

MEMBER STATE LIABILITY FOR INFRINGEMENT OF EUROPEAN COMMUNITY LAW

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After the *Francovich* case of November 19, 1991, held that “it is a principle of Community law that the member-States are obliged to pay compensation for harm caused to individuals by breaches of Community law for which they can be held responsible,”¹ four recent decisions of the Court of Justice set up the conditions under which the State could be held liable for infringement of EC law.²

A new chapter of Community case law about the relationship between Community law and domestic law is being created, defining

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1. Cases 6 and 9/90, *Francovich and Bonifaci v. the Republic of Italy*, 1991 E.C.R. I-5357, 5379, 2 C.M.L.R. 66, 114 (1993).

2. Joined Cases 46 & 48/93, *Brasserie du Pêcheur Sa v. Germany Regina v. Secretary of State for Transport, ex parte Factortame Ltd. and Others*, 1 C.M.L.R. 889 (1996); Case 392/93, *Regina v. HM Treasure, ex parte British Telecommunications*, 2 C.M.L.R. 217 (1996); Case 5/94, *Regina v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas Ltd.*, 2 C.M.L.R. 391 (1996); Dillenkofer, Abstract by European Court of Justice (publication forthcoming).

how and to which point private individuals who have been injured by an infringement of a Community rule by a Member State can obtain an indemnity in the domestic legal system of such Member State. This statement of the liability of a Member State for infringement of Community law could only have been made after the principle of supremacy of Community law had been held³ and also its indispensable consequences, *i.e.*, the pronouncements made by the Court of Justice in its so-called “2nd generation”⁴ cases about the conditions under which the domestic judge has authority to ensure the effective enforcement of Community law.

The obligation for Member States to indemnify a private individual for the injuring consequences of national measures that were contrary to Community law has provided the private individual with a new guarantee of the effectiveness of his rights based on EC law in the form of a private punishment. Such a guarantee is more secure and direct than the one provided by Article 169 infringement proceedings which is subject to the hazards of the Commission’s initiative. Moreover, even though it has been strengthened by the provisions of Article 171 EC of the Treaty on European Union,⁵ the Article 169 procedure does not provide the individuals with the insurance that Member States will effectively respect Community law.

I. A CASE LAW IN PROGRESS

This principle of liability was held for the first time and with much strength in the *Francovich* case dealing with the damages caused to an individual by the nonimplementation of a directive that lacked a direct effect. The directive in question was Directive 80/987 relating to the

3. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 1964 C.M.L.R. 425]; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629, 3 C.M.L.R. 263 (1978).

4. See Case 222/86, *Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football v. Heylens*, 1987 E.C.R. 4097, 1 C.M.L.R. 901 (1989) (the right to a remedy of a judicial nature); Case 213/89, *Regina v. Secretary of State for Transport, ex parte Factortame Ltd. and Others*, 1990 E.C.R. I-2433, 3 C.M.L.R. 1 (1990); Joined Cases 143/88 & 92/89, *Zuckerfabrik Suderdithmarschen AG v. Hauptzollamt Itzehoe*; *Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, 1991 E.C.R. I-415 (the right to interim relief to protect EC law rights); Case 312/93, *Peterbroeck van Campenhout & CIE SCS v. Belgium*, 1 C.M.L.R. 793 (1996); Joined Cases 430 & 431/93, *van Schijndel and van Veen v. Stichting Pensioenfonds Voor Fysiotherapeuten*, 1 C.M.L.R. 801 (1996) (the possibility or the obligation, depending on the circumstances, for the national jurisdictions to raise automatically any arguments based on infringement of Community law).

5. TREATY ON EUROPEAN UNION, Feb. 7, 1992, art. 171, 1992 O.J. C(224)1 [hereinafter EC TREATY].

protection granted to employees in the event of the insolvency of their employer.⁶ Italy failed to implement the directive during the required period of time. Although the provisions of the directive were sufficiently precise and unconditional, the Directive did not define the persons obliged to pay the guaranteed sums; the employees, therefore, could not rely on the direct effect of the directive against the defaulting State (no vertical direct effect due to insufficiently precise provisions of the directive).⁷ The Court stressed that the recognition of the principle of liability of the State thus seems “particularly indispensable when, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and consequently individuals cannot, in the absence of such action, enforce the rights granted to them by Community law before the national courts.”⁸ The amount of the damage caused by the nonimplementation was precisely calculated according to the specific circumstances of the *Francovich* case.

