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# Community and State Liability

*2 become 1?*

Master thesis  
10 points

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Field of study: EC Law

Semester: Autumn 2001

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# Abbreviations

C.M.L.Rev.	Common Market Law Review
EC	European Community
ECHR	European Convention on Human Rights
ECR	European Court Reports
ECSC	European Coal and Steel Community
EC Treaty	Treaty establishing the European Community
EEC	European Economic Community
E.R.T.	Europarättslig tidskrift
EU	European Union
M.L.R.	Modern Law Review
UK	United Kingdom

# 1 Introduction

## 1.1 Presentation of the Subject

Community law confers rights on individuals. It is a well-established principle that these rights have to be protected by national courts. Naturally it is also important that the Community courts protect individual rights. The protection can result in the remedies of restitution, interim relief and compensation for damages. When it comes to infringements of individual rights committed by the Community, the remedies can be found in the Treaty. Remedies against the Member States on the other hand, cannot. This is because enforcement of Community law was initially held to be a matter solely for the Member States. The Commission has a supervisory role but the actual implementation, and application, of Community law takes place in the Member States. Consequently, remedies were held to be matters for the national legal systems. It might have been assumed that those legal systems were sophisticated enough to protect individual Community rights and hence enforce Community law in a proper way. However, this turned out to be wrong and the Court of Justice took action in order to enhance the protection of individuals and their rights. This led to the laying down of certain Community remedies. These remedies have to be available to an individual trying to assert his or her rights in a national court. The remedies are thus developed by Community law but applied in the national legal systems.

Protection of individual rights serves two purposes. Firstly, it gives an individual the opportunity to make the most of his or her rights. When the rights are infringed, the individual can go to court and make sure that the infringement is corrected. Secondly, protection of individual rights contributes to the integration within the European Union. By suing the Member States, an individual gets involved in the actual enforcement of

Community law. The Member States are forced to apply Community law in a correct way, and if they fail they may have to pay damages. The same is true, although perhaps to a lesser extent, in relation to the Community itself. An infringement of individual rights can lead to liability in damages. Community liability does not however contribute to European integration in the same way as State liability.

Community and State liability are the two most important remedies available in relation to protection of individual rights. If it is too late to secure the actual right, there is always the possibility to obtain reparation as a final remedy. Community liability is regulated in the Treaty, whereas State liability has been developed by case-law. Community liability is a matter for the Community courts, and national courts decide State liability. The use of the preliminary ruling procedure in Article 234 EC has however led to involvement of the Court of Justice. It is through preliminary rulings that the Court of Justice has developed the Community remedies. The case-law of the Court of Justice has thus been very important in relation to both remedies.

Although Community and State liability are decided by different courts there are quite a few similarities between them. The main similarity is that they both strive towards protection of individual rights. However, there are also great differences between the two, especially when it comes to the actual action. It is by this action that the individual tries to assert his or her rights. The big problem in this area lies not in the fact that the individual has to bring action in different courts, but rather in the fact that the conditions for liability to arise have not always been the same. The result of this can be that individual rights do not get the same protection depending on whether the Community or a Member State has infringed them. This is naturally an unpleasant situation. However, it does seem like the Court of Justice has taken action in order to try to solve the problem.

## 1.2 Purpose and Limits of the Topic

The purpose of this thesis is to have look at, and compare, non-contractual State and Community liability in Community law. I will look at the basis of the two remedies as well as the actual action for damages, and the substantive conditions that an applicant has to fulfil in order to obtain reparation. Furthermore, I will look closely at the case-law that might have united the two remedies and see what questions are left for future case-law to decide. In order to fully understand the basis of State liability it is necessary to look at the development in case-law, which led up to the laying down of Community remedies. This includes such basic principles as direct effect and supremacy of Community law. However, these principles provide the foundation for protection of individual rights and must therefore be briefly examined.

Community remedies are subject to both substantive and procedural conditions. The former concerns issues such as damage and causation, whereas the latter handles for example time-limits and evidential rules. It is a principle of Community law that procedural matters are left to the legal systems of the Member States. The Court of Justice does not want to interfere with procedural matters unless it really has to. This thesis will deal only with the substantive side of the remedies.

This thesis deals with the non-contractual liability of the Community and of Member States vis-à-vis individuals. I will not deal with the Community's and Member States liability in relation to each other. Furthermore, joint liability of the Community and the Member States in relation to individuals will not be considered. Most of all, this thesis will not deal with contractual liability of any kind. Consequently, when I speak of liability in this thesis, I mean only non-contractual liability.

## **1.3 Method and Material**

The issues considered in this thesis are mainly the result of case-law from the Community courts. Remedies in national courts have been laid down by the Court of Justice, and Community liability has been developed and clarified through case-law. Therefore, I have mainly studied case-law. In order to fully understand this case-law, and get different opinions on it I have also studied comments in various legal articles and text books. In order not to make the text too theoretical I will try to go through the most important facts of the cases I consider. If a case or its facts are less interesting, or if the point made by the case is somewhat less important, I will only make a reference to the judgement. Apart from case-law I have studied quite a few articles in various legal journals, general text books on Community law and books dealing with more specific aspects.

## **1.4 Contents**

This thesis will start with a look at the case-law, which led up to the laying down of certain Community remedies in national courts. This development starts with the principle of direct effect and ends in the remedy of State liability. In Chapter 3 I will look at the non-contractual liability of the Community, and in Chapter 4 I will have a closer look at the principle of State liability. Chapter 5 deals with some recent case-law that might have unified the conditions for liability to arise. In Chapter 6 I will carry out my analysis of the two kinds of liability. The last chapter, Chapter 7, will contain some brief concluding remarks.



# 2 Remedies and Private Enforcement

## 2.1 Introduction

Community law contains various kinds of remedies. Some of them can be found in the Treaty whereas some have been developed in the case-law of the Court of Justice. Some of them are available to Member States and some are available to individuals. The remedies laid down by the Treaty are what they are and have more or less always been there. They were incorporated in the Treaty and naturally there has been no question about their existence since then. When it comes to remedies established by case-law on the other hand, there has been a development, which has gradually led to the laying down of the remedies. In order to get the full picture it is necessary to start by having a brief look at this development.

## 2.2 Private Enforcement

Private enforcement means that an individual enforces his or her Community rights in order to be able to exercise them. An early, and very important, example of private enforcement is the well-known *Van Gend en Loos* case.<sup>1</sup> The case concerned a Dutch import duty and Van Gend en Loos, which was importing goods from Germany, argued that the duty was contrary to Community law. The relevant provision of the Treaty said that the Member States were not allowed to adopt new customs duties or increase existing ones. The Dutch court decided to ask the Court of Justice to give a preliminary ruling on whether the relevant provision of the Treaty had direct application in national law in the sense that individuals could, on

the basis of that provision, claim rights that the national court had to protect. The Court of Justice held that the EEC Treaty had created a new legal order of international law and that the Member States had limited their sovereign rights in certain fields for the benefit of this legal order. Furthermore, the subjects of this legal order were not only the Member States but also their nationals. Community law was held to be able to confer both rights and obligations on individuals. The relevant provision of the Treaty was a clear and unconditional negative obligation for the Member States. It did not need any implementing measures to become part of national law and was thus ideally adapted to produce direct effects in the legal relationship between Member States and their nationals. Thus, the relevant article of the Treaty could create individual rights, which had to be protected by national courts.

The *Van Gend en Loos* judgement introduced the principle of direct effect in Community law. Direct effect means two things. Firstly, a provision with direct effect confers a right on individuals. Secondly, that right can be relied on in proceedings before national courts, and should, according to *Van Gend en Loos*, be protected by national courts. The conditions for direct effect to arise are that the relevant provision has to be unconditional and sufficiently precise.<sup>2</sup>

The principle of direct effect has been very important for the enforcement and implementation of Community law in the Member States. There was nothing in the Treaty indicating that its provisions assigned rights to individuals. The Treaty seems to be addressed solely to the Member States. Articles 211 and 226 of the Treaty give the Commission a duty to supervise the implementation of Community law in the Member States. By introducing direct effect, the Court of Justice accomplished two things. First of all it was able to involve individuals in the process of European

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<sup>1</sup> Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

integration. Individuals were given rights by the Treaty and could exercise and assert these rights against the Member States. Secondly, by giving individual parties an incentive to enforce their rights, the Court of Justice managed to take some load off of the shoulders of the Commission. The Commission was no longer alone in supervising national application of Community law. The principle of direct effect was thus developed and expanded as a mechanism for enhancing the effectiveness of Community law at the national level.<sup>3</sup>

The *Van Gend en Loos* ruling was very controversial. This can be seen in the fact that three of the then six Member States intervened in the case. This implies that direct effect was probably not an intended effect of the Treaty when it was adopted. However, the principle has continued to develop and today most binding types of Community law are capable of having direct effect.<sup>4</sup>

The principle of direct effect is complemented by the principle of supremacy of Community law. This principle says that national law, which does not comply with Community law, has to be set aside. Supremacy was introduced by the Court of Justice in the *Costa v. E.N.E.L.* case<sup>5</sup>, about a year after the judgement in the *Van Gend en Loos* case. In this case the Italian Government contended that an Italian court was obliged to apply national law and could therefore not use Article 234 EC to ask the Court of Justice for a preliminary ruling. The Court of Justice held that the Treaty was its own legal system, which had become an integral part of national law and had to be applied by national courts. This integration into national law made it impossible for a Member State to give precedence to a unilateral and subsequent measure of national law. Community law was to take precedence

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<sup>2</sup> Brealey and Hoskins, *Remedies in EC Law* (1998), p. 60, see also e.g. Case 9/70 *Grad v. Finanzamt Traunstein* [1970] ECR 825 paragraph 9, Case 8/81 *Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53 paragraph 25.

<sup>3</sup> Craig and De Búrca, *EU Law – Text, Cases and Materials* (1998) p. 174.

<sup>4</sup> Craig and De Búrca p. 176.

<sup>5</sup> Case 6/64 *Costa v. E.N.E.L.* [1964] ECR 585.

over national legislation. Consequently Article 234 EC was to be applied regardless of any domestic law, when questions about the interpretation of the Treaty arose.

