conferred on Netherlands nationals resident in the Netherlands Antilles or Aruba.

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 I-403, paragraph 95).

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.

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.

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 C46/93 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 I-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).

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).

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 FII 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?

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?

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 *Metallgesellschaft* (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 *Rewe* provisos

(principles of equivalence and effectiveness). It is for the national court to decide whether the particular losses incurred by the claimants were in fact caused by the breach of EC law by the UK. The ECJ then went on to consider possible Francovich liability after it noted that a State may always be liable under less restrictive conditions under its own law (reiteration of para. 66 *Brasserie*). The three basic liability requirements were noted. It then gave some detailed guidance on how they apply in the case in hand:

“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.”](#)

Case C-278/05 *Carol Marilyn Robins and Others v Secretary of State for Work and Pensions* [2007] ECR nyr (25 January 2007) 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 C224/01 *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.

(cf. Opinion A-G Kokott at Nos. 97-99).

40. Case [C-524/04 *Test Claimants in the Thin Cap Group Litigation*](#) [2007] ECR nyr (13 March 2007) 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.”

[C-470/03 A.G.M. COS.MET Srl v Suomen valtio, Tarmo Lehtinen](#), 17 April 2007, nyr. 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.