The Court in the *Francovich* case more generally established the principle of liability of the State for any infringement of EC law but did not mention the conditions under which the State could be held liable other than in the specific case of the nonimplementation of a directive. Almost five years later, the long-awaited case, *Brasserie du Pêcheur/Factortame III*, together with *British Telecom*, *Lomas* and *Dillenkofer*,—all in 1996—have set up the general principles of the liability of the State for infringing Community law.

In the *Brasserie du Pêcheur* case, the plaintiff was obliged, at the end of 1981, to stop its exports of beer to Germany, as the German authorities had considered that the exported beer did not comply with the German legal requirements on beer purity (due to additives) and that it could not be marketed under the name “bier.”⁹ Pursuant to Article 169 on infringement proceedings,¹⁰ the Court held that the German prohibition of sales was contrary to Article 30 EC. *Brasserie du Pêcheur* thus sued the German State for compensation for the damage suffered between 1981 and 1987 because of the prohibition of importation.¹¹ In such a context, the Bundesgerichtshof referred the question to the Court of Justice for a preliminary ruling on whether the principle of liability set

6. *Francovich*, 1991 E.C.R. at I-5371.

7. *Id.* at I-5362.

8. *Id.* at I-5414.

9. *Brasserie du Pêcheur*, 1 C.M.L.R. at 897.

10. Case 178/84, RE Purity Requirements for Beer: EC Commission v. Germany, 1987 E.C.R. 1227, 1 C.M.L.R. 780 (1988).

11. *Brasserie du Pêcheur*, 1 C.M.L.R. at 897.

up by the *Francovich* case could be applied to an infringement of Community law resulting from an act voted by the Parliament and what rules of law were applicable for such a liability.¹²

The *Factortame III* case, settled together with the previous case because the substantive issues raised were similar, is also a part of a famous litigation in the United Kingdom. The Merchant Shipping Act, 1988—applicable on 31st March 1989—made the registration of fishing vessels subject to conditions of nationality, residence, and management which deprived certain vessels not having sufficient links with the United Kingdom of their right to fish.¹³ Apart from its famous decision on interim provisions,¹⁴ the Court held in a preliminary ruling that the requirements of nationality, residence, and management of the owners of the vessels were contrary to Community law¹⁵ and confirmed this position in a decision of 4th October 1991.¹⁶ The victims of a nonregistration asked for compensation for the damage suffered between the date of enforcement of the Act (1st April 1989) and its repeal on 2nd November 1989. Within such a litigation, the British tribunals asked the ECJ for a preliminary ruling, as in the *Brasserie du Pêcheur* case, on the application of the liability principle when the infringement of EC law is the result of an Act of Parliament and on the criteria the domestic jurisdictions have to apply in order to calculate the compensation.¹⁷

In the *British Telecom* case, the British legislative authorities—using the delegated legislation procedure—made a mistake when implementing Council Directive 90/531 relating to the public procurement procedures in the fields of water, energy, transports, and telecommunications.¹⁸ The mistake was that the United Kingdom had defined in “Regulations” the telecom services which were to be excluded from the scope of the directive, whereas such a definition should have been adopted by the awarding authorities. These authorities asked for a remedy for the damage suffered because of the error of interpretation made at the time of the implementation.

12. *Id.* at 898-99.

13. Merchant Shipping Act, 1988 (U.K.).

14. *See* Regina v. Secretary of State for Transport, *ex parte* Factortame Ltd. and Others, 1990 E.C.R. I-2433, 3 C.M.L.R. 1 (1990).

15. EC TREATY, *supra* note 5, arts. 7, 52, & 221.

16. Case 246/89, RE Nationality of Fishermen: E.C. Commission v. United Kingdom, 3 C.M.L.R. 706 (1991).

17. *Id.* at 711.

18. *British Telecom*, 2 C.M.L.R. at 224.