The doctrine of supremacy of Community law was developed further in the *Simmenthal* case.<sup>6</sup> An Italian judge found that there was a conflict between Community law and a subsequent national law. Under the Italian Constitution the question whether a certain law was unconstitutional could be determined only by the Constitutional court. The effect of this was that precedence could not be given to Community law since a lower national court could not declare the conflicting national law void. The judge did not know how to handle the situation and referred the case to the Court of Justice for a preliminary ruling. The Court stressed that direct applicability of Community law meant that its provisions had to be fully and uniformly applied in all the Member States from their entry into force and for as long as they continued to be in force. Furthermore, in the relationship between national and Community law, the latter was to take precedence over conflicting national provisions and also make it impossible to adopt new national legislation which was incompatible with Community law. The effect of this was that every national court was obliged to apply Community law in its entirety and protect rights, which it conferred on individuals. Conflicting national provisions were, thus, to be set aside. The reason behind this was that any other solution would have impaired the effectiveness of Community law.

The *Simmenthal* case can also be seen as an expression of the general Community remedy of disapplication of national law. Disapplication of national law is a consequence of the supremacy of Community law. When Community law takes precedence over conflicting national law, the latter

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<sup>6</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

has to be set aside, or disapplied.<sup>7</sup> However, when striving towards the protection of individual rights within the Community it is also important to remember that uniform application is one of the cornerstones of Community law. Uniform application of Community law throughout the Community means that Community law is given full effectiveness. Disapplication of national provisions clears away obstacles to the protection of individual rights but it does not automatically give those rights the same level of protection throughout the Member States. In other words, disapplication of national rules does not lead to harmonization of national legal rules.<sup>8</sup> The effect of this is that the rights granted by Community law might not be uniformly protected throughout the Community and consequently the effectiveness of Community law is in danger. To deal with this dilemma the Court of Justice has introduced certain Community law based remedies that are to be made available in all the Member States when certain conditions are fulfilled.

## 2.3 Judicial Control

Before turning to the remedies it is necessary to say a few words about the right to judicial control. This right means that whenever an individual claims to have a Community right, which might have been infringed by a Member State, the individual must be given the opportunity to try his or her case in a court. This right was first laid down in the *Johnston* case.<sup>9</sup>

Johnston was a female police officer in Northern Ireland. National law said that only male police officers were allowed to carry firm arms. This made female officers less useful, and when Johnston's contract ran out she did not get it renewed. Under national law she could not get her case tried in court.

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<sup>7</sup> See Van Gerven, *Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?*, (1995) 32 C.M.L.Rev. 679, p. 686.

<sup>8</sup> Ibid p. 690.

Johnston then brought an action claiming that the national law was incompatible with the Community rules on equal treatment. A reference for a preliminary ruling was made and the case came before the Court of Justice. The Court held that the requirement of judicial control was a general principle of law, which had to be available in national legal systems. This statement was inspired by the legal systems of the Member States and Articles 6 and 13 of the ECHR.

The *Heylens* case is also interesting.<sup>10</sup> Heylens was a Belgian citizen who worked as a football coach in France. His Belgian diploma was not recognised in France and he was therefore not allowed to carry on his work. The decision of the French authorities could not be challenged. Heylens continued working and was finally prosecuted in French courts. The case came before the Court of Justice. The Court once again referred to Articles 6 and 13 of the ECHR. Under the EC Treaty, Heylens had the right to free access to employment. The French authorities had infringed this right, and consequently Heylens had to be able to challenge that decision.

## 2.4 Community Remedies in National Courts

The above-mentioned cases and principles taken together give an individual a powerful weapon in dealing with Member State infringements of Community rights. However, the Court has not stopped there. Further developments of the case-law have provided individuals with certain remedies that must be available in relation to Member State infringements of Community law. In the early case law, the Court of Justice showed some reluctance towards interfering with the national legal systems.<sup>11</sup> Remedies were initially held to be a matter for the Member States. However, the Court

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<sup>9</sup> Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

<sup>10</sup> Case 222/86 *UNECTEF v. Heylens* [1987] ECR 4097.

<sup>11</sup> See Case 6/60 *Humblet v. Belgium* [1960] ECR 559, Case 34/67 *Lück v. Hauptzollamt Köln-Rheinau* [1968] ECR 245 and Case 13/68 *Salgoil v. Italy* [1968] ECR 453.

gradually changed its mind and today I think it is safe to say that we have three Community law based remedies that must be available to an individual trying to enforce his or her Community rights in a national court.

### **2.4.1 Restitution**

Restitution means that an individual, who, contrary to Community law, has had to pay money to a Member State, has an opportunity of getting the money back. The main rule is that an individual has the right to obtain the remedy of restitution when money has been paid contrary to Community law. The right to restitution has been recognised by the Court of Justice in various situations. In *Rewe-Zentralfinanz*<sup>12</sup> the private party was given a right to restitution when the Member State had collected an import duty, which was contrary to Article 25 EC. In *Express Dairy Foods* the Court held that there was a right of restitution when a Member State had collected money on behalf of the Community, under a Community measure which was subsequently held to be invalid.<sup>13</sup>

When money has been paid contrary to a directly effective provision of Community law the right to restitution is based on Article 10 EC.<sup>14</sup> Under Article 10 the Member States are obliged to give effect to Community law. The Court held in *Rewe-Zentralfinanz* that under Article 10, it is the national courts that are entrusted with ensuring the legal protection which individuals derive from directly effective provisions of Community law.<sup>15</sup> This means that if money has been paid contrary to directly effective Community law, there has to be a right for the individual to be able to recover the money. Without that right, or remedy, the effectiveness of the relevant provision would be seriously impaired. The relevant Member State would also have failed to protect the individual right conferred by Community law.

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<sup>12</sup> Case 33/76 *Rewe-Zentralfinanz v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

<sup>13</sup> Case 130/79 *Express Dairy Foods v. IBAP* [1980] ECR 1887.

<sup>14</sup> Brealey and Hoskins (1998) p. 165.

The first important case in the area of restitution, and indeed in the area of remedies in national courts, is the *Rewe-Zentralfinanz* case. The case concerned a customs duty, which was levied in breach of Article 25 EC. The actual right of restitution was not really discussed in the case. Perhaps this was because the national court did not object in principle to the applicant's claim to be reimbursed. The question in the case was of a more procedural nature. The Court of Justice did however say that it was for the national courts to ensure the legal protection of individual rights under Community law, and consequently implied that there was a right to restitution.

In the *Just* case the Court of Justice made it clear that the right of restitution is not absolute in the sense that the individual is always entitled to get the money back.<sup>16</sup> In *Just* the Member State was allowed to argue unjust enrichment as a defence against the individual's claim to be reimbursed. Thus, when the cost of an unlawful charge has been passed on to someone else, the national court can take this into consideration and, if it is possible under national law, refuse restitution.

The *Comateb* case sums up the law on restitution fairly well.<sup>17</sup> The Court held that repayment of charges levied by a Member State in breach of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting such charges.<sup>18</sup> The Member State is therefore in principle required to repay charges levied in breach of Community law. The possibility to refuse restitution when the charges have been passed on to someone else is an exception to this principle. The exception can be relied on only where it is established that the charge has been borne in its entirety by another person and that reimbursement of the trader would constitute unjust enrichment. The

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<sup>15</sup> *Rewe-Zentralfinanz* paragraph 5.

<sup>16</sup> Case 68/79 *Hans Just v. Danish Ministry for Fiscal Affairs* [1980] ECR 501.

<sup>17</sup> Joined cases C-192/95 – C-218/95 *Comateb and Others v. Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165



requirement of restitution was quite smoothly accepted by the Member States. Perhaps this was because there already existed some form of action for restitution in the Member States, and, in particular, there was no direct clash with some constitutional or other principles, as we will see in the next passage that there was in, for instance, *Factortame*.<sup>19</sup>

## 2.4.2 Interim Relief

The second specific remedy imposed by Community law is the remedy of interim relief. Interim relief can be said to be a procedural right, in the sense that it is intended to ensure the effectiveness of substantive proceedings commenced before a court.<sup>20</sup> The remedy of interim relief has been considered to be a corollary of the existence of directly effective rights.<sup>21</sup> In order for a potential right under Community law not to be wholly ineffective it is necessary that an individual can ask a court to grant interim relief to protect his or her position while the content of the right in question is being established. If such protection were not possible, the individual would not be able to effectively rely on his or her right, once it is fully established.

The first case in the area of interim relief is the above mentioned *Factortame* ruling.<sup>22</sup> The dispute in the case concerned a piece of legislation, which made it virtually impossible for non-nationals to carry out fishing activities in the UK. Some Spanish fishermen objected to the legislation and relied on their right to free movement and the freedom of establishment under the EC Treaty. There was a risk that they would suffer irreparable damage while the exact content of their rights was being established. To protect the position they might be entitled to under

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<sup>18</sup> Ibid paragraph 20.

<sup>19</sup> Prechal, *EC Requirements for an Effective Remedy*, in Lonbay and Biondi (Eds.), *Remedies for Breach of EC Law* (1997), p. 7.

<sup>20</sup> Van Gerven, *Of Rights, Remedies and Procedures*, (2000) 37 C.M.L.Rev. 501, p. 515.

<sup>21</sup> Arnall, *Rights and Remedies: Restraint or Activism?*, in Lonbay and Biondi (Eds.) p. 16.

<sup>22</sup> Case C-213/89 *The Queen v. Secretary of State for Transport ex parte: Factortame Ltd and Others* [1990] ECR I-2433.

Community law, to be registered as fishing companies in the United Kingdom, they applied for interim relief from the national law. Such interim relief would mean that the applicants could pursue fishing activities while the case was being decided. The substantive conditions in national law for interim relief to be granted were fulfilled. However, the national courts did not have the power, under national law, to grant the application. The Court of Justice focused on the effectiveness of Community law, together with the principle of cooperation in Article 10 EC, and held that the national court had to grant the relief. The national rule standing in the way of the effectiveness of Community law, and the right granted thereby, had to be set aside.

