# The Law of the EUROPEAN UNION

UNIT 4

**Teaching Material**

## PRINCIPLES OF CONSTITUTIONAL LAW: THE RELATIONSHIP BETWEEN THE COMMUNITY LEGAL ORDER AND THE NATIONAL LEGAL ORDERS: REMEDIES AND NATIONAL PROCEDURES

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# TABLE OF CONTENTS

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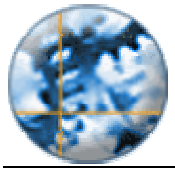
# 1 MAKING JUDICIAL PROTECTION MORE EFFECTIVE

## 1.1 Joined Cases C-6/90 and 9/90: Francovich



***NOTE AND QUESTIONS***

In 1991, in Francovich, the ECJ fully addressed the question of State liability for breach of Community law and its basis in EC for the first time.

1. What does legal protection look like in a post-Francovich communitarian world?

2. Do you agree that Member State liability to private parties for Community law violations is "inherent" in the Community law system?

**Andrea Francovich and Danila Bonifaci and others v Italian Republic**

**Joined cases C-6/90 and 9/90**

19 November 1991

Court of Justice

[1991] ECR I-5357

http://www.curia.eu.int/en/content/juris/index.htm

1 By orders of 9 July and 30 December 1989, which were received at the Court on 8 January and 15 January 1990 respectively, the Pretura di Vincenza (in case C-6/90) and the Pretura di Bassano del Grappa (in case C-9/90) referred to the Court for a preliminary ruling under article 177 of the EEC Treaty a number of questions on the interpretation of the third paragraph of article 189 of the EEC Treaty and Council directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (Official Journal 1980 l 283, p. 23).

2 Those questions were raised in the course of proceedings brought by Andrea Francovich and by Danila Bonifaci and others (hereinafter referred to as 'the plaintiffs') against the Italian republic.

3 Directive 80/987 is intended to guarantee employees a minimum level of protection under Community law in the event of the insolvency of their employer, without prejudice to more favourable provisions existing in the Member States. In particular it provides for specific guarantees of payment of unpaid wage claims.

4 Under article 11 the Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within a period which expired on 23 October 1983. The Italian republic failed to fulfil that obligation, and its default was recorded by the Court in its judgment in case 22/87 Commission v Italy ([1989] ECR 143).

5 Mr. Francovich, a party to the main proceedings in case C-6/90, had worked for CDN elettronica SNC in Vincenza but had received only sporadic payments on account of his wages. He therefore brought proceedings before the Pretura di Vincenza, which ordered the defendant to pay approximately lit 6 million. In attempting to enforce that judgment the bailiff attached to the Tribunale di Vincenza was obliged to submit a negative return. Mr. Francovich then claimed to be entitled to obtain from the Italian state the guarantees provided for in directive 80/987 or, in the alternative, compensation.

6 In case C-9/90 Danila Bonifaci and 33 other employees brought proceedings before the Pretura di Bassano del Grappa, stating that they had been employed by Gaia Confezioni SRL, which was declared insolvent on 5 April 1985. When the employment relationships were discontinued, the plaintiffs were owed more than lit 253 million, which was proved as a debt in the company's insolvency. More than five years after the insolvency they had been paid nothing, and the receiver had told them that even a partial distribution in their favour was entirely improbable. Consequently, the plaintiffs brought proceedings against the Italian republic in which they claimed that, in view of its obligation to implement directive 80/987 with effect from 23 October 1983, it should be ordered to pay them their arrears of wages, at least for the last three months, or in the alternative to pay compensation.

7 It was in those circumstances that the national Courts referred the following questions, which are identical in both cases, to the Court for a preliminary ruling:

'(1) under the system of Community law in force, is a private Individual who has been adversely affected by the failure of a Member State to implement directive 80/897 - a failure confirmed by a judgment of the Court of Justice - entitled to require the state itself to give effect to those provisions of that directive which are sufficiently precise and unconditional, by directly invoking the Community legislation against the Member State in default so as to obtain the guarantees which that state itself should have provided and in any event to claim reparation of the loss and damage sustained in relation to provisions to which that right does not apply?

(2) are the combined provisions of articles 3 and 4 of Council directive 80/987 to be interpreted as meaning that where the state has not availed itself of the option of laying down limits under article 4, the state itself is obliged to pay the claims of employees in accordance with article 3?

(3) if the answer to question 2 is in the negative, the Court is asked to state what the minimum guarantee is that the state must provide pursuant to directive 80/987 to an entitled employee so as to ensure that the share of pay payable to that employee may be regarded as giving effect to the directive.'

8 Reference is made to the report for the hearing for a fuller account of the facts of the main proceedings, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 The first question submitted by the national Courts raises two issues, which should be considered separately. It concerns, first, the direct effect of the provisions of the directive which determine the rights of employees and, secondly, the existence and scope of state liability for damage resulting from breach of its obligations under Community law. The direct effect of the provisions of the directive which determine the rights of employees

10 The first part of the first question submitted by the national Courts seeks to determine whether the provisions of the directive which determine the rights of employees must be interpreted as meaning that the persons concerned can enforce those rights against the state in the national Courts in the absence of implementing measures adopted within the prescribed period.

11 As the Court has consistently held, a Member State which has not adopted the implementing measures required by a directive within the prescribed period may not, against individuals, plead its own failure to perform the obligations which the directive entails. Thus wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the state (judgment in case 8/81 Becker v Finanzamt Muenster-Innenstadt [1982] ECR 53).

12 It is therefore necessary to see whether the provisions of directive 80/987 which determine the rights of employees are unconditional and sufficiently precise. There are three points to be considered: the identity of the persons entitled to the guarantee provided, the content of that guarantee and the identity of the person liable to provide the guarantee. In that regard, the question arises in particular whether a state can be held liable to provide the guarantee on the ground that it did not take the necessary implementing measures within the prescribed period.

13 With regard first of all to the identity of the persons entitled to the guarantee, it is to be noted that, according to article 1(1), the directive applies to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of article 2(1), the latter provision defining the circumstances in which an employer must be deemed to be in a state of insolvency. Article 2(2) refers to national law for the definition of the concepts of 'employee' and 'employer'. Finally, article 1(2) provides that the Member States may, by way of exception and under certain conditions, exclude claims by certain categories of employees listed in the annex to the directive.

14 Those provisions are sufficiently precise and unconditional to enable the national Court to determine whether or not a person should be regarded as a person intended to benefit under the directive. A national Court need only verify whether the person concerned is an employed person under national law and whether he is excluded from the scope of the directive in accordance with article 1(2) and annex 1 (as to the necessary conditions for such exclusion, see the judgments in case 22/87 Commission v Italy, cited above, paragraphs 18 to 23, and case C-53/88 Commission v Greece [1990] ECR I-3917, paragraphs 11 to 26), and then ascertain whether one of the situations of insolvency provided for in article 2 of the directive exists.

15 With regard to the content of the guarantee, article 3 of the directive provides that measures must be taken to ensure the payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a date determined by the Member State, which may choose one of three possibilities: (a) the date of the onset of the employer' s insolvency; (b) that of the notice of dismissal issued to the employee concerned on account of the employer' s insolvency; (c) that of the onset of the employer' s insolvency or that on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer' s insolvency.

16 Depending on the choice it makes, the Member State has the option, under article 4(1) and (2), to restrict liability to periods of three months or eight weeks respectively, calculated in accordance with detailed rules laid down in that article. Finally, article 4(3) provides that the Member States may set a ceiling on liability, in order to avoid the payment of sums going beyond the social objective of the directive. Where they exercise that option, the Member States must inform the Commission of the methods used to set the ceiling. In addition, article 10 provides that the directive does not affect the option of Member States to take the measures necessary to avoid abuses and in particular to refuse or reduce liability in certain circumstances.

17 Article 3 of the directive thus leaves the Member State a discretion in determining the date from which payment of claims must be ensured. However, as is already implicit in the Court' s case-law (see the judgments in case 71/85 Netherlands v FNV [1986] ECR 3855 and case 286/85 McDermott and Cotter v Minister for social welfare and Attorney general [1987] ECR 1453, paragraph 15), the right of a State to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals of enforcing before the national Courts rights whose content can be determined sufficiently precisely on the basis of the provisions of the directive alone.

18 In this case, the result required by the directive in question is a guarantee that the outstanding claims of employees will be paid in the event of the insolvency of their employer. The fact that articles 3 and 4(1) and (2) give the Member States some discretion as regards the means of establishing that guarantee and the restriction of its amount do not affect the precise and unconditional nature of the result required.

19 As the Commission and the plaintiffs have pointed out, it is possible to determine the minimum guarantee provided for by the directive by taking the date whose choice entails the least liability for the guarantee institution. That date is that of the onset of the employer' s insolvency, since the two other dates, that of the notice of dismissal issued to the employee and that on which the contract of employment or the employment relationship was discontinued, are, according to the conditions laid down in article 3, necessarily subsequent to the onset of the insolvency and thus define a longer period in respect of which the payment of claims must be ensured.

20 The possibility under article 4(2) of limiting the guarantee does not make it impossible to determine the minimum guarantee. It follows from the wording of that article that the Member States have the option of limiting the guarantees granted to employees to certain periods prior to the date referred to in article 3. Those periods are fixed in relation to each of the three dates provided for in article 3, so that it is always possible to determine to what extent the Member State could have reduced the guarantee provided for by the directive depending on the date which it would have chosen if it had transposed the directive.

21 As regards article 4(3), according to which the Member States may set a ceiling on liability in order to avoid the payment of sums going beyond the social objective of the directive, and article 10, which states that the directive does not affect the option of Member States to take the measures necessary to avoid abuses, it should be observed that a Member State which has failed to fulfil its obligations to transpose a directive cannot defeat the rights which the directive creates for the benefit of individuals by relying on the option of limiting the amount of the guarantee which it could have exercised if it had taken the measures necessary to implement the directive (see, in relation to an analogous option concerning the prevention of abuse in fiscal matters, the judgment in case 8/81 Becker v Finanzamt Muenster-Innenstadt [1982] ECR 53, paragraph 34).

22 It must therefore be held that the provisions in question are unconditional and sufficiently precise as regards the content of the guarantee.

23 Finally, as regards the identity of the person liable to provide the guarantee, article 5 of the directive provides that: 'Member States shall lay down detailed rules for the organization, financing and operation of the guarantee institutions, complying with the following principles in particular:

(a) the assets of the institutions shall be independent of the employers' operating capital and be inaccessible to proceedings for insolvency;
(b) employers shall contribute to financing, unless it is fully covered by the public authorities;
(c) the institutions' liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled.'

24 It has been submitted that since the directive provides for the possibility that the guarantee institutions may be financed entirely by the public authorities, it is unacceptable that a Member State may thwart the effects of the directive by asserting that it could have required other persons to bear part or all of the financial burden resting upon it.

25 That argument cannot be upheld. It follows from the terms of the directive that the Member State is required to organize an appropriate institutional guarantee system. Under article 5, the Member State has a broad discretion with regard to the organization, operation and financing of the guarantee institutions. The fact, referred to by the Commission, that the directive envisages as one possibility among others that such a system may be financed entirely by the public authorities cannot mean that the state can be identified as the person liable for unpaid claims. The payment obligation lies with the guarantee institutions, and it is only in exercising its power to organize the guarantee system that the state may provide that the guarantee institutions are to be financed entirely by the public authorities. In those circumstances the state takes on an obligation which in principle is not its own.

26 Accordingly, even though the provisions of the directive in question are sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as regards the content of that guarantee, those elements are not sufficient to enable individuals to rely on those provisions before the national Courts. Those provisions do not identify the person liable to provide the guarantee, and the state cannot be considered liable on the sole ground that it has failed to take transposition measures within the prescribed period.

27 The answer to the first part of the first question must therefore be that the provisions of directive 80/987 which determine the rights of employees must be interpreted as meaning that the persons concerned cannot enforce those rights against the state before the national Courts where no implementing measures are adopted within the prescribed period. Liability of the state for loss and damage resulting from breach of its obligations under Community law

28 In the second part of the first question the national Court seeks to determine whether a Member State is obliged to make good loss and damage suffered by individuals as a result of the failure to transpose directive 80/987.

29 The national Court thus raises the issue of the existence and scope of a state' s liability for loss and damage resulting from breach of its obligations under Community law.

30 That issue must be considered in the light of the general system of the Treaty and its fundamental principles.

(a) the existence of state liability as a matter of principle

31 It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their Courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals.

Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in case 26/62 van Gend en Loos [1963] ECR 1 and case 6/64 Costa v ENEL [1964] ECR 585).

32 Furthermore, it has been consistently held that the national Courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see in particular the judgments in case 106/77 Amministrazione delle finanze dello Stato v Simmenthal [1978] ECR 629, paragraph 16, and case C-213/89 Factortame [1990] ECR I-2433, paragraph 19).

33 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.

34 The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the state and where, consequently, in the absence of such action, individuals cannot enforce before the national Courts the rights conferred upon them by Community law.

35 It follows 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.

36 A further basis for the obligation of Member States to make good such loss and damage is to be found in article 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law (see, in relation to the analogous provision of article 86 of the ECSC Treaty, the judgment in case 6/60 Humblet v Belgium [1960] ECR 559).

37 It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

(b) the conditions for state liability

38 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.

39 Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.

40 The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the state's obligation and the loss and damage suffered by the injured parties.

41 Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.

42 Subject to that reservation, it is on the basis of the rules of national law on liability that the state must make reparation for the consequences of the loss and damage caused. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent Courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law (see the judgments in case 60/75 Russo v Aima [1976] ECR 45, case 33/76 Rewe v Landwirstschaftskammer Saarland [1976] ECR 1989 and case 158/80 Rewe v Hauptzollamt Kiel [1981] ECR 1805).

43 Further, the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (see, in relation to the analogous issue of the repayment of taxes levied in breach of Community law, inter alia the judgment in case 199/82 Amministrazione delle finanze dello Stato v San Georgio [1983] ECR 3595).

44 In this case, the breach of Community law by a Member State by virtue of its failure to transpose directive 80/987 within the prescribed period has been confirmed by a judgment of the Court. The result required by that directive entails the grant to employees of a right to a guarantee of payment of their unpaid wage claims. As is clear from the examination of the first part of the first question, the content of that right can be identified on the basis of the provisions of the directive.

45 Consequently, the national Court must, in accordance with the national rules on liability, uphold the right of employees to obtain reparation of loss and damage caused to them as a result of failure to transpose the directive.

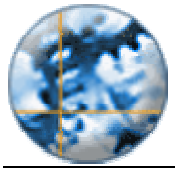
46 The answer to be given to the national Court must therefore be that a Member State is required to make good loss and damage caused to individuals by failure to transpose directive 80/987.

The second and third questions

47 In view of the reply to the first question referred by the national Court, there is no need to rule on the second and third questions.

[…]

## 1.2 Case C-91/92: Faccini Dori



***NOTE AND QUESTIONS***

1. Compare the Faccini Dori decision with the Court's decision in the CIA Security International case from Unit 3: Direct and Indirect Effect. Comments?

**Paola Faccini Dori v Recreb Srl**

**Case C-91/92**

14 July 1994

Court of Justice

[1994] ECR I-3325

http://www.curia.eu.int/en/content/juris/index.htm

1 By order of 24 January 1992, received at the Court on 18 march 1992, the giudice conciliatore di Firenze (judge-conciliator, Florence), Italy, referred to the Court for a preliminary ruling under article 177 of the EEC Treaty a question on the interpretation of Council directive 85/577/EEC, concerning protection of the consumer in respect of contracts negotiated away from business premises (OJ 1985 l 372, p. 31, hereinafter 'the directive'), and on the possibility of relying on that directive in proceedings between a trader and a consumer.

2 The question was raised in proceedings between Paola Faccini Dori, of Monza, Italy, and Recreb srl ('Recreb').

3 It appears from the order for reference that on 19 January 1989, without having been previously approached by her, Interdiffusion srl concluded a contract with Miss Faccini Dori at Milan central railway station for an English language correspondence course. thus the contract was concluded away from Interdiffusion' s business premises.

4 Some days later, by registered letter of 23 January 1989, Miss Faccini Dori informed that company that she was cancelling her order. The company replied on 3 June 1989 that it had assigned its claim to Recreb. On 24 June 1989, Miss Faccini Dori wrote to Recreb confirming that she had cancelled her subscription to the course, indicating inter alia that she relied on the right of cancellation provided for by the directive.

5 As is apparent from its preamble, the directive is intended to improve consumer protection and eliminate discrepancies between national laws providing such protection, which may affect the functioning of the common market. According to the fourth recital in the preamble, where contracts are concluded away from the business premises of the trader, it is as a rule the trader who initiates the negotiations, for which the consumer is wholly unprepared and is therefore often taken by surprise. In most cases, the consumer is not in a position to compare the quality and price of the offer with other offers. According to the same recital, that surprise element generally exists not only in contracts made on the doorstep but also in other forms of contract for which the trader takes the initiative away from his business premises. The purpose of the directive is thus, as indicated by the fifth recital in its preamble, to grant the consumer a right of cancellation for a period of at least seven days in order to enable him to assess the obligations arising under the contract.

6 On 30 June 1989, Recreb asked the giudice conciliatore di Firenze to order Miss Faccini Dori to pay it the agreed sum with interest and costs.

7 By order of 20 November 1989, the judge ordered Miss Faccini Dori to pay the sums in question. She lodged an objection to that order with the same judge. She again Stated that she had withdrawn from the contract under the conditions laid down by the directive.

8 However, it is common ground that at the material time Italy had not taken any steps to transpose the directive into national law, although the period set for transposition had expired on 23 December 1987. It was not until the adoption of decreto legislativo no 50 of 15 January 1992 (guri, ordinary supplement to no 27 of 3 February 1992, p. 24), which entered into force on 3 march 1992, that Italy transposed the directive.

9 The national Court was uncertain whether, even though the directive had not been transposed at the material time, it could nevertheless apply its provisions.

10 It therefore referred the following question to the Court for a preliminary ruling:

'is Community directive 85/577/EEC of 20 December 1985 to be regarded as sufficiently precise and detailed and, if so, was it capable, in the period between the expiry of the 24-month time-limit given to the Member States to comply with the directive and the date on which the Italian State did comply with it, of taking effect as between individuals and the Italian State and as between individuals themselves?'

11 The directive requires the Member States to adopt certain rules intended to govern legal relations between traders and consumers. In view of the nature of the dispute, which is between a consumer and a trader, the question submitted by the national Court raises two issues, which should be considered separately. The first is whether the provisions of the directive concerning the right of cancellation are unconditional and sufficiently precise. The second is whether a directive which requires the Member States to adopt certain rules specifically intended to govern relations between private individuals may be relied on in proceedings between such persons in the absence of measures to transpose the directive into national law. Whether the provisions of the directive concerning the right of cancellation are unconditional and sufficiently precise.

12 Article 1(1) of the directive provides that the directive is to apply to contracts concluded between a trader supplying goods and services and a consumer, either during an excursion organized by the trader away from his business premises or during a visit by him to the consumer' s home or place of work, where the visit does not take place at the express request of the consumer.

13 Article 2 states that 'consumer' means a natural person who, in transactions covered by the directive, is acting for purposes which can be regarded as outside his trade or profession and that

'trader' means a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity.

14 Those provisions are sufficiently precise to enable the national Court to determine upon whom, and for whose benefit, the obligations are imposed. No specific implementing measure is needed in that regard. The national Court may confine itself to verifying whether the contract was concluded in the circumstances described by the directive and whether it was concluded between a trader and a consumer as defined by the directive.

15 In order to protect consumers who have concluded contracts in such circumstances, article 4 of the directive provides that traders are to be required to give consumers written notice of their right of cancellation, together with the name and address of a person against whom that right may be exercised. It adds that, in the case of article 1(1), that information must be given to the consumer at the time of conclusion of the contract.

Finally, it provides that Member States are to ensure that their national legislation lays down appropriate consumer protection measures for cases where the information in question is not supplied.

16 Furthermore, pursuant to article 5(1) of the directive, the consumer is to have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from the time at which the trader informed him of his rights in accordance with the terms and conditions laid down by national law. Article 5(2) provides that the giving of such notice is to have the effect of releasing the consumer from any obligations under the contract.

17 Admittedly, articles 4 and 5 allow the Member States some latitude regarding consumer protection when information is not provided by the trader and in determining the time-limit and conditions for cancellation. That does not, however, affect the precise and unconditional nature of the provisions of the directive at issue in this case. The latitude allowed does not make it impossible to determine minimum rights. Article 5 provides that the cancellation must be notified within a period of not less than seven days after the time at which the consumer received the prescribed information from the trader. It is therefore possible to determine the minimum protection which must on any view be provided.

18 As regards the first issue therefore, the answer to be given to the national Court must be that article 1(1), article 2 and article 5 of the directive are unconditional and sufficiently precise as regards determination of the persons for whose benefit they were adopted and the minimum period within which notice of cancellation must be given. Whether the provisions of the directive concerning the right of cancellation may be invoked in proceedings between a consumer and a trader.

19 The second issue raised by the national Court relates more particularly to the question whether, in the absence of measures transposing the directive within the prescribed time-limit, consumers may derive from the directive itself a right of cancellation against traders with whom they have concluded contracts and enforce that right before a national Court.

20 As the Court has consistently held since its judgment in case 152/84 Marshall v Southampton and South-West Hampshire Health Authority [1986] ECR 723, paragraph 48, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual.

21 The national Court observes that if the effects of unconditional and sufficiently precise but untransposed directives were to be limited to relations between State entities and individuals, this would mean that a legislative measure would operate as such only as between certain legal subjects, whereas, under Italian law as under the laws of all modern States founded on the rule of

law, the State is subject to the law like any other person. If the directive could be relied on only as against the State, that would be tantamount to a penalty for failure to adopt legislative measures of transposition as if the relationship were a purely private one.

22 It need merely be noted here that, as is clear from the judgment in Marshall, cited above (paragraphs 48 and 49), the case-law on the possibility of relying on directives against State entities is based on the fact that under article 189 a directive is binding only in relation to 'each Member State to which it is addressed'. That case-law seeks to prevent 'the State from taking advantage of its own failure to comply with Community law'.

23 It would be unacceptable if a State, when required by the Community legislature to adopt certain rules intended to govern the State' s relations o or those of State entities o with individuals and to confer certain rights on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights. Thus the Court has recognized that certain provisions of directives on conclusion of public works contracts and of directives on harmonization of turnover taxes may be relied on against the State (or State entities) (see the judgment in case 103/88 Fratelli Costanzo v Comune di Milano [1989] ECR 1839 and the judgment in case 8/81 Becker v Finanzamt Muenster-Innenstadt [1982] ECR 53).

24 The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.

25 It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national Court.

26 It must also be borne in mind that, as the Court has consistently held since its judgment in case 14/83 von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under article 5 of the Treaty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States, including, for matters within their jurisdiction, the Courts. The judgments of the Court in case c-106/89 Marleasing v la comercial internacional de alimentacion [1990] ECR I-4135, paragraph 8, and case c-334/92 Wagner Miret v Fondo de garantia salarial [1993] ECR i-6911, paragraph 20, make it clear that, when applying national law, whether adopted before or after the directive, the national Court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of article 189 of the Treaty.

27 If the result prescribed by the directive cannot be achieved by way of interpretation, it should also be borne in mind that, in terms of the judgment in joined cases c-6/90 and c-9/90 Francovich and others v Italy [1991] ECR i-5357, paragraph 39, Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive, provided that three conditions are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the State' s obligation and the damage suffered.

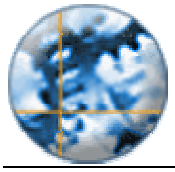
28 The directive on contracts negotiated away from business premises is undeniably intended to confer rights on individuals and it is equally certain that the minimum content of those rights can be identified by reference to the provisions of the directive alone (see paragraph 17 above).

29 Where damage has been suffered and that damage is due to a breach by the State of its obligation, it is for the national Court to uphold the right of aggrieved consumers to obtain reparation in accordance with national law on liability.

30 So, as regards the second issue raised by the national Court, the answer must be that in the absence of measures transposing the directive within the prescribed time-limit consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national Court. However, when applying provisions of national law, whether adopted before or after the directive, the national Court must interpret them as far as possible in the light of the wording and purpose of the directive.

[…]

## *1.3 Case C-46/93 and 48/93: Brasserie du Pêcheur*



***NOTE AND QUESTIONS***

On Case C-46 and 48/93: Brasserie du Pêcheur and the subsequent decision by the referring national court - the German Supreme Court:

1. Is Brasserie "just" another step towards a better legal protection in the Community?

2. What will non-contractual liability in the Community look like? Will it really not matter, whether it is the Community itself or a Member State, which infringed Community Law?

3. See, what the referring court in the Brasserie case made out of it, once the ECJ's answer came back.

4. Suppose that a national court again and again found that a Member State's breaches of community law are not "sufficiently serious". What recourse, if any, would Community institutions have?

**Brasserie du Pêcheur SA v Germany**
**R v Secretary of State for Transport, ex parte Factortame Ltd.**

Joined cases C-46/93 and C-48/93

6 March 1996

Court of Justice

[1996] ECR I-1029

http://www.curia.eu.int/en/content/juris/index.htm

1 By orders of 28 January 1993 and 18 November 1992, received at the Court on 17 February 1993 and 18 February 1993, respectively, the Bundesgerichtshof (Federal Court of Justice) (case C-46/93) and the high Court of Justice, Queen's bench division, divisional Court (case C-48/93) referred to the Court for a preliminary ruling under article 177 of the EEC Treaty questions concerning the conditions under which a Member State may incur liability for damage caused to individuals by breaches of Community law attributable to that State.

2 The questions were raised in two sets of proceedings between, on the one hand, Brasserie du pecheur SA and the Federal Republic of Germany and, on the other, Factortame LTD and others (hereinafter 'Factortame') and the United Kingdom of great Britain and northern Ireland.

Case C-46/93

3 Before the national Court, Brasserie du pecheur, a French company based at Schiltigheim (Alsace), claims that it was forced to discontinue exports of beer to Germany in late 1981 because the competent German authorities considered that the beer it produced did not comply with the Reinheitsgebot (purity requirement) laid down in paragraphs 9 and 10 of the Biersteuergesetz of 14 march 1952 (law on beer duty, BGBl. I, p. 149), in the version dated 14 December 1976 (BGBl. I, p. 3341, hereinafter 'the BStG').

4 The Commission took the view that those provisions were contrary to article 30 of the EEC Treaty and brought infringement proceedings against the Federal Republic of Germany on two grounds, namely the prohibition on marketing under the designation 'bier' (beer) beers lawfully manufactured by different methods in other Member States and the prohibition on importing beers containing additives. By judgment of 12 march 1987 in case 178/84 Commission v Germany [1987] ECR 1227, the Court held that the prohibition on marketing beers imported from other Member States which did not comply with the provisions in question was incompatible with article 30 of the Treaty.

5 Brasserie du pecheur consequently brought an action against the Federal Republic of Germany for reparation of the loss suffered by it as a result of that import restriction between 1981 and 1987, seeking damages in the sum of dm 1 800 000, representing a fraction of the loss actually incurred.

6 The Bundesgerichtshof refers to paragraph 839 of the Buergerliches Gesetzbuch (German civil code, 'the BGB') and article 34 of the Grundgesetz (basic law, 'the GG'). According to the first sentence of paragraph 839 of the BGB, 'if an official willfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom.' article 34 of the GG provides that 'if a person infringes, in the exercise of a public office entrusted to him, the obligations incumbent upon him as against a third party, liability therefor shall attach in principle to the State or to the body in whose service he is engaged.'

7 If those provisions are read together, it appears that, in order for the State to be liable, the third party must be capable of being regarded as beneficiary of the obligation breached, which means that the State is liable for breach only of obligations conceived in favour of a third party. However, as the Bundesgerichtshof points out, in the case of the BStG the task assumed by the national legislature concerns only the public at large and is not directed towards any particular person or class of persons who could be regarded as 'third parties' within the meaning of the provisions mentioned above.

8 In this context, the Bundesgerichtshof has referred the following questions to the Court for a preliminary ruling:

'1. Does the principle of Community law according to which Member States are obliged to pay compensation for damage suffered by an individual as a result of breaches of Community law attributable to those States also apply where such a breach consists of a failure to adapt a national parliamentary statute to the higher-ranking rules of Community law (this case concerning a failure to adapt paragraphs 9 and 10 of the German Biersteuergesetz to article 30 of the EEC Treaty)?

2. May the national legal system provide that any entitlement to compensation is to be subject to the same limitations as those applying where a national statute breaches higher-ranking national

law, for example where an ordinary Federal law breaches the Grundgesetz of the Federal Republic of Germany?

3. May the national legal system provide that entitlement to compensation is to be conditional on fault (intent or negligence) on the part of the organs of the State responsible for the failure to adapt the legislation?

4. If question 1 is to be answered in the affirmative and question 2 in the negative:

(a) may liability to pay compensation under the national legal system be limited to the reparation of damage done to specific individual legal interests, for example property, or does it require full compensation for all financial losses, including lost profits?

(b) does the obligation to pay compensation also require reparation of the damage already incurred before it was held in the judgment of the European Court of Justice of 12 march 1987 in case 178/84 Commission v Germany [1987] ECR 1227 that paragraph 10 of the German Biersteuergesetz infringed higher-ranking Community law?'

Case C-48/93

9 On 16 December 1988 Factortame and others, being individuals and companies incorporated under the laws of the United Kingdom, together with the directors and shareholders of those companies, brought an action before the high Court of Justice, Queen's bench division, divisional Court (hereinafter 'the divisional Court'), in which they challenged the compatibility of part ii of the merchant shipping act 1988 with Community law, in particular article 52 of the EEC Treaty. That act entered into force on 1 December 1988, subject to a transitional period expiring on 31 march 1989. It provided for the introduction of a new register for British fishing boats and made registration of such vessels, including those already registered in the former register, subject to certain conditions relating to the nationality, residence and domicile of the owners. Fishing boats ineligible for registration in the new register were deprived of the right to fish.

10 In answer to questions referred by the divisional Court, the Court held by judgment of 25 July 1991 in case C-221/89 Factortame II [1991] ECR I-3905 that conditions relating to the nationality, residence and domicile of vessel owners and operators as laid down by the registration system introduced by the United Kingdom were contrary to Community law, but that it was not contrary to Community law to stipulate as a condition for registration that the vessels in question must be managed and their operations directed and controlled from within the United Kingdom.

11 On 4 august 1989 the Commission brought infringement proceedings against the United Kingdom. In parallel, it applied for interim measures ordering the suspension of the abovementioned nationality conditions on the ground that they were contrary to articles 7, 52 and 221 of the EEC Treaty. By order of 10 October 1989 in case 246/89 R Commission v United Kingdom [1989] ECR 3125, the president of the Court granted that application. Pursuant to that order, the United Kingdom adopted provisions amending the new registration system with effect from 2 November 1989. By judgment of 4 October 1991 in case C-246/89 Commission v United Kingdom [1991] ECR I-4585, the Court confirmed that the registration conditions challenged in the infringement proceedings were contrary to Community law.

12 Meanwhile, on 2 October 1991, the divisional Court made an order designed to give effect to this Court's judgment of 25 July 1991 in Factortame ii and, at the same time, directed the claimants to give detailed particulars of their claims for damages. Subsequently, the claimants provided the national Court with a detailed Statement of their various heads of claim, covering expenses and losses incurred between 1 April 1989, when the legislation at issue entered into force, and 2 November 1989, when it was repealed.

13 Lastly, by order of 18 November 1992, the divisional Court gave Rawlings (trawling) LTD, the 37th claimant in case C-48/93, leave to amend its claim to include a claim for exemplary damages for unconstitutional behaviour on the part of the public authorities.

14 In that context, the divisional Court referred the following questions to the Court for a preliminary ruling:

'1. In all the circumstances of this case, where:

(a) a Member State's legislation laid down conditions relating to the nationality, domicile and residence of the owners and managers of fishing vessels, and of the shareholders and directors in vessel-owning and managing companies, and

(b) such conditions were held by the Court of Justice in cases C-221/89 and C-246/89 to infringe articles 5, 7, 52 and 221 of the EEC Treaty, are those persons who were owners or managers of such vessels, or directors and/or shareholders in vessel-owning and managing companies, entitled as a matter of Community law to compensation by that Member State for losses which they have suffered as a result of all or any of the above infringements of the EEC Treaty?

2. If question 1 is answered in the affirmative, what considerations, if any, does Community law require the national Court to apply in determining claims for damages and interest relating to:

(a) expenses and/or loss of profit and/or loss of income during the period subsequent to the entry into force of the said conditions, during which the vessels were forced to lay up, to make alternative arrangements for fishing and/or to seek registration elsewhere;
(b) losses consequent on sales at an undervalue of the vessels, or of shares therein, or of shares in vessel-owning companies;
(c) losses consequent on the need to provide bonds, fines and legal expenses for alleged offences connected with the exclusion of vessels from the national register;
(d) losses consequent on the inability of such persons to own and operate further vessels;
(e) loss of management fees;
(f) expenses incurred in an attempt to mitigate the above losses;
(g) exemplary damages as claimed?'

15 Reference is made to the report for the hearing for a fuller account of the facts of the main proceedings, the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

State liability for acts and omissions of the national legislature contrary t o Community law (first question in both case C-46/93 and case C-48/93).

16 By their first questions, each of the two national Courts essentially seeks to establish whether the principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the infringement in question.

17 In joined cases C-6/90 and C-9/90 Francovich and others [1991] ECR I-5357, paragraph 37, the Court held that it is a principle of Community law that Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

18 The German, Irish and Netherlands governments contend that Member States are required to make good loss or damage caused to individuals only where the provisions breached are not

directly effective: in Francovich and others the Court simply sought to fill a lacuna in the system for safeguarding rights of individuals. In so far as national law affords individuals a right of action enabling them to assert their rights under directly effective provisions of Community law, it is unnecessary, where such provisions are breached, also to grant them a right to reparation founded directly on Community law.

19 That argument cannot be accepted.

20 The Court has consistently held 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 (see, in particular, case 168/85 Commission v Italy [1986] ECR 2945, paragraph 11, case C-120/88 Commission v Italy [1991] ECR I-621, paragraph 10, and C-119/89 Commission v Spain [1991] ECR I-641, paragraph 9). The purpose of that right is to ensure that provisions of Community law prevail over national provisions. It cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State. As appears from paragraph 33 of the judgment in Francovich and others, the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law.

21 This will be so where an individual who is a victim of the non-transposition of a directive and is precluded from relying on certain of its provisions directly before the national Court because they are insufficiently precise and unconditional, brings an action for damages against the defaulting Member State for breach of the third paragraph of article 189 of the Treaty. In such circumstances, which obtained in the case of Francovich and others, the purpose of reparation is to redress the injurious consequences of a Member State's failure to transpose a directive as far as beneficiaries of that directive are concerned.

22 It is all the more so in the event of infringement of a right directly conferred by a Community provision upon which individuals are entitled to rely before the national Courts. In that event, the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.

23 In this case, it is undisputed that the Community provisions at issue, namely article 30 of the Treaty in case C-46/93 and article 52 in case C-48/93, have direct effect in the sense that they confer on individuals rights upon which they are entitled to rely directly before the national Courts. Breach of such provisions may give rise to reparation.

24 The German government further submits 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.

25 It must, however, be stressed that the existence and extent of State liability for damage ensuing as a result of a breach of obligations incumbent on the State by virtue of Community law are questions of Treaty interpretation which fall within the jurisdiction of the Court.

26 In this case, as in Francovich and others, those questions of interpretation have been referred to the Court by national Courts pursuant to article 177 of the Treaty.

27 Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by article 164 of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted

methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.

28 Indeed, it is to the general principles common to the laws of the Member States that the second paragraph of article 215 of the Treaty refers as the basis of the con-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties.

29 The principle of the non-contractual liability of the Community expressly laid down in article 215 of the Treaty is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused. That provision also reflects the obligation on public authorities to make good damage caused in the performance of their duties.

30 In any event, in many national legal systems the essentials of the legal rules governing State liability have been developed by the Courts.

31 In view of the foregoing considerations, the Court held in Francovich and others, at paragraph 35, that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty.

32 It follows that that 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.

33 In addition, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied (see, in particular, joined cases C-143/88 and C-92/89 Zuckerfabrik Suederdithmarschen and Zuckerfabrik Soest [1991] ECR I-415, paragraph 26), the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities.

34 As the advocate general points out in paragraph 38 of his opinion, in international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.

35 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.

36 Consequently, the reply to the national Courts must be that the principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the breach in question.

Conditions under which the State may incur liability for acts and omissions of the national legislature contrary to Community law (second question in case C-46/93 and first question in case C-48/93)

37 By these questions, the national Courts ask the Court to specify the conditions under which a right to reparation of loss or damage caused to individuals by breaches of Community law attributable to a Member State is, in the particular circumstances, guaranteed by Community law.

38 Although Community law imposes State liability, 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 (Francovich and others, paragraph 38).

39 In order to determine those conditions, account should first be taken of the principles inherent in the Community legal order which form the basis for State liability, namely, first, the full effectiveness of Community rules and the effective protection of the rights which they confer and, second, the obligation to cooperate imposed on Member States by article 5 of the Treaty (Francovich and others, paragraphs 31 to 36).

40 In addition, as the Commission and the several governments which submitted observations have emphasized, it is pertinent to refer to the Court's case-law on con-contractual liability on the part of the Community.

41 First, the second paragraph of article 215 of the Treaty refers, as regards the non-contractual liability of the Community, to the general principles common to the laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of Community law.

42 Second, 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. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.

43 The system of rules which the Court has worked out with regard to article 215 of the Treaty, particularly in relation to liability for legislative measures, takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question.

44 Thus, in developing its case-law on the non-contractual liability of the Community, in particular as regards legislative measures involving choices of economic policy, the Court has had regard to the wide discretion available to the institutions in implementing Community policies.

45 The strict approach taken towards the liability of the Community in the exercise of its legislative activities is due to two considerations.

First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterized by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (joined cases 83/76, 94/76, 4/77, 15/77 and 40/77 HNL and others v Council and Commission [1978] ECR 1209, paragraphs 5 and 6).

46 That said, the national legislature - like the Community institutions - does not systematically have a wide discretion when it acts in a field governed by Community law. Community law may impose upon it obligations to achieve a particular result or obligations to act or refrain from acting which reduce its margin of discretion, sometimes to a considerable degree. This is so, for instance, where, as in the circumstances to which the judgment in Francovich and others relates, article 189 of the Treaty places the Member State under an obligation to take, within a given period, all the measures needed in order to achieve the result required by a directive. In such a case, the fact that

it is for the national legislature to take the necessary measures has no bearing on the Member State's liability for failing to transpose the directive.

47 In contrast, where a Member State acts in a field where it has a wide discretion, comparable to that of the Community institutions in implementing Community policies, the conditions under which it may incur liability must, in principle, be the same as those under which the Community institutions incur liability in a comparable situation.

48 In the case which gave rise to the reference in case C-46/93, the German legislature had legislated in the field of foodstuffs, specifically beer. In the absence of Community harmonization, the national legislature had a wide discretion in that sphere in laying down rules on the quality of beer put on the market.

49 As regards the facts of case C-48/93, the United Kingdom legislature also had a wide discretion. The legislation at issue was concerned, first, with the registration of vessels, a field which, in view of the State of development of Community law, falls within the jurisdiction of the Member States and, secondly, with regulating fishing, a sector in which implementation of the common fisheries policy leaves a margin of discretion to the Member States.

50 Consequently, in each case the German and United Kingdom legislatures were faced with situations involving choices comparable to those made by the Community institutions when they adopt legislative measures pursuant to a Community policy.

51 In such circumstances, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

52 Firstly, those conditions satisfy the requirements of the full effectiveness of the rules of Community law and of the effective protection of the rights which those rules confer.

53 Secondly, those conditions correspond in substance to those defined by the Court in relation to article 215 in its case-law on liability of the Community for damage caused to individuals by unlawful legislative measures adopted by its institutions.

54 The first condition is manifestly satisfied in the case of article 30 of the Treaty, the relevant provision in case C-46/93, and in the case of article 52, the relevant provision in case C-48/93. Whilst article 30 imposes a prohibition on Member States, it nevertheless gives rise to rights for individuals which the national Courts must protect (case 74/76 Iannelli & Volpi v Meroni [1977] ECR 557, paragraph 13). Likewise, the essence of article 52 is to confer rights on individuals (case 2/74 Reyners [1974] ECR 631, paragraph 25).

55 As to the second condition, as regards both Community liability under article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.

56 The factors which the competent Court may take into consideration include 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.

57 On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.

58 While, in the present cases, 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, it will be helpful to indicate a number of circumstances which the national Courts might take into account.

59 In case C-46/93 a distinction should be drawn between the question of the German legislature's having maintained in force provisions of the Biersteuergesetz concerning the purity of beer prohibiting the marketing under the designation 'bier' of beers imported from other Member States which were lawfully produced in conformity with different rules, and the question of the retention of the provisions of that same law prohibiting the import of beers containing additives. As regards the provisions of the German legislation relating to the designation of the product marketed, it would be difficult to regard the breach of article 30 by that legislation as an excusable error, since the incompatibility of such rules with article 30 was manifest in the light of earlier decisions of the Court, in particular case 120/78 Rewe-Zentral [1979] ECR 649 ('Cassis de Dijon') and case 193/80 Commission v Italy [1981] ECR 3019 ('vinegar'). In contrast, having regard to the relevant case-law, the criteria available to the national legislature to determine whether the prohibition of the use of additives was contrary to Community law were significantly less conclusive until the Court's judgment of 12 march 1987 in Commission v Germany, cited above, in which the Court held that prohibition to be incompatible with article 30.

60 A number of observations may likewise be made about the national legislation at issue in case C-48/93.

61 The decision of the United Kingdom legislature to introduce in the merchant shipping act 1988 provisions relating to the conditions for the registration of fishing vessels has to be assessed differently in the case of the provisions making registration subject to a nationality condition, which constitute direct discrimination manifestly contrary to Community law, and in the case of the provisions laying down residence and domicile conditions for vessel owners and operators.

62 The latter conditions are prima facie incompatible with article 52 of the Treaty in particular, but the United Kingdom sought to justify them in terms of the objectives of the common fisheries policy. In the judgment in Factortame ii, cited above, the Court rejected that justification.

63 In order to determine whether the breach of article 52 thus committed by the United Kingdom was sufficiently serious, the national Court might take into account, inter alia, the legal disputes relating to particular features of the common fisheries policy, the attitude of the Commission, which made its position known to the United Kingdom in good time, and the assessments as to the State of certainty of Community law made by the national Court in the interim proceedings brought by individuals affected by the merchant shipping act.

64 Lastly, consideration should be given to the assertion made by Rawlings (trawling) LTD, the 37th claimant in case C-48/93, that the United Kingdom ailed to adopt immediately the measures needed to comply with the order of the president of the Court of 10 October 1989 in Commission v United Kingdom, cited above, and that this needlessly increased the loss it sustained. If this allegation - which was certainly contested by the United Kingdom at the hearing - should prove correct, it should be regarded by the national Court as constituting in itself a manifest and, therefore, sufficiently serious breach of Community law.

65 As for the third condition, 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.

66 The aforementioned three conditions are necessary and sufficient to found a right in individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law.

67 As appears from paragraphs 41, 42 and 43 of Francovich and others, cited above, subject to the right to reparation which flows directly from Community law where the conditions referred to in the preceding paragraph are satisfied, the State must make reparation for the consequences of the loss and damage caused in accordance with the domestic rules on liability, provided that the conditions for reparation of loss and damage laid down by national law must not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation (see also case 199/82 amministrazione delle finanze dello Stato v San Giorgio [1983] ECR 3595).

68 In that regard, restrictions that exist in domestic legal systems as to the non-contractual liability of the State in the exercise of its legislative function may be such as to make it impossible in practice or excessively difficult for individuals to exercise their right to reparation, as guaranteed by Community law, of loss or damage resulting from the breath of Community law.

69 In case C-46/93 the national Court asks in particular whether national law may subject any right to compensation to the same restrictions as apply where a law is in breach of higher-ranking national provisions, for instance, where an ordinary Federal law infringes the Grundgesetz of the Federal Republic of Germany.

70 While the imposition of such restrictions may be consistent with the requirement that the conditions laid down should not be less favourable than those relating to similar domestic claims, it is still to be considered whether such restrictions are not such as in practice to make it impossible or excessively difficult to obtain reparation.

71 The condition imposed by German law where a law is in breach of higher-ranking national provisions, which makes reparation dependent upon the legislature's act or omission being referable to an individual situation, would in practice make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law, since the tasks falling to the national legislature relate, in principle, to the public at large and not to identifiable persons or classes of person.

72 Since such a condition stands in the way of the obligation on national Courts to ensure the full effectiveness of Community law by guaranteeing effective protection for the rights of individuals, it must be set aside where an infringement of Community law is attributable to the national legislature.

73 Likewise, any condition that may be imposed by English law on State liability requiring proof of misfeasance in public office, such an abuse of power being inconceivable in the case of the legislature, is also such as in practice to make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law where the breach is attributable to the national legislature.

74 Accordingly, the reply to the questions from the national Courts must be that, where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon

them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the State must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

The possibility of making reparation conditional upon the existence of fault (third question in case C-46/93)

75 By its third question, the Bundesgerichtshof essentially seeks to establish whether, pursuant to the national legislation which it applies, the national Court is entitled to make reparation conditional upon the existence of fault (whether intentional or negligent) on the part of the organ of the State to which the infringement is attributable.

76 As is clear from the case-file, the concept of fault does not have the same content in the various legal systems.

77 Next, it follows from the reply to the preceding question that, where a breach of Community law is attributable to a Member State acting in a field in which it has a wide discretion to make legislative choices, a finding of a right to reparation on the basis of Community law will be conditional, inter alia, upon the breach having been sufficiently serious.

78 So, certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of Community law is serious (see the factors mentioned in paragraphs 56 and 57 above).

79 The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order.

80 Accordingly, the reply to the question from the national Court must be that, pursuant to the national legislation which it applies, reparation of loss or damage cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law.

The actual extent of the reparation (question 4(a) in case C-46/93 and the second question in case C-48/93)

81 By these questions, the national Courts essentially ask the Court to identify the criteria for determination of the extent of the reparation due by the Member State responsible for the breach.

82 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 so as to ensure the effective protection for their rights.

83 In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.

84 In particular, in order to determine the loss or damage for which reparation may be granted, the national Court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.

85 Indeed, it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself (joined cases C-104/89 and C-37/90 Mulder and others v Council and Commission [1992] ECR I-3061, paragraph 33).

86 The Bundesgerichtshof asks whether national legislation may generally limit the obligation to make reparation to damage done to certain, specifically protected individual interests, for example property, or whether it should also cover loss of profit by the claimants. It States that the opportunity to market products from other Member States is not regarded in German law as forming part of the protected assets of the undertaking.

87 Total exclusion of loss of profit as a head of damage for which reparation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.

88 As for the various heads of damage referred to in the divisional Court's second question, Community law imposes no specific criteria. It is for the national Court to rule on those heads of damage in accordance with the domestic law which it applies, subject to the requirements set out in paragraph 83 above.

89 As regards in particular the award of exemplary damages, such damages are based under domestic law, as the divisional Court explains, on the finding that the public authorities concerned acted oppressively, arbitrarily or unconstitutionally. In so far as such conduct may constitute or aggravate a breach of Community law, an award of exemplary damages pursuant to a claim or an action founded on Community law cannot be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law.

90 Accordingly, the reply to the national Courts must be that reparation by Member States of loss or damage which they have caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those

criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law.

Extent of the period covered by reparation (question 4(b) in case C-46/93)

91 By this question, the Bundesgerichtshof asks whether the damage for which reparation may be awarded extends to harm sustained before a judgment is delivered by the Court finding that an infringement has been committed.

92 Following from the reply to the second question, the right to reparation under Community law exists where the conditions set out in paragraph 51 above are satisfied.

93 One of those conditions is that the breach of Community law must have been sufficiently serious. The fact that there is a prior judgment of the Court finding an infringement will certainly be determinative, but it is not essential in order for that condition to be satisfied (see paragraphs 55, 56 and 57 of this judgment).

94 Were the obligation of the Member State concerned to make reparation to be confined to loss or damage sustained after delivery of a judgment of the Court finding the infringement in question, that would amount to calling in question the right to reparation conferred by the Community legal order.

95 In addition, to make the reparation of loss or damage conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to a Member State would be contrary to the principle of the effectiveness of Community law, since it would preclude any right to reparation so long as the presumed infringement had not been the subject of an action brought by the Commission under article 169 of the Treaty and of a finding of an infringement by the Court. Rights arising for individuals out of Community provisions having direct effect in the domestic legal systems of the Member States cannot depend on the Commission's assessment of the expediency of taking action against a Member State pursuant to article 169 of the Treaty or on the delivery by the Court of any judgment finding an infringement (see, to this effect, joined cases 314/81, 315/81, 316/81 and 83/82 Waterkeyn and others [1982] ECR 4337, paragraph 16).

96 Accordingly, the reply to the national Court's question must be that the obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question.

The request that the temporal effects of the judgment should be limited

97 The German government requests the Court to limit any damage to be made good by the Federal Republic of Germany to loss or damage sustained after delivery of judgment in this case, in so far as the victims did not bring legal proceedings or make an equivalent claim before. It considers that such a temporal limitation of the effects of this judgment is necessary owing to the scale of its financial consequences for the Federal Republic of Germany.

98 It must be borne in mind that, were the national Court to find that the conditions for liability of the Federal Republic of Germany are satisfied in this case, the State would have to make good the consequences of the damage caused within the framework of its domestic law on liability. Substantive and procedural conditions laid down by national law on reparation of damage are able to take account of the requirements of the principle of legal certainty.

99 However, those conditions may not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation (Francovich and others, paragraph 43).

100 In view of the foregoing, there is no need for the Court to limit the temporal effects of this judgment.

[…]

## *1.4 Decision of the German Supreme Court in Brasserie du Pêcheur*

**Brasserie du Pêcheur SA v Germany**

24 October 1996

German Federal Supreme Court

[1997] 1 CMLR 971

[…]

The appeal is admissible, but it is unfounded.

The sole factor which can be used to found a liability on the part of Germany is the failure to adapt sections 9 and 10 of the Beer Duty Act to the higher-ranking rules of European Community law; in other words, the liability involved is one for a "legislative default". On the other hand, liability on the part of Germany for the individual administrative measures taken on the basis of the said provisions which infringed Community law is not in issue. According to the plaintiff's own submissions the relevant proceedings, especially those in which fines were imposed, were not brought against the plaintiff itself but against its contractual partner within Germany. In particular, the plaintiff has already referred in its statement of claim to the fact that it was never itself the addressee of the relevant executive acts taken to its disadvantage.

German national law does not offer any basis of claim for the plaintiff's action. This Court has already explained the matter as follows in its decision to order a reference of 28 January 1993 ([1993] EuZW 226, [1993] NJW 1224 L):

(a) In particular, no state-liability claim arises as against Germany under section 839(1), first sentence, of the Civil Code in conjunction with Article 34 of the Constitution. The breach of Article 30 EEC for which Germany is responsible consisted in an omission by the Federal Legislature, ie the failure to adapt the former section 10 of the Beer Duty Act to the higher-ranking rules of Community law. That omission did not, however, result in any breach of official duties directed towards third persons for the purposes of section 839 of the Civil Code in conjunction with Article 34 of the Constitution to the prejudice of the foreign brewery possibly affected by the restriction of imports. Official duties of public bodies are in the first instance for the purpose of the general interest in the proper ordering of public life. In so far as official duties are exclusively concerned with serving that interest, and no special relationships have arisen between those official duties and specific persons or groups of persons, claims for compensation on the part of third parties outside such relationships do not come into question. Official duties of that sort are generally involved in the case of duties imposed upon the responsible bodies in the context of legislative functions. Statutes and regulations always contain general and abstract rules, and the legislature accordingly in general takes responsibility (as regards action and failure to act) exclusively as regards the general public, and such responsibilities are not directed towards specific persons or classes of person. Only in exceptional circumstances (not applicable here) such as Acts implementing specific measures or passed for individual cases, can the position be otherwise or can the interests of specific individuals be directly affected, so that they can be regarded as 'third persons' within the meaning of section 839 of the Civil Code. (Established case law; see most recently BGH, [1989] NJW 101, BGH Warn 1988 No 208). That was not the case with the plaintiff.