In the *Hedley Lomas* case, the United Kingdom refused to grant export licenses for live sheep shipped to Spain because the Spanish slaughterhouses would not respect the conditions of treatment of the animals imposed by a European directive. The question was referred to the Court for a preliminary ruling first on whether there was infringement of Article 34 EC and then on whether the British authorities could be held liable for refusing to grant an export license.¹⁹

The *Dillenkofer* case deals again, as in the *Francoovich* case, with the issue of the nonimplementation of a directive during the required period of time, *i.e.*, the issue of a defaulting legislature in a Member State.²⁰

The Court has been successively asked the question of liability of the State for infringement of EC law:

- (1) due to a Parliament acting in the wrong way (*Brasserie du Pêcheur, Factortame*) or failing to act (*Dillenkofer*);
- (2) due to the legislative authority acting pursuant to a delegated legislation procedure (*British Telecom*);
- (3) due to an administrative authority refusing an individual measure (*Lomas*).

Time has now come for a first analysis of the principle of liability of the State for infringement of EC law and of its practical implications.

II. THE PRINCIPLE OF LIABILITY OF THE STATE FOR INFRINGEMENT OF EC LAW

In the four decisions, the Court, in spite of the diversity of the cases, has always held that “the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.”²¹ As a result such a principle is valid for all types of infringements of EC law by a Member State.²²

19. *Lomas*, 2 C.M.L.R. at 401.

20. Council Directive 90/314, 1990 O.J. (L 158) (relating to travels, holidays and organized tours and provides for the protection of the consumer in the event of a default by the travel agency).

21. *British Telecom*, 2 C.M.L.R. at 233; *Francoovich*, 2 C.M.L.R. at 82-83; *Brasserie du Pêcheur*, 1 C.M.L.R. at 903.

22. *Brasserie du Pêcheur*, 1 C.M.L.R. at 903.

A. *The Principle of Liability “Inherent in the System of the Treaty”*

In the *Francovich* case where such a statement appeared for the first time, the Court laid down a justification based on its traditional case law on supremacy and direct effect:

(1) Community law involves the attribution of rights attached to individuals;²³

(2) as a result of a continuous case-law, it is a matter for the national jurisdictions in charge of applying Community law provisions to ensure full effectiveness of these rules and to protect the rights granted to the individuals.²⁴

The Court thus concluded that “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 compensation when their rights are infringed by a breach of Community law for which a member-State can be held responsible.”²⁵ Such an obligation on Member States to grant compensation stems, according to the Court, not only from its own case law but also from Article 5 of the Treaty which provides that Member States shall take “all appropriate measures whether general or particular to ensure fulfillment of their obligations under Community law.”²⁶

Despite the firmness of the wording used by the Court, one may wonder why it is “inherent in the system of the Treaty”²⁷ that the European judge shall prescribe for the national judge the implementation in its domestic law of a general principle of liability of the Member State for all kinds of breaches of Community law. On such a point, the *Francovich* case remains evasive. Does the principle of effectiveness involve a complete upheaval of the national systems of liability of Member States? None of them have a scheme of liability for the legislature’s failure to act, and some of them, such as Germany and England, for instance, do not accept or accept only very sparingly the liability of the State in connection with the legislative activity—which tends, by the way, to evidence that the rule of law does not automatically imply the principle of liability of the State for a damage done by its

23. Case 26/62, *N.V. Algemene Transport-En Expeditie Onderneming Van Gend En Loos v. Nederlandse Tariefcommissie*, 1963 C.M.L.R. 105, 114; *Costa*, 1964 C.M.L.R. at 456.

24. *Simmmenthal*, 3 C.M.L.R. 283-84; *Factortame*, 3 C.M.L.R. 29.

25. *Francovich*, 2 C.M.L.R. at 114.

26. *Id.*

27. *Id.*

legislative activity. In the *Brasserie du Pêcheur* case, the German government argued before the Court “that a general right to reparation for individuals 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 and with the institutional balance established by the Treaty.”²⁸ It should be remembered that when the EC treaties were renegotiated at Maastricht, the introduction in the Treaty of a principle of liability of the States for infringement of EC law was contemplated but then abandoned.

