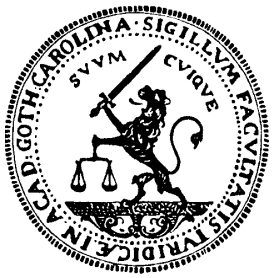

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The Principle of State Liability

-The Creation of a General Principle of Law to Enhance Effective Judicial Protection of Individual EC Rights

Master thesis
20 points

Supervisor: Associate Professor Joakim Nergelius

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Preface

During my stay as an Erasmus student at the Katholieke Universiteit in Leuven in the autumn of 1999, one of the most thought-provoking courses I took was *The Court of Justice and the Emerging Common Law of Europe*, given by professor and former Advocate General Walter Van Gerven. It was especially his ideas on the State liability principle and its possible effects on the harmonisation of national tort laws that inspired me to write this thesis. During my work I have continuously sought guidance from his numerous writings relating to this field of problems.

While writing this thesis, I have had the privilege of a very helpful father, Holger Rotkirch, Director General for Legal Affairs at the Finnish Ministry for Foreign Affairs, who did not spare his professional knowledge of international law for my benefit. Mats Björkenfeldt, attorney at Hjalmar Petris Advokatbyrå HB and Lina Töpper-Berg, legal administrator at the European Court of Justice, have helped me along by being generously available for discussing the *Volvo service* case, State liability for judicial actions and the obligation of a national Supreme Court to request a preliminary ruling from the ECJ. I am also grateful to Virpi Koivu who has corrected my English.

Finally I have to admit that without the constant encouragement, pertinent advice and personal guidance of docent Joakim Nergelius, Associate Professor of Constitutional Law at the University of Lund, these pages would still be in my computer. Needless to say, my text relies in substantial parts on his contributions, especially on his and Ulf Bernitz book *General Principles of European Community Law*.

Abbreviations

BGB	Bürgerliches Gesetzbuch (Civil Code-Germany)
CDE	Cahiers de droit européen
CML Rev.	Common Market Law Review
DI	Dagens Industri
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	Reports of Cases before the Court of Justice of the EuropeanCommunities and the Court of First Instance
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EC Treaty	Treaty establishing the European Community
EEA	Agreement of the European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EJIL	European journal of international law
EPL	European Public Law
ERT	Europarättslig Tidskrift
EURATOM	European Atomic Energy Community
ICLQ	International and Comparative Law Quarterly
JFT	Tidskrift utgiven av Juridiska Föreningen i Finland
JK	Justitiekanslern
JT	Juridisk Tidskrift vid Stockholms Universitet
LIEI	Legal Issues of European Integration
LQR	Law Quarterly Review
NJA	Nytt Juridiskt Arkiv
OJ	Official Journal
RTDE	Revue trimestrielle de droit européen
RÅ	Regeringsrättens Årsbok
SOU	Statens offentliga utredningar
SvJT	Svensk Jurist Tidning
TEU	Treaty on European Union
UK	United Kingdom

Contents

1 Introduction

1.1 Presentation of the Subject

In EU, individuals may today claim compensation from the State when it is held liable for a breach of Community law. This possible remedy has not always been available. The principle was laid down in the *Francovich* case in 1991 and then further developed in a number of following cases.[1] The case law that established the principle of State liability for breaches of Community law consists of some of the most important judgements that the European Court of Justice (ECJ) has delivered. Those were revolutionary decisions in which the Court showed how dynamically it could develop Community law by interpreting the EC Treaty[2]. The State Liability principle has had an important impact on ensuring the effective implementation of Community law and the protection of individual Community rights (the rights which persons or enterprises/companies can derive from Community law). Thus, many discussions and writings regarding the State Liability principle can be found in the doctrine. Authors have, for example, accounted for the origin of the principle, the conditions that must be fulfilled in order for an individual to obtain damages, the conditions for liability, the differences and similarities between Community and State liability and the effects that this development has had on the "procedural autonomy" of the Member States.[3]

I have chosen to consider the State liability principle in the light of the general principles of Community law. I am interested in how the creation of such a general principle has influenced the protection of individual Community rights. There are two reasons for this approach. Firstly, State liability is a *new kind of general principle*. Compared to the "classic" general principles, such as the principles of proportionality and legitimacy, the creation of this general principle is something entirely different. The earlier principles are based on the judicial traditions of the Member States and were usually developed in order to strengthen the rights of individuals. The State liability principle is a general principle that focuses on a new area. It is not based on

[1] Joined Cases 6/90 and 9/90 *Francovich* v *Italy*, [1991] ECR I-5357, Joined Cases 46 and 48/93 *Brasserie du Pêcheur* v. *Germany* and *the Queen* v *Secretary of State for Transport, ex parte Factortame Ltd.* [1996] ECR I-1029.
[2] Treaty establishing the European Community, herein after referred to as the EC Treaty.
[3] See e.g. the contributions in Beatson J. and Tridimas T. (eds.), *New Directions in European Public Law* (1998), Craig P., *Once More unto the Breach: The Community, the State and Damages Liability* 113 LQR 67 (1997), Van Gerven W., *Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie,* 45 ICLQ 507, (1996), Wathelet M. and Van Raepenbusch S., *La responsabilité des États Membres en cas de violation du droit Communautaire. Vers un alignement de la responsabilité de l'État sur celle da la Communauté ou l'inverse?,* 33 CDE 13 (1997).

the national laws of the Member States. Instead, the Court relied in the *Francovich* case on the fundamental principle of effective and uniform application of Community law to justify the creation of Member State liability as a rule of Community law. Although effectiveness was the key word, the establishment of the principle also led to stronger protection of individual rights. This may be seen as an example of a new phase in the development of general principles, which strengthens the protection of individual rights even though the effectiveness of the system is the original idea behind the initial development.

The second reason for taking the general principles of law into account in this context is that they play a fundamental role when dealing with non-contractual liability, both of the Community and the Member States. The area of tort law has not been harmonised in Community law. There are no directives or regulations determining when and how compensation will be paid to individuals suffering loss from breaches of Community law. Article 288(2)[215(2)] EC[4] provides that the non-contractual liability of the Community shall make good any damage on its part *in accordance with the general principles common to the laws of the Member States*. According to one opinion, Article 288(2)[215(2)]EC does not refer to principles like proportionality or legitimate expectations but to common principles of tort law that e.g. regulates the calculation of the interest or the evaluation of evidence.[5] It is true that the ECJ has referred to such principles in its case law on the non-contractual liability of the Community.[6] However, in the chapter on general principles of law I will not look at those principles of tort law but describe the general principles of Community law. My interest is in the establishment of the State liability principle and as sources of law, the general principles are resorted to when supplementing provisions and filling gaps in the law. The Court therefore relies on the general principles to establish the non-contractual liability of the Community and of the Member States. Hence, the Court developed the State liability principle by interpreting *Treaty provisions in the light of general principles of law*.[7] The increased application of various general principles by the European Court as well as by national courts in the Member States shows that they have a growing practical importance. In the process of EU integration and the expansion of activities falling within the competence of the European Union, common European principles are needed for the interpretation of the Treaty and for filling the gaps in new, unregulated areas. The development of common European legal

[4] In this thesis articles in the EC Treaty will be referred to according to their new numbering after the Treaty of Amsterdam came into force. The previous numbering will be put in brackets.
[5] This view is expressed in an article by Rauma C., *Allmänna gemensamma principer för skadeståndsansvar enligt Romfördragets artikel 215 (2)*, JFT, (1997) pp. 440-473.
[6] Ibid. p. 444.
[7] Toth A. G., *Human Rights as General Principles of Law, in the Past and in the Future*, in General Principles of Law, Bernitz U. and Nergelius J. (eds.), (2000) pp. 75-77.

principles could also lead to some kind of *jus commune*.[8] It would be good if the different Member States' liability regimes were homogeneous regarding the protection of Community rights, not least due to the requirement of uniform application of Community law and the desire to protect individuals in the same way throughout the Community.