The *Factortame* ruling was very controversial. The national rule that had to be set aside was an old constitutional principle, which said that interim relief could not be granted against the Crown. Still, the Court of Justice insisted on the effectiveness and supremacy of Community law, and required that interim relief were granted. It is possible to argue that the *Factortame* ruling was not a case of the specific remedy of interim relief, but rather the more general remedy of disapplying national law. Be that as it may, the result was still that the national court had to grant a remedy without being allowed to do so under national law. One way to put it is that the Court of Justice required that the national court had to broaden the scope of an existing remedy.<sup>23</sup>

In the *Zuckerfabrik* case the Court of Justice laid down the conditions under which a national court has to grant interim relief.<sup>24</sup> The applicants in the case wanted to be granted interim relief from a national measure, which was implementing a Community regulation. In practice, the interim relief sought would have the effect of indirectly suspending also the regulation. This is interesting in relation to the *Foto-Frost* case, which says that only the Court

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<sup>23</sup> Van Gerven (1995) p. 693.

of Justice has jurisdiction to declare a Community regulation invalid.<sup>25</sup> Nevertheless, the Court held that the national court was allowed, and obliged, to grant interim relief. The Court motivated this by stating that the interim legal protection for individuals before national courts under Community law had to be the same, irrespective of whether they contested the compatibility of national legal provisions with Community law or the validity of secondary Community law.<sup>26</sup> The Court drew a parallel to Article 242 EC and explained that the conditions for interim relief applied by the Court of Justice itself, had to be applied also by national courts. Since the case involved something similar to a national court's power to suspend the enforcement of Community law, the Court of Justice laid down very strict conditions. A national court could grant interim relief only:

- (i) if that court had serious doubts as to the validity of the Community measure and, if the question of validity had not already been brought to the Court of Justice, referred that question itself;
- (ii) if there was urgency and a threat of serious and irreparable damage to the applicant; and
- (iii) if the national court took due account of the Community's interests.<sup>27</sup>

In the *Atlanta* case the applicants applied for interim measures directly in relation a Community regulation.<sup>28</sup> Instead of trying to suspend the enforcement of the contested measure Atlanta applied for a positive order, which was in conflict with the terms of the regulation. The Community regulation in question provided for a system of import quotas for bananas imported from outside the Community. Atlanta was an importer of such bananas who did not like the regulation and therefore challenged it. At the

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<sup>24</sup> Joined Cases C-143/88 & C-92/89 *Zuckerfabrik Süderdithmarschen v. Hauptzollamt Itzehoe* [1991] ECR I-415.

<sup>25</sup> Case 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

<sup>26</sup> *Zuckerfabrik* paragraph 20.

<sup>27</sup> *Ibid* paragraph 33.

same time Atlanta applied for an interim measure increasing its quota under the regulation. When the case came before the Court of Justice it referred to Articles 242 and 243 EC and held that the interim legal protection of individuals under Community law in national courts had to be the same whether the individuals were seeking suspension of enforcement, as in the *Zuckerfabrik* case, or the grant of interim measures settling or regulating the disputed legal positions for their benefit.<sup>29</sup> The national court was thus allowed to grant the requested measures. The applicable conditions were to be the same as in *Zuckerfabrik*. However, when considering the application the national court had to respect any decisions of the Community courts on the validity of the regulation or on an application for similar interim measures at Community level.

From *Zuckerfabrik* and *Atlanta* it is clear that national courts can order both interim relief and interim measures in relation to national measures implementing Community regulations, and also directly in relation to a Community regulation. Individual rights are given effective protection not only in relation to incompatible national law but also in relation to Community law, which is likely to be invalid.<sup>30</sup>

### 2.4.3 State liability

This remedy will be dealt with at length in Chapter 4. At this stage it is enough to say that the Court of Justice made it part of Community law in the *Francovich* case<sup>31</sup> and developed it further in *Brasserie du Pêcheur and*

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<sup>28</sup> Case C-465/93 *Atlanta Fruchthandelsgesellschaft and Others v. Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3781.

<sup>29</sup> *Ibid* paragraphs 27,28.

<sup>30</sup> From the *T. Port* case it is clear that national court cannot grant interim measures when the Community has failed to act. In such situations only the Community courts can grant interim measures. Case C-68/95 *T. Port v. Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065.

<sup>31</sup> Cases C-6/90 & C-9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5357.

*Factortame III*<sup>32</sup>. The essence of the remedy is that when a Member State has infringed an individual Community right, the individual can bring an action in national courts and obtain reparation for the damage he or she has suffered. The basis of the remedy can be found in the requirement that Community law has to be effective, and in the obligation of the Member States to enhance this effectiveness by protecting individual rights.

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<sup>32</sup> Joined Cases C-46/93 & C-48/93 *Brasserie du Pêcheur v. Germany, and The Queen v. Secretary of State for Transport ex parte Factortame and Others* [1996] ECR I-1029.

# 3 Community liability

## 3.1 Introduction

In this Chapter I will look at the remedy available to an individual who thinks that his or her Community rights have been infringed by some Community institution. This is the only remedy in this thesis, which is expressly laid down in the Treaty. It can be found in Article 288(2) EC, which states:

*In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.*

Article 235 EC confers jurisdiction in cases concerning liability on the Court of Justice. This jurisdiction is exclusive; national courts cannot try such an action.<sup>33</sup>

## 3.2 Purpose and Basis of the Remedy

The purpose of this remedy seems to differ somewhat from the purpose of the private enforcement related ones. The private enforcement remedies available in actions against a Member States have two purposes. Firstly, they give individuals a possibility of protecting their rights and obtaining some sort of justice when an infringement has taken place. Secondly, the remedies serve as a means to further the integration and ensure that the Member States implement and obey their Community obligations. The liability of the Community on the other hand strives only towards the former purpose.

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<sup>33</sup> Cases 106-120/87 *Asteris v. Greece* [1988] ECR 5515, paragraph 14.

Article 288(2) serves as a mechanism whereby losses caused by governmental action may be recovered in an action brought by an individual; a mechanism that has to be part of any developed legal system.<sup>34</sup> Although the purposes of the remedies may be somewhat different, they are the same from the point of view of an individual; both State and Community liability are relied upon in order to obtain reparation and protection of rights.

Article 288(2) obliges the Court of Justice to decide claims with regard to the general principles common to the Member States. To the best of my knowledge this statement has never been of any major importance. However, the Court has indeed drawn inspiration from such principles common to the Member States. Examples of areas in which this has been done are interest, mitigation, liability for legislative acts, remoteness, assessment of damage, assignment of the cause of action, and time bars.<sup>35</sup>

### **3.3 The action**

An action for damages from the Community will be tried by the Court of First Instance, and after appeal by the Court of Justice. The action has, according to Article 43 of the Statute of the Court of Justice, to be brought within a time limit of five years from the occurrence of the event giving rise to it.

The relationship between an action for damages and an action for annulment of Community legislation under Article 230 EC is rather interesting. First of all, if an individual brings an action for damages that he or she has suffered as a consequence of Community legislation, the relevant piece of legislation does not have to be challenged or annulled through an Article 230 action

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<sup>34</sup> Craig and De Búrca p. 516.

<sup>35</sup> Brealey and Hoskins, *Remedies in EC Law*, London 1994, p. 225.

before an action under Article 288(2) can be brought. This has however not always been the case. In *Plaumann v. Commission* the Court held that only an annulled act could give rise to a claim for damages.<sup>36</sup> This position has however changed and it is no longer necessary for a measure to be annulled before it can result in damages.<sup>37</sup> The Court has in later case-law made it clear that an action under Article 288(2) is an independent cause of action, without any connection to actions for annulment under Article 230 or actions for failure to act under Article 232.<sup>38</sup> Furthermore, the time limit for bringing an Article 230 action is considerably shorter than the time limit for an action for damages. An action under Article 230 has to be brought within 2 months. This, taken together with the difficulty of qualifying for standing under Article 230, makes it both easier and a better solution for an individual to bring an action for damages instead of challenging a piece of Community legislation.

Any natural or legal person, including a Member State, who has suffered damage has standing under Article 288(2). However, the damage allegedly suffered has to be personal to the applicant.<sup>39</sup> This means that it is not possible for an association to bring a collective action for damage suffered by its members; the actions have to be brought individually.<sup>40</sup>

When it comes to the conditions that an action has to satisfy in order to obtain damages the Court has made a distinction between two kinds of liability. The first kind concerns liability for legislative acts and the second is other kinds of acts, or administrative acts. The legislative conditions are additional to the more general conditions applicable to administrative acts. Therefore, liability for administrative acts will be considered first.

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<sup>36</sup> Case 25/62 *Plaumann Co. v. Commission* [1963] ECR 95.

<sup>37</sup> Kapteyn & VerLoren van Themaat, *Introduction to the Law of the European Communities*, London 1998, p. 494.

<sup>38</sup> See e.g. Case 5/71 *Zuckerfabrik Schöppenstedt v. Council* [1971] ECR 975.

<sup>39</sup> Case 353/88 *Briantex SAS v. Commission* [1989] ECR 3623, paragraph 6.



### 3.4 Liability for Administrative Acts / General Conditions for Liability

The general conditions for liability were laid down in the *Lütticke* case.<sup>41</sup> When an administrative measure has caused damage an applicant must prove:

- 1) unlawful conduct on the part of the Community;
- 2) damage; and
- 3) causation.

The meaning of the term unlawful is that the conduct has to be contrary to law, and not merely unfair. The Court has also used the terms illegal and wrongful.<sup>42</sup> A good way to show that a conduct is unlawful is to rely on the grounds of annulment listed in Article 230 EC. As stated above, an action under Article 288(2) is independent from Article 230 EC, but since the grounds listed in the latter are grounds for annulment, they can also be relied on in order to show the unlawfulness of a certain Community conduct. However, there are more types of acts for which liability can arise. In the *Grifoni* case, the Commission had acted out of negligence and was thus held liable for damage suffered by Mr Grifoni.<sup>43</sup> Mr Grifoni worked at a meteorological station run by the Commission. The Commission had not followed the local safety requirements, and Mr Grifoni was seriously injured because of this negligence.

The *Adams* case shows that a failure to comply with an obligation can result in liability in damages.<sup>44</sup> The case arose out of an EC competition law

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<sup>40</sup> See Case 72/74 *Union Syndicale v. Council* [1975] ECR 401 and Case 114/83 *Société d'Initiatives et de Cooperation Agricoles v. Commission* [1984] ECR 2589.

