From *Francovich* to *Köbler* and beyond:

The evolution of a State liability regime for the European Community

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The law looks only to the distinctive character of the damage alone, and treats the persons as equal, if one commits and the other suffers injustice, and also if one has done and the other suffered damage. So that the judge endeavours to make this injustice, which is unequal, equal.

Aristotle, Nicomachean Ethics, Book V, Chapter IV
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Preface

I have been interested in the topic of Member State liability for breach of EC law ever since my participation at the European Law Moot Court 2003/2004 competition, where the case was relevant with the evolution of the Francovich doctrine. Even from that time, as an undergraduate student at the Faculty of Law of the Aristotle University of Thessaloniki, Greece, I found it very stimulating to study this new remedy for the protection of individuals’ rights, which was progressively employed through the case law of the Court of Justice.

During my postgraduate studies on European Law at the Faculty of Law of the University of Helsinki, I had the opportunity to look deeper into the relevant case law and realized that, surprisingly, in the post-Francovich era, no State liability actions have been directed against my home country, Greece, notwithstanding the poor record that it traditionally possesses in the implementation and enforcement of Community law. My surprise became even bigger when I realised that the Greek law on civil liability of the State, dating long before the establishment of a State liability regime within the Community, is fully compatible with the substantive conditions that were subsequently set by the ECJ. These factors gave me an even stronger impetus to deal with the topic.

In writing this paper I would like to thank my supervisor at the University of Helsinki, professor Juha Raitio, for his encouragement, support and understanding throughout the academic year. I would also like to mention Mr. Niilo Jääskinen, judge at the Supreme Administrative Court of Finland, for devoting some of his time to reply to my questions as regards the application of the Francovich doctrine in Finland and Mr. Dimosthenis Lentzis, PhD candidate at the Faculty of Law of the Aristotle University and my coach at the European Law Moot Court competition 2003/2004, whose ideas and friendship have always offered me valuable guidance. Finally, I would like to thank my family for all the support they are offering me in order to achieve my academic goals and my friends back in Greece for always being there whenever I need them.
Introduction

The European Community, an autonomous legal order, is a creation of law and a source of law at the same time. The Court of Justice of the European Communities\(^1\) has played a pivotal role in securing that the rule of law is observed and, pursuant to Article 220 EC Treaty\(^2\), it has tried to ensure that neither the Member States nor the Community institutions would avoid “a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”\(^3\). As a community based on law, the European Community, is necessarily dependent on the assumption that the legal obligations which stem from its constituent document shall be fully respected by its subjects, namely the Member States, its own institutions and private individuals.

The EC Treaty, like any other international treaty, confirms the *pacta sunt servanda* principle and contains a number of supervisory procedures to ensure that the law it establishes shall be observed. Article 226 entrusts a supranational institution, the Commission, to initiate proceedings before the ECJ each time it considers that a Member State has failed to fulfil its obligations under the Treaty, whereas Article 227 gives the same opportunity to other Member States\(^4\). The dispute is subsequently taken to the Court which, if it considers that the Member State in question has acted in breach of Community law, shall record the violation in a judgement taking the form of a declaration that the Member State has failed to fulfil its Community obligations.

This judgement of the Court, even declaratory in nature, is binding and, pursuant to the first paragraph of Article 228 EC Treaty, the Member State is obliged to terminate the violation found by the Court, though it can choose the way this will be done\(^5\). However, Member States have not always been willing to comply with the judgements of the Court in infringement proceedings, a fact that has raised the concern of the European Commission to such an extent to point out in 1989 that “this situation gives rise for concern as it undermines the fundamental principles of the

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\(^1\) Hereinafter mentioned as “the Court” or “the ECJ”.

\(^2\) Article 220: “The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.”


\(^4\) Article 227 has been rarely used due to the political implications it would occasion between Member States. However, see Case 141/78, *France v. United Kingdom* [1979] ECR 2923 and, more recently, Case C-388/95, *Belgium v. Spain* [2000] ECR I-3121.

Community based on law". Therefore, the Maastricht Treaty amended Article 228 EC Treaty to include a procedure for the imposition by the Court, after a second round of infringement proceedings initiated by the Commission, of fines to Member States that fail to give effect to its decisions under Article 226.

Still, however, the long and cumbersome procedure to reach this "ultima ratio which enables the Community interests contained in the Treaty to be protected against the inertia and resistance of the Member States" is not devoid of criticism for its practical effects. Political considerations enter the picture during the so-called administrative face of the whole procedure, when the Commission has almost absolute discretion as to whether and when it shall bring the proceedings. The role of individuals is almost non-existent, even though the Commission relies to a great extent on their complainants to sustain its position in law enforcement. A further problem with Article 226 EC is that it is primarily interested in enforcing EC law against the State than providing a remedy for the injured party, as individuals are not provided with compensation for the period that they have been deprived of their Community rights due to the illegal conduct of the Member States.

The whole historical background of the late 1990’s, with the pressure posed by the imminent 1992 deadline for the completion of the internal market, to be achieved largely through harmonization by directives, made the problem of Community law enforcement more acute. As Steiner writes, "despite redoubled efforts by the Commission under Article 226 States continued to neglect their duties of implementation and even successful proceedings failed to secure compliance… If the internal market programme were to succeed, something more had to be done".

Once again, the Court gave the solution. As one commentator has remarked, "besides the delegated enforcement power at the centralized EU level, an additional instrument has been created at the national level through the ECJ’s transformation of

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7 The first time that the Court imposed a financial penalty to a Member State was in Case C-387/97, Commission v. Greece [2000] ECR I-5047 for failure to implement Directives 75/442 and 78/319 on waste disposal.
the preliminary ruling procedure under Article 234 into a means of enforcement”\textsuperscript{12}.

Like it had happened with primacy or the direct and indirect effect of EC law, the ECJ once again took advantage of its authoritative position in interpreting Community law in a preliminary ruling coming from Italy so as to establish another, equally fundamental principle for the effectiveness of EC law, principle; the liability of Member States for breach of Community law.

Faithful to its opinion that “the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 226 and 227 to the diligence of the Commission and of the Member States”\textsuperscript{13}, the Court chose to involve once again the citizens and their national courts in the application and enforcement of Community law and, at the same time, fill a legislative lacune in the legal protection of individuals for breaches of EC law attributed to Member States. As has been noted, only on account of linking substantive rights with a remedy, individuals could live up their role of enforcement agents of Community law, which they had been given in \textit{Van Gend en Loos}\textsuperscript{14}. With its ruling in the eponymous \textit{Francovich} case\textsuperscript{15}, the ECJ presented the principle of State liability as the logical consequence of the basic constitutional values underlying the Community legal order and in this sense, the obligation of restitution of damage \textit{qua} Member State could be read as inherent in the system of the Treaty. At the same time, it managed to expand the existing remedial system, reinforce the application of Community law and guarantee novel means to preserve its \textit{effet utile}.

Tridimas mentions that even though Article 220 EC Treaty establishes the principle of legality as a paramount and overriding principle of Community law, “it contains no substantive principles of its own, and so mandates the Court to have recourse to the legal tradition of the Member States and extrapolate principles of law found therein, with a view to developing a notion of the rule of law appropriate to the


\textsuperscript{15} Cases C-6/90 and C-9/90, \textit{Francovich & Bonifaci v. Italy} [1991] ECR I-5357.
Community”\(^{16}\). With *Francovich* and its follow-up cases, the Court contributed once again to the development of Community law; it established the substantive and procedural conditions for State liability to incur and proceeded to a very illustrative extension and confirmation of the principle *ubi jus, ibi remedium* into the Community legal order, reaffirming that the value of a right is not determined only by the form of its textual manifestation but, more importantly, by the legal consequences which ensue from its violation, namely the remedies available for its enforcement\(^{17}\).

One can distinguish two phases in the development of the State liability doctrine. The first one, concerning the establishment of State liability as a matter of principle, started with *Francovich*, relating to the non-transposition of directives, and continued with *Wagner Miret*\(^{18}\), *Faccini Dori*\(^{19}\) and *El Corte Inglés*\(^{20}\), with similar factual and legal background. This first phase was concluded in 1996 with *Brasserie du Pêcheur* and *Factortame III*\(^{21}\) which unified the conditions between State and Community liability regimes and extended the possibility for individuals to obtain redress in any case that a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach.

The second period commenced in 1996, which became the most productive year for the Court when it comes to cases concerning State liability, since five\(^{22}\) out of the approximately thirty cases on the topic that have been delivered from 1991 until


\(^{22}\) Namely Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Germany* and R. v. Secretary of State for Transport, ex parte *Factortame Ltd. & others* [1996] ECR I-1029; Case C-392/93, R. v. HM Treasury, ex parte *British Telecommunications plc* [1996] ECR I-1631; Case C-5/94, R. v. Ministry of Agriculture, Fisheries & Food, ex parte *Hedley Lomas* [1996] ECR I-2553; Cases C-178/94, C-179/94 and C-188/94 to C-190/94, *Dillenkofer and others v. Germany* [1996] ECR I-4845; Cases C-283, C-291 and C-292/94, *Denkavit International v. Bundesamt fur Finanzen* [1996] ECR I-5063. What could be added to this has to do with the fact that AG Tesauro was the one to opine in cases *Brasserie*, *British Telecommunications* and *Dillenkofer*. If attention is given to the fact that he delivered his opinions in all the aforementioned cases on the same day (a remark made by both Neville Brown in “State Liability to Individuals in Damages: An Emerging Doctrine of EU Law”, 31 *Irish Jurist Reports* (1996), 7-21, at 16 and Josephine Steiner in “The Limits of State Liability for Breach of European Community Law”, 4:1 *European Public Law* (1998), 69-109, at 81), it seems that his opinions in 1996 have influenced subsequent rulings on State liability to a great extent, considering the fact that the Court in *Francovich* had not clarified many issues.
September 2003\textsuperscript{23} were decided in that year. During this second phase the Court had the opportunity to apply the \textit{Francovich} doctrine to a considerable number of divergent factual and legal backgrounds and to clarify in due course many issues that initially had been left unresolved. Finally, it is supported in this paper that after the Court’s ruling in \textit{Schmidberger}\textsuperscript{24} we have entered a third phase in the application of the doctrine, where the conduct of private individuals constitutes the subject matter of damage liability claims against the State and fundamental rights are invoked by States \textit{contra} individuals in defence of such actions. This position is further reinforced by reference to a case of Finnish interest pending before the ECJ\textsuperscript{25} that seems to be moving towards such a direction.

For the reasons of this paper, \textit{Francovich} and \textit{Brasserie} shall be examined in the detail that is justified by their seminal role. For the examination of the second phase of the State liability regime it has been chosen to present the relevant cases by focusing on the interpretation that the ECJ gave in relation to the three substantive conditions it had previously established in \textit{Brasserie}. \textit{Schmidberger} and the new dimensions that seem to have been opened in \textit{Brasserie}. This case shall be reviewed in a subsequent chapter, following the examination of the


\textsuperscript{25} Pending Case C-470/03, \textit{A.G.M.-COS.MET s.r.l.v. Finnish State and Tarmo Lehtinen}, OJ 2004 C 35/2.
Court’s ruling in Köbler\textsuperscript{26}, where the possibility of State liability was extended to breaches of Community law attributable to the national judiciary.

Part 1: The Development of the Case law on Member State Liability for Breach of EC Law

Chapter 1: The Seminal \textit{Francovich} and \textit{Brasserie du Pêcheur}: Setting the General Framework for Member State Liability.

1.1 The \textit{Francovich} Case

\textit{Francovich}\textsuperscript{27} arose from Italy’s failure to implement directive 80/987/EEC\textsuperscript{28} on the protection of employees in the event of their employers’ insolvency, a failure that had previously been recorded by the Court in enforcement proceedings brought by the Commission against the Italian Republic\textsuperscript{29}. Mr. Francovich, Mrs. Bonifaci and 33 more applicants in the main proceedings were owed wages by their employers, who had become insolvent. Since Italy had failed to implement the competent directive that aimed to create a mechanism to guarantee the payment of the wages owned to them, the applicants brought proceedings against the Italian Republic and argued that the Italian State should pay them their arrears of wages. The matter was brought to the ECJ under the procedure of Article 234 EC Treaty by identically worded questions of two Italian courts, “probably owing to the fact that the same learned counsel assisted the plaintiffs in both cases”\textsuperscript{30}, which requested a preliminary ruling, \textit{inter alia}, on the existence and extent of Member State liability.

The Court first ruled that not all the provisions of the directive in question were unconditional and precise to produce direct effects, no matter the Commission’s opinion to the contrary\textsuperscript{31}. Interestingly, it has been submitted that the Court intentionally did not recognize the direct effect of the competent directive in order to

\textsuperscript{26} Case C-224/01, Gerhard Köbler v. Austria [2003] ECR I-10239.
\textsuperscript{27} Cases C-6/90 & C-9/90, Francovich and Bonifaci v. Italy [1991] ECR I-5357.
\textsuperscript{29} Case 22/87, Commission v. Italy [1989] ECR 143.
\textsuperscript{31} For the Commission’s opinion on the direct effect of Directive 80/987/EEC look, in particular, the Opinion of AG Mischo in \textit{Francovich}, paras 27-31.
detach the, later on, establishment of State liability from the doctrine of direct effect\textsuperscript{32}. Having eagerly bypassed the question of direct effect, the ECJ went on to determine whether, as a matter of principle, a Member State is obliged to make good loss and damage sustained by individuals as a result of its failure to transpose a directive. Even in lack of a treaty provision on the matter\textsuperscript{33} and contrary to the observations submitted by the Italian, British, Dutch and German governments, the Court found that Member State liability for breach of Community law “is inherent in the system of the Treaty”\textsuperscript{34}.

It based this finding on three bases; firstly on the autonomy and original nature of Community legal system which grants rights to individuals not only where they are expressly granted by the Treaty but also by virtue of obligations that the Treaty imposes in a clearly defined manner both on individuals and on Member States and the Community institutions\textsuperscript{35}; secondly on the effective protection of individuals’ rights, since “the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible”\textsuperscript{36}; finally, a third basis was found in Article 10 EC Treaty and the principle of community loyalty, expressly established therein.

Having established State liability as a matter of principle, the Court continued by stating that “although State liability is thus required by Community law, 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”\textsuperscript{37}. In facts such as those raised before the Court (namely a failure of a Member State to fulfil its obligations under Article 249 (3) EC Treaty), three substantive conditions had to be satisfied:

\begin{itemize}
\item 33 It is to be mentioned that only Article 88 of the ECSC Treaty explicitly provides for the possibility of sanctions against Member States when they fail to fulfil their obligations, in the form of either suspending sums owed to these certain States or of allowing compensatory measures taken by other Member States.
\item 34 \textit{Francovich}, para 35.
\item 36 \textit{Francovich}, para 33.
\item 37 \textit{Francovich}, para 38.
\end{itemize}
a) The result prescribed by the directive should entail the grant of rights to individuals.

b) It should be possible to identify the content of those rights on the basis of the provisions of the directive.

c) There should be a causal link between the breach of the State’s obligation and the loss and damage sustained by the injured parties.  

As far as the procedural conditions under which the right of reparation shall take effect are concerned, the Court noted that, in the absence of Community legislation on the matter, it is on the basis of the procedural rules of national law on State liability to determine the competent courts and lay down the procedural rules for legal proceedings intended to fully safeguard the rights which individuals derive from Community law, subject to the principles of equivalence and effectiveness. Therefore, in safeguarding the Community-based right to reparation, national courts ought to review the adequacy of domestic tort remedies in order to ensure that national procedural rules for Francovich-type claims shall not be less favourable than those governing similar domestic actions (principle of equivalence) and that they shall not render virtually impossible or excessively difficult the exercise of individual’s rights in damages conferred by Community law (principle of effectiveness).

All in all, Francovich established the conditions, both substantive and procedural, for the exercise of a pre-existent, since it was held as “inherent in the Treaty”, right to reparation that was seemingly waiting to be discovered and enforced. Notwithstanding the bulk of academic literature it has given rise to, Francovich did not entail a fundamentally new rule, a fact that was implicitly accepted by the Court, which, contrary to the opinion of AG Mischo, refused to limit ratione temporis the effects of its judgement.

Indeed, State liability had already been founded within the case law of the ECJ long before 1991, the time that Francovich was delivered. It was in 1960 when the Court first ruled in Humblet, a case concerning obligations under ECSC Treaty, that “if the Court rules that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State is

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38 Francovich, para 40.
39 Francovich, paras 42-43.
40 Opinion of AG Mischo in Francovich, paras 82-86.
obliged, by virtue of Article 86 of the ECSC Treaty to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued”42. Some years later in Russo the Court provided early guidance on the issue, this time with respect to the EC Treaty, by declaring in a precise manner that “if damage has been caused through an infringement of Community law, the State is liable to the injured party in the context of the provisions of national law on the liability of the state” 43. In Granaria it took a step further and clarified that “the question of compensation by a national agency for damage caused to private individuals by the agencies and servants of the Member States, either by reason of an infringement of Community law or by act or omission contrary to national law does not fall within the second paragraph of Article 288 of the Treaty and must be determined by the national courts in accordance with the Member State concerned44.

Therefore, it is to wonder why the Court was not asked until Francovich for further guidance on a potential right to compensation of individuals for breaches of Community law, a matter it had directly addressed in pre-existing case law. The principle of direct and indirect effect most probably “reduced the number of potential claims for compensation by enabling individuals to invoke provisions of Community law at an early stage”45. Or even the Court itself may have not been willing, in a period that its rulings on supremacy and direct effect were facing sturdy resistance by national jurisdictions, to offer such a guidance and found expressis verbis a right to reparation for individuals on Community and not on national law.

Either way, it seems that the Court’s case law on State liability is consistent with its usual practice that has been characterized by Klami as “trend” in contrast to a “static attitude” towards law; a leading case proceeds and then a number of subsequent cases follow “that involve ramifications, modifications and developments of the ideas expressed by the leading case”46. However, in this step-by-step development of European law, “it is difficult to foresee when the next step will be taken because the ECJ needs always a concrete case that is capable of being solved in

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a manner involving novelties. Francovich established State liability as general principle of Community law but left many issues unresolved, creating more questions than those that it came to solve. It took the Court five years to reply to some of these questions in the equally fundamental Brasserie du Pêcheur and Factortame III.

1.2 Brasserie du Pêcheur and Factortame III

The two cases were heard and decided together, since in both of them the loss of individuals flowed from the activity of national legislature, either by the maintenance in force of existing legislation (Brasserie du Pêcheur) or by the introduction of new legislation (Factortame III), in both cases contrary to Community law. Furthermore, in contrast to Francovich, the Court here dealt with inadequate implementation of Community rules in the national legal order rather than complete inaction and total failure to implement them.

In Brasserie du Pêcheur a French brewery was unable to export its beer to Germany between 1981 and 1987 due to its failure to comply with the purity requirements laid down in the national law on beer duty. Since the provisions of German legislation, concerning the prohibition on imports of beer which failed to meet its requirements, had been found contrary to Article 28 EC Treaty in case Commission v. Germany of 1987, Brasserie du Pêcheur claimed alleged losses of profit mounting to the sum of 1.800.000 DM from the German State as a result of its exclusion from the German market. Factortame III concerned claims for alleged damages sustained by Spanish fishermen who had been prevented from fishing in the United Kingdom territorial waters under the British flag, as a result of the UK Merchant Shipping Act of 1988. The Act provided for the introduction of a register procedure for British fishing boats, made registration of such vessels subject to certain conditions relating to the nationality, residence and domicile of the owners and deprived those boats, which failed to follow the requirements of the registration procedure, from the right to fish. The Act had also been found contrary to Community law.

47 Hannu Tapani Klami, ibid., at 13.
law by two judgments of the Court, one decided under the preliminary ruling procedure and one in infringement proceedings brought by the Commission.

