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**State Liability - Ten years after
Francovich**

**Is German State Liability law
compatible with EC law?**

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Summary

This paper presents European case law concerning state liability and provides an overview of state liability law in Germany. Two German follow-up judgements of preliminary ruling cases will illustrate the discrepancy between the rulings of the ECJ and the judgements of the German courts. This discrepancy gives rise to a critical analyses of

State liability rules on a European level developed mainly because of the problems concerning the enforcement of directives. An effective remedy was needed in order to stop Member States from neglecting their duties to enforce Community law. The State liability rules, developed by the ECJ through case law did not only ensure and strengthen individuals' rights, they also closed a long-existing gap in the area of efficient sanctioning of breaches of Community law. There are three conditions under which liability arises under Community law. If a Member State committed a breach of Community law whereby individuals suffer losses or injury, they 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.

The German rules and laws concerning state liability rules are rather confusing, since they involve claims rooted in different fields of law. Main emphasis is drawn to the concept of tortious governmental liability (*Amshaftung*) according to § 839 BGB in combination with Art.34 GG, which has to be considered the correct and only basis for enforcing Community state liability. A claim for damages under German law thus requires that an official, i.e. a civil servant in the exercise of a public office culpably breached an official duty he owed to a third party which suffered harm as a consequence of his conduct.

The follow-up judgements concerning *Brasserie du Pêcheur* and *Dillenkofer* in the German Courts will be presented in the third part of this paper. Before finally discussing whether the German rules of state liability are compatible with EC law concerning state liability, or whether a reform is needed, the relationship between national courts and the ECJ, in particular concerning the preliminary ruling procedure is analysed.

Preface

Having studied European law intensively for a year at the university of Lund, I became particularly interested in the field of state liability law. Many books and articles have been written about this field of law, yet the issue of Member State liability towards their citizens does not seem to have reached a satisfactory level of enforcement and realisation. This is probably due to the lack of efficient remedy rules as well as the refusal to codify conditions for state liability law, which have so far only been developed through case law.

In analysing whether German state liability law is compatible with EC law, I hope to contribute to the amount of literature in a positive way. Although, ten years after *Francovich*, discussion about state liability have seem to silent down on a European level, suggestions concerning the reform of German state liability law are vividly discussed in Germany.

In writing this paper I was assisted by Peter Gjørtler, Director of the European Institute in Denmark, whom I would like to thank for his support and ideas. Furthermore I would also like to thank my parents for their support during this year of my Master Studies in Sweden.

Abbreviations

AG	Advocate General
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (Federal High Court of Justice)
BGHZ	Sammlung der Entscheidungen des Bundesgerichtshofes in Zivilsachen (Collection of Decisions of the Federal High Court of Justice in Civil Matters)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BVerfGE	Sammlung der Entscheidungen des Bundesverfassungsgerichts (Collection of Decisions of the Federal Constitutional Court)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court)
BVerwGE	Sammlung der Entscheidungen des Bundesverwaltungsgerichts (Collection of Decisions of the Federal Administrative Court)
CFI	Court of First Instance
CMLR	Common Market Law Report
CMLRev	Common Market Law Review
EC	European Community, Treaty establishing the European Community
ECJ	European Court of Justice
ECR	European Court Reports (official reports of the judgments of the European Court, English version)
ECSC	European Coal and Steel Community, Treaty establishing the European Coal and Steel Community
EinlALR	Einleitung zum preußischen Allgemeinen Landrecht 1974 Introduction to the Prussian General Land Law of 1794
ELRev	European Law Review
EuR	Europarecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EJIL	European Journal of International Law
GG	Grundgesetz (German Constitution)
ICLQ	International and Comparative Law Quarterly
LQR	The Law Quarterly Review
LS	Legal Studies
MLR	Modern Law Review
NJW	Neue Juristische Wochenschrift
NVwZ	Neue Zeitschrift für Verwaltungsrecht
OJ	Official Journal (of the European Communities)
OLG	Oberlandesgericht
Slg.	Sammlung Amtsblatt (official reports of the judgments of the European Court, German version)
TEU	Treaty on European Union
TEC	Treaty of the European Communities (Amsterdam Treaty)

1 Introduction

This paper focuses on a comparison of German law on state liability with European state liability rules, as they have been developed through case law since *Francovich*.

The paper is divided into three main parts. A short overview of procedural aspect explaining when and how Member States can be held liable and which remedies are available for the individual, as well as a description of the case law concerning state liability under European Law is presented in the first part of this paper.

In order not to bore the reader with background information to well-known cases, I have chosen to present this additional information in the most important cases in the text of the footnotes. The case presentation involves well-known cases like *Francovich* and *Brasserie du Pêcheur*, cases before the *Francovich* judgement in order to show how state liability was dealt with before as well as cases decided after the *Brasserie* judgement to show the development of case law in the post-*Francovich* era.

The second part of this paper provides an on overview of German state liability law. As the German state liability rules are very confusing, since they involve claims rooted in different fields of law, the main emphasis of the presentation will lie with those norms problematic within a European context, i.e. the concept of tortious governmental liability (*Amtshaftung*). As the translation of German terms is often likely to result in several possible expressions in English, I have chosen to write the German term in brackets behind the translation in order to facilitate understanding for those familiar with the German concepts.

A critical analysis of the follow-up judgements in the German Courts will be presented in the third part of this paper. Before discussing whether the German rules of state liability are compatible with EC law concerning state liability, or whether a reform is needed, the relationship between national courts and the ECJ, in particular concerning the preliminary ruling procedure is analysed.

Summing up the main arguments and points of this paper, I will finally draw a conclusion concerning the question of where we stand – ten years after *Francovich*.

2 State Liability under EC Law

It can be argued that it is largely due to problems concerning the enforcement of directives, that state liability rules were developed. Member States were failing to implement directives on time, thus a damages remedy was needed in order to stop them from neglecting their duties¹. State liability rules did not only ensure and strengthen individuals' rights, they also closed a long-existing gap in the area of efficient sanctioning of breaches of Community law².

Articles 226-228 ECT permit the Commission or a Member States to initiate proceedings against a Member State in the Court of Justice. Until 1992, the Treaty provisions provided no guidance as to the kinds of remedies available to the Court of Justice in the context of an enforcement action under these Articles³.

2.1 Procedural Aspects

According to Art.226 and Art.227 ECT a Member State can be held liable for failing to fulfil its obligation under the Treaty. The procedure under Art.226 ECT is initiated by the Commission and more common than the procedure under Art.227 ECT which is initiated by another Member State. Mainly for political reasons and due to lack of conveyance mechanisms Member State abstain from initiating a procedures against other Member States for breach of Community law⁴.

When being held liable for breach of Community law, the Member State will have to take all necessary measures to comply with the opinion of the Commission or the judgement of the ECJ. If it fails to do so, fines or periodical penalty payments can be imposed on the Member State as forms of sanctions. The power to impose penalties on the Member States was introduced by the Maastricht Treaty in 1993, today Art.228 (2) 2nd sentence ECT. Especially in the field of non-implementation of Directives within the given time-limits, the imposition of high fines has become a common procedure⁵. The Commission can also impose indirect fines by setting off future contributions, i.e. if a country is entitled to some kind of contribution, but is liable for a breach of EC law, the Commission can refuse to pay that contribution against the fine to be paid by that State.

¹ Steiner, ELRev 1993, pp.3,6 ; Lee, In Search for a Theory of State Liability in the European Union, see Introduction

² Deckert, pp. 203, 207, 208

³ Lee, Part I A 1

⁴ Rengeling, Middeke, Gellermann, p.35

⁵ Case C-387/97 Commission v Greece [2000] ECR I-5047

Apart from being subject to fines, Member State liable for having committed a breach of EC Law will also have to pay damages whenever third parties are involved. Damages can be claimed by natural and legal persons. But neither Art.226 nor Art.227 ECT gives individuals a right to issue a claim against Member States directly before the ECJ. Individuals can only issue a claim against a Member State in the national courts of that Member State or write complaints about the Member State's failure to fulfil its obligation under the Treaty to the Commission, hoping that the Commission will initiate proceedings against that Member State under Art.226 ECT⁶. In case individuals issue the claim in a national court, it is not necessary that the Member State's failure is recognised in a judgement by the ECJ. The national judge can of course refer the case to ECJ for preliminary ruling, but he can also recognise the failure of the Member State on his motion⁷. Liability is thus not dependant on the ECJ's ruling.

As traditional means of enforcement, especially the procedure under Art.226 ECT were inefficient, possibility for individuals to claim their rights, which have been violated due to the Member State's breach of Community law (e.g. failure to implement Directives), can be regarded as an adequate means to ensure the principle of full effectiveness of EC law⁸ as well as the principle of loyalty or solidarity as established in Art.10 ECT⁹.

Once a Member State is held liable for a breach of Community law, it will have to make good for the losses that occurred because of that breach of Community law. As the Treaty does not deal with this question of damages, the kind and amount of damages which have to be paid, is determined by national law¹⁰. However the remedy system available under national law may not be less effective nor discriminatory to towards the claimant, i.e. there has to be an effective, non-discriminatory remedy available under the national legal system¹¹.

As judicial protection of individuals against Member States is mainly found in case law developed by the Court of Justice especially in the 1990's¹², I will in the following discuss the most important cases dealing with the establishment of state liability law.

⁶ Wils, pp.191,192

⁷ Schockweiler, p.115

⁸ Case 106/ 77 Simmenthal [1978] ECR 629

⁹ Schlemmer-Schulte & Ukrow, p.84

¹⁰ van Gerven, CMLRev 2000, pp.501, 505

¹¹ Case 33/76 Rewe [1976] ECR 1989, para.111

¹² Caranta, pp. 703, 704

2.2 Case law prior to Francovich

The first case concerning state liability law was the *Humblet* case¹³, which was already decided in 1960. The ECJ ruled that if it “finds that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community Law, [then] that state is obliged by virtue of Article 86 of the ECSC Treaty to rescind the measure in question and to make reparation for any unlawful consequences thereof”.