<sup>41</sup> Case 4/69 *Lütticke v. Commission* [1971] ECR 325, paragraph 10.

<sup>42</sup> For the different terms used by the Court see Case 4/69 *Lütticke v. Commission* [1971] ECR 325 (illegal), Case 56/75-Rev *Elz v. Commission* [1976] ECR 1097 (wrongful) and Case 59/84 *Tezi v. Commission* [1986] ECR 887 (unlawful).

<sup>43</sup> Case C-330/88 *Grifoni v. EAEC* [1991] ECR I-1045. The case was brought under Article 188 of the Euratom Treaty, which is equivalent to Article 288 EC.

<sup>44</sup> Case 145/83 *Stanley Adams v. Commission* [1985] ECR 3539.

situation. Mr Adams was working in Switzerland for a company called Hoffman La-Roche. He suspected that his employer was not playing by the rules and informed the Commission about this. Naturally he wished to remain anonymous, mainly because under Swiss law it was not allowed to reveal such information. However, the Commission failed to protect Mr Adams' identity and Hoffman La-Roche got the Swiss authorities to arrest him for economic espionage. Mr Adams later sued the Commission for damages. The Court of Justice held that the Commission had had a duty of confidentiality not to reveal Mr Adams identity. The Commission was thus held to be liable in damages, its liability was however slightly diminished since the Court found that Mr Adams also had been a bit negligent.

Under Article 288(2) the Community is responsible for damage caused by its institutions or by its servants in the performance of their duties. When it comes to the latter, the Community is liable for acts of its servants which "by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions".<sup>45</sup> In the *Sayag v. Leduc* case the Court of Justice held that the Community could not be made responsible for a traffic accident caused by a Community civil servant in a private car in the course of his employment.<sup>46</sup>

When it comes to the damage that the applicant claims to have suffered, it has to be clearly specified. It is not possible to claim damages at large since such a claim for an unspecified form of damage will be regarded as inadmissible.<sup>47</sup> The nature of the damage thus has to be clearly set out in the application, for example loss of earnings or personal injuries. However, it is possible to claim damage that cannot be precisely assessed at the moment of the application. In such a case, the damage has to be imminent and foreseeable with sufficient certainty.<sup>48</sup> Thus it is possible to bring a claim

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<sup>45</sup> Case 9/69 *Sayag v. Leduc* [1969] ECR 329 paragraph 7.

<sup>46</sup> *Ibid* paragraph 12.

<sup>47</sup> *Zuckerfabrik Schöppenstedt* paragraph 9.

<sup>48</sup> Cases 56-60/74 *Kampffmeyer v. Commission* [1976] ECR 711.

asking for a finding of the Community's liability, and come back later with a specific amount.

It is the applicant that has to prove that the Community is liable. The Court of Justice is, as any normal court, free to decide whether the burden of proof has been fulfilled. The applicant has to provide the Court with conclusive proof.<sup>49</sup>

The Community has been held liable for many kinds of damages, not just pure economic loss. The Court has thus allowed claims for loss of earnings,<sup>50</sup> for penalties paid for cancellation of contracts,<sup>51</sup> for lost profit on concluded or foreseeable contracts,<sup>52</sup> for the wrongful abolition of production refunds<sup>53</sup> and for personal injuries and pain and suffering<sup>54</sup>.

Article 288(2) EC obliges the Community to make good any damage caused by its institutions or servants, but it does not require that any harmful consequence of an unlawful behaviour has to be made good. The Court has interpreted this passage as demanding that a damage has to be a sufficiently direct consequence of an unlawful conduct. The applicant thus has to show that there is a direct link between the conduct of the Community and the damage suffered. The *Dumortier Frères v. Council* case is an example of how an applicant failed to establish a direct link between conduct and damage.<sup>55</sup> The applicants claimed that the Council had unlawfully abolished some production refunds, and consequently forced the applicants to close their factories. The Court rejected the claim for compensation since the

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<sup>49</sup> Case 74/74 *CNTA v. Commission* [1976] ECR 797 paragraphs 15 and 16.

<sup>50</sup> Joined Cases C-104/89 & C-37/90 *Mulder v. Council and Commission* [1992] ECR I-3061.

<sup>51</sup> *Kampffmeyer v. Commission*, see note 48 above.

<sup>52</sup> *Ibid*, *CNTA v. Commission*, see note 49 above, Case 152/88 *Sofrimport v. Commission* [1990] ECR I-2477.

<sup>53</sup> See for example Case 238/78 *Ireks Arkady v. Council* [1979] ECR 2955. For more cases of this kind see Brealey and Hoskins (1994) p. 235.

<sup>54</sup> Joined Cases 169/83 & 136/84 *Leussink v. Commission* [1986] ECR 2801, Case 145/83 *Stanley Adams v. Commission* [1985] ECR 3539.

applicants had failed to show that the Council had caused the damage. Furthermore, the Court held that even if the abolition of the refunds had caused the financial problems for the applicants, those problems would not be a sufficiently direct consequence of the unlawful conduct of the Council. Thus, even if the Council had caused the problems, there was no direct link between the two and the Community could not be held liable.

### 3.5 Liability for Legislative Measures

When it comes to legislative measures involving choices of economic policy, the Court has added some additional requirements, which must be fulfilled in order for liability to arise. The Court is thus more restrictive in cases concerning liability for legislative measures. In the *HNL* case the Court explained why this is the case:<sup>56</sup>

“This restrictive view is explained by the consideration that the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals.”<sup>57</sup>

Thus, when it comes to liability for legislative acts involving choices of economic policy there might be a clash between individual interests and the public interest. To give the legislator some freedom, the Court has laid down additional conditions, which the applicant must fulfil. The applicant thus has to prove:

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<sup>55</sup> Joined Cases 64, 113/76, 167, 239/78, 27, 28, 45/79 *Dumortier Frères v. Council* [1979] ECR 3091.

<sup>56</sup> Cases 83, 94/76, 4, 15, 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG v. Council & Commission* [1978] ECR 1209.

<sup>57</sup> *Ibid.* paragraph 5.

- 1) unlawful conduct *and* a sufficiently serious breach of a superior rule of law for the protection of the individual;
- 2) that the unlawful conduct has caused damage *and* that the damage goes beyond the bounds of the economic risks inherent in the applicant's business;
- 3) that there is no overriding consideration of public interest, which absolves the Community from liability.<sup>58</sup>

The condition that the unlawful conduct has to be a sufficiently serious breach of a superior rule of law for the protection of the individual is called the *Schöppenstedt principle*, or the *Schöppenstedt test*. This is because the principle was laid down in the *Schöppenstedt* case.<sup>59</sup> The applicant in the case sued the Council for damages claiming that a certain regulation concerning the sugar market was discriminatory and thus unlawful. The applicant claimed to have suffered loss as a result of this unlawful legislative act. The Court of Justice held that in such a case, liability of the Community presupposed at the very least that the act in question was unlawful. That was however not enough. In relation to legislative acts of economic policy, the Community could not be held liable under Article 288(2) EC unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual had occurred. The Court decided that no such violation could be proven, and therefore rejected the applicant's claim.

At this stage it seems logical to say a few words about the meaning of the term 'legislative act involving a choice of economic policy'. A legislative act is normally an act which is legislative as opposed to administrative, mainly regulations and directives. However, the question whether an act is legislative for the purposes of the *Schöppenstedt test* depends on the substance of the measure and not the legal form in which it is expressed.<sup>60</sup> The decisive thing is thus the actual content of the contended measure and

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<sup>58</sup> Brealey and Hoskins (1994) p. 237.

<sup>59</sup> See note 38 above.

not the form in which it is adopted. A measure which is formally called a regulation might, for the purposes of Article 288(2), be an administrative decision. The other way around is of course also possible. This might be a very important classification since the conditions for liability to arise differ between legislative and administrative acts. The situation is thus a bit similar to the one under Article 230 EC. Whether a measure is challengeable or not will depend on substance, not form. However, the fact that an applicant has a sufficient interest for challenging under Article 230 will not automatically mean that the measure in question is not legislative for the purposes of Article 288(2).<sup>61</sup> One particular measure can thus be an administrative decision for the purposes of Article 230, and a legislative act for the purposes of Article 288(2). For the *Schöppenstedt principle* to be applicable it is also necessary that the legislative act involves a choice of economic policy. This means that there has to be an element of discretionary choice on the part of the Community institutions. Most legislative acts have these features, but there might be situations where no discretion is involved.<sup>62</sup>

A superior rule of law is any rule of law which is capable of invalidating the contested legislative measure. The rule of law must be at least partly intended to protect individual interests.<sup>63</sup> Such superior rules can be found directly in the Treaty. An example of this is the ban on discrimination in Article 34(3), which is concerned with the common agricultural policy.<sup>64</sup> Many of the general principles of Community law have also been held to qualify as superior rules of law for the protection of individual interests. Among these are the principles of non-discrimination<sup>65</sup>, legitimate

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<sup>60</sup> Craig and De Búrca p. 518.

<sup>61</sup> Cases T-480 & 483/93 *Antillean Rice Mills v. Commission* [1995] ECR II-2305.

<sup>62</sup> Craig and De Búrca p. 518.

<sup>63</sup> Lewis, *Remedies and the Enforcement of Community Law*, London 1996, p. 265.

<sup>64</sup> Craig and De Búrca p. 518.

<sup>65</sup> *Dumortier Frères v. Council*, see note 55 above.

expectations<sup>66</sup>, proportionality<sup>67</sup>, non-retroactivity<sup>68</sup> and free trade between the Member States<sup>69</sup>.