The Court started its analysis by reaffirming its ruling in Francovich and by clarifying that the right of reparation does not play merely a residual protective role, in the sense that it comes into the fore with regard to provisions which could not otherwise be relied on before national courts, as the German, Irish and Dutch governments had contented. Much to the contrary, the right of individuals to rely on directly effective provisions of Community law was characterized as “only a minimum guarantee”, whereas State liability and the resultant obligation to make reparation to individuals was found to be “the necessary corollary of direct effect”. The ECJ further replied to an argument advanced mainly by the German Government, according to which a general right of reparation could be created only by legislation and that for such a right to be recognized by judicial decision would be incompatible with the allocation of powers as between the Community institutions and the Member States. This could be born out, in particular, by the fact that the Member States chose not to incorporate any general rules governing State liability in the Maastricht Treaty but had chosen instead to revise Article 228, not to mention the rejection of a proposed State liability system by the Intergovernmental Conference of 1996. However, the Court held that the recognition of this right is a matter of Treaty interpretation which falls within its own jurisdiction, pursuant to Article 220 EC Treaty.

Even though the European Union is a self-contained regime of public international law, with own rules for its functioning that significantly limit the importance of external and general sources of law, the Court did not hesitate to articulate an analogy argument based on international law. Like in international law, where a State is viewed as a single entity when it comes to liability as a result of a breach of an international commitment, in Community law Member States are liable irrespective of the fact that the breach is attributable to the legislature, the executive

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53 See, in particular, the Opinion of AG Tesauro in Brasserie, para 24.
55 To this extent see Göran Lysén, “The European Community as a Self-Contained Regime”, Europarättslig Tidskrift (1999), Nummer 1, Ärgång 2, 128-135.
or the judiciary and the principle of state liability “holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach”\textsuperscript{56}. However, “the conditions under which that liability gives right to a right of reparation depend on the nature of the breach of Community law giving rise to loss and damage”\textsuperscript{57}.

In laying down the conditions under which State liability arises, the Court drew a parallel with its case law under Article 288 (2) EC Treaty on the non-contractual liability of the Community for damage caused by its institutions or its servants in the performance of their duties. It noted that, since the protection of rights which individuals derive from Community law cannot vary depending on whether a national or a Community authority is responsible for the damage, the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances.

With its case law on the interpretation of Article 288 (2) EC Treaty the Court had already established that the Community, when acting in a legislative context characterized by wide discretionaty powers, incurs liability only where it manifestly and gravely disregards the limits on the exercise of its powers. Therefore, even though national legislature does not systematically have a wide discretion when it acts in a field governed by Community law, when it does have such discretion, comparable to that of Community institutions in implementing its policies, a right to reparation is dependent on three conditions:

a) The rule of law infringed must be intended to confer rights on individuals.

b) The breach must be sufficiently serious.

c) There must be a direct causal link between the breach of the obligation resting on the Member State and the damage sustained by the injured parties.

These conditions reflect and correspond in substance with the so-called Schöppenstedt formula\textsuperscript{58}, which the Court had applied in proceedings under Article

\textsuperscript{56} Brasserie, para 32.
\textsuperscript{57} Brasserie, para 38.
\textsuperscript{58} The Schöppenstedt formula provides that an applicant must prove that a) the damage has been caused by a wrongful act of the Community; b) that act consists of a sufficiently flagrant violation of a superior rule of law; c) that rule of law is for the protection of the individual. Also see: Case 5/71,
288 (2) EC Treaty when the Community acts in a legislative context involving measures of economic policy and are both necessary and sufficient to found a right to obtain redress, always under the conditions of equivalence and effectiveness; however, the Court left the door open for the possibility that States would incur liability under less strict conditions on the basis of national law provisions. As regards the possibility of making reparation conditional upon the existence of fault under national law, the Court clarified that the notion of fault can be taken into consideration by national courts only for the purpose of determining whether on not a given breach of Community law is sufficiently serious and that “the obligation to make reparation for loss or damage caused to individuals cannot depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law” since that “supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order”. On the other hand, national courts “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” when determining the loss or damage sustained.

In any case, a right to reparation is not dependent upon a prior finding by the ECJ of an infringement, pursuant to Articles 226 or 227 EC Treaty, since such a precondition would undermine the fundamental principle of effectiveness of Community law and would be contrary to the decision in the Waterkeyn case, according to which individuals’ rights derive not from a judgment declaring that a Member State has failed to fulfill its obligations, but from the actual provisions of Community law having direct effect in the internal legal order.

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59 In the Netherlands, for instance, the State cannot plead an excusable error of interpretation because the risk of such an error must be born by the State. This stricter standard of liability should also apply with regard to Francovich liability. Reference from: Christiana Timmermans, Rapport Communautaire for the XVIII FIDE Congress, held at Stockholm from 3rd until 6th June 1998, at 35.

60 Brasserie, para 79.

61 Brasserie para 85.

Chapter 2: The Second Phase of the State Liability Doctrine. Clarifying the Brasserie Criteria

The added value of Brasserie lies in the fact that it unified the set of conditions established in Francovich into a new test that resembles the one applied in cases of Community liability under Article 288 (2) EC Treaty. In this way, the Court managed to show the affinity between State liability in damages and the rule of law; if an express article of the Treaty provides the base for the establishment of a general non-contractual liability regime within the Community legal order, the Court’s move to recognise a right to reparation against Member States is not lacking legitimacy.

As already seen, the new test established in Brasserie comprises of three conditions, namely the rule of law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious and there must be a direct causal link between the breach of the obligation resting on the Member State and the damage sustained by the injured parties, and is applied, as a matter of principle, on any occasion of State liability, no matter the breach stems from acts of the national legislature, executive or judiciary. It is on these three conditions that the Court has progressively built its jurisprudence on the new doctrine and it is of great interest to examine separately each one of them in order to get a clear picture of the Court’s case law.

2.1 First Condition: The Rule of Law Infringed Must Have Been Intended to Confer Rights on Individuals

Until present time the ECJ has been concerned with numerous violations of both primary and secondary Community norms. Even though it has not yet confronted liability claims resulting from breaches of legal rules which belong in the field of the so-called external relations of the Community, such an approach has already been advocated in academic literature and it cannot be precluded that it may be confirmed by the Court in the future.

As far as Treaty Articles are concerned, it has been adjudicated that Articles 28, 29, 39, 43, and 56 confer rights to individuals that can be invoked against

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a Member State for the purpose of State liability in damages, whereas the same approach has been followed as regards various provisions of secondary legislation. In the case of directives, however, things seem to be more complicated. The condition that Community norms should confer rights to individuals inevitably echoes the conditions for direct effect of directives, namely that their provisions should be clear, sufficiently precise and unconditional as regards their subject matter and the identity of both the intended beneficiary and the person upon which the obligation to envisage the result prescribed by the directive is imposed. Therefore, it is logical for one to wonder about the exact relationship between the doctrines of direct effect and State liability in damages.

The question was seemingly resolved in *Francovich*, where the Court found for the existence of State liability with regard to a directive that was not sufficiently precise to produce direct effects; but it was not until *Brasserie* that it the ECJ explicitly rejected the submission of several governments that damages could only be paid for infringement of provisions that did not meet the direct effect requirements. Thus, it can now be validly argued that State liability is “an autonomous, independent remedy, in so far as those terms express the principle that its use is not conditional on any prior or simultaneous use of other national remedies” and that “an individual right is identifiable for the purposes of *Francovich*, when it is possible to quantify its content with sufficient precision in monetary terms and to determine with certainty the identity of its holders”.

The obligation to identify the person responsible to give effect to the directive in question is not a necessary perquisite to found State liability, as *Francovich* seems to imply, since the State is not sued as the debtor of a right contained in the provisions of a given directive but because it breached its duty to implement the secondary Community norm. This is also the reason that a State liability claim is not precluded

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69 *Brasserie*, para 20.
in cases where a directive imposes obligations on private individuals and not public authorities. Indeed, such a conclusion seems to be supported by reference to *Faccini Dori*\(^ {72}\), concerned with the interpretation of Directive 85/577/EEC\(^ {73}\) the underlying purpose of which is to protect consumers against unfair commercial practices relating to contracts negotiated away from business premises. In that case however, even though the Court denied the possibility for directives to produce horizontal effects, it emphatically mentioned *Francovich*, thus leaving the door open for the incurrence of State liability in damages in such a case.

On any occasion, it seems that the first condition cannot cause any problems to potential *Francovich*-claim applicants in the future since, until present time at least, there seems to be only one case where the Court has ruled, in a damage liability context, that the rule of law in question did not confer an enforceable right to individuals\(^ {74}\).

### 2.2 Second condition: The Existence of a Sufficiently Serious Breach

As regards the second condition for the incurrence of State liability in damages, it is noteworthy that the Court did not adhere to the approach it had followed under Article 288 (2) EC Treaty to require a sufficiently serious breach of a *superior* rule of law. However, it has convincingly been supported that this omission is devoid of practical importance since, in the area of State liability, the ECJ requires the existence a sufficiently serious breach of *Community* law, which, in itself and in general, is superior to national law\(^ {75}\).

Even though the author of this paper supports an extension of the *Francovich* principle to include State liability claims even for acts of private individuals\(^ {76}\), it is interesting to mention a distinction introduced by Aalto\(^ {77}\), according to whom the aforementioned condition basically consists of two limbs: a) that the breach of EC law

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\(^ {74}\) Namely Case C-222/02, *Paul and others v. Germany* [2004] nyr, para 50.


\(^ {76}\) See the analysis that follows in Part 3 of the present paper.

must be committed by a public authority and b) that the breach must be sufficiently serious. For the purposes of this paper we shall adhere to such an approach as the most appropriate to encapsulate the case law on the matter.

### 2.2.1 The Breach of EC Law Must Be Committed by a Public Authority

So far, the ECJ has had the opportunity to adjudicate on breaches of Community law attributable to each one of the traditional domains of State function, namely the legislature, the executive and the judiciary. Certain examples of breaches include the complete lack of measures to transpose a directive (Francovich, Dillenkofer\(^{78}\)), incorrect implementation of secondary Community norms (British Telecommunications\(^{79}\), Denkavit\(^{80}\), Stockholm Lindöpark\(^{81}\)) or even the adoption of legislative measures that contravene with Community law (Brasserie, Konle\(^{82}\)). Accordingly, neither the practises of national administrative authorities escape the scrutiny of the Court (Hedley Lomas\(^{83}\), Norbrook Laboratories\(^{84}\), Haim\(^{85}\)), whereas it has recently been held that national courts adjudicating at last instance can in principle incur liability for breaches of either Community law or of their referral obligations (Köbler\(^{86}\)).

In addition to these, it should always be born in mind that a national authority cannot be held liable in damages when it merely implemented an unlawful Community legislative measure with respect to which Community institutions have not been obliged to pay compensation under Article 288 (2) EC Treaty\(^{87}\). This is illustrated in Asteris litigation, decided before the establishment of the Francovich doctrine. No matter the annulment of a Community regulation in proceedings brought

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82 Case C-302/97, Konle v. Austria [1999] ECR I-3099.
86 Case C-224/01, Gerhard Köbler v. Austria, [2003] ECR I-10239.
by Greece\textsuperscript{88}, a claim for damages brought by Greek producers of tomato concentrates against the Community was dismissed due to the fact that the relevant breach of EC law did not amount to a sufficiently serious breach of a superior rule of law\textsuperscript{89}. When the plaintiffs sought compensation for their damages from the Greek State that had merely applied the unlawful Community measure, the ECJ, operating under the preliminary reference procedure, ruled against such a possibility\textsuperscript{90}.

Furthermore, in \textit{Staat der Nederlanden v. Ten Kate}\textsuperscript{91}, a case that is currently pending before the ECJ, an interesting question on State liability that had not been raised until now is posed. The case concerns the possibility for State liability in case of failure to institute annulment proceedings in circumstances where individuals cannot avail themselves such legal means due to the restrictive \textit{locus standi} rules under Article 230 EC Treaty. If the Court follows the Opinion of AG Stix-Hackl\textsuperscript{92}, Member States may have a right but they are never obliged to initiate annulment proceedings and, subsequently, there exists no breach of Community law that would give rise to their liability in damages.

As regards the determination of time that the breach of EC law is committed, it is worth mentioning that in cases of the former EFTA States, which later on acceded to the European Union, like Finland, Sweden and Austria, the ECJ has ruled in \textit{Andersson}\textsuperscript{93} that they cannot be held liable in damages for breaches of Community law under the \textit{Francovich} doctrine when the facts at issue in the main proceedings occurred prior to the date of their accession\textsuperscript{94}. It has to be noted, however, that the Swedish government, against whom the claim for damages was directed in \textit{Andersson}, achieved only a Pyrrhic victory. Indeed, it may have succeeded to escape liability for not giving effect to Directive 80/987/EEC before its accession to the Union, but, on the other hand, its intense involvement in a case of Icelandic interest

\textsuperscript{90} Joined Cases 106-120/87, \textit{Asteris and others v. Greece and European Economic Community} [1988] ECR 5515.
\textsuperscript{91} Case C-511/03, \textit{Staat der Nederlanden v. Ten Kate Holding Musselkanaal BV, Ten Kate Europrodukten BV and Ten Kate Produktie Maatschappij BV}, pending before the ECJ, OJ 2004 C 59/3.
\textsuperscript{92} Opinion of AG Stix-Hackl in Case C-511/03, \textit{Staat der Nederlanden v. Ten Kate Holding Musselkanaal BV, Ten Kate Europrodukten BV and Ten Kate Produktie Maatschappij BV}, delivered on 17th February 2005, available (not yet in English) at the website of the ECJ, \texttt{www.curia.eu.int} (last visited 20th July 2005)
\textsuperscript{94} \textit{Andersson}, para 46.
before the EFTA court so as to prevent the extension of the State liability principle for breaches of obligations under the EEA agreement, did not pay off.

In its advisory opinion in Erla María Sveinbjörnsdóttir v. Government of Iceland\(^ {95}\) the EFTA court considered the principle of State liability as an integral part of the EEA agreement and found that it is a principle of the said Agreement that the Contracting Parties are obliged to provide compensation for damages caused to individuals by breaches of the obligations that derive from it, for which the EFTA States can be held responsible\(^ {96}\). The extensive Swedish intervention before the EFTA Court, four years after Sweden had ceased to be an EFTA Member, can be explained if one takes into account the fact that within the same period of time the Swedish State had been sued for damages in the Andersson litigation on the grounds of incorrect implementation of Directive 80/987/EEC, which constituted the subject matter in Sveinbjörnsdóttir as well\(^ {97}\). Sweden may have won the case in the ECJ but its victory had nothing to offer in effect. After Sveinbjörnsdóttir of the EFTA Court the applicants in Andersson acquired the ability to re-launch their State liability claims, with a slight and practically irrelevant difference; this time they shall invoke not a breach of Community law to implement the directive but a breach of the obligations that stem from the EEA agreement, of which the said directive constitutes an integral part\(^ {98}\). No matter the different legal base of the claim, its result shall in effect be the same and Sweden shall be obliged to pay the same amount of damages.

A final submission to be made has to do with the determination of the public authority that is responsible for the breach of EC law, since such a choice is not always apparent and this fact can potentially create obstacles to individuals who seek to recover damages from the State. Imagine the, not so unimaginable scenario, that a Member State fails to implement in time Directive 99/70 concerning fixed-term work\(^ {99}\). When it finally implements the competent directive, it does so by means of

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\(^{96}\) Andersson, paras 62-63.


\(^{98}\) To this extent see OJ 1994, L 1/410.

\(^{99}\) Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ 1999 L15/43. The example draws from a current legal problem concerning the incompatibility with Community law of legislative, administrative and judicial practices encountered in the author’s country of origin, Greece. See also Case C-180/04,
internal legislation that add onerous conditions for the conversion of fixed-term employment contracts into contracts of an indefinite duration as regards employees working for the public sector. Many individuals, employed in the public sector under fixed-term contracts, apply to the relevant administrative authority to acquire permanent post pursuant to the directive but, since the conditions of the national implementing measure were set so as to render their satisfaction practically impossible, most of them do not succeed in their applications. Consequently, an action is brought before the highest administrative court of the country for the annulment of the decisions of administrative authority. The court rejects the claim without making a reference to the ECJ. If those adversely affected by the application of the directive wished to lodge a *Francovich* claim, against which would they address their claim? The legislature for the profound inadequacy of the national implementing measures? The executive for not applying directly the provisions of the directive? Or the judiciary for withdrawing claims based on Community law without making a reference to the ECJ?

Interesting issues also arise in cases where liability claims result from Community law breaches attributable to a public law entity, which enjoys a considerable degree of independence and autonomy from the central State. Who is the appropriate defendant on this occasion? The decentralised entity, whose conduct gave rise to the relevant litigation, or the central State, seen under a unitary perspective, no matter the fact that the latter could not exercise any form of control over the former?

The ECJ replied to such considerations in *Haim*\(^{100}\) by bringing the determination of the appropriate defendant in such a case within the ambit of national procedural autonomy. It contented that there is nothing in the case law on State liability to suggest that reparation for loss and damage caused to individuals by national measures taken in breach of Community law must necessarily be provided by the Member State itself in order for its obligations under Community law to be fulfilled\(^{101}\). Therefore, Community law does not preclude a public-law body, in addition to the Member State itself, from being liable in damages, when it was that

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\(\textit{Abdrea Vassalo v. Azienda Ospedaliera Ospedale San Martino di Genova and Cliniche Universitarie Convenzionate,}\) pending before the ECJ, OJ 2004 C 156/6, concerning State liability claims for failure by Italy to implement the said directive.  
\(^{101}\) *Haim*, para 29.
body which took measures in breach of Community law\textsuperscript{102}, always in the light of the principles of equivalence and effectiveness.

A similar approach was followed by the Court in \textit{Konle}\textsuperscript{103}. The dispute in the main proceedings concerned a claim for damages lodged against Austria by a German national. Mr. Konle had been allocated a plot of land in the area of Tyrol on condition that he would acquire the authorization provided by the \textit{TGVG 1993}\textsuperscript{104}, as amended by \textit{TGVG 1996}\textsuperscript{105}, aiming to prevent the establishment by foreigners of a secondary residence in the area. After his application was turned down, Mr. Konle challenged this decision before Austrian Courts and, at the same time, instituted parallel proceedings seeking damages from the Austrian State for the incompatibility of the said legislative provision with Community law. The fact, however, that Austria is a federal state and the competent legislation was enacted by the Länder of Tyrol, gave rise to the question whether compensation should be provided by the central state or its constituent regional entities.

Once again the Court stated that, even though a Member State cannot plead the distribution of powers and responsibilities between the bodies which exist in its national legal order in order to escape liability, “Community law does not require Member States to make any change in the distribution of powers and responsibilities between the public bodies which exist on their territory”\textsuperscript{106}. It seems, therefore, that \textit{Konle} signals a re-allocation of liability from the central State towards its regional divisions and constitutes a confirmation of the principle that, even when a Community law rule has been firmly established, it may still undergo the influence of developments from the national scene\textsuperscript{107}. States organised in a federal structure are free not only to maintain the decentralisation of power within their legal order but also to allocate the responsibility arising from its misuse.

On any occasion, the solutions adopted both in \textit{Konle} and in \textit{Haim} should not become an area of abuse by the Member States in order to escape liability, whereas national rules on the allocation of responsibility should not impose burdens on

\textsuperscript{102} \textit{Haim}, para 34.
\textsuperscript{104} \textit{Tiroler Grundverkehrsgesetz 1993} (Tyrol Law on the Transfer of Land), Tiroler LGBl. 82/1993.
\textsuperscript{105} \textit{Tiroler Grundverkehrsgesetz 1996}, Tiroler LGBl. 61/1996.
\textsuperscript{106} \textit{Konle}, para 63.
individuals that would constitute insuperable fetters to the invocation of the Francovich doctrine. It is therefore plausible to support the possibility that an individual should on any occasion be allowed to bring an action against the central State, leaving to the latter the choice of bringing a recoupment action against the national authority it considers responsible for the applicant’s loss; or else, that a claim for damages might be brought cumulatively against all possible defendants, entrusting the determination of the matter to the national court deciding the case.\footnote{Georgios Anagnostaras, “The Allocation of Responsibility in State Liability Actions for Breach of Community Law: A Modern Gordian Knot?”, 26 European Law Review (2001), 139-158, at 152-153.}

2.2.2 The Breach Must be Sufficiently Serious

For a Member State to incur liability it is not enough merely to identify a breach of Community law attributable to it. Quite to the contrary, the breach must be of a “qualified” nature, or else, following the Court’s terminology, it must be “sufficiently serious”. In examining the seriousness of a breach the ECJ seems to have established a two-tiered system of liability, according to which:

(i) In cases where the public authorities act in areas in which they have wide discretion, the conditions under which they can be exposed to compensation claims cannot differ from those under which Community institutions incur liability in comparable situations (first tier).