In 1973, in the case *Commission v Italy*¹⁴ the ECJ articulated the idea of Member State liability again by ruling that “... a judgement by the Court under Art.169 [now Art. 226] and 171 [now Art. 228] of the [EC] Treaty may be of substantive interest as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member State, the Community or private parties.”, but the concept of state liability was not further developed until the *Francovich* judgement.

In the *Rewe* case¹⁵ the ECJ held that in the absence of Community rules, it is for the domestic legal system of each Member State to designate the courts and tribunal having jurisdiction, and to lay down procedural rules governing actions for safeguarding individual rights deriving from Community law. Those rules should not be less favourable than those governing similar domestic actions (principle of equivalence) and they could not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)¹⁶.

Before *Francovich* the ECJ thus relied on national laws or the protection of Community rights in national courts subject to the requirements of equivalence and effectiveness¹⁷. But although the ECJ had already noted in older case-law¹⁸ that if damage had been caused through an infringement of Community law the state was liable to the injured party for the consequences in accordance with national law on state liability, it did not establish clear conditions under which a state could be held liable. As neither explicit rules concerning Member State liability nor rules concerning efficient remedies existed in the Treaty¹⁹, and because the above mentioned cases did not provide a sufficient basis for establishing clear conditions for Member State liability, it was thus of great importance that the ECJ established the principle of state liability for damages

¹³ Case 6/60 *Humblet v Belgium* [1960] ECR 559; Jarvis, p. 366

¹⁴ Case 39/72 *Commission v Italy* [1973] ECR 101, para. 11

¹⁵ Case 33/76 *Rewe* [1976] ECR 1989; Jarvis, p. 366

¹⁶ Case 199/82 *San Giorgio* [1983] ECR 3595

¹⁷ *Tridimas*, p.303

¹⁸ Case 60/75 *Russo* [1976] ECR 45 para.8,9 Case 39/72 *Commission v Italy* [1973] ECR 101 para. 112

¹⁹ Möllers, pp.20, 21

suffered by individuals through breach of Community law in the *Francovich* case as well as in *Brasserie du Pêcheur*²⁰.

2.3 The Francovich Case

In *Francovich v Italy*²¹ the ECJ for the first time addressed the question of state liability for breach of Community law and its basis in EC law²². The ECJ held that where a state had failed to implement an EC Directive it would be obliged to compensate individuals for damage suffered as a result of its failure to implement the Directive. The Court based its ruling on two arguments, namely to provide effective protection for individuals' Community rights, i.e. to ensure the full effectiveness of Community law as well as the principle of loyalty according to Art.10 (ex Art.5) ECT²³.

In its first argument the Court's claimed that national courts have an obligation to ensure the protection of rights and 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 [EC] Treaty"²⁴. In circumstances where the full effectiveness of Community rules required prior action on behalf of the state, for example by implementing a directive and where without such action individuals are unable to enforce rights conferred on them, the possibility for the individual to obtain redress is indispensable²⁵.

The Court's second argument is based on Art.5 (now 10) ECT, according to which "...Member States are required to take all appropriate measures, ... to ensure fulfilment of their obligation under Community law, [i.a.] ...to nullify the unlawful consequences of a breach of Community law"²⁶. Although the Treaty did not provide explicitly for Member State liability in damages, such liability was necessary to ensure the full effectiveness of Community law.

2.3.1 The principle of liability

The *Francovich* case concerns a state's liability for non-implementation of a Directive. The ECJ does however not explicitly state in this ruling whether state liability exists for all breaches of Community law, i.e. the *Francovich* case being

²⁰ Kapteyn, VerLoren van Themaat, Gormley, p.564, 565

²¹ Cases C-6 & 9/90: Italy had failed to pass the necessary laws to implement Directive 80/987, which required Member States i.a. to provide a guarantee fund to ensure the payment of employee's arrears of wages in the event of their employer's insolvency. The claimants, who had been employed in a company which became insolvent, were seeking arrears of salary following their employer's insolvency. As the Directive would have given employees a minimum level of financial protection, the applicants claimed damages for the losses they had suffered as a consequence of the non-implementation of the Directive.

²² *Francovich Follow-Up*, Chapter: The Principle of State Liability

²³ Tridimas, p. 301

²⁴ Case C-6 & 9/90, *Francovich*, para 35

²⁵ Case C-6 & 9/90, *Francovich*, para 34; Kapteyn, VerLoren van Themaat, Gormley, p.565

²⁶ Case C-6 & 9/90, *Francovich*, para 36

just an example for one kind of state liability or whether state liability only exists with regard to non implementation of Directives. In cases of non-implementation of Directives the state's failure is undisputable.

2.3.2 Conditions for state liability

According to the ECJ the conditions of liability are dependant upon the “nature of the infringement of Community law which gave rise to the damage”²⁷. In cases where the damage arose due to the Member State's failure to implement a directive, compensation would be granted if three prerequisites are fulfilled²⁸. The Directive must grant rights to individuals, the content of those rights must be identifiable on the basis of the provisions of the Directive and there has to be a causal link between the breach of the state's obligation and the loss and damage suffered by the parties affected²⁹.

Where these three conditions are satisfied, individuals seeking compensation as a result of activities and practices, which are inconsistent with EC Directives may proceed directly against the state³⁰. Responsibility for non-implementation of a directive will thus lie with the state.

2.3.3 Consequences of the Francovich judgement

The most obvious consequence of the *Francovich* judgement is that in every Member State national judges have to allow a claim for damages against the Member State, if the above mentioned conditions are fulfilled³¹. Whether or not the national legal system allows for such a claim is irrelevant. Within national laws on civil liability a remedy system against the Member State must be made available, but it will be left for each state to decide which courts will be competent to deal with such claims and to determine the procedural aspects.

Furthermore the *Francovich* decision can be used as a means of considerable power to claim damages against any state who has not implemented a directive within the relevant time limit³². Reasons for non-implementation are irrelevant. The threat of the availability of damages in these circumstances is meant to diminish the problems of non-transposition of directives.

Obviously Member States can be in breach of Community law in various ways, i.e. not only by non-transposition of a directive³³. But whether or not the

²⁷ Cases C-6 & 9/90, *Francovich*, para.38

²⁸ Craig, LQR 1993, pp.595, 597; Steiner, EC Law, p.67

²⁹ Cases C-6 & 9/90, *Francovich*, para. 40

³⁰ Steiner, EC Law, p.67

³¹ Schöckweiler, p.120

³² Craig, LQR 1993, pp.595, 601

³³ Craig, LQR 1993, pp.595, 604

Francovich principles apply to others breaches of Community law as well as to legislative, administrative and judicial acts or omissions, was not decided until the *Brasserie du Pêcheur* case and later cases.

2.4 Development since Francovich

Several cases have been decided by the ECJ concerning state liability since the well-known judgement in the *Francovich* case. The presentation of cases is limited to those which best illustrate the development in this area.

2.4.1 Brasserie du Pêcheur

In the case *Brasserie du Pêcheur*³⁴ the ECJ ruled that the prohibition on imports was a breach of Art.30 (now Art.28) ECT and could not be justified under Art.36 (now Art.30) ECT by the need to protect public health. This was due to the fact that the principle that goods lawfully produced and marketed in one Member State could be lawfully introduced into another Member State had to be obeyed³⁵. And furthermore there was no scientific evidence justifying the prohibition on additives because some of those additives prohibited under the Beer Duty Act were even permitted on other products. Concerning the prohibition on the marketing of the French beer under the designation “Bier” the ECJ ruled that it was contrary to Art.30 (now Art.28 ECT) and could not be justified by reference to the mandatory requirement of consumer protection, since labelling would have resulted in sufficient protection.

The question raised in the case *Brasserie du Pêcheur* was whether state liability also arises in case of damages suffered by individuals for breach of Community law which does not result from a failure to implement a directive, but from an act or omission on behalf of the legislator³⁶. The Court took the view that liability can be imposed irrespective of which organ of the state was responsible for the breach³⁷.

With regard to the question of state liability the ECJ ruled furthermore 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

³⁴ Case C-46/93 & Case C-48/93: The French brewery Brasserie du Pêcheur was not allowed to import its beer into Germany because the beer, although lawfully produced in France did not comply with the purity requirements of the German Beer Duty Act, as it contained prohibited additives. The Commission initiated proceedings against Germany under Art.226 ECT for breach of Art.28 (ex Art.30) ECT. The German authorities had imposed two prohibitions, namely a prohibition on imports of beer containing additives and a prohibition to market the French beer under the designation “Bier”.

³⁵ Case 120/78 Cassis de Dijon [1979] ECR 649

³⁶ van Gerven, CMLRev 2000, pp.501, 510

³⁷ Craig, LQR 1997, pp.67, 68; Case C-46/93 & Case C-48/93 Brasserie, para.32

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.³⁸

As Art.30 (now Art.28) ECT referred rights on individuals the first condition was satisfied in the present case. When determining whether the second condition, a sufficiently serious breach was fulfilled, the ECJ listed the following factors which should be taken into account: the clarity and precision of the rule breached, the measure of discretion left 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 institutions may have contributed towards the omission and the adoption or retention of national measures or practices contrary to Community law³⁹. In essence, in order to determine whether the breach was sufficiently serious, the question of whether the state in question could have reasonably been expected to realise that its acts or omissions were violating Community law, has to be answered⁴⁰.

In order to find out whether a sufficiently serious breach existed in the present case, the ECJ distinguished between the prohibition on the marketing of the French beer as “Bier” and the prohibition on the import of the French beer containing additives. Whereas the prohibition on the designation “Bier amounted to a sufficiently serious breach of law, the prohibition on imports did not⁴¹. This is due to the fact that the first prohibition was difficult to excuse, because the inconsistency with Art.30 (now Art.28 ECT) had been established by earlier ECJ decisions⁴². Thus, a breach of Community law will be sufficiently serious if it has persisted despite a judgement of the Court which established the infringement in question. Prior case law concerning the second prohibition was non existent and the other factors mentioned above were not fulfilled either, so that this prohibition did not amount to a sufficiently serious breach.