The most difficult thing for the applicant to prove is that the allegedly unlawful conduct amounts to a *sufficiently serious breach* of a superior rule of law. For the breach to be sufficiently serious the applicant must show that the Community institution has manifestly and gravely disregarded the limits on the exercise of its power when adopting the invalid legislative measure.<sup>70</sup> This requirement is extremely difficult to satisfy.<sup>71</sup> In early case-law the Court held that the conduct of the institutions had to be verging on the arbitrary in order to be sufficiently serious.<sup>72</sup> The Court does seem to have relaxed that requirement a bit when it held in the *Stahlwerke* case that it is no longer necessary to show that the conduct was verging on the arbitrary.<sup>73</sup> However, this does not mean that liability will arise as soon as a legislative act is illegal. There still has to be a sufficiently serious breach but the required degree of seriousness seems to be slightly lower after the *Stahlwerke* case.<sup>74</sup> There are some factors that the Court of Justice will take into account when deciding whether a breach is sufficiently serious. These factors include the nature of the breach, whether the damage exceeds the risks inherent in the business, and the size of the group of potential claimants.<sup>75</sup> Other aspects taken into consideration are the category of persons affected, the extent of the damage and knowledge of the effects.<sup>76</sup>

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<sup>66</sup> *Mulder v. Council and Commission*, see note 50 above, *Sofrimport v. Commission*, see note 52 above, *CNTA v. Commission*, see note 49 above.

<sup>67</sup> Case 281/84 *Zuckerfabrik v. Council and Commission* [1987] ECR 49.

<sup>68</sup> *CNTA v. Commission*, see note 49 above.

<sup>69</sup> Case 30/66 *Becher v. Commission* [1967] ECR 285.

<sup>70</sup> *Ireks-Arkady GmbH v. Council and Commission*, see note 53 above.

<sup>71</sup> Brealey and Hoskins (1994) p. 238.

<sup>72</sup> Cases 116 & 124/77 *Amylum NV and Tunnel Refineries Ltd. v. Council and Commission* [1979] ECR 3497 paragraph 19.

<sup>73</sup> Case C-220/91P *Stahlwerke Peine-Salzglitter AG v. Commission* [1993] ECR I-2393.

<sup>74</sup> Craig and De Búrca p. 524-525.

<sup>75</sup> Lewis p. 265.

<sup>76</sup> Brealey and Hoskins (1994) p. 238-239.

The condition that the damage has to go beyond the bounds of the economic risks inherent in the applicant's business means that an individual has to accept certain harmful effects as a result of Community legislation. Some harmful effects are viewed as a risk, which is inherent in the business. The Court explained this in the *HNL* case:

“[I]ndividuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void.”<sup>77</sup>

In this case there was an unlawful regulation but compensation could not be rewarded. The effect of the regulation was that the applicant's production costs increased with 2 %. This effect was held to be a risk inherent in the activities of the relevant business.<sup>78</sup>

The last condition for liability to arise is that there can be no overriding consideration of public interest. This means that in some cases there are public interests that are more important than the individual one. In such cases the Community will not be liable.<sup>79</sup> Examples of when there are overriding public interests can be when there are serious disturbances in the market or where the market is operating artificially. In such cases the Community can take action in the interest of the Community as a whole, rather than caring for every individual interest.<sup>80</sup>

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<sup>77</sup> *HNL*, see note 56 above, paragraph 6.

<sup>78</sup> Brealey and Hoskins (1994) p. 240-241.

<sup>79</sup> *CNTA v. Commission*, see note 49 above, paragraph 43, Case 97/76 *Merkur v. Commission* [1977] ECR 1063 paragraph 5.

<sup>80</sup> Brealey and Hoskins (1994) p. 241.



# 4 State Liability

## 4.1 Introduction

So far I have looked at the principles behind private enforcement and the Community remedies developed by the Court of Justice. In the previous Chapter I dealt with the remedy available to an individual in relation to the Community. The corresponding remedy at Member State level is State liability. In order to be able to compare the two it is now necessary to have a closer look at the latter.

## 4.2 Basis of the Remedy

The principle of State liability was introduced into Community law in the *Francovich* case in 1991.<sup>81</sup> In its early case-law the Court had hinted that there might be something similar to a principle of State liability in Community law. In the *Russo* case, the Italian Government had breached Community law.<sup>82</sup> The Court of Justice held that if an individual had suffered damage as a result of this action, Italy had to take the consequences of that in the context of the provisions of national law relating to State liability. The *Humblet* case is another early example.<sup>83</sup> The Court of Justice held that if a national measure was contrary to Community law, the Member State had to make reparation for any unlawful consequences. However, these early cases referred to national remedies, and it was not until the *Francovich* ruling that State liability was established as a Community remedy, which had to be available in national courts.

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<sup>81</sup> See note 31 above.

<sup>82</sup> Case 60/75 *Russo v. AIMA* [1976] ECR 45.

<sup>83</sup> See note 11 above.

The dispute in the case arose out of the fact that Italy had failed to implement a directive on protection of employees in the event of the insolvency of the employer. Francovich was an employee who would have been protected if the directive had been correctly implemented. Instead, when his employer could not pay him, he brought an action against the Italian state in order to get either his guarantee payment under the directive, or damages for Italy's failure to implement the directive. The Court of Justice was asked, firstly, whether the directive produced direct effect so that Francovich could rely on it in relation to the Italian State. The second question was whether employees could sue the Member State for damages, which they had suffered as a result of the non-implementation of the directive in question.

The Court of Justice held that the directive did not have direct effect. The provisions of the directive were sufficiently precise and unconditional as regards the persons entitled to the guarantee and the content of the guarantee. However, the provisions did not identify the person who was liable to pay the guarantee and the Member State could not be held liable just because it had failed to implement the directive. Thus, there was no directly effective right of payment, which could be relied on in the national courts.<sup>84</sup>

The question then was whether there was any principle of State liability in Community law. The Court began by referring to the important rulings in the *Van Gend en Loos*<sup>85</sup>, *Costa v. E.N.E.L.*<sup>86</sup>, *Simmenthal*<sup>87</sup> and *Factortame*<sup>88</sup> cases. The duty of national courts to ensure that Community rules take full effect and to protect the rights that Community law confers on individuals was particularly stressed.<sup>89</sup> The court went on to state that the

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<sup>84</sup> *Francovich* paragraph 26.

<sup>85</sup> See note 1 above.

<sup>86</sup> See note 5 above.

<sup>87</sup> See note 6 above.

<sup>88</sup> See note 22 above.

<sup>89</sup> *Francovich* paragraph 32.

full effectiveness of Community rules would be impaired and the protection of the rights which they granted would be weakened if individuals were unable to obtain redress when their rights were infringed by a breach of Community law, for which a Member State could be held responsible. This was particularly so when, like in this case, the effectiveness of Community rules depended on state action, and when an individual could not assert his or her right because of lack of action on the part of the state. The principle of State liability for breaches of Community law was then found to be inherent in the system of the Treaty. To further illustrate its point the Court referred to Article 10 EC, and the Member States' obligations to take all appropriate measures in order to ensure fulfilment of their obligations under Community law, as a further basis for State liability. Thus, State liability for reparation of damages caused to individuals by breaches of Community law attributable to the state was found to be a principle of Community law.<sup>90</sup>

When the principle was laid down the Court went on to establish three substantive conditions for State liability, in the case of non-implementation of a directive. The first condition was that the directive must be intended to confer rights on individuals. As a second condition those rights should be possible to identify and the third condition was that there had to be a causal link between the breach of the State's obligation and the loss or damage suffered by the individual. When those conditions were fulfilled the individual had a right, founded directly on Community law, to obtain reparation. Although the right was founded directly on Community law it was on the basis of national law on liability that the State had to make reparation. The Court referred to *Rewe-Zentralfinanz*<sup>91</sup> and said that in the absence of Community rules it was for the national legal order to designate the competent courts and lay down the procedural rules for proceedings intended to safeguard the rights which individuals derived from Community law. However, the substantive and procedural conditions for reparation

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<sup>90</sup> Ibid paragraphs 33-37.

<sup>91</sup> See note 12 above.

could not be less favourable than those relating to similar domestic claims, and could not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.<sup>92</sup>

From *Francovich* it is clear that the principle of State liability is a principle of Community law. In fact, it was found to be inherent in the system of the Treaty and, consequently, the right to obtain reparation is founded directly on Community law. Thus, the court laid down in *Francovich* a remedy arising solely out of Community law. It is not a national remedy being made available in a Community situation, but rather a specific Community law remedy.<sup>93</sup>

The basis for State liability is thus to be found in Community law itself. The Court drew on the full effectiveness of Community law and the Member States obligation under Article 10 EC to ensure this effectiveness. The principle of State liability can be seen as a development of, or complement to, the principle of direct effect. State liability will ensure that a Community right is protected. However, it is important to note that the State liability principle is independent from the principle of direct effect. State liability does not care about whether the breached rule was directly effective or not. Instead it is based on the State's failure to act in accordance with its obligations under Community law. That State liability was applicable also in relation to directly effective rights did not follow from *Francovich*, but it was made clear in the *Brasserie du Pêcheur and Factortame III* ruling.<sup>94</sup>

In *Brasserie du Pêcheur*, Germany had breached Article 28 EC with its beer purity laws. As a consequence of this legislation a French company was unable to export its beer to Germany and thus suffered loss of income. The Court of Justice had in another ruling<sup>95</sup> held this legislation to be contrary to

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<sup>92</sup> *Francovich* paragraphs 40-43.

<sup>93</sup> See Ross, *Beyond Francovich*, (1993) 56 M.L.R. 55, at p. 57.

<sup>94</sup> See note 32 above.

<sup>95</sup> Case 178/84 *Commission v. Germany* [1987] ECR 1227.

Article 28, and *Brasserie du Pêcheur* subsequently brought an action in German courts for damages against Germany. *Factortame III* concerned the same national legislation as the earlier mentioned *Factortame* ruling.<sup>96</sup> The Spanish fishermen challenging the legislation held that it was contrary to Article 43 EC and sued the United Kingdom for reparation.

The German, Irish and Netherlands Governments held, in *Brasserie du Pêcheur and Factortame III*, that the principle of state liability should not be extended to breaches of directly effective provisions of Community law. The Court of Justice did not agree. The right of individuals to rely on directly effective provisions of Community law was held to be only a minimum guarantee, and not sufficient in itself to ensure the full and complete implementation of the Treaty.<sup>97</sup> The purpose of that right was to ensure that provisions of Community law prevailed over national provisions but that was not always sufficient to protect individuals from suffering loss when a Member State breached Community law. Therefore the full effectiveness of Community law would be impaired if individuals were unable to obtain reparation when their rights were infringed by a breach of Community law. The right to reparation was then held to be a necessary corollary of direct effect.<sup>98</sup>

### **4.3 Substantive Conditions for Liability**

A claim for damages under the State liability principle is to be brought in national courts. There is always a possibility to refer questions to the Court of Justice under Article 234 EC, but the claim as such has to be decided by national courts. The Court held in *Francovich* that it is for the national legal orders to designate the competent courts and lay down the detailed procedural rules governing inter alia actions for damages<sup>99</sup>. An applicant

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<sup>96</sup> See note 22 above.