(b) In just the same way no liability in respect of an infringement equivalent to expropriation comes into question:

(aa) Compensation for disadvantages brought about directly or indirectly by a formal legislative act contrary to European Community law is something which no longer remains within the boundaries of an established category of liability developed and shaped by judicial decisions in the way that the infringement equivalent to expropriation has been established by the case law of this Court. In German domestic law there is no adequate legitimation for the introduction and development by judicial decision of state liability for the disadvantageous consequences of formal legislation which contravenes higher-ranking European law. The regulation of this matter must continue to be reserved for the legislature. (See 100 BGHZ 136, at pp 145 et seq, [1987] NJW 1875, LM Art. 14 [Ba] constitutional provision re an unconstitutional parliamentary Act).

(bb) In the present case a claim in respect of an infringement equivalent to expropriation must fail in addition for the reason that no infringement of a vested interest of the plaintiff protected as a matter of property was present on the facts. The plaintiff's chances of being able to sell its products on the German market are not classified by the German legal system among the protected assets of the plaintiff's business so long as the core area of property rights is not affected as a result, as was the case here. (See 111 BGHZ 349, [1990] NJW 3260).

**I.**

The Court has nevertheless had to consider whether the plaintiff can derive a claim directly from European Community law.

The European Court of Justice in its judgment of 19 November 1991 (FRANCOVICH) ([1991] I ECR 5357, [1993] 2 CMLR 66, [1991] EuZW 758, [1992] NJW 165) affirmed the direct liability of a Member State towards the individual citizen affected by the failure to implement a directive, and in this connection it stressed in particular that the principle of the liability of the State for damage caused to an individual by breaches of Community law for which the State can be held responsible is inherent in the legal system created by the EEC Treaty. It was, therefore, necessary to clarify in the context of the present litigation whether the principles developed in the FRANCOVICH judgment on the right to claim state liability under Community law in respect of the non-implementation of a directive conferring benefits on individuals, as dealt with by the European Court on that occasion, is also applicable to the case to be decided here of an import restriction contrary to the EEC Treaty itself which is produced by a formal parliamentary law. On this issue, and for the purpose of a more precise formulation and as regards the extent of any state liability, this Court by its order of 28 January 1993 (BGH, [1993] EuZW 226, [1993] NJW 1224 L) referred the following questions to the European Court for a preliminary ruling:

[The preliminary questions were then set out.]

The European Court by its judgment of 5 March 1996 (BRASSERIE DU PECHEUR and FACTORTAME: [1996] I ECR 1029, [1996] 1 CMLR 889, [1996] EuZW 205, [1996] NJW 1267, [1996] JZ 789, [1996] EuGRZ 144) answered the questions as follows.

**II.**

The application of those principles to the present case produces the result that the plaintiff also has no claim to compensation under Community law.

The European Court emphasised that State liability for breaches of Community law flows directly from that law itself, and that it is (only) the consequences of the damage caused that have to be remedied in the framework of the domestic law on liability, for which purposes the application of domestic law is subject to the proviso that the conditions which it lays down for reparation may not be less favourable

than those for similar domestic claims and may not be so formulated as in practice to make it impossible or excessively difficult to obtain reparation ([1996] EuZW 205, [1996] NJW 1267, para [67]).

The direct derivation of the claim in respect of state liability from Community law is also emphasised in as much as the factual conditions for the State's liability for damage caused to individuals through a breach of Community law may not differ from the conditions applicable to the liability of the Community itself under comparable circumstances unless there is a special reason. The European Court therefore transferred the system which it had developed specifically under Article 215(2) of the European Community Treaty for liability by virtue of Community legislative acts so as to apply to the liability of Member States in issue here in such a way that the factual conditions for the liability of a Member State are congruent with those for the liability of the Community itself. Therefore, if it can be held simply on the basis of those Community-law criteria (as in this case) that no factual condition for liability is satisfied, there is no necessity to refer back to the principles on liability common to the laws of Member States. The subject-matter falling to be considered in this case therefore gives the Court no cause to re-examine its case law on state liability for legislative wrongs in so far as it affects German domestic law. It is not necessary, in particular, to decide whether the factual conditions for official liability for a legislative wrong may have to be changed under an interpretation "in conformity with European law" in such a way that the criterion which grounds and restricts liability -- that the infringed official obligation is directed towards a third party -- would have to be questioned as regards the sphere of application of the German national legal system.

The system of liability under Community law for defective legislative acts developed by the European Court makes a fundamental distinction in the first place according to whether the acts affect an area already governed by Community law or whether a legal area is concerned where that is not the case. In a legal area already governed by Community law the discretion of the national legislature is correspondingly reduced; in an area not so governed the scope of its discretion is substantially wider ([1996] EuZW 205, [1996] NJW 1267, paras [45]-[47]). The European Court held in the case which falls to be considered here that in the area of foodstuffs, and specifically beer, in the absence of any Community harmonisation, the German legislature possessed a wide discretion in laying down rules on the quality of beer put on the market ([1996] EuZW 205, [1996] NJW 1267, para [48]). In the case of a wide discretion of that kind Community law recognises a right to compensation so long as three conditions are satisfied:

1. that the rule of law infringed is intended to confer rights on individuals;
2. that the breach is sufficiently serious;
3. that there is a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. ([1996] EuZW 205, [1996] NJW 1267, para [51]; see, too, to this effect the later European Court judgments at [1996] I ECR 1631, [1996] 2 CMLR 217, [1996] EuZW 274 (BRITISH TELECOMMUNICATIONS); [1996] 3 CMLR 469, [1996] EuZW 654, [1996] NJW 3141 (DILLENKOFER AND OTHERS -- "PACKAGE TOURS")).

The claim to compensation asserted by the plaintiff must fail for the reason that no sufficiently serious breach can be established which could be the direct cause of the damage claimed.

The decisive criterion for answering the question whether a breach of Community law is to be regarded as sufficiently serious lies in the fact that a Member State has manifestly and gravely disregarded the limits imposed on its discretion ([1996] EuZW 205, [1996] NJW 1267, para [55]).

(a) As regards the subject-matter to be appraised here, the European Court points out that the issue of the maintenance in force by the German legislature of the provisions of the Beer Tax Act on the purity of beer, which prohibited the marketing under the designation "Bier" of beers imported from other Member States and lawfully produced under different provisions, has to be distinguished from the retention of the provisions of the same Act prohibiting the import of beers containing additives. The European Court takes the view that, as regards the first aspect, ie the prohibition of the designation "Bier", it would be difficult to deny that the German legislation was a (sufficiently serious) breach of Article 30 EEC, since the incompatibility of such rules with Article 30 was manifest in the light of decisions of the Court already in

existence at the time ([1996] EuZW 205, [1996] NJW 1257, para [59], with references). By contrast, the criteria available to the national legislature by reference to the relevant case law to determine the other aspect -- whether the prohibition on the use of additives was contrary to Community law -- were significantly less conclusive until the judgment of 12 March 1987 (EC COMMISSION v GERMANY), in which the Court held that provision to be incompatible with Article 30.

(b) It would not be possible to reach the conclusion from those expositions of the matter, as was done in one of the earliest academic opinions on the said judgment (EHLERS, [1996] JZ 776, at p 780), that the first of the two aspects alone was grounds for holding that there had been a sufficiently serious breach of Community law, which as a contributory cause giving rise to consequences for liability could not be subsequently nullified by the fact that the same Member State had added a second causal contribution, which was possibly not sufficiently serious. What was meant, rather, as is shown in particular by the conclusions of Giuseppe Tesauro AG of 21 October 1995, was that an evaluative assessment is required on the question: with which of the two aspects is the damage claimed by the plaintiff connected in a legal sense?

(c) The result of such an assessment in the present case is that the measures taken against the plaintiff on the basis of the legal provisions contravening Community law did not concern the designation of the drink produced by the plaintiff as "Bier". According to the documents entered on the file by the plaintiff itself, the object of the food-inspection controls and administrative-penalty proceedings was, rather, to deal solely with contraventions of the prohibition on using unlawful additives. They therefore concerned an area in which there were not yet any clear Community-law rulings and no unambiguous case law from the European Court. That is also the effect of the plaintiff's submissions in both the statement of claim and the grounds of the first appeal, in as much as it refers expressly to the measures taken by the German authorities against its appointed importers, and argues that "the damage is attributable solely to the restrictive administrative actions of German authorities". But they objected to the beverage produced by the plaintiff only because of the additives it contained. The labelling, too, viz: "Brewed as always in accordance with the German purity requirement" shows that it was of critical importance to the plaintiff to present the contents of its product as corresponding with the provisions of the Beer Duty Act and thus to conceal the use of additives. For that reason the requirement of a direct causal connection between the infringing act and the damage is not satisfied as regards the breach of the Treaty relating to the use of the designation "Bier". It is a matter for the national legal systems of the individual Member States to implement the conditions for liability as regards "direct causation" into national law while safeguarding the full effectiveness of Community law. (See FRANCOVICH, cited above, paras [42] et seq). This Court proceeds on the footing that in that respect an evaluative attribution of the consequences as regards liability has to be made by reference to the factual situation relevant to liability, which is comparable to the relationship which in German law is expressed by notions of necessary and sufficient causation. It is not necessary for present purposes to decide whether, in so doing, the characteristic of directness of causation makes it possible to adopt a narrower approach, possibly oriented towards considerations of protective purpose.

(d) As regards the other breach of the Treaty, that is, the prohibition on the import of beers containing additives, the position is as follows:

The Federal Government expressed the opinion in the proceedings instituted by the Commission at the time that, as regards the due to the use of additives, the long-term effects of which were not known, and in particular in view of the risks resulting from the accumulation of additives in the organism and their interaction with other substances, such as alcohol, it was necessary to minimise the ingestion of additives as far as possible. Since beer was a foodstuff of which large quantities were consumed in Germany, it was especially important to exclude the use of any additives in its production. That was all the more imperative in as much as the use of additives was not technologically necessary, because it could be avoided if only the ingredients prescribed by the Beer Tax Act were used. Given that factual situation, the prevailing German rules on additives for beer were comprehensively justified by the need to safeguard public health and did not disregard the principle of proportionality (EC COMMISSION v GERMANY, cited above, para [39]). The European Court took that as a cause for investigating whether the prohibition in

issue could be justified under Article 36 EEC on grounds of protection of human health. Although in the event it answered the question in the negative, and thus considered the Federal Government's arguments as not being conclusive, there is nothing in the judgment of 12 March 1987 to indicate that the Federal Government's legal position could have been so far removed on this point from the requirements of Community law that it was necessary to hold that there was a manifest and grave transgression of the boundaries placed on the discretion of the national legislature.

(e) In a comprehensive appraisal of the subject-matter set out above this Court -- following the rulings of the European Court -- regards the breach of the Treaty, in so far as it was the direct cause of the damage, as being in no way sufficiently serious.

4. The defendant is likewise not liable for the further damage incurred by the plaintiff after the giving of the European Court judgment of 12 March 1987. The defendant submitted without contradiction in both the proceedings below that it caused the judgment to be adhered to immediately following its publication by issuing notices and instructions to the competent authorities. The plaintiff's grounds of appeal, too, concede that the defendant took measures in order to give effect to the judgment of 12 March 1987 as from that date. In so far as the plaintiff had need of a transitional period after the publication of the judgment in order to build up a new distribution organisation, the profits that it lost in that period were not attributable to the defendant country; they were late consequences of the defendant's earlier actions, which, as explained, were not a sufficiently serious breach of Community law. The losses were not due to the fact that Germany failed in some way to implement the judgment of 12 March 1987 in good time.

[…]

## *1.5 Luigi Malferrari: The "Rebellion" of the Italian Corte di Cassazione against the Francovich Decision of the ECJ*

(Footnotes omitted)

Italian Corte di Cassazione (Supreme Court)
Sezione lavoro (labor law chamber)

Decision of 19 July 1995

No. 7832 (2 Il Fallimento 137 [1996])

This short piece aims at illustrating how the Italian Corte di Cassazione rejected, at least partially, the Francovich decision of the Court of Justice.

At the outset it should be recalled that Francovich was an Italian case. It was an Art. 177 reference from an Italian Pretore (Judge of First Instance in certain matters). The proceedings before the national court regarded Italian employees' unpaid wage claims. The Court of Justice held that, under certain conditions, the State had to pay for the damages caused by its breaches of Community law (in this case, Italy's failure to transpose Directive 80/987/EEC into national legislation).

Shortly thereafter, in order to comply with the Francovich decision Italy enacted a Statute (Decreto Legislativo n. 80 of Jan. 27, 1992) which implemented Directive 80/987/EEC. For our purposes the key point is that Art. 2 para. 7 of Statute n. 80 laid down both the amount and the conditions for the payment of damages caused by the non-implementation of Directive 80/987/EEC.

From the wording of Statute n. 80, it was not clear who would bear the cost of such payment. This doubt gave rise to a judicial dispute between workers who claimed that the State was responsible for paying damages and the Italian Government, which maintained that only the INPS (National Agency for Social Welfare Benefits) was liable for the amount in question.

The decision in the second instance found for the workers on the grounds that the payment of damages ensuing from the non-implementation of Directive 80/987/EEC fell under the general rule of compensation for unlawful acts (Art. 2043 of the Italian Civil Code). The latter provision has a very broad scope of application. It is worded as follows: "Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages."

The State appealed against the decision in the second instance to the Corte di Cassazione, the Italian Supreme Court. The Corte di Cassazione is the court of last appeal in civil and criminal matters, i. e. the highest judicial organ for the interpretation of the statutes concerning civil and penal law. It is different from the Corte Costituzionale (Constitutional Court). The Corte di Cassazione is in many regards the counterpart of the German Bundesgerichtshof (Federal Supreme Court).

In its decision n. 7832 of July 19, 1995, the Corte di Cassazione quashed the decision in the second instance. It held that the INPS and not the State is responsible for the payment laid down in Art. 2 para. 7 of Statute n. 80, i. e. the payment of damages caused by the non-implementation of Directive80/987/EEC. In my view, such an interpretation of Art. 2 para. 7 of Statute n. 80 is legitimate. However, the Corte di Cassazione did not limit itself to interpreting the provisions of Statute n. 80, but went on to make general remarks on the State's liability for omitted legislation.

In its reasoning the Corte di Cassazione held that the payment laid down in Art. 2 para. 7 of Statute n. 80 is not equivalent to compensation for damages under Art. 2043 of the Civil Code. First, it emphasized that under the Francovich decision, the handling of details regarding the payment of damages for non-implementation is a matter left to national law. Then, it held that in the Italian constitutional system citizens cannot force the legislature to enact a statute. Significantly, in this passage the Corte di Cassazione cited a Statute of 1924. It is unclear what significance a law of 1924 may bear for the interpretation of the higher-ranking and more recent constitutional norms (the Italian Constitution was enacted after WWII).

From the foregoing considerations the Corte di Cassazione drew the following conclusion: "Therefore, it must be excluded that in the Italian legal system individuals acquire from Community law, as interpreted by the Court of Justice, the right to the enactment of legislative acts; in any case, it must also be excluded that because of Community law such a character of the State's legal system [i. e. the impossibility for the citizens to force the legislature to enact legislation] may be qualified as an unlawful act in the sense of Art. 2043 of the Civil Code for which the State would be liable. (…) In other words, the legal system currently in force is in conflict with general rules of the Community legal order (…) in that it does not foresee that individuals have the right to an adequate compensation for the damages caused by the non-implementation of a Directive." It should be noted that in this passage the Corte di Cassazione mentions that the EC Treaty has been rendered enforceable in Italy through a statute and, thus, seems to imply that the application of Community law in Italy ultimately depends on a sovereign statutory act of the Italian Parliament.

In the last part of its decision the Corte di Cassazione held that Art. 2 of Statute n. 80, if interpreted to assign the financial responsibility at issue to the INPS, eliminates the aforementioned conflict between Community law and Italian Constitutional law. Thus the Corte di Cassazione purported to apply the principle whereby statutes must be interpreted in the light and according to the Constitution. The Corte di Cassazione also specified that its interpretation of Statute n. 80 had been upheld by the decision of Dec. 31, 1993 n. 512 of the Constitutional Court. It should be noted, however, that the latter decision was partly misread by the Corte di Cassazione. It is true that this decision of the Constitutional Court held that Art. 2 para. 7 of Statute n. 80 is to be interpreted to the effect that the INPS is the subject responsible for the payment in question. However, such holding of the Constitutional Court rested solely upon the interpretation of the provisions of Statute n. 80 and not on any principle of the Constitutional system.

In conclusion, it may be useful to draw a parallel between the present decision of the Corte di Cassazione and the ruling of the German Bundesgerichtshof in Brasserie du Pêcheur (October 24, 1996). Despite factual and legal differences in the two cases, these decisions present some remarkable similarities. In both cases the national court exercised its functions in such a way as to deny the responsibility of the State for damages caused by acts/omissions of the national legislature contrary to Community law: in the Italian case, the pivotal factor was the finding that the State was not the subject responsible for the payment; in the German case the key holding was that the conditions for the award of damages were not fulfilled. In both cases the national court construed the national legal order in such a way as to create a barrier to the application of EC law. And in both cases the national court did not make a reference to the Constitutional Court, although there were probably sufficient reasons for doing so.

## *1.6 Decision of the English Court of Appeal in Factortame*

**R v Secretary of State for Transport, ex parte Factortame Limited and others**

Court of Appeal (Civil Division)

8 April 1998

[1998] 3 C.M.L.R. 192 CA

**JUDGMENT-1:**

**I Introduction**

This is the judgment of the Court, to which each member of the Court has contributed, on an appeal by the Secretary of State for Transport. This case is important because it is the first case in which courts within this jurisdiction have had to consider the award of damages against the State for breach of Community law by the enactment and implementation of certain provisions of an Act of Parliament. It comes before this court on appeal from an order of the Divisional Court (Hobhouse LJ and Collins and Moses JJ) made on 31 July 1997. By that order it was declared that the Secretary of State's breaches of Community law were sufficiently serious to give rise to liability for any damages that may be shown to have been caused to the applicants (the respondents to the appeal). The order also declared that the applicants were not entitled to exemplary damages. That point is challenged in a respondent's notice of appeal but this court (being bound by authority limiting the availability of exemplary damages) has not heard any argument on the point. The applicants reserve their position if the case goes further.

The judgment of the Divisional Court is now reported in [1997] EU LR 475. In Parts I and II it sets out with conspicuous clarity the background facts. The dispute arises out of various provisions contained in the Merchant Shipping Act 1988 ('the 1988 Act'). These provisions discriminated against citizens of other Member States of the European Community. One of the cardinal principles which binds all Member States of the Community is contained in art 6 of the Treaty which provides that any discrimination on grounds of nationality shall be prohibited. The discrimination in the 1988 Act is found in provisions broadly to the effect that registration of vessels entitled to fly the British flag would only be possible if 75% of the ownership was in the hands of those who fulfilled three conditions: (a) they are citizens of the United Kingdom, (b) they are domiciled in the United Kingdom. The first of the conditions amounts to direct discrimination; the second and third to indirect discrimination. The Government of the day considered that this discrimination was compatible with our membership of the Community and the European Communities Act 1972. This was not the case. On 10 October 1989 the President of the ECJ made an interim order suspending the nationality condition. That condition was of no effect after 2 November 1989. However, the Government continued to enforce the domicile and residence conditions until the House of Lords in July 1990 granted interim relief against the Government. It is now common ground that the discrimination inherent in the imposition of each of the three conditions was in breach of the obligations which this country undertook upon becoming a member of the Community and was thus unlawful. The respondents to this appeal claim to have been disadvantaged by the discrimination provisions whilst they were in force. They sued the United Kingdom for damages. The Divisional Court held that, subject to establishing causation and amount, they are in principle entitled to damages. The Secretary of State appeals to this court. On this appeal the Secretary of State does not challenge any of the Divisional Court's findings of primary fact, or indeed any of its factual conclusions except the conclusion in Pt III of

the judgment ([1997] EU LR at page 503) that by January 1990 the Government's view of the legality of the 1988 Act under Community law:

"had ceased to be reasonable. It may have been reasonable, having come that far and in view of the fact that the United Kingdom case was being supported by other Member States, not wholly to abandon the case but there no longer existed any reasonable prospect that the outcome would be favourable."

[…]

**II The Factual Background**

At the end of 1986, in response to the second wave of registrations of British fishing vessels by Spanish fishermen, the Ministry of Agriculture, Fisheries and Food ('MAFF') saw a need for new legislation and sought support from other ministers. The Foreign and Commonwealth Office ('FCO') and the Law Officers stressed the importance of complying with the requirements of Community law. The purpose of the proposed Bill was described in a memorandum to the Law Officers as being:

"to define what a British fishing vessel is, which in effect means specifying who is entitled to register and operate a British fishing vessel; and thus to prevent vessels which are not owned and operated by British citizens or British-owned companies from being registered as British."

It was decided to seek counsel's opinion and instructions were on 23 December 1986 sent to a team of counsel headed by Professor Francis Jacobs QC, who has since become one of the Advocates General at the European Court of Justice ('ECJ'). The importance of Community law was emphasised by the reference of R v MAFF, ex p. Agegate ('Agegate') to the ECJ, under art 177, earlier in December 1986. In that case the issue was the legality of licensing conditions imposed by the United Kingdom upon licences to fish issued under the Sea Fish Conservation Act 1967. One of those conditions required 75% of the crew to reside ashore in this country. The ECJ in due course held that condition to be unlawful: [1989] ECR 4459.

[…] Counsel then wrote a joint opinion dated 24 February 1987 and reached the conclusion that:

"the proposed legislation should, if challenged, be held to be compatible with Community law on the basis that such legislation is a necessary consequence of the Common Fisheries Policy ('CFP')."

In reaching their conclusion counsel relied on the principle of international law that the right for a vessel to fly a national flag was to be determined by the state in question, so long as there was some genuine link between the vessel and the state. They also relied on the fact that the CFP allocated quotas on a national basis, so that:

"in our view, any discrimination that arises out of the proposed measures is a natural consequence of the CFP itself which divides out the available fishing quotas along national lines... In the case of fish which are no respecters of territorial limits it is necessary to establish a clear link between the Member State to whom the quota is granted and the vessels that are entitled to fish for that quota."

Nevertheless Counsel's advice was not unqualified and they referred to an element of risk. In order to reduce the risk they recommended that two modifications should be made to the proposals: that is the reduction from 100% to 75% of the proportion of shareholders and directors of fishing boat companies that had to meet the qualifying conditions of United Kingdom nationality, domicile and residence; and a period of grace for vessels already on the British register. Counsel also noted that the Secretary of State was to have a dispensing power where 'because of the applicant's long residence in the United Kingdom it would be unfair to refuse registration'.

A dispensing power was in due course enacted (in respect of the nationality condition only) as s.14(4) of the 1988 Act.

[…]

After the joint opinion had been given, the Solicitor General sought and obtained confirmation that counsel considered the proposals to be compatible with rights of establishment under Community law. On 31 March 1987 the Law Officers advised that there was a reasonably good prospect that the proposed legislation would be upheld by the ECJ. On the same day the Minister of State at the FCO informed the Minister of State at MAFF that the FCO was content for the legislation to be introduced, but that the European Commission should be informed as soon as possible. The initial reaction of the Commission was from the Government's point of view at best ambiguous.

On 9 May 1987 the British Government announced its intention to introduce legislation. Soon afterwards there was an art 177 reference to the ECJ in R v MAFF, ex p. Jaderow ('Jaderow'), accompanied by a formal agreement which represented a temporary compromise while the reference proceeded. The issue in Jaderow was the legality of another licensing condition for ships engaged in fishing. The ruling of the ECJ is reported at [1989] ECR 4459.

Instructions to parliamentary counsel were drafted, and the Bill was introduced to Parliament on 29 October 1987. During the preparation of the Bill there was discussion in Whitehall as to how far the new measures could or should be framed as primary legislation so as to be effective unless and until struck down by the ECJ. The legal adviser to the Department of Transport commented in July 1987:

"If the legislation is designed to be deliberately challengeable, its purpose will be largely frustrated. All we will produce is yet more cases to drag their slow lengths along in the [ECJ] in Luxembourg."

In the event, these proceedings have been dragging their slow length for about nine years, and their end is not yet clearly in sight.

The Bill had made progress in Parliament when on 28 March 1988 the Commission (in the person of Mr Fitchew, DG XV Financial Institutions and Company Law) wrote to the Government warning that the provisions of the Bill appeared to infringe rights of establishment under Community law, and that if the Bill were to be enacted in that form the Commission would have to give serious consideration to infringement proceedings under art 169. This threat of a challenge was not unexpected, and the Law Officers advised that the progress of the Bill should not be delayed. It went forward and received the Royal Assent on 3 May 1988. Part II of the 1988 Act (which provided for a new system of registration of British fishing vessels) was (by s.58(3)) to come into force on the date of the coming into force of the first regulations made under s.13, that is the 1988 Regulations. They were made on 2 November 1988 and laid before Parliament on 10 November 1988. They came into force on 1 December 1988. Regulation 66 provided for a transitional period ending on 31 March 1989.

The crucial provisions of the 1988 Act were in s.14. Subsection (1) provided (subject to the Secretary of State's power to impose further requirements under subsection (3) and his power to dispense with the citizenship requirement under subsection (4)) that a fishing vessel could be registered only if (a) it was British-owned; (b) it was managed, and its operations directed and controlled, from within the United Kingdom; and (c) any charterer, manager or operator of it was a qualified person or company. (…)

The general effect of the 1988 Act was therefore, in the words of the Divisional Court [1997] EU LR at page 479):

"to revoke any previous entitlement and substitute an entitlement which was dependent upon (among other requirements) the satisfaction of three criteria:

1. Nationality - being a 'British citizen';
2. Domicile - being domiciled in the United Kingdom: and
3. Residence - being resident in the United Kingdom."

In the meantime the dialogue with the Commission was continuing, and Agegate and Jaderow were before the ECJ. […] On 18 November 1988 Advocate-General Mischo delivered opinions in Agegate and Jaderow which were on the whole favourable to the United Kingdom Government.

[…]

On 16 December 1988 leave to apply for judicial review was granted in these proceedings. An earlier application had been refused because Pt II of the 1988 Act was not then in force. On 10 March 1989 the Divisional Court (Neill LJ and Hodgson J) referred the substantive questions to the ECJ under art 177 but did grant the applicants interim relief (1989 2 CMLR 353). Neill LJ (at page 374) refrained from expressing even a tentative view of the likely result of the reference under art 177, beyond saying that neither side's arguments were weak. Hodgson J (at page 383) said that the applicants had a strong prima facie case.

An appeal to this court was heard with great expedition ([1989] 2 CMLR 353, 392) and on 22 March 1989 this court (Lord Donaldson MR and Bingham and Mann LJJ) allowed the Secretary of State's appeal against the injunction granted by the Divisional Court. This court recognised that the issues raised were very difficult and of high constitutional importance. At least two members of the court would have continued the interim relief had not the challenged provisions been embodied in primary legislation.

There was a further expedited appeal to the House of Lords (Factortame Limted and others v Secretary of State for the Home Department [1990] 2 AC 85, [1989] 2 All ER 692). Their Lordships regarded both the substantive and the procedural issues as grave and difficult. On 18 May 1989 the House of Lords dismissed the appeal but made a further art 177 reference to the ECJ of the question whether Community law empowered or obliged an English Court, regardless of national law, to provide effective interim protection for the rights which the applicants claimed under Community law. So by the summer of 1989 there were before the ECJ both the procedural questions of Community law referred by the House of Lords ('Factortame I') and the substantive questions which had earlier been referred by the Divisional Court, but were overtaken ('Factortame II'); and Agegate and Jaderow had still not been decided.

Although the Commission had not succeeded in producing an alternative solution to the problem of quota-hopping it continued to object to the 1988 Act as an unacceptable solution. On 16 March 1989 the Vice President of the Commission sent to the Secretary of State for Foreign and Commonwealth Affairs a mise en demeure (formal notice) objecting to the nationality condition embodied in the 1988 Act.

[…]

This was followed on 29 May 1989 by the Commission's reasoned opinion objecting to the nationality condition and on 7 August 1989 by the Commission's action under art 169, applying for interim measures in respect of that condition.

After an oral hearing on the Commission's application during September, on 10 October 1989 the President of the ECJ made an order for interim measures in respect of the nationality condition.

[…]

The terms of the President's judgment were dismissive of the United Kingdom Government's submissions. As the Divisional Court put it, there was no comfort in it for the Government.

Three weeks elapsed before the President's order for interim measures was given effect by an Order in Council laid before both Houses of Parliament and made under s.2(2) of the European Communities Act 1972. This was the Merchant Shipping Act 1988 (Amendment) Ord 1989, 1989 SI No 2006, which was made on 1 November 1989 and came into force on the following day.

[…]

On 14 December 1989, more than a year after the opinions of Advocate General Mischo, the ECJ gave judgment in Agegate and Jaderow. In Agegate the judgment rejected the residence requirement (under the previous licensing system) as irrelevant to the quota system and unjustified. In Jaderow the judgment held that the aims of the quota system might justify conditions (such as the landing of a minimum proportion of catches) ensuring a real economic link between a fishing vessel and its flag state.

In January 1990 the Government was advised by counsel (Mr Christopher Bellamy QC, now one of the Judges of the Court of First Instance) that in the light of these decisions:

"it is going to be difficult to rely on the CFP, not least because our nationality provisions are not sufficiently 'focused' towards the local fisheries populations. But we may still be able to scare the Court away from tackling too directly the issues of nationality on the basis of the intrinsic differences between 'establishment' and the 'right to a flag' and the international law complications.. ."

On 5 April 1990 Advocate General Tesauro gave his opinion on the reference by the House of Lords in Factortame I and this was followed on 19 June 1990 by the judgment of the ECJ, ruling that in a case concerning Community law, a national court must set aside a rule of national law if that rule is the sole obstacle to the granting of interim relief. The matter came back to the House of Lords in July 1990. At the end of the hearing their Lordships indicated that interim relief would be granted, and their speeches were given on 11 October 1990.

[…]

On 13 March 1991 Advocate General Mischo gave his opinions in Factortame II and the art 169 proceedings, and these were followed by the judgements of the ECJ in those proceedings on 25 July and 4 October 1991 respectively.

[…]

In its judgment in Factortame II the ECJ dealt in an almost summary fashion with the three questions submitted to it by the Divisional Court. That was despite the fact that the United Kingdom Government had received support, on one or more of the questions, from Belgium, Denmark, Germany, Greece and Ireland. On the first question the ECJ ruled that it was for member states to decide, in accordance with the general rules of international law, what vessels should fly their flag, but that in doing so the member states must comply with the rules of Community law. On the second question (as reformulated) the judgment ruled that the nationality, domicile and residence requirements were all incompatible with Community law, and were not justified by the possibility of exercise of the dispensing power. On the third question it ruled that it was not the purpose of national legislation as to registration of vessels to define in detail how quotas should be used, and that the existence of national quotas did not therefore affect the replies to the second question.

The ECJ's judgment in the art 169 proceedings largely repeated its view in Factortame II. Shortly afterwards, on 19 November 1991, the ECJ gave its very important judgment in Francovich v Italian Republic [1991] ECR 1-5357. On 18 November 1992 the Divisional Court made the third reference to the ECJ under art 177[…].

[…] This reference (Case C-48/93) in Factortame III was joined to Case C-46/93, Brasserie du Pecheur SA v Federal Republic of Germany.

[…]

**III The Present Proceedings before the Divisional Court**

[…]

In Part III of its judgment the Divisional Court made findings as to the conduct of the Government. That conduct had been severely criticised, to the extent (as the Divisional Court understood it) of a charge of bad faith, although this court has been told that the applicants expressly disavowed that imputation. The Divisional Court found that the Government acted in good faith, and that has not been challenged in this court. The Divisional Court made eight particular findings, which merit careful attention ([1997] EU LR at pages 502-3). These were in very brief summary as follows. (1) The Government's policy towards the quota-hopping was not covert but open. (2) Its stated and actual purpose was to protect indigenous British fishing interests, not to injure the applicants, although that might be the effect of the policy. (3) The criteria of nationality, domicile and residence were chosen:

"because they would be effective to achieve the protection required. It was reasonably believed that a simple residence criterion alone would not have sufficed."

(4) "The Government did not decide to introduce what became the 1988 Act with an intent to flout Community law nor did it disregard the potential conflict between basic Community principles and what it was proposing to do. .. The Government took and acted on qualified advice. It had reason to believe before the decision to go ahead was taken that the legality of the Act, although it would probably be challenged, would be likely to be upheld by the ECJ."

(5) The reality of that advice progressively receded, and by January 1990 it was no longer reasonable for the Government to rely on it. (6) The handling of the domicile requirement was most regrettable but came about through muddle, not bad faith. (7) The choice of primary legislation was motivated by the desire for an effective solution immune to delaying tactics. (8) The Government was aware of the Commission's opposition but was not obliged to accept its view of Community law.

**IV The Task Before This Court**

We now proceed to examine the guidance given by the ECJ on the circumstances in which, as a matter of Community law, Member States must be held liable in damages for breaches of Community law.

[…]

For the present it suffices:

(a) to identify the principles which determine whether an infringement of Community law gives a right to damages to those who have suffered loss in consequence of the infringement ('the relevant principles'); and

(b) to decide whether applying the relevant principles to the infringement of Community law, which the ECJ has held that the bringing into force 1988 Act involves, results in the applicants being entitled in principle to damages during any, and if so which part, of the period between the coming into force of the 1988 Act and the granting of the interim injunction by the House of Lords ('the application of the principles').

**V The Relevant Principles**

In relation to the issues which arise on this appeal, the relevant principles are to be found in the decision of the ECJ in Factortame III.

[…]

It is not necessary in the present appeal to consider whether the breaches being considered infringed any rights of the applicants since this is conceded. Nor is it necessary to enter upon questions of causation since they are to be resolved after the result of this appeal is known. The issue for us is whether the breach in question is sufficiently serious to entitle the injured individual to damages.

The ECJ judgment gives guidance, both general and in the context of the present case, as to the circumstances which should be taken into account in arriving at a decision on the question whether to fix the State with liability for the damage caused by its unlawful acts. It makes clear, first, that the fact that the breaches of Community law were attributable to the national legislature of a Member State does not invariably exempt that State from any liability which it would otherwise incur by virtue of the principle that Member States are obliged to make good damages caused to individuals by breaches of Community law attributable to the State; the obligation to make good damage caused to individuals by breaches of Community law can not depend on domestic rules as to the division of powers between constitutional authorities (paras 33 and 36). Secondly it makes clear that the conditions under which that liability gives rise to a right to damages depend on the nature of the breach of Community law giving rise to the loss and damage in question (para 38).

[…]

The ECJ clearly proceeds on the basis that the field in which the United Kingdom was acting in the present case was one to which each of those two considerations was of relevance. Our task therefore is to decide whether or not in the present case the then Government and Parliament 'manifestly and gravely disregarded the limits on (their) discretion'.

The factors identified by the ECJ as being ones which the domestic court may take into consideration in determining whether a Member State has gone beyond the limits of its discretion:

"include the clarity and precision of the rule breached, the measure of discretion left by the rule to the national. .. 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." (para 56, emphasis added).

In view of the use of the word 'include' the considerations identified are presumably not exhaustive and there could be additional factors.

Having set out the general test which applies in cases involving the exercise of the legislative discretion of a Member State, the ECJ also made it clear that it would not substitute its assessment of seriousness for that of the national court which has the sole jurisdiction to find the facts and to decide how to characterise the breaches of Community law at issue. (Paragraph 58) (This is the function which the Divisional Court performed and the jurisdiction which it exercised in this case.) However, the court did seek to help the German and English national courts whose questions referred under art 177 it was answering by indicating 'a number of circumstances which the national courts might take into account'. (Paragraph 58, emphasis added).

While the ECJ made it clear that it was only identifying circumstances which the national courts might take into account, its comments are helpful. First because they tend to clarify the general test which the court had already identified. In addition they provide a 'steer' as to what should be the result in the particular cases which were before the national courts.

The guidance which was given in this case started off by suggesting that the assessment would be different 'in the case of the provisions making the registration subject to a nationality condition' from that in the case of provisions laying down 'residence and domicile conditions for vessel owners and operators'. In the case of the nationality condition the court stated that this constituted 'direct discrimination manifestly contrary to Community law'. In the case of the residence and domicile conditions, the court stated that they were 'prima facie incompatible with Article 52 of the Treaty' (art 52 being the Article which deals with the abolishing of restrictions on freedom of establishment of a Member State in the territory of another.) (Paragraphs 61 and 62).

The court added that as to the position as to residence and domicile, the English court, in determining whether the breach was sufficiently serious, might take into account:

"inter alia, the legal disputes relating to particular features of the [CFP] the attitude of the Commission, which made its position known to the United Kingdom in good time, and the assessments as to the state of certainty of Community law made by the national courts in the interim proceedings brought by individuals affecting the [1988] Act." (Paragraph 63)

Finally the court turned its attention to the specific claim of Rawlings that the United Kingdom had failed to comply with the order of the President of the ECJ of 10 October 1989 and said that this could be regarded by the national court as constituting in itself a manifest and therefore sufficiently serious breach of the Community law. (Paragraph 64). This suggestion of the ECJ as to the situation is accepted before this Court by the Secretary of State. This means that now it is not in dispute that in relation to the failure of the Government to respond to the President's Order for three weeks there was a sufficiently serious breach by the Secretary of State to create a right to damages.

Having referred to the detail of the judgment of the ECJ we summarise our conclusions as follows:

(1) As with the Community, so with Member States: as a matter of general principle they are under an obligation to make good any damage which they have caused by contravening Community law.

(2) Again as is the case with the Community, where a Member State has a wide legislative discretion, it will not be under a liability to pay damages unless the breach of Community law is sufficiently serious, that is to say it is grave and manifest.

(3) The reason for the restriction on liability is that the legislative function should not be hindered by the chilling effect of a liability for damages, unless the breach is of a seriousness which justifies the Member State being made liable to pay damages.

(4) In deciding whether there is liability in a particular case, various factors are relevant including:

(i) the complexity of the situation to be regulated;
(ii) difficulties in the application and interpretation of the text;
(iii) the margin of discretion available to the Member State in relation to the action in question;
(iv) the clarity and precision of the rule breached;
(v) the measure of discretion left by the rule to the Member States;
(vi) whether the infringement of the rule was intentional or involuntary;
(vii) whether the error of law was excusable or inexcusable;
(viii) whether the position taken by the Community institution may have contributed towards the omission;
(ix) in this particular case the features of the C F P; and

(x) the attitude of the Commission.

The court drew a clear distinction between the nationality requirement contained in the 1988 Act and the domicile and residence requirement. As to domicile, it appears probable that the ECJ did not appreciate that domicile was being used in the Act in its English law sense, that is, as creating a requirement that a person should both reside here and have the intention to make this country his or her permanent home. Because of this the Solicitor General accepted that for practical purposes the views expressed by the ECJ as to nationality would substantially also apply to domicile. It is only residence which comes into a different category.

[…]

**VI The Solicitor General's Submissions as to the Law**

[…]

The applicants placed particular weight upon the attitude expressed by the Commission. We think they were right to do so. The fact that a Member State proceeds in a way which conflicts with the opinion of the Commission as to what is lawful does not mean that the conduct of a Member State, which is subsequently held to be contrary to Community law, must necessarily be categorised as serious. However having regard to the Commission's role in the Community, any Member State should regard the views of the Commission as being worthy of great respect. A Member State always has the choice between proceeding on its course despite the opinion of the Commission or deferring action until the legality of what is proposed has been clarified. If a Member State adopts the former course and it subsequently transpires that this was a course which should not have been followed, the fact that the Commission's advice has not been followed, strengthens the case of those who seek damages for the loss which they have suffered. We share the approach of the Divisional Court that:

"Where there is doubt about the legality of any proposal, a failure by a Member State to seek the views of the Commission or, if it receives them, to follow them is likely to lead to any breach being regarded as inexcusable and so manifest."

**VII Application of the Principles**

The Solicitor General drew our attention to a number of matters which he submitted militated against the imposition of liability on the United Kingdom.

(1) The CFP was a Community policy which was intended to safeguard up to a point existing fishing interests. It appeared inherent in the very concept of national quota that Member States had a right to establish nationality criteria to determine who could fish against that quota. There was a tension between the prohibitions on discrimination in the Treaty and the Community's desire to safeguard existing interests.

(2) The attribution of nationality to people and vessels was something not specifically regulated under Community law. It was reasonable to suppose that Community law simply required Member States not to discriminate between vessels flying the flag of any Member State.

(3) In its legislative activity in the present case there was a fair amount of discretion which, on any basis, was left to the United Kingdom. The position was different from that which appertained for instance when a Community Directive gave a date by which its provisions were to be transposed into domestic law. In such a case, there was a discretion as to the date of transposition but there was no discretion to do this after the date specified in the Directive.

(4) Without the benefit of hindsight it was not obvious that the ECJ would rule as it did. A number of other Member States supported the stance taken by the Government of the United Kingdom.

(5) The Divisional Court found that the Government had acted in good faith and did not intend to breach Community law.

(6) The Government took and (up to a point, at any rate) acted upon qualified legal advice.

In our judgment a breach can be manifest and grave so as to make it sufficiently serious without it being intentional or negligent. The lack of the intention to commit the breach or negligence or fault are relevant circumstances but their presence is not a condition precedent to a breach being sufficiently grave or manifest. The seriousness has to be judged objectively taking into account all the relevant circumstances, which include the circumstances identified by the ECJ in Factortame III. At the end of the day the Court must come to a judgment as to whether the case before it is an appropriate one in which to permit the applicant before it to claim damages against the State for its legislative activity.

In a case in which the legislative discretion of a Member State is involved, as here, so as to avoid an excessive chilling factor defeating that discretion, a basket or global approach, involving weighing the relevant considerations is the required approach. Nonetheless, where what is relied on in support of an application for damages is a direct breach of the fundamental principle of the Treaty forbidding discrimination on grounds of nationality that will almost inevitably create a liability for damages. Whether intentional or not, such a breach is inexcusable in a case, such as this, where it is not suggested that the exceptions in arts 55 and 56 which apply to the right of establishment granted by art 52 have any relevance. While giving weight to the points made by the Solicitor General we consider that looking at the position overall it would not be right to deprive the respondents of a remedy for the wrong which has been done to them. In adopting this view, we regard ourselves as merely applying the approach clearly laid down by Factortame III. We do not find it necessary to rely on the opinion of the Advocate General van Gerven in Mulder v The Council and Commission 1992 ECR 1/306 para 16 page 3104, though that opinion is supportive of our conclusion.

Our decision as to the nationality condition means that there is a liability to pay damages during the period from the coming into force of the 1988 Act until 2 November 1989 when it ceased to have effect. For this period we see no cause to distinguish between the three conditions. They are cumulative and it would be artificial to distinguish between them.

However, thereafter the only conditions capable of causing damage were the domicile and residence conditions. In the course of the hearing before us the Solicitor General did not seek to disturb the finding of the Divisional Court that the domicile condition is to be equated with the nationality condition. It seems to be implicit in that concession that if, as we find, there ought to be a remedy in damages in relation to the nationality condition whilst it was in force there ought equally to be a remedy in relation to the domicile condition whilst it was in force - namely throughout the period ending with the granting of the interim injunction by the House of Lords.

[…]

**DISPOSITION:**

Appeal dismissed.

[…]

# 1.7 Carol Harlow: Francovich and the Problem of the Disobedient State

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*Carol Harlow*[*]

***Abstract:***

*This paper is an attempt to evaluate the rapidly expanding line of jurisprudence which derives from Francovich and Bonifaci v Italian Republic (Cases 6, 9/90). The paper argues that there is a serious mismatch between the priorities of the EC and national legal orders and that the impact of the superior on national legal systems may be both unexpected and detrimental. Section I argues: that the theoretical underpinnings for state liability in EC law are in fact weak and raise objections of principle; that 'infection' of national liability systems by the new principle is both inevitable and problematic; and that damage may be caused to the EC liability system through 'cross-infection'. Section II argues that in the modern state, balance between the Rule of Law doctrine and principles of political and democratic supremacy are both hard to attain and inevitably the subject of controversy. This problem is heightened within the Community by the existence of competing legislative systems, lack of clarity over sovereignty and worries over democratic deficit. The contribution of Francovich to the resolution of these problems is largely negative.*

## *I Introduction*

This paper is an attempt to evaluate the rapidly expanding line of jurisprudence deriving from Francovich and Bonifaci v Italian Republic[1], a case which has been the subject of so much comment as to require apology for any more[2]. Its starting-point is an observation by Dehousse[3] concerning the interlock between the national and EC legal orders. Dehousse contends that the two systems not only confront problems from a different angle but that their ultimate objectives also differ. In these circumstances the impact of the superior legal order on national legal systems may be both unexpected and detrimental; in short, a mismatch results. Dehousse is studiously neutral as to quality; he does not suggest at any point that the rules or objectives of one system are 'wrong' and of the other 'right'. Clearly, however, if this were to be the case, any mismatch would be more damaging.

This paper also considers a second discordance, familiar this time within national constitutions. In the modern state, the balance between the Rule of Law doctrine and principles of political and democratic supremacy may be hard to attain and is a subject of controversy. This problem is heightened within the Community by the existence of competing legislative systems, lack of clarity over sovereignty and

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[*] Professor of Public Law at the London School of Economics. This article was made possible through the support of Professor Yves Mény and the Robert Schumann Centre of the European University Institute. The author also wishes to thank Professor Sabino Cassese and Dr. della Cananea for arranging a seminar in Rome where the ideas could be discussed, as well as Armin von Bogdandy, Peter Cane, Luis Diez Picazo, Trevor Hartley and Richard Rawlings for correcting errors and stimulating rethinking on many points.

1 Joined Cases 6, 9/90 *Francovich and Bonafaci v Italy* [1991] ECR I-5357.

2 Caranta, 'Judicial Protection against Member States: A New Jus Commune Takes Shape', (1995) 32 *CML Rev.* 703 provides a short bibliography at note 24.

3 Dehousse, 'Comparing National and EC Law: The Problem of the Level of Analysis', (1994) 42 *Am. J. of Comp Law* 761, 765-7.

concerns over democratic deficit[4]. All these frictions, I shall argue, are likely to be intensified by the introduction into disputes of the threat of legal liability of component units.

The ECJ operates within a distinctive ideology - using this term strictly in its technical and value-free sense to convey a set of 'taken-for-granted, largely unexamined, common sense, and highly generalized assumptions about the nature of law which inform attitudes to law'[5]. The Community is a liberal economic polity and the EC legal order is necessarily based on a liberal economic philosophy. It reflects the ideologies of property, liberty and the Rule of Law. Less predictably, it is also emerging as a legal order rooted in legal positivism and in a nineteenth-century 'command' model of law[6]. These tendencies have fostered a belief that it is both proper to use EC law to promote and entrench a climate of free enterprise and improper to challenge these supposedly ideologically neutral objectives[7]. The dominant ideology is also self-avowedly integrationist; Judge Mancini has famously talked of integrationism as a 'genetic code transmitted to the court by the founding fathers'[8]. My paper argues that this particular vision of law and of law's purposes not only threatens the EC legal order but can weaken its constitution and political institutions. To express this in rational choice terminology, I shall describe the ECJ as 'selfish' in imposing its doctrine of supranational liability on national systems. Just as national courts are under the Article 5 EC obligation of solidarity to develop the law in such a way as to 'facilitate the achievement of the Community's tasks', so too the ECJ owes a corresponding obligation in respect of the national legal systems which act as its pillars. May puts this more strongly; as guardian of the EC legal order, it is the ECJ's function to act as 'conscious initiator of discussion with national courts, the Member State governments and jurists in general in the search for authority in the law'[9]. In short, a constructive relationship between the Community organs demands dialogue rather than command and understanding rather than sanction.

In Section I of this paper, I shall argue that the theoretical underpinnings for state liability in the Community are in fact weak and raise objections of principle. But although the imprecise concepts and inexplicit language of the judgments merit a critical linguistic analysis, this paper is not an exercise in analytical jurisprudence. Indeed, the account of the cases which follows is just sufficient to enable a reader unfamiliar with them to follow the argument. Justifying a theoretical approach, an American scholar has observed[10] that the fashionable questions of the day are instrumentalist: 'What social value does the rule of liability further in this case? Does it advance a desirable goal, such as compensation, deterrence, risk'distribution, or minimization of accident costs?' This assumption runs counter to the prevailing tenor of EC legal doctrine[11]. Much of what has been written about Francovich already falls clearly within the category of analytic jurisprudence, focusing primarily on the implications of the decision for EC law[12]. Little regard has been paid to the way in which liability systems actually operate, to practical difficulties of implementation or to the impact on national legal systems. The way is open for an instrumentalist approach.

In Section II, I shall argue on the one hand that 'infection' of national liability systems by the new principle is both inevitable and problematic and, on the other, that damage may be caused to the EC liability

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4 See Weiler, 'The Community System: The Dual Character of Supranationalism', (1981) 1 *YEL* 267 and *Idem*, 'The Transformation of Europe', (1991) 100 *Yale LJ* 2403; Weiler, Haltern, Mayer, 'European Democracy and its Critique', (1995) 18 *W. Eur Pol.* 1; Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', (1993) 30 *CML Rev.* 17.

5 R. Cotterell, *Law's Community. Legal Theory in Sociological Perspective* (Clarendon, 1995) p 253.

6 Shapiro, 'Comparative Law and Comparative Politics', (1980) 53 *S. Calif. Law Rev.* 461.

7 See von Mestmacker, 'On the Legitimacy of European Law', (1994) 58 *RabelsZ* 617; I. Ward, '(Pre) conceptions in European Law', (1996) 23 *J. of Law and Soc.* 198.

8 Mancini and Keeling, 'Democracy and the European Court of Justice', (1994) 57 *MLR* 175 186. See also Wincott, 'The Role of Law or the Rule of the Court of Justice? An Institutional Account of Judicial Politics in the EC', (1995) 2 *J. of Eur. Pub. Policy* 583, 584.

9 C. May, *The Function of Judicial Decision in European Economic Integration* (Martinus Nijhoff, 1972) p 417. See also Maher, 'National Courts as European Community Courts', (1994) 14 *Legal Studies* 226.

10 Fletcher, 'Fairness and Utility in Tort Theory', (1972) 85 *Harv. LR* 587.

11 See F. Snyder, *New Directions in European Community Law* (Weidenfeld and Nicolson, 1990) p 1; Shaw, 'European Legal Studies in Crisis? Towards a New Dynamic', *EUI Working Paper RSC* No 95/23, also published in (1996) 16 *Oxford J. of Legal Studies* 231.

12 See e.g., Caranta, 'Governmental Liability after Francovich', (1993) 52 *Cambridge LJ* 272; Green and Barav, 'National Damages in the National Courts for Breach of Community Law', (1986) 6 *YEL* 55; Simon, 'Droit communautaire et responsabilité de la puissance publique, Glissements progressifs ou révolution tranquille', (1993) 39 *AJDA* 235; Schockweiler, 'Le régime de la responsabilité du fait d'actes juridiques dans la CE', (1990) 26 *RTDE* 27.

system through 'cross-infection'. Before Francovich it was widely assumed[13] that the extra-contractual liability[14] of Member States was a matter for national law, governed exclusively by national legal systems, and that the charge of the ECJ was solely Community liability. The arrangements were governed by Article 178 EC, which gives competence to the ECJ to decide 'disputes relating to compensation for damage' according to the principles contained in Article 215 EC. The novelty of Francovich lay in the fact that this assumption was overturned. It is no part of my argument, however, that the ECJ lacked competence to enter a field previously reserved for national law; like Van Gend en Loos, Francovich is treated as water under the bridge. Expediency, and not legitimacy, is the target of this critique.