Apart from those statements concerning the establishment of a sufficiently serious breach, the ECJ moreover confirmed that fault on the part of public officials is not required and that the type of damage recoverable and the time-limits to recover damages were established by the laws of the Member States and could be limited provided that reparation was not made impossible or excessively difficult to obtain⁴³. As according to German laws reparation depended on proof that the passing of the offending law was referable to a particular third party, which made obtaining of compensation practically impossible, since the task of the legislature

³⁸ Case C-46/93 & Case C-48/93 Brasserie, para.74

³⁹ Case C-46/93 & Case C-48/93, Brasserie du Pêcheur, para. 56-57

⁴⁰ Deards, p.620, 622

⁴¹ Deards, p.620, 622

⁴² for example: Case 120/78 Cassis de Dijon [1979] ECR 649

⁴³ Deards, p.620, 622

generally related to the public at large, this German rule should therefore be set aside in cases of a breach of Community law⁴⁴.

2.4.2 Other judgements concerning state liability

In the case *R v Her Majesty's Treasury, ex parte British Telecommunications*⁴⁵, which was decided shortly after *Brasserie du Pêcheur* the ECJ ruled that no sufficiently serious breach of Community law exists, although the Directive in question had been improperly implemented. The ECJ reasoned his ruling by arguing that an Article of the Directive was imprecisely worded. Moreover the UK's "...interpretation [of that Article], 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"⁴⁶ and was hence given in good faith. As no guidance was available to the UK from case law as to the interpretation of the provision at issue and since the provisions of the Directive were sufficiently unclear, UK's error was rendered excusable⁴⁷.

Accordingly, when transposing a directive imprecisely but in good faith into national law, a Member State cannot be regarded as having committed a sufficiently serious breach of Community law.

In the case *Hedley Lomas*⁴⁸ the Court held that a "Member State [the UK] has an obligation to make reparation for the damage caused to an individual by a refusal to issue an export licence in breach of Art.34 of the [EC] Treaty where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a causal link between the breach and the damage sustained by the individuals"⁴⁹. As the Spanish authorities had implemented Directive 74/577, but simply did not make any provisions concerning the monitoring or the sanctioning of non-compliance with the aims of the Directive, the UK ban on export of animals to Spain was in breach of Art.34

⁴⁴ Deards, p.620, 622

⁴⁵ Case C-392/93: The case concerned the improper implementation of Directive 90/351. British Telecommunications claims to suffer financial disadvantages due to the wrongful implementation and claims damages. The Directive enables contracting entities to exclude themselves from the requirement it lays down, under notification of the Commission. The UK however itself decided which operators are excluded from the Directive, through Regulations. British Telecommunications argued that it was thus deprived of a rights conferred to it by the Directive.

⁴⁶ Case C-392/93 British Telecommunications, para.43

⁴⁷ Steiner, EC Law, p.70

⁴⁸ Case C-5/94: Hedley Lomas, an exporter claimed damages for losses suffered as a result of a UK ban on the export of live sheep to Spain, which was imposed because Spanish slaughterhouses did not comply with requirements on the stunning of animals before slaughter according to Directive 74/577.

⁴⁹ Case C-5/94, Hedley Lomas, para.32

(now 29) ECT and could not be justified under Art.36 (now 30) ECT⁵⁰. This breach constituted a sufficiently serious breach and thus resulted in state liability.

The ECJ stated that “Where ... [a] Member State... was not called upon to make any legislative choices and had... reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach”⁵¹. This ruling became known as the principle of liability for a mere infringement.

The principle of liability for a mere infringement of Community law was invoked again by the ECJ in *Dillenkofer*⁵². The ECJ ruled 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 contents are identifiable and a causal link exists between the breach of the State’s obligation and the loss and damage suffered”⁵³.

The ECJ also held that concerning the relationship of the conditions for state liability laid down in *Francovich* and those in *Brasserie du Pêcheur*, the two sets of conditions can be regarded the same in substance, as “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.”⁵⁴

The *Denkavit*⁵⁵ case involved claims for damages resulting from a faulty and imprecise implementation of Directive 90/435/EEC⁵⁶. The ECJ ruled that Germany’s failure was excusable for the same reasons as in the above mentioned case *British Telecommunications*. Thus the breach of Community law was not sufficiently serious and did therefore not justify liability.

The principles developed in *Francovich*, *Brasserie*, *British Telecommunications*, *Hedley Lomas* and *Dillenkofer* concerning state liability

⁵⁰ Steiner, EC Law, p.72

⁵¹ Case C-5/94, *Hedley Lomas*, para.28

⁵² Cases C-178, 179 and 188-190/94: This case deals with concerned a reference for preliminary ruling concerns the Package Travel Directive (90/314/EEC). The purpose of that Directive was to protect the purchaser of package travel, by providing sufficient security for refund of money and repatriation of the consumer in the event of the tour organiser’s insolvency. Mr. Dillenkofer who had bought such a package travel could not commence his journey because the tour organizer became insolvent.

⁵³ Cases C-178, 179 and 188-190/94, *Dillenkofer*, para.29

⁵⁴ Cases C-178, 179 and 188-190/94, *Dillenkofer*, para.23

⁵⁵ Cases C-283/94, C-291 and C-292/94: This case concerns a tax law matter, namely a claim for loss of interest, where the parent and subsidiary company are based in different states.

⁵⁶ Steiner, EC Law, p.72

are repeated in the *Sutton*⁵⁷ case. The ECJ emphasises that it is up to the national courts to assess the amount of damage, provided that national law does not treat breaches of EC law less favourable than similar domestic claims (principle of equivalence) nor makes it virtually impossible or excessively difficult to obtain reparation (principle of effectiveness). Not only the amount of damages is thus a matter of national law, but also what type of damage should be compensated is to be decided by national courts. This ruling is almost contrary to the judgement *Brasserie du Pêcheur* where the ECJ held that loss of profits was a necessary component of the damages⁵⁸.

The principle of liability for a mere infringement of Community law in situations in which the Member States are not required to make any legislative choices was again invoked in the *Norbrook Laboratories*⁵⁹ case. Regarding the requirement of a sufficiently serious breach the Court stated that such a breach exists, in the exercise of legislative powers, where such powers are manifestly and gravely disregarded and in the situation without or with limited discretion, “the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach”⁶⁰. Concerning the third liability issues (the causal connection between the breach and the damage) and the further conditions for liability (in particular heads and quantum of damages), the ECJ pointed out that they are to be determined by the applicable national law (and courts), albeit in conformity with the well-known *Rewe* criteria⁶¹.

In the case *Brinkmann Tabakfabriken v Skatteministeriet*⁶² (1996) the ECJ found that the failure of Danish authorities to properly implement Directive 79/30 did not amount to a sufficiently serious breach. The erroneous classification of the product gave no rise to liability.

⁵⁷ Case C-66/95: The case deals with a preliminary ruling on the interpretation of Directive 79/7/EEC on equal treatment of men and women in social security. The case concerns calculation of interest on arrears of benefits. Ms Sutton claims compensation calculated as interest due to late payment.

⁵⁸ Francovich Follow-Up, Chapter: Post-Francovich Judgements by the ECJ

⁵⁹ Case C-127/95: This case involves a claim for damages for faulty implementation of EC Directives on the marketing authorisation of veterinary medicinal products. The questions concerned the liability of a Member State where the authorities require information of the company which is incompatible with Directives 81/851 and 81/852. The Court ruled that certain information concerning the origin and the like of relevant components of the medicine could not be required from the undertaking, whereas certain other data with respect to the production process - in the interests of public health - could be required of the manufacturer.

⁶⁰ Francovich Follow-Up, Chapter: Post-Francovich Judgements by the ECJ; Case C-127/95, *Norbrook Laboratories*, para. 109

⁶¹ Case 33/76 *Rewe* [1976] ECR 1989, para.111

⁶² Case C-319/96: This case deals with the erroneous classification by the Danish authorities of a tobacco product manufactured by Brinkmann under Directive 79/32/EEC. The applicant was a German company which produced a tobacco product. In Germany that product was taxed as smoking tobacco, but the Danish authorities taxed it at a higher rate than cigarettes when it was imported into Denmark.

Those articles of the relevant Directive, containing definitions of "cigarettes" and "smoking tobacco", were improperly transposed, as no definitions had been adopted in Danish law at all⁶³. Although the definitions in the Directive did not corresponded exactly to Brinkmann's product, he had to pay higher rates of taxes for the cigarette roles he imported. According to the ECJ the way the Danish authorities interpreted these definitions in the Directive was not manifestly contrary to the wording nor the aim of the Directive, because it could be regarded as being "open to a number of perfectly tenable interpretations"⁶⁴.

The ECJ finally decided the question of liability on the basis of causation. Although the Directive had not been implemented in Denmark, the Danish authorities nonetheless had applied the definitions of the Directive and had thereby given immediate, but imperfect effect to its provisions⁶⁵. Therefore there was no direct causal connection between the legislative failure of the authorities and Brinkmann's damage. The ECJ accordingly held that a Member State whose authorities, erroneously classified a product is not bound by Community law to compensate the manufacturer for the damage sustained by the latter as a result of that erroneous decision⁶⁶.

The case *Konle v Austria*⁶⁷ deals with the assessment of the criterion of a sufficiently serious breach of Community law. The ECJ held that, in principle, it is a matter for the national courts to apply the principles governing State liability for breach of EC law, in accordance with the guidelines laid down by the Court in previous case law⁶⁸.