(ii) In cases where the public authorities have considerably reduced or even complete lack of discretion, a mere infringement of Community law is sufficient to fulfil the condition of a sufficiently serious breach (second tier).\footnote{The distinction between these two-tiered systems of liability has been introduced by Angela Ward in her book Judicial Review and the Rights of Private Parties in the EC, Oxford University Press, Oxford, 2000, at 98-108 and the analysis that follows draws a lot from her ideas.}

As regards the first-tier liability regime, the key issue lies on whether the Member State in question has manifestly and gravely disregarded the limits of its discretion in cases where it acts in a field of such a wide discretion, comparable to that of the Community institutions in implementing Community policies. In order to facilitate national courts, which have sole jurisdiction to this extent, in the task of evaluating the respect by national authorities to the limits posed upon their discretion,
the ECJ listed a number of factors that may be taken into consideration\footnote{See, however, the recent trend of the ECJ in the field of mis-implementation of Community directives in case C-63/01, Samuel Sidney Evans v. Secretary of State for Environment, Transport and the Regions and the Motor Insurer’s Bureau [2003] ECR I-4447, para 86, where it has been stated that taking into account all these criteria is mandatory for the national court (“all the factors which characterise the situation must be taken into account”).}, namely the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, 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. On any view, the Court noted that 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\footnote{Brasserie, paras 56-58.}.

However, there have been circumstances that the ECJ paid lip service to the sole jurisdiction of national courts in evaluating the conduct of national authorities and proceeded itself to such an evaluation, since it considered that it had “all the necessary information to assess whether the facts amount to a sufficiently serious breach of Community law”\footnote{British Telecommunications, para 41.}. This was the case in Brasserie and Factortame cases, where it found for the establishment of a sufficiently serious breach of Community law by the conduct of the German and the British legislature respectively. On the other hand, in cases like British Telecommunications\footnote{Case C-392/93, R. v. HM Treasury, ex parte British Telecommunications plc [1996] ECR I-1631.} and Denkavit\footnote{Cases C-283, C-291 and C-292/94, Denkavit International v. Bundesamt für Finanzen [1996] ECR I-5063.} the ECJ, having to evaluate timely but improper implementation of Community directives, reached the opposite conclusion.

Turning to the actual facts of British Telecommunications, the Court stated that a basic Article of the, relevant in the main proceedings, Directive 90/531/EEC\footnote{Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors OJ 1990 L 297/1.} was imprecisely worded and was reasonably capable of bearing the interpretation given to it by the United Kingdom in good faith. It also mentioned that other Member States shared the same interpretation, which was not manifestly contrary to the
wording of the directive or to the objective pursued by it. Finally, no guidance was available to the United Kingdom from the case law of the Court as to the interpretation of the provision at issue, nor did the Commission raise the matter when the national implementing legislation was adopted.

Once again in Denkavit the Court noted that a Member State’s interpretation, given this time by Germany to Directive 90/435/EEC, even though erroneous, was adopted by other Member States as well, on this occasion by those which had exercised the option to derogate under article 3 (2) of the said directive and had taken the view, following discussions within the Council, that they were entitled to adopt such an interpretation. This fact, in combination with the lack of case law on the matter, led the Court to decide that the breach of Community law committed by Germany did not amount to a sufficiently serious one. Even though Denkavit seems only just a reaffirmation of British Telecommunications, it is interesting to note that in this case the Court accepted discussions in legislative proceedings of the Council as being competent to establish an excusable error for a Member State if an action for damages is brought against it. This finding, however, seems to contradict with previous case law, under which declarations and expressions of intent by Member States in the minutes of a Council’s meeting during which a community act is adopted cannot have any legal consequences.

As regards the conditions of the second-tier liability regime, it can be argued that they were clarified to a great extent in Dillenkofer, even though the seminal Francovich and several other cases concerning non-implementation of directives definitely belong to this category as well. Dillenkofer concerned Germany’s failure to transpose Directive 90/314 EEC on package travel, package holidays and package taxation.

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117 Denkavit, paras 51-53.
121 Like Wagner Miret, Faccini Dori, El Corte Inglés, supra notes 18, 19 and 20 respectively.
The applicants in the main proceedings were purchasers of package holidays who had suffered loss due to the insolvency of their tour operators. After failing to obtain reimbursement of the sums they had paid to the operators, they brought actions for compensation against Germany on the ground that, if the directive at issue had been transposed into German law within the prescribed period, they would have been protected against the insolvency of the operators from whom they had purchased their package travels.

It is to be mentioned that the case was argued before the ECJ redefined the *Francovich* criteria into the *Brasserie* test, but decided after it had delivered its decisions in *Brasserie*, *British Telecommunications* and *Hedley Lomas*. It is therefore understandable that in *Dillenkofer* the Court tried to unify the conditions of liability under *Francovich* and *Brasserie* by stating that “in substance, the conditions laid down in that group of judgments are the same, since the condition that there should be a sufficiently serious breach, although not expressly mentioned in *Francovich*, was nevertheless evident from the circumstances of that case”.

Following this point of view, the Court held that “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 (emphasis added) a serious breach of Community law” that gives rise to a right of reparation.

This kind of automatic fulfilment of the sufficiently serious criterion is also to be found in *Larsy* concerning the refusal of a Belgian administrative authority to apply the interpretation given by the ECJ to Regulation 1408/71 EEC. Mr. Larsy, a self-employed nursery gardener had worked in Belgium and France and applied to the

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122 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158/59. It also has to be noted that, even though the deadline for implementation of the said Directive was the end of 1992, by January 1993 only four Member States, namely France, the United Kingdom, Netherlands and Portugal, had transposed it into their national laws whereas considerable delays in implementation can be mentioned as regards other Member States. Greece, for instance, transposed it only in September 1996, with a delay of three and a half years. Reference from: Evgenia Sahpekidou, “Member State Liability for Non-Implementation of a Directive: The *Dillenkofer* decision of the ECJ on Package Travel”, *Episkopisi Emporikou Dikaiou* (Review of Commercial Law) (1997), 273-290, at 275 (in Greek).


124 *Dillenkofer*, para 23.

125 *Dillenkofer*, para 29.


relevant Belgian social security authority (the “Institut National d’Assurances Sociales pour Travailleurs Indépendants”, hereinafter INASTI) for a retirement pension. Having a dispute upon the exact time that his pension entitlement would take effect, Mr. Larsy invoked a favourable for him interpretation of the said regulation by the ECJ in an earlier case, brought by his brother who was in a similar situation and lodged a claim for damages. The Court did not hesitate to state that in such circumstances INASTI had no substantive choice and that, by limiting in time the effects of the regulation, it had failed to draw all the consequences from a previous judgement of the Court providing a clear answer to the issues before that institution, thus committing a sufficiently serious breach of Community law.

On the other hand, it should be noted that the second tier liability applies not only in automatic, per se breaches but also in cases where national authorities have limited or even no discretion. To this extent Hedley Lomas constitutes the leading case as regards national administration. The case concerned a refusal by the British administration to issue licences for the export of live animals to Spain as a result of its suspicions that Spain had not implemented Directive 74/577 EEC on stunning of animals before slaughter. Hedley Lomas Ltd, an export company that was refused the competent licence, sought for a declaration that the behaviour of British administration was contrary to the directly effective Article 29 EC Treaty and that the United Kingdom should bear its loss of business.

In examining the existence of a sufficiently serious breach of Community law the Court stated that “where, at the time when it committed the infringement, the Member State in question 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”. Since, in the light of existing harmonizing measures in the field, recourse to the derogation from the free movement of goods provided in Article 30 EC for the protection of the life and health of animals was not possible, the administrative practice of the United Kingdom was found unjustifiable. Furthermore, it was

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129 Larsy, para 41.
130 Larsy, paras 44, 45 and 49.
133 Hedley Lomas, para 28.
contented that in the particular case, the United Kingdom was not even in a position to produce any proof of non-compliance with the directive by the Spanish slaughterhouse to which the animals, for which the export license was sought, were destined\textsuperscript{134}. Thus, the establishment of a sufficiently serious breach of EC law was clearly established.

A similar approach as regards national administrative authorities was also followed in \textit{Norbrook Laboratories}\textsuperscript{135}. Even though the determination of the breach was left to the national court to determine, the ECJ did not miss the opportunity to pave the way that the referring \textit{Court of Appeal in Northern Ireland} would follow. Indeed, it clarified beyond any doubt that some of the conditions imposed by British administration for the acquisition of marketing authorizations for veterinary medical products ran counter to Directives 81/851 and 81/852 EEC\textsuperscript{136}, thus showing implicitly that a sufficiently serious breach of Community law had been established.

However, it's not only national administrations that are not in a position to exercise discretion in implementing EC law. It might also occur that the legislature is bound by Community norms to such a degree that diminishes any room for discretion and prescribes the exact legislative choices to be made. For instance in \textit{Rechberg}\textsuperscript{137} the Court stated that the clarity and precision of Directive 90/314 EEC\textsuperscript{138} precluded the Austrian legislator, when transposing the said Community measure into the national legal order, from setting a later date from which the rights stemming from it would be enforceable, that was different from the one imposed by the directive itself. Therefore, since the Member State in question enjoyed no margin of discretion as to the entry into force in its internal legal order of the competent directive, it had manifestly and gravely disregarded the limits on the exercise of its powers and thus committed a sufficiently serious breach that could give rise to compensation of those adversely affected.

\textsuperscript{134} Hedley Lomas, para 29.
Similarly, in *Stockholm Lindöpark* the Swedish legislator this time was found to have breached Community law in a way that would trigger the liability of the Swedish State. Lindöpark, a development company running a golf course for the exclusive use of business, contended that the Swedish legislation in force until 1 January 1997 constituted a breach of its rights stemming from the Sixth Directive 77/388/EEC, at least from the time of Sweden's accession to the European Union, that is, from 1 January 1995. Therefore, it brought proceedings against the Swedish State, seeking damages that would purportedly represent the input tax paid between 1 January 1995 and 31 December 1996, which Lindöpark was not entitled to deduct during that period due to the incorrect implementation of the relevant directive, plus interest.

The Court did not mince its words in this case either and clearly stated that, given the clear wording of the Sixth Directive, Sweden had no discretion in achieving its *effet utile*, therefore the mere infringement of Community law would suffice to establish a sufficiently serious breach. The general exemption enacted by the Swedish legislature had no basis in the Sixth Directive and therefore became clearly incompatible with it as from the date of Sweden's accession to the European Union. The fact that the national legislation at issue in the main proceedings was repealed with effect from 1 January 1997, two years after Sweden’s accession, indicates that the Swedish legislature had become aware that it was incompatible with Community law, therefore “there could be no reasonable doubt, capable of extenuating the alleged breach, as to the import of the provisions in question”.

2.3 Third Condition: The Existence of a Causal Link

Causation is the third condition for the establishment of State liability in damages. As Van Gerven contents, it is interesting to note that the ECJ, in spite its intension, expressed already in *Brasserie*, to interpret the liability conditions in the light of Article 288 EC Treaty, did not follow that up when it dealt with causation. Much to the contrary, it declared in the same decision that “it is for the national courts..."
to determine whether there is a direct causal link between the breach of the obligation borne by the State and the damage sustained by the injured parties”\textsuperscript{143}. Such an approach, however, does not seem to provide a clear answer whether causation is viewed by the ECJ “as a national procedural rule which is the only hurdle that the individual must overcome in order to prove his or her case… or, alternatively, as a substantive requirement which, if not successfully fulfilled by the individual, may actually lead to a complete failure to obtain a remedy, thus actively preventing effective enjoyment of Community rights”\textsuperscript{144}.

The fact that on several subsequent occasions the Court itself went on to rule on the issue of causation seems to point towards the “substantive requirement” direction. Indeed, had the Court left the rules governing causation entirely upon national law to determine, it would amount to a nationalization of the conditions for State liability, a fact that would contravene with the “inherent in the Treaty” origin of the new remedy. This may also have been the reason for the gradual interference of the Court in the examination of the establishment of the causal link condition.

Such an approach was followed for the first time in \textit{Brinkmann}\textsuperscript{145}. The case concerned a claim for damages made by a German company against Denmark for erroneous classification and taxation of “Westpoint”, a tobacco product it produced and imported in the Danish market. “Westpoint” was taxed in Germany as smoking tobacco, whereas upon importation in Denmark was classified as cigarette product and was subject to a higher rate of taxation. Therefore, the applicant in the main proceedings brought an action claiming that its product should have been be taxed as smoking tobacco and that the Danish authorities ought to award compensation for the loss already sustained.

The Court in its analysis came to the conclusion that Denmark had not transposed Directive 79/32/EEC on taxes other than turnover taxes which affect the consumption of manufactured tobacco, that contained the definitions of the products to be taxed as cigarettes and those to be taxed as smoking tobacco\textsuperscript{146}. Expectedly, it recalled its ruling in \textit{Dillinkofer} according to which failure to transpose a directive constitutes \textit{per se} a sufficiently serious breach of Community law. Rather surprisingly

\textsuperscript{143} \textit{Brasserie}, para 65.  
though, it went on to examine the existence of a causal link, a matter which, until this case, had been left to the national courts to determine. Even more surprisingly, the Court went on to rule that the causal link between the breach of Community law and the damage sustained by Brinkmann was lacking since the Danish administrative authorities gave immediate effect to the competent directive, even in the lack of national implementing measures. Subsequently, it proceeded to a second Brasserie test, this time in order to determine whether the Danish administrative authorities had performed a sufficiently serious breach. Having regard to the fact that the provisions of Directive 79/32 EEC were not absolutely clear and precise on the definitions of tobacco products and to that “Westpoint” did not correspond exactly to either of these definitions (since it did not exist at the time when the directive was adopted), the Court dismissed the claim for damages on the ground that “the interpretation given by the Danish authorities to the relevant definitions was not manifestly contrary to the wording of the directive or in particular to the aim pursued by it”\(^\text{147}\).

The conclusion that can be drawn from \textit{Brinkmann} is that, in cases of breaches of Community law attributable to the legislature, the chain of causation can be broken when the administration gives immediate effect to a non-implemented directive. In such a case, any loss sustained by individuals is viewed as primarily due to the misinterpretation and misapplication of its provisions by the national administrative authorities rather than the failure of the national legislature to transpose the measure within the domestic legal order\(^\text{148}\). However, even if it is assumed that the practice of national administrative authorities “may present as a valid defence”\(^\text{149}\) when there are no implementing measures by national legislature, reasonable criticism can be mounted against such an approach as regards its consistency with previous case law. No matter its merits, as regards finding of the cause that is most proximate to the damage sustained or the incentive it gives to national administrations to apply directly Community law, the aforementioned position of the ECJ adds an extra burden upon the individual and is in conflict with the fact that “mere administrative practices, which by their nature may be altered at the whim of the administration, may not be considered as constituting the proper fulfilment of the obligation deriving from a

\(^{147}\) \textit{Brinkmann}, para 31.


directive and do not release the Member State from the obligation to give effect to the provisions of the directive by means of national provisions of a binding nature.\footnote{Case 96/81, Commission v. Netherlands [1982] ECR 1791.}

However, it seems that this is not the only occasion that the chain of causation can be interrupted. Imprudent conduct by travel agents, which led to a chain of wholly exceptional and unforeseeable events that diminished the causal link, constituted one of the main arguments of Austria in \textit{Rechberg}\footnote{Rechberg, para 69.} in order to escape its liability for not implementing a Community directive on package holidays. The ECJ did not accept the argument and, after mentioning that the national court had already contended that the causal link was existent, stated that the relevant directive imposed an obligation of result for the protection of consumers against the consequences of their agents’ bankruptcy, whatever the causes of it may be.\footnote{Rechberg, paras 73-75.}

Finally, it should be noted that the conduct of the applicant might also be considered as an intervening cause that can possibly affect the finding of a causal link. Notions like contributory negligence, already recognized under the case law of Article 288 (2) EC Treaty\footnote{Case 145/83, Adams v. Commission [1985] ECR 3539, paras 53-55; Case C-308/87, Grifoni v. European Atomic Energy Community [1990] ECR I-1203; Joined Cases C-104/89 and C-37/90, Mulder and others v. Council and Commission [1992] ECR I-3061, paras 33-34.} could be transposed within the field of State liability as well, having as an effect either a break of the causation chain or a limitation in the quantum of damages owned. Finally, the duty to mitigate one’s loss, by availing oneself in time any available remedies before national courts, can also be a factor to be taken into account when investigating causality.\footnote{Brasserie, paras 84-85. See, however, Joined Cases C-387/98 and C-410/98, Metallgesellschaft Ltd and Others, Hoechst AG and Hoechst (UK) Ltd v. Commissioners of Inland Revenue and HM Attorney General [2001] ECR I-1727, para 106, where the applicants’ failure to invoke the primacy and direct effect doctrines in order to set aside national tax law and get a tax relief, that would be denied to them beyond any doubt by the competent national authorities, did not constitute a fetter for their compensation claims. To this extent see the comment on the case by Gerrit Betlem in “The Doctrine of Consistent Interpretation; Managing Legal Uncertainty”, in: Jolande Prissen and Annette Schrauwen (eds.), Direct Effect. Rethinking a Classic of EC Legal Doctrine, Europa Law Publishing, Groningen, 2002, 79-106, at 101-103.}

2.4 The Extent and Form of Compensation

If all conditions for the incurrence of State liability in damages are successfully fulfilled, the amount and extent of the compensation to be granted seems to be a matter of national law to decide. Still, however, the ECJ has not refrained from setting a general scheme for the national courts to follow in their judgments. Even
from Brasserie it made clear that “reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained”\textsuperscript{155} and that total exclusion of loss of profit as a head of damage cannot be accepted\textsuperscript{156}. Additionally, the Court had already rejected in previous case law the practice of \textit{a priori} fixed ceilings in the amount of compensation to be granted\textsuperscript{157} and supported that the award of interest must be regarded as an essential component of the notion of compensation\textsuperscript{158}. Finally, it has to be noted that in case of repayment of charges on imports levied in breach of Community law, the affected traders may not be prevented from taking legal action for compensation of their damage by the fact that those charges have subsequently been passed on to consumers\textsuperscript{159}.

Furthermore, neither the form nor the character of compensation have escaped the scrutiny of the ECJ. On a number of occasions it has been held that retroactive application in full of national measures eventually implementing a belatedly transposed directive, enables, in principle, the harmful consequences of the breach of Community law to be remedied\textsuperscript{160}. However, in cases when the beneficiaries are in position to establish the existence of complementary loss sustained on account of the fact that they were unable to benefit at the appropriate time from the financial advantages guaranteed by the belatedly transposed directive, retroactive application of

\textsuperscript{155} Brasserie, para 82. Van Gerven contents in his article “Bridging the Unbridgeable: Community and National Tort Law after Francovich and Brasserie”, 45 International and Comparative Law Quarterly (1996), 507-544, at 523-524 that this statement entails a dissociation from the Court’s case law under Article 288 (2) EC Treaty, according to which damage resulting from unlawful legislative acts may remain uncompensated, to the extent that it does not exceed the boundaries of normal economic risk-taking on the part of the plaintiff.

\textsuperscript{156} Brasserie, para 87.


\textsuperscript{158} Case C-271/91, Marshall, \textit{ibid.}, para 31. See, however, the distinction that the Court has made as regards interest on amounts payable by way of social security benefits in Case C-66/95, The Queen v. Secretary of State for Social Security, \textit{ex parte Eunice Sutton} [1997] ECR I-2163. On such an occasion it was ruled that the payment of interest on arrears of social security benefits cannot be regarded as an essential component of the right to compensation, but at the same time the Court left the door open for such interest to be claimed under the Francovich doctrine.