1.2 Purpose and Delimitation of the Topic

The purpose of this thesis is to have a closer look at how the development of the State liability principle has enhanced the protection of individual Community rights and how it might continue to do so in the future. In order to discuss this subject I will investigate three different aspects: the State liability as a new kind of general principle, the concrete effects this principle has had on the protection of individual rights and the possible future developments this principle can lead to.

I will first focus on the creation of the *State liability principle as a new kind of general principle*. It is important to understand in which context the principle has been developed. Investigating this idea will give a better understanding of the principle itself and how new similar principles, which may have the same effect as the first by protecting Community rights, might be established in the future. I will then discuss *whether the State liability principle has affected the protection of Community rights*. This investigation will include a presentation of the principle and conditions for liability. Finally, I will consider *the possible ways in which the State liability principle might affect the protection of Community rights in the future*. It is, for example, possible that the national and Community liability regimes could be harmonised, regarding the protection of Community rights, through the Court's case law.

Individuals in the European Union are subject to two different systems of protection regarding their fundamental human rights at the supranational level. One is the system provided by EC and EU law and the other consists of the protection of human rights provided by the European Convention on Human Rights and Fundamental Freedoms (ECHR) to which all EU Member States are parties. Under the convention, individuals can turn to the European Court of Human Rights (ECtHR) in Strasbourg. Thus, it is not only EC law that implies extended responsibility for public authorities in the Member States. The ECtHR has in many cases stated that breaches of human

[8] Nergelius J., *General Principles of Community Law in the Future: Some Remarks on their Scope, Application and Legitimacy*, in General Principles of European Community Law (2000), p.223.

rights as a matter of fact are a result of the national legislation being in contradiction with the Convention.[9] However, the European Convention and the Court on Human Rights fall outside the scope of this thesis even though they are important for the protection of human rights. This thesis will focus on the impact of the State liability principle on individual EC rights.

Thus, in this thesis I will examine the State liability vis-à-vis individuals. The liability of the Community will fall outside the scope and will only be mentioned very briefly. Likewise, the liability of the State vis-à-vis the Community or another State, and the liability of the Community vis-à-vis the State will not be discussed. When describing State liability I will mainly look at liability for wrongful legislative or judicial acts and not the liability that the public authorities have for wrongful acts or omissions of their servants.

The European Union consists, as is well known, of three pillars. Community law, which falls under the first pillar, is the most significant from the individual's point of view. It is only under this system that individuals can have access to justice from courts of law. Rights under the two other pillars do not at present extend to individuals. As this thesis will concern the EC Treaty, the terms (European) Community and Community rights will predominantly be used.

1.3 Method and Material

This thesis is mainly based on the case law of the ECJ and on a literature study. In order to analyse the decisions of the ECJ I have often relied on standpoints from books or legal journals where the case in question has been interpreted. Where it is appropriate, I will give an account of the facts of the case in question whereas in other cases I will only make a reference to the case. In my work I have also resorted to studies of statutes and treaties and on cases from national courts. The bibliography used includes general books on EC/EU law (e.g. EU Law, Text Cases and Materials by Craig and de Búrca), books which consist of several articles by different authors (e.g. New Directions in European Public Law edited by Beatson and Tridimas and General Principles of European Community Law edited by Bernitz and Nergelius), articles in periodicals, books that deal with a specific subject (e.g. Tort law, Scope of Protection by Van Gerven) and governmental official reports (e.g. SOU 1997:194).

[9] See e.g. Cases *Marck*, 13.6 1979, A 31 and *Norris*, 26.10 1988, A 142.

My approach is not only to describe the State liability principle but also to analyse it under the presumption that it is a new kind of general principle and look at the consequences it has on enhanced judicial protection of individual EC rights. Assessments of possible future developments are usually vague and therefore it has not been easy to find a broad basis for all my thoughts. Even so, I have tried to make conclusions in order for this thesis to bring something to its readers.

1.4 Contents

This thesis will be structured in the following way. The next chapter will provide a brief description of the general principles and make a distinction between the State liability principle and the other principles. The third chapter will provide for the judicial protection of Community rights in general and place the possibility to claim damages from the State in relation to the other remedies in Community law to enforce rights. Chapter four describes the case law that established the principle of State liability and sets out the conditions for liability to arise. This will lead us to chapter five where the effects that the establishment of State liability has had on the protection of individual Community rights will be analysed. Before concluding, a chapter on possible future developments considering what has been discussed in this thesis will be presented. The conclusion will contain a general summary and personal remarks and comments.

2 General Principles of Law

2.1 Introduction

The general principles of law that arise from the Treaties establishing the European Communities[10] and the legal systems of the Member States is an independent source of Community law. This has been achieved through the jurisprudence of the ECJ.[11] The Treaties originally had few if any standards against excessive encroachment of Community power upon the individual. This led the Court to gradually develop a body of general principles of law that exist in a *Rechtsstaat*, such as legal certainty, legitimate expectations, proportionality and the protection of fundamental human rights.[12] These unwritten principles can be used in several ways. The Court can rely on them as a legal basis for its judgements in the same way as on rules found in the written sources of law. They may be resorted to for the purpose of reviewing the legality or the validity of the acts of the institutions or interpreting and supplementing the provisions of the written Community law. Member States and Community institutions may also rely on them, once they have been established by the Court. In order to describe the general principles of law I will have a closer look at their origin and at the nature of a general principle. I will then present some of the principles that the Court has adopted so far and study their function in the Community legal order.

2.2 Origins and Development of General Principles

The ECJ has not itself invented the concept of general principles. It has existed in public international law long before the development of European Community law. As a source of law the general principles first appeared in Article 38 (1) of the Statute of the Permanent Court of International Justice (the present International Court of Justice), that refers to "the general principles of law recognised by civilised nations".[13] However, general principles have not been used by the ECJ as a source of international law but as an autonomous source of Community law. When the Court needed to resort to general principles reference has not been made to the above-

[10] The Treaty of European Coal and Steel Community (ECSC), European Economic Community (EES) and the European Atomic Energy Community (EURATOM).
[11] Hartely T., *The Foundations of the European Community Law*, Oxford (1994), p. 130.
[12] Herdegen M., *The Origins and Development of the General Principles of Community Law*, in General Principles of Community Law (2000), pp. 3-4. The principle of proportionality is now to be found in Article 5[3b] EC and in the "Protocol on the application of the principles of subsidiarity and proportionality".
[13] Toth (2000), pp. 73-74.

mentioned Statute, but rather in order to avoid *déni de justice*.[14] This approach to general principles of law has probably been more inspired by the French administrative law than it has been by the Statute of the International Court of Justice.[15] There is a significant difference in the application of general principles by the International Court and by the European Court. In international law, the primary sources of law are still treaties and custom. No majority decision of the International Court has been expressly based on a general principle of law.[16] As will be described below in chapter 2.4, the function of general principles goes much further within the framework of Community law.