Briefly, because the decision is so well known, Francovich concerned the liability of Member States for non-implementation of directives. The case was the aftermath of a failure by Italy to implement EEC Directive 80/97, designed to secure a protected position for workers in the event of their employer's insolvency. This omission had already been the subject of Art. 169 proceedings by the Commission in which Italy had been condemned[15] but, at the date of the action, remained unimplemented. The applicants, left with arrears of unpaid salary on the insolvency of their respective employers, turned and sued the Italian State for damages. Convinced that no remedy was available in Italian law, two Italian courts seised of the question made an Article 177 reference to the Court of Justice (ECJ). Drawing on the solidarity principle of Article 5 EC, the ECJ returned the answer that, even though this directive had no direct effect, the State could be liable in damages. The preconditions for liability were said to be that:

1. the directive in question must be intended to confer rights on individuals;
2. the content of the rights must be clearly spelt out in the directive;
3. there must be a causal link between the failure to implement the directive and the loss suffered.

For several years after Francovich there was a golden silence[16]. I shall argue that unusually (since the nature of the judicial process renders it difficult for courts to withdraw from inopportune jurisprudence) an ideal opportunity arose after Maastricht to jettison Francovich with all its problems[17]; and that it was unfortunate that the opportunity was rejected. To the contrary, when earlier this year the ECJ finally ruled in a cluster of Article 177 references which had been pending for some time, it chose decisively to affirm the controversial Francovich principle.

In Brasserie du Pecheur[18], a claim was filed against Germany in respect of speculative loss of profit resulting from a German law on the purity of beer, previously annulled by the ECJ[19]. In Factortame (No 4), the saga of the Spanish fishermen was resumed with a £30 million claim against the United Kingdom for loss of profits allegedly occasioned by the activation of a licensing scheme for fishing vessels previously annulled by the ECJ[20]. In both cases, the loss flowed from invalid national legislation but, in contrast to Francovich, the complaint concerned faulty or inadequate implementation rather than total failure to implement. In a variant on these claims, a group of consumers who had suffered loss through the insolvency of travel agencies claimed compensation in the form of lost payments and deposits, on the

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13 Case 13/68 *Salgoil v Italy* [1968] ECR 661; Case 158/80 *Rewe* [1981] ECR 1805; A. Ward, 'Effective Legal Sanctions in EC Law: A Moving Boundary in the Division of Competence', (1995) 1 *ELJ* 205, 206-8. But see Green and Barav, *op cit* n 12, citing C 6/60 *Humblet v Belgium* [1960] ECR 559. See also Case 60/75 *Russo v AIMA* [1976] ELR 45; Case 33/76 *Rewe* [1976] ELR 1989; Case 199/82 *San Giorgio* [1983] ELR 3595. And see Curtin, 'Directives: The Effectiveness of Judicial Protection of Individual Rights', (1990) 27 *CML Rev.* 709, 727-9.

14 In this paper the European term 'extra-contractual liability' and the Anglo-American 'tort law' are treated as roughly equivalent, which, on closer examination and for jurisprudential and analytic purposes, would not necessarily be the case. For reasons of space, the paper cannot cover restitution, which falls outside the term 'tort'.

15 Case 22/87 *Commission v Italy* [1989] ECR 143.

16 Relevant cases include: Case 91/92 *Faccini Dori v Recreb* [1994] ELR I-3325; Case 334/92 *Wagner Miret* [1993] ECR I-6911 noted Tridimas, 'Horizontal Effects of Directives: a Missed Opportunity', (1994) 19 EL Rev. 621.

17 On which see Craig, '*Francovich*, Remedies and the Scope of Damages Liability', (1993) 109 *Law Quarterly Review* 595; Ross, 'Beyond *Francovich*', (1993) 56 *MLR* 55.

18 Joined Cases 46/93 and 48/93 *Brasserie du Pecheur SA v Germany* (hereafter *Brasserie*), *R v Transport Secretary ex p. Factortame (No 4)* (hereafter *Factortame*) [1996] 2 WLR 506. (Judgment of 5 March 1996).

19 Case 178/84 *Commission v Germany* [1987] ECR 1227.

20 Case 246/89 *Commission v United Kingdom* [1989] ECR 3125; Case 246/89 *Commission v United Kingdom* [1991] ECR I-4585.

ground that Germany had failed to transpose EEC Directive 90/314 on package travel and tours within the relevant time limit[21].

Again briefly, the ECJ held in a joint judgment in Brasserie and Factortame (No 4) that national legal systems must provide an opportunity to recover compensation for loss caused to individuals whether by failure to implement EC law or by incorrect implementation. It was for national legal systems to provide the means of reparation, subject to the usual requirement that conditions for liability must not be less favourable than is normal in domestic cases and that reparation must not be impossible or excessively difficult to obtain. The circumstances in which the obligation accrued were said to be:

1. that the rule of law infringed must be intended to confer rights on individuals;
2. the breach must be sufficiently serious;
3. there must be a direct causal link between the act/omission and the damage.

This formulation exactly mirrors the so-called Schoppenstedt formula[22], which has emerged as the governing principle of Community liability under Article 215 EC in cases of loss resulting from use of rule-making powers. It thus creates a link between national and EC jurisprudence which did not previously exist. According to the Schoppenstedt formula, the extra-contractual liability of the Community in respect of legislative actions rests on 'a sufficiently serious breach of a superior rule of law for the protection of an individual'.

To continue the catalogue, in Lomas[23], MAFF, acting on limited evidence of violations and contrary to Article 34 EC, had systematically refused export licences for movement of live beasts to Spanish abatoirs, giving as its reason that conditions in Spanish abatoirs fell short of the standards required by EEC Directive 74/577. Here Spain had transposed the Directive, though without providing sanctions for breach. The question was posed whether in these circumstances a Member State might utilise Article 36 EC to limit exports and, if not, whether compensation would be payable. The ECJ found that recourse to Article 36 EC was not possible in these circumstances and, repeating the Factortame formula, that there must be a prospect of compensation for loss caused. The distinction between the cases lay in the fact that the first set concerned regulatory action, while Lomas involved potentially unlawful or invalid administrative action.

Telecom[24] offered an opportunity for guidance on the vague and tenuous requirement of a 'sufficiently serious breach' of EC law. According to AG Tesauro, such a breach would occur where:

1. clear, precise obligations have not been complied with;
2. there is interpretative guidance from the ECJ on 'doubtful legal situations';
3. the national authorities' interpretation is 'manifestly wrong'.

The point in issue was the transposition into UK law of the public procurement directives, notably Article 8(1) of EEC Council Directive 90/531, transposed into UK law by the Utilities Supply and Works Contacts Regulations 1992. In one proceeding, the applicant challenged the correctness of the transposition and claimed damages for consequential loss. The ECJ ruled that the affair fell in principle within Brasserie. Unusually, because application of the rule would normally lie within the area of appreciation of the national court, it went on to hold that it possessed sufficient information to find against liability. In so doing, the Court tied the emerging jurisprudence still more firmly to its Art 215 jurisprudence, ruling that:

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21 Joined Cases 178,179, 188, 190/94 *Dillenkofer v Germany*. The Opinion of AG Tesauro recommending liability was delivered on 28 November 1995; judgment has not yet been delivered.

22 See Case 5/71 *Züickerfabrik Schoppenstedt v Council* [1971] ECR 975. For comment and explanation see T.C. Hartley, *The Foundations of European Community Law* (Clarendon, 3rd. ed, 1994) pp 486-498.

23 Case 5/94 *Hedley Lomas v Ministry of Agriculture and Fisheries (MAFF)* 23 May 1996 (hereafter *Lomas*).

24 Case 392/93 *R v Treasury ex p British Telecommunications* [1996] 3 WLR 203 (herafter *Telecom)*. See also the later joined Cases T-481, 484/93 *Vereniging van Exporteurs in Levende Varkens v Commission* (13 December 1995).

'A restrictive approach to state liability is justified in such a situation, for the reasons already given by the court to justify the strict approach to non-contractual liability of Community institutions or member states when exercising legislative functions in areas covered by Community law where the institution or state has a wide discretion - in particular, the concern to ensure that the exercise of legislative functions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or member states to adopt measures which may adversely affect individual interests...'[25].

My thesis is, in short, a dual one. I shall argue first that the case for Member State liability rests on weak theoretical foundations and that its imposition is capable of damaging the delicate Community political structure. Secondly, I shall argue that the fault lines between the liability systems of national and EC legal orders, previously satisfactory, have been violently disrupted and redrawn in the wrong place.

## II The Court's Perspective

*A Liability as Sanction*

It would be fair to summarise the ECJ's strategy for an effective legal order, initiated by the doctrine of direct effect[26], as centred on the development of rights under EC law justiciable in established national courts. This is seen as stimulating 'individual citizens' to validate their rights in citizen enforcement actions, generating a sort of unofficial police force to boost Commission manpower.

At the outset, we should dismiss the vision of a squad of citizen policemen engaged in law enforcement. There are, of course, actions fought by individuals or groups of individuals. Marshall falls into this category; Francovich, Dillenkofer, and Faccini Dori may. In the field of environmental law, we find a developing pattern derived from human rights law, where a number of specialist organisations (NGOs) dedicated to the enforcement of human rights conventions through courts operate; in Article 119 cases, their place has largely been assumed by state-funded agencies[27]. Whether or not these groups and agencies can be said to represent 'citizens' is a moot point but they do embody the private enforcement machinery to which the ECJ apparently aspires. This is not to imply, however, that the model of 'politics through law' espoused by the ECJ is best pursued through the medium of the action for damages; for reasons outlined in a later section, there is much to be said in favour of judicial review as the standard procedure, with annulment or declaratory orders as the standard remedy, in this type of citizen enforcement[28]. In other areas, citizen enforcement is in any event a fantasy. In her study of Community liability, Fines[29] shows, for example, that an overwhelming majority of actions against the Community are brought by corporations and that the litigation typically involves licences and other economic interests. Their dominant position in litigation raises questions as to what sort of rights EC law really protects (see below).

What Francovich added to the Court's armoury was the power of sanction[30]. There can be little doubt that sanction forms a large constituent of the decision. Caranta's excellent analysis[31] notes the references both to 'effet utile' and 'effective judicial protection', observing that the latter is 'to be used more to exact obedience from Member States than to protect citizens'. Van Gerven[32] refers to liability as a 'sanction,

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25 Para. 40 (emphasis added), citing Joined Cases 83, 94/76, 4, 15, 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH v Council and Commission* [1978] ECR 1209 and *Brasserie*, para 45. And see now, Case T-571/93 *Lefebvre freres et soeurs and others v Commission* (Commission delay in submitting proposal for regulation insufficient to found liability).

26 Which will not be pursued here: see Hartley, *op cit*, n 22, pp 195-233; de Burca, 'Giving Effect to European Community Directives', (1992) 55 *MLR* 215; Plaza Martin, 'Furthering the Effectiveness of EC Directives and the Judicial Protection of Individual Rights Thereunder', (1994) 43 *Int. and Comp. LQ* 26.

27 C. Harlow and R. Rawlings, *Pressure Through Law* (Routledge, 1992) Ch 6 (generally and on the EOC). And see Sands, 'European Community Environmental Law: Legislation, the European Court of Justice and Common-Interest Groups', (1990) 53 *MLR* 685.

28 See per Parker and Nourse LJJ, contra Oliver LJ, in *Bourgoin v Ministry of Agriculture and Fisheries (MAFF)* [1986] QB 716.

29 F. Fines, *Etude de la Responsabilité Extra-Contractuelle de la Communauté* (LGDJ, 1988) Annex II, pp 426-449. See also Harding, 'Who Goes to Court in Europe? An Analysis of Litigation against the European Community', (1992) 17 *EL Rev*. 105.

30 Steiner, 'From Direct Effects to *Francovich*: Shifting Means of Enforcement of Community Law', (1993) 18 *EL Rev.* 3.

31 *Op cit*, n 2 at 710, 755.

32 Van Gerven, 'Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?', (1995) 32 *CML Rev.* 679, 694 (discussing quantum of damages).

within the framework of the specific Community rule that it purports to make effective'. Schockweiler[33] emphasises that reparation is not the only, perhaps not even the most important, issue:

'.. il ne s'agit pas seulement de sanctionner l'atteinte que l'Etat a portée au patrimoine du particulier, sujet de l'ordre juridique communautaire, mais également l'atteinte que l'Etat en question a portée à cet ordre juridique en tant que tel'.

For Mestmacker[34], the ECJ was inspired to develop its radical jurisprudence 'by its all too familiar knowledge of that very world in which international agreements lacking a normative framework - lacking a direct effect on supremacy - have such a limited impact'. Other commentators express satisfaction with remedies which go much further than classic international law to protect Treaty rights against 'the inertia and resistance of member states'[35]. The problem of the disobedient state is self-evidently common in international law which has, in the postwar period, been arduously grappling with it, trying out remedies very similar to those now being acquired for the ECJ[36]. It is significant that the problems have engaged the attention of the International Law Commission since 1953 without their having reached any particularly satisfactory conclusion, driving one scholar to deny any intellectual basis for the idea of State responsibility[37]. Many of the areas of dispute - the rules concerning agency; the relationship of wrongfulness to harm; whether liability requires fault; whether it extends to acts of sovereignty or commercial transactions - are precisely those which have been singled out as most troublesome by critics of Francovich. The ambit of liability is limited and parallels classic domestic principles of tort/delict in covering cases of physical maltreatment and direct 'taking' of property (see below). Especially problematic are the question of liability for commercial transactions[38] and the relationship between delict/tort and the emerging concept of international criminality[39]. In international law, compensation is not typically punitive[40]; indeed, it is even a matter of controversy whether punitive damages are permissible. Gray, for instance, adopts the reasoning of many tort scholars in contending that such awards 'result in a victim receiving more than compensation for his injury'[41]. She relegates the subject for discussion as 'part of the wider debate over the possibility or desirability of international criminal responsibility'. One might be permitted to wonder whether it was wise to import into EC law this highly controversial remedy, characterised by vagueness ('it should mean something rather precise, but has over recent years come increasingly to mean everything'[42]) with all its manifold problems.

It is probable that French administrative law, in which liability undoubtedly contains an element of sanction[43], provided the pattern for the ECJ's sanctions theory of liability. Before this road was travelled, however, attention should have been paid to the special position of the French Conseil d'Etat[44]. The Conseil is something more than a court; it is both the conscience of the executive, responsible for determining equitable claims (see below) and possesses regulatory functions in respect of administrative

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33 Schockweiler, 'La responsabilité de l'autorité nationale en cas de violation du droit communautaire', (1992) 28 *RTDE* 27, 42 (emphasis added).

34 Mestmacker, *op cit*, n 7, 617, 624.

35 In this sense, e.g., Boulois and Chevallier, *Les Grands Arrets de la Justice Européenne* (Dalloz, 1994) note at p 33; Szyszczak, '"Making Europe More Relevant to its Citizens": Effective Legal Process'. (1996) 21 *EL Rev.* (forthcoming). And see Steiner, *op cit*, n 30.

36 Higgins, 'Accountability and Liability: The Law of State Responsibility' in *Problems and Progress, International Law and How We Use It*, The Hague Lectures, (Clarendon, 1994). See further M. Spinedi and B. Simma (eds), *United Nations Codification of State Responsibility* ( Oceana, 1987).

37 Allott, 'State Responsibility and the Unmaking of International Law', (1988) 29 *Harv. Inter. L.J* 1.

38 See Fox, 'State Responsibility and Tort Proceedings against a Foreign State in Municipal Courts', (1989) 20 *Netherlands Yearbook of International Law* 3; Higgins, *op cit*, n 36, p 152 queries this limitation.

39 Higgins, *op cit*, n 36, pp 165-8 and Art 19 (1) of the ILC Draft Articles.

40 Bing Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius, 1987) pp 47-8.

41 C. Gray, *Judicial Remedies in International Law* (Clarendon, 1987) p 26.

42 Higgins, *op cit,* n 36, p168.

43 See de Latournerie, 'The Law of France', in Bell and Bradley (eds), Governmental Liability: a Comparative Study (UKNCCL, 1992); Lochak, 'Reflexion sur les fonctions sociales de la responsabilite administrative', in J. Chevallier (ed.), *Le droit administratif en mutation* (PUF, 1993); Josse, 'L'exécution forcée des décisions du juge administratif par la mise en jeu de la responsabilité pécuniaire du service public', (1953) *Etudes et Documents du Conseil d'Etat* 50. On sanctions theories generally, see now, CE 11 March 1994 *CSA c. "La Cinq"* RDP 1995.517 note Blanquer.

44 See M-C. Kessler, *Le Conseil d'Etat* (Armand Colin, 1968); J-P Negrin, *Le Conseil d'Etat et la Vie Publique en France depuis 1958* (PUF, 1968).

authorities[45]. A partial explanation for its sanctions theory of administrative liability undoubtedly lies in its lack of mandatory remedies[46]. Its legendary problems with delay and with implementation of judgments, especially by local authorities[47], are also relevant. Latournerie explains[48] that compensation orders permit the Conseil d'Etat to take 'the necessary steps on the victim's behalf to authorise payment of the sum by the State, because of its powers of budgetary control over such bodies'.

Like the French administrative jurisdiction on which it is patterned, the ECJ possesses no mandatory remedies. Yet its role, as defined in Article 164 EC, perhaps implies something more than a classical declaratory and platonic statement of the law, since the article stipulates that the ECJ 'shall ensure that in the interpretation of this Treaty the law is observed'. Although the temptation to disregard the rulings of a court without mandatory remedies is fairly obvious, no widespread problem of disobedience has been identified[49]. At the time of Francovich, however, Italy certainly had a bad record for transposing directives[50].

In other respects, the ECJ possesses none of the characteristics of the French Conseil d'Etat. It has been called 'a dependent legal order' in that it relies for its enforcement on the legal orders of the Member States' [51]. It is unlikely that any State would directly refuse to comply with a judgment in damages; studies of relative effectiveness would, however, be interesting. There are so many escape routes for a recalcitrant State to explore. Several of the Member States have been condemned in the Court of Human Rights for excessive delay in state liability cases[52]. The Francovich saga has not yet reached a final conclusion[53]; aged seventy-six, after sixteen years of litigation Ms. Marshall received damages; the Factortame saga dates back to 1988... So long as procedure remains in the hands of the national courts, there will always be room for manoeuvre. This is perhaps why AG Leger foresees deeper inroads by the ECJ into procedure[54]. But at the end of the day, no system of state liability can be truly mandatory. The problem is circular; unenforceable or unenforced rulings bring the legal system into disrepute (the problem of Francovich); mandatory orders or punitive damages are substituted; the slur is greater from unenforced commands than from platonic, declaratory judgments; thus the problem simply escalates. In the legendary language of President Andrew Jackson, 'John Marshall has made his decision, now let him enforce it'[55]!

Apparently justifiable in terms of the fault principle captured in the terms 'tort' and 'delict'[56], there are other reasons why penal theories of civil liability are out of fashion. The sole author to fashion a full-blown

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45 Questiaux, 'Administration and the Rule of Law: The Preventive Role of the French Conseil d'Etat', [1995] *Public Law* 247.

46 It is more correct to say that the Conseil d'Etat deprived itself of mandatory remedies: see CE 27 Jan. 1933 *Le Loir* Rec 136 concl. Detton; CE 4 Nov. 1983 *Noulard* Rec. 451. Its unwillingness to address injunctions to an organ of the state or administrative authority may derive from its historical evolution as an advisory body or from the wording of the celebrated Law of 16-24 August 1790 to which it ultimately owes its existence. Since 1995, the Conseil has possessed injunctive powers: see, Law No. 95-125, 8 Feb. 1995 relative a l'organisation des juridictions et a la procedure civile, penale et administrative, noted (critically) by Fraisseix, RDP 1053, 1069.

47 See, for an extreme example, CE 17 May 1985 *Mme Menneret* Rec. 149 concl. Pauti, the first example of use by the Conseil of its new powers of *astreinte* (punitive use of damages as a fine).

48 Bell and Bradley, *op cit*, n 43, p 223 (emphasis added). It is noteworthy that the Conseil has needed to set up a *Commission du Rapport* to monitor implementation of judgments.

49 At the time of the *Francovich* application in 1990, 83 judgments were outstanding, about one-third of which involved Italy. At the end of 1992, however, there were only 10 cases where the ECJ handed down a second judgment for non-compliance: 10th Annual Report to European Parliament on the application of Community law: 1993 OJ C233/207, Annex V.

50 Now largely rectified by the 'La Pergola' Law in 1989, which provides new and more effective implementation procedures: see Furlong, 'The Italian Parliament and European Integration: Responsibilities, Failures and Successes', (1995) 1 *J. of Legislative Studies* 35, 36, 40-42.

51 Bridge, 'Procedural Aspects of the Enforcement of the EC Law through the Legal Systems of the Member States', (1984) 9 *EL Rev*. 28.

52 Notably, *H v France* (1989) 12 EHRR 74; *Edition Periscope v France* (1992) 14 EHRR 597; *Neves and Silva v Portugal* (27 April 1989, Series A No 153). *Bavaona v Portugal* (8 July 1987, Series A No 122) suggests wilful obstruction by the authorities in a case of wrongful arrest.

53 Case 479/93 *Francovich v Italy* (action to annul Decree-Law No 80/1992) transposing Council Directive EEC 80/987 concerning employers' insolvency.

54 Opinion, *Lomas*.

55 Allegedly after *Worcester v State of Georgia* (1832) 31 US 515. The story, which may be apocryphal, gained currency in the wake of *Brown v Board of Education of Topeka* (1954) 347 US 483, notably imperfectly implemented: see further, McKay, '"With All Deliberate Speed": A Study of School Desegregation', (1965) 31 *New York Univ. Law Rev.* 991.

56 Tunc, 'Tort Law and the Moral Law', (1972) 30 *Cambridge Law J.* 247; Fletcher, *op cit*, n 10; and generally, I. Englard, *The Philosophy of Tort Law* (Dartmouth, 1993).

punitive/deterrent theory of state liability is Schuck[57], who argues that awards of damages put indirect pressure on senior administrators to eliminate wrong-doing lower in the administrative hierarchy in order to relieve pressure on their budgets. If it seems uncontroversial to Schuck for liability to play a central role in disciplining administration, it must be remembered that he writes from within a system which makes excessive use of punitive and exemplary damages in tort law[58], to a degree which would certainly be unacceptable in European systems[59]. Common law systems still accept a limited principle of punitive damages. English law finds them notably problematic and abolition is on the agenda - except, perhaps, in traditional cases of police malfeasance[60]. The objection to punitive damages is Gray's 'golden handshake' or 'windfall' argument that the plaintiff receives more compensation than is necessary to restore the status quo ante, supposedly the measure of civil damages. This anomaly, which seems to breach the equality principle, has caused much resentment in English law actions, where large awards of punitive damages in libel actions so disfavoured harder-hit accident victims as to necessitate statutory intervention to restore a measure of equality[61]. On the other hand, because a primary goal of tort/delict is to secure compensation for victims, penal theories of liability often result in punishing acts which do not seem particularly culpable.

We all know of cases where state officials have used public powers and public office for ends wholly external to the purposes for which they have been granted[62], but these are covered in all systems by fault liability. In the much-debated Bourgoin case[63], where MAFF was accused of turning powers granted for purposes of public health to economic ends in imposing a ban on the import of French turkeys, there would have been liability if bad faith on the part of MAFF had been proved. The same must be true of Factortame or Lomas. But how is the blame to be apportioned? Vicarious and corporate liability are accepted inside compensatory regimes of civil liability; they pose difficult problems for criminal law, more closely linked to culpability and intention[64]. To impose sanctions for the acts of subordinates, of which the authorities may be unaware, is awkward. To remove the requirement of fault and substitute no-fault liability, as EC law apparently does[65], renders punitive liability untenable; indeed, it puts the ECJ in danger of breaching the fundamental principle nulla poena sine culpa.

Perhaps then we should follow Schuck in thinking of deterrence. Steiner certainly believes that[66]:

'the prospect of liability to all parties suffering damage as a result of their failures to implement Community law would provide States with a powerful incentive to comply with their Community obligations'.

Everything suggests, however, that we are talking here of conduct which cannot be deterred[67]. 'In the deterrence model, education and information should warn the tortfeasor when the sting will be applied'[68].

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57 P. Schuck, *Suing Government, Citizen Remedies for Official Wrongs* (Yale University Press, 1983).

58 J. Fleming, *The American Tort Process* (Clarendon, 1987) pp 214-24. Factors explaining the escalation of punitive damages in the US include: the absence of provision for costs and medi-care and the use of juries in civil cases.

59 For a notable example of German refusal to recognise an American punitive damages award, see *Bündesgerichtshof* [1992] ILPr 602.

60 In English law, punitive/exemplary damages are reserved for cases (i) where the defendant deliberately disobeys the law and (ii) abuse of state power, in practice usually police malfeasance: see, *Rookes v. Barnard* [1964] AC 1129; *A.B. v South West Water Services* [1993] 1 All ER 609 noted Pipe, 'Exemplary Damages After Camelford', (1994) 57 *MLR* 91 (who favours such awards). On reform, see Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Com. No. 132 (HMSO, 1993). A Law Commission survey found opinion divided on the practice.

61 Sec. 8 (2) Courts and Legal Services Act 1988 and *Rantzen v. Mirror Group Newspapers* [1993] 3 WLR 953. See below for the similar consequences of *Marshall (No 2)*.

62 The classic case is the Canadian case of *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689, interesting in this context because it links the common law with French administrative liability through the Quebec civil code.

63 B*ourgoin v Ministry of Agriculture and Fisheries (MAFF)* [1986] QB 716. After winning the preliminary point of law in the Court of Appeal, the Government settled before trial, allegedly to avoid an authoritative precedent from the House of Lords.

64 See, however, Clarkson, 'Kicking Corporate Bodies and Damning their Souls', (1996) 59 *MLR* 557 (who favours corporate liability for manslaughter).

65 Hartley, *op cit*, n 22, p 468 argues that all Community liability is no-fault liability; Curtin, *op cit*, n 13 at 709 calls it 'risk' liability.

66 *Op cit*, n 30 at 3, 9. Contrast Chayes and Handler, 'On Compliance', (1993) 47 *Int. Organisations* 175, 185-6, 204-5; Baxter, 'Enterprise Liability, Public and Private', (1978) 42 *Law and Contemporary Problems* 45, 46.

67 Cohen, 'Regulating Regulators: The Legal Environment of the State', (1990) 40 *Univ. of Toronto LJ* 213. The efficacy of tort law generally as a deterrent is controversial: see Dewees and Trebilcock, 'The Efficacy of the Tort System and its Alternatives: A Review of the Empirical Evidence', (1992) 30 *Osgoode Hall LJ* 57.

Only then can he make a rational choice to elect another course of conduct. The problem is to target the actor sufficiently closely. It is of little use, for example, to punish a Member State for non-implementation when, as is the case in Belgium, regional entities which cannot be coerced are to blame; indeed, to argue the contrary is to undercut the national constitutional order[69].

In the majority of cases, failure to implement is inadvertent. EC legislation has been widely criticised as 'voluminous, obscure, complex and inaccessible'[70]; it is EC legislation rather than German beer standards (see Brasserie) that is impure. Pleas for reform emanate from the heights of the Edinburgh European Council[71]. 'Disobedience' may come to depend on an unpredictable interpretation put on provisions by the ECJ. Hartley[72] cites examples of rulings which fall outside or run entirely counter to written texts. Fisheries experts agree that the ECJ has pursued an unexpectedly activist line over fisheries policy, the subject of the Factortame saga. The ECJ has been accused of law-making, when a Commission proposal 'became law, even though enough members in the Council (including Britain) voted against it to defeat its passage as a directive'[73] and, in promoting Community policies at the expense of the Member States, the ECJ has been accused of proceeding by 'drawing the broadest, most concrete and communautaire conclusions from provisions of the EEC Treaty which are notable for their generality and vagueness'[74]. Warner, on the other hand, points to the difficulty of the judicial task in interpreting law which may be (deliberately) vague and ambiguous[75]. If it is hard for the Court, it is harder for national draftsmen to manoeuvre within such inchoate parameters, to anticipate shifting boundaries or aberrant decisions. This point is tacitly conceded in the 'wide discretion' formula of Telecom. Not only does this vague formula point to the likelihood of a rich and nuanced jurisprudence from national courts[76] but it cuts the ground from under sanctions and deterrence arguments. Perhaps this is why the ECJ is shifting on to the high moral ground of rights.

### *B Rights-based Liability*

In a passage from Francovich not noted for its lucidity[77], it was said 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'.

Redolent of the language of rights, the Opinion of AG Tesauro in Brasserie[78] searches for a rights-based solution within the structural framework of EC law. Tesauro characterises rights-based liability as 'civilised'. He sees it as the inevitable result of the emergence of 'the state governed by the rule of law' and as representing 'a shift of emphasis, at least in the more advanced legal systems, from the conduct of the perpetrator of the damage to the rights of the injured party'.

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68 Sugarman, 'Doing Away with Tort Law', (1985) 73 *Cal. Law Rev.* 548, 564.

69 de Winter and Laurent, 'The Belgian Parliament and European Integration', (1995) 1 *J. of Legislative Studies* 75, 87. I am not arguing that the State cannot be *responsible* as it is in international law, simply that it cannot be *deterred*.

70 Burns, 'Better Lawmaking? An Evaluation of Law Reform in the European Community', paper presented to Hart Workhop, 'Lawmaking in the European Union', London, July 1996 (forthcoming); Barendts, 'The Quality of Community Legislation', (1994) 1 *Maas. J.* 101.

71 Resolution on Drafting Quality, OJ C 166 (17.6.93). And see, Declarations, 'Making New Community Legislation Clearer and Simpler', 'Making Existing Community Legislation More Accessible', 12 EC Bull. 18 (1992).

72 Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union', (1996) 112 *LQR* 95.

73 Garrett and Weingast, 'Ideas, Interests, and Institutions: Constructing the European Community's Internal Market', in J. Goldstein and R. Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change* (Cornell University Press, 1993) pp 195-6. See also Case 246/89 *Commission v United Kingdom* [1989] ECR 3125. And see, J. Farnell and J. Elles, *In Search of a Community Fisheries Policy* (Gower, 1984).

74 R. Churchill, *EEC Fisheries Law* (Martinus Nijhoff Publishers, 1987) p 45.

75 Warner, 'European Community Legislation: The View from Luxembourg', (1982) *Statute Law Rev.* 134.

76 See now, *R. v. Home Secretary ex p. Gallagher* CA (10 June 1996), the first judgment applying the new principles from a British court where the Home Secretary was held not liable for a decision taken under the Prevention of Terrorism (Temporary Provisions) Act 1989 to exclude the plaintiff from the mainland of Britain. The decision was flawed by a minor procedural error which was held insufficiently grave to establish liability. Predictably, much play was made both with the tests of 'area of legislative discretion' and 'sufficient seriousness'.

77 *Francovich*, para 33, 4.

78 Opinion, para 12. A somewhat similar conclusion, to the disadvantage of English law, was reached by Lord Wilberforce in *Hoffmann-La Roche v Trade Secretary* [1975] AC 295.

The American academic, Rosenberg[79], has suggested a 'rights-based' theory of tortious liability centred around the principle that those who benefit from an undertaking should bear a commensurate share of its burdens so that there is 'no unjustified sacrifice of some for others'. This formulation mirrors the French principle of égalité devant les charges publics (see below). It differs little from the theory of state liability constructed by Professors Cohen and Smith[80] on the basis of 'social entitlement', equality, and collective or mutual insurance. It echoes, but does not go as far as, Professor Patrick Atiyah's general theory of accident compensation based on social insurance[81]. The beauty of these theories is that they are all propounded by academics.

Far-reaching and hard to distinguish from the general welfare function of the modern State[82], they lock courts into 'tragic choices' (Calabresi's famous phrase) over the allocation of resources - a function strictly reserved in western constitutional theory for executive and legislature. The issues are not made easier by the presentation of polycentric problems as claims by 'individuals' in what Chayes terms the 'bi-polar lawsuit'[83]. The jurist Lon Fuller insisted that awarding compensation in a polycentric or 'on-going venture' moves a court infallibly from an adjudicative to an administrative function[84]. For slightly different reasons, Epstein[85] warns against compensation, both for economic loss and for invasions of constitutional rights, on the ground that they involve too great a conflict of interest:

'To give legal protection against these forms of harms is to undertake an enormous expansion of the legal system. People's sympathies in individual cases might incline many to start down this road even if they are not quite sure how far they are willing to go. But the temptation should be resisted: for these types of harms, the only correct legal response is the simple one of no compensation'.

This passage contains clues as to why a rights-based system of liability for the Community is sure to prove problematic. The genesis of EC rights in the 'four freedoms' plus the strictly delimited Community competence confines their ambit, a restriction which Article J 1(2) TEU cannot by itself dissolve[86]. With the possible exception of free movement, EC rights have emerged as primarily economic in character; indeed, I have already argued that property/economic values nourish an ideology of EC law. A grave danger necessarily arises of serious clashes of value. Judicial protection of property triggers conflict with government over valid economic and welfare policies - a common experience where property rights are entrenched or treated as 'fundamental' and a problem of droits acquis which may well escalate as the pendulum swings away from privatising conservative regimes. Property was, for example, a late entrant to the European Convention on Human Rights (ECHR), by reason of concern that it would fetter programmes of nationalisation and public works. Compensation for expropriation of property, a fixed point in European legal systems (see below), had to be written in subsequently by the judges[87]. The Strasbourg Court has in practice shown itself circumspect, permitting the nationalisation of property subject to statutory compensation and allowing a wide margin of appreciation to the State, prohibiting only 'manifest unfairnes'[88].

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79 Rosenberg, 'The Causal Connection in Mass Exposure Cases: A Public Law Vision of the Tort System'. (1984) 97 *Harv.Law Rev.* 851 at note 107.

80 Cohen and Smith, 'Entitlement and the Body Politic: Rethinking Negligence in Public Law', (1986) 64 *Can. Bar Rev.* 1; Cohen, 'Responding to Government Failure', (1995) 6 *National J. of Constitutional Law* 23.

81 See P. Cane and P.S. Atiyah, *Accidents, Compensation and the Law* (Weidenfeld and Nicolson, 6th ed, 1993).

82 See Bishop, 'The Rational Strength of the Private Law Model', (1990) 40 *Univ. of Toronto LJ* 663; Deswarte, 'Droits sociaux et Etat de droit', (1995) *RDP* 951.

83 Chayes, 'The Role of the Judge in Public Law Litigation', (1976) 89 *Harv LR* 1281.

84 Cited in Allison, 'The Procedural Reason for Judicial Restraint', [1994] *Public Law* 452, 459. See also Fuller, 'The Forms and Limits of Adjudication', (1978) 92 *Harv. Law Rev.* 353.

85 R. Epstein, *Simple Rules for a Complex World* (Harvard University Press, 1995) p 109.

86 See, de Burca, 'The Language of Rights and European Integration', in J. Shaw and G. More, *New Legal Dynamics of European Union* (OUP, 1996).

87 Frowein, 'The Protection of Property', in R. St J. MacDonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, 1993). Note that the Herman Committee wanted a protected property right based on the 'takings' clause: see, Title I, Article 7, Clause J of the Draft Bill of EC Rights, Draft Report on the Constitution of the European Union, September 1993, DOC EN\pr\234\234101 PE 203,601/rev.

88 *Lithgow and others v United Kingdom* [1986] 8 EHRR 329.

Lenaerts warns[89] against introducing 'rights discourse' into the Community; rights might then 'no longer be handy tools for integration but vehicles of division and disintegration'. The warning is strengthened if rights adjudication arises obliquely, a process known to public lawyers as 'collateral review'[90]. The point is particularly apposite to cases where economic interests (as we shall see, only occasionally characterised as rights) clash with rights perceived as more 'fundamental', more central to, or typical of, human rights discourse. It is not that property is not valued; attitudes to taxation or the rise of consumerism show how far, in a secular and mercenary age, this is the case. It is just that, when they come into conflict with rights of personality, they frequently prove to have a weak hold on the public imagination. One reason may be because they seem to pit powerful, vested, economic and commercial interests against an individual, human and moral dimension. The dilemma is aptly symbolised in the titles to several comments on the 'Irish abortion case'[91]. Here the discreet oblique ruling of the ECJ so offended Irish sensibilities that it led directly to Treaty amendment in Protocol No. 17; What would the effect have been had an opposite, though perfectly plausible, ruling been enhanced by a finding of liability for loss of profit suffered by foreign abortion clinics? This is nonetheless the Lomas scenario, where deep resentment will be generated at the (perceived) subordination of animal welfare to EC economic policy [92].

Ample support for circumspection comes from the practice and experience of constitutional courts. Even the Strasbourg Court of Human Rights, an international tribunal without mandatory remedies, has shown itself circumspect with compensation, except where this is the only adequate remedy; it has restricted the ambit of compensation and requires a previous finding of a violation before compensation is awarded[93]. There is little trace of the use by federal Supreme or Constitutional Courts of damages as a sanction for state/provincial non-compliance with federal government law or policy. The US Supreme Court frowns on the use of damages as a remedy for unconstitutional activity[94]. The 'no taking' principle, which protects private persons against expropriation of property, is accorded constitutional status by the Fifth Amendment, yet is subject to a notably restrictive interpretation through concern that public development could otherwise be stultified[95]. New powers under s. 24 (1) of the Canadian Charter of Rights 1982 to provide remedies have attracted the comment that 'the task of defining the scope of damages for constitutional wrongs involves careful calibration of a wide range of considerations and factors' and is likely to beget 'a complex web of principles and rules'. They have in practice been treated with reserve by the Canadian Supreme Court[96]. The compensation function of the German Constitutional Court (see below) has brought conflict with the civil courts, with whom jurisdiction in state liability cases is shared[97].

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89 Lenaerts, 'Fundamental Rights to Be Included in a Community Catalogue', (1991) 16 *EL Rev*. 367, 389-40. And see Bellamy, 'The Constitution of Europe: Rights or Democracy?', in R. Bellamy, V. Buffachi and D. Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation, 1995).

90 The warning has seldom been better conveyed than per Lord Diplock in the celebrated English decision of *Home Office v Dorset Yacht Co. Ltd.* [1970] AC 1004.

91 Case 159/90 *SPUC v Grogan* [1991] ECR I-4685. See Coppel and O'Neill, 'The European Court of Justice: Taking Rights Seriously', (1992) 12 *Legal Studies* 227; Phelan, 'Right to Life of the Unborn v. Promotion of Trade and Services: The European Court of Justice and the Normative Shaping of the European Union', (1992) 55 *MLR* 670; O'Leary, 'The Court of Justice as a Reluctant Constitutional Adjudicator: An Examination of the Abortion Information Case', (1992) 17 *EL Rev.* 138.

92 Wilkins, 'Banishing Animal Cruelty in Europe', (1992) 2 *European Voice* 14 blames the Commission for 'not doing much about' animal welfare. See also Simmonds, 'The Role of the European Community', in R. Ryder (ed), *Animal Welfare and the Environment* (Duckworth, 1992). The House of Commons Agriculture Select Committee, *Animals in Transit* (HC 45, 1990-I) p 7, notes 'the people's fears' of domination by Brussels on this issue. See also, *R v Coventry County Council ex p. Phoenix Aviation* [1995] 3 All ER 37 where, significantly, both the National Farmers Union and Compassion in World Farming asked and were permitted to intervene.

93 D. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995) pp 215-6; Mas, 'Right to Compensation under Article 50', in MacDonald, Matscher and Petzold, *op cit*, n 87.

94 J. Mashaw, R. Merrill, P. Shane, *Administrative Law: The American Public Law System, Cases and Materials* (West Publishing, 3rd ed, 1992) p 992 ff; Katz, 'The Jurisprudence of Remedies: Constitutional Legality and Law of Torts in Bell v. Hood', (1968) 117 *U. of Pennsylvania Law. Rev*. 1.

95 Michelman, 'Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law', (1967) 80 *Harv. LR*. 1165. Significantly, Ely Jr., 'That Due Satisfaction May Be Made: The Fifth Amendment and the Origins of the Compensation Principle', (1992) 36 *Am. J. of Legal History* 1 traces the origins of the 'no taking' principle to seventeenth-century *legislative* practice.

96 Mullan, 'Damages for Violation of Constitutional Rights - A False Spring?', (1995) 6 *National J. of Constitutional Law* 105 (citations from 126). *Shipton v A-G* [1994] 3 NZLR 667 noted Smillie (1995) 111 LQR 209 is apparently exceptional in creating a 'new' constitutional tort of breaching the New Zealand Bill of Rights but turns out on examination to concern the ancient, common law tort of wrongful arrest.

97 Rufner, 'Basic Elements of German Law on State Liability', in Bell and Bradley *op. cit*. n. 43, pp 260-2. But see Schefeld, 'Appunti sulle consequenze finanziari della giurisprudenza costituzionale in Germania', in Corte Costituzionale, *Le sentenze della Corte Costituzionale e l'Art. 81, U.C., della Costituzione* (Giuffre, 1993) p 63. The dispute over the constitutionality of the *Staatshaftungsgesetz* (state liability law) centred on the question of compensation for invasion of constitutional rights: see Decision 19 October 1982, *Entscheideungen,* vol 61, p 149.

In Italy, where Article 81 of the Constitution encapsulates the rights of government and parliament to control public expenditure, even the oblique effects of judicial review decisions on public finances have been judicially recognised and are a matter for study and concern; at a judicial colloquium, Zagrebelsky advised the Court to eschew the area, which it had neither the resources nor competence to tackle[98].

At first the ECJ showed similar caution. In Defrenne v Sabena[99], the first ruling that the discrimination provisions of Article 119 EC were directly effective, it employed the tactic of 'prospective overruling', enabling governments and employers in the Member States to avoid huge sums in retrospective compensation. Later, in Marshall (No 2)[100], the ECJ invalidated a statutory limitation on damages in gender discrimination cases, precluding governments from imposing prior restraints on the quantum of compensation (arguably both a legitimate and sensible response from government[101]). The full financial effect was felt in the UK in a series of actions brought under EC law by female members of the armed forces dismissed because of pregnancy, prior to, but in clear breach of, the Court of Justice's ruling in Dekker[102]. Marshall necessitated enhanced compensation; by 1994, 3,918 claims had been disposed of and £16 million paid out in compensation, rising to £55 million by 1996[103] - no mean sum even in the perspective of a state welfare budget! It is not wholly irrelevant that the affair attracted a great deal of unfavourable publicity; war veterans' organisations reminded the public that young women who had chosen to rear a family, and many of whom had found new employment, were receiving much greater sums in damages than the pensions awarded to seriously incapacitated war victims or their widows. And since the Treaty covers only gender equality, the decision had the incidental effect of introducing a grave inequality into UK law, as the ruling did not bite in race discrimination cases. This injustice, subsequently removed by legislation, points to a reason (discussed further in Section II) why EC liability doctrines are likely to impact on domestic systems, unable to resist pressure to level domestic law up to the standard set by Eurorights. Conversely, it suggests that the ECJ would have been wise to seriously consider adopting the American version of prospective overruling, where the new rule bites only on cases arising after the judgment which establishes it. This prudent course of action, expressly rejected in Brasserie, is presently high on the political agenda (below).

Rulings with serious financial consequences may produce a serious 'whiplash' effect, a point made by Craig after Francovich[104]. Again, unfavourable reactions to Article 119 jurisprudence is rumoured to have some bearing on UK reluctance to sign up to the Social Chapter. Meehan believes that[105]:

'By making social policy more expensive (...) the Court may or may not have politicised itself but it has politicised the policy field: or at least moved it from the realm of low politics, where according to all but the most recent analyses, agreements are easy to reach, to the realm of high politics where they are not'.

A sensible 'rights-based' response to the problem of Francovich would have been to fashion a discrete remedy at EC level and ideally administered by the CFI for breach of a right protected by EC law. Such a solution would more accurately reflect the wording of Article 178 EC, which speaks of 'compensation for damage'. It would acknowledge a tradition which stretches back, according to Judge Edward[106], to the Aquilian concept of 'uncovenanted loss - loss for which equity demands compensation as opposed to loss which must be regarded as an ordinary risk of commercial life'. The principle is found in every Member State: the provisions of Articles 14 and 34 of the German Grundgestz or Basic Law, for example, bestow on the Constitutional Court compensation powers for expropriation of property and for 'violation of

98 Zagrebelsky, 'Problemi in ordine ai costi delle sentenze costituzionali', in *Corte Costituzionale*, *op cit*, n 97, p 110.

99 Case 43/75 [1976] ECR 455.

100 Case 271/91 *Marshall v SW Hampshire Area Health Authority (No 2)* [1993] 3 CMLR 293, 3 WLR 1054 noted Curtin, Case Law, (1994) 31 *CML Rev.* 631. In response to *Marshall*, the statutory limit was removed by SI 1993/2798.

101 See, *The Doctrine of the Shield of the Crown*, Report by the Senate Standing Committee on Legal and Constitutional Affairs (Australian Federal Government, 1992) p 41.

102 Case 177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassen* [1990] ECR I-3941.

103 See *R v Defence Secretary ex p Leale and Lane and the EEC* (unreported), noted Fredman (1995) 111 *LQR* 220, 222. The legislation also imposed a statutory time limit, invalidated by Case 208/90 *Emmott v Minister of Social Welfare* [1991] ECR I-4869.

104 Craig, '*Francovich*, Remedies and the Scope of Damages Liability', *loc. cit*. n 17.

105 E. Meehan, *Citizenship and the European Community* (Sage, 1993) p 140.

106 Edward, 'Is There a Place for Private Law Principles in Community Law?', in H.G. Schermers, D. Curtin and T. Heukell, *Institutional Dynamics of European Integration* (Martinus Nijhoff Publishers, 1994) p 122.

obligation in the exercise of public office'[107]. The French principle of égalité devant les charges publics is essentially equitable in character[108]. Developed by the Conseil d'Etat in an exceptional nineteenth-century case of Act of State, where the Conseil openly admitted that informal settlement was really the appropriate remedy[109], the maxim has since been utilised in a handful of cases as a category of last resort. Its equitable character is underlined by the requirement of special damage or hardship (dommage anormal)[110]; in contrast to true liability, the emphasis lies on the subject's loss rather than the actor's fault or the unlawfulness of the act. Applied recently in a well-known case (Sté Alivar) involving failure to correctly transpose an EC directive, the principle may have led the ECJ into temptation. According to critics, it illustrates one of the least attractive features of 'collateral review': it effectively excludes any 'review' of fault or legality, allowing instead the French State to 'purchase illegality'[111]. For reasons discussed further in Section II[112], this is a major problem of state liability.

The adjective has in any case already been applied to the ECJ's Article 215 jurisprudence by Schermers[113]:

'The way the formula has been applied comes very close to ex aequo et bono, the Court of Justice creating the law on non-contractual liability in the way it considers best...'

An equitable solution would help to explain the striking disparities in the jurisprudence; equity is not necessarily bound by precedent.

## III Changing the Fault Lines

In his Opinion in Lomas, AG Leger stressed the separateness of Community liability from that of the Member States[114]. The motive was partly a wish to preserve the Court's hitherto restrictive jurisprudence under Article 215 EC, more especially in cases concerning general acts of a legislative character[115]. Like Leger, Steiner postulates Member State liability for wrongful transposition of directives on the ground that, 'in implementing these rights into national law both the legislative and the executive bodies of Member States are acting in an essentially administrative capacity'[116]. Yet she strangely goes on to exempt the Community from liability for cryptic reasons of 'policy considerations'!

We can dispose simply of this point, more relevant to the subject-matter of the previous section. The possibility of joint and concurrent liability existed long before Francovich[117]; it is implicit in provision for joint EC/Member State programmes, in the prevailing pattern of indirect administration and in the growth of executive agencies. Several commentators think that the Community should and could be vicariously

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107 See, Rufner, 'Basic Elements of German Law on State Liability', in Bell and Bradley, *op. cit*. n 43, p. 249. The jurisdiction is not exclusive. See also, the 'taking' principle (above).

108 Amelsek, 'La responsabilité sans faute des personnes publiques d'apres la jurisprudence administrative', in *Recueil d'etudes en hommage a Charles Eisenmann* (Editions Cujas, 1975) p 233; Gilli, 'La "responsabilite d'equite" de la puissance publique', Dall. 1971 chr. 125. And see, P. Delvolve, *Le principe d'égalité devant les charges publiques* (LGDJ, 1962).

109 CE 30 Nov 1923 *Couitéas*, Sirey 1923 III p. 57 n. Hauriou concl. Rivet.

110 For fuller exposition, see, notes under: CE 1 January 1938 *Sté anonyme des produits laitiers 'La Fleurette'* Rec 25; CE (Ass) 30 March 1966 *Cie générale d'energie radio-éléctrique* Rec 257, RDP 1966.774 concl. Bernard; CE (Ass) 23 March 1984 *Min du Commerce c/ Sté Alivar,* 40 AJDA 1984.396 n. Genevois, in M. Long, P. Weil, G. Braibant, P. Delvolvé and B. Genevois, *Les grands arrets de la jurisprudence administrative* (Sirey, 9th ed, 1990).

111 CE (Ass) 23 March 1984 *Min du Commerce c/ Sté Alivar,* 40 AJDA 1984.396 n. Genevois. For the same reason, the case is heavily criticised by Green and Barav, *op cit*, n 12. Concerned by the stringent conditions of liability, D. Simon, AJDA 1993.235, 242 queries whether no-fault liability amounts to an effective protection of Community rights.

112 And see Harlow, 'State Liability: Problem Without a Solution', (1996) 6 *National Journal of Constitutional Law* 67.

113 'Introduction' in Schermers, Curtin and Heukell, *op cit*, n 106, pp.x-xi.

114 *Lomas*, Opinion paras. 101,2 and 142,3. In *Brasserie*, AG Tesauro is more circumspect, calling the argument 'not completely baseless' (paras. 61, 67).

115 For an overview, see Hartley, *op cit,* n 22, pp 470-507. And see Bronkhorst, 'The Valid Legislative Act as a Cause of Liability of the Communities', in Schermers, Curtin and Heukell, *op cit*, n 106, p 13.

116 *Op cit*, n 30, 3, 16 (emphasis added). She is citing AG Mishco, *Francovich* para. 47, describing the function of national legislatures in implementing directives as 'similar to an administration under an obligation to implement a law'.

117 Hartley, *op cit*, n 22, pp 498-507 and *Idem*, 'Concurrent Liability in EEC Law: A Critical Review of Cases', (1977) 3 *EL Rev*. 249.

liable for the acts of some national agencies[118]. The likelihood is that a door half-open to arguments of agency and vicarious liability has been kicked wide open. As noted, language used in Francovich pointed in this direction and the linked liability formula of Brasserie and Schoppenstedt renders the nexus more visible. Even recursory actions by Member States are now not beyond the bounds of possibility[119]. Member States found liable in damages might seek to join regions or local authorities or turn against the Commission or EC agencies in actions for negligent advice. A real anxiety may underlie the Court's restrictive ruling in Telecom.

Anxiety is visible too in the persistent characterisation of Francovich as a rule of state liability[120], the emphasis being once again on divisibility. The fact that several of the cases (Francovich, Brasserie, Factortame) involve the State acting in a legislative capacity underlines the special character of the liability; the implication is that private bodies are in this respect impotent, hence incapable of incurring this type of liability. However, this is to ignore the way in which legal systems function and precedent expands liability.

Although courts perceive the legal system as their special preserve and within their control, law is also consumer-driven. Perhaps because of their previous life as practitioners, British judges are extremely alert to this pressure. Reference is constantly made to the danger of 'floodgates', a metaphor for opening the legal system to a torrent of claims[121]. Often derided by academics, this perspective is both realistic and sensible.

First observed in the United States, litigation mania is now well-advanced both in the United Kingdom, where legal aid and the growth of third-party insurance have acted as incentives, and on the continent of Europe, especially Germany, where litigation is facilitated by the practice of legal liability insurance[122]. The modern response to a transient feeling of annoyance is to telephone one's lawyer. We have seen the rapid rise of the mass tort action, while consumer litigation, medical malpractice suits, actions against the police have all multiplied. In child abuse cases, public authorities face suits from children, parents and foster parents; pupils and teachers regularly sue education authorities, while sporting events too often end in actions for assault and battery. However inefficent it is shown to be, the tort system has to some extent become an alternative to first-party insurance[123]. Civil liability has developed into a crude system of loss distribution in which the aim is to throw losses, especially economic, on to someone else's shoulders. It is also increasingly victim-oriented. In contract, the maxim caveat emptor is disappearing; in tort, there is a distinct feeling that someone who suffers a loss 'ought' to receive compensation for it.