\textsuperscript{159} Joined Cases C-192-218/95, Comateb and Others v. Directeur Général des Douanes et Droits Indirects [1997] ECR I-165, para 34.

national implementing measures seizes to constitute adequate compensation, with the result that such loss must be made good as well\(^{161}\).

**Part 2: Member State Liability for Acts of the Judiciary**

**Chapter 3: Köbler v. Austria and its Implications**

**3.1 Introductory Remarks**

The Court has recently delivered its decision in the *Köbler* case\(^{162}\), where, for the first time, it established what in 1993 seemed “unthinkable” in academic writing\(^ {163}\); the extension of *Francovich* to judicial acts and, more specifically, the possibility that Member States can be held liable for breaches of Community law attributed to their national courts adjudicating at last instance. It is submitted however that, no matter the reasonable concern that the aforementioned decision may have caused to European capitals, mainly for its potential financial implications, it should not be considered as a surprising one.

Actually, even from *Brasserie*, the Court had given indications of its will by proclaiming that the principle of State liability holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission is responsible for the breach\(^ {164}\). It has even been supported that *Köbler* gave the Court the opportunity to state explicitly what it had already implied\(^ {165}\). What would be a valid reason to assume that the Court would be more favorable towards a State *qua* judicator than a State *qua* legislator or a State operating in its executive capacity? However, the judicial function of the Member States was included in the *Francovich* doctrine not because the Court stubbornly adhered to what it had previously decided. More likely, the *ratio* of *Köbler* lies in the dogma, expressed by the current President of the ECJ, that “any possible differentiation as regards the other

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163 The term was used by Josephine Steiner, “From Direct Effects to *Francovich*: Shifting Means of Enforcement of Community law”, 18 *European Law Review* (1993), 3 et seq., at 11.

164 *Brasserie*, para 32. See also *Konle*, para 62 and *Haim*, para 27.

State functions would bring the judiciary to a position above Community law and would undermine the obligations that it poses on the Member States, making their fulfillment conditional to the examination of the organ that is responsible for the breach in each given case”\textsuperscript{166}.

Community law does not offer room for such differentiations, as has recently been proven by the successful infringement proceedings brought the Commission against Italy due to the fact that its national courts repeatedly decided a certain legal issue in conflict with Community law, following the established case law of an Italian supreme court\textsuperscript{167}. Therefore, in order for one to have an overall picture of the ECJ’s policy towards national supreme courts, Köbler should be read in conjunction with the afore-mentioned Commission v. Italy and Kühne & Heitz\textsuperscript{168}. In the latter judgment the ECJ established another way in which it could ensure the correct application of Community law by national courts. It found that an administrative authority is under an obligation to reopen a final administrative decision that is in breach of Community law, even though it had been subsequently confirmed by a national court having failed to refer the issue to the ECJ, as long as: (1) it has the power to reopen that decision under national law; (2) the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance; (3) that judgment is, in the light of a subsequent decision given by the Court, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under Article 234 (3) EC; and (4) the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.

It is noteworthy that all three cases were delivered within a time period of approximately six months; Köbler on 30\textsuperscript{th} June 2003, Commission v. Italy on 9\textsuperscript{th} December 2003 and Kühne & Heitz on 13\textsuperscript{th} January 2004. It seems, therefore, that they served as a mean for the ECJ to reframe its relations with national supreme courts by proclaiming in the most absolute manner the authoritative monopoly it holds in the interpretation of Community law. As a matter of fact, this new line of cases probably represents what Weiler had feared in 1993; a departure of the European

\textsuperscript{166} Vassilios Skouris, “Which Are the Consequences when a Breach of the Obligation to Apply Community Law is Attributable to National Supreme Courts?”, Elliniki Epitheorisi Evropaikou Dikaiou (Greek Journal of European Law) (2004), 251-266, at 265-266 (in Greek).
\textsuperscript{167} Case C-129/00, Commission v. Italy [2003] ECR I-4637.
\textsuperscript{168} Case C-453/00, Kühne & Heitz [2004] ECR I-837. See also the annotation of the case by Roberto Caranta in 42 Common Market Law Review (2005), 179-188.
Court from an ethos of presenting itself as *primus inter pares* and maintaining a zone of autonomy for national jurisdiction, even at the price of non-uniformity in the application of Community law, in order to achieve the prize of increased effectiveness, even at the cost of a potential tension in the critical relationship between the European Court and national courts. And this impression seems not to be eased by the assurances of the President of the Court, speaking in his extra-judicial capacity but on behalf of all its members, that “from our (emphasis added) perspective, the relationship between the ECJ and national constitutional courts is one of cooperation. It is certainly true that EU law may enjoy supremacy over national law and that, most of the times, EU law may also be directly applicable in Member States’ legal orders. However, that does not mean that national supreme courts, and especially national constitutional courts, are institutionally subordinate to the ECJ. On the contrary, the judicial architecture of the European Union and the Member States’ judiciaries must be viewed as parallel systems, coexisting within the same supranational structure, and having, in principle, their own proper areas of jurisdiction.”

### 3.2 The Actual Facts of the Case

The case concerned an Austrian university professor, Mr. Gerhard Köbler, who had applied for a length of service increment provided by national law to be granted to university professors upon completion of fifteen years of service at Austrian Universities. His application was turned down due to the fact that Mr. Köbler had not completed the required years of service teaching solely in Austrian Universities but had relied on the fact that the years of his service at German Universities would also be taken into account.

The dispute was subsequently brought to the *Verwaltungsgerichtshof* (Supreme Administrative Court). Mr. Köbler claimed there that the rejection of his...

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application on the ground that the fifteen years service ought be completed solely at Austrian Universities amounted to indirect discrimination against him, contrary to the principle of free movement of workers as guaranteed by Article 39 of the EC Treaty and by Article 7 of Regulation 1612/68\(^{172}\). On the 22\(^{nd}\) October 1997 the Verwaltungsgerichtshof stayed the proceedings and referred a request for a preliminary ruling to the ECJ, pursuant to Article 234 EC Treaty.

In the meantime, the Court delivered its ruling in the case *Kalliope Schöning-Kougebetopoulou*\(^{173}\). Mrs. Schöning-Kougebetopoulou, a Greek national, was working as a specialist doctor in Germany. She had applied for a classification at a higher salary group that was provided by a federal collective wage agreement on condition of completion of eight years of service. Like Mr. Köbler, her application was turned down due to the fact that the period Mrs. Schöning-Kougebetopoulou had worked in the Greek public service as a specialist doctor was not accounted. The dispute reached the ECJ for a preliminary ruling and the Court decided that the salary classification of Mrs. Schöning-Kougebetopoulou as a specialist doctor in Germany ought to have taken into account the previous periods of comparable employment completed in the public service of another Member State.

In the light of this decision, which had solved issues similar to those in the main proceedings in *Köbler*, the Registrar of the Court asked the Verwaltungsgerichtshof whether it deemed it necessary to maintain its request for a preliminary ruling\(^{174}\). The Austrian Supreme Court asked the opinion of the parties on the request of the Registrar, since on a provisional view the dispute was resolved in favour of Mr. Köbler and indeed, it withdrew its request from the ECJ. However, by a judgment of the same day, it dismissed Mr. Köbler’s application on the ground that the special length of service increment in question constituted a loyalty bonus, which was objectively justified as derogation from Community law provisions on the free movement of workers.

Subsequently, Mr. Köbler brought an action for damages against the Republic of Austria before the *Landesgericht für Zivilrechtssachen Wien*, claiming that the

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\(^{172}\) Council Regulation 1612/68 of 15 October 1968 on the freedom of movement of workers within the Community, OJ 1968 L257/2.


Supreme Administrative Court had infringed directly applicable provisions of Community law by treating the increment at issue as a loyalty bonus, contrary to the ECJ’s case law. As a consequence, he sought compensation for the alleged loss he had unlawfully sustained as a result of the judicial decision in question. Upon the arguments of the Austrian State that the decision of the Verwaltungsgerichtshof was not contrary to Community law and that, in any event, the decisions of a Supreme Court could not under the Austrian Constitution give rise to State liability, the Landesgericht für Zivilrechtssachen Wien decided to stall the proceedings before it and refer a request for a preliminary ruling to the ECJ.

3.3 The Establishment of State Liability as a Matter of Principle

In its reply the Court first decided that, as a matter of principle, Member State liability, can be extended so as to include damages that are caused to individuals by a judgement of a national court adjudicating at last instance. In finding arguments that would provide a solid dogmatic foundation for this approach, the ECJ first had recourse to international law on state responsibility for breach of an international commitment. It has to be noted that even though the European Union, as it stands today, has developed into an autonomous system that overlays and supersedes the general framework of international law\textsuperscript{175}, the Court still looks to international law in search for inspiration; this, however, does not include the application of international law as such, but only of rules of Community law modelled on those of international law\textsuperscript{176}. State responsibility of public international law, may serve as a useful source of theoretical inspiration for state liability within the Community legal order\textsuperscript{177} but cannot be implanted as such, “at least not in the classical sense”\textsuperscript{178}.

Indeed, any parallelism between the two notions has to take into account the idiosyncratic features of the Community legal order. State responsibility of


international law is based upon reciprocity and counter-measures that are enforced by states, acting individually or collectively\textsuperscript{179}, vis \textit{a vis} other states. Quite to the contrary, in Community law the issue of State liability is directly put by private individuals, who bring themselves proceedings against the defaulting states in order to protect their rights. Therefore, it is pertinent to view state liability as a modified and developed form of state responsibility, which takes into account the specific characteristics of Community law, in particular its unique individualizing tendency\textsuperscript{180}.

Under this spectrum, the attribution of the judiciary to the notion of the defaulting state in international law\textsuperscript{181} is for the Court a principle that must apply \textit{a fortiori} in the Community legal order. The principle of state unity, according to which the State is viewed as a single entity when it comes to liability as a result of a breach of an international commitment caused by the legislature, the judiciary or the executive, is even more vital within the Community where all state functions are involved in the implementation and application of Community rules and are bound in performing their tasks in accordance with these rules, which govern directly the situation of individuals\textsuperscript{182}.

National courts, especially those who adjudicate at last instance, play a predominant role to this extent, since they constitute the last judicial body before which individuals may assert the rights they derive from Community law. Their importance is underlined by Article 234 (3) EC Treaty, whose \textit{ratio legis} is to oblige national courts, against whose decisions there is no judicial remedy, to activate the preliminary reference procedure so as to provide full effectiveness to individual’s rights flowing from Community law and maintain its unity by depriving national supreme courts of the possibility to adjudicate on unresolved matters without the guidance of the ECJ.

\textsuperscript{180} Bernhard Rudolf Hofstötter, “The Problem of Non-Compliant National Courts in European Community Law”, \textit{supra} note 175, at 45.
\textsuperscript{181} The attribution of the judiciary to the concept of the State reflects a principle of customary international law that has been confirmed in Article 4(1) of the Draft Articles on State Responsibility that were drafted by the International law Commission and approved by a resolution of the General Assembly of the United Nations. It states that “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State”. See the Annex to Resolution 56/83 of the General Assembly, Doc A/Res/56/83.
\textsuperscript{182} Köbler, para 32.
Admittedly however, this approach has not always been firmly followed by national courts. The recognition of the *acte clair* doctrine by the ECJ in its *CILFIT* decision\(^{183}\) has given national courts a place for manoeuvre and conditional discretion on whether they would recourse to the preliminary ruling procedure. In exercising this discretion national courts of last instance have on various occasions exceeded their *CILFIT* mandate and considered as *acte clair* legal issues that obviously did not have this capacity, expressing an indirect reaction either to the Court’s case law or to the erosion of the national legal order by the primacy of Community law.\(^{184}\)

Subsequently, President Skouris was right in viewing *Köbler* as “another safeguard in the system of voluntary cooperation established by the preliminary ruling procedure, which does not have legislative source but finds its base on the ECJ’s case law”\(^{185}\). Köbler liability shall stand as the sword of Damocles above the heads of national...
supreme courts, in case they are to circumvent their obligation to refer to the ECJ and to exceed their CILFIT mandate.

Therefore, in the light of these considerations, the Court went on to blatantly state that “in the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, it seems that the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance…Since an infringement of those rights by a final decision of that court cannot thereafter be normally corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights”\textsuperscript{186}.

This axiomatic position is not rendered less convincing when contradicted with other, long-respected principles that govern the administration of justice and are respected in the legal systems both of the Member States and the Community as a whole. In fact, the Court chose to address and interpret each one of these principles, raised by several Member States in their observations as hindrances to the recognition of judicial liability, in a way that it would eventually support its ruling.

First of all, \textit{res judicata pro veritare habetur}; a matter adjudicated is held to be true. The principle of \textit{res judicata} is recognized by all Member States\textsuperscript{187} and is also well founded and respected within the Community legal order, since it has been recognized by the Court in case \textit{Eco Swiss}\textsuperscript{188}. According to \textit{res judicata}, judicial decisions, which have become definitive after all rights of appeal have been exhausted or after the expiry of the time limits provided for in that connection, can no longer be disputed. After all, legal certainty and stability of the legal order imply that a dispute should eventually come to a definitive end.

However, in the Court’s argumentation the “recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as \textit{res judicata}”\textsuperscript{189}. As AG Léger notes, “\textit{res judicata} is applicable only in certain circumstances, when there is a

\textsuperscript{186} Köbler, paras 33-34.
\textsuperscript{187} Opinion of AG Léger in Köbler, para 96.
\textsuperscript{188} Case C-126/97, Eco Swiss [1999] ECR I-3055, para 46.
\textsuperscript{189} Köbler, para 39.
threefold identity (which is cumulative, not alternative) - of subject-matter, legal base and parties - between a dispute already resolved and a subsequent dispute.” Accordingly, the applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of res judicata of the judicial decision which was responsible for the damage.

It seems, therefore, that the opinion according to which the Court essentially ignores the principle of res judicata is not well founded. As a matter of fact, the Court made clear that for the purposes of Community law, but contrary to the observations of several Member States, res judicata is confined to a formal and not substantive understanding. Besides, it has convincingly been submitted that even a possible breach of the principle “may on occasion be acceptable in the interests of justice since the reasons and values underlying res judicata (peace, legal certainty and an end to litigation) should be examined along with competing interests, such as justice for individual litigants.”

Even if one considers that the reef of res judicata was successfully bypassed, concerns can reasonably be raised for a possible hindrance of the independence of the judiciary. How could one speak for a judiciary that is independent from the executive when governmental liability is imposed? State liability identifies the judiciary too closely with the government and the executive and seems to contradict with the theory of separation of powers that Montesquieu articulated, upon which modern democracies are built. However, in the view of the Court, the independence of the judiciary is not threatened since “the principle of liability in question concerns not the personal liability of the judge but that of the State”. In addition to this, there is no

190 Opinion of AG Léger in Köbler, para 101.
191 Köbler, para 39.
193 For the distinction: Bernhard Rudolf Hofstötter, ibid., at 82. However, it has to be noted that the Court seemed to have also accepted a substantive aspect res judicata in its Order of 11th July 1996 on Case C-397/95 P, Dimitrios Coussios v. Commission [1996] ECR I-3873, para 25.
195 Helen Toner, ibid., at 169.
196 Köbler, para 42.
significant risk for the diminution of the authority of a court adjudicating at last instance when its final decisions will be called in question indirectly by implication during the subsequent proceedings against the Member State. Much to the contrary, the ECJ seems to embrace the opinion that confidence in a system is better preserved by a frank and open recognition of potential failings rather than blanket immunity by stating that “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”.

In a more theoretical analysis, Anagnostaras gives a noticeable reply as regards judicial independence that deserves to be cited in full. “The constitutionally protected judicial independence has been introduced with the purpose of guaranteeing the impartial performance by the courts of the duties entrusted to them, aiming at shielding judges from any interference emanating from either the legislature or the executive. The need to protect the decision-making freedom certainly explains why the imposition of personal liability for faulty judges is often seen as an unsuitable means of restoring the loss individuals may have sustained because of them. It does not equally explain, however, why this should be the same when the action for damages is brought against the state”. Therefore, since “the exercise by the judiciary of the duties entrusted to it has been authorized by the State and thus constitutes on more manifestation of the sovereign nature of the latter, …it should be the State to undertake any responsibility for the failure of the courts to respect the limits of legal authorization given to them…regardless of the fact that the State, expressing its sovereign character, has consented to abstain from any control on the way the judges will choose to perform the tasks the State has entrusted to them…”

From the aforementioned considerations it can reasonably be argued that the recognition of State liability for acts of the judiciary does not contradict, as a matter of principle, with neither res judicata nor judicial independence. Therefore, a claim for compensation has to be forwarded to a court that is both competent to adjudicate upon

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197 Helen Toner, ibid., at 175.
198 Köbler, para 43.
200 Georgios Anagnostaras, ibid., at 289.
it and impartial, in the light of the requirements imposed by Article 6 (1) of the ECHR. No matter the reasoned difficulties that were expressed by the intervening governments, concerning the adverse implications that the designation of a competent and impartial court to hear Köbler claims would bring to the organization of the domestic judicial hierarchies, both the ECJ and the Advocate General preferred to tackle away a response on this issue, hiding behind the Member States’ procedural autonomy, which the Court itself has on various occasion been more than willing to delimit. Both of them preferred to wash their hands of the issue by holding that it is for the national legal order to afford individuals an appropriate right of action in accordance with the principles of equivalence and effectiveness, since the application of State liability cannot be compromised by the absence of a competent court.

However, many and seemingly impenetrable problems arise at this point. It cannot be doubted that any Köbler claims court must be characterized by impartiality. AG Léger has pointed in his opinion, referring to the relevant case law of the European Court of Human Rights, that “the existence of impartiality... must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect”, and that “in this connection, even appearances may be of a certain importance”. Therefore, since even appearances can be important, it seems inconceivable to accept that the claim for reparation resulting from a breach of Community law committed by a national high court will be adjudicated by another national court, which belongs to the same, national judicial system with the wrongdoer.

These adverse results could not come up when the Court recognized State liability for breaches of Community law attributed to national executive or legislature since the doctrine of separation of powers within the national legal orders provided the credentials for the impartiality of the subsequent proceedings. The interesting idea that was posed by Stephanou and Xanthaki to bypass these difficulties that Article 288 (2) EC Treaty could be used as the legal base for bringing actions even against

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202 Opinion of AG Léger in Köbler, para 108.
Member States before the Court of First Instance, with the ECJ acting as an appeal court, may only be used with respect to concurrent liability of both the Community and the Member States, but seems that can provide a model for a future reform in the way compensation for breach of EC law by Member States is provided to individuals.

Furthermore, how can the domestic judicial hierarchy not be offended when courts holding a lower position will have to hear claims that challenge the solutions given by courts superior to them? How impartial can a judge of this lower court be when it is common ground in Member States, and actually perceived as a triumph of the independence of the judiciary, that all the matters regarding the labour status of judges shall be determined by councils in which high court judges and not state officials are members?

In addition to these, even if this judge can be impartial, how impartial can a national appellate procedure be when it might even bring the decision of the lower, competent claims court before the highest national one, whose infringements the first court was called upon to judge\textsuperscript{204}? It was AG Léger who opined that the Court of First Instance should be denied jurisdiction to decide those actions for damages directed against its own judgments, since its impartiality would be questionable on that occasion\textsuperscript{205}. Mutatis mutandis, how could one avoid the occurrence that a decision of a claims court might meet, at the end of the judicial route before it becomes definitive, the supreme court whose decision gave rise to the compensation claim in the first place?