Concerning the liability within a federal State, the judgment does not provide any clear guidance as to the question whether, as a matter of Community law, local or regional authorities are liable for implementation errors regarding directives. However, a joint liability of both of both a decentralized authority and the State in the event of a breach of EC law by the former does not seem to be required⁶⁹.

⁶³ Francovich Follow-Up, Chapter: Post-Francovich Judgements by the ECJ

⁶⁴ Case C-319/96, Brinkmann, para.32

⁶⁵ Tridimas, pp. 301, 305; Steiner, EC Law, p.74

⁶⁶ Case C-319/96, Brinkmann, para.33

⁶⁷ Case C-302/97: Mr Konle, a German national sought to acquire land in Tyrol, but was refused authorisation pursuant to the Tyrol Law on the Transfer of Land of 1993. As a condition for the granting of authorization, the prospective acquirer had to prove that the land would not be used for the purposes of establishing a secondary residence. The refusal was later annulled on the ground that the 1993 Law was unconstitutional. Mr Konle brought an action for State liability in damages on the ground that the Tyrol Law infringed Community law.

⁶⁸ Case C-302/97 Konle, para 58

⁶⁹ Francovich Follow-Up, Chapter: Post-Francovich Judgements by the ECJ; Case C-302/97 Konle, para 63

In *Rechberger and Others v Austria*⁷⁰ the ECJ found that Austria's way of implementing Directive 90/314/EEC failed to provide the level of consumer protection provided by the Directive. Austria's implementing Act applied only to package tours taking place after 1 May 1995. But the Directive, included a consumer guarantee and had to apply to all contracts concluded after 1 January 1995, i.e. the end of the transposition period. According to the Austrian law consumers could thus only file claims at a date a few months after the time-limit for implementation of the Directive⁷¹. The Court ruled that the Directive does not allow Member States to reduce or limit the effect of the consumer guarantees envisaged by the Directive. The incorrect implementation of one important norm constitutes a sufficiently serious breach of Community law, according to the Court⁷², and it is immaterial that Austria had taken measures with respect to other provisions of the Directive, because it failed to secure the consumers' guarantee in issue .

According to this judgement the non-transposition of one relevant provision of a Directive into national law within the time-limits can constitute a sufficiently serious breach of Community law.

In *Haim v Kassenzahnärztliche Vereinigung Nordrhein (Haim II)*⁷³ the ECJ had to deal with a similar question as in *Konle*, namely whether a constitutionally independent body may be liable under Community law, next to the Member State, for a breach of primary EC law. It ruled that liability extended to public-law bodies as well as to the Member States themselves. Secondly the ECJ states that in order for the right to reparation to arise, a sufficiently serious breach of Community law needs to exist⁷⁴. If at the time of the infringement the state had considerably reduced discretion or none at all, the mere infringement of EC law

⁷⁰ Case C-140/97: The offer of holiday trip at reduced price from an Austrian newspaper to its subscribers was more popular than expected and finally lead to travel organiser's insolvency. The plaintiffs, subscribers who had taken part in the newspaper offer and had paid the travel costs in advance, brought an action against Austria, claiming that they suffered losses due to the Austria's failure to implement the Package Travel Directive 90/314 fully.

⁷¹ Steiner, EC Law p.74

⁷² Case C-140/97, *Rechberger*, para.53

⁷³ Case C-424/97: This case concerns the refusal of the Association of Dental Practitioners of Social Security Schemes to enrol the Italian national, Mr Haim, on a social security register of dental practitioners. His diploma was not awarded by a Member State but by Turkey, but it had been recognised in Belgium as equivalent to the relevant dental qualification in that country. However the German authority subjected him to the requirement of an additional training period, a condition not applicable to those with a recognisable Community qualification. Although Mr. Haim was registered following the ECJ's *Haim I* judgment (Case C-319/92, [1994] ECR I-425), he contended to have suffered loss of income during a six year period for which he sought compensation. Under German law, there is no liability according to the national court as the authority had acted in good faith.

⁷⁴ compare Case C-5/94, *Hedley Lomas*, para 25

might suffice to establish the existence of a sufficiently serious breach⁷⁵. The existence and scope of that discretion were to be determined by reference to Community and not national law, so that the degree of discretion conferred by national law on the official or institution responsible for the breach of Community law was irrelevant in that respect⁷⁶. Other factors that were material to the question of seriousness of the breach included whether the error of law was excusable. In that respect it was important that, although Art.52 had been directly applicable since long before the facts in the case arose, the decision in *Vlassopoulou* had only been given in 1991, after the decision of the German authority in 1988 to deny registration of Mr. Haim. Thirdly, the ECJ ruled that a member state could make certain public dental appointments conditional on the applicant having a sufficient knowledge of that state's language.

2.4.3 Discussion

With its *Francovich* ruling the ECJ has created a remedy under Community law enforceable by individuals in their national courts against defaults of Member States, regardless of whether national procedural obstacles exist⁷⁷. This creation has however been subject to substantive criticism concerning the question whether the ECJ has exceeded its powers by formulating such a remedy under Community law⁷⁸. The ECJ argued that although no explicit remedy rule enforceable by individuals could be found within the Treaty, the principle of state liability was nonetheless inherent in the Treaty⁷⁹.

A substantive legal basis of liability and its required conditions were established in the so-called first generation of cases⁸⁰ after *Francovich*⁸¹. In *Brasserie du Pêcheur* the ECJ argued that due to the fundamental requirement of the Community legal order that Community law must be applied uniformly, the principle of State liability is applicable to all organs of the State, including the legislature⁸². Liability can thus arise as a result of action by the legislature, the administration or the judiciary. This case also established the universality of a right to reparation as well as the requirement of a serious breach⁸³. In order to define

⁷⁵ compare Case C-5/94, *Hedley Lomas*, para 28

⁷⁶ Case C-424/97, *Haim II*, para.40

⁷⁷ Ross, p.55

⁷⁸ Möllers, pp.20, 22; Schlemmer-Schulte & Ukrow, pp. 82, 90; Deckert, pp.203,204; Gellermann, pp.343, 352, 353

⁷⁹ The reasons for that are described above.

⁸⁰ First generation of cases: *Brasserie du Pêcheur*, *British Telecommunications*, *Dillenkofer*, *Denkavit*, *Hedley Lomas*

⁸¹ *Tridimas*, pp.301, 302

⁸² van Gerven, *Of rights, remedies and procedures*, pp.501,505; Case C-46/93 & Case C-48/93, *Brasserie du Pêcheur*, para. 33

⁸³ Case C-46/93 & Case C-48/93, *Brasserie du Pêcheur*, para. 32

the requirement of a serious breach several factors need to be taken into account, as established in *Brasserie du Pêcheur*⁸⁴.

As it has been established through case law, non-transposition of a directive will per se amounts to a serious breach of Community law (*Dillenkofer*), whereas misapplication of a directive does not necessarily give rise to liability (*British Telecommunications, Denkavit, Hedley Lomas*)⁸⁵. Thus if there is no clear guidance from a Directive, if the interpretation of it is neither untenable nor in bad faith and if other Member States and the Commission even share the same view then the misapplication of a Directive does not amount to a sufficiently serious breach of EC law.

A breach of Community rules is more likely to be serious, if the discretion is left to national authorities as was established in the case *Hedley Lomas*. By contrast, in cases where the Member State has no discretion, it will be held strictly liable for breaches of Community law⁸⁶. Conditions which establish a serious breach do not demand the existence of fraud, in order to prevent the differing application, interpretations and understandings of that concept within the various national legal systems⁸⁷.

The second generation cases⁸⁸ on state liability focuses on the requirement of a serious breach, a causal relationship and the question which authority is responsible to pay reparation, however they do not contain any innovations, but concentrate on developing and refining the remedy⁸⁹. Overall the ECJ seems to leave more discretion to the national courts, but the determining criterion remains, namely that the individual must have an effective opportunity to protect his rights deriving from Community law. Hence the ECJ will strike down national rules which prevent effective access to remedial protection⁹⁰.

As with legislative acts, existing national remedies may need to be modified to ensure that they are effective in protecting individuals' rights. A principle of liability or judicial acts in breach of Community law, as laid down in *Brasserie du Pêcheur* clearly breaks new constitutional ground in most Member States⁹¹.

⁸⁴ Case C-46/93 & Case C-48/93, *Brasserie du Pêcheur*, para. 56-57

⁸⁵ Betlem, see Chapter: The Ius Commune Regime

⁸⁶ Betlem, see Chapter: The Ius Commune Regime

⁸⁷ Kopp, p.646

⁸⁸ Second generation of cases: *Norbrook Laboratories, Brinkmann Tabakfabriken, Konle, Rechberger, Haim II*

⁸⁹ Tridimas, p.301

⁹⁰ Biondi, pp.1271 ff; Tridimas, p.304

⁹¹ Steiner, EC Law, p.458

3 German Law of State Liability

The German law on state liability is basically derived from two concepts, namely on the one hand from the concept of tortious governmental liability, (*Amtshaftung*) and on the other hand from the concept of encroachment (*Aufopferung*) and expropriation (*Enteignung*)⁹².

3.1 Encroachment and expropriation

The concept of encroachment and expropriation is of minor importance for in the European context. However it is mentioned in the reasoning of one of the follow-up judgements discussed below and thus a short explanation of this concept will be required.

According to the principle of expropriation and sacrificial encroachment, which derive from §§ 74 and 75 of the Introduction to the Prussian General Land Law⁹³, the state is bound to compensate for the deprivation of private rights and assets⁹⁴. Compensation for expropriation and sacrificial encroachment is awarded in cases of lawful, as well as unlawful, state activities. This claim is not based on fault on the part of the acting person⁹⁵. Whereas sacrificial encroachment refers to immaterial rights such as health and physical integrity, quasi-expropriatory encroachment relates to rights and assets⁹⁶. The most important element of a claim based on quasi-expropriatory encroachment is the special sacrifice of the citizen concerned, which has to go beyond the scope of what all citizens have to face and which therefore has to be compensated⁹⁷.