Doctrinally, the change is reflected in terms of a 'right' to security[124] or in efforts to explain all tortious liability in terms of the mutual assurance principle (above). The case law typically brings concessions to the risk principle, a form of enterprise liability whereby enterprises supposedly bear the cost of accidents caused by their activities[125]. We see too liability extending to new forms of loss: beyond physical to

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118 Scoffoni, 'Le contentieux des organismes nationaux chargés en France de l'application des politiques communautaires', (1990) 26 *Cahiers de droit européenne* 574, 599 ff. Oliver, 'Joint Liability of the Community and Member States', in Schermers, Curtin and Heukell, *op cit*, n 106, pp 125, 128 was prophesying potential conflict of laws problems but noted procedural obstacles.

119 Oliver, *op cit*, n 118, pp128-9.

120 Opinions, *Brasserie* and *Lomas*.

121 H. Rasmussen, *Thirty Years of Community Law* (European Commission, 1983) p 185 ff. asserts that too liberal damages rules had to be curtailed after a 'flood' of collateral review cases in the ECJ: see now, C T-167/94 *Detlef Nolle v Council* (18 August 1995). See also Jones, 'The Non Contractual Liability of the EEC and the Availability of an Alternative Remedy in the National Courts', (1981) *Legal Issues of European Integration* 1, 3 (noting the ECJ's dislike of 'collateral review' via Arts 178 and 215).

122 See Galanter, 'Law Abounding: Legalisation around the North Atlantic', (1996) 55 *MLR* 1 and references there cited; Markesinis, 'Comparative Law - A Subject in Search of an Audience', (1990) 53 *MLR* 1. For what is known about litigiousness, see Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society', (1983) 31 *UCLA Law Rev*. 4; Kritzer, 'Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases', (1991) 18 *Law and Soc. Rev*. 400.

123 On the link between insurance and tort law, see now Stapleton, 'Tort, Insurance and Ideology', (1995) 58 *MLR* 820 and references there cited.

124 G. Cornu, *Etude comparée de la responsabilité délictuelle en droit privé et en droit public* (Editions Matot-Braine, 1951) p 271.

125 See the classic piece by Calabresi, `Some Thoughts on Risk Distribution and the Law of Torts', (1961) 70 *Yale Law Journal* 499. On the inefficiency of this theory when applied to the state see Cohen, 'Regulating Regulators: The Legal Environment of the State', (1990) 40 *Univ. of Toronto LJ* 213, 245 ff.

psychological injury thence, in medical cases, to loss of a chance of recovery; beyond property to economic loss, thence to loss of profit and speculative loss of profit or a chance to make profit. Schuck[126] has conveniently epitomised typical doctrinal developments:

'Courts have enlarged the concept of 'action,' a traditional prerequisite for liability, to encompass inaction. In this way, they have placed individuals under a legal duty to help strangers in many situations, thereby hauling new kinds of relationships (and non-relationships) into the net of legal liability. They have accorded legal protection to new categories of interests (...). They have extended the domain in time and space over which defendants' duties apply by imposing responsibility for risks that eventuate long after dependents acted and, in some toxic tort cases, for risks that were scientifically unknowable at that time. They have accepted relatively weak chains of causation (...). They have routinely ignored or overridden express contractual limitations on tort liability, as well as implicit agreements by parties to allocate risk between themselves. They have abandoned or severely curtailed longstanding charitable, governmental, and familial immunities from tort liability'.

Doctrinal developments of this kind reflect perplexity over the role of the civil liability system in modern societies, but also growing pressure upon it. By making insulation and separateness difficult, this bears on Francovich. And when rights under EC and national law get out of kilter, we have a further catalyst for harmonisation. This has already led to a major change in the English law of restitution[127] while, in the light of Brasserie, the French Conseil d'Etat is currently considering lifting its restriction of 'abnormal loss' in égalité cases.

Variant rules and standards of liability can also be exploited by litigants in a sophisticated process of 'forum-shopping' for the most favourable outcome. Forum-shopping is especially tempting in the multinational EC legal system, where the typical litigant is a multinational enterprise with access to the best legal advice and experience of the American legal system[128]. It can also be used to good effect inside national legal systems, with the public/private divide a ripe target. A single illustration can make the points succinctly.

The affair of 'contaminated blood' crosses national frontiers and, like the earlier Thalidomide tragedy, has given rise to litigation in several European countries. The problem arose after blood used in transfusions was contaminated by the HIV virus. It took a period of time for scientific knowledge to identify the phenomenon and devise tests to eliminate it. In consequence, slic/private' distinction unreliable as a guide to liability. The process of blurring the boundary plus the effects of parallelism leave the State in a vulnerable position at the end of long liability chains.

In the Community, we have seen that the Commission is heavily engaged in consumer protection and the Products Liability Directive (EEC 85/374) indicates its concern for consumer protection; Dillenkofer shows, however, that both State and commerce play leading roles. The Community has growing responsibilities in the field of health and safety and both the Commission and the new Medicines Evaluation Agency are involved in regulation of the pharmaceutical industry, though parallel control systems exist at national level. In a regulatory capacity, it could easily have been implicated in the affair of 'contaminated blood'.

At the core of Francovich liability, however, lies the thorny issue of economic loss, problematic because - to borrow a famous phrase from the American Justice Cardozo - it raises the spectre of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'. It is not fortuitous that the property concept has not been extended to embrace administrative law's 'new property' of licences, welfare benefits and franchises for which Charles Reich long ago claimed the law's protection [129].

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126 Schuck, 'The New Ideology of Tort Law', (1988) 92 *The Public Interest* 93.

127 *Woolwich Equitable Building Society v Inland Revenue Commissioners (No 2)* [1993] AC 70 noted Hill, 'Restitution from Public Authorities and the Treasury's Position: *Woolwich Equitable Building Society v IRC'* [1993] *Public Law* 856. For the EC rule, see Case 199/82 *San Giorgio* [1983] ECR 3595.

128 See Rawlings, 'The Euro-law Game: Some Deductions from a Saga', (1993) 20 *J. of Law and Society* 309.

129 Reich, 'The New Property', (1964) 73 *Yale LJ* 733.

Sensibly, many systems look askance at speculative losses, such as planning blight, loss of business through public works or other loss caused through planning controls[130]. The ECJ's own parsimony is notorious. In Kampffmeyer[131], where the Commission had authorised safeguard measures on maize importation which were held unlawful, a grain dealer applied for licences and was wrongfully excluded. The Community was held liable in principle but the ECJ confined damages to loss of profits for contracts already concluded, excluding liability for speculative contracts. Noting the fact that the applicants had lodged 'an abnormally large number of applications for import licences' - they were, in other words, speculating on a known risk and had 'avoided any commercial risk to themselves' - the ECJ awarded only 10 per cent of the loss of profits.

In operating the Schoppenstedt formula, the ECJ has also shown awareness of the character of its clientele, using its powers of compensation so parsimoniously that only eight successful outcomes are recorded. In the CNTA case[132], where an applicant requested compensation for changes in the exchange rate, the Court remarked astringently that 'the system of compensation cannot be considered to be tantamount to a guarantee for traders against the risks of alteration of exchange'. The exceptional case might be if a given system were to mislead traders into not covering the risk for themselves.

Judicial caution here is both correct and understandable. Onerous compensation provisions seriously hamper the ability of public authorities to engage in public works and, as argued in the last section, they limit measures of economic planning and impinge on core governmental functions. In a commercial environment, the liability/no-liability equation is best calculated in terms of the transaction costs which enterprises have to bear. As with other transaction costs, attempts will be made whenever possible to transfer losses to other parties. Once again, the State's apparently inexhaustible resources are an irresistible magnet for litigants. As Epstein warns, economic losses should be left to the market, since losses and gains from the economic system are too uncertain; arguably, indeed, they form part of the market. And Schermers[133] argues that the victims of wrongful acts committed by the Community are often traders who are well aware of Community competences. The risks they take in dealing with the Community are 'normal' and 'the loss caused by such errors is part of business and compensated by the prices charged'. The challenge is to devise solutions which force these powerful actors to carry their own transaction costs. To translate this into the language of economists, a rational no-liability rule combines with a need to keep public and private liability in step. The door opened in Francovich should have been firmly slammed!

A less negative way to view 'levelling up' would be as a tentative step towards harmonisation. But if, as van Gerven predictably believes[134], harmonisation of liability rules is a desideratum, then we need to go about it more consciously. It is notable that the United States, whose legal systems are relatively homogeneous, have not proceeded beyond a voluntary Restatement. Again, it is significant that, when the Commission proposed an EC harmonisation of liability for non-transposition of directives, the proposal was declined[135].

The legal systems of the Member States differ in important respects[136]. There is the conspicuous common law/civil law divide. The public/private boundary falls in different places: in some Member States,

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130 See, for Italy, Clarich, 'The Liability of Public Authorities in Italian Law', Bell and Bradley, p. 245; Caranta, *op cit*, n 12, 272. For Germany, Rufner, in, Bell and Bradley, *op. cit*. n 43, p 249. For Sweden, see Kleinemann, 'The Indemnity Liability of the Public Legal Entity - Public-Law Regulation with Private Law Means' [1992] *Scandinavian Studies in Law* 145. For the US, see the 'taking' cases, *supra* n 95. For the UK, see P. Cane, *Tort Law and Economic Interests* (Clarendon Press, 1991).

131 Joined Cases 5, 7, 13-24/66 *Kampffmeyer v Commission* [1967] ECR 245.

132 Case 74/74 *CNTA v Commission* [1975] ECR 533.

133 Schermers, Curtin and Heukell, *op cit*, n 106, p xi.

134 Van Gerven, 'Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe', (1995) 1 *Maas. J.* 6; *Idem*, 'The Case-law of the European Court of Justice and National Courts as a Contribution to the Europeanisation of Private Law', (1995) 3 *Eur. Rev. of Private Law,* pp 367-378. And see, Hartlief, 'Towards a European Private Law? A Review Essay', (1995) 1 *Maas. J.* 166, 175, discussing the possibility of a Restatement.

135 At Maastricht: see, EC Bull, Supp 2/91. See also the views of Member States argued by Germany, the Netherlands and Ireland before the ECJ in *Brasserie*, Opinion para. 24.

136 Fromont, 'La Justice Administrative en Europe: Convergences', in, G. Teboul *et al* (eds.), *Mélanges René Chapus* (Montchrestien, 1992), convincingly argues that the latter are converging. But see Legrand, 'European Legal Systems Are Not Converging', (1996) 45 *ICLQ* 52.

all liability is treated under private law, in others a special, public law system applies, others again are mixed. In some administrative law systems damages play a central role, while others prioritise mandatory remedies. A few may favour collateral review, yet for a majority it poses serious problems, involving a transfer of the key powers of review from public to private tribunals[137]. To disrupt one element may seriously weaken the very system of national law on which the ECJ relies for enforcement. We find too that, although fault provides the basis of non-contractual liability in all European legal systems[138], a few legal systems, notably France, have moved far towards strict liability[139]. In the Community, this trend is illustrated by several directives, notably EEC 85/374 concerning liability for defective products or the new environmental directives, designed to 'make the polluter pay'. Or stepping across the contract/tort boundary, we find directives on the protection of consumers in contract law[140]. As Joerges, speaking of intervention by the Community legislator, explains[141]:

The compulsory incorporation of 'foreign' concepts (...) affects deeper structures of private law systems. Every legal concept, every dogmatic construction, every line of legal argument operates in pre-determined traditional contexts. Legislative acts of national parliaments remain rooted in these contexts, even when they are perceived as destructive interventions. Moreover, they are still subject to control by case law, which is formulated with the objective of maintaining coherence within private law.

To probe this a little more deeply, law is a cultural artifact[142] rooted in a shared community experience and reflecting the community's cultural identity and ethical values. Unhappy law reform can jar with societal and constitutional arrangements. Law also embodies political beliefs - views on distributive justice or property expropriation - and structures - the welfare state or constitutional adjudication. EC law, however, is particularly the culture of an elite group[143]. This is why the clash of cultures through interference with tradition may produce a particularly strong 'whiplash' effect. Not only national courts but also national legislatures have conveyed precisely such warnings[144]!

**IV Conclusion: Misreading the Rule of Law**

The Rule of Law is a noble ideal but one which, unrestrained, is capable of degenerating into an ideology of law courts. In some legal cultures, the ideology has taken such a strong hold that it can overwhelm competitors[145]; Article 6 ECHR, which postulates 'an independent and impartial tribunal' for the determination of civil rights and obligations, manifests this court-centred ideology. I have tried to show how, in locking the Community into national systems of liability, the ECJ may be creating an illusion of remedy where few remedies are in practice found. Factortame is an illustration of the 'Eurosaga' or litigation marathon[146], in which the outcome seldom justifies the expenditure of time and resources. Yet

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137 I owe this point to Professor Cassese. Italy is particularly affected, see Clarich, *op cit*, n 138; Daniele, 'Après l'arret Granital: Droit communautaire et droit national dans la jurisprudence récente de la cour constitutionnelle', (1992) 28 *Cahiers de droit européenne* 1; Gaja, 'New Developments in a Continuing Story: The Relationship between EEC Law and Italian Law', (1990) 27 *CML Rev.* 83. A variant of the problem arises in Luxembourg and Belgium.

138 Edward, *op cit*, n 106, p 122.

139 H. Mazeaud *et al*, *Lecons de Droit Civil*, Vol. II, *Obligations: Theorie generale*, (Montchrestien, 8th ed, 1991) p 420. For an English language explanation for Germany, see B. Markesinis, *The German Law of Torts, A Comparative Introduction* (Clarendon Press, 2nd ed, 1990). See also, Caranta, *op cit*, n 2 at 718.

140 EEC 93/13 Directive on Unfair Terms in Consumer Contracts. See Collins, 'Good Faith in European Contract Law', (1994) 14 *Oxford J. of Legal Studies* 229.

141 Joerges, 'The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines - An Analysis of the Directive on Unfair Terms in Consumer Contracts', (1995) 3 *Eur. Rev. of Private Law* 175, 183.

142 Nelken, 'Disclosing/Invoking Legal Culture: An Introduction', (1995) 4 *Social and Legal Studies* 435; Collins, 'European Private Law and the Cultural Identity of States', (1995) 3 *Eur. Rev. of Private Law* 353.

143 Cappelletti, 'Introduction', in M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (Sijthoff, 1978).

144 Many examples are recorded in *Working Papers* for the project *The European Court and National Courts: Doctrine and Jurisprudence: Legal Change in its Social Context* (directed Slaughter/Shapiro/Stone/Weiler) EUI RSC, 1995, especially the German report by J. Kokott. See also Voss, 'The National Perception of the CFI and the ECJ', (1993) 30 *CML Rev.* 1120, 1133. And see below.

145 See, Blair, 'Law and Politics in West Germany', (1978) 26 *Political Studies* 348, 352. And see, Rufner, in Bell and Bradley, *op. cit*., n 43, p. 252: 'The idea that there could be any state activity which may not be challenged in court is alien to German law'. See also van Dijk, 'Access to Court' in Macdonald, Matscher and Petzold, *op cit*, n 87, p 379 arguing that 'effective judicial control' should be accepted as an implication of the Rule of Law.

146 See for explanation, Harding, *op cit*, n 29, 105.

we know that the ECJ judgment in Factortame (No 4) provoked further writs in suits worth many millions of pounds. Is this the sort of society we want? As Schermers puts it[147]:

'All citizens profit from an orderly society and it seems justified that they may be required to make sacrifices for this general benefit (...). To a certain extent such sacrifices are normal and are made without compensation (...). In the United States of America it is quite normal to sue (...) whilst in Europe this is usually impossible. The American approach leads to an avalanche of lawsuits involving great expenditure. If we look at the whole field of liability, including private parties, if we consider the extremely high insurance premiums which must be paid by those who are sued, such as doctors, then it seems clear that we prefer the European system in which suits for liability are more exceptional'.

Article 13 ECHR, on the other hand, postulates only an 'effective remedy before a national authority'[148]. In many societies, claims for compensation are recognised which are not judicially enforceable. In the United Kingdom, for example, the practice of regular ex gratia compensation antedates the arrival of state (Crown) liability by some decades[149]. Today the rules are enforced through the parliamentary ombudsman, who has recently presided over regularisation of the practice[150]. Significantly too, he has just successfully disposed of a forerunner to the developing BSE crisis[151]. Similar practices exist in other countries: the Scandanavian countries are known for their strong ombudsmen[152] and the Dutch have a long tradition of administrative justice[153]. Perhaps this is a function for the European ombudsman? With its backlog problems, the ECJ should show more interest in alternative dispute resolution. By focusing on procedure rather than dogma, it could encourage effective remedies in a pluralist cultural context, playing to national strengths.

The Rule of Law is a great ideal; it must be remembered, however, that its maturation in modern constitutional theory took place during a period before the flowering of fully representative government[154]. Unrestrained, it is capable of blocking democratic evolution. AG Leger has described judicial enforcement as supporting and advancing the integration of Europe regardless of the uncertainties of European politics[155]. Is this either true or desirable?

The Community is a complex, culturally diverse, political entity, whose exacting functions are difficult to complete. It is inevitable that policies are hard to agree upon. Behind Factortame lies a sorry history of depleted fish stocks, decaying traditional communities and national quotas under strain from 'quota hopping'[156]; as we have seen, views on animal welfare, which underlie Lomas, differ significantly and are

147 'Introduction', in Schermers, Curtin and Heukell, *op cit*, n 106, p xii.

148 For the somewhat complex principles applied in the interpretation of this article, see, Harris, O'Boyle and Warbrick, *op cit*, n 93, pp 449-458.

149 See, C. Harlow, *Compensation and Government Torts* (Sweet & Maxwell, 1982).

150 The First Report of the Select Committee on the Parliamentary Commissioner for Administration, 'Maladministration and Redress', HC 112 (1994) contains a codification of practice available publicly.

151 'Compensation to Farmers for Slaughtered Poultry' HC 519 (1992-3). No EC law point arose.

152 On the ombudsman as an effective remedy, see *Leander v. Sweden* (1987) 9 EHRR 433, where the point I am making in the text is reflected in the Court's finding that the ombudsman's opinions 'command by tradition great respect in Swedish society and in practice are usually followed'. The Court has also ruled, however, that complaint to an ombudsman does not amount to an 'effective domestic remedy', at least for purposes of exhaustion of remedy: Application 11192/84 *Montion v France,* 52 DR 227 (1987).

153 Verhej, 'Dutch Administrative Law after Benthem's Case', [1990] *Public Law* 23; *Benthem v Netherlands* (1985) 8 EHRR 1. See also, the Netherlands Report (M. Claes and B. de Witte) in *The ECJ and National Courts* project.

154 Thus Montesquieu (*L'Esprit des Lois*, 1748), Hamilton, Madison and Jay (*The Federalist Papers*, 1787-8), Rousseau (*Contrat Social*, 1762) and Dicey, (*Introduction to the Study of the Law of the Constitution*, 1885) all wrote before universal suffrage had been attained. See further, Harlow, 'Power from the People? Representation and Constitutional Theory', in P. McAuslan (ed.), *Law Legitimacy and the Constitution* (Sweet & Maxwell, 1985) p 62; P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America*, (Clarendon Press, 1990).

155 Opinion, *Lomas*.

156 Churchill, 'Quota Hopping: The Common Fisheries Policy Wrongfooted?', (1990) 27 *CML Rev.* 209.

held to the point of civil disobedience. Patient negotiation rather than obedience is required for successful outcomes[157].

The EC law-making process is noted for its complexity but not for its participatory characteristics or transparency[158]; the warning conveyed by the German Constitutional Court in its celebrated Maastricht decision[159] strikes straight at the heart of the EC law-making process. Correction has proved more difficult than one might suppose[160]. National parliaments are presently making vigorous efforts towards greater democratic input into the process. While there are differences of opinion as to how they should do this[161], there is general agreement that it would be desirable. The language of agency - Steiner's picture[162] - is as unhelpful as it is insulting. It sits uncomfortably with the Maastricht subsidiarity principle and finds no counterpart in the jurisprudence of federal courts.

For many years the ECJ was able to pursue an integrationist course, fashioning its role as guardian of the EC legal order without attracting more than occasional criticism[163]; Was this, perhaps, because public perception of EC law was as largely technical[164]? Today, as its highly visible judgments veer alarmingly between the daring and the indecisive[165], this perception has changed; by moving the effects of its judgments from low to high policy, the ECJ moves itself and, at the same time, national courts into the political limelight. To maintain their standing, courts need to be alert to the reactions of political actors[166]. A topical warning is contained in the UK White Paper for the Rome Intergovernmental Conference, proposing structural modifications to the EC courts system plus restrictions on the retrospectivity of ECJ rulings, both aimed directly at Factortame (No 4)[167]. This has been followed by a demand for a special conference devoted to the subject. The German 'Maastricht' decision, Treaty opt-outs, a non-justiciable Third Pillar may be undesirable. They were quite as foreseeable, however, as are future Council ouster clauses!

At the time that Francovich was decided, no sanctions had specifically been made available to the ECJ. The TEU, amending Article 171 EC, empowered the Commission to bring an erring Member State back to Court in cases of failure to execute judgments. The ECJ may now impose 'a lump sum or penalty payment'[168]. The Community legislator has conceded that the disobedient State shall be sanctioned. The pity is that the ECJ did not leave the matter there.

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157 See Snyder, 'The Effectiveness of EC Law: Institutions, Processes, Tools and Techniques', (1993) 56 *Modern Law Rev*. 19. May, 1972, pp 417, 433 urges the ECJ to a negotiatory role. And see, Burley and Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', (1993) 47 *International Organisations* 42.

158 Curtin and Mejers, 'The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?', (1995) 1 *CML Rev.* 390.

159 The 'Maastricht Decision' *BVerfGE* 89 noted Herdegen, 'Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union"', (1994) 31 *CML Rev.* 235, also reported as *Brunner v European Union Treaty* (1994) 1 *CMLR* 57.

160 Dehousse, 'Constitutional Reform in the European Community. Are there Alternatives to the Majoritarian Avenue?', (1995) 18 *W. Eur. Politics* 118.

161 Norton, 'Conclusion: Addressing the Democratic Deficit', (1995) 1 *J. of Legislative Studies* 177, 183 (Special Issue on the performance of national parliaments). See also Judge, 'The Failure of National Parliaments?', 18 *W. Eur. Politics* 79.

162 *Op cit*, n 30, 3, 16. See also, AG Mishco in *Francovich*, AG Leger in *Lomas*. But see, *Telecom*.

163 Notably, H. Rasmussen, *On Law and Policy in the Court of Justice* (Martinus Nijhoff Publishers, 1986).

164 Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', (1981) 75 *Am. J. of Int. Law* 1, 3.

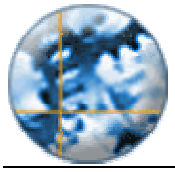
165 Reich, 'The "November Revolution" of the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited', (1994) 31 *CML Rev.* 459; Ward, *op cit*, n 13 205.

166 Garrett, 'International Cooperation and Institutional Choice: The EC's Internal Market', (1992) 46 *International Organizations* 534, 558.

167 *A Partnership of Nations: The British Approach to the European Union Intergovernmental Conference 1996* Cm. 3181, 1996. See also, HC Deb. vol. 276 cols. 198-204 (23 April 1996): Private Member's Bill introduced by Ian Duncan-Smith MP to amend the European Communities Act 1972 in respect of judgments of the ECJ.

168 See Diez-Hochleitner, 'Le traité de Maastricht et l'inexécution des arrets de la Cour de Justice par les Etats Membres', (1994) 2 *Revue du Marché Unique Européen* 111, preferring the liability route. Fines and 'penalty payments' also feature in EC competition law (EEC Art 172 and Art. 17 of Reg. 17: Joined Cases 90. 91/63 *Commission v Luxembourg and Belgium* [1964] ECR 625.

## *1.8 Joined Cases 83 and 94/76, 4, 15 and 40/77: HNL*



***NOTE AND QUESTIONS***

HNL is an example of how liability of the Community legislator is dealt with.

1. Do you think, the same standard will (and can) be applied to Member States?

**Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and others v Council and Commission of the European Communities**

**Joined cases 83 and 94/76, 4, 15 and 40/77**

25 May 1978

Court of Justice

[1978] ECR 1209

http://www.curia.eu.int/en/content/juris/index.htm

1 The applicants claim that the European Economic Community, represented by the Council and the Commission, should be ordered to compensate them for the damage allegedly suffered as a result of the effects of Council regulation (EEC) no 563/76 of 15 march 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuffs (Official Journal 1976, l 67, p. 18).

2 Since the cases have been joined for the purposes of the written and oral procedure, they should continue to be joined for the purposes of the judgment.

3 In three judgments of 5 July 1977 in case 114/76 (Bela-Muehle), case 116/76 (Granaria) and joined cases 119 and 120/76 (Olmuehle Hamburg AG and Firma Kurt a. Becher) (( 1977) ECR 1211 et seq) referred to the Court of Justice for preliminary rulings the Court declared that regulation no 563/76 was null and void. It reached this conclusion on the ground that the regulation provided for the obligation to purchase at such a disproportionate price that it was equivalent to a discriminatory distribution of the burden of costs between the various agricultural sectors without being justified as a measure in order to obtain the objective in view, namely the disposal of stocks of skimmed-milk powder.

4 The finding that a legislative measure such as the regulation in question is null and void is however insufficient by itself for the Community to incur non-contractual liability for damage caused to individuals under the second paragraph of article 215 of the EEC Treaty. the Court of Justice has consistently stated that the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.

5 In the present case there is no doubt that the prohibition on discrimination laid down in the second subparagraph of the third paragraph of article 40 of the Treaty and infringed by regulation no 563/76 is in fact designed for the protection of the individual, and that it is impossible to disregard the importance of this prohibition in the system of the Treaty. To determine what conditions must be present in addition to such breach for the Community to incur liability in accordance with the criterion laid down in the case-law of the Court of Justice it is necessary to take into consideration the principles in the legal systems of the Member States governing the liability of public authorities for damage caused to individuals by legislative measures. Although these principles vary considerably from one Member State to another, it is however possible to state that the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy. This restrictive view is explained by the consideration that the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals.

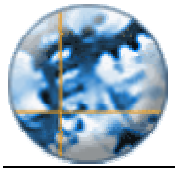
6 It follows from these considerations that individuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void. In a legislative field such as the one in question, in which one of the chief features is the exercise of a wide discretion essential for the implementation of the common agricultural policy, the Community does not therefore incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.

7 This is not so in the case of a measure of economic policy such as that in the present case, in view of its special features. In this connexion it is necessary to observe first that this measure affected very wide categories of traders, in other words all buyers of compound feeding-stuffs containing protein, so that its effects on individual undertakings were considerably lessened. Moreover, the effects of the regulation on the price of feeding- stuffs as a factor in the production costs of those buyers were only limited since that price rose by little more than 2 %. This price increase was particularly small in comparison with the price increases resulting, during the period of application ofthe regulation, from the variations in the world market prices of feeding-stuffs containing protein, which were three or four times higher than the increase resulting from the obligation to purchase skimmed-milk powder introduced by the regulation. The effects of the regulation on the profit-earning capacity of the undertakings did not ultimately exceed the bounds of the economic risks inherent in the activities of the agricultural sectors concerned.

8 In these circumstances the fact that the regulation is null and void is insufficient for the Community to incur liability under the second paragraph of article 215 of the Treaty. The application must therefore be dismissed as unfounded.

[…]

## *1.9 Case C-392/93: British Telecommunications*



***NOTE AND QUESTIONS***

C-329/93 British Telecommunications, C-5/94 Hedley Lomas and C 178, 179 and 188/94 Dillenkoffer show how the Court, so far, has developed the new “Brasserie-Doctrine”.

**The Queen v H. M. Treasury, ex parte British Telecommunications plc.**

**Case 392/93**

26 March 1996

Court of Justice

[1996] ECR 411

http://www.curia.eu.int/en/content/juris/index.htm

1 By order of 28 July 1993, received at the Court on 23 August 1993, the High Co urt of Justice, Queen' s Bench Division, Divisional Court ("the Divisional Court"), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Article 8(1) of 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 19 90 L 297, p. 1, "the directive").

2 Those questions arose in proceedings brought by British Telecommunications plc ("BT") against the Government of the United Kingdom for annulment of Sched ule 2 to the Utilities Supply and Works Contracts Regulations 1992 ("the 1992 Regulations"), implementing Article 8(1) of the directive.

3 Article 2(2)(d) of the directive provides that relevant activities for the purposes of the directive are to include, in particular, "the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services".

4 According to Article 2(1)(b), the directive is to apply to contracting entities which, "when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State". Article 2(3)(a) further provides that, for the purpose of applying Article 2(1)(b), a contracting entity is to be considered to enjoy special or exclusive rights in particular where, "for the purpose of constructing the networks or facilities

referred to in paragraph 2, it may take advantage of a procedure for the expropriation or use of property or may place network equipment on, under or over the public highway".

5 According to Article 2(6), "the contracting entities listed in Annexes I to X shall fulfil the criteria set out above". Annex X, which specifically concerns the "Operation of telecommunications networks or provision of telecommunications services", refers in particular, as regards the United Kingdom, to BT, Mercury Communications Ltd ("Mercury") and the City of Kingston upon Hull ("Hull").

6 Article 8 of the directive provides as follows:

"1. This directive shall not apply to contracts which contracting entities ... aw ard for purchases intended exclusively to enable them to provide one or more telecommunications services where other entities are free to offer the same services in the same geographical area and under substantially the same conditions.
2. The contracting entities shall notify the Commission at its request of any services they regard as covered by the exclusion referred to in paragraph 1. The Commission may periodically publish the list of services which it considers to be covered by this exclusion, for information, in the Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information."

7 Lastly, Article 33(1) provides:

"1. Contracting entities shall keep appropriate information on each contract which shall be sufficient to permit them at a later date to justify decisions taken in connection with:
...
(d) non-application of Titles II, III and IV in accordance with the derogations provided for in Title I."

8 In the United Kingdom, Article 8(1) of the directive has been transposed into national law by Regulation 7(1) of the 1992 Regulations, which provides as follo ws:

"These Regulations shall not apply to the seeking of offers in relation to a contract by a utility specified in Schedule 2 for the exclusive purpose of enabling it to provide one or more of the public telecommunications services specified in the Part of Schedule 2 in which the utility is specified."

9 Part B of Schedule 2 is set out thus:

"British Telecommunications plc.
Kingston Communications (Hull) plc.2. All public telecommunications services, other than the following services when they are provided within the geographical area for which the provider is licensed as a public telecommunications operator: basic voice telephony services, basic data transmission services, the provision of private leased circuits and maritime services".

10 Regulation 7(2) further provides:

"A utility specified in Schedule 2 when requested shall send a report to the Minister for onward transmission to the Commission describing the public telecommunications services provided by it which it considers are services specified in the Part of Schedule 2 in which the utility is specified."

11 BT is a joint stock limited liability company set up on 1 April 1984 under the British Telecommunications Act 1984 ("the 1984 Act"), which transferred to it t he property, together with all rights and obligations, of the former public corporation also known as British Telecommunications, itself the successor, pursuant to the British Telecommunications Act 1981, to

the Post Office, which had previously held an exclusive monopoly in the running of telecommunications systems throughout almost the entire national territory.

12 In the field of fixed-link telecommunications services (including fixed-terminal vo ice telephony), the Government granted the necessary licences under the 1984 Act to BT and Mercury. In order to ensure greater competition, the 1984 Act required interconnection of the two networks. BT and Mercury thereby acquired the exclusive right to operate fixed-link telecommunications services until 1990 (the "duopoly" period).

13 The duopoly policy was abandoned in that sector in the early 1990s. Numerous licences were issued by the Government. However, in 1992 BT still controlled 9 0% of telephone business, with Mercury controlling 7% and the new operators o nly 3%. Between 1984 and July 1993 the Government gradually sold off its remaining shareholding in BT.

14 The licence granted to BT for 25 years imposes an obligation to provide voice telephony services throughout the United Kingdom, subject to certain exceptions, to anyone who asks for them, even where demand is insufficient to cover the c osts of providing them (the "universal service obligation"). BT is the only licens ee which is subject to regulation in respect of tariff changes (the "price cap").

15 In transposing Article 8 of the directive into national law, the 1992 Regulations exclude almost all of the operators in the sector concerned, including Mercury, from the obligation to comply therewith as regards contracts for the supply of telecommunications services. Only BT (and Hull, in the area for which it holds a licence) remains subject to the provisions of the directive, albeit solely as regard s basic voice-telephony services, basic data-transmission services, the provision of private leased circuits and maritime services.

16 In its action before the Divisional Court, BT seeks annulment of Schedule 2 to t he 1992 Regulations on the ground that Regulation 7(1) and Schedule 2 implem ent Article 8 of the directive incorrectly. BT claims that the Government should have transposed the criteria laid down in Article 8(1) of the directive rather than proceeded to apply them. By determining, in respect of each contracting entity, which of the services provided meet those criteria, the Government is alleged to have deprived BT of the power conferred on it by the directive to make its own decisions.

17 BT further claims damages for the loss it claims to have suffered as a result of incorrect implementation of the directive, namely the additional expense borne by it in complying with the 1992 Regulations. Furthermore, those regulations have allegedly prevented it from concluding profitable transactions and placed it at a commercial and competitive disadvantage, by subjecting it to the requirement, from which the other operators in the sector are exempt, to publish its procurement plans and contracts in the Official Journal.

18 The Divisional Court has decided to stay the proceedings brought by BT and to refer the following questions to the Court of Justice for a preliminary ruling:

[…]

4. If a Member State has erred in its implementation of Article 8(1) of Cou ncil Directive 90/531, is that Member State liable as a matter of Community law to compensate a contracting entity in damages for loss which it has suffered as a result of that error and, if so, under what conditions does su ch liability arise?"

[…]

Question 4

37 By its fourth question, the Divisional Court seeks to ascertain whether a Member State which, in transposing the directive into national law, has itself determined which services of a contracting entity are to be excluded from its scope pursuant to Article 8, is required by Community law to compensate that undertaking for any loss suffered by it as a result of the error committed by the State.

38 It should be recalled, as a preliminary point, that the principle of State liability 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 (judgments in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 35, and in Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-0000, paragraph 31). It follows that that principle holds good for any case in which a Member State breaches Community law (judgment in Brasserie du Pêcheur and Factortame, cited above, paragraph 32).

39 In the latter judgment the Court also ruled, with regard to a breach of Community law for which a Member State, acting in a field in which it has a wide discretion in taking legislative decisions, can be held responsible, that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (paragraphs 50 and 51).

40 Those same conditions must be applicable to the situation, taken as its hypothesis by the national court, in which a Member State incorrectly transposes a Community directive into national law. A restrictive approach to State liability is justified in such a situation, for the reasons already given by the Court to justify the strict approach to non-contractual liability of Community institutions or Member States when exercising legislative functions in areas covered by Community law where the institution or State has a wide discretion ° in particular, the concern to ensure that the exercise of legislative functions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests (see, in particular, the judgments in Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 HNL and Others v Council and Commission [1978] ECR 1209, paragraphs 5 and 6, and in Brasserie du Pêcheur and Factortame, paragraph 45).

41 Whilst it is in principle for the national courts to verify whether or not the conditions governing State liability for a breach of Community law are fulfilled, in the present case the Court has all the necessary information to assess whether the facts amount to a sufficiently serious breach of Community law.

42 According to the case-law of the Court, a breach is sufficiently serious where, in the exercise of its legislative powers, an institution or a Member State has manifestly and gravely disregarded the limits on the exercise of its powers (judgments in HNL and Others v Council and Commission, cited above, paragraph 6, and in Brasserie du Pêcheur and Factortame, paragraph 55). Factors which the competent court may take into consideration include the clarity and precision of the rule breached (judgment in Brasserie du Pêcheur and Factortame, paragraph 56).

43 In the present case, Article 8(1) is imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it by the Court in this judgment, the interpretation given to it by the United Kingdom in good faith and on the basis of arguments which are not entirely devoid of substance (see paragraphs 20 to 22 above). That interpretation, which was also shared by other Member States, was not manifestly contrary to the wording of the directive or to the objective pursued by it.

44 Moreover, no guidance was available to the United Kingdom from case-law of the Court as to the interpretation of the provision at issue, nor did the Commission raise the matter when the 1992 Regulations were adopted.

46 The answer to Question 4 must therefore be that Community law does not require a Member State which, in transposing the directive into national law, has itself determined which services of a contracting entity are to be excluded from its scope in implementation of Article 8, to compensate that entity for any loss suffered by it as a result of the error committed by the State.

[…]

## *1.10 Case C-5/94: Hedley Lomas*

**The Queen**
**v**
**Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd**

**Case 5/94**

23 May 1996

Court of Justice

[1996] ECR I-2553

http://www.curia.eu.int/en/content/juris/index.htm

1 By order of 6 December 1993, received at the Court on 10 January 1993, the High Court of Justice of England and Wales, Queen' s Bench Division, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the interpretation of Articles 34 and 36 of that Treaty and the principle of non-contractual State liability for breach of Community law.

2 Those questions have been raised in proceedings between Hedley Lomas (Ireland) Ltd (hereinafter "Hedley Lomas") and the Ministry of Agriculture, Fisheries and Food for England and Wales following that Ministry' s refusal to issue a licence for the export of live sheep to Spain requested by Hedley Lomas on 7 October 1992.

3 Between April 1990 and 1 January 1993 the Ministry of Agriculture, Fisheries and Food systematically refused to issue licences for the export to Spain of live animals for slaughter on the ground that their treatment in Spanish slaughterhouses was contrary to Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter (OJ 1974 L 316, p. 10, hereinafter "the Directive").

4 As is clear from its preamble, the Directive, which is based on Articles 43 and 100 of the EEC Treaty, is intended to remove the disparities between the legislation of Member States in the field of protection of animals which directly affect the functioning of the common market. It also seeks, in general, to avoid all forms of cruelty to animals and, as a first step, to avoid all unnecessary suffering on the part of animals when being slaughtered. Articles 1 and 2 of the Directive require Member States to ensure the stunning, by appropriate approved methods, of animals for slaughter of the following species: bovine animals, swine, sheep, goats and solipeds. The Directive does not harmonize procedures for monitoring compliance with its provisions.

5 The Kingdom of Spain had to comply with the Directive as from the date of its accession to the Community on 1 January 1986.

6 The Directive was transposed in Spain by Royal Decree of 18 December 1987 (Boletin Oficial del Estado No 312 of 30 December 1987) which reproduces in particular the provisions of Articles 1 and 2 of the Directive and specifies, as approved methods of stunning, the use of a captive-bolt gun or pistol, electric shock or carbon dioxide. It does not lay down any penalty for breach of its provisions.

7 Despite the adoption of that decree, the Ministry of Agriculture, Fisheries and Food became convinced, in particular on the basis of information obtained from the Spanish Society for the Protection of Animals, that a number of Spanish slaughterhouses were not complying with the rules contained in the Directive, either because they did not have the necessary equipment for stunning animals or because the equipment was not being used correctly or at all. Although it did not have sufficient evidence as to the overall position in Spanish slaughterhouses, the Ministry formed the view that the information in its possession indicated a degree of non-compliance with the Directive such as to create a substantial risk that animals exported to Spain for slaughter would suffer treatment contrary to the Directive.

8 Following complaints in 1990 by animal welfare groups in the United Kingdom and Spain, the Commission contacted the Spanish authorities and held several meetings with them to discuss the situation in Spain, in particular the absence of punitive measures for non-compliance with the Spanish provisions implementing the Directive. In view of assurances given by the national and regional authorities in Spain regarding the application of the Directive, the Commission decided, in 1992, not to take any action under Article 169 of the EEC Treaty. The Commission informed the United Kingdom authorities that it considered the United Kingdom' s general ban on exports of live animals to Spain to be contrary to Article 34 of the EEC Treaty and not capable of justification under Article 36 of that Treaty.

9 That general ban was lifted, with effect from 1 January 1993, following a meeting between the United Kingdom' s Chief Veterinary Officer and his Spanish counterpart to review the progress achieved by Spain in giving effect to the Directive and to examine means of ensuring in future that all animals exported from the United Kingdom would be treated in accordance with the Directive. Following those exchanges of views, the two Governments drew up measures to ensure that animals sent from the United Kingdom for immediate slaughter in Spain would be sent only to slaughterhouses which the Spanish authorities had confirmed as meeting Community requirements on animal welfare.

10 On 7 October 1992 Hedley Lomas applied for an export licence for a quantity of live sheep intended for slaughter in a specified Spanish slaughterhouse. The licence was not issued, even though, according to the information obtained by Hedley Lomas, the slaughterhouse in question had been approved since 1986 and was complying with Community directives on animal welfare and the United Kingdom authorities did not have any evidence to the contrary.

11 Hedley Lomas brought proceedings before the High Court of Justice in which it seeks, first, a declaration that the refusal by the Ministry of Agriculture, Fisheries and Food to grant it an export licence is contrary to Article 34 of the Treaty and, second, damages.

12 The Ministry does not deny that the refusal to issue the export licence constitutes a quantitative restriction on exports but argues that it was justified under Article 36 of the Treaty and was consequently compatible with Community law.

13 Taking the view that the case before it necessitated the interpretation of Community law, the High Court of Justice decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

"(1) Does the existence of a harmonizing directive (Directive 74/577/EEC), which does not contain any sanctions or procedures for non-compliance, prevent a Member State (Member State A) from relying on Article 36 of the EEC Treaty to justify measures restrictive of exports in circumstances where an interest specified in that article is threatened by the failure of another Member State (Member State B), as a matter of fact, to secure the results required by the directive?

If the answer to Question 1 is in the negative,

(2) In the circumstances described in Question 1, does Article 36 entitle Member State A to prohibit the export of live sheep to Member State B for slaughter

(i) generally; or

(ii) in a case where the stated destination of the sheep is a slaughterhouse in Member State B in respect of which Member state A does not have evidence that the provisions of the Directive are not complied with?

If the answer to Question 1 is in the affirmative, or if the answer to Question 2 is in the negative, and in the circumstances of this case:

(3) Is Member State A liable as a matter of Community law to compensate a trader in damages for any loss caused to the trader by the failure to grant an export licence in breach of Article 34 and, if so, under what conditions does such liability arise and how is such compensation to be calculated?"

The first and second questions

[…]

[S*ee Unit IX on free movement of goods*.]

The third question

23 By its third question the national court asks the Court to state the conditions under which a Member State is obliged to make good damage caused to an individual by its refusal to issue an export licence in breach of Article 34 of the Treaty.

24 The principle of State liability 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 (judgment in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 35, and judgment in Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame, not yet published in the ECR, paragraph 31). Furthermore, the conditions under which State liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss or damage (judgment in Francovich and Others, cited above, paragraph 38; judgment in Brasserie du Pêcheur and Factortame, cited above, paragraph 38).

25 In the case of a breach of Community law attributable to a Member State acting in a field in which it has a wide discretion to make legislative choices the Court has held, at paragraph 51 of its judgment in Brasserie du Pêcheur and Factortame, cited above, that such a right to reparation must be recognized where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

26 Those three conditions are also applicable in the circumstances of this case.

27 As regards the first condition, as is clear from the answer given to the first question, the United Kingdom' s refusal to issue an export licence to Hedley Lomas constituted a quantitative restriction on exports contrary to Article 34 of the Treaty which could not be justified under Article 36. Whilst Article 34 imposes a prohibition on Member States, it also creates rights for individuals which the national courts must protect (judgment in Case 83/78 Pigs Marketing Board v Redmond [1978] ECR 2347, paragraphs 66 and 67).

28 As regards the second condition, 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.

29 In that respect, in this particular case, the United Kingdom was not even in a position to produce any proof of non-compliance with the Directive by the slaughterhouse to which the animals for which the export licence was sought were destined.

30 As regards the third condition, it is for the national court to determine whether there is a direct causal link between the breach of the obligation resting on the State and the damage sustained by the applicant in the main proceedings.

31 As appears from paragraphs 41, 42 and 43 of Francovich and Others, cited above, subject to the right to reparation which flows directly from Community law where the three conditions referred to above are satisfied, the State must make reparation in accordance with its domestic law on liability for the consequences of the loss and damage caused. However, the conditions for reparation of loss and damage laid down by domestic law must not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation (see also the judgment in Brasserie du Pêcheur and Factortame, cited above, paragraph 67).

32 The answer to the third question must therefore be that a Member State has an obligation to make reparation for the damage caused to an individual by a refusal to issue an export licence in breach of Article 34 of the Treaty where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the State must make good the consequences of the loss or damage caused by a breach of Community law attributable to it, in accordance with its domestic law on liability. However, the conditions laid down by the applicable domestic laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

[…]

## *1.11 Case C-178, 179 and 188/94: Dillenkofer*

**Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor**
**v**
**Bundesrepublik Deutschland**

**Joined Cases 178,179, 188 and 190/94**

Court of Justice

8 October 1996

[1996] ECR I-4845

http://www.curia.eu.int/en/content/juris/index.htm

1 By orders of 6 June 1994, received at the Court on 28 June 1994 in Cases C-178/94 and C-179/94 and on 1 July 1994 in Cases C-188/94, C-189/94 and C-190/94, the Landgericht Bonn referred to the Court for a preliminary ruling under Article 177 of the EC Treaty 12 questions on the interpretation of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59, hereinafter "the Directive").

2 The questions have been raised in the course of actions for compensation which Erich Dillenkofer, Christian Erdmann, Hans-Juergen Schulte, Anke Heuer, and Werner, Torsten and Ursula Knor (hereinafter "the plaintiffs") have brought against the Federal Republic of Germany for damage they suffered because the Directive was not transposed within the prescribed period.

3 The purpose of the Directive, according to Article 1 thereof, is to approximate the laws, regulations and administrative provisions of the Member States relating to package travel, package holidays and package tours sold or offered for sale in the territory of the Community.

4 Article 2 contains a number of definitions. It provides that:

"For the purposes of this Directive:

1. 'package' means the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:

(a) transport;
(b) accommodation;
(c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.
...
2. 'organizer' means the person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer;
3. 'retailer' means the person who sells or offers for sale the package put together by the organizer;

4. 'consumer' means the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee');
...".

5 Article 7 provides: "The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency."

6 Article 8 states that Member States may adopt or maintain more stringent provisions in the field covered by the Directive to protect the consumer.

7 Article 9 requires Member States to bring into force the measures necessary to comply with the Directive before 31 December 1992.

8 On 24 June 1994, the German legislature adopted a Law implementing the Directive (Bundesgesetzblatt I, p. 1322). That law introduced into the Buergerliches Gesetzbuch (German Civil Code, hereinafter "the BGB") a new provision, Paragraph 651k, in terms of which:

"1. The travel organizer shall ensure that the package traveller obtains a refund of:
(1) the travel price paid if the travel services are not provided as a result of the organizer' s insolvency; and
(2) necessary expenditure incurred by the traveller in respect of his repatriation following the organizer' s insolvency.
The travel organizer can fulfil the obligations set out in (1) only:
(1) by taking out insurance with a company authorized to operate within the scope of this Law; or
(2) through a promise of payment from a credit institution authorized to operate within the scope of this Law.
2. ...
3. In order to satisfy the requirement set out in (1), the organizer must provide for the traveller to have a direct remedy against the insurer or the credit institution and be responsible for furnishing evidence thereof by way of an attestation issued by the said company (security document).
4. Apart from a deposit of up to 10% of the travel price, subject, however, to a maximum of DM 500, the organizer may demand or accept payment towards the travel price before completion of the travel only if he has given the traveller a security document.
...".

9 That law entered into force on 1 July 1994. It applies to travel contracts which were concluded after that date and under whose terms the travel was to commence after 31 October 1994.

10 The plaintiffs in the main proceedings are purchasers of package travel who, following the insolvency in 1993 of the two operators from whom they had bought their packages, either never left for their destination or had to return from their holiday location at their own expense. They have not succeeded in obtaining reimbursement of the sums they paid to the operators or of the expenses they incurred in returning home.

11 The plaintiffs have brought actions for compensation against the Federal Republic of Germany on the ground that if Article 7 of the Directive had been transposed into German law within the prescribed period, that is to say by 31 December 1992, they would have been protected against the insolvency of the operators from whom they had purchased their package travel.

12 They rely in particular on the judgment of the Court of Justice of 19 November 1991 in Joined Cases C-6/90 and C-9/90 Francovich and Others v Italy [1991] ECR I-5357, paragraphs 39 and 40,

according to which, where a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation, provided that the result prescribed by the directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State' s obligation and the loss and damage suffered by the injured parties. According to the applicants, those conditions are satisfied in this case. They therefore claim refund of sums paid for travel never undertaken or expenses incurred in their repatriation.

13 The German Government contests the claims. It considers that the conditions laid down in Francovich are not satisfied in these cases and that in any event failure to transpose a directive within the prescribed period cannot render a Member State liable to pay damages unless there has been a serious, that is to say manifest and grave, breach of Community law, for which it can be held responsible.

14 The Landgericht Bonn found that German law did not afford any basis for upholding the claims for compensation but having doubts regarding the consequences of the Francovich judgment it decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

"(1) Is the EC Council Directive of 13 June 1990 on package travel, package holidays and package tours (90/314/EEC) intended to grant individual package travellers, via national transposing provisions, the individual right to security for money paid and repatriation costs in the event of the insolvency of the travel organizer (see paragraph 40 of the judgment in Joined Cases C-6/90 and C-9/90 Francovich)?
(2) Is the content of that right sufficiently identified on the basis of that Directive?
(3) What are the minimum requirements for the 'necessary measures' to be taken by the Member States within the meaning of Article 9 of the Directive?
(4) In particular, did it satisfy Article 9 of the Directive if the national legislature by 31 December 1992 provided the legislative framework for imposing a legal obligation on the travel organizer and/or retailer to take measures for security within the meaning of Article 7 of the Directive? Or did the necessary change in the law, taking into account the lead times involved in consultation of the travel, insurance and credit sectors, have to come into effect sufficiently in advance of 31 December 1992 for that security actually to function in the package travel market from 1 January 1993?
(5) Is the protective purpose, if any, of the Directive satisfied if the Member State allows the travel organizer only to require a deposit towards the travel price of up to 10% of the travel price with a maximum of DM 500 before documents of value are handed over?
(6) To what extent are the Member States obliged under the Directive to act (by legislating) in order to protect package travellers against their own negligence?
(7) (a) Could the Federal Republic of Germany, in view of the 'advance payment' judgment (Vorkasse-Urteil) of the Bundesgerichtshof (BGH) of 12 March 1987 (BGHZ 100, 157; NJW 86, 1613), have omitted altogether to transpose Article 7 of the Directive by means of legislation?
(b) Is there no 'security' within the meaning of Article 7 of the Directive even where, on payment of the travel price, travellers were in possession of documents of value confirming a right to performance against those responsible for providing particular services (airline companies, hotel operators)?
(8) (a) Does the mere fact that the time-limit specified in Article 9 of the Directive has been exceeded suffice to confer a right to compensation involving State liability as defined in the Francovich judgment of the Court of Justice, or can the Member State put forward the objection that the period for transposition proved to be inadequate?
(b) If that objection fails, does the response to the previous question apply even where the Member State concerned cannot achieve the protective purpose of the Directive simply by a change in the law (as for instance with payments in lieu of wages to employees in the event of insolvency), the

cooperation of private third parties (travel organizers, the insurance and credit sector) being essential?
(9) Does liability on the part of a Member State for an infringement of Community law presuppose a serious, that is to say a manifest and grave, breach of obligations?
(10) Is it a precondition of State liability that a judgment in infringement proceedings establishing a breach of Treaty obligations has been delivered before the event giving rise to damage?
(11) Does it follow from the Francovich judgment of the Court of Justice that the right to compensation on grounds of breach of Community law is not dependent on a finding of fault in general, or at any rate of wrongful non-adoption of legislative measures, on the part of the Member State?
(12) If that conclusion is not correct, could the 'advance payment' judgment of the Bundesgerichtshof have been an acceptable reason justifying or excusing the Federal Republic of Germany for transposing the Directive, as defined in the answers of the Court of Justice to Questions 4 and 7, only after expiry of the time-limit specified in Article 9?"
Conditions under which a Member State incurs liability (Questions 8, 9, 10, 11 and 12)

15 Questions 8, 9, 10, 11 and 12, concerning the conditions under which a State incurs liability towards individuals where a directive has not been transposed within the prescribed period, will be examined first.