This problem seems impossible to override even within the framework of those national legal systems that have established a functional distinction between their national courts. For instance, in France and in Greece, where such distinction is established, ordinary courts adjudicate on civil and penal cases and administrative courts adjudicate on administrative cases. At the top of the ordinary judicial hierarchy the \textit{Cour de Cassation} and the \textit{Άρειος Πάγος} (\textit{Arios Pagos}) have been placed respectively. The supreme position among the administrative courts is held, on the other hand, by the \textit{Conseil d’Etat} and its Greek equivalent, the \textit{Συμβούλιο της Επικρατείας} (\textit{Simvoulio tis Epikratias}). In order to organize an appeal procedure in these countries in an impartial way, “claims based on wrongful decisions of the

\textsuperscript{204} Peter Wattel, “Köbler, CILFIT and Welthgrove: We Can’t Go On Meeting Like This”, supra note 192, at 180.

Conseil d’État will have to be considered in the judicial column that ends with the Cour de Cassation adjudicating at last instance, and claims based on wrongful decisions of the Cour de Cassation will have to be considered in the judicial column which ends with the Conseil d’État adjudicating at last instance” 206.

It becomes apparent such adjustments can resolve into severe procedural entanglements that offend the allocation of jurisdiction within the national legal order and can be turned into a battle between higher courts of different branches for jurisdiction over the dispute. Therefore, special procedures should be set in every Member State so as to determine courts that will hear Köbler claims. The only reasonable way to bypass these procedural difficulties within the present procedural structure seems to be the set in motion of the preliminary ruling procedure on any case that liability for acts of the judiciary arises. To this direction points the opinion of AG Léger, who sees in the preliminary procedure a guarantee of impartiality. “Indeed, in order to dispel any reasonable doubt as to its impartiality, the national court might choose to refer a question for a preliminary ruling and thus entrust to the Court the responsibility of examining whether the supreme court concerned has in fact acted in breach of Community law and, if so, to what extent. Recourse to such a procedure would offer a dual advantage since it would make it possible both to dispel any reasonable doubt as to the impartiality of the national court and to give guidance to that court in this delicate exercise by avoiding the risk of error in the appraisal of an alleged error. In such circumstances, the role which the Court would be invited to assume - as an international court independent of the national courts - could be compared to that of the European Court of Human Rights – in the examination of individual complaints” 207. What, the Advocate General seems to forget is that the proposed extensive recourse to the preliminary ruling procedure would contravene with the already established jurisprudence of the Court under the Francovich doctrine according to which “the Court cannot substitute its assessment for that of the national courts, which have sole jurisdiction to find the facts in the main proceedings and decide how to characterize the breaches of Community law at issue” 208.

207 Opinion of AG Léger in *Köbler*, paras 111-112.
208 *Brasserie*, para 58.
Additionally, recourse to the preliminary ruling procedure in such a case seems inevitable as well for scholars that have commented on the topic.\textsuperscript{209} Is it, however, a desirable solution, when the queuing line in Luxemburg for a judgment to be delivered is approximately two years? In the light of the reasonable time limit imposed by Article 6 of the European Convention of Human Rights, how many years of litigation would be needed for an individual to be compensated for a breach of Community law attributed to a national court adjudicating at last instance?\textsuperscript{210} A commentator has recently calculated the years it took Mr. Köbler to bring his litigation to an end. “His story began in 1996. It took two years from his request for the increment to the dismissal of his application by the Verwaltungsgerichtshof. It must be born in mind that in this case the proper preliminary ruling procedure was replaced by a simplified procedure whereby the Registrar of the Court referred in accordance with Article 104 (3) of the Rules of Procedure to another similar judgment. The Verwaltungsgerichtshof withdrew the question, without waiting for the complete preliminary ruling, which normally takes approximately two years. Then the second claim came – the one of liability. As we know the Court of Justice gave its ruling in late 2003 and professor Köbler must now wait for the decision of the Landesgericht, which, in line with the ruling of the Court of Justice, will most probably dismiss the action of Mr Köbler”.\textsuperscript{211}

From the considerations mentioned above it becomes apparent that State liability for breaches of Community law caused by the conduct of the national judiciary is a notion that cannot be easily fitted to current, domestic, procedural frameworks. Still, Köbler seems to be a reasonable decision that can be explained in terms of the ECJ’s long-term judicial policy; First of all, it has become common sense that the Court does not generally pay extensive attention on whether the solutions it gives are able to be accommodated within the procedural framework provided by national legal systems. The “no new remedies” rule seems to have irrevocably reversed. National courts ought nowadays to find ways for Community rights to be


\textsuperscript{210} Even though the ECrtHR has ruled, in case \textit{Pafitis v. Greece}, judgement of the 26\textsuperscript{th} February 1998, that, in assessing the length of national judicial proceedings under the spectrum of Article 6 (1) ECHR, it would not take into account the time during which the proceedings were stayed pending a reference for a preliminary ruling, still, the length of the proceedings before the ECJ can be assessed as a factor not favouring the set into motion by national courts of the preliminary reference procedure.

enforced by disapplying, amending or even inventing national procedural rules. What would be a valid reason for the ECJ to change this position when it comes to Köbler claims? Efficiency and uniform application of Community law constitute the foundation stone upon which the Court’s reasonings are built. It is up to the national legal systems to provide or even introduce the procedures that will accommodate the innovations the Court introduces, through a procedure of fertilization that is not awkward in the Community legal order\textsuperscript{212}.

Furthermore, and as regards judicial liability in particular, Köbler implies a shift of power from supreme courts to national courts of lower instance; national lower courts are being transformed, from a functional point of view, into supreme courts, whenever a question of State liability stemming from an alleged incompatibility of a decision of a supreme court is at issue. This effect, however, can also be easily conceptualized as part of the ECJ’s strategy to empower national courts of lower instance.\textsuperscript{213} The rulings in Rheinmühlen\textsuperscript{214} and Simmenthal\textsuperscript{215} cases offer a precedent that can be understood as offering useful guidance to this respect.

Finally, it has to be noted that Köbler constitutes another implicit empowerment of the preliminary reference procedure, which ultimately entails the enhancement of the surveillance role of the ECJ. It seems that national courts facing Köbler claims will most definitely resort to the preliminary reference procedure to avoid the implications of their decisions when they award damages by circumventing decisions of national supreme courts, not in conformity with Community law, which they would otherwise have been bound to observe on account of national law.\textsuperscript{216} Indeed, the questions referred in Köbler by the Landesgericht für Zivilrechtssachen Wien invited the Court to rule extensively on the conditions concerning the possible existence of State liability. A similar approach, that proves the correctness of this assumption and the acceptability it has already found by national courts of lower instance, can also be found in case C-173/03, Traghetti del Mediterrano SPA v.

\textsuperscript{212} See, however, the intense criticism by Carol Harlow in “Francovich and the Problem of the Disobedient State”, 2:3 European Law Journal (1996), 199-225, who describes (at 200) the ECJ as “selfish” in imposing its doctrine of supranational liability on national systems.
\textsuperscript{213} Bernhard Rudolf Hofstötter, \textit{ibid.}, at 134.
\textsuperscript{216} Bernhard Rudolf Hofstötter, \textit{ibid.}, at 134.
Italian Republic\textsuperscript{217}, pending before the Court at the time these lines are written. An Italian court this time, the Tribunale di Genova, once again referred to the ECJ questions concerning State liability on account of breaches of Community law attributed to national courts of last instance but, at the same time, insisted to get a reply on the compatibility of national provisions that almost exclude such possibility that would work its hands free in case it had to decide contrary to the national legal framework.

Furthermore, in order to introduce such a controversial notion like Köbler liability, the Court attempted to find further support in the comparative analysis of the various national legal systems, conducted by the Advocate General of the case. This approach serves two, equally important aims; first of all, at the level of formation of Community law, it aims to accrue to the principles deduced by this analysis, normative importance and the force of positive law\textsuperscript{218}. Secondly, it has as its telos the conferral upon Community law of a label of acceptability to national legal orders, so as to promote solutions that shall not face extensive resistance that would undermine its primacy, effectiveness and uniform application\textsuperscript{219}. In this way, State liability can be seen to derive from well-established principles of the national legal orders rather than from the imagination of the ECJ\textsuperscript{220}.

It seems conspicuous, however, that the Court fell short from recognizing a “common” or “general” principle of Community law to the extent of an inclusion of national judiciaries, adjudicating at last instance, within the ambit of State liability\textsuperscript{221}. Much to the contrary, and opposite to the opinion of the Advocate General\textsuperscript{222}, it merely limited its findings in concluding that the application of the principle of State liability to judicial decisions, in general and not in particular to decisions of last instance courts, has been accepted in one form or another by most of the Member

\textsuperscript{217} Case C-173/03, Traghetti del Mediterrano SPA v. Italian Republic, pending before the ECJ, OJ 2003 C 158/10.

\textsuperscript{218} To this extent see George Benos, “The Practical Debt of Community Law to Comparative Law”, Revue Hellénique de Droit International (1984), 241-254, especially at 251.

\textsuperscript{219} For such an approach as regards the teleology of the comparative law method within the Community legal order see Koen Lenaerts, “Interlocking Legal Orders in the European Union and Comparative Law”, 52 International and Comparative Law Quarterly (2003), 873-906, at 879-880.

\textsuperscript{220} Paul Craig & Gráinne de Búrca, EU Law – Text, Cases and Material, Oxford University Press, Oxford, 2003 at 262.


\textsuperscript{222} Opinion of AG Léger in Köbler, para 85, where he acknowledges the existence of a “general principle of Community law”.
At this point it is submitted that the Court was right in upholding such a position. The comparative analysis of national legal systems by AG Léger in Köbler has subsequently been criticized in academic literature even as “superficial, that it cannot live up to the promise made in its outset, namely to demonstrate that the principle is accepted in all (emphasis on the original) the Member States”.

Indeed, AG Léger seems to have toned down the differences that exist, not only between the various Member States, but, more fundamentally, on several occasions, between the assumption of the alleged general principle he eagerly wanted to conclude and legal reality. For instance, the Spruchrichterprivileg pursuant to Article 839 (2) of the German Civil Code is not even mentioned. This very provision entails the factual ruling out of State liability for judicial acts, unless for the highly exceptional case of a breach of law amounting to a criminal act. Therefore, e silentio Germany is regarded as one of “all the Member States” that would provide for State liability for judicial acts, which the AG refers to.

Furthermore, it has validly been submitted that the two cases of national jurisdictions to which the Advocate General has referred, cannot be considered as precedents upon which one could base a general principle of Community law on State liability for breaches of EC law attributed to courts of higher instance. The first one, De Keyser of the Belgian Cour de Cassation, indeed recognized the possibility of a state to be held liable for a decision of a court but on condition that the court’s judgement must be previously quashed. It seems obvious, however, that this condition can never be satisfied where a supreme court’s judgement is at stake because there is no further instance to quash the decision. The second one concerned an Italian decision according to which the Tribunale di Roma was asked to rule whether the Corte Suprema di Cassazione had acted in breach of Community law. The Tribunale, however, did not decide on the alleged breach but found that the causal link between the decision of the supreme court and the damage sustained had not been

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223 Köbler para 48.
224 Opinion of AG Léger in Köbler, paras 77-85.
225 Bernhard Rudolf Hofstötter, ibid., at 70.
226 839 (2) of the Bürgerliches Gesetzbuch (German Civil code).
227 Bernhard Rudolf Hofstötter, ibid., at 71.
228 Judgement of 19th December 1990, found in: 111 Journal des tribunaux (1992), 142-152.
established. Therefore, it has been submitted that it cannot serve as a precedent either.\footnote{Marten Breuer, \textit{ibid.}, at 250.}

In search of further precedents that would justify their decision, both the ECJ and the Advocate General point towards the liability of the Member States of the Council of Europe for violations of human rights. The recent \textit{Dulaurans v. France}\footnote{ECrHR, \textit{Dulaurans v. France}, judgement of the 21\textsuperscript{st} March 2000.} is mentioned to this extent but, what is more interesting, is the omission of any mention to the judgement of the ECrtHR in case \textit{Dangeville v. France}\footnote{ECrtHR, \textit{Dangeville v. France}, judgement of the 16\textsuperscript{th} April 2002. A short description of the case is given by Bernhard Rudolf Hofstötter, \textit{ibid.}, at 63-64: “Dangeville, a French insurance company was denied exemption granted by the Sixth VAT Directive by decision of the \textit{Conseil d’État} in 1986, at a time when the latter court did not recognize the doctrine of direct effect of directives. France had failed to transpose the said directive into national law within the prescribed time limit. In the course of secondary State liability proceedings, the applicant claimed damages to the amount of the exemption denied. Although by that time the doctrine of direct effect was recognized by the \textit{Conseil d’État}, this court dismissed the State liability claim essentially on the basis of \textit{res judicata} of its original judgment. The fact that the damages action had remained unsuccessful was qualified by the ECrtHR as a violation of Article 1 of Protocol No. 1. According to the ECrtHR’s reasoning, the applicant had a valid claim against the State when it lodged the State liability claim. A claim of that nature constituted an asset and therefore amounted to a ‘possession’ within the meaning of Article 1 of Protocol 1. In any case, there was a legitimate expectation on the part of the applicant of being able to obtain reimbursement”.} The factual importance of the latter case is underlined by the opinion, supported in academic literature, that the ECJ’s Köbler decision may also have been motivated by the wish not to fall behind the position of the ECrtHR in \textit{Dangeville}\footnote{Jörg Gundel, “Neue Anforderungen des EGMR an die Ausgestaltung des nationalen Rechtsschutzsystems – Die Schaffung effektiver Rechtsbehelfe gegen überlange Verfahrensdauer”, \textit{Deutsche Verwaltungsblätter} (2004), 17, at 26. Reference from: Bernhard Rudolf Hofstötter, \textit{ibid.}, at 66.} and to fit within the Community legal order the development of a system of holding the State liable for judicial conduct, for which the aforementioned cases seem to have paved the way.

Completely opposite to any form of analogy between the regime of judicial liability within the framework of the European Convention of Human Rights and the one of the Community is Wattel who notes “that comparison does not hold water, because: (i) in ECHR cases indeed very special interests (human rights) are at issue, whereas in the case of Köbler liability we may well be dealing with infringement of an EC directive on the luminosity of bicycle taillights...(ii) in ECHR cases the Member States have actually submitted themselves, by multilateral Treaty, to the possibility of individual complaints and the possibility ensuing State liability for individual damages caused by mistakes of their highest Courts, to be established and calculated, not by any national Court, but by a special, higher, international Court
which also deals at last instance with the substance of the case. However, no matter the rationality and the profound correctness of these arguments, it is submitted that they cannot deal a decisive blow to the dogmatic foundation of Köbler, simply because the ECHR serves merely as a residual base for the argumentation of the ECJ and, on any occasion, it does reveal a profound trend towards the recognition of liability of the State in its judicial capacity that cannot be overseen.

The final point I would like to add, as regards the Court’s reasoning for the establishment of State liability for judicial breaches as a matter of principle, is the noticeable abstain of the Court to reply to an observation brought forward by Austria, according to which there should be a parallel between the rules governing Member State liability and those governing Community liability. Since, Austria maintained, Article 288 (2) EC Treaty cannot be applied to an infringement of Community law attributable to the Court of Justice, because in such a case it would be required to determine a question concerning damage which itself had caused, so as to render it judge and party at the same time, nor can the liability of the Member States be incurred in respect of damage caused by a court adjudicating at last instance.

AG Léger, on the other hand, addressed the issue and gave a convincing answer to these considerations in the light of recent case law. He first cited Bergaderm, a case that concerned liability of the Community under Article 288 (2) EC Treaty where, for the first time, the Court relied on its case law on State liability and not on the Schöppenstedt formula to determine the conditions applicable to the liability of Community institutions. It has actually been suggested that Bergaderm unifies the conditions of liability and that “tort laws laid down in the two line of

235 Peter Wattel, *ibid.*, at 187.
236 Köbler, para 21.
cases, one relating to Community institutions and the other relating to Member States, are used by the Court, *back and forth*, as a source of inspiration\(^{240}\). Therefore, the first part of Austria’s contention was a fact. However, since both the Member States and the Community are indeed liable under the same conditions, if the principle of Community liability was extended to the judicial functions of the ECJ or the CFI, then the Member States ought to accept the application of the same principle regarding the judicial functions of their national courts. To this extent, the Advocate General mentions another recent and very important decision, *Baustahlgewebe v. Commission*\(^{241}\), where the Court held the CFI infringed the principle that decisions are to be adopted within a reasonable time\(^{242}\) and afforded the applicant a “reasonable satisfaction” for the excessive duration of the proceedings, even though the amount could be characterized as merely symbolic.

In this way AG Léger tries to reverse the argument posed by Austria. He does not mention, however, that in *Baustahlgewebe* the liability of the Community was not the subject matter of the case and no proceedings pursuant to Article 288 EC Treaty had been brought; quite to the contrary, the ECJ chose to appropriate the position of the Strasbourg Court and judge in favour of a reason of appeal that was posed by the applicant, based on the exceeding of the reasonable time for the CFI to reach a decision. And it had no other alternative to do otherwise. Under Article 61 of the Court’s Statute, had it found the appeal as well founded, it had two alternatives; either to give itself final judgment or to refer the case back to the CFI for judgment. The referral to the CFI was precluded in this case since it could amount to a more severe exceeding of the reasonable time period. Therefore, it had to quash the decision of the CFI and decide itself. However, it could not eliminate the fine imposed by the Commission for the breach of rule concerning competition, since no causality could be found between the exceeding of reasonable time by the CFI and an alleged misapplication by the Commission of competition rules. Therefore, the Court perceived that Baustahlgewebe was, among others, quasi-requesting compensation for


\(^{242}\) The total time for the entire proceedings before the CFI in this case was approximately five and a half years.
the exceeding of reasonable time and took the position that it should be rendered some “reasonable satisfaction”\(^\text{243}\).

From the above, it becomes evident that, *Baustahlgewebe* merely shows a tendency of the Court to provide some “reasonable” and not “just”, as the ECHR demands, compensation when certain fundamental procedural rights, which have been acknowledged as human rights, are violated. The ECJ has not yet judged on compensation claims posed directly by individuals against the decisions of the CFI for misapplication of Community law. And more importantly, the core question remains open; under which procedure, before which court and under which substantial conditions will Community’s liability be imposed on the occasion that the ECJ itself breaks Community law by its judgments?

### 3.4 The Substantive Conditions for State Liability by Judicial Breaches

Having surpassed all the obstacles posed by the observations of the Member States for the recognition, as a matter of principle, of State liability for judicial breaches, the Court continued its analysis to designate the substantive conditions that should govern such liability. It first recalled the typical, threefold State liability test, first established in *Brasserie* and confirmed in subsequent case law. According to it, Member States can be held liable when a *trias* of necessary and sufficient conditions are satisfied, namely 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 individual.

As regards the second of these conditions, the Court accepted as that “regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty...(therefore) State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law”\(^\text{244}\). It is noteworthy that the exceptionality of manifest infringements of Community law is a new element that enters the picture in *Köbler* and is absent in

\(^{243}\) To the same extent see the analysis of *Baustahlgewebe* in: Petros Stangos, *Judicial Protection of Fundamental Rights in the Community Legal Order*, Sakkoulas, Thessaloniki, 2004, at 210-213 (in Greek)

\(^{244}\) *Köbler*, para 53.
the Court’s case law concerning infringements attributed to national legislature or administration. It seems therefore logical to assume that the Court wished to provide a more stringent standard of liability with regard to judicial acts\textsuperscript{245}.

To this extent, the factors to be taken into consideration are similar to those set in \textit{Brasserie} and include “the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and 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”\textsuperscript{246}. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case law of the Court in the matter\textsuperscript{247}.

It has to be underlined that for the ECJ the obligation to request a preliminary ruling pursuant to Article 234 (3) EC Treaty is considered as a factor of manifest importance for the incurrence of liability. To this extent, the Court did not follow the opinion of AG Léger who saw a risk in establishing a causal link between the failure of the national court to resort to the preliminary ruling procedure and the loss sustained by the applicant, since such an approach presupposes the assumption that the decision of the supreme court would have upheld the applicant’s claims, had it in fact referred a request for a preliminary ruling\textsuperscript{248}. Such a possibility would only have been assumed if Article 234 (3) EC Treaty itself had the effect of creating \textit{a priori} individual rights which must be protected, thus causing liability\textsuperscript{249}.