3.2 Tortious Governmental Liability

Tortious governmental liability refers to the German term *Amtshaftung* which relates to the claim under § 839 in connection with Article 34 GG. The concept of tortious governmental liability, i.e. liability for unlawful acts committed by a public authority, has its origin in the law of torts. The German law of torts is embodied in the German Civil Code (BGB⁹⁸), consisting of thirty successive articles

⁹² The material primarily used in this Chapter is *Rüfner*, Basic Elements of German Law on State Liability p.249 – 274; *Surma*, A Comparative Study of the English and German Judicial Approach to the Liability of Public Bodies in Negligence (Part I); *Schlechtriem*, Civil Liability for Economic Loss

⁹³ see Supplement B, Badura, pp.283-288, 285

⁹⁴ Rüfner, p.260

⁹⁵ Ekkehart, § 41 III g bb

⁹⁶ Badura, pp.283-288, 286

⁹⁷ Rüfner, p.263

⁹⁸ Bürgerliches Gesetzbuch

(paragraphs §§ 823 ff.), which can be found in the second book of the Code as part of the law of obligations⁹⁹. § 823 BGB, the first and most important German tort provisions, does not include any limitation, but generally does not apply in the same way to private persons and public authorities or their employees performing public functions¹⁰⁰. Regarding public liability there is a special claim for breach of official duty which is established in § 839 BGB in conjunction with Article 34 of the German Constitution (GG¹⁰¹)¹⁰².

3.2.1 § 839 BGB

According to § 839 (1) an official is liable for any damage resulting from a violation of an official obligation which he owes to a third party, committed intentionally or negligently. In case the official can be blamed merely for negligence he can be sued only if the injured party is unable to obtain compensation elsewhere.¹⁰³

§ 839 served as an all-encompassing means of protection against governmental unlawfulness¹⁰⁴. However originally the first section of § 839 imposes liability for breach of official duty only on the official acting on behalf of the public body and not on the public body itself¹⁰⁵. Thus the success of the claim, which had to be directed against the official personally, depended on his ability to pay. This unsatisfactory result led to the fact that today the state or the public body in whose service the official is, becomes liable for the official by virtue of Art.34 GG¹⁰⁶.

3.2.2 Art. 34 GG

Art. 34 GG¹⁰⁷ introduced a general liability of the state and its various administrative units and bodies, such as the Federal Republic, the Länder, counties and cities, for any damage caused by their employees acting in the course of their public obligations and violating their so-called official duty (*Amtspflichten*), i.e. duties of the state and its organisations towards its citizens¹⁰⁸.

⁹⁹ Surma, text after note 117; Markesinis, *The German Law of Obligations – Volume II The Law of Torts: A Comparative Introduction* (3rd edition, 1997)

¹⁰⁰ Surma, text after footnote 124

¹⁰¹ Grundgesetz

¹⁰² Surma, text after note 125

¹⁰³ see Supplement A

¹⁰⁴ Rübner, pp.250, 251

¹⁰⁵ Surma, text after note 133

¹⁰⁶ Rübner, p.251

¹⁰⁷ see Supplement B

¹⁰⁸ Schlechtriem, *Civil Liability for Economic Loss*, http://www.jura.uni-freiburg.de/ipr/LB_BRIST.pdf

3.3 Elements of a claim under § 839 in combination with Art.34 GG

A claim for damages under § 839 (1) BGB and Art.34 GG requires that an official, i.e. a civil servant in the exercise of a public office culpably breached an official duty he owed to a third party which suffered harm as a consequence of his conduct¹⁰⁹. The elements of a claim under § 839 BGB and Art.34 GG thus require: (1) an official (*Beamter*), (2) acting in exercise of a public office (*in Ausübung seines Amtes, nicht nur bei Gelegenheit*), (3) a breach of official duty (*Verletzung einer Amtspflicht*), (4) a duty owed to a third party (*drittbezogene Amtspflicht*), (5) fault (*Verschulden*), (6) causation (*Kausalität*) and (7) damages (*Schaden*).

3.3.1 The meaning of “official”

When the German Civil Code was enacted in 1900 the wording of § 839 BGB imposed personal tortious liability of civil servants¹¹⁰. § 839 applied only to *Beamte* in a strict sense, i.e. governmental employees with a formal civil-service status.

Art. 34 GG introduced a general liability of the state and its various administrative units and bodies (such as the Federal Republic, the Länder, the counties and cities). Today ‘official’ refers to any person acting in a public law capacity, not only those who have civil service status but also employees and workers, or even persons who have been authorised to act in a public law capacity by a public authority without any contract of employment (officers or agents: *beliehener Unternehmer*)¹¹¹.

According to the wording of Art. 34 GG ‘any person’ who is performing functions which are part of the sovereign activities of the public body not only including its employees but also private enterprises or private individuals, can be regarded as ‘an official’. Hence not the legal position or status of the acting person is decisive for the liability of the public body, but the nature of the activity¹¹².

3.3.2 Acting in exercise of a public office

The official has to act in exercise of his public office. This element is satisfied whenever an act is based on a statute which expressly designates a certain duty as

¹⁰⁹ Surma, text after note 143

¹¹⁰ Schlechtriem, I.4

¹¹¹ Rübner, pp. 253, 254

¹¹² Surma, text after note 145

an official duty in the exercise of a public office¹¹³. The exercise of a public office generally encompasses any kind of sovereign conduct. Activities which pursue public duties or functions with public law means can be referred to as sovereign¹¹⁴.

Furthermore, it is necessary that there is a special connection between the public duty pursued and the tortious conduct¹¹⁵. The connection must be so close that the physical act can be regarded as part of the sovereign activity of the public body¹¹⁶. The requirement of 'in the exercise' is for example not fulfilled, when the official acts purely out of personal motives¹¹⁷.

3.3.3 Breach of an official duty

Official duties are defined as the personal behavioural duties (*Verhaltenspflichten*) of the official with regard to the exercise of his office¹¹⁸. When defining official duty it is important to refer to the duty which the official owes to his employer, i.e. the state and not to the duties which the state has towards the citizen¹¹⁹. Thus, official duties constitute internal duties the official owes to the public body as his employee and not to third parties¹²⁰.

As long as the official has to follow orders of his superiors, he cannot be in breach of an official duty, i.e. when injustice is done to the citizen in such a case, it is the conduct of the superior which needs to be examined¹²¹.

As there is no conclusive list of official duties either in § 839 BGB or in Art.34 GG, the courts were forced to create official duties via case law. The main official duty, deriving from Art. 20 III GG, is the duty to act lawfully¹²².

The official duty to act lawfully also encompasses the duty to exercise discretion in a proper and lawful manner without arbitrariness¹²³. Where the official acts within the ambit of his discretion, liability will not occur. Incorrect application of discretion will however result in a breach of official duty, even if it did not amount to evident abuse¹²⁴. An official could for example apply its discretion incorrectly

¹¹³ BGH NJW 1981, pp. 2120, 2121

¹¹⁴ BGH NJW 1992, p.972

¹¹⁵ OLG Köln NJW 1970, p. 1322

¹¹⁶ Surma, text after note 153

¹¹⁷ OLG Köln NJW 1970, pp. 1322, 1324

¹¹⁸ Surma, text after note 156

¹¹⁹ Rübner pp. 249, 254

¹²⁰ Surma, text after note 156 and 157

¹²¹ Rübner, pp. 249, 254

¹²² BGHZ 16, pp. 111, 113; BGHZ 60, pp. 112, 117, Surma, text after note 162

¹²³ Rübner, pp.249, 255; BGHZ 74, pp. 144, 156; BGHZ 75, pp. 120, 124; BGHZ 118, pp. 263, 271

¹²⁴ BGHZ 74, pp. 144, 156; BGHZ 75, pp. 120,124

by exceeding it, by not applying it at all, but not realising that his discretion was limited and by simply applying it wrongly.

Other examples of official duties recognised to fall within § 839 BGB and Art. 34 GG are the duty to act proportionally¹²⁵, the duty to act without delay¹²⁶, to act consistently¹²⁷, the duty to provide correct information¹²⁸, and especially the duties not to commit tortious acts¹²⁹ and to comply with the public law duties to maintain safety (*öffentlich-rechtliche Verkehrssicher-ungspflichten*)¹³⁰.

3.3.4 Duty owed to a third party

The official duty must be owed towards a third party, i.e. the plaintiff, which is the case if the official duty exists in the interest of a limited group of people worthy of protection and not only in the interest of the community as a whole¹³¹. A statute is intended for the protection of others if it exists to defend not only general but also or solely individual interests¹³².

Official duties of officials are laid down in laws and other legal provisions. General or individual orders can also establish official duties¹³³. In order for an official duty to exist three conditions have to be fulfilled. The official duty must generally be capable of including individual protection¹³⁴. The plaintiff has to belong to the class of people protected by the duty and, finally, the damage suffered must fall within the protective scope of the duty¹³⁵.

Due to these vague conditions an imposition of liability on the public body should in principle only be justified when the official duty establishes a close proximate relationship between the plaintiff and the public body¹³⁶. Such a connection is however not required where the public conduct breaches the official duty not to commit tortious acts and directly violates interests of the plaintiff enumerated in § 823 I BGB, which are of an absolute nature towards everybody¹³⁷. In such circumstances the affected plaintiff is always a third person within the meaning of § 839 I BGB¹³⁸. The requirement of a relationship between the plaintiff and the public body is in theory intended as a means to limit the liability of public bodies,

¹²⁵ BGH NJW 1973 p. 894

¹²⁶ BGHZ 30, pp. 19, 26, BGH NVwZ 1994, p. 405

¹²⁷ BGH NJW 1963, pp. 644, 645, BGH NVwZ 1986 pp. 245, 246

¹²⁸ BGH NJW 1992, pp. 1230, 1231; NJW 1994, pp. 2087, 2090

¹²⁹ BGH NJW 1992, p. 1310

¹³⁰ Surma, text after note 172

¹³¹ BGHZ 65, pp. 196, 198; BGHZ 74, pp. 144, 146, Surma, text after note 178 and 179

¹³² Surma, text after note 123

¹³³ Rübner, p.254

¹³⁴ Surma, text after note 182

¹³⁵ BGH NJW 1992, pp. 1230, 1231

¹³⁶ BGH NJW 1989, p. 99

¹³⁷ Surma, text after note 186

¹³⁸ BGHZ 69, pp. 128, 138; BGHZ 78, pp. 274, 279

because not all cases in which an official breaches an official duty involve a duty owed towards a third party.