There is only one article in the EC Treaties that expressly authorises the ECJ to apply general principles of law when deciding disputes submitted to it. Article 288(2) [215(2)] EC provides that the non-contractual liability of the Community shall be determined in accordance with the general principles common to the laws of the Member States. General principles are also more recently recognised as a source of law with regard to fundamental rights in Article 6 para. 2 of the Treaty on European Union. As they are not regulated in the Treaty, the Court of Justice has developed and sometimes even "invented" general principles of Community law through a process of interpretation. The Court derives its power to apply general principles of law from Article 220[164] EC, which states that the Court of Justice shall ensure that, in the interpretation and application of the Treaty, the law is observed.

The ECJ thus has an exclusive power to interpret EC law with final binding authority and is therefore the only institution that can define the general principles of Community law.[17] "The law" that has to be observed according to Article 220[164] EC seems to include not only what is laid down in the Treaties but also general principles and fundamental values embodied in the national constitutional traditions of the Member States.[18] The *Brasserie du Pêcheur* case is a good example of how the Court applies general principles by relying on Article 220[164] EC. The Court stated that "*Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 220 [164] of the Treaty (…) to rule on such a question in accordance with generally accepted methods of interpretation, in*

[14] Avoid a denial of justice, see Nergelius J., in *General Principles of Community Law* (2000), p. 225. perhaps the first time the ECJ did fill gaps in EC law by references to general principles was in the Joined Cases 7/56 & 3-7/57, *Algera & Others* v *Assembly*, [1957/58] ECR 39.
[15] Herdegen (2000), p. 6.
[16] Toth (2000), pp. 74-75.
[17] Ibid. p. 76.

[18] Herdegen (2000), p.16, Hartley (1994), p. 131.

particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States." [19]

The Court's competence to interpret law with final binding authority gives it the power to develop Community law in a dynamic way. By relying on the general principles it can develop a notion of the rule of law appropriate to fill obvious gaps in the body of the law.[20] That is how the protection of human rights and the State Liability doctrine have been developed. It has, however, been argued that the Court sometimes goes too far in its interpretations and regulates areas that should be encompassed by the procedural autonomy of the Member States. The question is whether the Member States have empowered the Court to rely on general principles in order to extend the scope of application of Community law.[21] It can be hard to decide where the limit beyond which the Court cannot use these general principles should be drawn. In any case, the limits of the Community's powers are more or less determined by the objectives pursued by the Treaty and the general principles can of course only be resorted to within that area.[22]

The importance of general principles common to the legal systems of the Member States as a source of law may gradually decrease in the continuing process of European integration. Firstly, they have been transformed from national principles to fundamental principles *of Community law*. Secondly, there is an increasing tendency to codify principles that the Court previously applied as general principles of law. For example the principle of proportionality can be found in Article 5[3b] of the EC Treaty and soon a Charter of Fundamental Rights for the European Union will be established in order to make these rights more visible to the Union's citizens.[23]

2.3 Nature of General Principles in EC Law

General principles are normally derived by the Court from the common legal traditions of Member States and used by it to supplement and refine the Treaty provisions. International conventions which all Member States have ratified also serve

[19] *Brasserie du Pecheur and Factortame* (see note 1 above), para. 27.
[20] Toth (2000), p. 76.
[21] Herdegen (2000), p. 5.
[22] See Article 2[2], 3[3], 5[3b] and 7[4] EC, Toth (2000), p.78.
[23] Draft Charter of Fundamentl rights of the European Union, charte 4487/00, Convemt 50, Bruxelles 000928, Herdegen (2000), p. 22, Toth (2000), p. 92.

as an important source.[24] These principles primarily regulate the relationship between the individual and the public authorities (both Community and national).[25] The case law of the ECJ reveals little of the methodological approach followed in the development and application of general principles of law. One thing that is clear is that the Court does not seek a specific national legal provision as a normative point of reference. It is the underlying ideas or principles of the Member States' legislations that are used.[26] It has not been established whether these underlying principles must be present in all the Member States' constitutions in order for the ECJ to protect a particular right. It is probably sufficient though that a right is guaranteed in some of the Member States' Constitutions.[27]

Once the principle has been established in Community law it may differ from the way it works in national law. The ECJ may apply a principle creatively, going further than national laws. It can be extended, narrowed, restated or transformed during the "re-transplantation" as a general principle of Community law. Although these principles derive from the laws of the Member States, their content within the Community framework is determined by the distinct characteristics and needs of the Community legal order.[28]

What is then the relationship between a general principle and a specific rule? The ECJ has recognised that the general principles of law are above secondary legislation in the hierarchy. They are indeed used to review and overrule acts adopted by the institutions. Whether they stand higher than the Treaties themselves is not as clear and different views have been expressed in the doctrine.[29] One fact that speaks for this opinion is that the Court may invoke the general principles when supplementing and possible even amending written Treaty provisions in order to make them comply with a general principle. Some argue that Article 230[173] EC was amended in the *Les Verts* and *Chernobyl* cases,[30] in order to ensure that the European Parliament had both a passive and active right of action for annulment as required by the principles of democracy and institutional balance.[31] Many, however, argue that the Court used the principles to fill a gap in the law and not to amend a provision contrary to the Treaty.

[24] See e.g. the European Convention of Human Rights (ECHR), Nergelius, *General Principles of European Community Law*, (2000) p. 225.
[25] Tridimas, *The General Principles of EC law*, (1999), p. 3.
[26] Herdegen (2000), p. 17.
[27] Nergelius, *General Principles of European Community Law* (2000), pp.225-226, Tridimas (1999), p. 4.
[28] Tridimas (1999), pp. 3-4.
[29] Toth (2000) p. 76, Tridimas (1999), p. 33.
[30] Case 294/83, *Les Verts* v *Parliament* [1989] ECR 1339 and Case 70/88, *Parliament* v *Council* [1990] ECR I-2041.
[31] Hartley (2000), Toth (2000), p. 78.

It is difficult to find other cases where the general principles could have been held to stand higher than primary Community law. Therefore it might be more realistic to talk about a hierarchy of norms based on primary law at the top, general principles in the middle and secondary law at the bottom.[32]

2.4 Overview of Established General Principles

2.4.1 Different Categories of General Principles

The ECJ has identified many principles that can be included in the concept of general principles of EC law. These principles can be divided into different categories. It is not, however, evident how they should be classified. Many scholars think that a distinction should be made between *traditional principles* that serve to protect the position of the individual and *institutional principles* that regulate the relations between the Community institutions or the relations between the European Union and its Member States.[33] The traditional principles have been developed through the case law of the ECJ with reference to the legal traditions of the Member States.[34] In this group we will, for example, find the principles of proportionality and legal certainty.

In the doctrine, especially the principles of *fundamental human rights* are often emphasised as being a group of their own. In that case the other group consists of what are *essentially administrative law principles*.[35] Both traditional principles and institutional principles could be included in this category. Another possibility is to divide the traditional principles into *principles of substantive Community law*, including for example human rights, and *principles derived from the rule of law* which regulate the relation between individuals and authorities, for example the principle of proportionality.[36] One could ask what the differences between these two categories are. Maybe the distinction is made because the principles of fundamental human rights are of such special importance. It might be useful when determining the position that the principles have in the hierarchy of norms of EC law. That is the case according to one view that makes a distinction between *regulatory principles of law that are used to fill gaps* and *fundamental compulsory principles*. According to that

[32] Nergelius, *General Principles of European Community Law* (2000), pp. 229-230, Nergelius, *Förvaltningsprocess, normprövning och europarätt* (2000), p. 38.
[33] de Witte B., *Institutional Principles: A Special Category of General Principles of EC Law*, in General Principles of European Community Law (2000), p. 143.
[34] Nergelius, *General Principles of European Community Law* (2000), p. 226.
[35] Temple Lang J., *Legal Certainty and Legitimate Expectations as General Principles of Law*, in General Principles of European Community Law (2000), p. 163.
[36] Tridimas (1999), p. 3.

opinion the first category is subordinate to written legislation while the principles of the other category are of a higher level, taking priority over written legislation.[37]

There have been discussions about the growing importance of what may be called *institutional principles*.[38] They are, contrary to the traditional ones, largely based on written rules. Most of them have not been developed through the case law of the ECJ, but have instead become part of the Treaty through negotiations between the Member States. The principles of subsidiarity, solidarity and the principle of sincere co-operation between the institutions belong to this category.[39] Some principles will, however, be suitable for both categories. As stated above, both traditional and institutional principles could belong to the category of essential administrative law principles. The institutional principles fall outside the scope of this chapter. I will discuss the traditional ones because they serve as a background for my interest in the State liability principle. This principle has, as the traditional principles, been developed through the Court's case law and, like them, protects the position of the individual.