16 The crux of these questions is whether a failure to transpose a directive within the prescribed period is sufficient per se to afford individuals who have suffered injury a right to reparation or whether other conditions must also be taken into consideration.

17 More specifically, the national court raises the question of the importance to be attached to the German Government' s contention that the period prescribed for transposition of the Directive proved inadequate (Question 8). It asks, further, whether State liability requires a serious, that is to say, a manifest and grave, breach of Community obligations (Question 9), whether the breach must have been established in infringement proceedings before the loss or damage occurred (Question 10), whether liability presupposes the existence of fault, of either commission or omission, in the adoption of legislative measures by the Member State (Question 11) and, lastly, in the event that Question 11 is answered in the affirmative, whether liability can be excluded by reason of a judgment such as the "advance payment" judgment of the Bundesgerichtshof referred to in Question 7 (Question 12).

18 The German, Netherlands and United Kingdom Governments have submitted in particular that a State can incur liability for late transposition of a directive only if there has been a serious, that is to say, a manifest and grave, breach of Community law for which it can be held responsible. According to those Governments, this depends on the circumstances which caused the period for transposition to be exceeded.

19 In order to reply to those questions, reference must first be made to the Court' s case-law on the individual' s right to reparation of damage caused by a breach of Community law for which a Member State can be held responsible.

20 The Court has held that the principle of State liability 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 (Francovich, paragraph 35; Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-0000, paragraph 31; Case C-392/93 British Telecommunications [1996] ECR I-0000, paragraph 38; and Case C-5/94 Hedley Lomas [1996] ECR I-0000, paragraph 24). Furthermore, the Court has held that the conditions under which State 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 (Francovich, paragraph 38; Brasserie du Pêcheur and Factortame, paragraph 38, and Hedley Lomas, paragraph 24).

21 In Brasserie du Pêcheur and Factortame, at paragraphs 50 and 51, British Telecommunications, at paragraphs 39 and 40, and Hedley Lomas, at paragraphs 25 and 26, the Court, having regard to the circumstances of the case, held that individuals who have suffered damage have a right to reparation where three conditions are met: the rule of law infringed must have been 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 State and the damage sustained by the injured parties.

22 Moreover, it is clear from the Francovich case which, like these cases, concerned non-transposition of a directive within the prescribed period, that the full effectiveness of the third paragraph of Article 189 of the Treaty requires that there should be a right to reparation where the result prescribed by the directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State' s obligation and the loss and damage suffered by the injured parties.

23 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.

24 When the Court held that the conditions under which State liability gives rise to a right to reparation depended on the nature of the breach of Community law causing the damage, that meant that those conditions are to be applied according to each type of situation.

25 On the one hand, a breach of Community law is sufficiently serious if a Community institution or a Member State, in the exercise of its rule-making powers, manifestly and gravely disregards the limits on those powers (see Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 HNL and Others v Council and Commission [1978] ECR 1209, paragraph 6; Brasserie du Pêcheur and Factortame, paragraph 55; and British Telecommunications, paragraph 42). On the other hand, if, 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 (see Hedley Lomas, paragraph 28).

26 So where, as in Francovich, a Member State fails, in breach of the third paragraph of Article 189 of the Treaty, to take any of the measures necessary to achieve the result prescribed by a directive within the period it lays down, that Member State manifestly and gravely disregards the limits on its discretion.

27 Consequently, such a breach gives rise to a right to reparation on the part of individuals if the result prescribed by the directive entails the grant of rights to them, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State' s obligation and the loss and damage suffered by the injured parties: no other conditions need be taken into consideration.

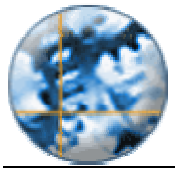
28 In particular, reparation of that loss and damage cannot depend on a prior finding by the Court of an infringement of Community law attributable to the State (see Brasserie du Pêcheur, paragraphs 94 to 96), nor on the existence of intentional fault or negligence on the part of the organ of the State to which the infringement is attributable (see paragraphs 75 to 80 of the same judgment).

29 The reply to Questions 8, 9, 10, 11 and 12 must therefore be 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 a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the

grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State' s obligation and the loss and damage suffered.

[…]

## *1.12 Case C-94/02 P: Biret*



### *NOTE AND QUESTIONS*

Biret is a case regarding a claim for damages based on infringement of WTO law, where the Community has failed to implement a binding award of the WTO dispute settlement body within the prescribed period.

**Summary of the facts and procedure:**

*Biret is a French company, trading in foodstuffs, in particular meat.*

*Two Community directives in 1981 and 1988 prohibited the import into the Community of meat and meat products treated with particular hormones. On 1 January 1995 the Agreement Establishing the World Trade Organisation and, inter alia, the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") and the Understanding on Rules and Procedures Governing the Settlement of Disputes by the WTO Dispute Settlement Body ("DSB") entered into force for the EU. In April 1996 the Council adopted a new EC directive which maintained the abovementioned import ban and extended it to one other hormone. On 13 February 1998 the DSB declared the rules in that directive to be incompatible with the SPS Agreement. The Community was given until 13 May 1999 within which to implement the binding recommendations of the DSB. For that purpose, the Council has before it the Commission's proposal of 24 May 2000 to amend the 1996 directive, but it has not yet been adopted. In June 2000 Biret brought an action against the Council of the EU before the Court of First Instance of the EC, seeking compensation for damage suffered as a result of the ban on the import into the EC of beef treated with certain hormones.*

*The Court of First Instance dismissed the application for damages and referred to the case-law of the Court of Justice, according to which the WTO Agreement and its annexes are part of Community law, but in view of their nature and structure they do not in principle form part of the rules by which the Court of Justice reviews the legality of acts adopted by the Community institutions; the WTO rules did not create any rights for individuals on which they could rely before the Court of First Instance. There is an exception to that principle only where the Community implements a specific obligation assumed in the context of the WTO or where the Community measure refers expressly to the precise provisions of the WTO Agreements. According to the Court of First Instance, neither of those alternatives applied in the present case. Biret appealed to the Court of Justice of the EC.*

## 1.12.1 Opinion of AG Alber

*The text bellow is only a summary of AG Alber's opinion, which is not yet available in its English version.*

**Biret International SA v Council of the European Union**

**Case C-94/02 P and Case C-94/02 P**

15 May 2003

AG Opinion

[2003] ECR I-0000

http://www.curia.eu.int/en/content/juris/index.htm

*The AG pointed out first that, according to settled case-law, WTO law is not directly applicable and that neither of the exceptions recognised in the case-law (implementation of a particular obligation assumed in the context of the WTO; express reference to the precise provisions of the WTO Agreements) exists here.*

*The AG found that after the issue of the DSB recommendations of February 1998 it was still necessary to adopt a Community measure in order to implement them. He went on to consider whether, exceptionally, Biret should nevertheless be able to rely on the DSB recommendation and therefore directly on WTO law because the period for implementing the recommendations has long since expired. The implementation period expired in May 1999. Although the Commission has submitted a proposal to amend Community law in June 2000, the legislative procedure is still not complete, so that since May 1999 there has been no change either in the situation under WTO law or under Community law. It must therefore be asked whether Biret must accept the situation without compensation or whether, in such circumstances, it should be possible to rely on a DSB recommendation which made a binding finding of the illegality of Community law, with the result that WTO law is to be regarded as directly applicable, opening the way for a possible damages claim by Biret. In AG Alber's view this should be the case.*

*He observed that a feature of the WTO dispute resolution mechanism is¸ unlike under the GATT¸ that once a DSB decision or recommendation has been made, it must be unconditionally implemented. The parties can then no longer reach a settlement or agree on an exception from their obligations. They can only discuss the period within which the DSB award is to be implemented. In the present case this was fixed at 15 months and expired in May 1999.*

*According to the AG, the recognition of a damages claim does not restrict the freedom of action of the Community's legislative and executive organs. After the issue of a DSB recommendation or decision, the WTO contracting parties no longer have any room for manoeuvre regarding the question whether they implement the recommendation or decision. They cannot escape their WTO obligations by negotiating a waiver. How the Community establishes the conformity of its measures with its obligations under the SPS Agreement is and remains a matter for the competent Community bodies. On the basis of new scientific discoveries, they may quite possibly re-establish an import ban, this time in conformity with the SPS Agreement. The recognition of direct applicability does not found a right of the individual to demand a particular course of action, such as the lifting of the import ban, but merely a right to monetary compensation. In the AG's view, the recognition of a damages claim in such cases is in line with the case-law on failure to fulfil obligations and the liability of the Member States for non-implementation of Community law (Case C-6/90 Francovich, judgment of 19 November 1991).*

*In addition he states that there is a fundamental right to freedom of economic activity and that it is unfair to deny a citizen a damages claim where the Community legislature, through its inaction, has continued to maintain a state of affairs contrary to WTO law for a period of four years after the expiry of the period allowed for implementation of the DSB recommendation, and thereby further unlawfully restricted the fundamental rights of the citizen.*

*The AG concludes that WTO law is directly applicable where the incompatibility of a Community measure with WTO law has been found in DSB recommendations or decisions and the Community has failed to implement the recommendations or decisions within the reasonable period of time allowed by the WTO.*

*The AG went on to examine whether the purpose of the WTO rules is to protect the individual. He emphasised that in States organised on market economy principles trade is primarily conducted by private individuals and, consequently, restrictions of trade have an effect on the scope of their freedom of economic activity. It is clear from the case-law of the Court that the fact that a legal rule is for the protection of general interests (here: liberalisation of world trade) does not rule out the possibility that it is also for the protection of individuals. In his view this is the case in Biret. The Council has therefore infringed a rule of Community law, on which an individual may rely. Consequently the AG proposed that the ECJ should set aside the judgment of the CFI and refer the dispute back to it so that it can examine the additional requirements for a damages claim (loss and causality).*

## 1.12.2 Judgement of the Court of Justice

**Biret International SA v Council of the European Union**

**Case C-94/02 P**

30 September 2003

Court of Justice

[2003] ECR I-0000

http://www.curia.eu.int/en/content/juris/index.htm

[…]

38. By its first plea in law, the appellant claims that the Court of First Instance, primarily, misconstrued Article 228(7) of the Treaty.

39. In so doing, the Court of First Instance negated the effectiveness of Article 228(7) of the Treaty, as it failed to separate the application of the provision from any condition relating to its direct effect in accordance with the monist approach to the Community legal order. It is contradictory to hold that the WTO Agreements form an integral part of that legal order but at the same time to deny that they provide a basis for judicial review of subordinate Community legislation. The Court has, on several occasions (Case 40/72 Schröder [1973] ECR 125 and Case 112/80 Dürbeck [1981] ECR 1095), reviewed the legality of Community measures in the light of international agreements without first having ascertained whether the international provision in question has direct effect.

40. Both the spirit and the letter of Article 228(7) of the Treaty should be interpreted in such a way that the Community institutions' compliance with a rule of international law may be subject only to the condition that the rule has become an integral part of the Community legal order, something which cannot be, and has not been, challenged as regards the WTO agreements and the decisions adopted by the dispute settlement bodies set up by those agreements - decisions which moreover have the force of res judicata.

41. In that regard, the contested judgment does not address the argument that the Community, in acceding to the dispute settlement system set up by the WTO agreements, undertook to observe the procedure and the authority of DSB decisions.

42. In the alternative, the appellant complains that the Court of First Instance failed to develop the Court of Justice's case-law so as to acknowledge that all or part of the WTO agreements have direct effect and it asks the Court of Justice to take steps to do so.

43. In particular, it is irrelevant in this case to mention, as the Court of First Instance did in paragraph 62 of the contested judgment, that the Community's legislative and executive bodies should enjoy the same discretion as similar bodies of the Community's trading partners, since, in view of the DSB decision of 13 February 1998, no such discretion exists.

44. The appellant also challenges the argument that WTO law allows for solutions other than withdrawal of unlawful measures such as settlement, payment of compensation or suspension of

concessions (see Joined Cases C-27/00 and C-122/00 Omega Air and Others [2002] ECR I-2569). Such an argument gives rise to uncertainty as regards both the text of the WTO agreements and the objective nature of a breach of a legal rule.

45. The appellant submits in that connection that it is apparent from Article 22(1) of the Understanding that compensation is a temporary measure and must in any event be compatible with the WTO agreements. Furthermore, compensation does not alter the fact that there has been a breach of a legal rule forming an integral part of the Community legal order, which must be found by the court regardless of any political considerations.

46. Conversely, the appellant mentions various reasons which, in its submission, militate in favour of recognition of the direct effect of all or part of the WTO agreements and of the Court's power to review whether Community law complies with them:

- first, reasons connected with the subject-matter of the WTO agreements and their foreseeable development: a growing number of those provisions - such as those concerning public procurement, intellectual property or particularly food safety - have an immediate impact not only on legal relations between States and their nationals but also between individuals themselves;
- second, reasons relating to fairness as to the effect of the WTO dispute settlement system: it is inconsistent not to allow individuals to rely on certain provisions of the WTO agreements where, by contrast, commercial retaliation undertaken on the basis of other provisions of those agreements adversely affects undertakings in the European Union;
- third, the need for consistency within the Community legal order, in which legal persons comprise not only the Member States but also their nationals (see Case 26/62 Van Gend en Loos [1963] ECR 1).

47. The Council contends that the first plea is inadmissible in part and unfounded in part.

48. First, the contested judgment is consistent with the Court of Justice's case-law on the effects of international agreements in general: by virtue of that case-law the effect of a provision of an international agreement is determined by its nature and objectives (see point 127 of Advocate General Gulmann's Opinion in Germany v Council). The objective of the WTO agreements is not to create rights for individuals but merely to govern relations between States and regional economic organisations on the basis of negotiations based on the principle of reciprocity.

49. The Court of First Instance was right in referring, in paragraph 67 of the contested judgment, to paragraphs 19 and 20 of the judgment in Atlanta v European Community, which are of general application, notwithstanding the fact that they concern the admissibility of an appeal. The appellant also fails to explain where and when the Community undertook to implement all the obligations flowing from a DSB decision, a step which would run counter to the basic philosophy of the agreements in question. Nor does it state by which specific measure the Community intended to give effect to the DSB's decision of 13 February 1998 relating to imports of meat containing hormones. In any event, no provision of the SPS Agreement or of the DSB decision of 13 February 1998 required the Community to import meat containing hormones. It is quite possible to comply with the SPS Agreement without, however, authorising imports whose prohibition is at the root of the damage which the appellant claims it has suffered.

50. Second, by calling on the Court to develop its case-law, the appellant is merely criticising that Court without putting forward any real arguments. The appellant's contention that the institutions allegedly lose any discretion if they comply with their obligations in the SPS Agreement fails to take any account whatsoever of the contents of the agreement or of the fact that there are various ways in which to comply with the agreement. WTO Members may choose whether to base their veterinary measures on international standards or on another scientific evaluation of the risk or the precautionary principle. Paragraph 62 of the contested judgment is thus well founded.

Findings of the Court

51. According to settled case-law (see, inter alia, Atlanta v European Community, paragraph 65), non-contractual liability on the part of the Community under the second paragraph of Article 215 of the Treaty is subject to a number of conditions relating to the illegality of the conduct alleged against the Community institutions, actual damage and the existence of a causal link between the conduct of the institution and the damage complained of.

52. As the Court of First Instance observed in paragraph 61 of the contested judgment, given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions (see Portugal v Council, paragraph 47; the order in OGT Fruchthandelsgesellschaft, paragraph 24; and the judgments in Omega Air and Others, paragraph 93, and Case C-76/00 P Petrotub and Republica v Council [2003] ECR I-79, paragraph 53).

53. It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules (see, as regards GATT 1947, Fediol v Commission, paragraphs 19 to 22, and Nakajima v Council, paragraph 31, and, as regards the WTO agreements, Portugal v Council, paragraph 49).

54. In that regard, the Court of First Instance found, in paragraph 64 of the contested judgment, that the circumstances of this case clearly did not correspond to either of the two hypotheses set out in the preceding paragraph. In its view, since Directives 81/602 and 88/146 were adopted on 1 January 1995, several years before the entry into force of the SPS Agreement, it was not logically possible for them either to give rise to a specific obligation entered into under that agreement or to refer expressly to some of its provisions.

55. The Court of First Instance added, in paragraph 67 of the contested judgment, that since the decision of the DSB of 13 February 1998 was inescapably and directly linked to the plea alleging infringement of the SPS Agreement, it could be taken into consideration only if the Court had found that Agreement to have direct effect in the context of a plea alleging the invalidity of the directives in question.

56. Such reasoning does not suffice, however, to deal with the plea put forward by the applicant at first instance concerning infringement of the SPS Agreement.

57. It further fell to the Court of First Instance to address the argument that the legal effects of the DSB decision of 13 February 1998 vis-à-vis the European Community called into question the Court's finding that the WTO rules did not have direct effect and provided grounds for a review by the Community Courts of the legality of Directives 81/602, 88/146 and 96/22 in the light of those rules in the action for damages brought by the then applicant.

58. That question was central to the arguments relating to the scope of Article 228(7) of the Treaty which the appellant advanced before the Court of First Instance, as it is before the Court of Justice at the appeal stage.

59. Furthermore, the judgment in Atlanta v European Community, to which the Court of First Instance also referred, in paragraph 67 of the contested judgment, is irrelevant in this connection. In paragraph 19 of the judgment in Atlanta v European Community the Court of Justice found that the DSB decision, taken after the appeal had been brought and which establishes the incompatibility of the Community measure in question with WTO law, was inescapably and directly linked to the plea of infringement of the provisions of GATT, which had been raised by the appellant before the Court

of First Instance but had not been repeated by it in its pleas on appeal. Consequently, the Court of Justice rejected as inadmissible, on account of the late stage at which it had been invoked, the plea based on the DSB's decision, raised before the Court of Justice for the first time in the reply, and the Court did not examine the substance of the plea.

60. However, the errors of law thus made by the Court of First Instance as regards the duty to state reasons and the scope of the judgment in Atlanta v European Community do not invalidate the contested judgment, if the operative part thereof and in particular the rejection of the plea at first instance concerning the SPS Agreement, appears founded on other legal grounds (see to that effect Case C-367/95 P Commission v Sytraval and Brink's France [1998] ECR I-1719, paragraph 47).

61. In that regard, the dispute settlement procedure which culminated in the DSB decision of 13 February 1998 was instigated in 1996. Since the Community had stated that it intended to comply with its WTO obligations but that it needed a reasonable time to do so, under Article 21(3) of the Understanding it was granted a period of 15 months for that purpose, which expired on 13 May 1999.

62. Accordingly, for the period prior to 13 May 1999, the Community Courts cannot, in any event, carry out a review of the legality of the Community measures in question, particularly not in the context of an action for damages under Article 178 of the Treaty, without rendering ineffective the grant of a reasonable period for compliance with the DSB recommendations or decisions, as provided for in the dispute settlement system put in place by the WTO agreements.

63. It is appropriate to add that it is apparent from the contested judgment that the Tribunal de commerce de Paris, by judgment of 7 December 1995, opened judicial liquidation proceedings in respect of the appellant and provisionally set the date for cessation of payments at 28 February 1995. As a result, it cannot be accepted that any damage to the appellant allegedly arising from the maintenance in force, after 1 January 1995, of Directives 81/602 and 88/146 and from the adoption on 29 April 1996 of Directive 96/22 could have been sustained during the period after 13 February 1998, the date on which the DSB decision relating to imports of meat containing hormones was adopted, and a fortiori after 13 May 1999, when the 15-month period granted to the Community for the purpose of complying with its obligations under the WTO rules expired.

64. In those circumstances and without it being necessary to consider what damage might be suffered by individuals as a result of the Community's failure to implement a DSB decision finding a Community measure incompatible with the WTO rules, the Court finds that in the present case in the absence of any damage allegedly occurring after 13 May 1999, the Community cannot, on any view, have incurred liability.

65. In the light of those considerations, it must be held that, despite the shortcomings of the reasoning of the contested judgment on this point, the Court of First Instance was right in finding that the plea concerning infringement of the SPS Agreement was unfounded.

66. The first plea must therefore be rejected as being ineffective in part and unfounded in part.

Second plea

67. By its second plea, the appellant submits that the Court of First Instance, by holding, in paragraph 71 of the contested judgment, that its argument concerning a system of no-fault liability for the Community was a new plea in law which could not be introduced in the course of proceedings, infringed Article 48 of its Rules of Procedure. In its submission, the issue of possible no-fault liability on the part of the Community was raised in its application before the Court of First Instance, although the arguments were developed in the reply.

68. It is sufficient on this point to state that a mere reading of the application at first instance shows that no mention was made there of no-fault liability on the part of the Community. In particular, the part of the application dealing with the compatibility of the directives at issue with the WTO rules was specifically entitled Community's unlawful conduct resulting in it being at fault.

69. The Court of First Instance was thus right in holding, in paragraph 71 of the contested judgment, that the argument concerning the Community's alleged no-fault liability, was submitted too late and could not be considered, in accordance with Article 48 of the Rules of Procedure of the Court of First Instance.

70. The second plea must therefore be rejected as unfounded.

71. In light of all of the foregoing considerations, the appeal must be dismissed in its entirety.

[…]

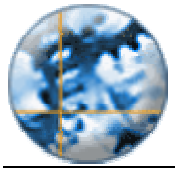
On those grounds,

THE COURT (Full Court),

hereby:

1. Dismisses the appeal;
2. Orders Biret International SA to bear its own costs and to pay two thirds of the costs of the Council of the European Union;
3. Orders the Council of the European Union to bear one third of its own costs;
4. Orders the United Kingdom of Great Britain and Northern Ireland and the Commission of the European Communities to bear their own costs.

## *1.13 Case C-224/01: Köbler*



### *NOTE AND QUESTIONS*

1. Kobler is the first of the three cases discussing Member States' liability for loss or damage caused to individuals as a result of a breach of Community law by a Supreme Court

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

2. Was the Court right in the Kobler case (a) on the general principle it adopted and (b) on the facts of the case?

**Gerhard Köbler and Republik Österreich**

**Case 224/01**

30 September 2003

Court of Justice

[2003] ECR I-0000

http://www.curia.eu.int/en/content/juris/index.htm

**Summary of the facts and procedure:**

*Mr Köbler has been an ordinary university professor in Austria since 1986. On the basis of 15 years' university teaching in various Member States, he applied for a special length-of-service increment pursuant to an Austrian law. His application was rejected, because the legislation makes the grant of that increment conditional on 15 years' service as a professor in Austrian universities alone. He appealed against that decision, claiming indirect discrimination contrary to the principle of freedom of movement for workers; the Austrian supreme administrative court.*

*Mr Köbler took the view that that decision of the Austrian court infringed a number of Community law provisions and thereby caused him loss. He therefore brought an action for damages against Austria before a Regional Civil Court, which has made a reference to the ECJ.*

**Judgement:**

[…]

15. By its first and second questions, which must be examined together, the referring court is essentially asking whether the principle according to which Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance and whether, if so, it is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation.

Observations submitted to the Court

16. Mr Köbler, the German and Netherlands Governments and the Commission consider that a Member State can be rendered liable for breach of Community law owing to a fault attributable to a court. However, those governments and the Commission consider that that liability should be limited and subject to different restrictive conditions additional to those already laid down in the Brasserie du Pêcheur and Factortame judgment.

17. In that connection the German and Netherlands Governments claim that there is a sufficiently serious breach for the purposes of that judgment only if a judicial decision disregarded the applicable Community law in a particularly serious and manifest way. According to the German Government, breach of a rule of law by a court is particularly serious and manifest only where the interpretation or non-application of Community law is, first, objectively indefensible and, secondly, must be subjectively regarded as intentional. Such restrictive criteria are justified in order to safeguard both the principle of res judicata and the independence of the judiciary. Moreover, a restrictive regime of State liability for damage caused by mistaken judicial decisions is in keeping, in the German Government's view, with a general principle common to the laws of the Member States as laid down in Article 288 EC.

18. The German and Netherlands Governments maintain that the liability of the Member State should remain limited to judicial decisions against which no appeal lies, in particular because Article 234 EC imposes an obligation to make a reference for a preliminary ruling only on courts called upon to make such decisions. The Netherlands Government considers that State liability can be incurred only in the event of a manifest and serious infringement of that obligation to make a reference.

19. The Commission submits that a limitation of State liability on account of judicial decisions exists in all the Member States and is necessary in order to safeguard the authority of res judicata of final decisions and thus the stability of the law. For that reason it advocates that the existence of a sufficiently serious breach of Community law should be recognised only where the national court is manifestly abusing its power or discernibly disregarding the meaning and scope of Community law. In the present case, the alleged fault by the Verwaltungsgerichtshof is excusable and that fact is one of the criteria enabling it to be concluded that there has not been a sufficiently serious breach of the law (Case C-424/97 Haim [2000] ECR I-5123, paragraph 43).

20. For their part the Republic of Austria and the Austrian Government (hereinafter together referred to as the Republic of Austria), and the French and United Kingdom Governments, maintain that the liability of a Member State cannot be incurred in the case of a breach of Community law attributable to a court. They rely on arguments based on res judicata, the principle of legal certainty, the independence of the judiciary, the judiciary's place in the Community legal order and the comparison with procedures available before the Court to render the Community liable under Article 288 EC.

21. The Republic of Austria claims in particular that a re-examination of the legal appraisal by a court adjudicating at last instance would be incompatible with the function of such a court since the purpose of its decisions is to bring a dispute to a definitive conclusion. Moreover, since the Verwaltungsgerichtshof conducted a detailed examination of Community law in its judgment of 24 June 1998, it would be consonant with Community law to preclude another possibility of bringing proceedings before an Austrian court. Moreover, the Republic of Austria maintains that the conditions for rendering a Member State liable cannot differ from those applicable to the liability of the Community in comparable circumstances. Since the second paragraph of Article 288 EC cannot be applied to an infringement of Community law by the Court of Justice, because in such a case it would be required to determine a question concerning damage which it 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.

22. Moreover, the Republic of Austria contends that Article 234 EC is not intended to confer rights on individuals. In the context of a preliminary-reference procedure pending before the Court the parties to the main proceedings can neither amend the questions referred for a preliminary ruling nor have them declared irrelevant (Case 44/65 Singer [1965] ECR 1191). Moreover, only the infringement of a provision intended to confer rights on individuals is capable in a proper case of rendering the Member State liable. Accordingly, that liability cannot be incurred in the case of an infringement of Article 234 EC by a court adjudicating at last instance.

23. The French Government claims that a right to reparation on the ground of an allegedly mistaken application of Community law by a definitive decision of a national court would be contrary to the principle of res judicata, as upheld by the Court in Case C-126/97 Eco Swiss [1999] ECR I-3055. That government claims in particular that the principle of res judicata constitutes a fundamental value in legal systems founded on the rule of law and the observance of judicial decisions. However, if State liability for infringement of Community law by a judicial body were recognised, that would be to call in question the rule of law and observance of such decisions.

24. The United Kingdom Government states that, as a matter of principle and save where a judicial act infringes a fundamental right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), signed in Rome on 4 November 1950, no action in damages can be brought against the Crown in respect of judicial decisions. It adds that the principle on which the principle of State liability is based, namely that rights conferred by Community rules must be effectively protected is far from being absolute and cites in that regard the application of fixed limitation periods. That principle would be capable of founding a remedy in damages against the State only in rare cases and in respect of certain strictly defined national judicial decisions. The advantage to be gained from acknowledging that damages may be obtained in respect of judicial decisions is therefore correspondingly small. The United Kingdom Government considers that that advantage must be weighed against certain powerful policy concerns.

25. In that regard it cites, first, the principles of legal certainty and res judicata. The law discourages re-litigation of judicial decisions except by means of an appeal. That is both to protect the interests of the successful party and to further the public interest in legal certainty. The Court has in the past shown itself willing to limit the principle of effective protection in order to uphold the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of res judicata, which is an expression of that principle (judgment in Eco Swiss, cited above, paragraphs 43 to 48). Acknowledgment of State liability for a mistake by the judiciary would throw the law into confusion and would leave the litigating parties perpetually uncertain as to where they stood.

26. Secondly, the United Kingdom Government submits that the authority and reputation of the judiciary would be diminished if a judicial mistake could in the future result in an action for damages. Thirdly, it maintains that the independence of the judiciary within the national constitutional order is a fundamental principle in all the Member States but one which can never be

taken for granted. Acceptance of State liability for judicial acts would be likely to give rise to the risk that that independence might be called in question.

27. Fourthly, inherent in the freedom given to national courts to decide matters of Community law for themselves is the acceptance that those courts will sometimes make errors that cannot be appealed or otherwise corrected. That is a disadvantage which has always been considered acceptable. In that regard the United Kingdom Government points out that, in the event that the State could be rendered liable for a mistake by the judiciary, with the result that the Court could be called upon to give a preliminary ruling on that point, the Court would be empowered not only to pronounce upon the correctness of judgments of national supreme courts but to assess the seriousness and excusability of any error into which they had fallen. The consequences of this for the vital relationship between the Court and the national courts would clearly not be beneficial.

28. Fifthly, the United Kingdom Government points to the difficulties in determining the court competent to adjudicate on such a case of State liability, particularly in the United Kingdom where there is a unitary court system and a strict doctrine of stare decisis. Sixthly, it maintains that, if State liability for a mistake by the judiciary can be incurred, the same conditions for the liability of the Community for mistakes by the Community judicature would have to apply.

29. Specifically in regard to the second question, Mr Köbler and the Austrian and German Governments submit that it is for the legal system of each Member State to designate the court competent to adjudicate on disputes involving individual rights derived from Community law. That question should therefore be answered in the affirmative.

Reply by the Court

Principle of State liability

30. First, as the Court has repeatedly held, the principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of Community law for which the State is responsible is inherent in the system of the Treaty (Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 35; Brasserie du Pêcheur and Factortame, cited above, paragraph 31; Case C-392/93 British Telecommunications [1996] I-1631, paragraph 38; Case C-5/94 Hedley Lomas [1996] ECR I-2553, paragraph 24; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and Others [1996] ECR I-4845, paragraph 20, Case C-127/95 Norbrook Laboratories [1998] ECR I-1531, paragraph 106 and Haim, cited above, paragraph 26).

31. The Court has also held that that principle applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach (Brasserie du Pêcheur and Factortame, cited above, paragraph 32; Case C-302/97 Konle [1999] ECR I-3099, paragraph 62 and Haim, cited above, paragraph 27).

32. In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals (Brasserie du Pêcheur and Factortame, cited above, paragraph 34).

33. In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, 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.

34. It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be 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.

35. Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article 234 EC a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.

36. Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance (see in that connection Brasserie du Pêcheur and Factortame, cited above, paragraph 35).

37. Certain of the governments which submitted observations in these proceedings claimed that the principle of State liability for damage caused to individuals by infringements of Community law could not be applied to decisions of a national court adjudicating at last instance. In that connection arguments were put forward based, in particular, on the principle of legal certainty and, more specifically, the principle of res judicata, the independence and authority of the judiciary and the absence of a court competent to determine disputes relating to State liability for such decisions.

38. In that regard the importance of the principle of res judicata cannot be disputed (see judgment in Eco Swiss, cited above, paragraph 46). In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question.

39. However, it should be borne in mind that 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 res judicata. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of res judicata. 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. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage.

40. It follows that the principle of res judicata does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance.

41. Nor can the arguments based on the independence and authority of the judiciary be upheld.

42. As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.

43. As to the argument based on the risk of a diminution of the authority of a court adjudicating at last instance owing to the fact that its final decisions could by implication be called in question in proceedings in which the State may be rendered liable for such decisions, the existence of a right of action that affords, under certain conditions, 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.

44. Several governments also argued that application of the principle of State liability to decisions of a national court adjudicating at last instance was precluded by the difficulty of designating a court competent to determine disputes concerning the reparation of damage resulting from such decisions.

45. In that connection, given that, for reasons essentially connected with the need to secure for individuals protection of the rights conferred on them by Community rules, the principle of State liability inherent in the Community legal order must apply in regard to decisions of a national court adjudicating at last instance, it is for the Member States to enable those affected to rely on that principle by affording them an appropriate right of action. Application of that principle cannot be compromised by the absence of a competent court.

46. According to settled case-law, in the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law (see the judgments in Case 33/76 Rewe [1976] ECR 1989, paragraph 5; Case 45/76 Comet [1976] ECR 2043, paragraph 13; Case 68/79 Just [1980] ECR 501, paragraph 25; Frankovich and Others, cited above, paragraph 42, and Case C-312/93 Peterbroeck [1995] ECR I-4599, paragraph 12).

47. Subject to the reservation that it is for the Member States to ensure in each case that those rights are effectively protected, it is not for the Court to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system (judgments in Case C-446/93 SEIM [1996] ECR I-73, paragraph 32 and Dorsch Consult, cited above, paragraph 40) .

48. It should be added that, although considerations to do with observance of the principle of res judicata or the independence of the judiciary have caused national legal systems to impose restrictions, which may sometimes be stringent, on the possibility of rendering the State liable for damage caused by mistaken judicial decisions, such considerations have not been such as absolutely to exclude that possibility. Indeed, application of the principle of State liability to judicial decisions has been accepted in one form or another by most of the Member States, as the Advocate General pointed out at paragraphs 77 to 82 of his Opinion, even if subject only to restrictive and varying conditions.

49. It may also be noted that, in the same connection, the ECHR and, more particularly, Article 41 thereof enables the European Court of Human Rights to order a State which has infringed a fundamental right to provide reparation of the damage resulting from that conduct for the injured party. The case-law of that court shows that such reparation may also be granted when the infringement stems from a decision of a national court adjudicating at last instance (see ECt.HR, Dulaurans v France, 21 March 2000, not yet published).

50. It follows from the foregoing that the principle according to which the Member States are liable to afford reparation of damage caused to individuals as a result of infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance. It is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation.

Conditions governing State liability

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

52. State liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringes a rule of Community law is governed by the same conditions.

53. With regard more particularly to the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the Member States which submitted observations in this case have also contended. 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.

54. In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it.

55. Those factors include, in particular, 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.

56. 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 (see to that effect Brasserie du Pêcheur and Factortame, cited above, paragraph 57).

57. The three conditions mentioned at paragraph 51 hereof are necessary and sufficient to found a right in favour of individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law (see Brasserie du Pêcheur and Factortame, cited above, paragraph 66).

58. Subject to the existence of a right to obtain reparation which is founded directly on Community law where the conditions mentioned above are met, it is on the basis of rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused, with the proviso that the conditions for reparation of loss and damage laid down by the national legislation must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation (Francovich and Others, paragraphs 41 to 43 and Norbrook Laboratories, paragraph 111).

59. In the light of all the foregoing, the reply to the first and second questions must be that the principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of

the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.

Third question

60. At the outset it must be recalled that the Court has consistently held that, in the context of the application of Article 234 EC, it has no jurisdiction to decide whether a national provision is compatible with Community law. The Court may, however, extract from the wording of the questions formulated by the national court, and having regard to the facts stated by the latter, those elements which concern the interpretation of Community law for the purpose of enabling that court to resolve the legal problems before it (see the judgment in Joined Cases C-332/92, C-333/92 and C-335/92 Eurico Italia and Others [1994] ECR I-711, paragraph 19).

61. In its third question the national court essentially seeks to ascertain whether Article 48 of the Treaty and Article 7(1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ English Special edition, 1968(II), p.475) are to be interpreted as meaning that they preclude the grant, under conditions such as those laid down in Article 50a of the GG of a special length-of-service increment which, according to the interpretation of the Verwaltungsgerichtshof in its judgment of 24 June 1998, constitutes a loyalty bonus.

Observations submitted to the Court

62. First, Mr Köbler claims that the special length-of-service increment provided for in Article 50 of the GG is not a loyalty bonus but an ordinary element of salary, as the Verwaltungsgerichtshof initially acknowledged. Moreover, until the judgment of the Verwaltungsgerichtshof of 24 June 1998 no Austrian court considered that the abovementioned allowance constituted a loyalty bonus.

63. Next, even on the supposition that that allowance is a loyalty bonus and such a bonus could justify indirect discrimination, Mr Köbler maintains that there is no settled and certain case-law of the Court on this point. In those circumstances the Verwaltungsgerichtshof acted ultra vires in withdrawing its request for a preliminary ruling and in reaching its determination alone since the interpretation and definition of concepts of Community law is exclusively a matter for the Court.

64. Finally, Mr Köbler submits that the criteria governing the grant of the special length-of-service increment preclude any justification for the indirect discrimination which it applies against him. That allowance is payable irrespective of the question as to the Austrian university in which the claimant has performed his duties and it is not even a requirement that the claimant should have taught for fifteen years continuously in the same discipline.

65. Stating that the Court cannot interpret national law, the Republic of Austria maintains that the third question must be construed as meaning that the referring court wishes to obtain an interpretation of Article 48 of the Treaty. In that regard it claims that that provision does not preclude a system of remuneration which enables account to be taken of the qualifications acquired with other national or foreign employers by a candidate for a post with a view to determining his salary and which, moreover, provides for an allowance which may be termed a loyalty bonus, eligibility for which is linked to a specific period of service with the same employer.

66. The Republic of Austria explains that, in the light of the fact that Mr Köbler, as an ordinary university professor, is in an employment relationship governed by public law, his employer is the Austrian State. Therefore, a professor passing from one Austrian university to another does not change employer. The Republic of Austria points out that there are also private universities in Austria. The professors teaching there are employees of those establishments and not of the State with the result that their employment relationship is not governed by the GG.

67. The Commission contends for its part that Article 50 of the GG discriminates, in breach of Article 48 of the Treaty, between periods of service completed in Austrian universities and those completed in the universities of other Member States.

68. According to the Commission, the Verwaltungsgerichtshof in its final assessment clearly misconstrued the scope of the judgment in Schöning-Kougebetopolou, cited above. In the light of the fresh elements of national law, the Commission considers that that court ought to have persisted with its request for a preliminary ruling at the same time as reformulating it. In fact, the Court has never expressly adjudged that a loyalty bonus can justify a discriminatory provision in regard to the workers of other Member States.

69. Moreover, the Commission claims that, even if the special length-of-service increment at issue in the main proceedings is to be regarded as a loyalty bonus, it cannot justify an impediment to freedom of movement for workers. It considers that, in principle, Community law does not preclude an employer from seeking to retain qualified employees by offering increases in salary or bonuses to its staff depending on length of service in the undertaking. None the less, the loyalty bonus provided for in Article 50a of the GG is to be distinguished from bonuses which produce their effects solely within the undertaking inasmuch as it operates at the level of the Member State concerned to the exclusion of the other Member States and thus directly affects freedom of movement of teachers. Moreover, the Austrian universities are not only in competition with the establishments of the other Member States but also amongst themselves. Yet, the provision mentioned does not produce effects in regard to the latter type of competition.

Reply by the Court

70. The special length-of-service increment granted by the Austrian State qua employer to university professors under Article 50a of the GG secures a financial benefit in addition to basic salary the amount of which is already dependent on length of service. A university professor receives that increment if he has carried on that profession for at least fifteen years with an Austrian university and if, furthermore, he has been in receipt for at least four years of the normal length-of-service increment.

71. Accordingly, Article 50a of the GG precludes, for the purpose of the grant of the special length-of-service increment for which it provides, any possibility of taking into account periods of activity completed by a university professor in a Member State other than the Republic of Austria.

72. Such a regime is clearly likely to impede freedom of movement for workers in two respects.

73. First, that regime operates to the detriment of migrant workers who are nationals of Member States other than the Republic of Austria where those workers are refused recognition of periods of service completed by them in those States in the capacity of university professor on the sole ground that those periods were not completed in an Austrian university (see, in that connection, with regard to a comparable Greek provision Case C-187/96 Commission v Greece [1998] ECR I-1095, paragraphs 20 and 21).

74. Secondly, that absolute refusal to recognise periods served as a university professor in a Member State other than the Republic of Austria impedes freedom of movement for workers established in Austria inasmuch as it is such as to deter the latter from leaving the country to exercise that freedom. In fact, on their return to Austria, their years of experience in the capacity of university professor in another Member State, that is to say in the pursuit of comparable activities, are not taken into account for the purposes of the special length-of-service increment provided for in Article 50a of the GG.

75. Those considerations are not altered by the fact relied on by the Republic of Austria that, owing to the possibility afforded by Article 48(3) of the GG to grant migrant university professors a higher basic salary in order to promote the recruitment of foreign university professors, their remuneration is often more than that received by professors of Austrian universities, even after account is taken of the special length-of-service increment.

76. In fact, on the one hand, Article 48(3) of the GG offers merely a possibility and does not guarantee that a professor from a foreign university will receive as from his appointment as a professor of an Austrian university a higher remuneration than that received by professors of Austrian universities with the same experience. Secondly, the additional remuneration available under Article 48(3) of the GG upon appointment is quite different from the special length-of-service increment. Thus, that provision does not prevent Article 50 a of the GG from having the effect of occasioning unequal treatment in regard to migrant university professors as opposed to professors of Austrian universities and thus creates an impediment to the freedom of movement of workers secured by Article 48 of the Treaty.

77. Consequently, a measure such as the grant of a special length-of-service increment provided for in Article 50a of the GG is likely to constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty and Article 7(1) of Regulation No 1612/68. Such a measure could be accepted only if it pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of that measure would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose (see, inter alia, Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32, Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 37 and Case C-415/93 Bosman [1995] ECR I-4921, paragraph 104).

78. In its judgment of 24 June 1998 the Verwaltungsgerichtshof held that the special length-of-service increment provided for in Article 50a of the GG constituted under national law a bonus seeking to reward the loyalty of professors of Austrian universities to their sole employer, namely the Austrian State.

79. Accordingly, it is necessary to examine whether the fact that under national law that benefit constitutes a loyalty bonus may be deemed under Community law to indicate that it is dictated by a pressing public-interest reason capable of justifying the obstacle to freedom of movement that the bonus involves.

80. The Court has not yet had the opportunity of deciding whether a loyalty bonus can justify an obstacle to freedom of movement for workers.

81. At paragraphs 27 of the judgment in Schöning-Kougebetopoulou, cited above, and 49 of the judgment in Case C-195/98 Österreichischer Gewerkschaftsbund [1995] ECR I-10497, the Court rejected the arguments advanced in that regard by the German and Austrian Governments respectively. Indeed, the Court there stated that the legislation at issue was not on any view capable of seeking to reward the employee's loyalty to his employer, because the increase in salary which that worker received in respect of his length of service was determined by the years of service completed with a number of employers. Since in the cases giving rise to those judgments, the increase in salary did not constitute a loyalty bonus it was not necessary for the Court to examine whether such a bonus could in itself justify an obstacle to freedom of movement for workers.

82. In the present case the Verwaltungsgerichtshof held in its judgment of 24 June 1998 that the special length-of-service increment provided for in Article 50a of the GG rewards an employee's loyalty to a single employer.

83. Although it cannot be excluded that an objective of rewarding workers' loyalty to their employers in the context of policy concerning research or university education constitutes a pressing public-interest reason, given the particular characteristics of the measure at issue in the main proceedings, the obstacle which it entails clearly cannot be justified in the light of such an objective.

84. First, although all the professors of Austrian public universities are the employees of a single employer, namely the Austrian State, they are assigned to different universities. However, on the employment market for university professors, the various Austrian universities are in competition not only with the universities of other Member States and those of non-Member States but also amongst themselves. As to that second kind of competition the measure at issue in the main proceedings does nothing to promote the loyalty of a professor to the Austrian university where he performs his duties.

85. Second, although the special length-of-service increment seeks to reward workers' loyalty to their employer, it also has the effect of rewarding the professors of Austrian universities who continue to exercise their profession on Austrian territory. The benefit in question is therefore likely to have consequences in regard to the choice made by those professors between a post in an Austrian university and a post in the university of another Member State.

86. Accordingly, the special length-of-service increment at issue in the main proceedings does not solely have the effect of rewarding the employee's loyalty to his employer. It also leads to a partitioning of the market for the employment of university professors in Austria and runs counter to the very principle of freedom of movement for workers.

87. It follows from the foregoing that a measure such as the special length-of-service increment provided for in Article 50a of the GG results in an obstacle to freedom of movement for workers which cannot be justified by a pressing public-interest reason.

88. Accordingly, the reply to the third question referred for a preliminary ruling must be that Articles 48 of the Treaty and 7(1) of Regulation No 1612/68 must be interpreted as meaning that they preclude the grant, under the conditions laid down in Article 50a of the GG, of a special length-of-service increment which, according to the interpretation of the Verwaltungsgerichtshof in its judgment of 24 June 1998, constitutes a loyalty bonus.

Fourth and fifth questions

89. By its fourth and fifth questions, which must be dealt with together, the national court is essentially seeking to ascertain whether, in the main proceedings, the liability of the Member State is incurred owing to an infringement of Community law by the judgment of the Verwaltungsgerichtshof of 24 June 1998.

Observations submitted to the Court

90. In regard to the fourth question, Mr Köbler, the German Government and the Commission claim that Article 48 is directly applicable and creates for individuals subjective rights which the authorities and national courts are required to safeguard.

91. The Republic of Austria maintains that it is appropriate to give a reply to the fourth question only if the Court does not reply to the preceding questions in the manner suggested by it. Inasmuch as the fourth question was raised only in the event of an affirmative reply to the third question, which it regards as inadmissible, it proposes that the Court should not reply to that fourth question. Moreover, it claims that it is unclear since the order for reference contains no reasoning in regard to it.

92. As regards the fifth question, Mr Köbler maintains that the reply to it should be in the affirmative since the Court has to hand all the materials enabling it to rule itself on whether in the main proceedings the Verwaltungsgerichtshof clearly and significantly exceeded the discretion available to it.

93. The Republic of Austria considers that it is for the national courts to apply the criteria concerning the liability of the Member States for loss or damage caused to individuals by infringements of Community law.

94. None the less, in the event that the Court should itself reply to the question whether the liability of the Republic of Austria is incurred, it maintains, first, that Article 177 of the EC Treaty (now Article 234 EC) is not intended to confer rights on individuals. It considers therefore that that condition governing liability is not satisfied.

95. Secondly, it is undeniable that, in the context of a dispute pending before them, the national courts have a large margin of discretion in determining whether or not they are obliged to formulate a request for a preliminary ruling. In that regard the Republic of Austria maintains that, since in its judgment in Schöning-Kougebetopoulou the Court considered that loyalty bonuses are not, in principle, contrary to the provisions relating to freedom of movement for workers, the Verwaltungsgerichtshof rightly concluded that, in the case before it, it was entitled itself to decide the questions of Community law.

96. Thirdly, should the Court acknowledge that the Verwaltungsgerichtshof did not observe Community law in its judgment of 24 June 1998, the conduct of that court could not in any event be characterised as a sufficiently serious breach of that law.

97. Fourthly, the Republic of Austria claims that there cannot be any causal link between the withdrawal by the Verwaltungsgerichtshof of the request for a preliminary ruling addressed to the Court and the damage actually alleged by Mr Köbler. Those arguments are in fact based on the plainly unacceptable supposition that, if the request had been maintained, the preliminary ruling by the Court would necessarily have upheld Mr Köbler's arguments. In other words, underlying those arguments is the implication that the damage constituted by non-payment of the special length-of-service increment for the period from 1 January 1995 to 28 February 2001 would not have occurred if the request for a preliminary ruling had been maintained and had resulted in a decision of the Court. However, it is neither possible for a party to the main proceedings to found arguments on a prejudgment as to what the Court would have decided in the case of a request for a preliminary ruling, nor is it permissible to claim damage under that head.

98. For its part, the German Government maintains that it is for the national court to determine whether the conditions governing the liability of the Member State are satisfied.

99. The Commission considers that the liability of the Member State is not incurred in the main proceedings. In fact, although in its view the Verwaltungsgerichtshof in its judgment of 24 June 1998 misinterpreted the Schöning-Kougebetopoulou judgment, cited above and, moreover infringed Article 48 of the Treaty in ruling that Article 50a of the GG was not contrary to Community law, that infringement is in some way excusable.

Reply by the Court

100. It is clear from the case-law of the Court that it is, in principle, for the national courts to apply the criteria for establishing the liability of Member States for damage caused to individuals by breaches of Community law (Brasserie du Pêcheur and Factortame, paragraph 58), in accordance with the guidelines laid down by the Court for the application of those criteria (Brasserie du Pêcheur and Factortame, paragraphs 55 to 57; British Telecommunications, cited above, paragraph 411; Joined

Cases C-283/94, C-291/94 and C-292/94 Denkavit and Others [1996] ECR I-5063, paragraph 49, and Konle, cited above, paragraph 58).

101. None the less, in the present case the Court has available to it all the materials enabling it to establish whether the conditions necessary for liability of the Member State to be incurred are fulfilled.

The rule of law infringed, which must confer rights on individuals

102. The rules of Community law whose infringement is at issue in the main proceedings are, as is apparent from the reply to the third question, Articles 48 of the Treaty and 7(1) of Regulation No 1612/68. Those provisions specify the consequences resulting from the fundamental principle of freedom of movement for workers within the Community by way of the prohibition of any discrimination based on nationality as between the workers of the Member States, in particular as to remuneration.

103. It cannot be disputed that those provisions are intended to confer rights on individuals.

The sufficiently serious nature of the breach

104. The course of the procedure which led to the judgment of the Verwaltungsgerichtshof of 24 June 1998 should be kept in view.

105. In the dispute pending before it between Mr Köbler and the Bundesminister für Wissenschaft, Forschung und Kunst (Federal Minister for Science, Research and Art) concerning the latter's refusal to grant Mr Köbler the special length-of-service increment provided for in Article 50a of the GG, that court, by order of 22 October 1997 registered at the Registry of the Court under number Case C-382/97, referred to the Court for a preliminary ruling a question on the interpretation of Article 48 of the Treaty and Articles 1 to 3 of Regulation No 1612/68.

106. The Verwaltungsgerichtshof states in that order, inter alia, that in order to decide the issue pending before it: it is essential to know whether it is contrary to Community law under Article 48 of the EC Treaty (...) for the Austrian legislature to make the grant of the special length of service increment for ordinary university professors, which is in the nature of neither a loyalty bonus nor a reward, but is rather a component of salary under the advancement system, dependent on 15 years' service at an Austrian university.

107. First, that order for reference reveals without any ambiguity that the Verwaltungsgerichtshof considered at that time that under national law the special length-of-service increment in question did not constitute a loyalty bonus.

108. Next, it follows from the written observations of the Austrian Government in Case C-382/97 that, in order to demonstrate that Article 50a of the GG was not capable of infringing the principle of freedom of movement for workers enshrined in Article 48 of the Treaty, that Government merely contended that the special length-of-service increment provided for by that provision constituted a loyalty bonus.

109. Finally, the Court had already held at paragraphs 22 and 23 of its Schöning-Kougebetopoulou judgment, cited above, that a measure which makes a worker's remuneration dependent on his length of service but excludes any possibility for comparable periods of employment completed in the public service of another Member State to be taken into account is likely to infringe Article 48 of the Treaty.

110. Given that the Court had already adjudged that such a measure was such as to infringe that provision of the Treaty and also that the only justification cited in that regard by the Austrian Government was not pertinent in the light of the order for reference itself, the Registrar of the Court, by letter of 11 March 1998, forwarded a copy of the judgment in Schöning-Kougebetopoulou to the Verwaltungsgerichtshof so that it could examine whether it had available to it the elements of interpretation of Community law necessary to determine the dispute pending before it and asked it whether, in the light of that judgment, it deemed it necessary to maintain its request for a preliminary ruling.

111. By order of 25 March 1998, the Verwaltungsgerichtshof asked the parties to the dispute before it for their views on the request by the Registrar of the Court, observing, on a provisional basis, that the point of law forming the subject-matter of the preliminary-reference procedure in question had been resolved in favour of Mr Köbler.

112. By order of 24 June 1998, the Verwaltungsgerichtshof withdrew its reference for a preliminary ruling, taking the view that it was no longer necessary to persist with that request in order to resolve the dispute. It stated that the decisive question in the present case was whether the special length-of-service increment provided for in Article 50a of the GG was a loyalty bonus or not and that that question had to be decided in the context of national law.