3.3.5 Fault

As a tort-law provision, § 839 requires fault on behalf of the acting official¹³⁹. Thus § 839 I 1 BGB imposes liability only if the official has wilfully or negligently breached the official duty¹⁴⁰. In case of an intended breach of the official duty on behalf of the official the requirement of fault is without doubt satisfied and § 839 I 1 BGB applies, i.e. the official will be held liable for the breach.

In the case of negligent conduct § 839 I 2 BGB will apply and lead to an exclusion of the liability of the official or public body if the injured party can obtain compensation otherwise¹⁴¹. § 276 I 2 BGB provides a legal definition of the term negligence, which subdivided into light, ordinary and gross negligence. The required standard of care is objective (*Verobjektivierung des Verschuldens*), i.e. decisive is what standard could be expected from the average official who was acting in compliance with his duties¹⁴². Furthermore, the plaintiff does not need to name or individualise the particular official who acted and fell below the necessary standard of care in order to succeed (*Entindividualisierung*).

If the behaviour of the official is considered to be lawful by a court, the official cannot be regarded as having acted in a culpable way, even though the Court's judgement might be wrong¹⁴³. Moreover an official applying unconstitutional law does so in most cases act without fault¹⁴⁴.

3.3.6 Causation

Causation is to established according to the theory of equivalence or rule of *conditio sine qua non*. This rule requires that the damage would not have occurred without the breach of official duty¹⁴⁵. Moreover the causal connection between damage and breach of duty has to be adequate. A causal connection is not adequate if according to objective human experience and common opinion it cannot reasonably be taken into account¹⁴⁶. If, according to the concept of alternative lawful conduct, the damage would have occurred even in case of

¹³⁹ Rübner, pp.249, 257

¹⁴⁰ Surma, text after note 191

¹⁴¹ Surma, text after note 191

¹⁴² Rübner, pp. 249, 257

¹⁴³ BGH NVwZ 2000, 1206

¹⁴⁴ BGH NJW 1984, 168; BGH NJW 1986, 2954

¹⁴⁵ Surma, text after note 196

¹⁴⁶ Surma, text after note 197

lawful conduct of the official, the breach of duty is generally not regarded as being a sufficient cause of the damage¹⁴⁷.

3.3.7 Damages

According to § 839 I 1 BGB in conjunction with Art. 34 GG the public body is liable for any damage arising from the unlawful conduct of the official¹⁴⁸. The only condition is that the suffered damage represents the kind of loss that the official duty was supposed to prevent¹⁴⁹.

The assessment of damages is determined by the general rules in §§ 249 et seq., §§ 842 et seq. BGB. Public liability does generally only lead to monetary compensation.¹⁵⁰ Apart from pecuniary losses, compensation for non-pecuniary losses may be claimed for pain and suffering in cases of personal injury, deprivation of personal liberty and severe infringement of someone's general right of personality on the basis of §§ 839, 847, 253 BGB, Art. 34 GG¹⁵¹.

¹⁴⁷ BGHZ 96, pp. 157,171, Surma, text after note 199

¹⁴⁸ Markensinis, The German Law of Obligations – Volume II The Law of Torts: A Comparative Introduction, 3rd edition, 1997, p.903

¹⁴⁹ Surma, text after note 202; OLG Oldenburg, NVwZ-RR 1993, 593

¹⁵⁰ BGH NJW 1993, pp. 1799, 1800; BGHZ 34, pp.99, 104-105

¹⁵¹ BGHZ 78, pp. 274, 279-280

4 EC Law – German Law

Since Francovich until today four cases were brought before the ECJ concerning the German rules on state liability. Those cases are *Brasserie du Pêcheur*, *Dillenkofer*, *Denkavit* and *Haim II*. In this part of my paper I will describe and analyse the judgements of those cases decided by the German Courts after the ECJ had given its ruling. Furthermore I will discuss whether those follow-up judgments are compatible with EC law and EC principles.

4.1 Follow-up judgements of the ECJ's ruling before German Courts

4.1.1 Brasserie

In the case *Brasserie du Pêcheur* the ECJ stated that there exist a sufficiently serious breach, hence Germany is to be held liable for its breach of EC law.

However concerning the claim of the brewery based on German law the Bundesgerichtshof (BGH) rejected a claim for damages filed by the brewery *Brasserie du Pêcheur* against Germany and held in his follow-up judgement¹⁵² that neither tortious governmental liability nor quasi-expropriatory encroachment (or expropriation-like intrusion, enteignungs-gleicher Eingriff) would give rise for compensation¹⁵³.

The BGH argued that tortious governmental liability did not arise under domestic law, because the failure to amend the Beer Duty Act to comply with Community law was not referable to any particular third party¹⁵⁴. Secondly, the BGH also denied liability in respect of an infringement equivalent to expropriation, because domestic law did not apply in this area and, in any event, no such infringement existed on the facts¹⁵⁵.

Thirdly, under Community law the BGH held that regarding the two types of wrongs the Federal Republic of Germany in one situation did not commit a sufficiently serious breach whereas in the other no direct causal connection between the loss suffered and the breach of Community law could be

¹⁵² Bundesgerichtshof, III ZR 127/91, Europäische Zeitschrift für Wirtschaftsrecht 1996, 761, *Brasserie du Pêcheur*; CMLR 1997, 971; BGHZ 134, 30

¹⁵³ Puder, p.327

¹⁵⁴ Deards, pp. 620, 622

¹⁵⁵ Deards, pp. 620, 622

established¹⁵⁶. Therefore the Federal Republic of Germany was not to be held liable according to the BGH.

Concerning the prohibition on the designation “Bier” (second situation), the ECJ ruled that this rule amounted to a sufficiently serious breach, due to its incompatibility with Community law, which Germany should have been aware of because of earlier judgements. This prohibition however did not cause any loss to Brasserie du Pêcheur, as no proceedings had been taken against the brewery by the German authorities in respect of this rule¹⁵⁷. According to the German law of causation a necessary and sufficient causation between the prohibition and the occurred damage must be given. In applying the German rules of causation the BGH relied on the *Francovich* judgement in which the ECJ stated that it was “a matter for Member States to implement the conditions for liability as regards ‘direct causation’ into national law while safeguarding the full effectiveness of Community law.”¹⁵⁸ It was however not because of the prohibition to use the term “Bier” on its products that the brewery suffered losses. The BGH thus denied the existence of a direct causal connection on the ground that the prohibition on the marketing of the French beer as “Bier”, did not cause the loss suffered by Brasserie du Pêcheur.

The losses occurred due to the proceedings under the Beer Duty Act related to the prohibition on imports (first situation). But regarding this prohibition the ECJ had ruled that it did not amount to a sufficiently serious breach of Art.30 (now Art.28 ECT)¹⁵⁹. Although this prohibition caused loss to Brasserie du Pêcheur it was insufficient to give rise to liability on the part of the German state. Concerning the non-existence of a sufficiently serious breach the BGH simply argued that even the ECJ did not regard the import prohibition of beer containing additives as a sufficiently serious breach.

4.1.2 Dillenkofer

In the follow-up judgement¹⁶⁰ of the Dillenkofer case, the Federal Republic of Germany was not held liable by the Oberlandesgericht (OLG) Köln for the non-implementation of the Package Travel Directive by Germany, because in this case the relevant contract regarding the trip was concluded before the end of the transposition period¹⁶¹. The ECJ delivered its judgement on 8th October 1996 as discussed above.

¹⁵⁶ Francovich Follow-up, Chapter: Application by National Courts – Germany

¹⁵⁷ Deards, pp.620, 623

¹⁵⁸ Deards, pp. 620, 623

¹⁵⁹ Concerning the reasons please see presentation of the case above.

¹⁶⁰ OLG Köln, Europäische Zeitschrift für Wirtschaftsrecht, 1998, 95, Dillenkofer

¹⁶¹ Francovich Follow-up, Chapter: Application by National Courts – Germany

On 15th July 1997 the OLG Köln¹⁶² ruled that Art.7 of Directive 90/314 on package travel, package holidays and package tours provides that the tour organiser to the contract is to provide sufficient evidence of security for the refund of money paid over by the consumer in the event of the organiser's insolvency. However, Art.7 of the Directive does not provide an answer to the question whether the organiser also has to provide sufficient evidence of security for refund of money for contracts which were conducted before 1st January 1993.

According to Art.9 of the Directive, the Member States should have adopted all the measures necessary to ensure that, as from 1st January 1993, individuals would have effective protection against the risk of the insolvency of the organizer. A law guaranteeing the protection of purchasers of package travel who entered into contract with the tour operator after 1st January 1993 would have thus ensured the transposition of the Directive. This also follows from the ECJ's ruling in para.50 and 51 of the *Dillenkofer* case, where it states that "it must therefore be held that, in order to ensure full implementation of Article 7 of the Directive, the Member States should have adopted, within the prescribed period, all the measures necessary to provide purchasers of package travel with a guarantee that, as from 1 January 1993, they would be refunded money paid over and be repatriated in the event of the organizer's insolvency. It follows that Article 7 would not have been fully implemented if, within the prescribed period, the national legislature had done no more than adopt the necessary legal framework for requiring organizers by law to provide sufficient evidence of security". However the ECJ however does not give an answer to the question whether protection shall be only be granted for contracts being conducted after that date or also in cases where the beginning of journey will take place after 1st January 1993.