2.4.2 General Principles Adopted by the Court

The ECJ has recognised, among others, the following principles as general principles of law: the protection of fundamental human rights, the principle of proportionality, the principle of legal certainty and the principle of protection of legitimate expectations, the principle of non-discrimination, the right to a hearing, transparency and access to documents and the rights of defence. In the following I will shortly describe three of the most important principles: the principle of fundamental human rights, the principle of proportionality and the principle of legal certainty.

2.4.2.1 The principle of fundamental human rights

In most fields the domestic laws on *human rights* are the same, or very similar, in all Member States. However, the national views on how those rights in a particular context should be protected may differ from country to country. When balancing the public interest with the interest in protecting an individual right, some countries will accept greater restrictions than others.[40] The balancing of two conflicting rights, for

[37] Schermers H. G., *Human Rights as General Principles of Law,* in General Principles of European Community Law, p. 61.
[38] See e.g. de Witte (2000).
[39] Nergelius, *General Principles of European Community Law* (2000), p. 227.

[40] Schermers (2000), p. 61.

example the protection of ethnic or religious minorities v the freedom of expression, may also create different results. Nor is the protection regarding certain rights always the same. The differences in the Member States are of course due to different interpretations and ideas of, for example, the conception of morality. The principle of non-discrimination provides that individual EC rights should be treated in the same manner regardless of the nationality of the individual. It is therefore important that the human rights in Community law are identified and that their protection in the national courts will become uniform throughout the whole Community. Thus, a genuine *jus commune* in the field of human right could be established.[41]

Fundamental human rights were not mentioned in the original Treaties. However, the ECJ has through its case law developed what amounts effectively to an unwritten charter of rights. [42] This development is the direct result of the insistence of Germany who would not accept that the principle of supremacy of Community law over national law would diminish the protection of fundamental rights granted in their Constitution. In the 1960's, German litigants argued, in both German courts and the ECJ, for Community law to comply with the fundamental rights provisions of the German Constitution. [43] The Court had initially resisted attempts by litigants to invoke such principles as part of the Community's legal order but changed its approach in the *Stauder* case.[44] In this case the Court stated that "*fundamental rights [were] enshrined in the general principles of Community law and [hence] protected by the Court"*.[45] This statement was confirmed in many subsequent cases.[46] Today Article 6[F] TEU provides the following: " *The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (…) and as they result from the constitutional traditions common to the Member States, as general principles of Community law"*. Further, Article 46[L] TEU states that the ECJ's competence to interpret shall also apply to Article 6[F] TEU.

Human rights have been applied by the ECJ against the Community as rules of interpretation or for the purpose of striking down Community measures. The Court has, however, been criticised for not having the courage to set aside EC enactments as often as it could.[47] Community law also requires Member States to respect human

[41] Toth (2000), p. 91.
[42] Craig P.and de Búrca G. *EC Law- Text, Cases and Materials* (1998), p. 296.
[43] Hartley (1994), pp. 132-133.
[44] Case 29/69, *Stauder* v *City of Ulm* [1969] ECR 419.
[45] Ibid. note 19, at 425, at para.7.
[46] See e.g. Case 4/73, *Nold* v *Commission* [1974] ECR 491 at 507, Case 36/75, *Rutili* v *Minister for the Interior*, [1975] ECR 1219, at 1232, para. 32.
[47] Rasmussen H. *On Legal Normative Dynamics and Jurisdictional Dialogue in the field of Community General Principles of Law* in General Principles of European Community Law (2000), pp. 43-44.

rights.[48] A Member State, which persistently disregards human rights, may also have some of its rights under the Treaty suspended under the new Article 7[F.1] TEU.[49]

As already noted above, all Member States of the European Union are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The rights protected by the Convention are the so-called "classic human rights", such as the right to life, freedom of expression and the prohibition of torture and slavery. Many of them are not within the competence of the Community as they belong to the exclusive competence of the Member States (the Community does not, for example, have the competence to take measures that could violate the prohibition of torture). The ECJ has reaffirmed the "special significance" of the Convention but never considered the Community to be formally bound by it.[50] It has held that the Community lacks competence to accede to the Convention under the present provisions of the EC Treaty.[51] However, the Inter-Governmental Conference currently taking place might amend the Treaty to give competence to the Community to accede to the Convention. The foreseen adoption of a Charter of Fundamental Rights for the EU in December 2000 will also enhance the protection of the individual within the Union.[52]

2.4.2.2 The principle of proportionality

The *principle of proportionality* requires that an action undertaken must be proportionate to its objectives.[53] It exists in all legal systems of the Member States. However, both the form and function of the principle differ from country to country because of the different legal cultures and constitutional structures. One can for example compare the role of the principle in German and French law. In German law, the principle of proportionality is an unwritten constitutional principle that applies both to administrative and legislative measures. It plays an important role in the area of basic rights, where the Federal Constitutional Court or the Federal Administrative Court reviews legislative action. In German law the principle contains three elements: suitability, necessity and proportionality. Thus, the state measure concerned must be

[48] See chapter 2.5. for a description of the binding effect of general principles for acts of national authorities, Hartley (1994), p. 141.
[49] Article 7 [F1] TEU.
[50] Herdegen (2000), p. 13, see e.g. Case 222/84, *Johnston* v *Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, at 1682, para. 18, Joined Cases 46/87 and 227/88, *Hoechst AG* v *Commission*, [1989] ECR 2859, at 2923, para 13 and Opinion 2/94 on Accession by the Community to the ECHR, [1996] ECR I, p. 1759, at 1789, para 33.
[51] Ibid. Opinion 2/94 at 1787-89, para.23 *et seq*.
[52] Draft Charter of Fundamentl rights, see note23 above.
[53] Tridimas, *Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny*, in The Principle of Proportionality in the Laws of Europe, Ellis E. (ed.), (1999) p. 65.

suitable for the purpose of achieving the pursued objective, necessary in the sense that no less restricting instrument is available and it must not be disproportionate to the restriction that it involves. Thus, the principle of proportionality is a tool to balance conflicting values.[54] In contrast to German law, proportionality is not regarded as a general principle of public law in French law. The French law takes a more pragmatic approach and the principle of proportionality is used in the form of a vague concept of proportionality in several fields of the law. German law uses it to a larger extent to examine the constitutionality of legislative acts.[55]

The ECJ has applied the principle of proportionality from the beginning. Already in 1956, the Court expressly mentioned the principle as a general principle of law.[56] In Community law, the principle of proportionality has similarities with its origins in the national legal systems. The ECJ has for example often used the German approach in its case law.[57] The Court has, however, developed the principle into its own function in Community law. As a general principle of law, proportionality has been developed by the Court primarily to protect the individual from action by Community institutions and by the Member States. Today it can also be found in Article 5[3b] EC. The third paragraph of it reads as follows: "*Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty*". The Article does not add to the existing case law, but emphasises the aim to control the expansion of Community legislative action and seeks to limit burdens on Member States rather than burdens on individuals.[58]