113. In its judgment of 24 June 1998 the Verwaltungsgerichtshof held that, in its order for reference of 22 October 1997, it had taken the view that the special length of service increment for ordinary university professors is in the nature neither of a loyalty bonus nor of a reward, and that that interpretation of the law, which is not binding on the parties to proceedings before the Verwaltungsgerichtshof, cannot be upheld. The Verwaltungsgerichtshof then comes to the conclusion that that benefit is in fact a loyalty bonus.

114. It follows from the foregoing that, after the Registrar of the Court had asked the Verwaltungsgerichtshof whether it was maintaining its request for a preliminary ruling, the latter reviewed the classification under national law of the special length-of-service increment.

115. Following that reclassification of the special length-of-service increment provided for in Article 50a of the GG, the Verwaltungsgerichtshof dismissed Mr Köbler's action. In its judgment of 24 June 1998 it inferred from the judgment in Schöning-Kougebetopoulou that since that benefit was to be deemed a loyalty bonus, it could be justified even if it was in itself contrary to the principle of non-discrimination laid down in Article 48 of the Treaty.

116. However, as is clear from paragraphs 80 and 81 hereof, the Court did not express a view in the judgment in Schöning-Kougebetopoulou on whether and if so under what conditions the obstacle to freedom of movement for workers constituted by a loyalty bonus could be justified. Thus the inferences drawn by the Verwaltungsgerichtshof from that judgment are based on an incorrect reading of it.

117. Accordingly, since the Verwaltungsgerichtshof amended its interpretation of national law by classifying the measure provided for in Article 50a of the GG as a loyalty bonus after the judgment in Schöning-Kougebetopoulou had been sent to it and since the Court had not yet had the opportunity of expressing a view on whether the obstacle to freedom of movement for workers constituted by a loyalty bonus could be justified, the Verwaltungsgerichtshof ought to have maintained its request for a preliminary ruling.

118. That court was not entitled to take the view that resolution of the point of law at issue was clear from the settled case-law of the Court or left no room for any reasonable doubt (Case 283/81 CILFIT and Others [1982] ECR 3415, paragraphs 14 and 16). It was therefore obliged under the third paragraph of Article 177 of the Treaty to maintain its request for a preliminary ruling.

119. Moreover, as is clear from the reply to the third question, a measure such as the special length-of-service increment provided for in Article 50a of the GG, even if it may be classified as a loyalty bonus, entails an obstacle to freedom of movement for workers contrary to Community law. Accordingly, the Verwaltungsgerichtshof infringed Community law by its judgment of 24 June 1998.

120. It must therefore be examined whether that infringement of Community law is manifest in character having regard in particular to the factors to be taken into consideration for that purpose as indicated in paragraphs 55 and 56 above.

121. In the first place, the infringement of Community rules at issue in the reply to the third question cannot in itself be so characterised.

122. Community law does not expressly cover the point whether a measure for rewarding an employee's loyalty to his employer, such as a loyalty bonus, which entails an obstacle to freedom of movement for workers, can be justified and thus be in conformity with Community law. No reply was to be found to that question in the Court's case-law. Nor, moreover, was that reply obvious.

123. In the second place, the fact that the national court in question ought to have maintained its request for a preliminary ruling, as has been established at paragraph 118 hereof, is not of such a nature as to invalidate that conclusion. In the present case the Verwaltungsgerichtshof had decided to withdraw the request for a preliminary ruling, on the view that the reply to the question of Community law to be resolved had already been given in the judgment in Schöning-Kougebetopoulou, cited above. Thus, it was owing to its incorrect reading of that judgment that the Verwaltungsgerichtshof no longer considered it necessary to refer that question of interpretation to the Court.

124. In those circumstances and in the light of the circumstances of the case, the infringement found at paragraph 119 hereof cannot be regarded as being manifest in nature and thus as sufficiently serious.

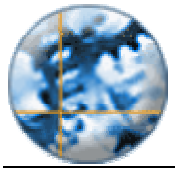
125. It should be added that that reply is without prejudice to the obligations arising for the Member State concerned from the Court's reply to the third question referred.

126. The reply to the fourth and fifth questions must therefore be that an infringement of Community law, such as that stemming in the circumstances of the main proceedings from the judgment of the Verwaltungsgerichtshof of 24 June 1998, does not have the requisite manifest character for liability under Community law to be incurred by a Member State for a decision of one of its courts adjudicating at last instance.

[…]

# 2 EFFECTIVENESS OF NATIONAL COURT REMEDIES

## 2.1 Case 33/76: Rewe



***NOTE AND QUESTIONS***

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On Case 33/76 Rewe and Case 158/80 Rewe "Butter-Buying-cruises":

1. How does the “cooperation” between the Court of Justice and the national courts work in principle. Which conditions does the Court impose and why?

**Rewe-Zentral Finanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland**

**Case 33/76**

16 December 1976

Court of Justice

[1976] ECR 1989

http://www.curia.eu.int/en/content/juris/index.htm

1 By order dated 23 January 1976, received at the Court registry on 6 April 1976, the Bundesverwaltungsgericht referred to the Court three questions on articles 5, 9 and 13 (2) of the EEC Treaty for a preliminary ruling under article 177 of the EEC Treaty.

2 These questions have arisen in a case relating to the payment in 1968 on the importation by the appellants of French apples of charges for phytosanitary inspection, regarded as equivalent to customs duties by the judgment of the Court of 11 October 1973 in case 39/73 (Rewe Zentralfinanz GmbH (1973) ECR 1039).

The respondent to the appeal rejected the appellants' claims to have the decisions imposing the charges annulled and the amounts paid refunded (with interest) on the ground that they were inadmissible because the time-limits laid down by article 58 of the Verwaltungsgerichtsordnung (code of procedure before the administrative Courts) had not been observed.

3 The first question asks whether where an administrative body in a state has infringed the prohibition on charges having an effect equivalent to customs duties (articles 5, 9 and 13 (2) of the EEC Treaty) the Community citizen concerned has a right under Community law to the annulment or revocation of the administrative measure and/or to a refund of the amount paid even if under the

rules of procedure of the national law the time-limit for contesting the validity of the administrative measure is past.

The second question asks whether this is so if the Court of Justice has already ruled that there does exist an infringement of the prohibition contained in Community law.

The third question asks whether, if a right to refund is held to exist under Community law, interest is to be paid on the amount and if so from what date and at what rate.

The first question

4 Both the respondent and the national Court accept that the charges in question had been unlawfully exacted. Although it has been possible to rely on the direct effect of article 13 (2) of the EEC Treaty only as from 1 January 1970, the end of the transitional period, it should be stated however that the levying of the said charges was already previously unlawful by virtue of article 13 (1) of regulation no 159/66/EEC of the Council of 25 October 1966 (JO 192 of 27 October 1966) which abolished them in respect of fruit and vegetables as from 1 January 1967. 5 the prohibition laid down in article 13 of the Treaty and that laid down in article 13 of regulation no 159/66/EEC have a direct effect and confer on citizens rights which the national Courts are required to protect. Applying the principle of cooperation laid down in article 5 of the Treaty, it is the national Courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law. Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the Courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. Where necessary, articles 100 to 102 and 235 of the Treaty enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the common market. In the absence of such measures of harmonization the right conferred by Community law must be exercised before the national Courts in accordance with the conditions laid down by national rules. The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national Courts are obliged to protect. This is not the case where reasonable periods of limitation of actions are fixed. The laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the tax-payer and the administration concerned.

6 The answer to be given to the first question is therefore that in the present state of Community law there is nothing to prevent a citizen who contests before a national Court a decision of a national authority on the ground that it is incompatible with Community law from being confronted with the defence that limitation periods laid down by national law have expired, it being understood that the procedural conditions governing the action may not be less favourable than those relating to similar actions of a domestic nature.

The second question

7 The fact that the Court has given a ruling on the question of infringement of the Treaty does not affect the reply given to the first question.

The third question

8 In view of the reply given to the first question the third question does not arise.

[…]

## 2.2 Case 158/80: Rewe “Butter-Buying-cruises”

**Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v Hauptzollamt Kiel**

**Case 158/80**

7 July 1981

Court of Justice

[1981] ECR 1805

http://www.curia.eu.int/en/content/juris/index.htm

By an order of 5 June 1980, which was received at the Court on 9 July 1980,the Finanzgericht [Finance Court] Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions as to the interpretation of Regulation (EEC) No. 1544/69 of the Council of 23 July 1969 on the tariff applicable to goods contained in travellers' personal luggage (Official Journal, English Special Edition 1969 (II), p. 359), Council Directive No. 69/169/EEC of 28 May 1969 on the harmonization of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (Official Journal, English Special Edition 1969 (I), p. 232) and the validity of Council Regulation (EEC) No. 3023/77 of 20 December 1977 on certain measures to put an end to abuses resulting from the sale of agricultural products on board ship (Official Journal No. L. 358, p.2).

These questions were submitted in the course of proceedings between a wholesaler and a retailer established in the Federal Republic of Germany on the one hand and the Hauptzollamt [Principal Customs Office] Kiel, on the other, and raised the issue whether the "butter-buying cruises" run by various shipping companies from ports on the Baltic coast are in breach of Community law.

The "butter-buying cruises" cross the maritime customs zone into the territorial waters or on to the high seas outside German territory. During the cruise passengers on the ships have the opportunity to buy goods such as spirits, butter, meat, tobacco, perfume and other products. Within certain limits no tax is charged on the importation of the goods at the German frontier. The "butter-buying cruises" are of considerable commercial importance to the undertakings which organize them.

The first plaintiff in the main action is a wholesaler whose head office is near Kiel in the Federal Republic of Germany. It markets, inter alia, the same products as those sold during the cruises. Its customers, one of whom is the second plaintiff in the main action, are retailers established in the region of the Baltic coast.

The order for reference shows that the applicants argued before the Finanzgericht that the effect of these cruises is to withdraw a large part of the purchasing power of the inhabitants of the Baltic coast from the local retail and wholesale businesses and to redistribute it amongst the shipping companies which arrange such cruises. The fact that these undertakings are able to sell goods tax-free or subsidized gives them a considerable competitive advantage which leads to distortion of competition.

The plaintiffs originally asked the Finanzgericht to declare that the defendant must stop permitting the goods concerned to clear customs free of tax. They subsequently requested the Finanzgericht to order

the defendant not to apply to passengers, when they cross the customs frontier, the exemption in respect of goods acquired by them tax-free or subsidized on "butter-buying cruises".

The Finanzgericht, before which the dispute was brought, submitted the following questions to the Court of Justice for a preliminary ruling:

[…]

3. Does a breach of a Community regulation give directly applicable rights to a person whose rights have been adversely affected by provisions laid down by the law or administrative action of a Member State or the implementation thereof which are inconsistent with the provisions of that regulation so that he may bring an action before a national court for the application of measures contravening Community law to be discontinued or for the provisions of Community law to be complied with?

4. Is Council Regulation (EEC) No. 3023/77 invalid because it is in breach of a superior rule of Community law (for example, the principle of equality, the prohibition of discrimination, freedom of competition, the principle of proportionality)?

5. If the answer to Question 4 is in the affirmative, does a person whose rights are adversely affected by reason of the law or administrative provision of a Member State, or the implementation thereof, based on Council Regulation (EEC) No. 3023/77, acquire directly applicable rights so that he may bring an action before a national court for the application of measures contravening Community law to be discontinued?

[…]

8. Does Council Regulation No. 69/169/EEC, as last amended, give directly applicable rights to a person whose rights have been adversely affected by provisions laid down by the law or administrative action of a Member State or the implementation thereof which are inconsistent with the provisions of that regulation, so that he may bring an action before a national court for the application of national measures contravening Community law to be discontinued?"

[…]

These three questions [third, fifth and eighth] concern the question whether a person whose interests are adversely affected either by national legislation incompatible with Community law or by the application of an unlawful Community measure may take action before the national courts in order to have measures contrary to Community law declared inoperative.

In its order the Finanzgericht states that, according to the case-law of the Bundesverfassungsgericht [Federal Constitutional Court] and of the Bundesverwaltungsgericht [Federal Administrative Court], laws controlling the economy which are passed to further the interests of individual groups and which alter the situation with regard to competition are in breach of the principle of equality if they are not required in the public interest and if the interests of other persons which merit protection are arbitrarily prejudiced. In such a case under German law the person affected has a right of action. Placed in that context, the questions raised by the national court are intended in substance to establish whether that right of action may be exercised in similar conditions within the framework of the Community legal system in particular in the sense the economic interests of a person to whom Community law applies are adversely affected by the non-application of a Community provision to a third party, either through the action of a Member State or of the Community authorities that person may institute proceedings before the courts of a Member State in order to compel the national authorities to apply the provisions in question or to refrain from infringing them.

It should be remarked first of all that under Article 189 of the Treaty a regulation "shall be binding in its entirety and directly applicable in all Member States". A directive "shall be binding, as to the result to be achieved", but leaves to the national authorites the choice of form and methods. According to the case-law of the Court the binding effect of a directive implies that a national authority may not apply to an individual a national legislative or administrative measure which is not in accordance with a provision of the directive which has all the characteristics necessary to render possible its application by the court.

It follows from these considerations that a person may rely before the national courts on his rights under the regulation.

Likewise, a national authority may not apply to a person legislative or administrative measures which are not in accordance with an unconditional and sufficiently clear obligation imposed by the directive.

With regard to the right of a trader to request the courts to require the authorities of a Member State to compel a third party to comply with obligations arising from Community rules in a given legal situation in which that trader is not involved but is economically adversely affected by the failure to observe Community law, it must be remarked first of all that, although the Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Court of Justice, it 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. On the other hand the system of legal protection established by the Treaty, as set out in Article 177 in particular, implies that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning the admissibility and procedure as would apply were it a question of ensuring observance of national law.

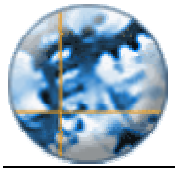
With regard more particularly to Regulation No. 3023/77, it should be noted that that regulation in itself does not confer any exemption. It merely conferred upon the national authorities power to grant a restricted exemption. It accordingly follows from the fact that the regulation is invalid that national measures taken on the basis thereof are not in accordance with Community law.

The reply to the third, fifth and eighth questions should accordingly be as follows:

"The system of legal protection established by the Treaty, as set out in Article 177 in particular, implies that it must be possible for every type of action provided for by national law to be available before the national courts for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning admissibility and procedure as would apply were it a question of ensuring observance of national law".

[…]

## 2.3 Case 265/78: Ferweda



***NOTE AND QUESTIONS***

Case 265/78: Ferweda gives you a first example of how national rules can conflict with the abovementioned conditions laid down by the Court.

1. How would you resolve this tension between principles of national procedural law on the one hand and effectiveness of Community law on the other?

**H. Ferwerda BV v Produktschap voor Vee en Vlees**

**Case 265/78**

5 March 1980

Court of Justice

[1980] ECR 617

http://www.curia.eu.int/en/content/juris/index.htm

1 By a judgment of 15 December 1978 which was received at the Court on 21 December 1978, the college van Beroep voor het Bedrijfsleven referred three questions to the Court for a preliminary ruling under article 177 of the EEC Treaty on the interpretation of article 6 (5) of Regulation (EEC) no 1957/69 of the Commission of 30 September 1969 on additional detailed rules for granting export refunds on products subject to a single price system (Official Journal, English special edition 1969 (ii), p. 417).

2 Those questions are worded as follows :

"1. Properly interpreted, does article 6 (5) of Regulation (EEC) no 1957/69 signify that reliance on the principle of legal certainty laid down in, or applied pursuant to, a national law is precluded in respect of a claim for repayment of a refund?

2. Does it follow from a proper interpretation of article 6 (5) of Regulation (EEC) no 1957/69 that a decision to seek repayment of a refund is not subject to the principle of legal certainty derived from Community law?

If the answer to questions 1 and 2 must be that it is not possible in those cases to rely on a national or Community principle of legal certainty, does article 6 (5) of regulation (EEC) no 1957/69 also preclude a claim for damages by the exporter against the administration which has sought repayment of the refund, based on the same facts and circumstances which might justify reliance on the principle of legal certainty if this were not precluded by the said article 6 (5)?

3 The questions were put in the course of an action between Ferwerda b.V., a Netherlands exporter of meat, and the competent authority in the Netherlands which claims that the former should reimburse it the export refunds which the parties agree were wrongly granted and paid following a mistaken application of article 3 of regulation (EEC) no 192/75 of the Commission (Official Journal 1975, l 25, p. 1) laying down detailed rules for the application of export refunds in respect of agricultural products. According to the said article 3 for the purposes of entitlement to a refund, supplies for victualling within the Community sea-going vessels or aircraft serving on international routes, including intra-community routes, shall be treated as exports from the Community and confer entitlement to an export refund. The file of the national Court establishes that the meat exported was intended for victualling ships flying the Netherlands flag sailing in Bermudan waters so that the condition that victualling must take place within the Community if it is to be treated as an export qualifying for a refund was not fulfilled since Bermuda does not appear in the list of non-member countries constituting destinations in respect of which exports qualify for refunds. The circumstances of that mistaken application were such that the national Court considered it must give a ruling on the point whether the mistaken application was the work of the Netherlands administration or of Ferwerda and decide on what conditions the amounts in question are recoverable from the latter.

4 The national Court raises the point whether the obligation to effect a repayment laid down in article 6 (5) of regulation no 1957/69, an obligation which has direct effect in the legal systems of the Member States, may be nullified or limited in its effects by a national provision based on a general principle of law. Ferwerda has in fact maintained that the claim made on it to repay the export refunds which it had wrongly received is contrary to the principle of legal certainty. According to the national Court that principle is recognized in the legal system of the Netherlands as constituting a valid defence in the context of proceedings for the recovery of moneys by the administration, as is established in particular by a provision of the Netherlands in- on uitvoerwet (import and export law) of 5 July 1962 and the information given by the Netherlands government in the recitals thereto.

5 In those circumstances the national Court in fact wishes to know whether Community law in general and article 6 (5) of regulation no 1957/69 in particular rule out the application of such a principle of national law. If it does the national Court wishes to know whether such a principle is to be found in Community law which it must then apply.

6 The export refund obtained by Ferwerda constitutes a financial benefit accorded in pursuance of the Community provisions and financed by the Community from its own resources within the general framework of the budgetary arrangements made by articles 199 to 209 which constitute the financial provisions of the EEC Treaty.

7 The arrangements for the fixing and the conditions of collection of the financial charges which the Community is empowered to levy and which specifically constitute its own resources, such as customs duties, agricultural levies and monetary compensatory amounts, and the arrangements concerning the conditions for the granting and payment of financial benefits to traders from the Community budget are laid down by the Council decision of 21 April 1970 on the replacement of financial contributions from Member States by the communities' own resources (Official Journal, English special edition 1970 (I), p. 224) and the regulations in implementation thereof, together with regulation (EEC) no 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (official journal, English special edition 1970 (I), p. 218) the provisions of which were extended to monetary compensatory amounts by article 2 of regulation no 2746/72 of the Council of 19 December 1972 (official journal, English special edition 1972 (28-30 December), p.

64). These provisions must be considered within the framework of the general arrangements regarding the financial provisions of the Treaty which, like the corresponding arrangements in the Member States, are governed by the general principle of equality which requires that comparable situations may not be treated differently unless difference of treatment is objectively justified.

8 It follows that the revenues which are contributed to the Community budget and the financial advantages charged thereto must be so arranged and applied as to constitute a uniform burden or to confer uniform benefits on all persons who meet the conditions specified in the Community provisions on such burdens or advantages. That requirement implies that there must be no discrimination in respect of the procedural and substantive conditions on which, on the one hand, traders may challenge Community charges imposed upon them by demanding a refund where payment was wrongly made or claiming the financial benefit of a Community nature to which they are entitled, and on which on the other, the authorities of the Member States, acting on behalf of the community, may collect the said charges and, if necessary, recover financial benefits which were wrongly granted.

9 The Council has adopted this approach in particular by enacting regulation (EEC) no 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (official journal 1979, l 197, p. 1) and regulation (EEC) no 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (official journal 1979, l 175, p. 1) which, however, are only to enter into force on 1 July 1980. The arrangements already in existence and the above-mentioned provisions nevertheless provide only a partial solution to the problems concerning the equality of persons in this sphere and the necessarily technical and detailed nature of such provisions means that a judicial interpretation can only provide a partial remedy.

10 It follows, as the Court held in its judgment of 21 May 1976 in case 26/74 Roquette [1976] ECR 677), that disputes in connection with the reimbursement of amounts collected for the Community are thus a matter for the national courts and must be settled by them under national law in so far as no provisions of Community law are relevant. In those circumstances it is for the courts of the Member States to provide, in pursuance of the requirement of co-operation embodied in article 5 of the Treaty, the legal protection made available as a result of the direct effect of the Community provisions both when such provisions create obligations for the subject and when they confer rights on him. It is, however, for the national legal system of each Member State to determine the courts having jurisdiction and to fix the procedures for applications to the courts intended to protect the rights which the subject obtains through the direct effect of Community law but such procedures may not be less favourable than those in similar procedures concerning internal matters and may in no case be laid down in such a way as to render impossible in practice the exercise of the rights which the national courts must protect.

11 The considerations set out above have been stated inter alia in the said regulation no 729/70 of the Council, article 8 of which expressly requires the Member States acting on behalf of the Community to recover financial benefits which have been improperly granted but adds that such recovery shall be" in accordance with national provisions laid down by law, regulation or administrative action".

12 It follows nevertheless from those considerations that the express reference to national laws is subject to the same limits as those affecting the implied reference, the need for which has been acknowledged in the absence of Community provisions, inasmuch as the application of national legislation must be effected in a non-discriminatory manner having regard to the procedural rules relating to disputes of the same type, but purely national, and in so far as procedural rules cannot have the result of making impossible in practice the exercise of rights conferred by Community law.

13 Pursuant to those provisions the Court of Justice ruled in its judgment of 28 June 1977 (case 118/76 Balkan [1977] ECR 1177) that even though all the formalities concerning the recovery of Community charges are entrusted to the competent authorities in the Member States the

application of a national rule of natural Justice (Haerteklausel) permitting the administration to provide exemption from charges due under Community law is precluded" in so far as its effect would be to modify the scope of the provisions of Community law concerning the basis of assessment, the manner of imposition or the amount of a charge introduced by that law".

14 It must therefore be considered whether a general principle or specific provision of Community law precludes the application of the national rule referred to by the Court making the reference. Consideration of that point shows that this is not so.

15 In this connection it must be observed that no consideration whatever which under one of the national legal systems of the Member States is or may be based on a principle of legal certainty can in all cases constitute a defence against a claim for the recovery of Community financial benefits wrongly granted. It must in each case be considered whether such application does not jeopardize the very basis of the rule providing for such recovery and whether it does not result in practice in frustrating such recovery.

16 The considerations of the national Court show that the principle of legal certainty to which it refers is embodied, with regard to the recovery by the public authorities of export refunds wrongly paid, in article 9 (1) of the in- en uitvoerwet in accordance with which "a refund may be withdrawn if the information given in order to obtain it appears incorrect or incomplete with the result that a different decision would have been taken on the application if the true position had been fully known at the time when it was considered".

17 Although in the context of an application for a preliminary ruling it is not for the Court of Justice to interpret the national provision in question or determine its precise scope it must nevertheless be found that an application of a principle of legal certainty based on national law, whereby financial benefits wrongly conferred on a trader may not be recovered if the error committed was not due to incorrect information supplied by the recipient or if, despite the fact that the information was incorrect though supplied in good faith, the error could easily have been avoided, does not in the present state of Community law conflict with a general principle thereof.

18 It must nevertheless be considered whether article 6 of regulation no 1957/69, and in particular paragraph (5) thereof, the interpretation of which has been requested, constitutes a special provision which forms an exception to the reference to national law and substitutes for it a Community rule unconditionally requiring the trader in question to reimburse the refund granted in error.

19 Regulation no 1957/69 lays down detailed rules in addition to those already prescribed in other regulations of the Council and of the Commission and in particular in regulation no 441/69 of the Council of 4 March 1969 (Official Journal, English special edition 1968 (I), p. 91) with regard to the granting of export refunds. It refers to a certain number of specific situations such as the case where products qualifying for export refunds are processed before their exportation and in that case, in conjunction with the provisions of regulation no 441/69 of the Council and of regulation no 1041/67 of the Commission of 21 December 1967 (official journal, English special edition 1967, p. 323), subsequently replaced by regulation no 192/75 of the Commission of 17 January 1975 (official journal 1975 l 25, p. 1) replaced by regulation no 2730/79 of 29 November 1979 (official journal 1979, l 317, p. 1) authorizes the granting in advance of all or part of the refund. According to article 6 (1) of regulation no 1957/69 the application of the procedures laid down in articles 2 and 3 of regulation no 441/69 - that is to say the granting in advance of the refund - shall, as has been stated above, be conditional on the lodging of a deposit. That deposit is intended to provide a guarantee that within certain time-limits proof will be furnished that the products or goods have reached the destination in respect of which the refund was granted. Article 6 (5) provides that" the amount of the refund paid, plus any increase, shall be repaid in accordance with the provisions of this article if the proofs referred to in paragraph (1) are not furnished within the time-limits laid

down. In such case, if repayment has been claimed but is not received the deposit which was lodged shall be forfeited".

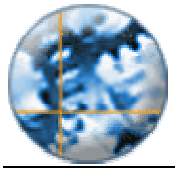
20 It is unnecessary to decide whether the said article 6 (5) covers situations such as those at issue in this case and it is sufficient to find that it is impossible to establish from the wording of paragraph (5), and in particular from the words "in accordance with the provisions of this article" alone that it was intended by that provision to make, for proceedings which might arise from the particular situations governed by regulation no 441/69 of the Council and of the above-mentioned Regulations nos 1041/67, 192/75 and 2730/79 of the Commission, specific Community arrangements concerning the recovery of payments wrongly made whilst in all other disputes concerning the recovery of refunds national law is to be applied where no Community provisions are applicable.

21 It follows from the foregoing considerations that the reply to the first question must be that Community law in its present state and in particular article 6 (5) of regulation no 1957/69 of the Commission do not preclude the application in proceedings concerning the recovery by the authorities of the Member States of sums paid in error as export refunds to traders, of a principle of legal certainty based on national law whereby financial benefits granted in error by the public authorities may not be recovered if the error committed was not due to incorrect information supplied by the beneficiary or if such error, despite the fact that the information supplied was incorrect though provided in good faith, could easily have been avoided.

22 It follows from the wording of the second and third questions that, in view of the reply which has been given to the first question, the former are devoid of purpose.

[…]

## 2.4 Case C-213/89: Factortame I



### *NOTE AND QUESTIONS*

This case should be read with a view as to how far the Court of Justice goes to assure the principle of effectiveness.

**R v Secretary of State for Transport, ex parte Factortame Ltd**

**Case C-213/89**

19 June 1990

Court of Justice

[1990] ECR I-2433

http://www.curia.eu.int/en/content/juris/index.htm

1 By a judgment of 18 May 1989, which was received at the Court on 10 July 1989, the House of Lords referred to the Court of Justice for a preliminary ruling under article 177 of the EEC Treaty two questions on the interpretation of Community law. Those questions concern the extent of the power of national Courts to grant interim relief where rights claimed under Community law are at issue.

2 The questions were raised in proceedings brought against the Secretary of State for transport by Factortame LTD and other companies incorporated under the laws of the United Kingdom, and also the directors and shareholders of those companies, most of whom are Spanish nationals (hereinafter together referred to as the 'appellants in the main proceedings ').

3 The companies in question are the owners or operators of 95 fishing vessels which were registered in the register of British vessels under the merchant shipping act 1894. Of those vessels, 53 were originally registered in Spain and flew the Spanish flag, but on various dates as from 1980 they were registered in the British register. The remaining 42 vessels have always been registered in the United Kingdom, but were purchased by the companies in question on various dates, mainly since 1983.

4 The statutory system governing the registration of British fishing vessels was radically altered by part ii of the merchant shipping act 1988 and the merchant shipping (registration of fishing vessels) regulations 1988 (si 1988, no 1926). It is common ground that the United Kingdom amended the

previous legislation in order to put a stop to the practice known as 'quota hopping' whereby, according to the United Kingdom, its fishing quotas are 'plundered' by vessels flying the British flag but lacking any genuine link with the United Kingdom.

5 The 1988 act provided for the establishment of a new register in which henceforth all British fishing vessels were to be registered, including those which were already registered in the old general register maintained under the 1894 act. However, only fishing vessels fulfilling the conditions laid down in section 14 of the 1988 act may be registered in the new register.

6 Paragraph 1 of that section provides that, subject to dispensations to be determined by the secretary of state for transport, a fishing vessel is eligible to be registered in the new register only if:

(a) the vessel is British-owned,
(b) the vessel is managed, and its operations are directed and controlled, from within the United Kingdom and;
(c) any charterer, manager or operator of the vessel is a qualified person or company'. According to section 14(2), a fishing vessel is deemed to be British-owned if the legal title to the vessel is vested wholly in one or more qualified persons or companies and if the vessel is beneficially owned by one or more qualified companies or, as to not less than 75%, by one or more qualified persons. According to section 14(7) 'qualified person' means a person who is a British citizen resident and domiciled in the United Kingdom and 'qualified company' means a company incorporated in the United Kingdom and having its principle place of business there, at least 75% of its shares being owned by one or more qualified persons or companies and at least 75% of its directors being qualified persons.

7 The1988 act and the 1988 regulations entered into force on 1 December 1988. However, under section 13 of the 1988 act, the validity of registrations effected under the previous act was extended for a transitional period until 31 march 1989.

8 On 4 august 1989 the Commission brought an action before the Court under article 169 of the EEC Treaty for a declaration that, by imposing the nationality requirements laid down in section 14 of the 1988 act, the United Kingdom had failed to fulfil its obligations under articles 7, 52 and 221 of the EEC Treaty. That action is the subject of case 246/89, now pending before the Court. In a separate document, lodged at the Court registry on the same date, the Commission applied to the Court for an interim order requiring the United Kingdom to suspend the application of those nationality requirements as regards the nationals of other Member States and in respect of fishing vessels which until 31 march 1989 were carrying on a fishing activity under the British flag and under a British fishing licence. By an order of 10 October 1989 in case 246/89 r Commission v United Kingdom ([1989] ECR 3125), the president of the Court granted that application. Pursuant to that order, the United Kingdom made an order in Council amending section 14 of the 1988 act with effect from 2 November 1989.

9 At the time of the institution of the proceedings in which the appeal arises, the 95 fishing vessels of the appellants in the main proceedings failed to satisfy one or more of the conditions for registration under section 14 of the 1988 act and thus could not be registered in the new register.

10 Since those vessels were to be deprived of the right to engage in fishing as from 1 April 1989, the companies in question, by means of an application for judicial review, challenged the compatibility of part ii of the 1988 act with Community law. They also applied for the grant of interim relief until such time as final judgment was given on their application for judicial review.

11 In its judgment of 10 march 1989, the divisional Court of the Queen's bench division: (I) decided to stay the proceedings and to make a reference under article 177 of the EEC Treaty for a preliminary ruling on the issues of Community law raised in the proceedings; and (ii) ordered that, by way of

interim relief, the application of part ii of the 1988 act and the 1988 regulations should be suspended as regards the applicants.

12 On 13 march 1989, the secretary of state for transport appealed against the divisional Court's order granting interim relief. By judgment of 22 March 1989, the Court of appeal held that under national law the Courts had no power to suspend, by way of interim relief, the application of acts of Parliament. It therefore set aside the order of the divisional Court.

13 The House of Lords, before which the matter was brought, gave its abovementioned judgment of 18 May 1989. In its judgment it found in the first place that the claims by the appellants in the main proceedings that they would suffer irreparable damage if the interim relief which they sought were not granted and they were successful in the main proceedings were well founded. However, it held that, under national law, the English Courts had no power to grant interim relief in a case such as the one before it. More specifically, it held that the grant of such relief was precluded by the old common-law rule that an interim injunction may not be granted against the Crown, that is to say against the government, in conjunction with the presumption that an act of Parliament is in conformity with Community law until such time as a decision on its compatibility with that law has been given.

14 The House of Lords then turned to the question whether, notwithstanding that rule of national law, English Courts had the power, under Community law, to grant an interim injunction against the Crown.

15 Consequently, taking the view that the dispute raised an issue concerning the interpretation of Community law, the House of Lords decided, pursuant to article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

'(1) where

(I) a party before the national Court claims to be entitled to rights under Community law having direct effect in national law (the 'rights claimed'),
(II) a national measure in clear terms will, if applied, automatically deprive that party of the rights claimed,
(III) there are serious arguments both for and against the existence of the rights claimed and the national Court has sought a preliminary ruling under article 177 as to whether or not the rights claimed exist,
(IV) the national law presumes the national measure in question to be compatible with Community law unless and until it is declared incompatible,
(V) the national Court has no power to give interim protection to the rights claimed by suspending the application of the national measure pending the preliminary ruling,
(VI) if the preliminary ruling is in the event in favour of the rights claimed, the party entitled to those rights is likely to have suffered irremediable damage unless given such interim protection, does Community law either

(a) oblige the national Court to grant such interim protection of the rights claimed; or
(b) give the Court power to grant such interim protection of the rights claimed?

(2) if question 1(a) is answered in the negative and question 1(b) in the affirmative, what are the criteria to be applied in deciding whether or not to grant such interim protection of the rights claimed?'

16 Reference is made to the report for the hearing for a fuller account of the facts in the proceedings before the national Court, the course of the procedure before and the observations submitted to the

Court of Justice, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

17 It is clear from the information before the Court, and in particular from the judgment making the reference and, as described above, the course taken by the proceedings in the national Courts before which the case came at first and second instance, that the preliminary question raised by the House of Lords seeks essentially to ascertain whether a national Court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must disapply that rule.

18 For the purpose of replying to that question, it is necessary to point out that in its judgment of 9 march 1978 in case 106/77 Amministrazione delle finanze dello Stato v Simmenthal spa (( 1978)) ECR 629 the Court held that directly applicable rules of Community law 'must be fully and uniformly applied in all the member states from the date of their entry into force and for so long as they continue in force' (paragraph 14) and that 'in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the member states on the other is such that those provisions and measures...by their entry into force render automatically inapplicable any conflicting provision of... national law' (paragraph 17).

19 In accordance with the case-law of the Court, it is for the national Courts, in application of the principle of cooperation laid down in article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law (see, most recently, the judgments of 10 July 1980 in case 811/79 Ariete spa v amministrazione delle finanze dello stato ([1980] ECR 2545) and case 826/79 Mireco v amministrazione delle finanze dello stato ([1980] ECR 2559)).

20 The Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national Court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law (judgment of 9 march 1978 in Simmenthal, cited above, paragraphs 22 and 23).

21 It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a Court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a Court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

22 That interpretation is reinforced by the system established by article 177 of the EEC Treaty whose effectiveness would be impaired if a national Court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice.

23 Consequently, the reply to the question raised should be that Community law must be interpreted as meaning that a national Court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.

[…]

## *2.5 Case C-208/90: Emmott*

**Theresa Emmott v Minister for Social Welfare and Attorney General**

**Case C-208/90**

25 July 1991

Court of Justice

[1991] ECR I-4269

http://www.curia.eu.int/en/content/juris/index.htm

1 By order of 22 June 1990, which was received at the Court on 12 July 1990, the high Court of Ireland referred to the Court for a preliminary ruling under article 177 of the EEC Treaty a question designed to ascertain in substance whether a Member State which has not correctly transposed council directive 79/7 of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Official Journal 1979 l 6, p. 24, hereinafter referred to as 'the directive') may, on the ground that the relevant time-limit laid down in national law for instituting proceedings has expired, preclude an individual from initiating proceedings for the purpose of securing entitlements which he or she derives from provisions of the directive which are sufficiently precise and unconditional to be relied upon before the national Courts.

2 That question was raised in proceedings between Mrs. Theresa Emmott and the Minister for Social Welfare and the attorney general of Ireland concerning additional social security benefits which Mrs. Emmott claimed on the basis of article 4(1) of the directive.

3 That provision prohibits all discrimination whatsoever on ground of sex, in particular as regards the calculation of benefits including increases due in respect of a spouse and for dependants. Article 5 provides that Member States are to take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished. Article 8 required the Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within six years of its notification, that is to say by 23 December 1984.

4 The directive was transposed into Irish law by the social welfare (no 2) act of 16 July 1985 the provisions of which did not enter into force, however, until various dates in 1986. That act, which was not made retroactive to 23 December 1984, laid down uniform rates of benefit for men and women and made entitlement to increases for adult and child dependants subject to the same conditions.

5 On 12 December 1986, however, the minister for social welfare adopted the social welfare (preservation of rights) (no 2) regulations 1986 (statutory instrument no 422 of 1986). The effect of those regulations was to reserve, on a transitional basis, the award of periodic compensatory payments to married men who, following the entry into force of the act of 16 July 1985, lost their entitlement to automatic increases in social security benefits for adult dependants. Those transitional provisions were repeatedly extended, in any case up to 2 January 1989.

6 In a previous case brought by two married women seeking to obtain from the same defendants the payment of social security benefits equal to those paid to married men in an identical family situation, the Court of Justice, from which the high Court of Ireland had requested a preliminary ruling, held that article 4(1) of the directive could be relied on as from 23 December 1984 in order to preclude the application of any national provision inconsistent therewith and that, in the absence of measures implementing that provision, women were entitled to have the same rules applied to them as were applied to men who were in the same situation (see judgment in case 286/85 Norah McDermott and Ann Cotter v Minister for Social Welfare and attorney general [1987] ECR 1453).

7 By judgment delivered on 13 March 1991 in case C-377/89 (Ann Cotter and Norah McDermott v Minister for Social Welfare and attorney general, not yet published in the reports of cases before the Court), on a preliminary reference from the supreme Court of Ireland, which was confronted with new claims by the same applicants, the Court of Justice ruled that article 4(1) of the directive had to be interpreted as meaning that married women were entitled to the same increases in benefits and compensatory payments as those awarded to married men in family situations identical to theirs even if this were to result in double payments or infringe the prohibition of unjust enrichment laid down by Irish law.

8 In paragraph 24 of the aforesaid judgment in case C-377/89 the Court stated that the directive did not provide for any derogation from the principle of equal treatment laid down in article 4(1) so as to authorize the continuation of the discriminatory effects of earlier provisions of national law. Accordingly a Member State could not maintain, beyond 23 December 1984, any inequalities of treatment attributable to the fact that the conditions for entitlement to compensatory payments were those which applied before that date. That was so notwithstanding the fact that those inequalities were the result of transitional provisions.

9 Mrs. Emmott is married and has two dependant children. As from 2 December 1983 she received a disability benefit under the Irish social security legislation. Until 18 may 1986 she received that benefit only at the reduced rate applicable, at that time, to all married women. Following amendments to the Irish legislation, her benefit was adjusted three times. From 19 May 1986 she received a benefit at the rate applicable to a man or woman but without any increases for dependant children. It was only from 17 November 1986 that those increases were granted to her. Finally, in June 1988 she was granted, with retroactive effect to 28 January 1988, an invalidity pension calculated at the personal rate normally applicable to a man or woman, together with an increase for dependant children.

10 As soon as the aforesaid judgment of the Court in case 286/85 had been delivered on 24 march 1987, Mrs. Emmott entered into correspondence with the minister for social welfare with a view to obtaining, as from 23 December 1984, the same amount of benefits as that paid to a married man in a situation identical to hers.

11 By letter of 26 June 1987 the minister replied that, since the directive was still the subject of litigation before the high Court, no decision could be taken in relation to her claim which would be examined as soon as that Court had given judgment.

12 By order of 22 July 1988, the high Court granted Mrs. Emmott leave to institute proceedings for judicial review for the purpose of recovering the benefits which had not been paid to her since 23 December 1984 in breach of article 4(1) of the directive, namely additional disability benefit at the appropriate personal rate, increases for adult and child dependants and compensatory payments. However, that leave was granted without prejudice to the right of the defendants to raise the issue of the non-observance of the time-limit for initiating proceedings.

13 The relevant provision in this regard is order 84, rule 21(1), of the rules of the superior Courts 1986. That provision is worded as follows: 'an application for leave to apply for judicial review shall be

made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made'.

14 The national authorities concerned did in fact plead that the applicant's delay in initiating proceedings constituted a bar to her claim. Consequently, in its order of 22 June 1990, the high Court decided to refer the following question to the Court of Justice for a preliminary ruling:

'is the ruling of the Court of Justice of 24 march 1987 in case 286/85 Norah McDermott and Ann cotter v Minister for social welfare and attorney general [1987] ECR 1453 whereby the Court of Justice answered the questions referred to it pursuant to article 177 of the EEC Treaty by the high Court in its interpretation of the provisions of article 4(1) of council directive 79/7/EEC of 19 December 1978 as follows: (1) 'where council directive 79/7/EEC of 19 December 1978 has not been implemented, article 4(1) of the directive, which prohibits all discrimination on grounds of sex in matters of social security, could be relied on as from 23 December 1984 in order to preclude the application of any national provision inconsistent with it.' (2) 'in the absence of measures implementing article 4(1) of the directive, women are entitled to have the same rules applied to them as are applied to men who are in the same situation since, where the directive has not been implemented, those rules remain the only valid point of reference.' to be understood as meaning that, in a claim before a national Court or tribunal made in purported reliance upon article 4(1) of that directive by a married woman for equal treatment and for compensatory payments in respect of discrimination alleged to have been suffered by reason of the failure to apply to her the rules applicable to men in the same situation, it is contrary to the general principles of Community law for the relevant authorities of a Member State to rely upon national procedural rules, in particular rules relating to time-limits, in bringing claims in defence of that claim such as to restrict or refuse such compensation?'

15 Reference is made to the report for the hearing for a fuller account of the legal background to and facts of the case, the course of the procedure and the written observations submitted to the Court, which are referred to hereinafter only in so far as is necessary for the reasoning of the Court.

16 As the Court has consistently held (see, in particular, the judgments in case 33/76 Rewe-Zentralfinanz e.g. and Rewe-Zentral AG v Landwirtschaftskammer fuer das Saarland [1976] ECR 1989 and case 199/82 amministrazione delle finanze dello stato v San Georgio spa [1983] ECR 3595), in the absence of Community rules on the subject, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law, provided that such conditions are not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible the exercise of rights conferred by Community law.

17 Whilst the laying down of reasonable time-limits which, if unobserved, bar proceedings, in principle satisfies the two conditions mentioned above, account must nevertheless be taken of the particular nature of directives.

18 According to the third paragraph of article 189 of the EEC Treaty, a directive is to be binding, as to the result to be achieved, upon each Member State to which it is addressed, but is to leave to the national authorities the choice of form and methods. Although that provision leaves Member States free to choose the ways and means of ensuring that a directive is implemented, that freedom does not affect the obligation, imposed on all the Member States to which a directive is addressed, to adopt, within the framework of their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues (see judgment in case 14/83 Sabine van Colson and Elisabeth Kamann v Land Nordrhein-Westfalen [1984] ECR 1891).

19 In this regard it must be borne in mind that the Member States are required to ensure the full application of directives in a sufficiently clear and precise manner so that, where directives are intended to create rights for individuals, they can ascertain the full extent of those rights and, where necessary, rely on them before the national Courts (see, in particular, judgment in case 363/85 Commission v Italy [1987] ECR 1733).

20 Only in specific circumstances, in particular where a Member State has failed to take the implementing measures required or has adopted measures which are not in conformity with a directive, has the Court recognized the right of persons affected thereby to rely, in judicial proceedings, on a directive as against a defaulting Member State. This minimum guarantee, arising from the binding nature of the obligation imposed on the Member States by the effect of directives, cannot justify a Member State absolving itself from taking in due time implementing measures appropriate to the purpose of each directive (see judgment in case 102/79 commission v Belgium [1980] ECR 1473).

21 So long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights. That state of uncertainty for individuals subsists even after the Court has delivered a judgment finding that the Member State in question has not fulfilled its obligations under the directive and even if the Court has held that a particular provision or provisions of the directive are sufficiently precise and unconditional to be relied upon before a national Court.

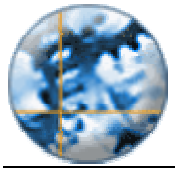
22 Only the proper transposition of the directive will bring that state of uncertainty to an end and it is only upon that transposition that the legal certainty which must exist if individuals are to be required to assert their rights is created.

23 It follows that, until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time.

24 The answer to the question referred to the Court must therefore be that Community law precludes the competent authorities of a Member State from relying, in proceedings brought against them by an individual before the national Courts in order to protect rights directly conferred upon him by article 4(1) of directive 79/7, on national procedural rules relating to time-limits for bringing proceedings so long as that Member State has not properly transposed that directive into its domestic legal system.

[…]

## 2.6 Case C-410/92: Johnson



### *NOTE AND QUESTIONS*

The Emmott case caused quite some alarm amongst the Member States. So where are we now after Johnson?

**Elsie Rita Johnson v Chief Adjudication Officer**

**Case C-410/92**

6 December 1994

Court of Justice

[1994] ECR I-5483

http://www.curia.eu.int/en/content/juris/index.htm

1 By order of 30 October 1992, received at the Court on 10 December 1992, the Court of Appeal referred for a preliminary ruling under Art. 177 of the EEC Treaty questions on the interpretation of Council Directive (EEC) 79/7 of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

2 Those questions arose in a dispute between Mrs Johnson and the Chief Adjudication Officer concerning payment of the severe disablement allowance.

3 The material Community provisions are those of Directive 79/7.

4 Article 2 provides that the directive applies:

'... to the working population -- including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment -- and to retired or invalided workers and self-employed persons.'

5 Article 4(1) provides:

'The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns: the scope of the schemes and the conditions of access thereto, the

obligation to contribute and the calculation of contributions, the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.'

6 Under Art. 8, the period within which member states were required to transpose the directive expired six years after its notification, hence on 22 December 1984.

7 Mrs Johnson, the appellant in the main proceedings, gave up work in or about 1970 in order to look after her daughter, who was then six years old. She sought to resume employment in 1980 but was unable to do so because of a back complaint. For that reason she was granted non-contributory invalidity benefit (NCIB) in 1981, when she was living alone.

8 In 1982 she began cohabiting with a male friend. Payment of NCIB then ceased because at that period a woman cohabiting with a man was required, in order to qualify for NCIB, to prove not only that she was unfit for work but also that she was unfit to carry out normal household duties (s 36(2) of the Social Security Act 1975, as then in force). This household duties test did not apply to men.

9 The Health and Social Security Act 1984 abolished the NCIB and introduced the Severe Disablement Allowance (SDA), which may be granted to persons of either sex under identical conditions. However, reg 20(1) of the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, allowed persons entitled to the old NCIB to qualify automatically for the new SDA without being required to prove that they satisfied the new conditions.

10 On 17 August 1987 Mrs Johnson applied through the Citizens Advice Bureau for SDA.

11 Her application was turned down on the basis of s 165A(1) of the Social Security Act 1975 (inserted by s 17 of the Social Security Act 1985, as amended), which provides:

'Except in such cases as may be prescribed, no person shall be entitled to any benefits unless, in addition to any other conditions relating to that benefit being satisfied (a) he makes a claim for it (i) in the prescribed manner; and (ii) subject to subsection (2) below, within the prescribed time.. .'

12 In a case such as this, the effect of that provision is that a person who has not claimed payment of NCIB before the abolition of that benefit may not claim automatic entitlement to SDA (see Johnson v Chief Adjudication Officer Case C-31/90 [1992] 2 All ER 705 at 725, [1991] ECR I-3723 at 3753 (para 29)).

13 The Social Security Commissioners, before whom the case came on appeal, referred questions to the Court of Justice of the European Communities by decision of 25 January 1990 asking in particular whether such a rule was compatible with Directive 79/7.

14 In its judgment in Johnson's case, the Court answered that question by ruling that it had been possible since 23 December 1984 to rely on Art. 4 of Directive 79/7 in order to have set aside national legislation which made entitlement to a benefit subject to the previous submission of a claim in respect of a different benefit which had since been abolished and which had entailed a condition discriminating against female workers. In the absence of appropriate measures for implementing Art. 4 of Directive 79/7, women placed at a disadvantage by the maintenance of the discrimination were entitled to be treated in the same manner and to have the same rules applied to them as men who were in the same situation, since, where the directive had not been implemented correctly, those rules remained the only valid point of reference.

15 Following the Court's judgment in that case, the Social Security Commissioners, by decision of 16 December 1991, granted SDA to Mrs Johnson with effect from 16 August 1986, that is to say 12 months prior to her claim, but refused to grant payments in respect of any period prior to that date.

16 That refusal was based on the rule contained in s 165A(3) of the 1975

Act, which provided:

'Notwithstanding any regulations made under this section, no person shall be entitled. .. (c) to any other benefit (except disablement benefit or reduced earnings allowance or industrial death benefit) in respect of any period more than 12 months before the date on which the claim is made.'

17 Mrs Johnson appealed to the Court of Appeal, where argument centred on whether the judgment of the Court of Justice in Emmott v Minister for Social Welfare Case C-208/90 [1991] ECR I-4269 constituted a precedent for the present case and whether it entitled Mrs Johnson to receive benefits from 22 December 1984, when the period for transposing Directive 79/7 expired.

18 In Emmott's case the Court ruled that Community law precludes the competent authorities of a member state from relying, in proceedings brought against them by an individual before the national Courts in order to protect rights directly conferred upon him by Art. 4(1) of Directive 79/7, on national procedural rules relating to time limits for bringing proceedings so long as that member state has not properly transposed that directive into its domestic legal system.

19 The Court of Appeal, in doubt as to the proper scope of that judgment, decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is the decision of the European Court of Justice in Emmott (Case C-208/90) to the effect that a Member State may not rely on national procedural rules relating to the time-limits for bringing proceedings so long as that Member State has not properly transposed Directive 79/7 into its legal system to be interpreted as applying to national rules on claims for benefit for past periods in cases where a Member State has implemented measures to comply with that directive before the relevant deadline but has left in force a transitional provision such as that considered by the European Court of Justice in Case 384/85 Borrie Clarke?

2. In particular in circumstances where: a Member State has adopted and implemented legislation to fulfil its obligations under Council Directive 79/7 ("the directive") prior to the deadline laid down in the directive; (ii) the Member State introduces ancillary transitional arrangements in order to safeguard the position of existing social security beneficiaries; (iii) it subsequently transpires as a result of a preliminary ruling by the Court of Justice that the transitional arrangements breach the directive; (iv) an individual brings a subsequent claim for benefit shortly after the preliminary ruling referred to above relying on the transitional arrangements and the directive in a national tribunal pursuant to which that individual is awarded the benefit for the future and for 12 months prior to the bringing of the claim in accordance with the relevant national rules on payments for the period prior to the making of the claim, must that national tribunal disapply those national rules on arrears of payment from the date that the deadline for implementationof the directive has expired, that is, 23 December 1984?'

20 By those questions, which should be considered together, the national Court asks, in essence, whether it is compatible with Community law to apply, to a claim based on the direct effect of Directive 79/7, a rule of national law which limits the period prior to the bringing of the claim in respect of which arrears of benefit are payable, even where that directive has not been properly transposed within the prescribed period in the member state concerned.

21 The right conferred on women by the direct effect of Art. 4(1) of Directive 79/7 to claim benefits for incapacity for work under the same conditions as men must be exercised under the conditions determined by national law, provided that, as the Court has consistently held, those conditions are no less favourable than those relating to similar domestic actions and that they are not framed so as to render virtually impossible the exercise of rights conferred by Community law (see Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen Case C-338/91 [1993] ECR I-5475 at 5502 (para 15), and Emmott [1991] ECR I-4269 at 4298 (para 16)).

22 Here, the wording of the contested rule shows that it is of general application and that actions based on Community law are therefore not subject to less favourable conditions than those applying to similar domestic actions.

23 Nor does that rule, which merely limits the period prior to the bringing of a claim in respect of which arrears of benefit are payable, make it virtually impossible for an action to be brought by an individual relying on Community law.

24 Referring to the terms of the Emmott judgment, however, Mrs Johnson submits that the rule in question is a 'national procedural rule relating to time-limits' and that a member state cannot therefore rely on it so long as it has not 'properly transposed' a directive.