<sup>97</sup> See Case 168/85 *Commission v. Italy* [1986] ECR 2945.

<sup>98</sup> *Brasserie du Pêcheur and Factortame III* paragraphs 20-22.

<sup>99</sup> *Francovich* paragraph 42.

thus has to follow the national rules on for example standing and time limits. The Court has been reluctant to interfere with the procedural systems of the Member States. It is only when domestic claims are treated more favourably than Community claims or when it is excessively difficult to assert a Community right that the Court of Justice gets involved with national procedural rules.<sup>100</sup> Other than that, procedures are considered to be purely a matter for the legal orders of the Member States.

The Court has thus decided to leave the procedural matters to the Member States. Substantive rules, on the other hand, have been very much a Community matter. The Court of Justice has consequently laid down the substantive conditions under which State liability will arise. It did so already in the *Francovich* case. The conditions were slightly changed in the *Brasserie du Pêcheur and Factortame III* ruling and have, as we will see later on, remained the same since then. State liability arises when the following three conditions are met:

- 1) the rule of law infringed must be intended to confer rights on individuals;
- 2) the breach must be sufficiently serious; and
- 3) there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.<sup>101</sup>

The Court's reasoning when deciding on the conditions is very interesting, especially for a thesis dealing with both Community and State liability. The national courts referring the case asked the Court of Justice to specify the conditions under which State liability was to arise. The Court of Justice started off by stating that although State liability was a Community law principle, the conditions under which that principle would give rise to a right

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<sup>100</sup> See for example *Francovich* paragraph 43, *Rewe-Zentralfinanz* paragraph 5 and Case 199/82 *Amministrazione delle Finanze dello Stato v. San Giorgio* [1983] ECR 3595 paragraph 14.

<sup>101</sup> *Brasserie du Pêcheur and Factortame III* paragraph 53.

of reparation depended on the nature of the breach of Community law giving rise to the damage.<sup>102</sup> The Court then went on to make a link with the non-contractual liability of the Community in Article 288(2) and held that the conditions for State liability should not differ from the conditions governing Community liability in similar circumstances. In fact, the protection of individual Community rights could not vary depending on whether a national authority or a Community authority was responsible for the damage.<sup>103</sup> The Court then went on to focus on the margin of discretion available to legislative authorities. The *HNL* case<sup>104</sup> was referred to in order to explain that a margin of discretion is necessary in legislation, especially when choices of economic policy are to be made.<sup>105</sup> However, the national legislature does not always have a wide discretion when acting in field governed by Community law, for example when, although formally legislating, it comes to implementing Community law in the national legal orders. An example of when the discretion was smaller was found in *Francovich*, where the directive imposed an obligation to reach a certain goal within a certain period of time.<sup>106</sup> On the other hand, there could be situations where a Member State had a wide discretion comparable to that of the Community institutions. In such cases, the conditions for liability had, in principle, to be the same as for Community liability.<sup>107</sup> The Court then looked at the relevant cases and found that the national legislatures had been faced with situations involving choices comparable to those made by the Community institutions when adopting legislative measures pursuant to a Community policy.<sup>108</sup> It was this reasoning that led the Court of Justice to adopt the above mentioned conditions. Thus, originally the conditions laid down in *Brasserie du Pêcheur and Factortame III* were intended to be applicable to cases concerning legislative measures involving something similar to choices of economic policy, or a relatively wide discretion. It

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<sup>102</sup> Ibid paragraph 38.

<sup>103</sup> Ibid paragraph 42.

<sup>104</sup> See note 56 above.

<sup>105</sup> *Brasserie du Pêcheur and Factortame III* paragraphs 43-45.

<sup>106</sup> Ibid paragraph 46.

<sup>107</sup> Ibid paragraph 47.

might just be that the Court tried to lay down some sort of *Schöppenstedt principle* in the field of State liability.

The Court of Justice then went on to say a few words about the conditions. Both the relevant articles, 28 and 43 EC, were found to confer rights on individuals.<sup>109</sup> The next step was to clarify the meaning of the term “sufficiently serious”. The decisive test for finding whether a breach was sufficiently serious was held to be whether the Member State, or the Community institution, manifestly and gravely had disregarded the limits on its discretion. Factors to take into consideration were the clarity and precision of the breached rule, the measure of discretion left by that rule to the national, or Community authorities, whether the infringement and the damage had been intentional or involuntary, whether any error of law were excusable or inexcusable, whether the position taken by a Community institution could have contributed to the breach. In any case, the Court held a breach to be sufficiently serious if it had persisted despite a judgement finding the infringement in question to be in breach of Community law, or if it clearly followed from a preliminary ruling or settled case-law of the Court that the conduct in question constituted an infringement.<sup>110</sup> In both *Brasserie du Pêcheur and Factortame III* there were earlier judgements from the Court stating that the conduct of the national authorities was in breach of Community law. The Court discussed this for a while and then left it to the national courts to decide whether there was any causal link between the relevant breaches and damages.

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<sup>108</sup> Ibid paragraphs 48-50.

<sup>109</sup> Ibid paragraph 54.

<sup>110</sup> Ibid paragraphs 55-57.



## 4.4 Subsequent Case-law and Recent Developments

The case-law dealing with State liability after *Brasserie du Pêcheur and Factortame III* has mainly been focused on clarifying the conditions for State liability. Not much new has been said and the remedy has not been dramatically developed. However, there are a few interesting cases and since the case-law in this area is rather recent there is good reason for having a look at it.

In the *British Telecommunications* case<sup>111</sup> the Court of Justice applied the conditions laid down in *Brasserie du Pêcheur and Factortame III* to a Member State's failure to correctly implement a directive. The Member State in question, the UK, was found to have had a wide discretion when implementing the directive. This fact made it appropriate to use the existing conditions, since they, by demanding a sufficiently serious breach, take discretion into account. The Court found that the UK had acted in good faith and therefore that the infringement was excusable. The breach was thus not held to be sufficiently serious.

So far the conditions had only been applied in cases of legislative actions by a Member State. In the *Hedley Lomas* case, the Court of Justice for the first time applied the conditions in relation to an administrative, or perhaps executive, state action.<sup>112</sup> The British Ministry of Agriculture had refused to grant licences for the export of live sheep to Spain. The applicant found this to be in breach of Community law and sued for damages. The granting of a licence in a particular case does indeed seem to be an administrative act rather than a legislative. The Court of Justice applied its conditions and held that when the Member State in question had only a reduced or even no

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<sup>111</sup> Case C-392/93 *The Queen v. HM Treasury ex parte British Telecommunications plc* [1996] ECR I-1631.

<sup>112</sup> Case C-5/94 *The Queen v. Ministry of Agriculture, Fisheries & Food ex parte Hedley Lomas Ltd* [1996] ECR I-2553.

discretion, the mere infringement of Community law would be sufficient to establish the existence of a serious breach.<sup>113</sup>

The *Dillenkofer* case concerned Germany's failure to implement a directive, and it is important for two reasons.<sup>114</sup> Firstly, the Court of Justice held that a failure to implement a directive in time is a sufficiently serious breach in itself. There is thus no excuse for not implementing a directive in time and if a Member State fails to do so, the first condition will automatically be fulfilled. Secondly, in *Dillenkofer* it became clear that the conditions laid down in *Brasserie du Pêcheur* were the same as the ones laid down in *Francovich*.<sup>115</sup> Since the *Dillenkofer* case concerned a Member State failure to implement a directive in time, it was exactly the same breach of Community law as in the *Francovich* case. The Court of Justice did however not use the conditions it laid down in *Francovich*, but instead used the ones established in *Brasserie du Pêcheur and Factortame III*. This implies that the latter conditions are general and should be applied to all kinds of Member State breaches. This was not totally clear from *Brasserie du Pêcheur and Factortame III* since the Court expressly held the conditions to be applicable to breaches committed by legislative acts.<sup>116</sup> The Court did not, until *Dillenkofer*, make it clear whether the conditions were to be generally applied or not.

The *Brinkmann* case deals with the issue of causation.<sup>117</sup> *Brinkmann* was a German company, which produced a certain patented tobacco product. In Germany the product was classified as smoking tobacco, but when Brinkmann wanted to export it to Denmark, the Danish authorities classified

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<sup>113</sup> Ibid paragraph 28.

<sup>114</sup> Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 & C-190/94 *Dillenkofer and Others v. Germany* [1996] ECR I-4845.

<sup>115</sup> Rotkirch, *The Principle of State Liability – The Creation of a General Principle of Law to Enhance Effective Judicial Protection of Individual EC Rights*, Master Thesis at the Faculty of Law Lund 2000, p. 44.

<sup>116</sup> See *Brasserie du Pêcheur and Factortame III* paragraphs 50 and 51.

<sup>117</sup> Case C-319/96 *Brinkmann Tabakfabriken GmbH v. Skatteministeriet* [1998] ECR I-5255.

it as cigarettes. In Denmark, cigarettes were heavier taxed than smoking tobacco. Brinkmann brought an action claiming that the Danish authorities should classify the product as smoking tobacco, and sought compensation for the loss suffered. The case was referred to the Court of Justice, which held that under a certain directive, Brinkmann's product was to be classified as smoking tobacco. The Court then turned to the question of State liability. It found that the articles of the directive dealing with classification of cigarettes and smoking tobacco had not been correctly implemented by Denmark. It was recalled that according to *Dillenkofer*, a failure to implement a directive was per se a sufficiently serious breach. However, in this case there was no causal link between Denmark's failure to implement the directive and the loss suffered by Brinkmann. This was because the Danish authorities had applied the provisions of the directive, despite the fact that they had not been correctly implemented.<sup>118</sup> The Court then went on to consider whether the Danish authorities had committed a sufficiently serious breach of the directive or not. Brinkmann's product was new and did not really fit into either of the definitions laid down in the directive. The classification made by the Danish authorities was held not to be manifestly contrary to the wording or the aim of the directive. The infringement was thus not sufficiently serious.<sup>119</sup> In short, Denmark could not be held liable for its failure to implement the directive since there was no causal link between the failure and the damage suffered by Brinkmann. Furthermore, it could not be held liable for the error in classification committed by the Danish authorities since the breach was not sufficiently serious.

