

## The Principle of State Liability

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

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

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

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

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

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

The above constitutes the first step in the ECJ's development of a unified liability regime for both Member States and the Community under Article 288 EC. Following its announcement in *Brasserie*, the Court firmly established this *ius commune* in its [Bergaderm judgment of 4 July 2000](#) (Case C352/98 P, [2000] ECR I-5291). The three requirements for both EC and State liability are now identical. They are: (1) conferral of a right on individuals; (2) a sufficiently serious breach and (3) a direct causal link between the loss and the breach. See the page on [EC Liability](#) for a more detailed discussion.

Further reading

See for a thorough overview up until mid 2002: Carsten Kremer, "Liability for Breach of European Community Law: An Analysis of the New Remedy in the light of English and German Law," in: P. Eekhout and T. Tridimas (eds.), [22 Yearbook of European Law](#) (2003); see also Georgios Anagnostaras, 'The Principle of State Liability for Judicial Breaches: the Impact of European Community Law' 7:2 *European Public Law* 281-305 (2001).

On the merger of EC and State liability, see Takis Tridimas, 'Liability for Breaches of Community law: Growing Up and mellowing Down' 38 *Common Market Law Review* 301-332 (2001).

On the more theoretical aspects of the case law, see Carol Harlow, '*Francovich* and the Problem of the Disobedient State,' 2 E.L.J. 199 (1996). On the specific issue of the allocation of responsibility, see Georgios Anagnostaras 'The allocation of responsibility in State liability actions for breaches of Community law' 26 *European Law Review* 139158 (2001).

For an examination of *Francovich* in the context of environmental protection, see Han Somsen, "*Francovich* and its application to EC environmental law," in: Han Somsen (ed.), *Protecting the European Environment: Enforcing EC Environmental Law* (London: Blackstone 1996), 135-150.

For political science perspectives, see Jonas Tallberg, 'Supranational influence in EU enforcement: the ECJ and the principle of state liability', 7 [Journal of European Public Policy](#) 104-121 (2000) and Geoffrey Garrett, R. Daniel Kelemen, and Heiner Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' 52(1) [International Organization](#) 149-176 (1998).