25 In Emmott's case [1991] ECR I-4269 at 4299 (paras 21, 23) the Court did indeed hold that so long as a directive has not been properly transposed into national law individuals are unable to ascertain the full extent of their rights and that consequently, until the directive has been properly transposed, a defaulting member state may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time.

26 However, it is clear from the judgment in Steenhorst-Neerings's case that the solution adopted in Emmott's case was justified by the particular circumstances of that case, in which a time bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under the directive.

27 The Court pointed out in Steenhorst-Neerings [1993] ECR I-5475 at 5503 (para 20) that in Emmott's case the applicant in the main proceedings had relied on the judgment of the Court in McDermott v Minister for Social Welfare Case 286/85 [1987] ECR 1453 in order to claim entitlement by virtue of Art. 4(1) of Directive 79/7, with effect from 23 December 1984, to invalidity benefits under the same conditions as those applicable to men in the same situation. The administrative authorities had then declined to adjudicate on her claim since Directive 79/7 was the subject of proceedings pending before a national Court. Finally, even though Directive 79/7 had still not been correctly transposed into national law, it was claimed that the proceedings she had brought to obtain a ruling that her claim should have been accepted were out of time.

28 In contrast, the rule at issue in Steenhorst-Neerings' case did not affect the right of individuals to rely on Directive 79/7 in proceedings before the national Courts against a defaulting member state but merely limited to one year the retroactive effect of claims for benefits for incapacity for work.

29 The Court concluded that Community law did not preclude the application of a national rule of law whereby benefits for incapacity for work were payable not earlier than one year before the date of claim, in the case where an individual sought to rely on rights conferred directly by Art. 4(1) of Directive 79/7 with effect from 23 December 1984 and where on the date the claim for benefit was made the member state concerned had not yet properly transposed that provision into national law (see Steenhorst-Neerings [1993] ECR I-5475 at 5504 (para 24)).

30 In the light of the foregoing, the national rule which adversely affects Mrs Johnson's action before the Court of Appeal is similar to that at issue in Steenhorst Neerings' case. Neither rule constitutes a bar to proceedings; they merely limit the period prior to the bringing of the claim in respect of which arrears of benefit are payable.

31 At the hearing, however, Mrs Johnson argued that the two cases had to be distinguished since their facts were different.

32 In the first place, she submitted that there was no difficulty, in certain areas of social security, and in this case in particular, in determining whether the claimant satisfied the conditions governing entitlement to benefit prior to the bringing of the claim. Since the relevant rules in the United Kingdom provided that the burden of proof rested on the claimant, the claim would fail if the lapse of time made it impossible to adduce that proof.

33 Mrs Johnson further submitted that the benefit in question in this case was non-contributory, unlike that at issue in Steenhorst-Neerings' case, and that there was consequently no need in this case to preserve the financial balance of a fund having limited resources. Payment of arrears from the date on which the period for transposition expired would constitute no more of a burden on state resources than a proper transposition of the directive within the specified period.

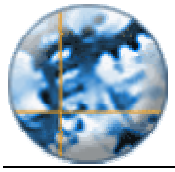
34 Those arguments are not cogent. Admittedly, the individual position of Mrs Johnson and the benefit which she seeks can be distinguished in certain respects from the situation and the benefit at issue in Steenhorst-Neerings' case.

35 The fact remains, however, that the rule at issue in this case is identical to that under consideration in Steenhorst-Neerings' case and that the application of those rules does not make it impossible to exercise rights based on the directive.

36 Accordingly, the answer to the national Court's questions must be that Community law does not preclude the application, to a claim based on the direct effect of Directive 79/7, of a rule of national law which merely limits the period prior to the bringing of the claim in respect of which arrears of benefit are payable, even where that directive has not been properly transposed within the prescribed period in the member state concerned.

[…]

## 2.7 Case C-246/96: Magorrian



### *NOTE AND QUESTIONS*

*Why did the Court, in this case, adopt an approach regarding the limit on the retroactive effect of a claim for benefits different from the view taken in Johnson?*

**Magorrian and Cunningham**
**v**
**Eastern Health and Social Services Board and Department of Health and Social Services**

**Case C 246/96**

11 December 1997

Court of Justice

[1997] ECR I-7153

http://www.curia.eu.int/en/content/juris/index.htm

**Summary of the facts and procedure**

Mrs. Magorrian was employed as qualified nurse in the mental health sector by a public-sector health board in Northern Ireland. On 18 October 1992, she retired at the age of 59 years, having completed 9 years of full-time work as an mental health officer status (MHO), and the equivalent of 11 years of part-time service. Mrs. Magorrian was affiliated to and contributed to the "Superannuation Scheme", a voluntary contracted-out pension scheme to which both the employer and the employee contribute.

On her retirement, Mrs Magorrian received the lump sums to which she was entitled, together with her basic retirement pensions, but was not given certain additional benefits to which she would have been entitled under regulation 50(2) of the Superannuation Regulation if she had had the status of MHO at the time of her retirement.

Part-time psychiatric nurses were excluded from MHO status, which the national court found to constitute unjustified indirect discrimination based on sex, contrary to Article 119 of the Treaty, since a considerably smaller proportion of women than men working in the mental-health sector were in a position to satisfy the requirements imposed by full-time working.

The Court of Justice confirmed that periods of service completed by part-time workers who have suffered indirect discrimination based on sex must be taken into account as form 8 April 1976, the date of the judgment in Defrenne, for the purposes of calculating the additional benefits to which they are entitled.

But, Regulation 12 of the Occupational Pension Regulations provides that, in proceedings concerning access to membership of occupational pension schemes (such as the Superannuation Regulation), the right to be admitted to the scheme is to have effect from a date no earlier than two years before the institution of proceedings. In its preliminary reference to the Court of Justice, the national court is asking whether Community law precludes the application to a claim based on Article 119 of the Treaty of such a national rule under which entitlement, in the event of a successful claim, is limited to a period which starts to run from a point in time two years prior to commencement of proceedings in connection with the claim.

**Judgment**

[…]

40 The United Kingdom Government […] argues that a restrictive national rule of the type at issue in the main proceedings has the effect of limiting the scope of a retroactive claim relating to a period preceding commencement of the proceedings and that it is therefore comparable to the rule at issue in Johnson.

41 As far as this issue is concerned, it must be stated that application of a procedural rule such as regulation 12 of the Occupational Pensions Regulations whereby, in proceedings concerning access to membership of occupational pension schemes, the right to be admitted to a scheme may have effect from a date no earlier than two years before the institution of proceedings would deprive the applicants in the main proceedings of the additional benefits under the scheme to which they are entitled to be affiliated, since those benefits could be calculated only by reference to periods of service completed by them as from 1990, that is to say two years prior to commencement of proceedings by them.

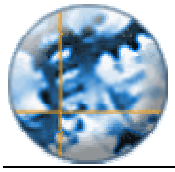
42 However, it should be noted that, in such a case, the claim is not for the retroactive award of certain additional benefits but for recognition of entitlement to full membership of an occupational scheme through acquisition of MHO status which confers entitlement to the additional benefits.

43 Thus, whereas the rules at issue in Case C-338/91 Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel [1993] ECR I-5475 and in Johnson merely limited the period, prior to commencement of proceedings, in respect of which backdated benefits could be obtained, the rule at issue in the main proceedings in this case prevents the entire record of service completed by those concerned after 8 April 1976 until 1990 from being taken into account for the purposes of calculating the additional benefits which would be payable even after the date of the claim.

44 Consequently, unlike the rules at issue in the judgments cited above, which in the interests of legal certainty merely limited the retroactive scope of a claim for certain benefits and did not therefore strike at the very essence of the rights conferred by the Community legal order, a rule such as that before the national court in this case is such as to render any action by individuals relying on Community law impossible in practice.

[…]

## 2.8 Case C-312/93: Peterbroeck



***NOTE AND QUESTIONS***

On Case C-312/93 Peterboreck and Case C-430 and 431/93 Van Schijndel:

1. Why were these two cases decided in different ways? Can you make out a rule?

**Peterbroeck, Van Campenhout & Cie SCS v Belgian State**

**Case C-312/93**

14 December 1995

Court of Justice

[1995] ECR I-4599

http://www.curia.eu.int/en/content/juris/index.htm

1 By judgment of 28 May 1993, received at the Court on 10 June 1993, the Cour d'appel (Court of appeal), Brussels, referred to the Court for a preliminary ruling under article 177 of the EEC Treaty a question of interpretation of Community law concerning the power of a national Court to consider of its own motion the question whether national law is compatible with Community law.

2 The question was raised in proceedings between a Belgian partnership with limited liability, Peterbroeck, van Campenhout & Cie (hereinafter 'Peterbroeck') and the Belgian State concerning the applicable rate of non-resident tax.

3 In the 1974 tax year the Dutch company Continentale & Britse trust bv (hereinafter 'CBT') drew from Peterbroeck an active partner's income of Bfr 6 749 112. When CBT was charged non-resident tax in respect of the 1975 tax assessment year, Peterbroeck, as CBT's legal representative in Belgium, lodged complaints on 22 July 1976 and 24 January 1978 with the regional director of direct contributions (hereinafter 'the director').

4 After most of those complaints had been rejected by the director on 23 august 1979, Peterbroeck, acting on its own behalf and, in so far as necessary, on behalf of CBT, brought proceedings before the Cour d'appel, Brussels, on 8 October 1979. As the main proceedings now stand, the only outstanding issue is the rate of tax applicable to the income earned by CBT, which the director set

at 44.9%, whereas if the earnings had been those of a Belgian company the rate would not exceed 42%.

5 It was only before the Cour d'appel that Peterbroeck argued for the first time that application to a company having its seat in the Netherlands of a rate of tax higher than that applicable to a Belgium company constituted an obstacle to freedom of establishment prohibited by article 52 of the EEC Treaty.

6 The Belgian State contended that that argument was a new plea which was inadmissible because it had been raised outside the time-limit laid down in the combined provisions of the second paragraph of article 278, the second paragraph of article 279 and article 282 of the code des impots sur les revenus (income tax code, hereinafter 'the CIR'), in the version applicable at the material time. Under those provisions, pleas which had not been raised in the complaint nor considered of his own motion by the director could be raised by the appellant taxpayer either in the appeal document or by notice in writing to the registry of the Cour d'appel, subject to a limitation period of 60 days with effect from the lodging by the director of a certified true copy of the contested decision together with all the documents relating to the taxpayer's objection. It appears that, under Belgian case-law, a plea is new for the purposes of the abovementioned provisions if it raises for the first time an issue which in its object, nature or legal basis differs from those already before the director.

7 The Cour d'appel considered that, article 52 of the Treaty having been raised as a ground of appeal for the first time before it, this constituted a new plea within the meaning of the relevant provisions of the CIR. It also considered that those provisions prevented the Court from raising of its own motion a point which the taxpayer could no longer raise before it. It observed, however, that the application of those procedural rules would curtail its power to examine the question whether national law was compatible with Community law and limit the possibility which it has under article 177 of the Treaty to ask the Court of Justice for a preliminary ruling on a question of interpretation of Community law.

8 The Cour d'appel further observed that, although the procedural rules in question also applied to most pleas based on domestic law, Belgian case-law allowed exceptions for pleas alleging breach of a limited number of principles of domestic law, in particular time-bar of the right to charge tax and the force of res judicata.

9 Finally, it referred to the case-law of this Court, which requires national Courts and Tribunals to ensure the legal protection afforded to individuals by the direct effect of Community law and which confers on national Courts and Tribunals the power to do all that is necessary to set aside national provisions which might prevent Community law from taking full effect.

10 In view of the foregoing, the Cour d'appel, Brussels, decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'must Community law be interpreted as meaning that a national Court hearing a dispute concerning Community law must set aside a provision of national law which it considers makes the power of the national Court to apply Community law which it is bound to safeguard subject to the making of an express application by the plaintiff in the dispute within a short time-limit which, however, does not apply to applications based on the breach of an - albeit limited - number of principles of national law, in particular the bar on the right to impose taxation outside a given period and the force of res judicata?'

11 Having regard to the facts of the case before the national Court as set out in its judgment making the reference, that Court in substance seeks to ascertain, first, whether Community law precludes application of a domestic procedural rule whose effect, in procedural circumstances such as those in question in the main proceedings, is to prevent the national Court, seised of a matter falling

within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period. Secondly, the national Court asks whether Community law precludes application of such a rule where it allows exceptions for certain claims founded on principles of domestic law.

The first part of the question

12 As regards the first part of the question, as thus reworded, the Court has consistently held that, under the principle of cooperation laid down in article 5 of the Treaty, it is for the Member States to ensure the legal protection which individuals derive from the direct effect of Community law. In the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the Courts and Tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law (see, in particular, the judgments in case 33/76 Rewe v Landwirtschaftskammer fuer das Saarland [1976] ECR 1989, paragraph 5, case 45/76 Comet v Produktschap voor Siergewassen [1976] ECR 2043, paragraphs 12 to 16, case 68/79 Hans Just v Danish Ministry for fiscal affairs [1980] ECR 501, paragraph 25, case 199/82 Amministrazione delle finanze dello stato v San Giorgio [1983] ECR 3595, paragraph 14, joined cases 331/85, 376/85 and 378/85 Bianco and Girard v Directeur general des douanes des droits indirects [1988] ECR 1099, paragraph 12, case 104/86 Commission v Italy [1988] ECR 1799, paragraph 7, joined cases 123/87 and 330/87 Jeunehomme and Egi v Belgian State [1988] ECR 4517, paragraph 17, case C-96/91 Commission v Spain [1992] ECR I-3789, paragraph 12, and joined cases C-6/90 and C-9/90 Francovich and others v Italian Republic [1991] ECR I-5357, paragraph 43).

13 The Court has also held that a rule of national law preventing the procedure laid down in article 177 of the Treaty from being followed must be set aside (see the judgment in case 166/73 Rheinmühlen v Einfuhr-und Vorratsstelle fuer Getreide und Futtermittel [1974] ECR 33, paragraphs 2 and 3).

14 For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.

15 In the present case, according to domestic law, a litigant may no longer raise before the Cour d'appel a new plea based on Community law once the 60-day period with effect from the lodging by the director of a certified true copy of the contested decision has elapsed.

16 Whilst a period of 60 days so imposed on a litigant is not objectionable per se, the special features of the procedure in question must be emphasized.

17 First of all, the Cour d'appel is the first Court which can make a reference to the Court of Justice since the director before whom the first-instance proceedings are conducted is a Member of the fiscal authorities and, consequently, is not a Court or Tribunal within the meaning of article 177 of the Treaty (see, to this effect, the judgment in case C-24/92 Corbiau [1993] ECR I-1277).

18 Secondly, the limitation period whose expiry prevented the Cour d' appel from examining of its own motion the compatibility of a measure of domestic law with Community law started to run from the

time when the director lodged a certified true copy of the contested decision. That meant, in this case, that the period during which new pleas could be raised by the appellant had expired by the time the Cour d'appel held its hearing so that the Cour d'appel was denied the possibility of considering the question of compatibility.

19 Thirdly, it seems that no other national Court or Tribunal in subsequent proceedings may of its own motion consider the question of the compatibility of a national measure with Community law.

20 Finally, the impossibility for national Courts or Tribunals to raise points of Community law of their own motion does not appear to be reasonably justifiable by principles such as the requirement of legal certainty or the proper conduct of procedure.

21 The answer to be given to the question submitted by the Cour d'appel, Brussels, must therefore be that Community law precludes application of a domestic procedural rule whose effect, in procedural circumstances such as those in question in the main proceedings, is to prevent the national Court, seised of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period.

The second part of the question

22 In view of the foregoing, it is not necessary to examine the second part of the question, as reworded above.

[…]

## *2.9 Joined Cases C-430 and 431/93: Van Schijndel*

**Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen**
**v**
**Stichting Pensioenfonds voor Fysiotherapeuten**

**Joined Cases C-430 and 431/93**

14 December 1995

Court of Justice

[1995] ECR I-4705

http://www.curia.eu.int/en/content/juris/index.htm

1 By judgments of 22 October 1993, received at the Court on 28 October 1993, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 EEC six questions on, (i) the interpretation of Community law with regard to the power of a national court to consider of its own motion the compatibility of a rule of domestic law with Articles 3(f), 5, 85, 86 and/or 90 EEC, and (ii) the interpretation of those same provisions.

2 The questions were raised in proceedings between Mr van Schijndel and the Stichting Pensioenfonds voor Fysiotherapeuten (Pension Fund Foundation for Physiotherapists, hereinafter "the Fund") (Case C-430/93) and between Mr van Veen and the Fund (Case C-431/93).

3 By order of 2 December 1993 the two cases were joined for the purposes of the written procedure, the oral procedure and judgment.

4 Under Article 2(1) of the Wet Betreffende Verplichte Deelneming in een Beroepspensioenregeling (Act on Compulsory Participation in an Occupational Pension Scheme, hereinafter "the WVD"), the Minister of Social Affairs is empowered, at the request of one or more professional organisations which, in his opinion, are sufficiently representative of persons working in the professional sector concerned, to make membership of an occupational pension scheme established by the Members of the profession compulsory for all categories or for one or more particular categories of them. According to Article 2(4) of the same Act, the members concerned must comply with the provisions set out in, or pursuant to, the statutes and regulations of the pension fund.

5 In 1978, the physiotherapists' profession set up the Fund. According to Article 2(1) of the pension scheme regulations adopted by the Fund, a scheme member is "any physiotherapist carrying on an activity as a physiotherapist in the Netherlands and not yet of pensionable age". Certain categories of physiotherapists are excluded from the Fund, in particular those "whose activity is solely in employment in respect of which they are covered by the rules contained in the Algemene Burgerlijke Pensioenwet (General Pensions Act) or by other pension arrangements which are at least equivalent to those laid down in those rules, provided that the persons concerned give the Fund written notice of their intention and comply with the administrative requirements set out in Article 25(3)" (Article 2(1)(a)).

6 On 31 March 1978 the State Secretary for Social Affairs issued a decree pursuant to Article 2(1) of the WVD making membership of the Fund compulsory for physiotherapists carrying on their activity in the Netherlands. Like the Fund regulations, that decree excludes from the obligation to join the Fund physiotherapists "whose activity is solely in employment in respect of which they are covered by the rules contained in the Algemene Burgerlijke Pensioenwet or by other pension arrangements which are at least equivalent to the aforementioned occupational scheme, provided that the persons concerned give the Fund Written notice of their intention and comply with the administrative requirements set out in the abovementioned pension scheme regulations".

7 Under "Rules for applying Article 2(1)(a) of the pension scheme regulations", adopted by the Fund, membership is compulsory except where the pension insurance arrangements, made by a physiotherapist practising his profession under a contract of employment, apply to "all members of the profession employed by the company".

8 Pursuant to the provisions described above, Mr van Veen and Mr van Schijndel, who exercise the profession of physiotherapist in the Netherlands as employees, applied for exemption from compulsory membership of the occupational pension scheme for physiotherapists. The Fund refused exemption on the ground that the pension scheme which the two physiotherapists had joined by entering into contractual arrangements with the insurance company Delta Lloyd was not applicable to all members of the profession in the service of the employer concerned ("the collectivity requirement"). It therefore directed Mr van Veen and Mr van Schijndel to continue to pay the contributions payable under the pension scheme. Mr van Veen and Mr van Schijndel challenged the Fund's decisions, the former before the Kantonrechter (Cantonal Court) at Breda and the latter before the Kantonrechter at Tilburg, on the ground that the collectivity requirement had no basis in either the pension scheme regulations of the Fund or in the WVD.

9 The Breda court found against Mr van Veen whilst the Tilburg court found in favour of Mr van Schijndel. On appeal, however, the Breda Rechtbank upheld the Fund's view and dismissed the two appellants' claims.

10 Mr van Veen and Mr van Schijndel applied to the Hoge Raad to have those judgments quashed. For the first time in the proceedings they contended in particular that the Breda Rechtbank should have considered, "if necessary of its own motion", the question of the compatibility of compulsory Fund membership with higher-ranking rules of Community law, in particular Article 3(f), the second paragraph of Article 5, Articles 85 and 86 and Article 90, as well as Articles 52 to 58 and 59 to 66 EEC. In their view, the requirement in question could render ineffective the competition rules applicable to providers of pension insurance and to individual members of a profession by imposing or promoting the conclusion of contracts incompatible with Community competition rules or reinforcing their effects. Furthermore, the Fund could not meet market demand, or at any rate demand for equivalent pension insurance on more attractive terms.

11 The Hoge Raad has found that in support of their plea in cassation Mr van Veen and Mr van Schijndel are relying on various facts and circumstances which were not established by the Breda Rechtbank or relied on by them in support of their claims before the lower courts. In Netherlands law, a plea in cassation by its nature excludes new arguments unless on pure points of law, that is to say that they do not require an examination of facts. Furthermore, even though Article 48 of the Netherlands Code of Civil Procedure requires courts to raise points of law, if necessary, of their own motion, the principle of judicial passivity in cases involving civil rights and obligations freely entered into by the parties entails that additional pleas on points of law cannot require courts to go beyond the ambit of the dispute defined by the parties themselves nor to rely on facts or circumstances other than those on which a claim is based.

12 In view of those considerations, the Hoge Raad decided to stay proceedings and has referred the following questions to the Court for a preliminary ruling:

[…]

The First Question

13 The competition rules mentioned by the national court are binding rules, directly applicable in the national legal order. Where, by virtue of domestic law, courts must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned (see, in particular, Case 33/76, REWE v LANDWIRTSCHAFTSKAMMER FUR DAS SAARLAND. ([1976] ECR 1989, [1977] 1 CMLR 533, para [5]).

14 The position is the same if domestic law confers on courts a discretion to apply of their own motion binding rules of law. Indeed, pursuant to the principle of co-operation laid down in Article 5 of the Treaty, it is for national courts to ensure the legal protection which persons derive from the direct effect of provisions of Community law (see, in particular, the judgment in Case C-213/89, FACTORTAME AND OTHERS ([1990] I ECR 2433, [1990] 3 CMLR 375, para [19]).

15 The reply to the first question must therefore be that, in proceedings concerning civil rights and obligations freely entered into by the parties, it is for the national court to apply Articles 3(f), 85, 86 and 90 of the Treaty even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court.

The Second Question

16 By this question, the Hoge Raad seeks to ascertain whether such an obligation also exists where, in order to apply of its own motion the aforementioned Community rules, the court would have to abandon the passive role assigned to it by going beyond the ambit of the dispute defined by the parties themselves and/or by relying on facts and circumstances other than those on which the party to the proceedings with an interest in application of the provisions of the Treaty bases his claim.

17 In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law (see, in particular, Case 33/76, REWE v LANDWIRTSCHAFTSKAMMER FUR DAS SAARLAND, Case 45/76, COMET v PRODUKTSCHAP VOOR SIERGEWASSE, ([1976] ECR 2043, [1977] 1 CMLR 533, paras [12]-[16]) Case 68/79, HANS JUST v DANISH MINISTRY FOR FISCAL AFFAIRS, ([1980] ECR 501, [1981] 2 CMLR 714, para [25]) Case 199/82, AMMINISTRAZIONE DELLE FINANZE DELLO STATO v SAN GIORGIO, ([1983] ECR 3595, para [14]) Joined Cases 331, 376 & 378/85, BIANCO AND GIRARD v DIRECTEUR GENERAL DES DOUANES DES DROITS INDIRECTS, ([1988] ECR 1099, [1989] 3 CMLR 36, para [12]) Case 104/86, EC COMMISSION v ITALY, ([1988] ECR 1799, [1989] 3 CMLR 25, para [7]) Joined Cases 123 & 330/87, JEUNEHOMME AND EGI v BELGIUM, ([1988] ECR 4517, para [17]) Case C-96/91, EC COMMISSION v SPAIN, ([1992] I ECR 3789, para [12]) and Joined Cases C6 & 9/90, FRANCOVICH AND OTHERS v ITALY ([1991] I ECR 5357, [1993] 2 CMLR 66, para 43).

18 The Court has also held that a rule of national law preventing the procedure laid down in Article 177 of the Treaty from being followed must be set aside (see the judgment in Case 166/73, RHEINMUHLEN v EINFUHR-UND VORRATSSTELLE FUR GETREIDE UND FUTTERMITTEL ([1974] ECR 33, [1974] 1 CMLR 523, paras [2]-[3])).

19 For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.

20 In the present case, the domestic law principle that in civil proceedings a court must or may raise points of its own motion is limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it.

21 That limitation is justified by the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. That principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas.

22 In those circumstances, the answer to the second question must be that Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.

The Other Questions

23 In view of the answers given to the first two questions, it is not necessary to reply to the third question. Nor is it necessary to reply to the other questions, which called for reply only if it were held that the Hoge Raad must consider an issue such as that raised by the parties to the main proceedings.

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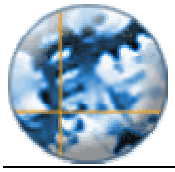
## *2.10 Joined Cases 205 to 215/82: Milchkontor*



***NOTE AND QUESTIONS***

On Joined Cases 205 to 215/82 Milchkontor and Case C-24/95 Alcan:

1. What makes Alcan different from Milchkontor? Is the different result justified?

**Deutsche Milchkontor GmbH and Others v Federal Republic of Germany**

**Joined Cases 205 to 215/82**

21 September 1983

Court of Justice

[1983] ECR 2633

http://www.curia.eu.int/en/content/juris/index.htm

1 BY 11 ORDERS DATED 3 JUNE 1982, WHICH WERE RECEIVED AT THE COURT ON 11 AUGUST 1982, THE VERWALTUNGSGERICHT (ADMINISTRATIVE COURT) FRANKFURT AM MAIN REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY QUESTIONS AS TO THE INTERPRETATION OF VARIOUS PROVISIONS OF REGULATION (EEC) NO 986/68 OF THE COUNCIL OF 15 JULY 1968 LAYING DOWN GENERAL RULES FOR GRANTING AID FOR SKIMMED MILK AND SKIMMED-MILK POWDER FOR USE AS FEED (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1968 (I), P. 260), REGULATION (EEC) NO 990/72 OF THE COMMISSION OF 15 MAY 1972 ON DETAILED RULES FOR GRANTING AID FOR SKIMMED MILK PROCESSED INTO COMPOUND FEEDINGSTUFFS AND FOR SKIMMED-MILK POWDER FOR USE AS FEED (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1972 (II), P. 428) AND REGULATION (EEC) NO 729/70 OF THE COUNCIL OF 21 APRIL 1970 ON THE FINANCING OF THE COMMON AGRICULTURAL POLICY (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1970 (I), P. 218), AND AS TO THE PRINCIPLES OF COMMUNITY LAW REGARDING THE RECOVERY OF UNDULY-PAID AIDS

2 THOSE QUESTIONS WERE RAISED IN DISPUTES PENDING BEFORE THE VERWALTUNGSGERICHT (ADMINISTRATIVE COURT) FRANKFURT AM MAIN BETWEEN THE BUNDESAMT FUR ERNAHRUNG UND FORSTWIRTSCHAFT (FEDERAL OFFICE FOR FOOD AND FORESTRY), THE COMPETENT AUTHORITY FOR PAYING AIDS FOR THE PROCESSING OF SKIMMED-MILK POWDER IN THE FEDERAL REPUBLIC OF GERMANY, AND A NUMBER OF UNDERTAKINGS WHICH MAKE COMPOUND FEEDINGSTUFFS AND TRADE IN MILK

PRODUCTS. THE UNDERTAKINGS ASKED THE VERWALTUNGSGERICHT TO ANNUL DECISIONS OF THE BUNDESAMT FUR ERNAHRUNG UND FORSTWIRTSCHAFT REQUIRING THEM TO REPAY SUMS GRANTED TO THEM FOR SKIMMED-MILK POWDER PURSUANT TO ARTICLE 10 (1) OF REGULATION (EEC) NO 804/68 OF THE COUNCIL OF 27 JUNE 1968 ON THE COMMON ORGANIZATION OF THE MARKET IN MILK AND MILK PRODUCTS (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1968 (I), P. 176), REGULATIONS NOS 986/68 OF THE COUNCIL AND 990/72 OF THE COMMISSION, REFERRED TO ABOVE, AND COMMISSION REGULATION (EEC) NO 1624/76 OF 2 JULY 1976 CONCERNING SPECIAL ARRANGEMENTS FOR THE PAYMENT OF AID FOR SKIMMED-MILK POWDER DENATURED OR PROCESSED INTO COMPOUND FEEDINGSTUFFS IN THE TERRITORY OF ANOTHER MEMBER STATE (OFFICIAL JOURNAL 1976, L 180, P. 9).

3 PURSUANT TO THE AFORESAID PROVISIONS THE PLAINTIFF UNDERTAKINGS IN THE MAIN PROCEEDINGS RECEIVED THE AIDS FOR SKIMMED-MILK POWDER EITHER FOR THE PROCESSING OF SKIMMED-MILK POWDER INTO COMPOUND FEEDINGSTUFFS OR FOR THE EXPORTATION OF SKIMMED-MILK POWDER TO ITALY FOR THE PURPOSE OF SUCH PROCESSING. IN THE MAIN PROCEEDINGS THE BUNDESAMT FUR ERNAHRUNG UND FORSTWIRTSCHAFT CONTENDS THAT THE SKIMMED-MILK POWDER FOR WHICH THE PLAINTIFFS RECEIVED THE AIDS DID NOT SATISFY THE CONDITIONS LAID DOWN BY THE COMMUNITY REGULATIONS IN SO FAR AS THE POWDER CAME FROM THE UNDERTAKING MILCHWERKE AUETAL-BEYER KG (HEREINAFTER REFERRED TO AS “AUETAL”).

4 IN 1978 AND 1979 AUETAL USED, BESIDES SKIMMED MILK, LARGE QUANTITIES OF A PRODUCT COMPOSED OF 56% POWDERED WHEY, 31% SODIUM CASEINATE AND 13% LACTOSE TO MAKE SKIMMED-MILK POWDER. AS REGARDS ITS CONTENT OF PROTEIN, CARBOHYDRATES AND SO FORTH, THE COMPOSITION OF THE POWDER MADE IN THAT WAY WAS THE SAME AS THAT OF SKIMMED-MILK POWDER MADE FROM FRESH SKIMMED MILK. THE ISSUE IN THE MAIN PROCEEDINGS IS, DEPENDING ON THE CASE, WHETHER AND TO WHAT EXTENT THE PLAINTIFFS RECEIVED AND USED FOR THE PROCESSING AND EXPORTATION OF THE SKIMMED-MILK POWDER IN QUESTION NORMAL SKIMMED-MILK POWDER SUPPLIED BY AUETAL OR ANOTHER SUPPLIER OR POWDER MADE BY AUETAL USING THE PARTICULAR METHOD DESCRIBED ABOVE AND PUT ON THE MARKET AS SKIMMED-MILK POWDER.

5 THE VERWALTUNGSGERICHT FOUND THAT AT THE MATERIAL TIME NEITHER THE UNDERTAKINGS IN THE MILK PRODUCT INDUSTRY NOR THE PUBLIC LABORATORIES WERE ABLE, USING THE METHODS OF CHEMICAL ANALYSIS HABITUALLY EMPLOYED AT THAT TIME, TO DETECT ANY DIFFERENCE BETWEEN SKIMMED-MILK POWDER MADE FROM FRESH SKIMMED MILK AND THE POWDER MADE BY AUETAL USING THE PARTICULAR METHOD IN QUESTION. THE PLAINTIFFS IN THE MAIN PROCEEDINGS THEREFORE ARGUE THAT THEY COULD NOT TELL WHETHER OR NOT THEY WERE RECEIVING AND USING A PRODUCT OTHER THAN SKIMMED-MILK POWDER MADE FROM FRESH SKIMMED MILK.

6 THE USE OF THAT PARTICULAR MANUFACTURING METHOD BY AUETAL WAS DISCOVERED BY THE COMPETENT GERMAN AUTHORITIES IN MAY 1979. THE PARTIES TO THE MAIN PROCEEDINGS ARE AT ODDS ON THE QUESTION WHETHER ITS USE MIGHT AND OUGHT TO HAVE BEEN DISCOVERED EARLIER AS SOME EVIDENCE OF UNUSUAL MANUFACTURING PROCESSES HAD PREVIOUSLY BEEN FOUND. FOLLOWING THE DISCOVERY THE BUNDESAMT FUR ERNAHRUNG UND FORSTWIRTSCHAFT DECIDED TO CANCEL THE NOTICES GRANTING AID AND TO DEMAND REPAYMENT OF THE SUMS UNDULY PAID UNDER THOSE NOTICES ON THE GROUND THAT THE CONDITIONS FOR THE GRANT OF AIDS, NAMELY THE USE OF SKIMMED-MILK POWDER IN THE PRESCRIBED QUANTITY AT LEAST, WERE NOT FULFILLED BECAUSE THE PLAINTIFF UNDERTAKINGS HAD USED, AT LEAST IN PART, POWDER MADE BY AUETAL.

7 IN THE PROCEEDINGS BEFORE THE VERWALTUNGSGERICHT FRANKFURT THE PLAINTIFFS CONTEST THOSE DECISIONS OF THE BUNDESAMT FUR ERNAHRUNG UND FORSTWIRTSCHAFT ON THE GROUND THAT THE CONDITIONS LAID DOWN BY ARTICLE 48 OF THE VERWALTUNGSVERFAHRENSGESETZ (LAW ON ADMINISTRATIVE PROCEDURE) OF 25 MAY 1976 (BUNDESGESETZBLATT I, P. 1253) ON WHICH AN ADMINISTRATIVE DECISION GRANTING A PECUNIARY ADVANTAGE MAY BE REVOKED AND SUMS PAID PURSUANT TO SUCH A DECISION RECOVERED ARE NOT FULFILLED IN THE PRESENT CASE.

8 THE NATIONAL COURT CONSIDERED THAT THE DISPUTES RAISED A NUMBER OF QUESTIONS CONCERNING THE INTERPRETATION OF COMMUNITY LAW.

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9 THE FIRST OF THOSE QUESTIONS CONCERNS THE CONDITIONS UPON WHICH AIDS ARE GRANTED WHILST THE SECOND TO SEVENTH QUESTIONS ARE CONCERNED WITH VARIOUS ASPECTS OF THE RECOVERY OF AIDS BY NATIONAL AUTHORITIES WHERE THEY HAVE BEEN PAID WITHOUT THE CONDITIONS FOR THEIR GRANT HAVING BEEN FULFILLED. TO MAKE IT EASIER TO FORMULATE THE RELEVANT PRINCIPLES WITH THE AID OF WHICH THE NATIONAL COURT SHOULD BE ABLE TO DECIDE THE CASES BEFORE IT THE QUESTIONS SUBMITTED WILL BE REARRANGED AND DEALT WITH IN THE FOLLOWING ORDER:

THE CONDITIONS UPON WHICH AIDS ARE GRANTED (FIRST QUESTION);

THE EXTENT TO WHICH COMMUNITY LAW AND NATIONAL LAW APPLY TO THE QUESTION OF THE RECOVERY OF UNDULY-PAID AIDS (FIFTH AND SIXTH QUESTIONS);

THE PROTECTION OF LEGITIMATE EXPECTATION AND ASSURANCE OF LEGAL CERTAINTY IN THE RECOVERY OF UNDULY-PAID AIDS (SEVENTH QUESTION);

THE BURDEN OF PROOF IN THE RECOVERY OF UNDULY-PAID AIDS (FOURTH QUESTION);

THE OBLIGATION TO MONITOR THE MANUFACTURE OF SKIMMED-MILK POWDER AT THE MANUFACTURER'S PREMISES (SECOND AND THIRD QUESTIONS).

THE CONDITIONS UPON WHICH AIDS ARE GRANTED

10 BY ITS FIRST QUESTION THE NATIONAL COURT WISHES TO KNOW HOW IT MUST INTERPRET THE TERM “SKIMMED-MILK POWDER” USED IN THE COMMUNITY REGULATIONS ON AIDS FOR SKIMMED-MILK POWDER AND, MORE SPECIFICALLY, ARTICLE 1 OF REGULATION NO 986/68 OF THE COUNCIL IN ORDER TO DECIDE WHETHER OR NOT A POWDER SUCH AS THAT MADE BY AUETAL MEETS THE CONDITIONS FOR THE GRANT OF AIDS.

11 IN ITS OBSERVATIONS TO THE COURT THE PLAINTIFF FRISCHLI-MILCHWERKE HOLTORF + SCHAEKEL KG TAKES THE VIEW THAT IT IS THE PHYSICAL COMPOSITION AND NOT THE MANUFACTURING PROCESS WHICH IS DETERMINATIVE AS REGARDS THE DEFINITION OF SKIMMED-MILK POWDER, ESPECIALLY AS THE RECONSTITUTION OF MILK PRODUCTS FROM THEIR PREVIOUSLY SEPARATED CONSTITUENTS IS THE USUAL AND ACCEPTED PRACTICE IN COMMUNITY DAIRIES.

12 THE POINT TO BE MADE IN THIS REGARD IS THAT ARTICLE 1(D) OF REGULATION NO 986/68 OF THE COUNCIL DEFINES SKIMMED-MILK POWDER AS “POWDERED MILK” AND ALSO SPECIFIES ITS FAT AND MOISTURE CONTENT. MILK ITSELF IS DEFINED IN ARTICLE 1(A) AS “THE MILK-YIELD OF ONE OR MORE COWS, TO WHICH NOTHING HAS BEEN ADDED AND WHICH HAS, AT THE MOST, BEEN ONLY PARTIALLY SKIMMED”. IT IS CLEAR FROM THOSE DEFINITIONS THAT A PRODUCT FOR THE MANUFACTURE OF WHICH SUBSTANCES OTHER THAN THE MILK-YIELD OF ONE OR MORE COWS HAVE BEEN USED CANNOT ATTRACT AIDS UNDER THE INTERVENTION MACHINERY REFERRED TO ABOVE, REGARDLESS OF THE CHEMICAL COMPOSITION OF THE FINAL PRODUCT OBTAINED IN THAT WAY.

13 THE LITERAL INTERPRETATION IS SUPPORTED BY THE PURPOSE OF THE SYSTEM OF AIDS IN QUESTION, WHICH, UNDER THE INTERVENTION SYSTEM ESTABLISHED BY REGULATION NO 804/68 OF THE COUNCIL, IS TO ENABLE MILK TO BE DISPOSED OF AT THE PRICE FIXED WITHIN THE COMMON ORGANIZATION OF THE MARKET IN MILK AND MILK PRODUCTS. IT WOULD BE CONTRARY TO THAT OBJECTIVE FOR AIDS FOR SKIMMED-MILK POWDER TO BE ATTRACTED BY A PRODUCT MADE FROM SUBSTANCES NO LONGER ON THE MILK MARKET OR IN RESPECT OF WHICH SIMILAR AIDS HAVE ALREADY BEEN GRANTED WHEN THEY WERE MANUFACTURED, AS IS THE CASE WHERE SKIMMED MILK IS PROCESSED INTO CASEIN AND CASEINATE IN ACCORDANCE WITH ARTICLE 11 OF REGULATION NO 804/68 OF THE COUNCIL.

14 THE ANSWER TO THE FIRST QUESTION MUST THEREFORE BE THAT A PRODUCT CONSISTING OF A SPRAY-DRIED MIXTURE OF SKIMMED MILK AND A POWDER COMPOSED OF WHEY, SODIUM CASEINATE AND LACTOSE IS NOT SKIMMED-MILK POWDER FOR THE PURPOSES OF THE COMMUNITY REGULATIONS GOVERNING AID FOR SKIMMED-MILK POWDER AND, MORE PARTICULARLY, OF ARTICLE 1 OF REGULATION (EEC) NO 986/68 OF THE COUNCIL OF 15 JULY 1968 EVEN IF ITS COMPOSITION IS THE SAME AS THAT OF SKIMMED-MILK POWDER MADE FROM COW' S MILK.

THE EXTENT TO WHICH COMMUNITY LAW AND NATIONAL LAW APPLY TO THE QUESTION OF THE RECOVERY OF UNDULY-PAID AIDS

15 ACCORDING TO THE EXPLANATIONS PROVIDED BY THE NATIONAL COURT, ITS FIFTH QUESTION IS IN SUBSTANCE WHETHER COMMUNITY LAW AND IN PARTICULAR ARTICLE 8 (1) OF REGULATION NO 729/70 OF THE COUNCIL OF 21 APRIL 1970 DIRECTLY AUTHORIZES THE COMPETENT NATIONAL AUTHORITIES TO DEMAND REPAYMENT OF AIDS UNDULY PAID, SO THAT THE SUBSTANTIVE CONDITIONS FOR A RIGHT OF RECOVERY ARE EXHAUSTIVELY SET OUT IN THAT PROVISION, OR WHETHER RECOVERY IS GOVERNED BY THE RULES AND PROCEDURES LAID DOWN BY NATIONAL LEGISLATION; IF IT IS, THE COURT WISHES TO KNOW WHAT LIMITS ARE PLACED ON THE APPLICATION OF NATIONAL LAW.

16 IN ORDER TO ANSWER THAT QUESTION IT IS NECESSARY TO RECALL FIRST THE RELEVANT RULES AND GENERAL PRINCIPLES OF COMMUNITY LAW EVOLVED BY THE COURT IN ITS DECISIONS.

17 ACCORDING TO THE GENERAL PRINCIPLES ON WHICH THE INSTITUTIONAL SYSTEM OF THE COMMUNITY IS BASED AND WHICH GOVERN THE RELATIONS BETWEEN THE COMMUNITY AND THE MEMBER STATES, IT IS FOR THE MEMBER STATES, BY VIRTUE OF ARTICLE 5 OF THE TREATY, TO ENSURE THAT COMMUNITY REGULATIONS, PARTICULARLY THOSE CONCERNING THE COMMON AGRICULTURAL POLICY, ARE IMPLEMENTED WITHIN THEIR TERRITORY. IN SO FAR AS COMMUNITY LAW, INCLUDING ITS GENERAL PRINCIPLES, DOES NOT INCLUDE COMMON RULES TO THIS EFFECT, THE NATIONAL AUTHORITIES WHEN IMPLEMENTING COMMUNITY REGULATIONS ACT IN

ACCORDANCE WITH THE PROCEDURAL AND SUBSTANTIVE RULES OF THEIR OWN NATIONAL LAW; HOWEVER, AS THE COURT STATED IN ITS JUDGMENT OF 6 JUNE 1972 IN CASE 94/71 (SCHLUTER & MAACK V HAUPTZOLLAMT HAMBURG-JONAS (1972) ECR 307), THIS RULE MUST BE RECONCILED WITH THE NEED TO APPLY COMMUNITY LAW UNIFORMLY SO AS TO AVOID UNEQUAL TREATMENT OF PRODUCERS AND TRADERS.

18 IT IS IN THIS CONTEXT, THEN, THAT ARTICLE 8(1) OF REGULATION NO 729/70 OF THE COUNCIL PROVIDES THAT "IN ACCORDANCE WITH NATIONAL PROVISIONS LAID DOWN BY LAW, REGULATION OR ADMINISTRATIVE ACTION" MEMBER STATES MUST TAKE THE MEASURES NECESSARY TO PREVENT AND DEAL WITH IRREGULARITIES AFFECTING THE OPERATIONS OF THE EUROPEAN AGRICULTURAL GUIDANCE AND GUARANTEE FUND AND TO RECOVER SUMS LOST AS A RESULT OF IRREGULARITIES OR NEGLIGENCE. CONSEQUENTLY THE COMPETENT NATIONAL AUTHORITIES ARE BOUND TO EXERCISE ALL THE SUPERVISION NECESSARY TO ENSURE THAT AIDS ARE GRANTED ONLY UPON THE CONDITIONS LAID DOWN BY THE COMMUNITY REGULATIONS AND THAT ANY INFRINGEMENT OF THE RULES OF COMMUNITY LAW IS APPROPRIATELY PENALIZED. AT ITS PRESENT STAGE OF DEVELOPMENT COMMUNITY LAW DOES NOT INCLUDE ANY SPECIFIC PROVISIONS RELATING TO THE EXERCISE OF THAT SUPERVISION BY THE COMPETENT NATIONAL AUTHORITIES.

19 IN ACCORDANCE WITH THOSE PRINCIPLES THE COURT HAS REPEATEDLY HELD (ON 5 MARCH 1980 IN CASE 265/78 H. FERWERDA BV V PRODUKTSCHAP VOOR VEE EN VLEES (1980) ECR 617, ON 12 JUNE 1980 IN JOINED CASES 119 AND 126/79 LIPPISCHE HAUPTGENOSSENSCHAFT EG AND ANOTHER V BUNDESANSTALT FUR LANDWIRTSCHAFTLICHE MARKTORDNUNG (1980) ECR 1863 AND ON 6 MAY 1982 IN CASE 54/81 FIRMA WILHELM FROMME V BUNDESANSTALT FUR LANDWIRTSCHAFTLICHE MARKTORDNUNG (1982) ECR 1449 AND JOINED CASE 146, 192 AND 193/81 BAYWA AG AND OTHERS V BUNDESANSTALT FUR LANDWIRTSCHAFTLICHE MARKTORDNUNG (1982) ECR 1503) THAT IN THE ABSENCE OF PROVISIONS OF COMMUNITY LAW DISPUTES CONCERNING THE RECOVERY OF AMOUNTS UNDULY PAID UNDER COMMUNITY LAW MUST BE DECIDED BY NATIONAL COURTS PURSUANT TO THEIR OWN NATIONAL LAW SUBJECT TO THE LIMITS IMPOSED BY COMMUNITY LAW INASMUCH AS THE RULES AND PROCEDURES LAID DOWN BY NATIONAL LAW MUST NOT HAVE THE EFFECT OF MAKING IT VIRTUALLY IMPOSSIBLE TO IMPLEMENT COMMUNITY REGULATIONS AND NATIONAL LEGISLATION MUST BE APPLIED IN A MANNER WHICH IS NOT DISCRIMINATORY COMPARED TO PROCEDURES FOR DECIDING SIMILAR BUT PURELY NATIONAL DISPUTES.

20 IF FOLLOWS THAT ARTICLE 8(1) OF REGULATION NO 729/70 DOES NOT GOVERN THE RELATIONS BETWEEN THE INTERVENTION AGENCIES AND THE TRADERS CONCERNED AND IN PARTICULAR IT DOES NOT CONSTITUTE A LEGAL BASIS AUTHORIZING THE NATIONAL AUTHORITIES TO BRING ACTIONS TO RECOVER UNDULY-PAID AIDS FROM THEIR RECIPIENTS; SUCH ACTIONS ARE GOVERNED BY NATIONAL LAW.

21 ALTHOUGH AS A RESULT OF SUCH RELIANCE ON NATIONAL LAW THE CONDITIONS FOR THE RECOVERY OF UNDULY-PAID AIDS MAY VARY TO SOME EXTENT FROM ONE MEMBER STATE TO ANOTHER, THE EFFECT OF SUCH DIFFERENCES, WHICH MOREOVER IN THE PRESENT STATE OF DEVELOPMENT OF COMMUNITY LAW ARE INEVITABLE, IS REDUCED BY THE LIMITS TO WHICH THE COURT HAS SUBJECTED THE APPLICATION OF NATIONAL LAW IN THE DECISIONS CITED ABOVE.

22 IN THE FIRST PLACE THE APPLICATION OF NATIONAL LAW MUST NOT AFFECT THE SCOPE AND EFFECTIVENESS OF COMMUNITY LAW. THAT WOULD BE THE CASE IN PARTICULAR IF THE APPLICATION OF NATIONAL LAW MADE IT IMPOSSIBLE IN PRACTICE TO RECOVER SUMS IRREGULARLY GRANTED. FURTHERMORE, THE EXERCISE OF ANY DISCRETION TO DECIDE WHETHER OR NOT IT WOULD BE EXPEDIENT TO DEMAND

REPAYMENT OF COMMUNITY FUNDS UNDULY OR IRREGULARLY GRANTED WOULD BE INCONSISTENT WITH THE DUTY TO RECOVER SUCH SUMS WHICH ARTICLE 8(1) OF REGULATION NO 729/70 IMPOSES ON THE NATIONAL ADMINISTRATION.

23 SECONDLY, NATIONAL LAW MUST BE APPLIED IN A MANNER WHICH IS NOT DISCRIMINATORY COMPARED TO PROCEDURES FOR DECIDING SIMILAR BUT PURELY NATIONAL DISPUTES. THIS MEANS FIRST THAT IN SUCH CASES THE NATIONAL AUTHORITIES MUST ACT WITH THE SAME DEGREE OF CARE AS IN COMPARABLE CASES CONCERNING SOLELY THE APPLICATION OF CORRESPONDING NATIONAL LEGISLATION AND IN ACCORDANCE WITH RULES AND PROCEDURES WHICH DO NOT MAKE THE RECOVERY OF THE SUMS IN QUESTION MORE DIFFICULT. SECONDLY, NOTWITHSTANDING THE PRINCIPLE REFERRED TO ABOVE THAT THE EXERCISE OF ANY DISCRETION TO DECIDE WHETHER OR NOT IT IS EXPEDIENT TO DEMAND REPAYMENT IS RULED OUT, THE OBLIGATIONS IMPOSED BY NATIONAL LEGISLATION ON UNDERTAKINGS WRONGLY GRANTED PECUNIARY ADVANTAGES BASED ON COMMUNITY LAW MUST BE NO MORE STRINGENT THAN THOSE IMPOSED ON UNDERTAKINGS WHICH HAVE WRONGLY RECEIVED SIMILAR ADVANTAGES BASED ON NATIONAL LAW, PROVIDED THAT THE TWO GROUPS OF RECIPIENTS ARE IN COMPARABLE SITUATIONS AND THEREFORE DIFFERENT TREATMENT IS OBJECTIVELY UNJUSTIFIABLE.

24 HOWEVER, IF DISPARITIES IN THE LEGISLATION OF MEMBER STATES PROVED TO BE SUCH AS TO COMPROMISE THE EQUAL TREATMENT OF PRODUCERS AND TRADERS IN DIFFERENT MEMBER STATES OR DISTORT OR IMPAIR THE FUNCTIONING OF THE COMMON MARKET, IT WOULD BE FOR THE COMPETENT COMMUNITY INSTITUTIONS TO ADOPT THE PROVISIONS NEEDED TO REMEDY SUCH DISPARITIES.

25 THE ANSWER TO THE FIFTH QUESTION OF THE VERWALTUNGSGERICHT FRANKFURT AM MAIN MUST THEREFORE BE THAT IN THE PRESENT STATE OF COMMUNITY LAW SUMS UNDULY PAID BY WAY OF AIDS UNDER THE COMMUNITY REGULATIONS ARE RECOVERED BY THE NATIONAL AUTHORITIES ACCORDING TO THE RULES AND PROCEDURES LAID DOWN BY NATIONAL LEGISLATION SUBJECT TO THE LIMITS IMPOSED BY COMMUNITY LAW ON SUCH AN APPLICATION OF NATIONAL LAW.

26 IN VIEW OF THAT ANSWER TO THE FIFTH QUESTION, THE SIXTH QUESTION, WHICH IS SUBJECT TO THE PREMISE THAT THE RECOVERY OF UNDULY-GRANTED AIDS IS GOVERNED BY RULES AND PROCEDURES LAID DOWN BY COMMUNITY LAW, HAS NO PURPOSE.

THE PROTECTION OF LEGITIMATE EXPECTATION AND ASSURANCE OF LEGAL CERTAINTY IN THE RECOVERY OF UNDULY-PAID AIDS

27 THE NATIONAL COURT ' S SEVENTH QUESTION IS IN SUBSTANCE WHETHER THE RESTRICTIONS WHICH COMMUNITY LAW PLACES ON THE APPLICATION OF NATIONAL LAW MAY EXCLUDE CONSIDERATION OF THE PROTECTION OF LEGITIMATE EXPECTATION AND ASSURANCE OF LEGAL CERTAINTY IN THE RECOVERY OF AIDS UNDULY PAID.