The *Brasserie du Pêcheur/Factortame* case raises this issue of the EC judge’s competence to set up such a principle, whose implications are so important for the Member States. The Court asserts that the question of the existence and the scope of Member States’ liability for breach of the EC law “are questions of Treaty interpretation which fall within the jurisdiction of the Court.”²⁹ Without any provisions in the Treaty specifying the consequences of a breach of EC law by the Member States, it belongs to the Court, within its task of applying and interpreting the law, conferred by Article 164 of the EC Treaty, to rule on this issue according to the methods generally allowed.³⁰

The Court reminds us that Article 215 of the EC Treaty on the noncontractual liability of the Community refers to the general principles common to the laws of the Member States as sources of law applicable to the matter.³¹ Those principles, according to the Court, generally encompass that (1) an illegal action or failure to act involves the obligation to grant damages and that (2) the public authorities shall compensate for the damage caused in the performance of their duties. Moreover, the Court states that “in many national legal systems the essentials of the legal rules governing State liability have been developed by the courts.”³²

On the contrary, even though the Court does not say it, it is clearly ascertained that common principles relating to the liability of the public authorities for damage caused by their legislative activity cannot be found in the legal systems of the Member States.³³ In some countries,

28. *Brasserie du Pêcheur*, 1 C.M.L.R. at 985-86.

29. *Id.* at 986.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Lomas*, 2 C.M.L.R. at 441-43.

such as France, the courts accept the principle of the liability of the State in connection with its legislative activity even though the conditions of application remain extremely strict. Whereas German law proscribes it in practice by imposing the condition of a breach of a duty/obligation towards a defined individual—which is very unlikely in the case of a legislative activity—English law totally proscribes it, the Parliament being incapable of being guilty of “misfeasance in public office.” Furthermore, in none of the Member States has any possibility of liability for failure of the legislative body been recognized. Nevertheless, such a lack of principles common to the Member States does not prevent the Court, pursuing its own case law, to state in this matter general principles of EC law. That is what has been done in the above cases, in a very innovative way.

There have been some hints in the previous case law of the willingness of the Court to have the Member States punished for breach of EC law³⁴ and a comprehensive case law on the right of recovery by individuals of the sums unduly paid to member States in breach of EC law; but what is new with the *Francovich* case and above all with the *Brasserie du Pêcheur/Factortame* case is that the liability of the Member State is asserted in very broad terms and is founded on the Treaty itself. The right to make the State liable within the national system is part of the legal protection of the rights granted to individuals by EC law such as the right to a remedy of a judicial nature, the right to interim relief, and the right to the recovery of the sums unduly paid.

The new principle involves far more important consequences for the Member States than the previous case law on the legal protection of the private individual. Previous case law merely asserted the supremacy of the EC rule over the national law of Member States but did not intend any other sanction than the voidness, the suspension, or the definitive nonimplementation of a national rule or decision which does not comply with the EC rule. From now on, the private individual possesses a formidable new weapon, consisting of a private punishment such as the possibility of claiming compensation for breach of EC law, knowing that it is always possible to rely on the logistic support of a reference to the Court for a preliminary ruling. Where the Commission could only recommend to the State that “while keeping the choice of the sanctions, they shall ensure that the breaches of EC law shall be punished in an

34. Case 6/90, *Humblet v. Belgian State*, 1960 E.C.R. 559.

effective, proportionate and deterrent way,”³⁵ the Court has put in the hands of the private individual a tool of instant use before the national judge. As stressed by Advocate General Léger in his opinion on the *Lomas* case presented on June 20, 1995,³⁶ individuals, especially in France, have not been long in understanding the message, and they have referred to the administrative tribunals claims for damages due to the nonrespect of the primacy of EC law over adverse national provisions.³⁷

B. The Principle of Liability for any Kind of Infringement of EC Law by any Kind of State Authority

The *Brasserie du Pêcheur* case has been more explicit than the *Francovich* case regarding the scope of application of this new principle of liability: “[the] principle 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.”³⁸

1. Whatever the State Authority May Be

Advocate General Tesauro, in his opinion on the *Brasserie du Pêcheur* and *Factortame III* cases, noticed that, in public international law, when the liability of the State is involved, the State is regarded as a whole, whether the infringement of the international obligation which had caused the damage is imputable to the legislative, judiciary or executive power.³⁹ The international order does not interfere with the internal organization of the State. It is the same approach which prevails for Article 169 proceedings, which remain clearly connected with the international legal order because of the identity of the parties—Member States and the Commission representing the interest of the Community—and the nature of the judge—the European Court of Justice. Those relations between subjects of international law are of such a nature that they do not take account of the individuals and legal persons which disappear behind the legal personality of the sovereign State. On the

35. Commission Communication 147/3 of 21 Sept. 1989, 1990 J.O.

36. *Lomas*, 2 C.M.L.R. at 410.