After these preliminary remarks, the Court stated that it had all the necessary criteria that would enable it to establish whether the necessary conditions for the liability of the Austrian state were fulfilled in the case at hand. Applying the aforementioned test to the actual facts of the case, the ECJ maintained that the rules of law infringed, namely Articles 39 EC Treaty and 7 of Regulation 1612/68, prohibit any discrimination based on nationality as between the workers of Member States, in particular as to remuneration and subsequently, it cannot be doubted that they are intended to confer rights to individuals.

\textsuperscript{245} Bernhard Rudolf Hofstötter, \textit{ibid.}, at 105.
\textsuperscript{246} Köbler, paras 55-56.
\textsuperscript{247} For the precedential impact of the preliminary rulings of the ECJ on national courts see: Tuomas Ojanen, “Between Precedent and the Present”, 3:1 \textit{Turku Law Journal} (2001), 105-118.
\textsuperscript{248} Opinion of AG Léger in Köbler, paras 146-153.
\textsuperscript{249} Claus Dieter Classen, “Annotation to Köbler”, \textit{supra} note 209, at 820.
With regard to the determination of a possible existence of a sufficiently serious breach of Community law, the Court chose to focus on the fact that, before the case at hand, there had not been any case law of the ECJ concerning the possibility that a loyalty bonus, even though an impediment to the free movement of workers, may be justified under Community law. It was supported than not even the Court’s ruling in Schöning-Kougebetopoulou provided a clear answer to this extent. Therefore, in absence of any guidance on the matter, the Verwaltungsgerichtshof ought to have maintained its request for a preliminary ruling, a course of action that was obligatory, following *CILFIT* and the provisions of Article 234 (3) EC Treaty. However, by withdrawing its request and deciding against Mr. Köbler’s claim, it did not commit a sufficiently serious breach of Community law since its decision was based on an incorrect reading of the Court’s ruling in Schöning-Kougebetopoulou.

Contrary to the decision of the Court, AG Léger focused on the fact that, on any occasion, a loyalty bonus constitutes a form of indirect discrimination that is not proportionate so as to be justified. The *Verwaltungsgerichtshof* could have drawn adequate guidance from the existing case law of the ECJ and uphold Mr. Köbler’s claim, therefore the committed breach of Community law had to be considered as manifest and thus, incurring liability. However, the diversion between the judgment of the Court and the opinion of the Advocate General in Köbler was not limited simply to the qualification of the conduct of the Austrian supreme court. Additionally, AG Léger kept a different approach on the adaptation of the conditions for Member State liability to the peculiarity of breaches committed by the national judiciary. Within his reasoning, the decisive factor to be taken into account is whether the error of law at issue is excusable or inexcusable. This characterization can depend either on the clarity and precision of the rule infringed, the disregard of the case law of the Court or an infringement of the obligation to refer a preliminary ruling question. On the other hand, he contended that the position taken by Community institutions is irrelevant, whereas the question of an intentional breach committed by the supreme courts would be particularly difficult to adjudicate, since it consists of a subjective element.

The approach of the Court, to rule in effect against the opinion of AG Léger, seems to have taken over the area of notable consensus between the ECJ and the opinions of its Advocates General as regards the case law on State liability in

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damages for breach of EC law, where “the Court and the Advocates General spoke to a large extent with one voice”\textsuperscript{251}. However, even if such differences are sparse, they deserve our attention especially where a subject matter has proven in the past to be one of the most powerful instruments of securing the effective application of Community law in the national legal order, as has the issue of State liability for breach of EC law\textsuperscript{252}.

However, by the determination of those criteria and the way they were applied, both the Court and the Advocate General left the door open to criticism. If the decisive factors for a the qualification of a breach as manifest include the degree of clarity and precision of the rule infringed and the observance of the Court’s case law at any given time, “does this mean that the Community instead of the Member States is responsible for damages caused by the excusable misreading or misunderstanding of illegible EC rules, or the enigmatic or simply erroneous ECJ answers - especially answers to questions which were reframed by the ECJ or answers not given?”\textsuperscript{253} Furthermore, since the application of Community law \textit{bona fide}, like the one the \textit{Verwaltungsgerichtshof} made, will be sufficient in order to eschew the risk of triggering liability, even if not compliant in the end\textsuperscript{254}, it is uncertain where to place the border line until which a national court shall be excused if it misreads the Court’s judgments. Unfortunately, it seems that it will take several years of litigation, both before national courts and the ECJ, until the issue is clarified.

Finally, it should not be left without mentioning that the Court did not provide any answer regarding the criteria to be followed for the establishment of the causal link. Of course, one can argue that since the Court had ruled out the existence of a sufficiently serious breach, there was no need to proceed to the examination of the third condition of State liability for infringements of Community law attributable to the judiciary. Given, however, the serious effects that the recognition of such liability brings to the legal systems of the Member States, it is submitted that it would be more

\textsuperscript{253} Peter Wattel, “Köbler, \textit{ibid}, at 182.
\textsuperscript{254} Bernhard Rudolf Hofstötter, \textit{ibid.,} at 100. See also Helen Toner, “Thinking the Unthinkable? State Liability for Judicial Acts after Factortame (III)”, supra note 194, at 186, who argues that this assumption can find further support in previous case law, like \textit{British Telecommunications} and \textit{Denkavit}, where the interpretation given to Community norms within national legal orders, even though erroneous, was found not to amount to a sufficiently serious breach that would give rise to State liability.
than helpful for the proper adjudication of claims that might follow Köbler before national courts, if the ECJ had taken the opportunity to provide some general guidelines as regards the matter of causation.

3.5 Conclusion: When Köbler Meets Kühne & Heitz

Köbler is not the end of the story neither for Mr. Köbler’s claim nor for the ECJ. If one puts Köbler in the light of Kühne & Heitz, Mr. Köbler may not have succeeded in triggering the Austrian State liable for the decision of the Verwaltungsgerichtshof but he can still compel Austrian administration, that rejected his application in the first place, to re-examine his request for the special length of service increment he had applied. Mr. Köbler satisfies all the criteria set by the Court in Kühne & Heitz that would enable him to demand the review of the final administration decision that gave rise to such a series of litigation in the first place. Indeed, the Austrian Rules of Administrative Procedure allow him to ask the administrative body which in the very beginning decided not to grant him the contested increment to re-open that decision. The negative administrative decision became final as a result of a judgement of the Verwaltungsgerichtshof, which is a court of last instance, whereas the case was decided contrary to Community law by failing to request a preliminary ruling. Therefore, if he were to come to the administrative authority immediately thereafter, there would be nothing to prevent him from getting the increment, according to Kühne & Heitz at least.

From the Court’s point of view, Köbler can mean nothing else than more litigation on the matter. In describing the Court’s policy, Hartley has stroke the right note by maintaining that “a common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle, but suggest that is subject to various qualifications; the Court may even find some reason why it should not be applies to the particular facts of the case. The principle, however, is established. If there are not too many protests, it will be re-

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255 Case C-453/00, Kühne & Heitz [2004] ECR I-837. This approach has been proposed by Jan Komárek in its article “Federal Elements in the Community Legal System: Building Coherence in the Community Legal Order”, supra note 211, at 20-21 and the subsequent analysis of Köbler in the light of Kühne & Heitz draws from his ideas.
256 See above, page 36 of this paper.
affirmed in later cases”258. Academic literature that followed the establishment of the doctrine of State liability for judicial breaches was, in its vast majority, favourable towards the Court’s ruling with the striking exception of Peter Wattel, to whose article I have referred on numerous occasions in writing this paper. It should not be overseen, however, that Mr. Wattel is a member of Hoge Raad, the Dutch supreme administrative court. Therefore, the uneasiness he may have felt with Köbler, which de facto places the ECJ to the position of a Supreme Court for the Community, seems understandable, taking into account his bias as a member of a court whose superiority is eroded.

It seems that the re-affirmation of Köbler in subsequent case law will not take long. Its aftermath may be found soon in another case, this time from Italy, that concerns State liability for judicial breaches and is pending before the Court at present time259. This fact signals that the ruling in Köbler has started being acceptable not only in academic literature but also within national legal systems, which try to find ways to accommodate the new doctrine and, to this extent, seek the guidance of the ECJ.

Part 3: The Third Phase of the State Liability Doctrine: Fundamental Rights v. Fundamental Freedoms

Chapter 4: Spanish Strawberries in France, the Blocking of the Brenner Highway and the Implications on State Liability Claims

4.1. The Ruling in Case C-265/95, Commission v. France

In case C-265/95, Commission v. France260 the ECJ introduced a novel approach, according to which infringements of Community law caused by private individuals are brought within the realm of the responsibilities of the State. In summary, the actual facts of the case include the hindrance in the free movement of Spanish strawberries and Belgian tomatoes within the French territory. In contrast, however, with other cases on the interpretation of Article 28 EC Treaty, on this occasion the free movement of goods was hindered not by a State measure but by
actions of private individuals; for more than a decade French farmers had persistently intercepted lorries transporting the aforementioned products, destructed their loads, used violence against the lorry drivers, threatened French supermarkets selling agricultural products originating in other Member States and damaged those goods when on display in shops in France. Therefore, after receiving complaints as regards the passivity of French authorities when dealing with such incidents, the Commission brought an action under Article 226 EC Treaty for a declaration that France had failed to fulfill its obligations under Article 28, read in conjunction with Article 10 EC Treaty.

After reaffirming the fundamental position that the free movement of goods possess within the system of the Treaty, the Court mentioned Article 28, providing that quantitative restrictions and all measures having equivalent effect shall be prohibited between Member States, and recalled the Dassonville formula\textsuperscript{261}, with a slight, but crucial differentiation; Article 28 does not anymore aim to eliminate barriers to intra-community trade caused solely by measures enacted by Member States, but is instead intended to eliminate “all barriers” (emphasis added) that might have this effect\textsuperscript{262}. Under this line of reasoning, Article 28 also applies where the Member State abstains from adopting the measures required in order to deal with obstacles that are created by private individuals within its territory, since such inaction “is just as likely to obstruct intra-community trade as is a positive act”\textsuperscript{263}.

The attempt of the Court to maximize the \textit{ratione personae} scope of Article 28, so as to include adverse actions of private individuals, is more than apparent. To this extent, the conjunction of Article 28 and the principle of Community loyalty, expressly founded in Article 10 EC Treaty, leads, according to the Court, to a \textit{positive obligation} for the Member States, namely the obligation to adopt all adequate and proportionate measures within their territories to ensure that the free movement of goods shall be fully respected, even by private individuals. Subsequently, in this case, France was found to have violated its obligations under the aforementioned Articles

\textsuperscript{261} Case 8/74, \textit{Procureur du Roi v. Dassonville} [1974] ECR 837, para 5 stating that “All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions”.
\textsuperscript{263} Commission v. France, para 31.
and the lack of measures to deal with the disrespect towards the free movement of goods by private factors was considered as “manifestly inadequate”\textsuperscript{264}.

4.2 The Implications on Francovich Claims

It becomes apparent that there is a trend employed by the ECJ to bring private actions within the more general framework of State action and that Member States can face adverse consequences following this equivalence, such as infringement proceedings brought by the Commission pursuant to Article 226 EC Treaty. Far from bearing the obligation to refrain from taking action that would jeopardize the aims of the Treaty, the growing complexity of the economic environment in which the Treaty aims to produce its effects obliges Member States to take positive action to protect rights and freedoms, which, in a more traditional view, only required protection against interference by the public authorities.

Indeed, it is beyond doubt that Community rights and freedoms are currently exposed to violations by powers other than the State, and individuals must be protected against this danger. Although not the author of such interference, the State is still regarded as liable and has the duty to intervene and prevent it. To this extent, the principle of the third party effect, known by the German term “\textit{Drittwirkung}” suggests that a Member State can be held responsible at Luxembourg level for violations of certain Community rights committed by private actors. The State is not merely answerable for violations committed by itself but also, in a more general sense, for all violations committed within its territory. This extension of the public authorities’ role obliges them to go beyond mere abstention and to take positive action\textsuperscript{265}.

Therefore, the advent of \textit{Commission v. France}, apart from signalling the apotheosis of Community law’s incursion into traditional domains of State sovereignty, namely the monitoring that the law is actually applied, enforced and respected within a given legal order, opened up another front, this time concerning the doctrine of State liability. Article 10 EC Treaty imposes on all national authorities “a duty, when necessary, to make Community institutions, laws and policies work the

\textsuperscript{264} \textit{Commission v. France}, para 52.

\textsuperscript{265} This reasoning has been articulated by Dimitrios Evrigenis, judge at the ECtHR, as regards the legal framework of the ECHR, in his article “Recent Case-Law of the European Court of Human Rights of Articles 8 and 10 of the European Convention on Human Rights”, 3 \textit{Human Rights Law Journal} (1982), 121-139, at 136-137.
way they are intended to work, and a general duty, which applies in every case, not to interfere with the way they are intended to work...This duty means, among other things, that national authorities must enforce Community law against private parties whenever appropriate. Furthermore, we have already seen that the Court founded its ruling in *Francovich* on the principle that the full effectiveness of Community rules would be impaired and the protection of rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law. Accordingly, in case where a third party has caused the damage, it is submitted that one can valuably argue that, if the law had been properly implemented, the damage would have never been caused and thus the damage under consideration should be attributed to the behaviour of the State.

This line of argumentation is even more enforced with concern to the crucial role national authorities have in the implementation of Community law; acting in an extensive dédoublement fonctionnel, the effectiveness of implementation and application of Community law relies to a considerable degree upon the executive, legislative and judicial functions of the Member States. Member States however, do not solely have the duty to formally transpose Community legislation in their national legal orders, a procedure also referred to as the “black letter” implementation. There is a second stage, the practical implementation of the Community norm, which concerns its execution and enforcement by the authorities of the Member State; and to this extent, the surveillance to ensure respect for it by private individuals is crucial, since otherwise Community policies would suffer.

Furthermore, if the State is considered as “an acting person”, a personification of the its legal order, liability for an infringement of Community law can be attributed to it only if the infringement is caused by a person or an organ that is functionally connected to it. The Court followed this approach in *Foster* where it stated that the emanations of the State, against which the direct effect of a directive can be invoked include “a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of

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the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included.\textsuperscript{268}

However, if one more plausibly considers that the notion “State” includes the national legal order itself, any legal function that is regulated within this legal order can be attributable to the State, since it is the State itself which provides for that very legal function within its territory. Community norms, with the supremacy they possess, must be respected within Member States’ legal orders through the specified functions that the States themselves have established, among which is the surveillance by the executive. Consequently, the Member State can also be held responsible even when private individuals do not follow the Community norms, due to the fact that national authorities in such a case did not exhaust their necessary surveillance powers to ensure the application of Community law within the national legal order.\textsuperscript{269} The subject-matter of individuals’ disregard towards Community law falls within the scope of the obligations imposed upon the Member States, which necessarily extend to every legal activity within the national legal orders.

Seen under this perspective, the decision of the Court in \textit{Commission v. France} offers the base upon which an individual can raise a claim for damages, against a Member State for its inaction to secure the attainment of the scope of Community norms. Article 10 EC Treaty can provide the legal base for such an assumption, if read in the following way: the national legal orders (“Member States”) shall proceed to the necessary arrangements, e.g. executive surveillance, to ensure the effective application of Community law within their realms (“shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty”) and, if they neglect to do so, they must be held responsible (as the Court has ruled in \textit{Commission v. France}).

Of course, such a liability, like any kind of Member State liability, must then be evaluated against the criteria laid down by the Court in \textit{Brasserie du Pêcheur}, namely the rule of law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious and there must be a direct causal link between the breach of the obligation resting on the Member State and the damage sustained by the


\textsuperscript{269} To this effect see the analysis by Nikos Scandamis, \textit{The Community Function of the National Executive}, Sakkoulas, Athens, 1990 (in Greek), with particular mention to pages 118-124.
injured parties. It can reasonably be argued, however, that the proposed, expansive approach towards State liability can satisfy the aforementioned criteria.

As regards the rule of law infringed, Article 10 EC Treaty cannot by itself provide with satisfying solutions. “The duty of solidarity, whilst express, is not specific”\(^{270}\). If, however, Article 10 is read in conjunction with other Community norms that produce direct effects, it can provide the base on which individuals could found such actions\(^{271}\).

The existence of a sufficiently serious breach is a matter that is judged \emph{ad hoc} but it can be reasonably argued that an abstain by a Member State to take measures in order to secure the obedience and respect of private individuals to fundamental aims of the Community within its territory, can be qualified as a sufficient serious breach in accordance with the criteria laid down by the Court in \textit{Brasserie du Pêcheur}. To this direction points not only the Court’s ruling in the case under scrutiny, where the French measures were considered as “manifestly inadequate”, but also an older ruling of the ECJ relating to fraud and to the lack of measures by a Member State to combat it, namely \textit{Commission v. Greece} case of 1989\(^{272}\).

Maybe, the establishment of causation between the breach of the obligation resting upon the Member State and the damages sustained by the individual is the most difficult criterion to establish\(^{273}\). Indeed, the chain of causality is normally...


\(^{271}\) To this extent see also Malcolm Ross, \textit{ibid.}, at 67, who notes that “In essence, \textit{Francovich} potentially creates two types of State liability. The first, and most easily identified, relates to breaches of express and specific duties contained in the Treaty and secondary legislation. These would be actionable according to the conditions laid down in \textit{Francovich} without any additional requirements to be satisfied. The second type of liability concerns more nebulous claims, such as breach of an obligation created by general principles recognized by the Court to be generated by Article 10. Such actions would demand the additional requirement of fundamentality to render it specific enough. In other words, the capacity for a breach of Article 10 to trigger an action for damages by an individual would work…as a reference provision which demands for its availability to individuals upon the nature of the rule or principle which it seeks to underscore”.


\(^{273}\) As regards the problem of causation in such circumstances see: John Temple Lang, “The Principle of Effective Protection of Community Law Rights” in: David O’Keeffe and Antonio Bavasso (eds.), \textit{Judicial Review in European Union Law, Liber Amicorum in Honour of Lord Slynn of Hadley}. Kluwer Law International, The Hague, 2000, 235-274, at 255 who notes that “the establishment of causation is complex when the violation of Community law is an omission or failure by a national authority to apply or enforce a rule against a third party. The precise question about causation may ultimately have to be decided by the Court of Justice. The test must concern both the thoroughness of the enforcement or supervision and the likelihood of loss of the kind in question as a result of incomplete enforcement. Probably the test is whether the failure to enforce the rule fully is inherently likely to lead to serious losses of the kind suffered by the plaintiff. It would not be necessary to show that such losses would inevitably occur, but merely that such losses were the kind of losses which the rule was intended to prevent. It might be important that the State had previously been asked to enforce more thoroughly, if
broken when a third party, in the examined case other individuals, intervene between the breach and its effects on the plaintiff. Anagnostaras suggests a concurrent, joint liability scenario according to which “if any liability can thus arise with regard to the conduct of public authorities, it will be joint with that of the defaulting private parties. It will be for the national courts to determine the exact allocation of responsibility”274. However, it should be born in mind that in such circumstances, even though the original source of the damage is obviously the unlawful activities of private factors, it is the Member States’ failure to monitor and enforce the proper application of law by these individuals that shall give rise to State liability. It is therefore solely for the Member States to bear the consequences of such a behaviour and to provide compensation to those adversely effected by it.

4.3 **Schmidberger and the New Approach towards Fundamental Rights**

Actually, such an approach towards State liability has already been followed by the applicant in *Schmidberger*275, which constitutes one of the more recent cases on State liability decided by the ECJ. *Schmidberger* on many respects echoes *Commission v. France* and concerned a claim lodged against Austria for damages that an individual sustained due to the fact that the Austrian authorities did not prevent a demonstration of an ecological group on the Brenner highway, a vital for intra-community transport route. To this effect, the applicant in the main proceeding relied upon the combination of Articles 28 and 10 EC Treaty to found his right to reparation.