The OLG argues that if protection would also be granted in cases where the contract has been conducted before 1st January 1993, but the journey does not commence until after that date, the law-making body would have interfered in already existing contracts in an unlawful manner. Reciprocal contracts are legally and economically identified through the fact that the relationship between performance (*Leistung*) and consideration (*Gegen-leistung*) are established. A change of this relationship due to a change in law in favour of one party to the contract is only acceptable under exceptional circumstances and compelling reason. The transposition of the Directive leads to an increase in cost on behalf of the organiser, who must have been given the opportunity to calculate this increase into the prices for the package travel. This possibility does not exist, if the above mentioned protection would also be granted in relation to those contract which had been conducted before 1st January 1993. According to the OLG it cannot be concluded from Art.9 of the Directive that this disadvantageous result was intended by the Directive.

¹⁶² Huff, pp.727-729

The OLG ruled that the claimant is therefore not entitled to damages, although the start of his journey would have been after the expiration of the transposition date, but because the relevant contract was concluded before the end of the transposition period. Although the ECJ had stated that in this case there is a sufficiently serious breach of Community law, which would result in an entitlement to damages, the claimant did not receive any kind of compensation under German law.

4.1.3 Denkavit

In the *Denkavit* case the ECJ itself states that there is no sufficiently serious breach. Therefore there is no liability under EC law. Hence in this case there is no state liability under German law either. This case does therefore not allow for intensive discussion.

4.1.4 Haim

In *Haim II* the ECJ held that in order to establish the existence of a sufficiently serious breach account must be taken of the extent of the discretion enjoyed by the Member State concerned. The existence and scope of that discretion must be determined by reference to Community law and not by reference to national law¹⁶³.

Whereas under German state liability rules, the elements of a claim for damages under § 839 in combination with Art.34 GG include an element of fraud, the ECJ in his judgement expressly stated that the obligation to make reparation for loss or damage caused to individuals cannot depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law¹⁶⁴.

The national court asked whether the mere fact that the official lacked discretion in applying the faulty domestic law already constitutes a sufficiently serious breach. The ECJ ruled that “The discretion referred to in paragraph 38 above is that enjoyed by the Member State concerned. Its existence and its scope are determined by reference to Community law and not by reference to national law. The discretion which may be conferred by national law on the official or the institution responsible for the breach of Community law is therefore irrelevant in this respect.”¹⁶⁵

¹⁶³ Haim, para.49

¹⁶⁴ Haim, para.39 ; also compare Cases C-46/93 & C-48/93 *Brasserie du Pêcheur* and *Factortame*, para 79

¹⁶⁵ Haim, para.40

Furthermore the ECJ stated that determining whether and when a mere infringement by a Member State will amount to a sufficiently serious breach is up to the national court to decide by taking into account that the violated norm in question, Art. 43 (ex Art.52) ECT, is directly effective.

Thus in a follow-up judgement¹⁶⁶ the German court would have to determine whether the breach by the German was sufficiently serious. In any case, the judgement of the national court will not be contrary to the ECJ's ruling, as the latter did not rule upon the issue of a sufficiently serious breach. Therefore this case won't give rise to intensive discussion either.

4.2 Conflicting judgements

With regard to the *Brasserie du Pêcheur* and the *Dillenkofer* follow-up judgements, it can be concluded that whereas the ECJ clearly ruled in favour of a liability of the German State, the German national courts' ruling awarded no compensation to the claimants at all. How is it possible that German courts can give an opposite ruling to the ECJ? Are these follow-up judgements in conformity with European law?

4.2.1 Relationship between National Courts and the ECJ

The relationship between the national courts and the Court of Justice in proceedings under Art. 234 ECT is co-operative rather than hierarchical, since a reference to the ECJ cannot be regarded as an appeal against the decision of the national court¹⁶⁷. The proceedings can be described as a form of dialogue between the Court of Justice and the referring court.

The Court of Justice cannot rule on matters that are within the exclusive jurisdiction of the national court in proceedings under Art. 234 ECT. For example, it can neither rule on the application of the law to the specific facts of the case before the national court nor on the compatibility of a provision of national law with the requirements of Community law.

The Court of Justice is supposed to provide guidance on the correct interpretation of Community law. However, the existence of the right to ask the Court of Justice for a preliminary ruling does not deprive national courts and tribunals of the right to reach their own conclusions on questions of Community law.

¹⁶⁶ Despite intensive research I was not able to find out if a final judgment has been delivered by a German Court in this case.

¹⁶⁷ Maher, pp. 226, 228 ff.; Kapteyn, Verloren van Themaat, Gormley, pp.249 ff.; Steiner, EC Law pp.461 ff.

4.2.2 Preliminary ruling procedure

The preliminary ruling under Art. 234 procedure plays a central part in the development and enforcement of EC law¹⁶⁸. The purpose of Art. 234 is to facilitate and ensure the harmonization of Community law. It enables any question of EC law to be referred to the ECJ for a preliminary ruling by any national court or tribunal¹⁶⁹, which considers a decision on the question necessary to enable it to give judgement.

Where a question is raised concerning interpretation in a case pending before a court or tribunal of a Member State against whose decision there is no judicial remedy under national law, that court or tribunal has a duty to bring the matter before the Court of Justice. For all other courts, referral is discretionary. Regarding the second paragraph of Art. 234 ECT, courts and tribunals in the Member States whose decisions are subject to a judicial remedy under national law enjoy a discretionary jurisdiction.

Generally the Court of Justice has encouraged national courts to refer questions for preliminary rulings in order to allow a harmonized application of Community law. In a few cases it has refused jurisdiction, as the function of the Art. 234 ECT was to contribute to the administration of justice in the Member States, and not to give advisory opinions on general or hypothetical questions¹⁷⁰.

The matters that are referred to the Court of Justice are left entirely to the discretion of the national judge. However the questions referred must be “objectively required” by the national courts as “necessary to enable that court to give judgement” in proceedings before it as required under Art. 234 (2) ECT¹⁷¹. The national courts are allowed to formulate the questions they refer however they want to. There are no requirements imposed. If the questions are inappropriately phrased the Court of Justice will merely reformulate them, answering what it considers to be the relevant issues. It may even interpret what it regards as the relevant issues even if the referring court does not raise them.¹⁷²

The Court’s jurisdiction is limited to the extent that it has no jurisdiction to interpret domestic law or to judge on the compatibility of domestic law with the EC law. Furthermore, the Court of Justice has no jurisdiction to rule on the application of Community law by national courts. However it has to provide the national court with practical or worthwhile rulings, since the application of Community law often raises problems for national courts. The preliminary ruling

¹⁶⁸ Steiner EC Law, p.461

¹⁶⁹ Exceptions: C-24/92, *Corbiau v Administration des Contributions*, [1993] ECR 1277 and C-134/97, *Victoria Film A/S v Riksskattenverket*, [1998] ECR 7023

¹⁷⁰ Cases 104/79, *Foglia v Novello*, [1980] ECR 745, 244/80, *Foglia v Novello*, [1981] ECR 3045; C-83/91, *Meilicke v ADV/ORG A*, [1992] ECR 4871

¹⁷¹ C-428/93, *Monin Automobiles v Maison du Deux-Roues*, [1994] ECR 1707.

¹⁷² C-130/92, *OTA SpA v Ministero delle Finanze*, [1994] ECR 3281.

procedure also plays an important role for individuals, since they can only claim their rights before a national court, which then might decide to seek guidance from the ECJ¹⁷³.

4.2.3 Effects of a ruling of the ECJ

A ruling under Art. 234 EC from the Court of Justice is “binding on the national courts as to the interpretation of the Community provisions and acts in question”¹⁷⁴. The referring court is thus under a duty to give full effect to the provisions of Community law as the Court of Justice interprets them. This may sometimes require the national court to refuse to apply conflicting provisions of national law.

Obviously it was possible for the BGH to disobey the ruling of the ECJ in the *Brasserie du Pêcheur* case without being sanctioned for it. This is due the fact that the BGH judgement could not be appealed by the claimant, as the BGH is the highest German court within a civil procedure. The claimant could not raise the matter before the ECJ of its own motion either, because on the one hand such a right does not exist under the EC Treaty¹⁷⁵ and on the other hand the ECJ is not regarded as an appeal court to the BGH. Moreover the ECJ’s jurisdiction depends “solely on the existence of a request from the national court”¹⁷⁶, hence it could not raise the matter on its own motion either.

4.3 Reforming German state liability law?

Some authors argue that the rules concerning state liability law in Germany are too complicated and thus need to be reformed¹⁷⁷. Taking into account that those rules derive from several sources of law, I generally agree to those reform suggestions.

Nevertheless I would like to add that not only need the German state liability law be reformed due to the reason mentioned, but also because of the difficulties encountered concerning the conformity with EC rules. Especially the case *Brasserie du Pêcheur* and *Dillenkofer* showed that German courts are able to avoid state liability, although national courts are in principle obliged to follow the ECJ’s ruling. Whereas the ECJ clearly announced Germany’s liability towards the claimant, the national court denied liability and awarded no recovery of the damages faced by the applicant.

¹⁷³ Steiner, EC Law p.462

¹⁷⁴ Case 52/76, *Benedetti v Munari*, [1977] ECR 163.

¹⁷⁵ Rengeling, Middeke, Gellermann pp. 192, 193

¹⁷⁶ Case 13/61, *De Geus en Uitdenbogerd v Robert Bosch GmbH*, [1962] ECR 89.

¹⁷⁷ Binia, pp. 244 ff.; Pfab, pp.151 ff.; Rüfner, p.249

Due to the principle of direct effect and the principle of supremacy of law, there is a duty to interpret national law on state liability according to the criteria established by the ECJ in its case law. Consequently the German law has to be adapted as follows.