37. See generally Martine Laroque, *Fixation du Prix des Tabacco Importes: Rothmans International France and Société Arizona Tabacco Products*, 1992 L’Actualité Juridique Droit Administratif (AJDA) 210, 224-26 (1992); La Cour Administrative d’Appel de Paris, July 1, 1992, available in LEXIS, French Public Library, APPEL File; La Cour Administrative d’Appel de Paris, Nov. 12, 1992, available in LEXIS, French Public Library, APPEL File.

38. *Brasserie du Pêcheur*, 1 C.M.L.R. at 986.

39. *Id.* at 943.

other hand, the principle of liability of the State, which is at stake here, is to be applied before a domestic jurisdiction and at the initiative of individuals. The comparison with the international order seems a less convincing rationale for the principle than the reference the Court made in the *Brasserie du Pêcheur* case to the fundamental requirement of the Community legal order consisting of the uniform application of the law.⁴⁰ The obligation of Member States to grant damages to individuals for breaches of EC law—an obligation which is, as seen above, an indispensable consequence of the principle of supremacy of EC law over national law of Member States—shall not depend on the domestic rules which differ from one Member State to another.

The Court has long asserted the primacy of the entire Community law over all the national laws⁴¹ and has pointed out the ways and means to realize such a primacy.⁴² It is not surprising then that it requires that the principle of liability shall be equally comprehensive. The *Francovich*, *Brasserie du Pêcheur* and *Dillenkofer* cases, even the *British Telecom* case—which is a case of delegated legislation—are good examples of a possible punishment of the State due to the conduct of the domestic lawmaker. The election by universal suffrage does not confer to the Parliament any special right to escape from its obligation to comply with EC law; if it does so, it takes the risk of involving the financial liability of the State. As stated by the Court in the *Brasserie du Pêcheur* case:

The fact that, according to national rules, the breach complained of is attributable to the legislature cannot affect the requirements inherent in the protection of the rights of individuals who rely on Community law and, in this instance, the right to obtain redress in the national courts for damage caused by that breach.⁴³

The liability of the national administration for failure to comply with EC law does not raise the same issue of constitutional legitimacy. In several member States the principle of liability of public authorities for damage caused by their failure to comply with the rule of law is accepted under certain conditions. On the other hand, one can wonder about the situation of the domestic judicial power, as its actions have until now

40. *Id.* at 985.

41. Case 11-70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1972 C.M.L.R. 255.

42. *Simmmenthal*, 3 C.M.L.R. at 263.

43. *Brasserie du Pêcheur*, 1 C.M.L.R. at 987.

never been questioned under Article 169 proceedings; the Commission has been anxious to preserve the independence of the judiciary. In the next few years, will the litigants claim compensation for a judicial decision which would appear to be based on a wrong construction of Community law? French law requires a serious mistake (*faute lourde*) in order to involve the liability of the judiciary. Therein, it is interesting to notice that a judgment of the commercial division (*Chambre Commerciale*) of the Cour de Cassation⁴⁴ has quashed a judgment of the Court of Appeal of Paris which had refused to grant damages to whisky importers who suffered prejudice due to a note from the Ministry of Justice proposing to take legal action for infringement of the national rules prohibiting the advertisement of alcoholic drinks, this national rule being incompatible with EC law. As mentioned by the judgment of the Cour de Cassation, France has been condemned several times by the European Court of Justice (Article 169 proceedings) for keeping rules on the advertisement of alcoholic drinks that are incompatible with the EC Treaty.⁴⁵ The Court of Appeal, according to the judges of Cassation, would have had to determine whether the French State had not committed a serious mistake by ignoring the scope of those ECJ decisions, and whether the note of the Ministry of Justice proposing criminal law suits against the plaintiffs “had not affected the conditions of competition, thus creating a damage.”⁴⁶

Indeed, the damage originates in a note of the Ministry of Justice and not in a legal decision contrary to Community law. Here is, however, an interesting approach towards the acceptance by the national judge of the liability of the State for conduct contrary to Community law and imputable to a section of the judiciary.

2. Any Kind of Infringement of EC Law

The *Brasserie du Pêcheur* case has cleared up a misunderstanding created by the *Francovich* case about the links between the direct effect of the infringed Community rule and the principle of liability. In the *Francovich* case, the Court has indeed set up the general principle of liability of the State for damage caused to individuals by breaches of Community law imputable to it, but had applied it, as mentioned above, to a specific case, the nonimplementation by Member States of a directive

44. Cass. Com. Feb. 21, 1995, *Gaz. Pal.* 1996, 366, note Fourgoux.

45. *Id.* at 50, 366.