Unfortunately for the reasons of this paper, but quite fortunately for the level of protection of fundamental rights within the Community legal order, the Court did not conclude its examination of the conditions for State liability; in the light of the significance that human rights have within the Community legal order276 their

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protection was recognized as “a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods”. Even though the freedoms of expression and assembly (Articles 10 and 11 of the ECHR) are not absolute, the Court reached the conclusion that Austria’s tolerance for the demonstration in question did not constitute a disproportionate hindrance to the free movement of goods.

Still, however, it is important to note that the Court accepted the admissibility of the claim for damages, as formulated by the applicant in Schmidberger. It accepted that the combined invocation of Article 10 can establish rights for individuals, since it continued its examination on the second criterion for the foundation of State liability in damages, namely the existence of a breach of Community law. It was only because it had already found that there was not a breach of Community law capable of giving rise to State liability, and not because the breach of Community law was committed by private individuals instead of a Member State, that the Court did not examine the damage claim further.

Finally, further support for the opinion supported in this paper can also be derived from the case law of the ECtHR, to which the ECJ often refers in search of inspiration. In case X and Y v. The Netherlands the ECtHR ruled that a State may be required to adopt “measures designed to secure respect for private life even in the sphere of relations of individuals between themselves”. Even more interestingly, in López Ostra v. Spain and Guerra and others v. Italy, two cases with strong environmental law component, the Strasbourg court explicitly accepted the

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277 Schmidberger, paras 73-74.
278 Schmidberger, paras 95-96.
279 ECtHR, X and Y v. The Netherlands, judgement of the 26th March 1985.
281 ECtHR, Guerra and others v. Italy, judgement of the 19th February 1998.
responsibility of the signatory States for violations of certain Convention rights, caused by private actors and not by State activity. Not surprisingly, within the Community legal order, environmental law has been viewed by academic literature as an area where the application of the *Francovich* doctrine should be extended.\(^{282}\) It seems, therefore, that these two cases shall have great precedential value for those who can translate harm resulting by acts of private individuals into a protected human right, for which, under the Convention, the State is responsible.\(^{283}\)

However, if one leaves Strasbourg to move to Luxembourg, human rights do not seem to be the determining factors that shall give rise to state responsibility. Much to the contrary, *Schmidberger* signals a different trend for the jurisprudence of the ECJ. Nowadays human rights seem to be conceived by the ECJ as specific derogations from fundamental Community norms and freedoms, as *Schmidberger* indicates for the free movement of goods\(^{284}\) and the more recent *Omega*\(^{285}\) as regards the freedom to provide services. In striking a balance between economical rights derived from the Treaty and human rights as general principles of Community law, the Court did not hesitate to state its preference for the latter. At the same time however, it implicitly gave Member States a valid defence to escape their liability for breaches of Community law attributable to their individuals.

The Court in *Schmidberger* did not only indicate “the way in which contradictions between economic freedoms and the protection of human rights should be dealt in the future”\(^{286}\); it also introduced a new philosophy towards human rights. It is not coincidental that AG Jacobs noted in his opinion that *Schmidberger* constitutes the first case in which a Member State has invoked the necessity to protect fundamental rights to justify a restriction of one of the fundamental freedoms of the

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\(^{284}\) To this extent see also Takis Tridimas, “The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?”, retrieved from http://ssrn.com/abstract=490603 (last visited 30th July 2005), at 30-36.


Human rights, traditionally invoked contra the State have acquired a new orientation when they are relevant with Francovich liability claims of Community law. They are also able to be invoked by the State contra the individual when the former acts as a their guarantor within the national legal order, a possibility that, judged on its noble merits, diminishes any breach of Community law and makes the conditions of the Brasserie test impossible to be satisfied.

The Court currently faces the same critical choice in a pending case of Finnish interest and has the opportunity to reply to many questions on State liability that are still unresolved. The case concerns a claim for damages against the Finnish States by a company manufacturing car lifts. Mr. Lehtinen, an expert official belonging to the State’s health and safety at work organisation expressed his opinion at the mass media that the competent car lifts constituted a threat to health and even to life of their users. He proceeded to his statement even though he lacked decision-making power and before the competent authority had made a decision in the case of supervision of the relevant market. Interestingly, it seems that Mr. Lehtinen’s statement cannot, under the aforementioned circumstances, be imputable to the Finnish State, following the Court’s case law under Article 288 (2) EC Treaty, and more specifically the ruling in case Sayag v. Leduc. Still, the Finish court referred a preliminary ruling on the possibility of State liability in damages, a fact that seems to reinforce the position supported in this paper that Member States can be held responsible for breaches of Community law attributable to private individuals within their respected territories. And once again, a State invokes a fundamental right, the freedom of speech, against an individual, to discharge its possible liability for breach of Article 28 in conjunction with Article 10 EC Treaty.

287 Opinion of AG Jacobs in Schmidberger, para 89.
288 Pending Case C-470/03, A.G.M.-COS.MET s.r.l.v. Finnish State and Tarmo Lehtinen, OJ 2004 C 35/2.
Part 4: The Francovich Doctrine Encounters the Principle of Legal Certainty

Chapter 5: Francovich and Brasserie du Pêcheur: A Breach of Legal Certainty by Judicial Activism?

5.1 Introductory Remarks

After examining the evolution of this new constitutional principle for the Community legal order, it is pertinent to refer to its relationship with legal certainty, a general principle of law underlying the EC legal order which can, among others, be related to the fact that the application of the legal solutions adopted by the Court to a specific situation must be predictable by the national legal systems. Equally important, however, can be the acceptability of the Court’s judgements, a notion that can be analysed by focusing on their impact as regards both national jurisdictions and the case law of the ECJ\(^\text{290}\).

The foundation of State liability by the Court in *Francovich* and *Brasserie* once again challenged the national jurisdictions, like it had previously happened with the introduction of direct effect in *van Gend en Loos\(^\text{291}\)* and the supremacy of Community law in *Costa/ENEL\(^\text{292}\)*. It is submitted, however, that this challenge did not amount to a breach of the principle of legal certainty. The teleological reasoning articulated by the Court in these cases seems to fit harmoniously with its proceeding case law, aiming to review the adequacy of domestic remedies for the protection of Community rights. Even more interestingly, the signs from national legal orders are also favourable; academic literature in Member States has identified ways to overcome possible fetters to the invocation of the Francovich doctrine before national courts, national jurisdictions in their vast majority have ever since applied the Francovich doctrine in general conformity with the criteria set by the ECJ, whereas the Court itself adhered to its initial approach and provided further guidance with its subsequent case law.


\(^{292}\) Case 6/64, Flaminio Costa v. ENEL [1964] ECR 585.
5.2 The Predictability of the Francovich Doctrine

Even though Community law is adopted by Community institutions, Member States are responsible to give effect to it, pursuant to Article 10 EC Treaty. Individuals derive rights from Community law, the consideration, however, of rights without remedies seems unthinkable. Still, the ECJ initially took the position that the Treaty was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law and that “in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the application of rights which individuals acquire through the direct effect of Community law”.

Relying, however, solely upon national remedies and procedures for the implementation and enforcement of Community law would tantamount in making the desired supremacy, uniformity and effectiveness of Community law subject to all the restrictions of and the differences between the various national legal systems. Therefore, the Court gradually undertook the task of striking a balance between the effectiveness of Community law and national procedural autonomy.

At the initial stages of this attempt it founded the obligation of every national legal order to guarantee that any national court shall be able, within the limits of its jurisdiction, to give effect to Community law without having to wait for a conflicting national measure to be set aside by the national legislature or by a decision of a Constitutional Court. In 1984 it extended to national courts the obligation to achieve the result envisaged by a directive and the duty under Article 10 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of this obligation. In the same line of cases the so-called “interpretation obligation” was introduced, according to which national courts, in cases where a directive does not produce direct effects or where it is invoked horizontally against a private individual, are required to interpret their national law in the light of the

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wording and purpose of a directive in order to achieve the result referred to in the third paragraph of Article 249 EC Treaty\textsuperscript{298}. In \textit{Johnston}\textsuperscript{299} and \textit{Heylens}\textsuperscript{300} a right to a judicial remedy was expressly recognised in order for individuals to be able to challenge national measures that contravene with Community law.

\textit{Commission v. Greece}\textsuperscript{301} of 1989 signalled the departure from the Court’s \textit{dictum} in the \textit{Amsterdam Bulb} case, that “in the absence of any provisions in the Community rules providing for specific sanctions to be imposed on individuals for a failure to observe those rules, the Member States are competent to adopt such sanctions as appear to them to be appropriate”\textsuperscript{302}. Much to the contrary, a new \textit{dictum} was articulated, according to which the ECJ acquired competence to review the adequacy Member States’ enforcement methods for their compatibility with the principles of effectiveness and assimilation. Therefore, in the case under discussion, the Greek method of enforcement, namely the failure to initiate criminal or disciplinary proceedings to punish fraud evading the Community’s own resources, was found manifestly inadequate\textsuperscript{303}. Finally, \textit{Factortame}\textsuperscript{304} further diminished any sign of Member State procedural autonomy by proclaiming that a national court is obliged even to oversee the lack of a rule of national law granting interim relief in disputes governed by Community law, whereas \textit{Peterbroeck}\textsuperscript{305} and \textit{Van Schlijndel}\textsuperscript{306} marked the introduction of a “procedural the rule of reason”\textsuperscript{307} in reviewing \textit{ad hoc} procedural provisions for their compatibility with the principle of effective application of EC law\textsuperscript{308}.

The aforementioned case law mooted the idea in academic literature that no “autonomy” is reserved to the Member States, and that “the Court has tended to


\textsuperscript{302} Case 10/76, \textit{Amsterdam Bulb BV v. Produktschap voor Siergewassen} [1977] ECR 137, at 150.


\textsuperscript{304} Case C-213/89, \textit{R. v. Secretary of State for Transport, ex parte Factortame Ltd. and Others} [1990] ECR I-2433.


\textsuperscript{308} See, for instance, the Court’s ruling in Case C-441/93, \textit{Panagis Pafitis v. Trapeza Kentrikis Ellados AE} [1996] ECR I-1347 where the application of the Greek concept of abuse of rights was prohibited.
regard national procedural law merely as an ancillary body of law the function of which is to ensure the effective application of substantive Community law”\(^{309}\). Van Gerven expressed the opinion that it might be better to abandon the term procedural “autonomy” and speak of procedural “competence” of Member States as long as no Community rules have been enacted to this effect\(^{310}\), whereas it has also been argued that, even though the starting point is national procedural competence, the end result is a *praxis* of European procedural primacy, in order to remove obstacles at the national level, since access at that level is fundamental to the protection of rights and freedoms in the European legal order\(^{311}\).

This growing interest of the Court to provide adequate and effective remedies to individuals for the protection of their rights in national courts has led to the suggestion that its rulings in *Francovich* and *Brasserie* constitute “nothing more than a logical development of previous case law”\(^{312}\), or else a “dynamic expression of an expanding Community jurisdiction to prescribe remedies available under domestic legal orders in respect of the enforcement of Treaty-based rights”\(^{313}\). If one also takes into consideration the earlier proclamations of State liability in *Humblet* and *Russo*, it can be reasonably argued that *Francovich* and *Brasserie* do not constitute a breach of the principle of legal certainty, as far as their predictability is concerned. Much to the contrary, and like a former President of the ECJ has remarked, “the private parties who invoked Community law in those cases quite correctly regarded the outcome as a natural consequence of the fact that they are no longer merely nationals of their respective States but they also - as expressly stated in the Treaty on European Union - enjoy rights as citizens of the European Community”\(^{314}\).

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5.3 The Acceptability of the Francovich Doctrine

It is of great interest to begin the examination of the reaction that Francovich brought to national legal systems from Italy, since it was by two Italian judges that the whole issue of State liability started for the Community legal order. The Italian rules of non-contractual liability are based on vague provisions of Article 2043 of the Civil Code\(^{315}\), however, the narrow and stringent interpretation of the Article that was followed by Italian courts, namely the division between diritti soggettivi (subjective rights) and interessi legittimi (legitimate interests)\(^{316}\), extensively limited liability for the conduct of public authorities. In addition to the fact that in Italian law citizens can avail themselves of no right in relation to activities or omissions of legislative bodies\(^{317}\), compensation for acts of the administration is also excluded\(^{318}\) since citizens cannot claim to have a subjective right as regards the exercise by the administration of a discretionary power\(^{319}\).

Having to accommodate the Court’s ruling in Francovich, Italy adopted a legislative decree\(^{320}\) that would implement Directive 80/987 and provide compensation to those suffered loss as a result of its non-implementation by that time. The decree’s ambiguity as regards the foundation that had to shoulder such payments (namely the State itself or the newly-founded INPS, the National Agency for Social Welfare Benefits) gave rise to a new series of litigation before Italian courts, which resulted in a landmark decision of the Corte di Cassazione\(^{321}\), ruling in discordance to the underlying idea of Francovich, namely the supremacy of Community law\(^{322}\). No

\(^{315}\) “Any fraudulent, malicious or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages”. Reference from: Luigi Malferrari, “State Liability for Violation of EC Law in Italy: The Reaction of the Corte di Cassazione to Francovich and Future Prospects in Light of its Decisions of July 22, 1999, No. 500”, in: Sofia Moreira de Sousa and Wolfgang Heusel (eds.), Enforcing Community law from Francovich to Köbler: Twelve Years of the State Liability Principle, Bundesanzeiger, Cologne, 2004, 117-143.

\(^{316}\) For an analysis of the distinction see: Luigi Malferrari, ibid., 120-121.


\(^{318}\) Celestina Iannone, Italian National Report for the XIX FIDE Congress held at Helsinki from 1st until 3rd June 2000, at 201.

\(^{319}\) Roberto Caranta, ibid., at 287.


\(^{322}\) The Italian Supreme Court proceeded to a contra legem approach towards Francovich and reached the conclusion that any compensation would have been provided according to the provisions of Italian law. Since the Italian legal order excluded any possibility of compensation for an act of the legislature, there was an obvious conflict with the legal order of the Community, which could only be conciliated if INPS and not the State was to be assigned financial liability for breach of the competent Directive. In this way, however, Corte di Cassazione did not come up to its role as a court of the Community legal order, since it did not respect the teleology of Francovich and extrapolated solutions that would only in
matter this adverse initial approach, that seems to be due to “not only the revolutionary content of Francovich per se but also to the fact that Francovich highlighted and exacerbated tensions that already existed within the Italian case law on State liability”\textsuperscript{323}, it seems that the Italian legal system has subsequently fertilized the need to accommodate the Francovich doctrine. This fact becomes apparent by a recent decision of the Corte di Cassazione\textsuperscript{324}, which overruled Italian case law consistently followed on the matter of State liability\textsuperscript{325} and brought the Italian system closer to providing satisfactory solutions in the light of Community law. Finally, it also has to be noted that Italy recognises public liability for acts of the judiciary by means of a law specifically enacted to this extent\textsuperscript{326}, whose compatibility will soon be tested against the criteria of Köbler, when the ECJ’s decision in the pending Traghetti del Mediterrano\textsuperscript{327} comes out. On any occasion, it seems ironic that Mr. Francovich, the man who gave his name to the new Euro-damage claim, was not compensated after all, following a subsequent decision of the ECJ, and not of a national court as one might expect, that he did not qualify for his categorization into those entitled to compensation for the breach committed by Italy\textsuperscript{328}.

The claim of Brasserie du Pêcheur had a similar conclusion as well, with the striking difference that this time the reasoning of the Bundesgerichtshof, to which the case returned after the decision of the ECJ, was seen as in conformity with the community standards that were “workable” and “acceptable” by the German legal order\textsuperscript{329}. The follow-up judgement of Dillenkofer\textsuperscript{330} also amounted to the same result

\textsuperscript{323} Luigi Malferrari, ibid., at 143.
\textsuperscript{324} Decision of July 22, 1999, No. 500, rec.4.
\textsuperscript{325} More precisely, it introduced the notion that Article 2043 of the Civil Code can protect not only diritti soggettivi but also interessi legittimi violated by public authorities. For an analysis of this decision and its implications see: Luigi Malferrari, ibid., 137-142.
\textsuperscript{326} Law No. 117 of 1988 on reparation of damages caused by the judiciary and civil liability of judges and public prosecutors.
\textsuperscript{327} Case C-173/03, Traghetti del Mediterrano SPA v. Italian Republic, supra note 217.
\textsuperscript{329} As noted by Elspeth Deards in her article “Brasserie du Pêcheur: Snatching Defeat from the Jaws of Victory?”, 22 European Law Review (1997), 620-625, at 624, where one can also find a full annotation of the mentioned follow up decision of the German Bundesgerichtshof, which can be found in: Common Market Law Review (1997), at 971.
for the claimant, with the German court’s argumentation being able to fit once again into the framework set by the ECJ, even though with adverse results for the applicant. Noticeably, it becomes evident from the aforementioned judgements that Francovich is not a panacea and, even when the ECJ finds for the fulfilment of the conditions for State liability, national courts may validly preclude the application of the doctrine to the actual facts of the case.

In general, the legal framework of tortious governmental liability in Germany finds its legal base in Article 839 of the Bürgerliches Gesetzbuch (German Civil Code), seen in connection with Article 34 of the Grundgesetz (German Basic Law). One of its shortcomings, namely the fact that an official duty must be owed towards a third party in particular and not in the interest of the community as a whole, practically excludes liability of the German State acting in its legislative capacity since “under German law the duties of the legislator are not regarded as duties owed to a third party, as there is no close proximate relationship between the plaintiff and the public body”\textsuperscript{331}. Given, however, that German courts are bound by the authoritative interpretation of Community law by the ECJ, such conflicting provisions of German law, in addition to those requiring the existence of the notion of fault, can be set aside, if not possible to be interpreted in consistency with Community law.

The 91 out of the 93 claimants of the Factortame litigation were surely luckier that Mr. Francovich and Brasserie du Pêcheur. By virtue of an extra-judicial settlement in 2001 with the British State, a total sum of £55 million including interest was paid to them for breach of the EC Treaty\textsuperscript{332}. This fact can cause some surprise, given the adverse - or, to be more accurate, the completely lacking - legal framework in the United Kingdom when it comes to a general right of an action in damages against a public authority that has exercised its powers unlawfully. It is also true that no cause of action known to English law is capable of fastening on “wrongs” attributable to the legislature and that a public authority cannot be held liable in tort.


for a valid, *intra vires* act\(^{333}\). Still, both the follow-up decision of the *Divisional Court* in the *Factortame* saga\(^{334}\) and the subsequent rulings of the *Court of Appeal*\(^{335}\) and of the *House of Lords*\(^{336}\), where the case was taken on appeals by the Secretary of State, did not hesitate to find a sufficiently serious breach of EC law in the introduction by the United Kingdom of the 1988 Merchant Shipping Act.

Even though English law of tort recognizes only three principal non-contractual causes of action against the State and its officials, namely negligence, breach of a statutory duty and misfeasance in public office\(^{337}\), the aforementioned courts managed to fit this newly founded remedy into the hostile British legal background and provide for compensation for the applicants, where such a possibility was expressly excluded. Ever since the final end of the *Factortame* saga, British courts, influenced by the recommendations of academic literature\(^{338}\), have either provided an altered definition of the three causes of action against the State to include claims based on breach of Community law, or classified such claims as *sui generis* and managed to provide reasonable solutions when confronted with the issue of State liability for breach of EC law. The ECJ itself has dealt with numerous preliminary rulings by British Courts on the issue of State liability\(^{339}\), a fact which shows that Francovich claims have been accepted within the British legal order by both individuals, who often find recourse to them, and British courts, who turn to the ECJ in order to overcome the inconsistencies of the hostile British legal environment.

Hopefully, the aforementioned developments in the field of State liability in the United Kingdom shall have application in the Republic of Cyprus as well. Quite


\(^{335}\) The decision of the Court of Appeal can be found in [1998] EuLR 456.

\(^{336}\) The decision of the House of Lords can be found in [1999] WLR 1062.