The proportionality principle applies to both Community and national measures, and to both legislative and administrative action. According to the principle a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure.[59] The principle of proportionality has been applied in the case law of the ECJ in different ways, mainly as a ground for review of Community measures and as a ground for review of national measures affecting one of the fundamental freedoms. In the first

[54] Van Gerven , *The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe*, in The Principle of Proportionality in the Laws of Europe, see note 53 above, pp. 44-46.
[55] Ibid. p. 51.
[56] Schermers (2000), p. 62.
[57] See e.g. Case 331/88, *R* v *Ministry of Agriculture, Fisheries & Food & the Secretary of State for Health*, ex parte *Fedesa* [1990] ECR I-4023.
[58] Tridimas, see note 53 above, p. 80.
[59] Hartley (1994), p. 148.

situation the Court balances private interests against public ones whereas in the second case it balances Community interests against national interests.[60]

2.4.2.3 The principle of legal certainty

The idea of *legal certainty* is recognised in most legal systems. However, in Community law it can play a much more concrete role.[61] The principle of legal certainty is very complex, as it in fact consists of a group of several principles that are not entirely separate from one another. They all have the aim to ensure that all citizens should, as far as possible, be aware of their legal rights and duties. This requires that legal rules must be clear and precise. In a series of cases the Court has repeated that directly applicable Community measures must be clear and their application foreseeable.[62] Thus, there is a right to be free from unnecessary uncertainty in the law. Therefore, it should not require too much inconvenience and expenses to find out what one is entitled to do. Thus, a Community measure that is not sufficiently clear may not be relied on against anyone whose legal position in relation to the measure was not sufficiently clear. By ensuring the idea of the principle, subconcepts have been developed such as the principles of non-retroactivity and legitimate expectations. The non-retroactive requirement entails that retroactive legislation is permitted only in exceptional circumstances, for specific reasons, duly explained and respecting legitimate expectations.[63]

Legitimate expectations can arise from different situations. One is where a public authority gives precise assurance in an individual case. The result of a misleading impression created by the authority or an institution is another. Any economic operator to whom an institution has given justified hopes may rely on the principle of legitimate expectations.[64] It must be the Community itself that has created the situation that gives rise to the expectation. It follows from the case law of the ECJ that there is a breach of this principle if a Community institution abolishes a specific advantage, worthy of protection, without warning and with immediate effect. Unless an overriding matter of public interest is at stake, appropriate transnational measures should instead be adopted.[65] The principle of legitimate expectations is used both as a rule of interpretation and as a ground for annulment of a Community measure. Most

[60] Tridimas, see note 53 above, p. 66.
[61] Hartley(1994), p. 143.
[62] See e.g. Case 63/93, *Duff* v *Minister for Agriculture* [1996] ECR I-569 at paras. 19-20, Case T-105/96, *Pharos*, [1998] ECR II-285, at para. 63.
[63] Temple Lang, (2000), pp. 165-166.
[64] Ibid. pp. 171-172.
[65] The Court of First instance summarises the law in Case T-472/93, *Campo Ebro* [1995] ECR II-421 at para. 52.

often it is however used as the basis for an action for damages for a non-contractual liability.[66] A Member State could probably also be held liable in a similar situation. However, no case law does yet exist in this area.

2.5 Function of General Principles in the Community Legal Order

Although the general principles of law appear vague and general, the Court has deduced some very practical results from them.[67] Thus, they have many important functions in the Community legal order; as an aid to interpretation, as grounds for review of legal acts and as rules of law breach of which may give rise to tortuous liability.[68] As *rules of interpretation of written Community law*, the general principles have enabled the ECJ to interpret Treaty provisions more liberally. In particular, the Court has understood its own jurisdiction widely in order to ensure respect for the fundamental right to judicial protection. General principles can also be relied upon to supplement and refine Treaty provisions. In some cases they may even have a gap-filling function. That was the case when the non-contractual liability of the Member States was established. National measures that implement Community law should also be interpreted in the light of the general principles. Thus, a national court must interpret a provision of national law, which falls within the scope of Community law, so as to comply with general principles.[69]

The Court can also use the general principles as a *standard of review of Community acts*, administrative, legislative and executive. Any Community act that is susceptible to judicial review can be challenged and possibly annulled on grounds of breach of a general principle. An individual may attack the validity of a Community measure before a Community court on grounds of infringement of the general principles. If loss has been caused by a breach of a general principle by a Community institution, compensation can be recovered under Article 288[215] EC.[70] These actions by the Community must be distinguished from national measures that can be challenged on the same grounds. It is not completely clear whether a breach of a general principle can make a Member State liable in damages since no case law exists in this area.

[66] Hartley (1994), p.145.
[67] Temple Lang (2000), p. 164.
[68] Tridimas (1999), p.17.
[69] Tridimas (1999), p.23. See e.g. the Swedish case *Lassagård*, RÅ 1997 ref. 65, where the Supreme Administrative Court based its right to examine a case on the general principles of European Community law, Nergelius, *Förvaltningsprocess, normprövning och europarätt*, (2000) p. 29.

[70] See e.g. Case 152/88, *Sofrimport* [1990] ECR I-2477 and Joined Cases 104/89 and 37/90, *Mulder* [1992], ECR I-3061.

However, it should be accepted that a Member State may be liable in damage for failing to observe general principles of law when implementing or acting within the scope of Community law.[71] It would be unlogical if an individual had a right to receive compensation for a breach of fundamental rights resulting from an act of the Community but not from an act taken by a national authority. Since the Community is obliged to comply with the general principles, it cannot confer immunity from those principles when it delegates power to the Member States.[72]

It is important at this stage to have a closer look at the *binding effect* of general principles concerning acts of national authorities. When are Member States obliged to respect the general principles of law and therefore accept that they are used as a standard of review of their acts? It could even be possible that, in appropriate circumstances, the general principles could be relied on also to review the failure of Member States, to exercise their discretion in this respect.[73] When national authorities implement Community law, they act as agents of the Community. Thus, they are also obliged to respect the general principles of law when implementing Community rules or in situations regulated in various ways by Community law.[74] This is also true for situations when a national authority is acting on behalf of the Community and regulating or restricting any right given or protected by EC law.[75] It is not clear which other measures trigger the application of general principles. In the areas where the Community enjoys exclusive competence by virtue of a Treaty provision, it is accepted that, in principle, Member States may not enact legislation on their own initiative even in the absence of Community measures. At least national measures in such an area, where permitted at all, are subject to review on the grounds of a breach of a general principle. The binding effect of general principles does, however, not extend to national measures, which do not affect Community legislation in areas where the Community has competence but has not exercised it. Whether national implementing legislation leads to a breach of a general principle is a matter for the national court to decide, if necessary on the basis of guidance given by the Court of Justice under Article 234[177] EC.[76]

Thus, the general principles of law bind the Community institutions and in many cases also the public authorities in the Member States. Whether they also bind private

[71] Tridimas (1999) p. 23.
[72] Temple Lang, *The sphere in which Member States are obliged to comply with the general principles of law and Community fundamental rights principles*, LIEI, 23 (1991) p. 29, see more about this discussion in chapter 4.3.3.
[73] Tridimas (1999) p. 27.
[74] Temple Lang (1991). p. 25.
[75] See e.g. Case 260/89, *ERT* [1991] ECR I-2925.
[76] Tridimas (1999) pp. 23-26.

individuals is still an open question. So far the case law has not given an answer. The Court has been reluctant to accept that the general principles by themselves would impose obligations on individuals.[77] I will return shortly to this question below in chapter 6.