The interesting part of *Brinkmann* is the part dealing with causation. This was the first case where the Court of Justice relied on causation in order to restrict State liability. By relying on causation it did not have to overrule the statement from *Dillenkofer* that failure to implement a directive is per se a sufficiently serious breach. This means that when a Member State has failed

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<sup>118</sup> Ibid paragraph 29.

<sup>119</sup> Ibid paragraph 31.

to implement a directive, it may still escape liability if the national authorities try to comply with the provisions of the directive.<sup>120</sup> However, it is important to note that *Brinkmann* applies only to cases where it is possible for a national authority to apply provisions of a directive in the absence of implementing legislation.<sup>121</sup>

Another interesting case is the *Rechberger* case.<sup>122</sup> The case concerned Austria's implementation of a directive on package travel, the same directive that was at issue in the *Dillenkofer* case. The purpose of the directive was to protect purchasers of package travels. An Austrian newspaper had offered a holiday trip to its subscribers. A lot of people paid for the trip, but unfortunately for them the newspaper went bankrupt and they lost their money. The applicants then brought an action against Austria, claiming that their loss was attributable to the State's failure to implement the directive in full. The first issue before the Court of Justice concerned a temporal limitation of protection. The national rules stated that travel purchasers were to be protected if the departure date was 1 May 1995 or later. Since Austria joined the Union on 1 January 1995 the directive had to be implemented and in force by then. The Court held that the provision of the directive dealing with protection of travel purchasers had not been correctly implemented. It then went on to state that this was a sufficiently serious breach, although all the other provisions of the directive had been correctly implemented.<sup>123</sup> Another issue concerned Austria's method of providing the protection, and the question of causation. The Court held that the Austrian rules failed to fulfil the obligation laid down by the directive. It did not however state whether this amounted to a sufficiently serious breach or not. When it came to causation, the Austrian government argued that the loss of the applicants was a result of the conduct of the newspaper, and

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<sup>120</sup> For further discussions on *Brinkmann* and its effects see Tridimas, *Liability for Breach of Community Law: Growing Up and Mellowing Down?*, (2001) 38 C.M.L.Rev. 301, p. 303-307.

<sup>121</sup> *Ibid* p. 307.

<sup>122</sup> Case C-140/97 *Rechberger and Others v. Austria* [1999] ECR I-3499.

<sup>123</sup> *Ibid* paragraphs 51-52.

therefore there could be no causal link between the breach and the damage. The Court rejected this argument since the directive required that consumers were protected, no matter what the causes of bankruptcy were.<sup>124</sup> Another way to put it is to say that the chain of causation cannot easily be broken by the conduct of the travel organiser since it is against the financial risks associated with that very trader that the directive was intended to protect the consumers.<sup>125</sup>

From the *Konle* case it is clear that a Member State cannot escape liability by referring to the distribution of powers and responsibilities in its national legal order.<sup>126</sup> The question in the case was whether, in a federal system, the federal state had to provide reparation for breaches of Community law committed by a regional organ. The Court held that Community law did not require Member States to make any change in the distribution of powers and responsibilities between the public bodies that existed on their territory. The federal state did not necessarily have to provide reparation itself, as long as it was possible to obtain reparation from some other state organ. In *Haim II*<sup>127</sup> the Court developed its point further and held that a Member State cannot escape liability by claiming that the public authority responsible for the breach of Community law did not have “the necessary power, knowledge, means or resources”.<sup>128</sup>

When studying State liability it is very important to remember that the actual question of damages is to be decided by national courts. The Court of Justice is involved only by way of preliminary rulings. However, the Court has taken great interest in many of the cases and provided extensive guidelines for the national courts. Despite this activity of the Court of Justice it has repeatedly held that it is in principle for the national courts to apply the

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<sup>124</sup> Ibid paragraphs 74-75.

<sup>125</sup> Tridimas p. 309.

<sup>126</sup> Case C-302/97 *Konle v. Austria* [1999] ECR I-3099.

<sup>127</sup> Case C-424/97 *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123.

<sup>128</sup> Ibid paragraph 28.

criteria to establish State liability for damage caused to individuals by breaches of Community law.<sup>129</sup> However, the Court's willingness to provide national courts with guidelines as how to assess whether the conditions have been fulfilled seems to have diminished a bit in recent cases. An example of this is *Konle* where the Court just repeated its statement about national courts and did not provide any further guidelines on whether the conditions had been fulfilled in the relevant case.<sup>130</sup> It is however important that the Court of Justice does provide information on how to assess whether the conditions have been fulfilled or not. The actual claim is indeed to be decided by national courts, but it is important to bear in mind that the conditions themselves are matters of Community law. State liability rests on Community law and the substantive conditions have been laid down by the Court of Justice. Thus, it is important that the Court is willing to provide guidelines when national courts have uncertainties about whether the conditions have been fulfilled or not.

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<sup>129</sup> See for example *Brasserie du Pêcheur and Factortame III* paragraph 58 and *Konle* paragraph 58.

<sup>130</sup> *Konle* paragraphs 57-59.

# 5 The Bergaderm Case

## 5.1 Introduction

The previous two Chapters have dealt with, in turn, Community and State liability. As can be seen in the *Brasserie du Pêcheur and Factortame III* case there are some connections between the two remedies. In that case the Court held that the conditions for liability could not vary depending on whether the Community or a Member State was responsible for the damage. It is clear from the *Brasserie du Pêcheur and Factortame III* ruling that State liability has been influenced by Community liability. From the case that will be examined in this Chapter it will become apparent that State liability now has started to influence Community liability. On 4 July 2000 the Court of Justice delivered a very interesting judgement in the *Bergaderm* case.<sup>131</sup> The case came before the Court of Justice on appeal from the Court of First Instance; this ruling will be considered first.<sup>132</sup>

## 5.2 The Court of First Instance

Bergaderm was a company making cosmetic products, for example a sun oil called Bergasol. Bergasol contained a substance called 5-MOP, which was suspected of being potentially carcinogenic. In 1995 the Commission adopted a directive, which made it impossible for Bergaderm to carry on producing its sun oil. Bergaderm subsequently went into liquidation and therefore brought an action for damages against the Commission.

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<sup>131</sup> Case C-352/98P *Laboratoires Pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission* [2000] ECR I-5291.

<sup>132</sup> Case T-199/96 *Laboratoires Pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission* [1998] ECR II-2805.

The applicants argued that the directive was to be regarded as an administrative measure instead of a legislative act. The reason for this was probably that Bergaderm did not want to have to fulfil the *Schöppenstedt test* with its additional requirements regarding legislative act. The Court of First Instance did not agree and held that it was clearly a matter of a legislative act. The CFI then went on to consider whether the Commission had breached any higher-ranking rule of law for the protection of individuals. It found that Bergaderm had not been able to show any such breach and consequently dismissed the application without looking at the issues of damage and causal link.

### 5.3 The Court of Justice

Bergaderm was obviously not too thrilled with the Court of First Instance's judgement and appealed on a point of law to the Court of Justice. The Court of Justice was not impressed and dismissed the appeal rather swiftly. However, it is not the outcome of the case that is interesting but rather the Court's general reasoning about Community liability.

The Court relied heavily on the *Brasserie du Pêcheur and Factortame III* ruling and thus created a link between the two kinds of liability. It held that the conditions for State liability should not, in the absence of particular justification, differ from the rules governing Community liability in similar circumstances. Furthermore, the protection of individual rights should not vary depending on whether a national or Community authority was responsible for the damage.<sup>133</sup> This passage was a direct quotation of the ruling in *Brasserie du Pêcheur and Factortame III*. Still referring to that case, the Court looked at the conditions for State liability; that the rule infringed must be intended to confer rights on individuals; that the breach must be sufficiently serious; and that there must be a causal link. In relation to the second condition, the Court held that the decisive test for finding that



a breach is sufficiently serious is whether the Community or the Member State concerned manifestly and gravely disregarded the limits on its discretion. Here the Court referred to the above mentioned judgement and also the *Dillenkofer* case.<sup>134</sup> Finally the *Hedley Lomas* case was used in order to make it clear that if the margin of discretion was small, a mere infringement of Community law could be enough to establish a sufficiently serious breach.<sup>135</sup>

The Court thus used the case-law on State liability in the area of Community liability and did not even mention the *Schöppenstedt principle*. This seems to imply that the Court wanted to give effect to its earlier statement that the protection of individuals should not vary depending on whether the Community or a Member State was responsible for the damage. Furthermore, the conditions for State liability to arise now seem to be applicable also in cases of Community liability. The Court had relied on Community liability case-law in the area of State liability before, but this was the first time that State liability was allowed to influence Community liability. Both kinds of liability now seem to be subject to the same set of conditions, namely the ones laid down in *Brasserie du Pêcheur and Factortame III*.

The new element introduced by *Bergaderm* is thus the express unification of the conditions for liability. Another point is that these conditions apply to all kinds of infringements; both legislative and administrative acts. The most important aspect of the case can be said to be that it places particular emphasis on the degree of discretion enjoyed by the organ responsible for the damage. *Bergaderm* thus links liability with discretion, and this is irrespective of whether the measure in question is legislative or administrative.<sup>136</sup> If the responsible organ gravely and manifestly

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<sup>133</sup> *Bergaderm* paragraph 41.

<sup>134</sup> *Bergaderm* paragraphs 42,43.

<sup>135</sup> *Ibid.* paragraph 44.

<sup>136</sup> *Tridimas* p. 326.

disregarded its powers, the breach will be sufficiently serious. Consequently there is no longer any need to distinguish between legislative and administrative measures. Furthermore, there no longer has to be any breach of a *superior* rule of law for the protection of the individual. The Court merely held that there must be a breach of a rule of law intended to confer rights on individuals. The important aspect is thus that there has to be an individual right, whether that right was laid down by a superior rule of law does not matter anymore.<sup>137</sup> The *Schöppenstedt principle* has thus been abandoned.