\(^{337}\) For the interpretation and application of this triad of UK torts see: Rhodri Thompson, “The Impact of the Francovich Judgement on UK Tort Law”, in: Sofia Moreira de Sousa and Wolfgang Heusel (eds.), *Enforcing Community law from Francovich to Köbler: Twelve Years of the State Liability Principle*, Bundesanzeiger, Cologne, 2004, 165-177, at 166-170.


\(^{339}\) See, for instance, cases *Evans*, *Hedley Lomas*, *British Telecommunications* and *Norbrook Laboratories*. 
surprisingly for an independent state, Chapter 148 containing the law on civil torts\textsuperscript{340} expressly states that its terms shall be interpreted in accordance with the meaning that was given to them by British law. The whole issue is connected with the history of Cyprus as a colony of Great Britain until 1960 and the adherence of the Cypriot legal system to the common law tradition\textsuperscript{341}. Given the strong influence by the British legal framework, it is not strange that the Cypriot law on public liability excludes \textit{expressis verbis} any form of State liability for acts of the legislature or the judiciary and it seems that all the incompatibilities with Community law shall be overcome by referral of the Cypriot common law judges to the solutions their British colleagues gave in comparable situations.

As regards Finland, the statutory base for public liability in damages can be found in Chapter 3 of the Damages Act\textsuperscript{342}. According to this Act, a public body shall be liable in damages for an act caused through fault or negligence in the exercise of public authority\textsuperscript{343}. However, national authorities have been imposed a duty of care, whose interpretation creates a presumption of negligence that leads to almost objective liability\textsuperscript{344}. It also has to be noted that legislative bodies have been left beyond the scope of the Act\textsuperscript{345} and that a claim for compensation of damages caused by a decision of a court may not be brought unless the decision has been revered or annulled or unless the alleged offender has been found guilty of crime in the office\textsuperscript{346}. If a decision of an administrative authority has been appealed to the Government, the Supreme Administrative Court or the Supreme Court, an action for damages may not be brought if the decision has been affirmed\textsuperscript{347}.

\textsuperscript{340} Κεφάλαιο 148, ο Περί Αστικών Αδικημάτων Νόμος.
\textsuperscript{341} Chapter 148 is influenced by the British legal tradition to such an extent that it even contains a provision precluding any action for damages “against Her Majesty”, even though Cyprus is a sovereign presidential democracy that has never had a monarch. For further comments on the issue of the application of British law in Cyprus see: Evangelos Vasilakakis, “The Effects of the Cypriot Accession to the European Union as regards the Orientation of Cypriot Law”, \textit{Elliniki Epitheorisi Evropaikou Dikaiou} (Greek Journal of European Law) (1999), 35-42 (in Greek).
\textsuperscript{342} Vahingtonkorvauslaki 31.5.1974/412.
\textsuperscript{343} Juha Raitio and Pekka Aalto, Finish National Report for the XVIII FIDE Congress held at Stockholm from 3\textsuperscript{rd} until 6\textsuperscript{th} June 1998, at 225.
\textsuperscript{346} Juha Raitio and Pekka Aalto, Finish National Report for the XVIII FIDE Congress, \textit{ibid.}, at 226.
\textsuperscript{347} Juha Raitio and Pekka Aalto, \textit{ibid.}, at 226.
When compared with the liability regime established in the Community by the ECJ, Finnish rules of State liability do not seem to be in conformity with Community law. The legislature is out of reach when damage actions enter the picture, whereas liability for decisions of Supreme Courts seems to be practically excluded in cases that they affirm previous administrative decisions. On the other hand, the test of reasonableness according to Article 3:2:2 of the Damages Act resembles the “sufficiently serious breach” test and compensation can be acquired from the State for pure economic damage according to Article 5:1 of the said Act. No matter the diversions from the Community standards, it has been supported that the principle of primacy of Community law in addition to Article 92 of the Finnish Constitution Act 1919/94 can provide to a Finnish court, having to adjudicate on State liability claims, a solid legal base to bypass any obstacles posed by national legislation.

At the time these lines are written, there is a pending case at the ECJ that concerns possible liability of the Finnish State for breach of Community law, where the Tampereen käräjäoikeus has referred to the Court a number of extensive questions which, inter alia, concern the compatibility of many Finnish rules on public liability with EC law. Except for this case, however, there have also been other occasions where individuals enacted proceedings before Finnish courts to claim damages from the State for alleged breaches of Community law. One that is of great interest is Karelia Lines Oy v. The State of Finland, concerning losses sustained by a shipping company due to the introduction of the so-called 20 hours’ rule in 1996. Unfortunately, after the ruling in the Heinonen case, where the ECJ maintained that the 20 hours’ rule does not contradict with Community law, the plaintiff withdrew its action, since its legal ground had lapsed, and the dispute was not adjudicated. Two

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349 Suomen Hallitusmuoto 17.7.1919/94.
350 Tuuli Junkkari, ibid., at 384.
351 Case C-470/03, A.G.M.-COS.MET s.r.l.v. Finnish State and Tarmo Lehtinen, pending before the ECJ, OJ 2004 C 35/2.
352 See in particular Questions 5 (e), and 6.
353 The plaintiff, a shipping company engaged in brief cruises from Finland to Russia and Estonia, claimed damages for the reduction of passengers using the company’s ships due to the introduction of the so-called 20 hours’ rule in 1996. This provision restricted the possibility for Finnish residents to import alcoholic beverages from outside the EEA to only those travellers whose trip had lasted more than 20 hours and is directed, along with numerous other measures, to combat alcoholism, which is an intense social problem in Finland. Since this provision limited the opportunity of passengers to buy cheap alcoholic beverages during the aforementioned cruises, Karelia Lines maintained that the incentive of passengers to use its services was reduced and therefore it suffered damage.
354 Case C-394/97, Criminal proceedings against Sami Heinonen [1999] ECR 1-3599.
other cases concerning actions for damages against the Finnish State, namely *Helitour Oy v. The Maritime Administration*, for breach of Community rules on public procurement, and *Meriläinen and Meritime Kehitys Oy v. The State of Finland* on illegal State aid, were also not adjudicated, either because the plaintiffs withdrew their action in the Court of Appeal (*Helitour*) or because the Supreme Court did not grant leave to an appeal (*Meriläinen and Meritime Kehitys*)\(^{355}\).

In Sweden, national courts started hearing claims and awarding damages for breaches of Community law attributable to the State soon after the seminal *Francovich* and *Brasserie*\(^{356}\). Like in Finland, the Swedish Tort Liability Act\(^ {357}\) recognizes blanket immunity for the national legislature\(^ {358}\). It has been submitted, however, that individuals may invoke directly the Francovich principle before Swedish courts within the procedural context of the Act, used by analogy\(^ {359}\). There must have been at least one application of this approach, following the ECJ’s decision in *Stockholm Lindöpark*\(^ {360}\) in which the Court found for the liability of the Swedish State for acts of its legislature. Much to the contrary, under Swedish tort law governmental liability is recognized for faulty judgements\(^ {361}\), whereas any implication that may be caused by the reliance of the Liability Act on the notions of negligence or fault can be bypassed by reference to the supremacy of Community law.

The author of this paper is not aware of any actions for damages brought before Greek courts for breaches of Community law attributable to the State dating after the *Francovich* judgement. This fact seems peculiar taking into account the traditionally poor record that Greece holds in the implementation of Community law.

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\(^{355}\) All the cases mentioned are included in the article by Niilo Jääskinen, “The Application of Community Law in Finland: 1995-1998”, 36 *Common Market Law Review* (1999) 407-441, but were still pending at the time the author had written his article. However, I wish to express once again my gratitude to Mr. Jääskinen, acting at present time as a judge at the Supreme Administrative Court of Finland, for devoting some of his time to reply to my questions concerning the final outcome of the cases he mentions in his article.

\(^{356}\) See the judgements of the *District Court of Solna* in case T 360/96 and of the *Svea Court of Appeal* in case T 466/95. Reference from: Dan Eliasson, Olle Abrahamsson and Dag Mattsson, Swedish National Report for the XVIII FIDE Congress held at Stockholm from 3rd until 6th June 1998, at 398.

\(^{357}\) Skadestandslagen 1972:207.


\(^{359}\) Torbjörn Andersson, “Remedies for Breach of EC Law before Swedish Courts”, in: Julian Lomdbay and Andrea Biondi (eds.), *Remedies for Breach of EC Law*, Wiley, Sussex, 1997, 203-222, at 211-214. The same writer contents (at 213) that the *ratio* for legislative immunity to liability in damages would be diminished within the areas where the Swedish Parliament, due to the accession to the Union and the doctrine of supremacy, would no longer have legislative privilege.


Even more surprisingly, the legal provision on the civil liability of the Greek State, namely Article 105 of the Introductory Law to the Civil Code\(^{362}\), lays down vague provisions that fit harmoniously with the framework set by the ECJ. Objective liability is established, with no need to make recourse to notions of fault, whereas the provision has been interpreted, on disputes deriving their legal base from the internal legal order, so as to cover acts and or omissions of the legislature, the executive and the judiciary\(^{363}\). However, it is important to note Greek courts have extended the possibility for the State to incur, as a matter of principle, liability \textit{qua législateur} for breach of Community law before the \textit{Francovich} judgement\(^{364}\).

Finally, it has to be noted that national courts have also awarded damages to individuals for breaches of Community law under the Francovich saga in France\(^{365}\), Belgium\(^{366}\), the Netherlands\(^{367}\) and, more recently, Spain\(^{368}\), a fact that reinforces the opinion that the solutions employed by the ECJ have gained acceptance within the legal orders of an increasing number of Member States.

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\(^{362}\) Άρθρο 105 Εισαγωγικού Νόμου Αστικού Κώδικα, which stipulates that “The State is liable for restitution in damages for acts or omissions of its organs when exercising public authority that has been conferred to them, unless the act or omission has occurred in breach of a provision that has been set to protect the public interest”.


\(^{364}\) Judgement of the Appeal Administrative Court of Athens in case 2174/1991, published on 30/5/1991, where the court expressly states that “the civil liability of the State can incur as a result of the illegal acts of its legislative organs by the introduction of a legal provision that is in conflict with a superior rule of law, i.e. the Constitution and European Community law (emphasis added), as long as an individual’s right that is protected by the superior rule of law is impaired… The State is also liable, under the same conditions, in case of inaction of the legislature to exercise its legislative function in accordance with its competence, as established by the superior rule of law”.


Concluding Remarks

The evolution of the Francovich doctrine signals one of the peak points of ECJ’s jurisprudence in establishing the distinctive constitutional principles which form the idiosyncratic character of the Community legal order. Even in lack of specific Treaty provisions, the Court managed to gradually formulate a consistent liability regime drawing inspiration from divergent notions of international, community and national law, thus marking the birth of a *jus commune*, of a law common to all Member States and to the Community itself, in the field of the judicial protection of individuals against public powers.\(^{369}\)

This dialectical relationship between Community and national law is further reinforced by the acceptability that the notion of State liability seems to have gained within national legal orders. In this respect the ECJ formulated vague clauses for the coercion of State authority that leave room for the national courts to fit the Francovich doctrine into the divergent legal environment of the twenty-five Member States. And it has been shown in this paper that national courts have, indeed, applied the criteria established by the ECJ, in general conformity with the perquisites of Community law.

Furthermore, it is of great significance to notice the spillover effect that the Francovich doctrine has had as regards the non-contractual liability of the Community pursuant to Article 288 (2) EC Treaty. The Court’s ruling in *Bergaderm* is of particular interest to this extent and proves that the ECJ tries to extrapolate legal solutions that would provide the whole Community legal order with a greater degree of convergence and homogeneity.

However, there are still many areas to be explored by the ECJ in the field of State liability for breach of EC law. The recent *Köbler*, extending in principle the application of the Francovich doctrine to breaches committed by the national judiciary, left unresolved a variety of issues, the clarification of which shall require the guidance of the Court. Additionally, *Schmidberger* seems to suggest a further extension of the Francovich doctrine to encapsulate breaches of Community law attributable to private individuals but such a conclusion has to be reaffirmed in subsequent case law as well. In any event, what becomes obvious is that State liability does not constitute a static notion but a gradually evolving legal doctrine, whose application in full we have not yet witnessed.

Table of Cases

European Court of Justice

Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1
Case 6/64, Flaminio Costa v. ENEL [1964] ECR 585
Case 29/69, Stauder v. City of Ulm [1969] ECR 419
Case 60/75, Russo v. Aima [1976] ECR 45
Case 141/78, France v. United Kingdom [1979] ECR 2923
Case 115/78, J. Knoors v. Secretary of State for Economic Affairs [1979] ECR 399
Case 96/81, Commission v. Netherlands [1982] ECR 1791
Case 283/81 CILFIT and others [1982] ECR 3415
Cases 314, 315, 316/81 and 83/82, Waterkeyn and others [1982] ECR 4337
Case C-79/83, *Dorit Harz v. Deutsche Tradax GmbH* [1984] ECR 1921
Case 178/84, *Commission v. Germany* [1987] ECR 1227
Case 22/87, *Commission v. Italy* [1989] ECR 143
Case C-188/89, *A. Foster and others v British Gas plc.* [1990] ECR I-3313
Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd. and Others* [1990] ECR I-2433
Case C-31/92, Larsy v. INASTI [1993] ECR I-4543
Case C-334/92, Teodoro Wagner Miret v Fondo de Garantía Salarial [1993] ECR I-6911
Case C-392/93, R. v. HM Treasury, ex parte British Telecommunications plc [1996] ECR I-1631
Case C-84/95, Bosphorous v. Minister for Transport [1996] ECR I-3953
Joined Cases C-94/95 and 95/95, Danila Bonifaci and others v. INPS [1997] ECR I-3969

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Case C-261/95, *Rosalba Palmisani v. INPS* [1997] ECR I-4025


Case C-373/95, *Federica Maso and others v. INPS and the Italian Republic* [1997] ECR I-4051


Case C-126/97, *Eco Swiss* [1999] ECR I-3055

Case C-131/97, *Annalisa Carbonari and others v. Universita degli studi di Bologna, Ministero della Sanita, Ministero dell’Universita e della Ricerca Scientifica and Ministero del Tesoro* [1999] ECR I-1103

Case C-140/97, *Rechberger and Greindl v. Austria* [1999] ECR I-3499


Case C-394/97, *Criminal proceedings against Sami Heinonen* [1999] ECR I-3599


Case C-118/00, *Larsy v. INASTI* [2001] ECR I-5063


Case C-129/00, *Commission v. Italy* [2003] ECR I-4637


Case C-224/01, *Gerhard Köhler v. Austria*, [2003] ECR I-10239


Case C-453/00, *Kühne & Heitz* [2004] ECR I-837

Case C-222/02, *Paul and others v. Germany* [2004] nyr

Case C-173/03, *Traghetti del Mediterrano SPA v. Italian Republic*, pending before the ECJ, OJ 2003 C 158/10

Case C-470/03, *A.G.M.-COS.MET s.r.l.v. Finnish State and Tarmo Lehtinen*, pending before the ECJ, OJ 2004 C 35/2

Case C-511/03, *Staat der Nederlanden v. Ten Kate Holding Musselkanaal BV, Ten Kate Europrodukten BV and Ten Kate Produktie Maatschappij BV*, pending before the ECJ, OJ 2004 C 59/3

**European Court of Human Rights**

ECrTHR, *X and Y v. The Netherlands*, judgement of the 26th March 1985


ECrTHR, *Guerra and others v. Italy*, judgement of the 19th February 1998


ECrTHR, *Dulaurans v. France*, judgement of the 21st March 2000

ECrTHR, *Dangeville v. France*, judgement of the 16th April 2002

**National courts**

**Belgium**

*Cour de Cassation*, judgement of 19th December 1990, found in: 111 *Journal des tribunaux* (1992), 142-152

**Finland**

Case *Karelia Lines Oy v. The State of Finland*

Judgement in case *Helitour Oy v. The Maritime Administration*

Judgement in case *Meriläinen and Meritime Kehitys Oy v. The State of Finland*

**Germany**


Judgement of the *Oberlandesgericht Köln* in *Dillenkofer*, found in: *Europäische Zeitschrift für Wirtschaftsrecht* (1998), at 95

**Greece**

Judgement of the *Συμβούλιο της Επικρατείας (Simvoulio tis Epikratias)* in case 3457/1998

Judgement of the *Συμβούλιο της Επικρατείας (Simvoulio tis Epikratias)* in case 1440/2000
Judgement of the Διοικητικό Εφετείο Αθηνών (Appeal Administrative Court of Athens) in case 2174/1991

**Italy**

*Corte di Cassazione*, judgement of July 19, 1995, No. 7832, rec. 2
*Corte di Cassazione*, judgement of July 22, 1999, No. 500, rec.4
*Tribunale di Roma*, judgement of the 28th June 2001

**Spain**

Judgement of the Tribunal Supremo in case 1/46/1999

**Sweden**

Judgement of the District Court of Solna in case T 360/96
Judgement of the Svea Court of Appeal in case T 466/95

**United Kingdom**

Judgement of the Divisional Court Decision of the 31st July 1997 in case *R v. Secretary of State for Transport ex parte Factortame Ltd (No 5)*
Judgment of the Court of Appeal in case *R v. Secretary of State for Transport ex parte Factortame Ltd (No 5)*, found in [1998] EuLR 456
Judgement of the House of Lords in case *R v. Secretary of State for Transport ex parte Factortame Ltd (No 5)*, found in [1999] WLR 1062
Bibliography


de Zwaan Jaap W., “The Netherlands (Judiciary and Authorities) and Article 10 of the EC Treaty”, National Report for the XIX FIDE Congress held at Helsinki from 1st until 3rd June 2000.


Iannone Celestina, Italian National Report for the XIX FIDE Congress held at Helsinki from 1st until 3rd June 2000.


Skouris Vassilios, “Which Are the Consequences when a Breach of the Obligation to Apply Community Law is Attributable to National Supreme Courts?”, Elliniki Epitheorisi Evropaikou Dikaiou (Greek Journal of European Law) (2004), 251-266 (in Greek).


Stephanou Constantin and Xanthaki Helen, “Are the National Remedies the Only Way Forward? Widening the Scope of Article 215 (2) of the Treaty of Rome” in:


Timmermans Christiaan, Rapport Communautaire for the XVIII FIDE Congress, held at Stockholm from 3rd until 6th June 1998.


Official References

European Official References

Council Regulation 1612/68 of 15 October 1968 on the freedom of movement of workers within the Community, OJ 1968 L257/2


Seventh Annual Report COM (90), C 232/1, at C 232/5

**United Nations Official References**


**National Official References**

**Austria**

Allgemeines Verwaltungsverfahrens-Gesetz 1991 (AVG) BGBl. 51/1991, § 69 (1) 3
*Tiroler Grundverkehrsgesetz 1993, Tiroler LGBl. 82/1993*
*Tiroler Grundverkehrsgesetz 1996, Tiroler LGBl. 61/1996*

**Cyprus**

Κεφάλαιο 148, ο Περί Αστικών Αδικημάτων Νόμος (Chapter 148 containing the law on civil torts)

**Finland**

Vahingonkorvauslaki 31.5.1974/412
Article 92 of the Suomen Hallitusmuoto 17.7.1919/94
**Germany**


Article 839 of the Bürgerliches Gesetzbuch

Article 34 of the Grundgesetz

**Greece**

Άρθρο 16 του Συντάγματος (Article 16 of the Constitution)

Άρθρο 105 Εισαγωγικού Νόμου Αστικού Κώδικα (Article 105 of the Introductory Law to the Civil Code)

**Italy**

Article 2043 of the Civil Code

Law No. 117 of 1988 on reparation of damages caused by the judiciary and civil liability of judges and public prosecutors

Decreto Legislativo No.80 of January 27, 1992, Gazzetta Ufficiale No.36 of February 13, 1992

**Sweden**

Skadestandslagen 1972:207

**United Kingdom**

Merchant Shipping Act of 1988

**Note**

In all article references to the TEC, the new numbering system (post-Amsterdam, which is maintained in the present Nice Treaty) has been used.

References from Greek legal sources have been translated by the author of this paper, therefore their translation is not official.