2.6 State Liability - a New Kind of General Principle?

In the *Francovich* case[78], the ECJ was asked to adjudicate the specific question of liability relating to the failure to implement a provision of a directive. However, the Court pronounced a principle of Member State liability for each and every breach of Community law. It based its decision on the principle of effectiveness and on Article 10[5] EC, the principle of co-operation that requires the Member States to take measures in order to ensure fulfilment of their obligations and to refrain from other contrary actions.[79] It stated that the full effectiveness of Community rules would be impaired and that the protection of the rights which they grant 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 can be held responsible.[80]

This approach was criticised by some Member States in the following case where the State liability principle was further developed, *Brasserie du Pêcheur*.[81] The German government argued that a general right of reparation for individuals could be created only by legislation. In its opinion another method would be incompatible with the allocation of powers between the Community institutions and Member States.[82] The Court dismissed that argument and held that the existence and extent of State liability for a breach of Community law is a question of interpretation of the Treaty which falls within the jurisdiction of the Court.[83] However, the Court based its decision in addition on " a general principle familiar to the legal systems of the Member States". It stated that *"the principle of the non-contractual liability is simply an expression of the general principles familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused"*.[84] The Court still did not succeed in identifying the basis for State liability with sufficient clarity. Although it made a reference to principles common to the laws of the Member States, the principle cannot be found there but rather in the distinct

[77] Ibid. pp. 31-32.
[78] *Francovich*, see note 1 above.
[79] Tridimas (1999), p. 322.
[80] *Francovich*, see note 1 above at para. 33.
[81] *Brasserie du Pêcheur*, see note 1 above.
[82] Ibid. para. 24.
[83] Ibid. para. 25.

nature of Community law and the principle of supremacy.[85] However, by locating the principle of State liability to the only Treaty article that is expressly based on the general principles common to the Member States, the Court's reasoning brings to mind the way it earlier had introduced the idea of fundamental rights and general principles of law into Community law.[86]

The role of the general principles of law, when discussing the State liability principle, is important. They were relied upon when the principle was established and, as rules of law, a breach of them may give rise to liability. The way the Court developed the State liability principle through its case law and the position it holds today could lead us to conclude that it is a recognised general principle of its own.[87] In that case, however, it must be seen as a *new kind* of general principle. In contrast to the other general principles presented above, this principle was not, as already stated, derived from the legal systems of the Member States. The principle of State liability does not exist in all Member States, at least not in the form it has been transformed into in Community law.

The idea of paying compensation to the one who has suffered damage from a breach of law is of course known both in international and national law. Within the framework of international law, it is usually referred to as State responsibility. One State can be held liable towards another for the non-observance of obligations imposed on them by the international legal system.[88] International law does not, however, provide a possibility for individuals to claim damages. Whether a State may be liable for damages towards an individual for overriding its powers is also regulated in various ways in the national legislation of the Member States.[89] However, as Advocate General Léger stated in the *Hedley Lomas* case, there are no general principles that are truly common to the Member States as far as State liability for legislative action is concerned.[90] In many legal systems there is even a lack of such rules.[91] Before the *Francovich* judgement a State could not either be held liable to pay damages for a loss caused to individuals by its breach of Community law. Therefore the establishment of State liability has been viewed as a new kind of general principle

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[84] Ibid. para. 29.
[85] Tridimas (1999), p. 325.
[86] Craig and de Búrca (1998), p. 240.
[87] This is the opinion of e.g. Herdegen, Nergelius and Toth, expressed in *General Principles of European Community Law* (2000).
[88] Lysén G., *State Responsibility and International Liability of States for Lawful Acts- A discussion of Principles* (1997), pp. 53-54.
[89] See chapter 5.3 below.
[90] Case 5/94 *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas Ltd.*, [1996] ECR I-2553, at 2579.
[91] See chapter 5.3 below.

based on the abstract concept of the law or rule of law that governs the interpretation of the Treaties.[92]

If State liability is considered to be a general principle, it is an example of how the ECJ uses new methods to establish principles of this kind. Instead of turning to common legal traditions of the Member States or international conventions, the Court can develop principles based on the need for Community law to have an effective and uniform application. One could ask how the development of general principles in Community law will continue in the future. By relying on the principle of effectiveness the Court could read in new obligations into the Treaty. It could for example develop a principle of *individual liability*. Although the Court's motive might be to provide a useful instrument when forcing Member States to apply Community law correctly, the development could result in even stronger protection of Community rights. The establishment of general principles might lead to a new *jus commune*, which could also enhance the judicial protection further. It is therefore important to analyse the State liability principle and its effects in order to discuss future developments within the protection of individual rights through tort law and to see how far the Court may go before it exceeds its powers.

[92] Toth (2000) p. 78.

3 Judicial Protection of Community Rights

3.1 Introduction

The establishment of the State Liability principle was the beginning of a new chapter in the field of enforcement of Community rights in the national jurisdictions.[93] Before describing it in more detail, I will first look at it as being one remedy among others. Tort liability is only one aspect of the Community scheme of judicial protection. This chapter will therefore generally describe that system and place the possibility to claim damages from the State in relation to the other remedies in Community law to enforce rights. It is important to account for the judicial protection in Community law in general in order to understand the background that made it possible for the ECJ to establish the State liability principle. I will look at the judicial protection of individual EC rights in relation to the Member States, which has mainly been established through the Court's case law. Other institutions of the Community have only intervened in specific sectors and have therefore played a small role in this process.[94]

3.2 The Basis of Judicial Protection - Direct Effect

The judicial protection has its origin in the doctrine of direct effect. One of the characteristics of the Community legal system is that sufficiently clear and unconditional provisions of Community law have direct effect. This means that individuals can enforce them immediately in national courts.[95] The Court first set out this doctrine in in the famous *Van Gend en Loos* case from 1963. At that time six States were part of the Community and three out of them intervened in the case. This illustrates how the concept of direct effect was difficult to accept at first.[96] Today the direct effect of Community law is, however, recognised as a part of the EC legal order.

In order for a provision to have a direct effect, it must fulfil three conditions. It must be sufficiently clear and precise, it must be unconditional and there shall be no need

[93] Tridimas, *Epilogue: Recent Developments in the Law relating to State Liability in Damages*, New Directions in European Public Law, Beatson and Tridimas (eds.) (1998) p. 191.
[94] The Council has, for example, adopted two directives which aim to make remedies uniform in the field of public work and procurement contracts (Council Directives 89/665/EEC and 92/13/EEC).
[95] Craig and de Búrca (1998) p.165.
[96] Case 26/62, *Van Gend en Loos*, [1963] ECR 1, Craig and de Búrca (1998), p. 165.

for further implementing measures. The two latter requirements mean that the right or obligation may not be conditional on a subsequent measure taken by an independent authority, such as a Community institution or a Member State.[97] If a provision is sufficiently clear, positive as well as negative obligations can be directly effective. The extent to which a provision must be sufficiently precise varies depending on each situation. A higher degree of clarity is for example required when obligations are imposed on private individuals than when they are invoked against national authorities. If a general objective is presented in a provision without any detail of the means attaining the goal, additional legislation will be necessary before the provision can be applied by a national court.[98] The direct effect can be both of a vertical and horizontal nature. If a provision has a horizontal direct effect, an individual may rely on it in proceedings before a national court against another individual. If it has a vertical effect, it may only be enforced against the State.[99]