46. *Id.* at 51 (author’s translation).

on which individuals could not rely before the national courts because its provisions were not specific enough. Moreover, the Court had, quite awkwardly, stipulated three conditions for the State to be held liable:

- (1) the result prescribed by the directive should entail the grant of rights to individuals;
- (2) it should be possible to identify the content of those rights on the basis of the provisions of the directive;
- (3) the existence of a causal link between the breach of the State's obligation and the harm suffered by the injured parties.⁴⁷

The German government, defendant in the *Brasserie du Pêcheur* case, has drawn from the conditions set up in the *Francovich* case the conclusion that the principle of liability should be regarded as a substitute for the impossibility in such a case of relying on a nonimplemented directive, insufficiently precise to benefit from the vertical direct effect, but nevertheless sufficiently precise to identify the rights of individuals.

In its *Brasserie du Pêcheur* decision, the Court corrected an approach which would have considerably narrowed the scope of the principle of liability. It stated that "the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty."⁴⁸ The Court also held that "the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained."⁴⁹

Therefore, one may assert that in the case of a nonimplementation or a wrong implementation of a directive (*Francovich*, *British Telecom*, *Dillenkofer*), the liability of the State which has failed to implement correctly the directive, is involved for breach of Article 189, paragraph 3 of the Treaty: such article provides individuals with a right to have the directives implemented, a right on which the victim of a nonimplementation can rely before the national jurisdiction even though he or she cannot directly invoke certain provisions of the directive. The direct effect of the directive in itself is not important; its provisions, if they are specific enough, will help to identify the rights to compensation. As far as the substantive provisions of the Treaty are concerned (Article 30 in the *Brasserie du Pêcheur* case, Article 52 in the *Factortame* case,

47. *Francovich*, 2 C.M.L.R. at 114.

48. *Brasserie du Pêcheur*, 1 C.M.L.R. at 985.

49. *Id.*

Article 34 in the *Lomas* case), their infringement can give rise to a legal action in tort as long as “the rule of law infringed . . . [is] intended to confer rights on individuals.”⁵⁰ This is exactly equivalent to the condition of the direct applicability which appears to be the first condition for the exercise of a right to compensation now established by the jurisprudence.⁵¹

III. THE IMPLEMENTATION OF THE PRINCIPLE OF LIABILITY

Once it is asserted that the principle of liability is founded on Community law and that it is likely to be applied to any infringement by any State authority of a Community rule which aims at granting rights to individuals, the implementation depends on national law. In other words, remedies should be provided for within the national laws of the Member States with a certain scope left to them regarding the conditions under which compensation could be granted. The *Francovich* case already prepared the way for a certain harmonization of the conditions for a right to compensation which would depend on “the nature of the infringement of Community law” causing the damage.⁵² The *Brasserie du Pêcheur* and *Lomas* cases have produced some important explanations concerning the conditions for the remedy, proposing a Community harmonization for some of them, and for the rest of them, leaving the determination of the procedure, properly constrained, though, to the Member States.

We can find in the most recent cases, on a repeated basis,⁵³ a revised version of the conditions set up in the *Francovich* case. The application of the right to compensation requires:

- (1) that the infringed rule aims at attributing rights to individuals—such a condition has already been mentioned several times;
- (2) that the violation is sufficiently flagrant;
- (3) that there is a casual link between the failure by the Member State to fulfill its obligations and the damage suffered by the individuals.

The last two conditions indicate the wish to constrain the autonomy of the national judge by Community case law, with the risk

50. *Id.* at 989.

51. *Id.*; see also *British Telecom*, 2 C.M.L.R. at 244; *Lomas*, 2 C.M.L.R. at 447.

52. *Francovich*, 2 C.M.L.R. at 114.

53. *Lomas*, 2 C.M.L.R. at 447, *Brasserie du Pêcheur*, 1 C.M.L.R. at 989; *British Telecom*, 2 C.M.L.R. at 245.

that such case law be either insufficiently precise or interfere excessively with domestic rules or principles.

A. *A Harmonized Condition: "A Sufficiently Serious Violation"*

According to the formula used by the Court, State liability does not exist for every kind of infringement of an EC obligation, but only for a "sufficiently serious violation."⁵⁴

The condition does not bear on the nature of the rule—the breach of any EC rule can give rise to compensation—but on the seriousness of the breach.