28 IT IS CLEAR FROM THE ORDERS FOR REFERENCE THAT THE VERWALTUNGSGERICHT FRANKFURT AM MAIN HAS ASKED THIS QUESTION IN ORDER TO ENABLE IT TO DECIDE WHETHER THE APPLICATION OF PARAGRAPH 48 OF THE VERWALTUNGSVERFAHRENSGESETZ TO A CASE LIKE THIS IS CONSISTENT WITH THE AFOREMENTIONED PRINCIPLES OF COMMUNITY LAW. TO TAKE ACCOUNT OF THE PRINCIPLES OF THE PROTECTION OF LEGITIMATE EXPECTATION AND ASSURANCE OF LEGAL UNCERTAINTY THAT PARAGRAPH PROVIDES IN PARTICULAR THAT:

AN UNLAWFUL ADMINISTRATIVE DECISION GRANTING A PECUNIARY BENEFIT MAY NOT BE REVOKED IN SO FAR AS THE BENEFICIARY HAS RELIED UPON THE DECISION AND HIS EXPECTATION, WEIGHED AGAINST THE PUBLIC INTEREST IN REVOKING THE DECISION, MERITS PROTECTION

THE RECIPIENT OF SUCH A BENEFIT MAY PLEAD LOSS OF ENRICHMENT IN ACCORDANCE WITH THE RELEVANT RULES OF CIVIL LAW UNLESS HE KNEW, OR WAS UNAWARE OF OWING TO GROSS NEGLIGENCE ON HIS PART, THE CIRCUMSTANCES WHICH MADE THE GRANT OF THE BENEFIT UNLAWFUL;

UNLESS OBTAINED BY FRAUD, DURESS OR BRIBERY, AN UNLAWFUL ADMINISTRATIVE DECISION MUST BE REVOKED WITHIN ONE YEAR FROM THE TIME WHEN THE ADMINISTRATION BECAME AWARE OF THE FACTS IN QUESTION;

THE AMOUNT UNDULY PAID CANNOT BE RECOVERED WHERE THE AUTHORITY KNEW, OR WAS UNAWARE OWING TO GROSS NEGLIGENCE ON ITS PART, THAT IT WAS GRANTING THE BENEFIT UNLAWFULLY.

29 IN THE COMMISSION ' S VIEW, THE APPLICATION OF AT LEAST SOME OF THE CRITERIA LAID DOWN BY PARAGRAPH 48 OF THE VERWALTUNGSVERFASSUNGSGESETZ FOR THE EXCLUSION OF RECOVERY OF AIDS UNDULY PAID MIGHT CONFLICT WITH THE PRINCIPLE THAT THE APPLICATION OF NATIONAL LAW MUST NOT AFFECT THE SCOPE AND EFFECTIVENESS OF COMMUNITY LAW. THIS WOULD BE THE CASE IN PARTICULAR IF THE PERIOD IN WHICH THE RIGHT OF RECOVERY HAD TO BE EXERCISED WERE TOO SHORT OR IF KNOWLEDGE OR NEGLIGENCE ON THE PART OF THE NATIONAL AUTHORITY WERE SUFFICIENT TO PRECLUDE THE RECOVERY OF AIDS UNDULY PAID.

30 THE FIRST POINT TO BE MADE IN THIS REGARD IS THAT THE PRINCIPLES OF THE PROTECTION OF LEGITIMATE EXPECTATION AND ASSURANCE OF LEGAL CERTAINTY ARE PART OF THE LEGAL ORDER OF THE COMMUNITY. THE FACT THAT NATIONAL LEGISLATION PROVIDES FOR THE SAME PRINCIPLES TO BE OBSERVED IN A MATTER SUCH AS THE RECOVERY OF UNDULY-PAID COMMUNITY AIDS CANNOT, THEREFORE, BE CONSIDERED CONTRARY TO THAT SAME LEGAL ORDER. MOREOVER, IT IS CLEAR FROM A STUDY OF THE NATIONAL LAWS OF THE MEMBER STATES REGARDING THE REVOCATION OF ADMINISTRATIVE DECISIONS AND THE RECOVERY OF FINANCIAL BENEFITS WHICH HAVE BEEN UNDULY PAID BY PUBLIC AUTHORITIES THAT THE CONCERN TO STRIKE A BALANCE, ALBEIT IN DIFFERENT WAYS, BETWEEN THE PRINCIPLE OF LEGALITY ON THE ONE HAND AND THE PRINCIPLES OF LEGAL CERTAINTY AND THE PROTECTION OF LEGITIMATE EXPECTATION ON THE OTHER IS COMMON THE LAWS OF THE MEMBER STATES.

31 WHERE THE RULES AND PROCEDURES APPLIED BY THE NATIONAL AUTHORITIES IN THE RECOVERY OF COMMUNITY AIDS ARE THE SAME AS THOSE WHICH THEY APPLY IN COMPARABLE CASES CONCERNING PURELY NATIONAL FINANCIAL BENEFITS, THERE IS IN PRINCIPLE NO REASON TO ASSUME THAT THOSE RULES AND PROCEDURES ARE CONTRARY TO THE NATIONAL AUTHORITIES' DUTY UNDER ARTICLE 8 OF REGULATION NO 729/70 TO RECOVER SUMS IRREGULARLY GRANTED AND THAT CONSEQUENTLY THEY REDUCE THE EFFECTIVENESS OF COMMUNITY LAW. THIS APPLIES IN PARTICULAR TO GROUNDS FOR EXCLUDING RECOVERY WHERE THESE ARE RELATED TO THE ADMINISTRATION ' S OWN CONDUCT AND IT CAN THEREFORE PREVENT THEM FROM OCCURRING .

32 IT SHOULD BE ADDED, HOWEVER, THAT THE PRINCIPLE THAT NATIONAL LEGISLATION MUST BE APPLIED WITHOUT DISCRIMINATION COMPARED TO PURELY NATIONAL

PROCEDURES OF THE SAME KIND REQUIRES THE INTERESTS OF THE COMMUNITY TO BE TAKEN FULLY INTO CONSIDERATION IN THE APPLICATION OF A PROVISION WHICH, LIKE THE FIRST SENTENCE OF PARAGRAPH 48(2) OF THE VERWALTUNGSVERFAHRENSGESETZ, REQUIRES THE VARIOUS INTERESTS IN QUESTION, NAMELY ON THE ONE HAND THE PUBLIC INTEREST IN THE REVOCATION OF THE MEASURE AND ON THE OTHER HAND THE PROTECTION OF THE LEGITIMATE EXPECTATION OF THE PERSON TO WHOM IT IS ADDRESSED, TO BE WEIGHED UP AGAINST ONE ANOTHER BEFORE THE DECISION IS REVOKED.

33 THE ANSWER TO THE SEVENTH QUESTION MUST THEREFORE BE THAT COMMUNITY LAW DOES NOT PREVENT NATIONAL LAW FROM HAVING REGARD, IN EXLUDING THE RECOVERY OF UNDULY-PAID AIDS, TO SUCH CONSIDERATIONS AS THE PROTECTION OF LEGITIMATE EXPECTATION, THE LOSS OF UNJUSTIFIED ENRICHMENT, THE PASSING OF A TIME-LIMIT OR THE FACT THAT THE ADMINISTRATION KNEW, OR WAS UNAWARE OWING TO GROSS NEGLIGENCE ON ITS PART, THAT IT WAS WRONG IN GRANTING THE AIDS IN QUESTION, PROVIDED HOWEVER THAT THE CONDITIONS LAID DOWN ARE THE SAME AS FOR THE RECOVERY OF PURELY NATIONAL FINANCIAL BENEFITS AND THE INTERESTS OF THE COMMUNITY ARE TAKEN FULLY INTO ACCOUNT .

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THE OBLIGATION TO MONITOR THE MANUFACTURE OF SKIMMED-MILK POWDER AT THE MANUFACTURER'S PREMISES

40 LASTLY, BY ITS SECOND AND THIRD QUESTIONS THE VERWALTUNGSGERICHT FRANKFURT AM MAIN ASKS WHETHER THE NATIONAL AUTHORITIES ARE UNDER A DUTY TO MONITOR THE MANUFACTURE OF SKIMMED-MILK POWDER AT THE MANUFACTURER ' S PREMISES AND IF SO WHETHER A FAILURE TO FULFIL THAT DUTY MAY BAR THE RECOVERY OF THE AIDS UNDULY PAID.

41 THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED KINGDOM CONTEND THAT NO SUCH DUTY EXISTS. THEY ARGUE THAT REGULATION NO 990/72 OF THE COMMISSION, TO ARTICLE 10 OF WHICH THE VERWALTUNGSGERICHT FRANKFURT AM MAIN REFERS IN ITS QUESTIONS, CONCERNS ONLY THE DENATURING OF SKIMMED-MILK POWDER AND ITS PROCESSING INTO COMPOUND FEEDINGSTUFFS AND NOT ITS MANUFACTURE.

42 IT SHOULD BE NOTED THAT THE VARIOUS PROVISIONS REQUIRING NATIONAL AUTHORITIES TO EXERCISE A CERTAIN AMOUNT OF SUPERVISION TO ENSURE THAT THE RELEVANT PROVISIONS OF COMMUNITY LAW, SUCH AS ARTICLE 10 OF REGULATION NO 990/72 OF THE COMMISSION AND ARTICLE 8 OF REGULATION NO 729/70 OF THE COUNCIL, ARE OBSERVED MERELY EXPRESSLY CONFIRM A DUTY WHICH MEMBER STATES ALREADY HAVE BY VIRTUE OF THE PRINCIPLE OF COOPERATION LAID DOWN IN ARTICLE 5 OF THE TREATY.

43 CONSEQUENTLY, MEMBER STATES MUST VERIFY BY MEANS OF APPROPRIATE CONTROLS THAT SKIMMED-MILK POWDER COMPLIES WITH THE RELEVANT COMMUNITY RULES SO AS TO ENSURE THAT COMMUNITY AIDS ARE NOT PAID IN RESPECT OF PRODUCTS FOR WHICH THEY OUGHT NOT TO BE GRANTED. IT IS FOR THE NATIONAL COURT TO DETERMINE THE CONTROLS NECESSARY FOR THIS PURPOSE HAVING REGARD IN PARTICULAR TO THE CIRCUMSTANCES OF THE CASE AND THE TECHNIQUES AVAILABLE AT THE TIME.

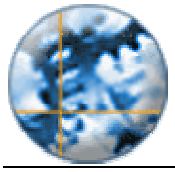
44 AS REGARDS THE CONSEQUENCES OF A FAILURE TO EXERCISE SUCH SUPERVISION FOR THE RECOVERY OF SUMS UNDULY PAID AND IN PARTICULAR THE QUESTION

WHETHER THE RECIPIENTS OF THE AIDS MAY RELY ON THE FAILURE AS A DEFENCE TO AN ACTION FOR RECOVERY, IT FOLLOWS FROM THE FOREGOING STATEMENTS REGARDING THE EXTENT TO WHICH COMMUNITY LAW AND NATIONAL LAW ARE APPLICABLE TO THE QUESTION OF THE RECOVERY OF UNDULY-PAID AIDS AND FROM THE PRINCIPLES OF THE PROTECTION OF LEGITIMATE EXPECTATION AND ASSURANCE OF LEGAL CERTAINTY THAT IN THE PRESENT STATE OF DEVELOPMENT OF COMMUNITY LAW THOSE CONSEQUENCES ARE DETERMINED BY NATIONAL LAW AND NOT BY COMMUNITY LAW. IT IS THEREFORE LIKEWISE THE TASK OF THE NATIONAL COURTS TO DETERMINE THEM ON THE BASIS OF THE RELEVANT NATIONAL LAW.

45 THE ANSWER TO THE SECOND AND THIRD QUESTIONS MUST THEREFORE BE THAT THE NATIONAL AUTHORITIES MUST MONITOR THE MANUFACTURE OF SKIMMED-MILK POWDER BY CONDUCTING INSPECTIONS AT THE MANUFACTURER'S PREMISES IF THIS IS NECESSARY TO ENSURE THAT THE COMMUNITY RULES ARE OBSERVED. IT IS FOR THE NATIONAL COURT TO DETERMINE THE CONSEQUENCES OF ANY FAILURE TO FULFIL THAT DUTY ON THE BASIS OF THE RELEVANT NATIONAL LAW.

[…]

## 2.11 Case C-24/95: Alcan



### *NOTE AND QUESTIONS*

1. Does the Court of justice in Alcan de facto apply national law and assess the facts of the case? If yes, should this be a matter left to the national courts?

2. In recital 43 of Alcan the Court says that recovery of illegally awarded State aid shall take place even when the national public authority was responsible for the illegality of the aid award. Is this justified? Why?

**Land Rheinland-Pfalz v Alcan Deutschland GmbH**

**Case C-24/95**

20 March 1997

Court of Justice

[1997] ECR I-1607

http://www.curia.eu.int/en/content/juris/index.htm

1. By order of 28 September 1994, which was received at the Court of Justice of the European Communities on 2 February 1995, the Bundesverwaltungs-gericht (the Federal Administrative court) referred to the Court of Justice for a preliminary ruling under art 177 of the EC Treaty three questions on the interpretation of arts 92 and 93(3) of the EC Treaty with regard to the obligation of national authorities to recover unlawful state aid where national rules protecting the recipient of aid give rise to difficulties.

2. The questions were raised in the course of a dispute between Land Rheinland-Pfalz and Alcan Deutschland GmbH (Alcan).

3. Between 1979 and 1987 Alcan operated an aluminium plant in Ludwigshafen which was threatened by closure in 1982 as a result of a substantial rise in the cost of electricity. After Alcan had indicated that it intended to shut down the plant and terminate the contracts of 330 employees, the Rheinland-Pfalz government proposed to pay Alcan transitional aid of DM 8m to compensate for electricity costs.

4. After learning of the proposed aid from the press, the European Commission sent a telex to the Federal Government on 7 March 1983 requesting information.

5. Land Rheinland-Pfalz granted the first tranche of aid, amounting to DM 4m, by decision of 9 June 1983.

6. The Federal Government confirmed the intention of Land Rheinland-Pfalz to grant aid in a telex to the Commission of 25 July 1983, and provided additional details in response to a supplementary request for information from the Commission of 3 August.

7. On 7 November 1983 the Commission acknowledged receipt of the information from the Federal Government, and stated that the 30-day period for examining the proposed aid therefore began to run on 11 October 1983. By a telex dated 24 November 1983, received by the Commission on 28 November 1983, the German government informed the Commission that, since the prescribed period had expired, it presumed that the transitional aid could be paid.

8. By a letter of 25 November 1983 the Commission informed the Federal Government that it had decided to open the procedure under the first paragraph of art 93(2) of the EEC Treaty.

9. Land Rheinland-Pfalz was informed of this on 28 November 1983. Nevertheless, by a decision of 30 November 1983, it paid Alcan the remaining DM 4m of aid.

10. On 13 December 1983 Alcan was informed by the national authorities that the aid had not been notified to the Commission.

11. By Commission Decision (EEC) 86/60 on aid which Land Rheinland-Pfalz of the Federal Republic of Germany has provided to an undertaking producing primary aluminium situated in Ludwigshafen, the Commission found the aid granted to Alcan to be illegal, having been granted in breach of art 93(3) of the Treaty, and incompatible with the common market under art 92 of the Treaty; it accordingly ordered its recovery. Alcan was informed of that decision on 15 January 1986.

12. Neither the German government nor Alcan has contested Decision 86/60.

13. On 12 February and 21 April 1986 the Federal Government informed the Commission that there were substantial political and legal obstacles to the recovery of the aid. By letter of 27 June 1986 the Commission insisted on the recovery, and since the time limit for bringing an action challenging Decision 86/60 had expired, it lodged an application under the second paragraph of art 93(2) of the EEC Treaty.

14. In its judgment in EC Commission v Germany Case 94/87 [1989] ECR 175, the court held that Germany had failed to fulfil its obligations under the Treaty by not complying with Decision 86/60.

15. By a decision of 26 September 1989, Land Rheinland-Pfalz revoked the decisions of 9 June and 30 November 1983 granting the aid and demanded repayment of the sums paid out. Alcan brought an action for the annulment of that decision, which succeeded before the Verwaltungsgericht (the Administrative Court) Mainz. An appeal to the Oberverwaltungsgericht (the Higher Administrative Court) having been dismissed, Land Rheinland-Pfalz appealed on a point of law to the Bundesverwaltungsgericht, which made this reference.

16. In opposing recovery, Alcan relies on art 48 of the Verwaltungs-verfahrensgesetz (the Law on Administrative Procedure (the VwFfG) applicable in the Land pursuant to art 1(1) of the Landesverwaltungs-verfahrensgesetz), which provides:

'1. An unlawful administrative measure, even after it is no longer open to challenge, may be revoked, wholly or in part, with prospective or retrospective effect. An administrative measure which has founded or confirmed a right or a legally material advantage (administrative measure granting a benefit) may be revoked only subject to the restrictions of subparagraphs (2) and (4) hereof. 2. An unlawful administrative measure which grants a non-recurring or continuous monetary payment or a divisible payment in kind or forms the basis thereof, may not be revoked, in so far as the beneficiary has relied upon the administrative measure's being maintained in force and that expectation, weighed against the public interest in revocation, requires protection. Expectation in general requires protection where the beneficiary has used the benefits granted or has made some disposition of them affecting his resources which he either cannot reverse or can reverse only by incurring unreasonable disadvantages. The beneficiary cannot rely on expectation where he (1) has secured the administrative measure by intentional deception, threats or corrupt practices; (2) has secured the administrative measure by giving information which was incorrect or incomplete in a material respect; (3) knew, or did not know as a result of gross negligence, that the administrative measure was unlawful. In the circumstances referred to in sub-subparagraph 3 hereof the administrative measure shall in general be revoked with retroactive effect. In so far as the administrative measure has been revoked, payments already made thereunder shall be reimbursed. As to the amount of restitution, the provisions of the Burgerliches Gesetzbuch (Civil Code) relating to the restitution of unjust enrichment shall apply so far as relevant. If the conditions mentioned in sub-subparagraph 3 hereof are satisfied the person liable to make the restitution cannot plead loss of the enrichment if he knew, or did not know as a result of gross negligence, the circumstances leading to the illegality of the administrative measure. The amount of restitution shall be determined by the authority at the time of the revocation of the administrative measure. .. 4. If the authority receives knowledge of facts justifying the revocation of an unlawful administrative measure, revocation shall be permissible only within a period of one year from the time at which such facts came to its notice, save in the circumstances referred to in the third sentence of subparagraph (2) hereof, sub-subparagraph 1.'

17. The national court considers that, on the basis of those provisions, the appeal should be dismissed. First, the time limit referred to in the first part of para 48(4) of the VwVfG has expired, since the aid was found to be unlawful by Decision 86/60, dated 14 December 1985, or at the latest in the Commission's letter of 27 June 1986, and revocation of the measure took place only on 26 September 1989. National law therefore precludes such revocation. However, Community law could restrict the provisions of national law, in particular where the time-bar has been used for an improper purpose by the administration in order to prevent the recovery required by Community law. The Bundesverwaltungsgericht refers in this connection to the court's judgment in Deutsche Milchkontor GmbH v Germany Joined cases 205-215/82 [1983] ECR 2633, from which it follows that where unduly paid aid must be recovered, first, national law must be applied in such a way that the recovery of sums unlawfully granted is not rendered practically impossible, and, secondly, the interests of the Community must be taken fully into consideration.

18. The Bundesverwaltungsgericht then states that the recipient of aid may, under domestic law, challenge revocation of aid where the discretionary powers of the state authorities have been exercised unlawfully. Those conditions are probably satisfied in the case at issue, inasmuch as the aid was practically imposed on Alcan in order to safeguard jobs during a period preceding important elections. Land Rheinland-Pfalz is thus responsible for the illegality of the decision to grant aid to such an extent that the plea of misuse of powers would, under domestic law, prevent revocation of the said decision. However, application of the principles set out in Deutsche Milchkontor, could lead to a different assessment at Community level.

19. Lastly, the Bundesverwaltungsgericht points out that, under national law, Alcan can also rely on the fact that the gain has ceased to exist, pursuant to art, 48(2), sixth and seventh sentences, of the VwVfG, read in conjunction with para 818(3) of the German Civil Code, which provides that the obligation to repay or compensate is excluded where it appears that the recipient is no longer enriched.

20. In those circumstances, the Bundesverwaltungsgericht referred to the Court of Justice for a preliminary ruling on the following questions:

'(1) Is the competent authority obliged, by reason of the requirement to apply national law in such a way that "the recovery required by Community law is not rendered practically impossible and the interests of the Community are taken fully into consideration", to revoke, in accordance with a final, binding decision of the EC Commission ordering recovery, the aid decision in question even if the authority has allowed the preclusive time limit which exists for that purpose under national law in the interest of legal certainty to elapse?

(2) If the reply to Question 1 is in the affirmative: Is the competent authority obliged, by reason of the abovementioned requirement, to revoke, in accordance with a final, binding decision of the EC Commission ordering recovery, the aid decision in question even if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient?

(3) If the reply to Questions 1 and 2 are in the affirmative: Is the competent authority obliged, by reason of the abovementioned requirement, to demand, in accordance with a final, binding decision of the EC Commission ordering recovery, the repayment of the aid which was granted even if such demand is excluded by national law because the gain no longer exists and in the absence of bad faith on the part of the recipient of the aid?'

21. The three questions concern the interpretation of Community law with regard to certain national rules of procedure applicable to the recovery, required by a decision of the Commission, of state aid granted unlawfully and declared incompatible with the common market. It is therefore appropriate to recapitulate first the rules of Community law on the matter.

22. Article 93(2) of the Treaty provides that if the Commission finds that aid granted by a state or through state resources is not compatible with the common market it is to decide that the state concerned shall abolish or alter such aid within a period of time to be determined by the Commission. Where, contrary to the provisions of art 93(3), the proposed aid has already been granted, the decision may take the form of an order to the national authorities to recover the aid (see the judgments in Deufil GmbH & Co KG v EC Commission Case 310/85 [1987] ECR 901 (para 24) and Spain v European Commission Joined cases C-278-280/92 [1994] ECR I-4103 (para 78)).

23. The purpose of the obligation of states to abolish aid regarded by the Commission as incompatible with the common market is to re-establish the previously existing situation (see, inter alia, European Commission v Italy Case C-348/93 [1995] ECR I-673 (para 26)).

24. In principle, the recovery of aid must take place in accordance with the relevant procedural provisions of national law, subject however to the proviso that those provisions are to be applied in such a way that the recovery required by Community law is not rendered practically impossible (see the judgments in Belgium v EC Commission Case C-142/87 [1990] ECR I-959 (para 61) and EC Commission v Germany Case C-5/89 [1990] ECR I-3437 (para 12); the same applies as regards recovery of Community aid (see Deutsche Milchkontor). In particular, the interests of the Community must be taken fully into consideration in the application of a provision which requires the various interests involved to be weighed up before a defective administrative measure is withdrawn (see the judgment in EC Commission v Germany Case 94/87 [1989] ECR 175 (para 12)).

25. In that connection, although the Community legal order cannot preclude national legislation which provides that the principles of the protection of legitimate expectations and legal certainty are to be observed with regard to recovery, it must be noted that, in view of the mandatory nature of the supervision of state aid by the Commission under art 93 of the Treaty, undertakings to which aid

has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed (see the judgments in EC Commission v Germany Case C-5/89 [1990] ECR I-3437 (paras 13-14) and Spain v European Commission Case C-169/95 [1997] ECJ Transcript, 14 January (para 51)).

26. The questions referred by the national court must be answered in the light of those considerations.

Question 1

27. By its first question, the national court is asking, essentially, whether the competent authority is obliged to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering its recovery, even if the authority has allowed the time limit which exists for that purpose under national law in the interest of legal certainty to elapse.

28. The national court considers that the date from which that period began to run was the date on which the Commission decision declaring the aid incompatible with the common market and requiring recovery was adopted or, at the latest, the date on which the Commission repeated that demand in a letter addressed to the member state.

29. Land Rheinland-Pfalz, the German and Austrian governments and the Commission consider that the requirement that account must be taken of Community interests as set out in Deutsche Milchkontor, must prevail over the application of such a time limit. Alcan, however, considers that legal certainty, which the setting of such a time limit serves to ensure, is a fundamental principle which Community law must safeguard, as do the national legal orders. Unlawful state aid should therefore cease to be recoverable on the expiry of such a time limit.

30. It appears from the file on the case that the aid was paid without prior notification to the Commission, so that it was unlawful under art 93(3) of the Treaty. The first tranche was paid on 9 June 1983, without prior advice to the Commission, and the second on 30 November 1983, after the Commission's letter of 25 November 1983 informing the Federal Government that the grant of the first tranche had been unlawful and that the second tranche should not be paid.

31. In accordance with the principle set out in para 25 of this judgment, the recipient of aid could not, therefore, have had at that time a legitimate expectation that its grant was lawful.

32. Decision 86/60, which found the aid incompatible with the common market and expressly and unconditionally ordered the sums paid out to be recovered, was adopted on 14 December 1985 and Alcan knew of the decision by 15 January 1986 at the latest.

33. It is also clear from the file that the national administration allowed the one-year time limit provided for in national law which began to run from the date on which it became aware of the Commission's decision to elapse.

34. It must be noted that where state aid is found to be incompatible with the common market, the role of the national authorities is, as the Advocate General stated in para 27 of his opinion, above, merely to give effect to the Commission's decision. The authorities do not, therefore, have any discretion as regards revocation of a decision granting aid. Thus, where the Commission, in a decision which has not been the subject of legal proceedings, orders the recovery of unduly paid sums, the national authorities are not entitled to reach any other finding.

35. Where the national authorities nevertheless allow the time bar provided for in national law in respect of revocation of the decision granting the aid to come into effect, that situation cannot be treated in the same way as the situation where a trader does not know whether the competent administrative authorities are going to reach a decision, and where the principle of legal certainty requires that such uncertainty be brought to an end after a certain period has elapsed.

36. Since the national authorities have no discretion in the matter, the recipient of unlawfully granted aid ceases to be in a state of uncertainty once the Commission has adopted a decision finding the aid incompatible with the common market and requiring recovery.

37. The principle of legal certainty cannot therefore preclude repayment of the aid on the ground that the national authorities were late in complying with the decision requiring such repayment. If it could, recovery of unduly paid sums would be rendered practically impossible and the Community provisions concerning state aid deprived of effectiveness.

38. The answer to Question 1 must therefore be that Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even if the authority has allowed the time limit laid down for that purpose under national law in the interest of legal certainty to elapse.

Question 2

39. By its second question the national court asks essentially whether the competent authority is obliged to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering its recovery, even if that authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient.

40. Land Rheinland-Pfalz, the German and Austrian governments and the Commission consider that that question also calls for a reply in the affirmative; Alcan, however, claims in particular that the circumstances of the case in the main proceedings were highly exceptional, since the national authorities had practically compelled it to accept the aid in order to prevent its closure. Accordingly, an objection based on good faith, in a very specific case, would not have the effect of automatically or nearly always preventing the implementation of Community law.

41. Without its being necessary to examine the conduct of the German authorities in the case at issue in the main proceedings, which is a task for the national courts alone and not for the court in the context of proceedings under art 177 of the Treaty, it must be stated that, as is clear from paras 30 and 31 of this judgment, the recipient of the aid cannot claim that it had a legitimate expectation that the aid was lawful. The recipient's obligation to ensure that the procedure set out in art 93(3) of the Treaty has been complied with cannot, in fact, depend on the conduct of the state authorities, even if the latter were responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith.

42. In circumstances such as those in the main proceedings, failure to revoke the decision granting aid would seriously and adversely affect the Community interest and render practically impossible the recovery required by Community law.

43. The answer to Question 2 must therefore be that Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient, where the latter could not

have had a legitimate expectation that the aid was lawful because the procedure laid down in art 93 of the Treaty had not been followed.

Question 3

44. By its third question, the national court asks essentially whether the competent authority is obliged to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering its recovery, even if that would be excluded by national law because the gain no longer exists, in the absence of bad faith on the part of the recipient of the aid.

45. In this connection Alcan claims that the aid was used, as intended, to compensate for part of the electricity costs incurred between March 1983 and February 1984, which, under national law, could be regarded as a gain that no longer exists.

46. It also considers that it follows from the judgment in Deutsche Milchkontor, that the principle underlying the plea that a gain no longer exists, which flows from the principle of proportionality, is also part of Community law and must therefore be complied with. Moreover, cases concerning state aid where the gain has disappeared are very rare since, in most cases, the aid will continue to have an effect on the assets of the recipient. In this case, the circumstances were highly exceptional and were not such as to render practically impossible the implementation of Community law.

47. Land Rheinland-Pfalz, the German and Austrian governments and the Commission consider that the court's case law as set out in EC Commission v Germany Case C-5/89 [1990] ECR I-3437, also applies to this case, so that the recipient of aid cannot claim that the gain has ceased to exist.

48. On this point it should be noted that according to the national court, the fact that under national law account is taken of the disappearance of the gain, in the absence of bad faith on the part of the recipient, falls under the general principle of protection of the legitimate expectations of the addressee of an unlawful administrative act.

49. It has already been pointed out, in para 25 of this judgment, that undertakings receiving aid cannot have a legitimate expectation as to the lawfulness of the aid unless it has been granted in compliance with the procedure laid down in art 93 of the Treaty.

50. The same conclusion therefore applies to the plea that the gain has ceased to exist, which would in this case render the recovery required by Community law practically impossible.

51. Contrary to Alcan's claims, the fact that the gain has ceased to exist is not unusual from an accounting point of view; it is in fact the rule in the case of state aid, which is generally granted to undertakings in difficulty, whose balance sheet, when aid is recovered, no longer reveals the added value indisputably resulting from the aid.

52. Moreover, as the Advocate General emphasised in para 38 of his opinion, above, an undertaking which incurs losses after the grant of aid may nevertheless obtain ongoing benefits from its temporary survival in terms of retention of its place on the market, reputation and goodwill. Accordingly, it cannot be maintained that the gain no longer exists simply because the benefit resulting from the grant of state aid no longer appears on the recipient undertaking's balance sheet.

53. Consequently, Alcan's argument that the court should take its exceptional situation into consideration because the gain has allegedly ceased to exist is without foundation.

54. Accordingly, the answer to Question 3 must be that Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even where such recovery is excluded by national law because the gain no longer exists, in the absence of bad faith on the part of the recipient of the aid.

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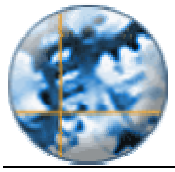
# 3 RECOVERY OF CHARGES LEVIED IN BREACH OF EC LAW



## *NOTE AND QUESTIONS*

In order to guarantee the effectiveness of EC law as well as the protection of rights granted to individuals, the ECJ has framed the procedural autonomy of the national courts. Therefore, the Member state liability includes, as sanction for EC law infringements, the obligation to reimburse charges levied contrary to EC law. In Les fils de Jules Bianco (331,376 and 378/85, 25 February 1988) the Court stated that national rules must not be such as in practice to make it impossible or excessively difficult to obtain compensation or such as less favourable than the rules applicable in comparable "domestic" situations.

Besides these well known principles of effectiveness and equivalence, the member states may not, the EC illegality of a national pecuniary charge being established, modify the modalities of tax refund in the sense of reducing a posteriori the chances of an action (309/85, Barra, 2 February 1988).

In Hans Just (68/79, 27 February 1980), the Court admitted that the theory of unjust enrichment could justify the application of national procedural rules providing for an exoneration or reduction of the national administrations' obligation to reimburse.

Furthermore, in San Giorgio (199/82, 9 November 1983), the Court effectively held to be incompatible with EC law national rules requiring the applicant to prove the absence of repercussion.

In Comateb finally, the Court seems to suggest that where a national remedy is not entirely satisfactory, due to the existence of a legitimate national procedural restriction, there might be scope for a more satisfactory remedy in damages against the State.

## *3.1 Case 199/82: San Giorgio*

**Amministrazione delle Finanze dello Stato v SpA San Giorgio**

**Case 199/82**

9 November 1983

Court of Justice

[1983] ECR page 3595

http://www.curia.eu.int/en/content/juris/index.htm

1 BY AN ORDER DATED 23 JULY 1982, WHICH WAS RECEIVED AT THE COURT ON 5 AUGUST 1982, THE TRIBUNALE CIVILE E PENALE (CIVIL AND CRIMINAL DISTRICT COURT), TRENTO, REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY CERTAIN QUESTIONS CONCERNING, FIRST, THE DETERMINATION OF THE PRINCIPLES OF THE EEC TREATY RELATING TO THE REPAYMENT OF CHARGES LEVIED CONTRARY TO COMMUNITY LAW AND, SECONDLY, THE INTERPRETATION OF COUNCIL REGULATION (EEC) NO 1430/79 OF 2 JULY 1979 ON THE REPAYMENT OR REMISSION OF IMPORT OR EXPORT DUTIES (OFFICIAL JOURNAL 1979, L 175, P. 1).

2 IT APPEARS THAT BETWEEN 1974 AND 1977 SPA SAN GIORGIO, THE PLAINTIFF IN THE MAIN PROCEEDINGS, WAS REQUIRED TO PAY HEALTH INSPECTION CHARGES WHICH WERE LEVIED CONTRARY TO COMMUNITY LAW ON THE IMPORTATION OF DAIRY PRODUCTS FROM MEMBER STATES OF THE EEC.

3 SPA SAN GIORGIO BROUGHT AN ACTION BEFORE THE TRIBUNALE DI TRENTO RECLAIMING THE AMOUNTS IN QUESTION. AFTER SUMMARY PROCEEDINGS THE PRESIDENT OF THAT COURT DIRECTED THAT THE STATE FINANCE ADMINISTRATION SHOULD REPAY SPA SAN GIORGIO LIT 65 160 585 AND AUTHORIZED PROVISIONAL ENFORCEMENT OF THAT ORDER.

4 THE STATE FINANCE ADMINISTRATION APPEALED AGAINST THE ORDER AND APPLIED FOR SUSPENSION OF THE ENFORCEMENT THEREOF. IN SUPPORT OF ITS APPLICATION IT RELIED ON ARTICLE 10 OF DECREE-LAW NO 430 OF 10 JULY 1982 LAYING DOWN PROVISIONS RELATING TO MANUFACTURING TAXES, THE MOVEMENT OF PETROLEUM PRODUCTS, DIRECT TAXES, VALUE-ADDED TAX AND RELATED CHARGES (GAZZETTA UFFICIALE NO 190 OF 13 JULY 1982), WHICH PROVIDES AS FOLLOWS:

“A PERSON WHO HAS PAID IMPORT DUTIES, MANUFACTURING TAXES, TAXES ON CONSUMPTION, OR STATE TAXES WHICH HAVE BEEN UNDULY LEVIED, EVEN PRIOR TO THE ENTRY INTO FORCE OF THIS DECREE, IS NOT ENTITLED TO THE REPAYMENT OF THE SUMS PAID WHEN THE CHARGE IN QUESTION HAS BEEN PASSED ON IN ANY WAY WHATSOEVER TO OTHER PERSONS, EXCEPT IN CASES OF SUBSTANTIVE ERROR.

THE CHARGE IS PRESUMED TO HAVE BEEN PASSED ON WHENEVER THE GOODS IN RESPECT OF WHICH THE PAYMENT WAS EFFECTED HAVE BEEN TRANSFERRED, EVEN

AFTER PROCESSING, TRANSFORMATION, ERECTION, ASSEMBLY OR ADAPTATION, IN THE ABSENCE OF DOCUMENTARY PROOF TO THE CONTRARY."

5 SPA SAN GIORGIO QUESTIONED THE COMPATIBILITY OF THOSE PROVISIONS WITH THE PRINCIPLES OF COMMUNITY LAW AND, IN VIEW OF THE "SERIOUS NATURE" OF THE OBSERVATIONS MADE AND THEIR IMPORTANCE FOR THE DECISION ON WHETHER TO SUSPEND ENFORCEMENT OF THE ORDER, THE PRESIDENT OF THE TRIBUNALE DI TRENTO REQUESTED THE COURT TO ANSWER THE FOLLOWING QUESTIONS:

"1. WOULD THE COURT, IN ORDER TO CLARIFY AND, IF APPROPRIATE SUPPLEMENT ITS PREVIOUS DECISIONS, IN PARTICULAR ITS JUDGMENT OF 27 MARCH 1980 IN CASE 61/79 (AMMINISTRAZIONE DELLE FINANZE DELLO STATO V DENKAVIT (1980) ECR 1205) AND ITS JUDGMENTS OF 10 JULY 1980 IN CASE 811/79 (AMMINISTRAZIONE DELLE FINANZE DELLO STATO V ARIETE (1980) ECR 2545) AND IN CASE 826/79 (AMMINISTRAZIONE DELLE FINANZE DELLO STATO V MIRECO (1980) ECR 2559), EXPLAIN:

(A) WHETHER A NATIONAL LAW WHICH, BY WAY OF EXCEPTION TO THE GENERAL PROVISIONS CONCERNING THE RECOVERY OF UNDUE PAYMENTS, PROVIDES THAT CERTAIN CHARGES (INCLUDING, IN PARTICULAR, HEALTH INSPECTION CHARGES) UNDULY LEVIED CONTRARY TO CERTAIN PROVISIONS OF COMMUNITY LAW, INASMUCH AS THEY ARE CHARGES HAVING AN EFFECT EQUIVALENT TO CUSTOMS DUTIES, MAY BE REPAID ONLY IF IT IS PROVED THAT THE CHARGES HAVE NOT BEEN PASSED ON TO OTHER PERSONS, BUT DOES NOT SUBJECT THE REPAYMENT OF ANY OTHER TAX, CHARGE OR DUTY WRONGLY LEVIED TO THE SAME CONDITION, IS TO BE REGARDED AS DISCRIMINATORY, CONTRARY TO THE PRINCIPLES OF COMMUNITY LAW; AND WHETHER IT IS SIGNIFICANT THAT THE CHARGES COVERED BY THE ABOVE-MENTIONED PROVISION HAVE BEEN WRONGLY LEVIED SOLELY INASMUCH AS THEIR COLLECTION CONFLICTS WITH A RULE OF COMMUNITY LAW;

(B) WHETHER THE REQUIREMENT OF NEGATIVE DOCUMENTARY PROOF, THE SOLE CONDITION TO WHICH THE AFORESAID NATIONAL LAW SUBJECTS THE REPAYMENT OF CHARGES UNDULY LEVIED, RENDERS "THE EXERCISE OF RIGHTS WHICH NATIONAL COURTS ARE UNDER A DUTY TO PROTECT VIRTUALLY IMPOSSIBLE".

[…]

THE FIRST QUESTION

11 IN ESSENCE THE FIRST QUESTION ASKS WHETHER A MEMBER STATE MAY MAKE REPAYMENT OF NATIONAL CHARGES LEVIED CONTRARY TO THE REQUIREMENTS OF COMMUNITY LAW CONDITIONAL UPON PROOF THAT THOSE CHARGES HAVE NOT BEEN PASSED ON TO OTHER PERSONS:

WHERE REPAYMENT IS SUBJECT TO RULES OF EVIDENCE WHICH RENDER THE EXERCISE OF RIGHTS WHICH THE NATIONAL COURTS ARE UNDER A DUTY TO PROTECT VIRTUALLY IMPOSSIBLE; AND WHERE THE SAME RESTRICTIVE CONDITIONS DO NOT APPLY TO THE REPAYMENT OF ANY OTHER NATIONAL TAX, CHARGE OR DUTY WRONGLY LEVIED.

12 IN THAT CONNECTION IT MUST BE POINTED OUT IN THE FIRST PLACE THAT ENTITLEMENT TO THE REPAYMENT OF CHARGES LEVIED BY A MEMBER STATE CONTRARY TO THE RULES OF COMMUNITY LAW IS A CONSEQUENCE OF, AND AN ADJUNCT TO, THE RIGHTS CONFERRED ON INDIVIDUALS BY THE COMMUNITY PROVISIONS PROHIBITING CHARGES HAVING AN EFFECT EQUIVALENT TO CUSTOMS

DUTIES OR, AS THE CASE MAY BE, THE DISCRIMINATORY APPLICATION OF INTERNAL TAXES. WHILST IT IS TRUE THAT REPAYMENT MAY BE SOUGHT ONLY WITHIN THE FRAMEWORK OF THE CONDITIONS AS TO BOTH SUBSTANCE AND FORM, LAID DOWN BY THE VARIOUS NATIONAL LAWS APPLICABLE THERETO, THE FACT NEVERTHELESS REMAINS, AS THE COURT HAS CONSISTENTLY HELD, THAT THOSE CONDITIONS MAY NOT BE LESS FAVOURABLE THAN THOSE RELATING TO SIMILAR CLAIMS REGARDING NATIONAL CHARGES AND THEY MAY NOT BE SO FRAMED AS TO RENDER VIRTUALLY IMPOSSIBLE THE EXERCISE OF RIGHTS CONFERRED BY COMMUNITY LAW. [*references omitted*].

13 HOWEVER, AS THE COURT HAS ALSO RECOGNIZED IN PREVIOUS DECISIONS, AND IN PARTICULAR IN THE AFORESAID JUDGMENT IN JUST V MINISTRY FOR FISCAL AFFAIRS, COMMUNITY LAW DOES NOT PREVENT A NATIONAL LEGAL SYSTEM FROM DISALLOWING THE REPAYMENT OF CHARGES WHICH HAVE BEEN UNDULY LEVIED WHERE TO DO SO WOULD ENTAIL UNJUST ENRICHMENT OF THE RECIPIENTS. THERE IS NOTHING IN COMMUNITY LAW THEREFORE TO PREVENT COURTS FROM TAKING ACCOUNT, UNDER THEIR NATIONAL LAW, OF THE FACT THAT THE UNDULY LEVIED CHARGES HAVE BEEN INCORPORATED IN THE PRICE OF THE GOODS AND THUS PASSED ON TO THE PURCHASERS. THUS NATIONAL LEGISLATIVE PROVISIONS WHICH PREVENT THE REIMBURSEMENT OF TAXES, CHARGES, AND DUTIES LEVIED IN BREACH OF COMMUNITY LAW CANNOT BE REGARDED AS CONTRARY TO COMMUNITY LAW WHERE IT IS ESTABLISHED THAT THE PERSON REQUIRED TO PAY SUCH CHARGES HAS ACTUALLY PASSED THEM ON TO OTHER PERSONS.

14 ON THE OTHER HAND, ANY REQUIREMENT OF PROOF WHICH HAS THE EFFECT OF MAKING IT VIRTUALLY IMPOSSIBLE OR EXCESSIVELY DIFFICULT TO SECURE THE REPAYMENT OF CHARGES LEVIED CONTRARY TO COMMUNITY LAW WOULD BE INCOMPATIBLE WITH COMMUNITY LAW. THAT IS SO PARTICULARLY IN THE CASE OF PRESUMPTIONS OR RULES OF EVIDENCE INTENDED TO PLACE UPON THE TAXPAYER THE BURDEN OF ESTABLISHING THAT THE CHARGES UNDULY PAID HAVE NOT BEEN PASSED ON TO OTHER PERSONS OR OF SPECIAL LIMITATIONS CONCERNING THE FORM OF THE EVIDENCE TO BE ADDUCED, SUCH AS THE EXCLUSION OF ANY KIND OF EVIDENCE OTHER THAN DOCUMENTARY EVIDENCE. ONCE IT IS ESTABLISHED THAT THE LEVYING OF THE CHARGE IS INCOMPATIBLE WITH COMMUNITY LAW, THE COURT MUST BE FREE TO DECIDE WHETHER OR NOT THE BURDEN OF THE CHARGE HAS BEEN PASSED ON, WHOLLY OR IN PART, TO OTHER PERSONS.

15 IN A MARKET ECONOMY BASED ON FREEDOM OF COMPETITION, THE QUESTION WHETHER, AND IF SO TO WHAT EXTENT, A FISCAL CHARGE IMPOSED ON AN IMPORTER HAS ACTUALLY BEEN PASSED ON IN SUBSEQUENT TRANSACTIONS INVOLVES A DEGREE OF UNCERTAINTY FOR WHICH THE PERSON OBLIGED TO PAY A CHARGE CONTRARY TO COMMUNITY LAW CANNOT BE SYSTEMATICALLY HELD RESPONSIBLE.

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17 IT MUST BE POINTED OUT IN THAT REGARD THAT THE REQUIREMENT OF NON-DISCRIMINATION LAID DOWN BY THE COURT CANNOT BE CONSTRUED AS JUSTIFYING LEGISLATIVE MEASURES INTENDED TO RENDER ANY REPAYMENT OF CHARGES LEVIED CONTRARY TO COMMUNITY LAW VIRTUALLY IMPOSSIBLE, EVEN IF THE SAME TREATMENT IS EXTENDED TO TAXPAYERS WHO HAVE SIMILAR CLAIMS ARISING FROM AN INFRINGEMENT OF NATIONAL TAX LAW. THE FACT THAT RULES OF EVIDENCE WHICH HAVE BEEN FOUND TO BE INCOMPATIBLE WITH THE RULES OF COMMUNITY LAW ARE EXTENDED, BY LAW, TO A SUBSTANTIAL NUMBER OF NATIONAL TAXES, CHARGES AND DUTIES OR EVEN TO ALL OF THEM IS NOT THEREFORE A REASON FOR WITHHOLDING THE REPAYMENT OF CHARGES LEVIED CONTRARY TO COMMUNITY LAW.

18 THE REPLY TO THE FIRST QUESTION MUST THEREFORE BE THAT A MEMBER STATE CANNOT MAKE THE REPAYMENT OF NATIONAL CHARGES LEVIED CONTRARY TO THE REQUIREMENTS OF COMMUNITY LAW CONDITIONAL UPON THE PRODUCTION OF PROOF THAT THOSE CHARGES HAVE NOT BEEN PASSED ON TO OTHER PERSONS IF THE REPAYMENT IS SUBJECT TO RULES OF EVIDENCE WHICH RENDER THE EXERCISE OF THAT RIGHT VIRTUALLY IMPOSSIBLE, EVEN WHERE THE REPAYMENT OF OTHER TAXES, CHARGES OR DUTIES LEVIED IN BREACH OF NATIONAL LAW IS SUBJECT TO THE SAME RESTRICTIVE CONDITIONS.

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## *3.2 Joined Cases C-192/95 to C-218/95: Comateb and Others*

**Société Comateb and Others**
**v**
**Directeur général des douanes et droits indirects**

**Joined cases C-192/95 to C-218/95**

14 January 1997

Court of Justice

[1997] ECR I-0165

http://www.curia.eu.int/en/content/juris/index.htm

***Summary of facts and procedure***

*27 companies (Comateb and others) brought proceedings against the Director-General of Customs and Indirect Taxes for the repayment of octroi de mer (dock dues) levied by the Department of Customs and Indirect Taxes, Guadeloupe, on the importation into Guadeloupe of various goods from another Member State, from non-member countries and from other parts of French territory, and for an order that the customs authority should pay them compensation. French law provides for dock dues to be levied by way of input tax, without any possibility of subsequent deduction.*

***Judgment***

[…]

13 The question referred asks in essence whether a Member State may object to repayment of a charge levied but not due on the ground that it has been passed on to the purchaser, when that State's legislation actually requires the charge to be passed on.

14 All the parties refer to the decisions of the Court concerning the refund of sums not due, particularly in Case 68/79 Just v Ministry for Fiscal Affairs [1980] ECR 501, Case 61/79 Amministrazione delle Finanze dello Stato v Denkavit Italiana [1980] ECR 1205, Case 199/82 San Giorgio, cited above, and Joined Cases 331/85, 376/85 and 378/85 Bianco and Girard v Directeur Général des Douanes et Droits Indirects [1988] ECR 1099.

15 According to the French and Spanish Governments, it is clear from that case-law that provisions which prevent the reimbursement of taxes, charges and duties levied in breach of Community law cannot be regarded as contrary to Community law where it is established that the person required to pay those charges has in fact passed them on to other persons.

16 Comateb and Others consider that that case-law does not apply where the laws of a Member State contain provisions constraining traders to incorporate the charge in the cost price of goods. Even if

those provisions do not place on the taxpayer the burden of proving that the charge has not been passed on to the purchaser, they make it virtually impossible to obtain reimbursement of charges levied in breach of Community law.

17 The French Government and the Commission contend that the legal obligation to incorporate the charge in the cost price does not mean that traders are required to pass it on to purchasers. Traders can always take the commercial decision to absorb the charge in whole or in part, and thus eliminate its effect on the sale price.

18 In the view of the French Government and the Commission, a legal obligation to incorporate the charge in the cost price is irrelevant as regards the case-law of the Court concerning recovery of sums not due. Consequently, it is necessary to determine in each case whether or not the disputed charge has actually been passed on.

19 Since the premise on which the question is based is thus itself in dispute, it is necessary, in order to give a useful reply to the national court, to clarify the effect of the case-law concerning recovery of charges levied in breach of Community law.

20 The first point to note is that entitlement to the repayment of charges levied by a Member State in breach of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting such charges (San Giorgio, cited above, paragraph 12). The Member State is therefore in principle required to repay charges levied in breach of Community law.

21 There is, however, an exception to that principle. As the Court stated in Just, Denkavit and San Giorgio, cited above, the protection of the rights so guaranteed by the Community legal order does not require repayment of taxes, charges and duties levied in breach of Community law where it is established that the person required to pay such charges has actually passed them on to other persons (see, in particular, San Giorgio, paragraph 13).

22 In such circumstances, the burden of the charge levied but not due has been borne not by the trader, but by the purchaser to whom the cost has been passed on. Therefore, to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge.

23 It is accordingly for the national courts to determine, in the light of the facts in each case, whether the burden of the charge has been transferred in whole or in part by the trader to other persons and, if so, whether reimbursement to the trader would amount to unjust enrichment.

24 In this respect it should be made clear, first, that if the final consumer is able to obtain reimbursement through the trader of the amount of the charge passed on to him, that trader must in turn be able to obtain reimbursement from the national authorities. On the other hand, if the final consumer can obtain repayment directly from the national authorities of the amount of the charge which he has paid but which was not due, the question of reimbursing the trader does not, as such, arise.

25 Second, it must be noted that in Bianco and Girard, cited above, paragraph 17, the Court stated that even though in national law indirect taxes are designed to be passed on to the final consumer and even if in commerce they are normally passed on in whole or in part, it cannot be generally assumed that the charge is actually passed on in every case. The actual passing on of such taxes, either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts. Consequently, the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by

the national court which may freely assess the evidence. However, in the case of indirect taxes, it may not be assumed that there is a presumption that they have been passed on and that it is for the taxpayer to prove the contrary.

26 The same applies where taxpayers have been obliged by the relevant legislation to incorporate the charge in the cost price of the product concerned. The fact that such a legal obligation exists does not mean that there is a presumption that the entire charge has been passed on, even where failure to comply with that obligation carries a penalty.

27 Accordingly, a Member State may resist repayment to the trader of a charge levied in breach of Community law only where it is established that the charge has been borne in its entirety by someone other than the trader and that reimbursement of the latter would constitute unjust enrichment.

28 It follows that if the burden of the charge has been passed on only in part, it is for the national authorities to repay the trader the amount not passed on.

29 It should be borne in mind, however, that even where it is established that the burden of the charge has been passed on in whole or in part to the purchaser, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment.

30 In Just, cited above, the Court stated at paragraph 26 that it would be compatible with the principles of Community law for courts before which claims for repayment were brought to take into consideration the damage which an importer might have suffered because the discriminatory or protective tax provisions had the effect of restricting the volume of imports from other Member States.

31 As the Advocate General pointed out in paragraph 23 of his Opinion, the trader may have suffered damage as a result of the very fact that he has passed on the charge levied by the administration in breach of Community law, because the increase in the price of the product brought about by passing on the charge has led to a decrease in sales. Thus, the levying of dock dues may make the price of products from other parts of the Community significantly higher than the price of local products which are exempt from those dues, with the result that importers suffer damage, regardless of whether the charge has been passed on.

32 In such circumstances, the trader may justly claim that, although the charge has been passed on to the purchaser, the inclusion of that charge in the cost price has, by increasing the price of the goods and reducing sales, caused him damage which excludes, in whole or in part, any unjust enrichment which would otherwise be caused by reimbursement.

33 It follows that where domestic law permits the trader to plead such damage in the main proceedings, it is for the national court to give such effect to the claim as may be appropriate.

34 Furthermore, traders may not be prevented from applying to the courts having jurisdiction, in accordance with the appropriate procedures of national law, and subject to the conditions laid down in Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029, for reparation of loss caused by the levying of charges not due, irrespective of whether those charges have been passed on.

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