The Court has stated in a series of cases that numerous provisions of the EC Treaty have a direct effect.[100] This includes, for example, Treaty articles guaranteeing freedom of establishment and freedom to provide services, and articles prohibiting anti-competitive agreements and the abuse of a dominant position. The same is also true for most provisions of Community law containing a binding obligation of conduct or of result. Thus, in addition to Treaty provisions the Court has held that also provisions of regulations, decisions, agreements with third countries and directives can give rise to rights which individuals can enforce in national courts.[101] If a provision is directly effective it usually provides for both vertical and horizontal direct effect.[102] This is however not always true for directives as will be described below. It is easy to understand the reason behind giving certain Treaty provisions and regulations a direct effect. If clear provisions could not be enforced on the national level by those affected, the fundamental aims of the Treaty would be impeded.[103] Regulations, of course, are directly applicable (see Article 249[189] EC) and according to the Court that is similar to having a direct effect. Decisions are addressed

[97] Weatherill S. and Beaumont P., *EC Law*, (1995), p. 338.
[98] Hartley (1994), pp. 201-203.
[99] Craig and de Búrca (1998), p. 168..
[100] See e.g. Case 2/74, *Reyners* v *Belgium*, [1974] ECR 631, Case 43/75 *Defrenne* [1976] ECR 455.
[101] Shaw J., European Community Law (1993), p. 160, see e.g. Case 43/71 *Politi* v *Italian Minister of Finance* [1971] ECR 1093 regarding Regulations, Case 9/70 *Grad* v *Finanzamt Traunstein*, [1970] ECR 825 regarding Decisions, Case 104/81 *Kupferberg* [1982] ECR 3641 regarding agreements with third countries and Case 41/74, *Van Duyn* v *Home Office* [1974] ECR 1337 regarding Directives.
[102] Van Gerven and others, *Cases, Materials and Text on National, Supranational and International Tort Law, Scope of Protection* (1999), p.477.
[103] Craig and de Búrca (1998), p. 185.

to an individual person with the intention to be binding upon that person and are therefore also directly applicable.[104]

It is not as easy to argue for the direct effect of directives. It was earlier held that directives could not be capable of judicial enforcement since they contained obligations of result and not of conduct. Another fact supporting this opinion was that only regulations are expressed to be "directly applicable" in Article 249[189] EC. However, in the *Van Duyn* case[105] the ECJ expressly recognised the direct effect of directives. It held that only because regulations alone are mentioned as being directly applicable, it does not mean that other categories of acts mentioned in that article could never have similar effects. According to the Court, the binding effect attributed to directives must in principle give those concerned the possibility to invoke them.[106] However, directives can never have a direct effect before the time limit given for the implementation has expired. *Nor are they capable of having a horizontal direct effect.*[107] This was decided in the *Marshall* case[108] where the Court argued that the Community only had competence to create obligations for individuals in areas where it was empowered to adopt regulations. Thus, a directive may only be relied on before a national Court against another State but never against another individual.[109] Advocate General Lenz argued for the overrulement of Marshall in the *Faccini Dori* case.[110] He described the considerations favouring the horizontal effect of directives as *"a drive to do justice by the beneficiary of a provision which the Community legislator intended to be binding and not abandon his situation for an indefinite period to the whim of a Member State in default of his obligations"*. He stated that it was contrary to the requirements of an internal market for individuals to be subject to different laws in the various Member States. Lenz made a reference to Advocates General Van Gerven and Jacobs who also had spoken out in favour of the horizontal applicability of directives.[111] The Court however chose to maintain the distinction between regulations and directives and expressly confirmed that directives are unable to create a horizontal direct effect.

[104] Craig and de Burca, pp. 176-179.
[105] *Van Duyn*, see note 101 above.
[106] Ibid, at p. 1348.
[107] Shaw (1993), pp. 160-162.
[108] Case 152/84, *Marshall* v *Southampton & South-West Hampshire Area Health Authority* (*Marshall I*), [1986] ECR 723.
[109] Shaw, pp. 160-161.
[110] Case 91/92 *Dori* v *Recreb Srl* [1994] ECR I-3325.

[111] Paras. 47, 48 and 51 in the opinion by Advocate General Lenz in the Faccini Dori case, see supra note.

This solution can be hard to understand**.** Faccini Dori was an Italian citizen who concluded a contract with a company on a railway station for an English language correspondence course. Some days later she informed the company that she was cancelling her order. In order to release herself from the contract she was relying on Directive 85/577/EEC, concerning the protection of consumers in respect of contracts negotiated away from business premises, that provided for a right of renunciation. The Directive was not, however, implemented in Italian law within the prescribed time limit. In the absence of such rules in the Italian legislation, Faccini Dori was not given the right to cancel her contract against the company or to enforce such a right in a national court. The Court stated that a directive is binding only on the Member State to which it is addressed. Thus, a directive may not of itself impose obligations on an individual. On the one hand, one can ask why she would loose her rights just because she happened to have an individual and not the State as her counterpart. On the other hand, a directive is addressed to the State and it is its fault if it is not implemented in due time. In my opinion, it is also unfair to require citizens to respect rules that are not yet national law. It is impossible for them to know what the law should be before it is implementated.

It is unfortunate when an individual, in the mentioned case Faccini Dori, has suffered her EC rights but still cannot get reparation. Therefore the Court developed *other ways to give horizontal effect to directives indirectly*. One was to expand the notion of the public body to include all kinds of organs of the State. In its case law the ECJ has held that the term covers all organs of the administration, incuding decentralized authorities.[112] In the *Foster* case[113] it held that an individual can enforce a directive against all bodies that have been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from normal rules applicable in relations between individuals.[114]Another way was to develop the principle requiring national law to be interpreted in the light of directives. In the *Marleasing* case, the Court ruled that national legislation originating before a directive must be interprted in coherence with the directive. The principle of indirect effect was even extended to legislation passed prior to the directive. Obligations can therefore indirectly be placed on private parties by using interpretative measures to alter national law. Thus, through the establishment of indirect effect a result similar to the one created by horizontal direct effect can be achieved. However, it can never provide for the same kind of

[112]Craig (1997) p. 70, e.g. Case 103/88, *Fratelli Consanzo SpA* v *Commune di Milano* [1989] ECR 1839, Case 222/84, *Johnston*, see note 50 above.
[113] Case 188/89, *Foster* v *British Gas Plc* [1990] I ECR 3313.
[114] Ibid. para. 20.

effect as the horizontal direct effect does. What if, for example, the wording of the national law contradicted the directive or if there was no national law at all to construe in the light of the directives?[115] The development of the State liability principle was therefore very important. Instead of trying to enforce the provisions against a private party , individuals can bring proceedings for damages against the State for failing to implement the directive.[116] The need to extend the liability principle to make it applicable also on other individuals will be discussed below, in chapter 6.

3.3 Remedies to Enforce Community Rights

Through the doctrine of direct effect the rights that individuals derive from Community law may be invoked before national courts. This does not, however, give a satisfactory protection of individual rights unless sanctions and remedies are also available for their enforcement. There is no system at the Community level of harmonised remedies for a breach of Community law.[117] The ECJ can in most cases not declare national measures invalid because of inconsistency with Community law. There are some exceptions in specific areas. One is Article 81(2)[85(2)] EC which provides for nullity when cartel agreements, which are not exempted from the cartel prohibition laid down in Article 81(19[85(1)] EC, are closed. However, in most cases when the Court has found that a Member State has failed to fulfil an obligation under the Treaty, it is for the competent national courts to take the necessary measures to comply with the judgement.[118] According to the principle of procedural autonomy of the Member States, the Community does not have competence in procedural matters. However, the ECJ has many times emphasised the importance of the principle of uniform application of Community law because of its supremacy over national legislation.[119] The uniform application cannot, however, be an absolute requirement. National rules will apply except when they make it extremely impossible for an individual to obtain a remedy when suffering from a breach of Community law.