Setting up a Community-wide rule is a difficult task. Due to the diversity of public authority liability schemes within national systems, the EC judge cannot refer to principles common to the laws of the Member States.

On the other hand, in order to maintain a certain coherence—"congruity" as it is sometimes called—Advocate General Misho mentioned in his opinion on the *Francovich* case that the EC judge wanted first of all to keep in line with the conditions he himself had set up when applying Article 215 EC relating to the liability of the Community for damage caused to individuals by unlawful acts on the part of EC institutions.⁵⁵ The Court brought up the parallel with Article 215 EC in the *Brasserie du Pêcheur* case with respect to the liability for the legislative acts in order to justify the reference to the requirement of a "sufficiently serious" violation of the EC rule.⁵⁶ Incidentally, one might be surprised to observe that although the activities for which Member States are likely to be held liable for infringement of EC law are not limited to legislative activity, the Court has focused on this single criterion borrowed from its jurisprudence based on Article 215 EC which not only de facto concerns exclusively the legislative activity, but also is rather restrictive both in imposing the condition of a "sufficiently serious breach" and because it refers to the infringement of a "superior rule of law."⁵⁷

The Court strives to provide the national judge with a guideline helping it to determine whether there is a "sufficiently serious

54. *Francovich*, 2 C.M.L.R. at 83.

55. *Id.* at 89-91.

56. *Brasserie du Pêcheur*, 1 C.M.L.R. at 905.

57. *Lomas*, 2 C.M.L.R. at 427.

violation.”⁵⁸ Among the factors the competent jurisdiction might take into consideration, the Court has pointed out

the clarity and precision of the rule breached, the measure of discretion left by that rule to 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.⁵⁹

These are criteria suggested by the Court to the national jurisdictions which remain free to appraise each specific case. Some are questionable; thus the reference to the intentional or unintentional nature of the infringement is surprising, while precisely the general principle of liability excludes a subjective qualification in favor of a more objective notion of illegality.

The Court reminds us that, in any case, the breach of EC law is manifest when there has been a legal decision in an Article 169 proceeding, a preliminary ruling, or when there is well-established case law on the matter. Outside those indisputable unlawful situations, the Court is not entitled to substitute its own appreciation of the existence of a “sufficiently serious violation” for that of the national jurisdictions. In the context of the *Brasserie du Pêcheur*, *Factortame*, *British Telecom* or *Lomas* cases, the Court has sometimes indulged in some questionable appreciation of the existence of a sufficiently flagrant violation when it should have left it to the national jurisdictions to qualify the disputed violation.⁶⁰

If we try to summarize such a “Community” appreciation of a sufficiently flagrant infringement, we notice that the Court in practice attaches a great importance to the scope of appreciation left to the Member State. In the *Lomas* case, about the refusal by Great Britain to grant export licenses, in breach of Article 34 EC, the Court has observed that when the Member State is “not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the

58. *Brasserie du Pêcheur*, 1 C.M.L.R. at 990.

59. *Id.*

60. Denys Simon, *La Responsabilité de l'État Saisie Par le Droit, Communautaire: La Jurisprudence Brasserie du Pêcheur, Factortame, British Telecom, Hedley Lomas*, 1996 AJDA 489, 496 (1996).

mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.”⁶¹ The wording is hesitating; we would have preferred a stronger assessment of the fact that in case of limited competence, any breach of law shall constitute a “sufficiently serious violation.” This is, by the way, the solution held by the Court on the merits of the *Dillenkofer* case where it stated that “the absence of any measure implementing the directive, in order to reach the result to be achieved in the prescribed period constitutes by itself a flagrant violation of EC law and thus involves a right to compensation to the individuals who suffered a prejudice”⁶²

When, on the contrary, the Member State has a wider scope of appreciation and is confronted with choices as to the form of legislation for the implementation of a directive (*Francovich*) or for the interpretation of a directive (*British Telecom*), or for the application of treaty provisions (*Brasserie du Pêcheur* and *Factortame*), the national jurisdiction which has to rule on the existence of a “sufficiently serious violation” of EC law must first of all look for indications in the case law of the Court—if it exists (for example, Article 169 proceedings); it shall otherwise take into account the network of indications defined by the Court itself. When, as in the *British Telecom* case, the State does not have at its disposal any indication in the case law of the Court and thus adopts an interpretation based on relevant arguments, nothing precludes the national judge from concluding that there is no liability incurred. In the domestic litigations to come which will be encouraged by the *Francovich*, *Brasserie du Pêcheur* cases, one may expect a multiplicity of preliminary rulings on interpretation in order to make the Court clarify how “sufficiently serious violation” must be understood.