A few months after *Bergaderm*, the Court of First Instance decided the *Fresh Marine Company* case.<sup>138</sup> This case is interesting because the CFI did not follow *Bergaderm*. The case concerned an anti-dumping measure adopted by the Commission. The CFI followed the old line of case-law and focused on whether the measure should be characterised as legislative or administrative. The CFI found that the measure was administrative, and that a mere infringement of Community law would be sufficiently serious.<sup>139</sup> There actually was a reference to *Bergaderm*, but only in relation to cases of limited discretion. The worrying part about the judgement is that the CFI focused on the nature of the measure in order to see what conditions to apply to it. The CFI does however seem to have corrected itself in the *Comafrica* case, which was decided in 2001.<sup>140</sup> The case concerned import quotas for importation of bananas from countries outside the common market. The Commission had adopted some regulations, which laid down import quotas. The applicants did not like the regulations and sued the Commission for damages, which they claimed to have suffered due to the regulations. The CFI did not say anything about making a distinction between administrative and legislative measures, and talked only about one set of conditions,

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<sup>137</sup> Ibid p. 327.

<sup>138</sup> Case T-178/98 *Fresh Marine Company AS v. Commission* [2000] ECR II-3331.

<sup>139</sup> Ibid paragraph 61.

<sup>140</sup> Joined cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica SpA and Dole Fresh Fruit Europa Ltd & Co v. Commission*, judgement of 12 July 2001, not yet in ECR.

namely the one established in *Bergaderm*. The discretion of an institution was a relevant factor when it came to deciding whether there was a serious breach. Furthermore, the CFI held that the general or individual nature of an act of an institution was not a decisive test for identifying the limits of the discretion enjoyed by that institution. The regulations in the case were of an administrative nature and the Commission was found to have had only a limited discretion. Therefore, a mere breach of Community law could be sufficient for liability to arise.<sup>141</sup> The Court of First Instance found that the Commission had acted with due care and diligence. Consequently, the breach that had been committed was not sufficiently serious and the Commission could not be held liable under Article 288(2)<sup>142</sup>.

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<sup>141</sup> Ibid paragraphs 134-138.

<sup>142</sup> Ibid paragraphs 149-150.

## 6 Analysis

When comparing the two kinds of liability described in this thesis it is quite easy to see that the situation was not completely satisfactory before the *Bergaderm* case. The State liability principle is rather new and is probably still a bit under construction but it is nevertheless much easier to understand and apply than the system of rules laid down in relation to the Community liability. Furthermore, although the principles have pretty much the same purpose and function within Community law, there were considerable differences between them.

The first problem lies in the lack of clarity of Community liability. The rules governing Community liability used to be very complex and not easy to apply. First of all, there was a need to distinguish between legislative and administrative actions. Administrative measures were governed solely by a general set of conditions. If the measure in question were held to be a legislative act involving choices of economic policy the Court would apply some additional conditions. The exact meaning of the term “involving choices of economic policy” is very hard to define. However, it seems that the Court of Justice focused on the discretion enjoyed by the relevant institution when deciding the question. Furthermore, if the relevant measure was held to be such a legislative act, the applicant was forced to show that a sufficiently serious breach of a superior rule of law had been committed. Once again the discretion of the institution was important. This set of rules strikes me as being confusing and very hard to apply.

Another problem is the difference in protection of individual rights under Community law. The *Zuckerfabrik* and *Francovich* cases can be taken as examples. In *Zuckerfabrik*, interim relief was to be granted only when very strict standards were met. The relevant infringement of individual rights had been committed by the Community legislature and the Court of Justice made

interim relief from the relevant piece of legislation subject to very strict conditions. In *Francovich* on the other hand a Member State was responsible for the breach and the Court of Justice held that national courts were required to offer the individual full protection of his rights. Furthermore, the conditions for State liability seem to be less strict than the ones relating to Community liability. There is for example no need to get into a difficult characterisation of the contested measure. Neither is there any reference to superior rules of law in the case-law on state liability, only individual rights. This implies that the Court of Justice has applied a double standard in relation to protection of individual rights. There was one standard for protection against Member State infringements and a stricter one in relation to the Community. This is of course not satisfactory. The protection of individual rights should be dealt with in the same way, irrespective of whether the Community or a Member State has committed the breach. This approach was also taken, but not totally applied, by the Court of Justice in for example *Zuckerfabrik*.<sup>143</sup>

The *Brasserie du Pêcheur and Factortame III* case provided the first link between the two remedies. Consequently a small step towards consistency in the field of protection of individual rights was taken. The Court of Justice let the rules on Community liability influence the principle of State liability. The contested measures were held to be similar to Community legislation and the conditions therefore resembled the ones relating to Community liability. Once again the Court held that the protection of individual rights should be the same irrespective of who was responsible for the infringement. However, there were still differences between the two kinds of liability. There was for example no mention of any *Schöppenstedt principle* in the judgement. Maybe this is because the supremacy of Community law implies that a Member State breach of a Community right is always a breach of a superior rule of law. All Community rules are, as we know, superior to

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<sup>143</sup> Caranta, *Judicial Protection Against Member States: A New Jus Commune Takes Shape*, (1995) 32 C.M.L.Rev. 703, p. 725-726.

national law. However, the remedy of State liability was definitely influenced by Community liability and the two remedies started approaching each other.

Naturally a coherent set of rules for reparation would be good for the individual and the protection of his or her rights. Such a system would mean that the remedy of reparation would be subject to the same conditions irrespective of whether the Community or a Member State has committed a breach. The substantive rules governing the remedy would thus be the same and the only difference would be that the two remedies would be decided by different courts; the Community courts in cases of Community liability and national courts in cases of State liability. An individual right would thus be afforded the same substantive protection irrespective of where the infringement comes from.

There is however a big difference between the Community and the Member States. In many ways the Community can be seen as the legislator and the Member States as enforcers, or administrative organs. This means that the Community in general enjoys a much wider discretion than the Member States. When taking this into account it is easier to understand why the Court did apply a double standard. A parallel can be seen in *Hedley Lomas* where the Court said that in cases of less or no discretion a mere infringement of Community law could be enough for liability to arise. This fits rather well with the past case-law, which made it easier to obtain protection of individual rights in relation to the Member States than the Community. However, the potential difference in discretion can be taken into account under the conditions for liability to arise, namely when deciding whether the breach was sufficiently serious or not. The Court held in *Brasserie du Pêcheur and Factortame III* that the decisive test for finding that a breach is sufficiently serious is whether the organ in question manifestly and gravely disregarded the limits of its discretion. The discretion

of the relevant organ it thus taken into account in every case and consequently there is no need to apply a double standard.

The judgement in *Bergaderm* unifies the conditions for liability to arise. Community liability and State liability is now subject to the same conditions. The coherent system seems thus to be in place now. At least a very important unifying step has been taken. The Court continued the development it started in *Brasserie du Pêcheur and Factortame III*. An individual right will now get the same substantive protection in relation to both the Community and the Member States. Furthermore, there is no longer any need to carry out the difficult distinction between legislative and administrative Community measures. Both kinds are now subject to the same set of conditions. The discretion of the relevant institution is taken into account only in relation to the seriousness of the breach. Thus, both the system of protection of individual rights and the remedy of Community liability has been enormously enhanced by the *Bergaderm* case.

The judgement in the *Comafrica* seems to focus on whether the relevant institution acted with due care and diligence. The CFI did thus focus on due diligence and found that the Commission had not committed a sufficiently serious breach. This is interesting because due diligence has not been an express factor in the case-law before. It seems to have had some influence in for example the *British Telecommunications* and *Brinkmann* cases, but the Court has never expressly relied on it before. In the *Comafrica* case, the Commission was held to have had only a limited discretion and consequently a mere infringement of Community law might have led to liability. However, the CFI focused on the fact that the Commission had acted with due care and diligence and thus found that the breach had not been sufficiently serious for liability to arise.

## 7 Concluding Remarks

Despite the importance and assets of the *Bergaderm* case there is still some questions to be solved by future case-law. The Court of First Instance delivered a confusing judgement in the *Fresh Marine Company* case. The CFI did not follow the *Bergaderm* case, but carried out the old distinction between administrative and legislative measures. It reached the conclusion that the relevant measure was administrative. *Bergaderm* was admittedly applied to the question of seriousness but its principles were not applied in full. Since the measure was found to be administrative, the failure to apply *Bergaderm* was not really serious. Nevertheless it is worrying that such an important and new case is not followed all the way. The CFI does admittedly seem to have corrected itself in the *Comafrica* case. However, a few more cases in the lines of *Bergaderm* may help to really establish the new approach to the remedy of reparation.

To the best of my knowledge the *Fresh Marine* judgement has not been appealed. The Court of Justice will thus not have an opportunity to strike down the approach taken by the CFI in that case. However, after the *Comafrica* case there is perhaps less need for such a ruling. Still, more cases following the same line would be nice. Future case-law thus has to show whether the standard set in *Bergaderm* is to be generally applied or not.

Another question to be solved by future case-law is if, and which of, the elements for determining the seriousness of a breach that have been used in relation to Community liability are to be applied also in relation to State liability. The Court has for example held that factors such as whether the damage exceeds the risks inherent in the relevant business, and the size of the group of potential claimants can be used when deciding whether a breach is sufficiently serious. These factors have not been used in the area of



State liability and future case-law thus has to show whether or not they will be.

Furthermore, there is the question of due diligence. Due diligence was expressly relied on for the first time in the *Comafrica* case. It remains to be seen whether it will become an influential factor for the remedy of reparation. Personally, I think that due diligence is a bit vague but nevertheless an important factor. The flexibility of the principle is perhaps a bit worrying from a legal certainty point of view, but I do think that there are situations where it has a role to play.

A set of coherent rules will favour the protection of individual rights and private enforcement. The remedies will be easier to apply for the individual and, on the face of it, it seems like it will be easier to see whether an applicant is likely to be able to fulfil the conditions for liability to arise. However, future case-law will have to show whether this is a correct assumption or not.

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