4.3.1 Tortious governmental liability

Although the principle of expropriation and sacrificial encroachment can fill the gap that § 839 BGB leaves open, as it is not based on fault, § 839 in conjunction with Art. 34 GG has to be considered the correct and only basis for enforcing Community state liability¹⁷⁸. With regard to liability of public bodies for breach of official duty in a European context the following elements (1) duty owed to a third party and (2) fault have to be modified.

4.3.1.1 The criterion of the official duty owed to a third party

In the case of a legislative wrong, i.e. a legislative failure to act (legislatives Unrecht) the requirement that the official duty breached should be referable to a third party (Drittbezogenheit) is normally absent¹⁷⁹. Under German law the duties of the legislator are not regarded as duties owed to a third party, as there is no close proximate relationship between the plaintiff and the public body¹⁸⁰. German courts are however bound to the interpretation of the ECJ concerning the requirement of a duty owed to a third party according to Community law. If the ECJ rules that the duty to implement directives according to Art.249 (3) ECT confers rights to a certain group of people, the national courts can't argue that the law implementing the directive is directed at the public at large.

A legislative failure to act occurs in the event of an omission on part of the legislature to amend an act which is in conflict with Community law. The legislature normally does not create law concerning any individuals or class of individuals, but its tasks normally relate to the public at large and concern the common good¹⁸¹. If reparation depended upon the legislature's act or omission being referable to an individual situation, that condition would make it in practice impossible or extremely difficult to obtain effective reparation for loss or damage resulting from breach of Community law. Germany's argument that such a limitation on the availability of damages also applies to breaches of higher-ranking national provisions, such as provisions of the German Basic Constitutional Law, is not a valid justification¹⁸².

¹⁷⁸ Pfab, p.194

¹⁷⁹ Van Gerven, Bridging the Unbridgeable..., pp.507, 535

¹⁸⁰ Pfab, pp.131, 132

¹⁸¹ Pfab, p. 133

¹⁸² Case C-46/93 & Case C-48/93, Brasserie du Pêcheur, paras. 69-72

The criterion of the official duty owed to a third party does therefore always exist whenever an individual right under Community law claims an action or omission of the executive or legislative body of the Member States¹⁸³. Acts or omissions of the national judiciary could also lead to a breach of the official duty owed to a third party, if for example a national court breaches its duty to ask for preliminary ruling under Art.234 ECT. This duty to ask for preliminary ruling is based on the individual right of a fair trial which is guaranteed by the German Constitution according to Art.101 (1) 2nd sentence GG¹⁸⁴.

4.3.1.2 The criterion of fault

As discussed above the ECJ in *Brasserie du Pêcheur* explicitly stated that the criterion of fault on the part of public officials is not required. Thus Germany can't argue that because a claim under § 839 BGB in combination with Art.34 GG requires the existence of fraud, compensation will not be available due to negligent behaviour on behalf of the official. Whether or not the official acted intentionally or negligent is of no interest for a claim concerning damages due to tortious governmental liability. The criterion under German state liability law must thus either be set aside or interpreted in the light of Community law.

4.3.2 Quasi-expropriatory encroachment

But not only need the German law be adjusted with regard to the rules of tortious governmental liability (§ 839 BGB in connection with Art.34 GG). Also the rules concerning quasi-expropriatory encroachment (expropriation-like intrusion) need to be reconsidered.

In the *Brasserie du Pêcheur* judgement the BGH denied liability for an expropriation-like intrusion, reasoning that the requirements for such a claim were not satisfied. The German legal system does not recognise a mere opportunity to sell products on the market as a protected asset¹⁸⁵. The mere chance to gain property is not protected by Art. 14 GG¹⁸⁶. Therefore the BGH ruled that the plaintiff's property rights which are protected under Art.14 GG were not infringed.

However the ECJ explicitly stated that "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

¹⁸³ Martin-Ehlers, pp. 376, 397

¹⁸⁴ Article 101 [Ban on extraordinary courts] GG: (1) Extraordinary courts are inadmissible. No one may be removed from the jurisdiction of his lawful judge. (2) Courts for special fields of law may be established only by Legislation.

¹⁸⁵ Puder, pp. 311, 327; *Brasserie du Pêcheur* para.86

¹⁸⁶ Martin-Ehlers, pp.376, 398

make reparation of damage practically impossible.”¹⁸⁷ Thus according the principle of effect utile, losses suffered due to a non-realisation of an opportunity to sell products, must be recoverable under German law. This results in an enlargement of the scope pf applicability and enforcement of Art.14 (1) GG.

4.4 Conclusion

German national courts are prevented by their own national laws from awarding damages, because liability for legislative failure to act is not recognised by German law¹⁸⁸. When a legislature is however bound to comply with particular limits imposed by superior rules, the state has no reason to deny that it may be bound to compensate for damage suffered by laws which exceed those national limits¹⁸⁹. Due to the principles of direct effect and supremacy of law, which every Member State agreed to when joining the European Union, liability for legislative acts is consistent with the Community legal order and thus should be recognised in every Member State¹⁹⁰.

¹⁸⁷ Cases C-46/93 & C-48/93 Brasserie du Pêcheur para.87

¹⁸⁸ Binia, pp.248 ff.; Deckert, pp. 203, 213

¹⁸⁹ Craig, LQR 1997, pp.67, 69

¹⁹⁰ Craig, LQR 1997, pp.67, 69

5 Ten years after Francovich

Not only will it be necessary to reform Germany's state liability law. It would also be a tremendous achievement, if the EC Treaty were to be "reformed" as to deal with the requirements for liability and compensation directly. Until today, rules and conditions concerning the question of Member State liability are not codified law, but result from principles established and developed in decisions by the ECJ.

At this stage the type and amount of damage recoverable are to be determined by national law. Although Member States have to comply with EC law, damages are often denied due to national characteristics of a claim for damages.

If state liability rules were to be inherent in the Treaty, national courts would probably be more willing to apply them, since they would be primary law and not just principles, established by case law. However the ECJ seems to have taken a rather reluctant approach concerning a further development of state liability law. As stated above in its recent judgements concerning state liability, the ECJ actually authorised the national courts to determine whether there is a sufficiently serious breach or a causal link between the breach and the damage suffered. Thus it is probably not very likely that the ECJ will pursue a strict policy concerning the rules of state liability in the near future.

It appears to be the case that German law is not over generous in the area of state liability law and that damages are even less likely to be awarded on the basis of national law than on the basis of Community law. It is furthermore evident that the *Brasserie du Pêcheur* judgement allows national courts to avoid awarding damages against a Member State¹⁹¹. The strictness of the sufficiently serious breach at the one hand allows national courts to find the Member State not liable. Some authors even argue that due the fact that compensation depends on the existence of a sufficiently serious breach of a Community obligation, individuals are not sufficiently protected¹⁹². And on the other hand the application of the causation test may enable national courts to rule that no liability is incurred¹⁹³. Finally reliance on national remedies may permit the national court to restrict the amount of damages in some way – although not to the extent as to render reparation impossible or excessively difficult to obtain¹⁹⁴.

¹⁹¹ Deards, pp. 620, 624

¹⁹² van Gerven, ICLQ 1996, pp.507,523; Van den Bergh & Schäfer, pp.552, 553 (with further references)

¹⁹³ Deards, pp. 620, 624

¹⁹⁴ Deards, pp. 620, 625

Supplement A

Cited norms (paragraphs) from the German Civil Code:

§ 823 BGB¹⁹⁵

1. A person who wilfully or negligently injures the life, body, health, freedom, property, or other right of another contrary to law is bound to compensate him for any damage arising therefrom.
2. The same obligation attaches to a person who infringes a statutory provision intended for the protection of others. If according to the purview of the statute infringement is possible without fault, the duty to make compensation arises only if some fault can be imputed to the wrongdoer.

§ 839 BGB¹⁹⁶

1. If an official intentionally or negligently violates an official obligation which he owes to a third party, he is liable for any damage resulting therefrom. If the official can be blamed merely for negligence he can be sued only if the injured party is unable to obtain compensation elsewhere.
2. If an official violates his official obligation as regards any judgement delivered in an action, he is liable for the damage caused thereby only in so far as his default is in the nature of a criminal offence. This does not apply to unlawful refusal of or delay in the performance of the official duty.
3. The liability is excluded if the injured party could have averted such damage by resorting to available appeal procedures and has wilfully or negligently failed to do so.

¹⁹⁵ Translation taken from Markesinis, The German Law of obligations – Volume II The Law of Torts: A Comparative Introduction (3rd edn. 1997), p.12

¹⁹⁶ Rüdner, Basic Elements of German Law on State Liability, p.250

Supplement B

Cited norms (provisions) from the German Constitution:

Art.14 GG¹⁹⁷:

1. Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.
2. Property imposes duties. Its use should also serve the public good.
3. Expropriation shall be permitted only for the public good. It may be carried out only by or pursuant to a law which shall provide for the nature and extent of the compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts.

Art. 34 GG¹⁹⁸:

If any person, in the exercise of a public office entrusted to him, violates his official obligations to a third party, liability shall lie in principle with the state or the public body which employs him. In the event of wilful intent or gross negligence the right of recourse shall be reserved. In respect of the claim for compensation or the right of recourse, the jurisdiction of the ordinary courts must not be excluded.

Introduction to the Prussian General Land Law of 1794 (EinlALR – Einleitung zum preußischen Allgemeinen Landrecht)¹⁹⁹:

- § 74: The furthering of the common good takes precedence over individual rights and privileges of the members of the state of a genuine conflict (collision) exists between these two provisions.
- § 75: The State is, however, bound to compensate anybody who is forced to sacrifice his particular rights and privileges for the common good.

¹⁹⁷ Rübner, Basic Elements of German Law on State Liability, p.250

¹⁹⁸ Rübner, Basic Elements of German Law on State Liability, p.250

¹⁹⁹ Rübner, Basic Elements of German Law on State Liability, p.250

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