Eventually, the approach deduced from these different affairs would be unfairly caricatured if it was described as merely keeping in line with the case law based on Article 215 EC on the noncontractual liability of the Community. On the contrary, the Court seems to induce the national jurisdictions to take a more open route: the threshold of liability for the State depends on “the nature of the infringement of EC law which is the cause of the damage.”⁶³ The liability related to legislative or administrative activities shall be modulated according to the breadth of the scope of authority left to the national bodies. For the judicial activities, there is still a lack of “Community” indication.

61. *Lomas*, 2 C.M.L.R. at 448.

62. See *Dillenkofer*, *supra* note 2 (author’s translation).

63. *Brasserie du Pêcheur*, 1 C.M.L.R. at 957-58.

B. *The Conditions of Compensation According to the National Law of Each Member State: A Constrained Procedural Autonomy*

The last paragraphs of the *Francovich* case should be reproduced here almost literally. Once the principle of liability is asserted, the State has to pay compensation for the damage within its national law.⁶⁴ In the absence of a Community rule, it belongs to the internal legal order of each Member State to designate the competent jurisdictions and to rule on the procedural terms designed to protect the rights granted to the individuals by Community law.⁶⁵

The Court has held, following its now classical case law on procedural guarantees⁶⁶ that “the substantive and procedural conditions laid down by the national law of the various member-States on compensation for harm may not be less favourable than those relating to similar internal claims and may not be so framed as to make it virtually impossible or excessively difficult to obtain compensation.”⁶⁷

In most of the States, the liability of the public authorities for illegal conduct is surrounded by very stringent restrictions, especially when the legislature’s conduct is at stake. Certain States will have to adapt their internal legal order so as not to make it “practically impossible or excessively difficult to obtain compensation.” The French system of public liability is not among the most restrictive ones. The administrative case law has for a long time acknowledged the principle of objective liability due to acts of Parliament⁶⁸ or due to delegated legislation⁶⁹ based on the breach of the principle of equality. As soon as the *Francovich* case law became known, the French jurisdictions showed a remarkable tendency to leave room for the infringement of EC law—without qualifying it as unlawful—as a ground for the liability of the State authorities.⁷⁰

On the practical conditions of compensation—causal link, amount of the damage—the commented cases provide some indications which probably go beyond what is up to the Community judge to

64. *Francovich*, 2 C.M.L.R. at 115.

65. *Id.*

66. *Amministrazione delle Finanze dello Stato v. SpA San Giorgio*, 1983 E.C.R. 3595, 2 C.M.L.R. 658 (1985).

67. *Francovich*, 2 C.M.L.R. at 115; *see also Brasserie du Pêcheur*, 1 C.M.L.R. at 994; *Lomas*, 2 C.M.L.R. at 448.

68. CE *Société anonyme des produits laitiers La Fleurette*, Jan. 14, 1938 Rp 25.

69. CE *Bovero*, Jan. 25, 1963 Rp 53; CE *Commune de Gavarnie*, Feb. 22, 1963 Rp 113.

70. *See cases cited supra* notes 66-67.

stipulate. This judge should be able to accept, within the procedural autonomy left to the legal order of the States, that certain systems grant exemplary damages and others do not, that certain systems compensate for indirect damages and others do not. That is why one might be surprised that the Court has imposed the condition of a direct causal link (3rd condition) between the violation of the EC obligation and the damage incurred.⁷¹ All procedural rules of the domestic law of a Member State that provide better compensation for the damage suffered with regard to the minimum required by the *Francovich*, *Factortame/Brasserie du Pêcheur*, *Lomas* case law, should be considered as compatible with the requirements of EC law. The case for uniformity of rules on liability should not have as a side-effect a decrease in the amount of compensation individuals are entitled to under domestic law.

It should be remembered that the purpose of such a new wave of case law is indeed to ensure a better protection of the rights the individual gets from EC law and at the same time to guarantee a minimal uniformity in the national implementation of directly effective EC law.

71. Simon, *supra* note 60, at 498.