[115] Steiner, From Direct Effects to Francovich, Shifting Means of Enforcement of Community Law (1993), pp. 3-6.
[116] Craig and de Búrca (1998), pp. 193-198, 210.
[117] Ibid. p.252.
[118] Article 228[171] EC.

[119] Case 6/64, *Costa* v *ENEL* [1964] ECR 585, Case 314/85, Firma Foto-Frost v Hauptzollamt Lübeck-Ost, [1987] ECR 4199, Joined Cases 143/88 and Case 92/89, *Zuckerfabrik Suderdithmarschen*, [1991] ECR I-415.

3.3.1 Inapplicability and Unenforceability

For a long time the ECJ mainly treated rights as a matter of Community law and remedies as a matter of national law. It left to the national legal systems to ensure the legal protection of Community rights. The Member States were to determine the procedural conditions under which Community rights were protected. The only requirements that the Court imposed on the national procedures were that they had to comply with the principles of non-discrimination and practical possibility. Thus, the remedies in Community law had to be available in the same way as remedies in national law and the applicable national conditions and procedures should not make the exercise of the right impossible in practice.[120] Community law did not require States to provide or create remedies which did not exist under national law.[121] This way to regulate the matter created a lack of uniformity of protection and enforcement between the various Member States. The position of ECJ therefore changed from not intervening to enforcing the principle of effectiveness.

Thus, to strengthen the protection of individual rights the Court changed its approach and started to direct national courts in providing adequate remedies for a breach of Community law. It developed remedies with the involvement of the national courts by balancing the need to respect the autonomy of the national legal systems and the need to ensure adequate enforcement and effectiveness of EC law. The Court changed its formulation of the practical possibility requirement by emphasising the obligation for national courts to give adequate effect to Community rights despite the existence of conflicting national rules. Instead of stating that the national rule should not render the exercise of the Community right "*impossible in practice*" it prohibited the national rule from rendering the right "*excessively difficult to exercise*".[122] In its case law the Court focused on the fact that national remedies must secure the effectiveness of Community rights. It found that the principle of co-operation in Article 10[5] EC in the Treaty obliged national courts to set aside national rules that precluded or limited the grant of an appropriate remedy.[123] Setting aside a national rule or rendering it inapplicable because of a conflict with Community law is the foremost and most general remedy that national legal systems should ensure for individuals harmed by a

[120] Case 33/76, *Rewe-Zentralfinanz eG & Rewe-Zentral AG* v *Landwirtschaftskammer für das Saarland* [1976] ECR 1989 , Case 265/78, *Ferweda* v *Produktschap voor Vee en Vlees* [1980] ECR 617.
[121] Case 158/80, *Rewe-Handelsgesellschaft Nord mbH* v *Hauptzollamt Kiel* [1981] ECR 1805 at para. 44.
[122] Craig and de Búrca (1998) pp. 226, 252.
[123] See e.g. Case 213/89, *R* v *Secretary of State for Transport,* ex parte *Factortame Ltd. & others (Factortame I)* [1990] ECR I-2433.

breach of Community law. In addition to this remedy the Court developed the more specific remedies of restitution, interim relief and compensation.[124]

3.3.2 Restitution, Interim Protection and Compensation

When sums have been paid in breach of Community law, the means of repayment is provided by the remedy of *restitution (and specific performance)*. For restitutionary rights to arise, the claimant must prove illegality, the fact that the sums have been passed on to other persons and that the recovery does not amount to unjust enrichment. If that is successfully showed, the State must pay for the damage done. A Member State can also make an individual repay sums that have been paid to him/her in breach of Community law. A typical situation where this is required is a State subsidy case. If a State has granted subsidies contrary to what is permitted according to Community rules, it is liable to make restitution towards the individual who received the subsidy.[125]

Interim relief gives the claimant a right to get a suspension of enforcement of a judgement or other administrative measure. That form of protection was granted in the *Factortame I* case.[126] The claimants were challenging an act of the English Parliament as being in breach of Community law. They also sought interim relief until the final judgement was given because they feared loss that could not be repaired afterwards. The grant of interim relief was, according to British law, in this case precluded by a Common law rule and by the presumption that an act of Parliament is in conformity with Community law until a decision stating otherwise has been given. The ECJ had to face a conflict between the principle of effectiveness and the principle that national courts need not create new remedies. In its judgement, the ECJ referred to an earlier decision, *Simmenthal,* wherein it insisted on the necessity that directly applicable rules of Community law "*must be fully and uniformly applied in all the Member States*".[127] It then stated that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.[128] Thus, the ECJ underlined the requirement of effectiveness and gave that principle priority over using procedural rules of national law.[129] In a later judgement, the *Zuckerfabrik* case,

[124] Van Gerven, *Of Rights, Remedies and Procedures*, CML Rev. (2000) p. 503.
[125] Ibid. pp. 517-518. The Court summarized its previous case law in Joined cases 192/95 to 218/95, *Société Comateb* v *Directerur Général des douanes et droits indirects* [1997] ECR I-165.
[126] Case 213/89 *Factrortame I*, see note 123 above.
[127] See Case 106/77, *Simmenthal*, [1978] ECR 629, at para. 14.
[128] Case 213/89 *Factortame I*, see note 123 above, at para 21.
[129] Craig and de Búrca (1998), pp. 220-221.

the Court stated that the interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law.[130]

The last remedy is *compensation* to individuals who have suffered a loss as a consequence of a breach of Community law. Today there are two regimes of extra-contractual liability in Community law. The first regime governs the liability of Community institutions and their servants. Its legal basis is found in Article 288(2)[215(2)] EC. The second regime is a judge-made law that relates to the tortuous liability of Member States for breaches of Community law. The following chapters will analyse the State liability regime and the impact that the development of this principle has had on the judicial protection of individual rights. Since this principle is closely connected to the Community liability, I will first, however, briefly account for Article 288(2) [215(2)] EC.

3.4 Community Liability- An Analysis of Article288(2)[215(2)] EC

Compensation for wrongful acts or omissions of the Community institutions and their civil servants is governed by Article 288(2)[215(2)] EC and provides the following:
" *In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the member states, make good any damage caused by its institutions or by its servants in the performance of their duties*"
Individuals can, under Article 230(4)[173(4)] EC, ask the Court of First Instance to review the legality of binding Community acts or, under Article 232(3)[175(3)] EC, to condemn failures to act on the part of Community institutions. In these situations proceedings for compensation are also normally taking place. An annulment of the Community act in question is not, however, a pre-condition for the possibility of getting compensation.[131] Thus, liability under Article 288[215] EC is an independent and autonomous remedy.

Article 288[215] EC refers to the administrative or governmental liability in contrast to civil law liability. The Treaty does not give any definition of "non-contractual liability". Therefore the ECJ is given a wide discretion to interpret the circumstances in which damages may be claimed. According to the case law, the claimant must

[130] Case 92/89, *Zuckerfabrik*, see note 119 above, para. 20.
[131] See Case 5/71, *Aktien Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975.

establish three things: the existence of a wrongful act or omission on the part of the institution or its servant, the damage suffered by the claimant and a causal link between the two.[132]

The Community can be held liable for legislative acts, administrative acts or acts of EC servants. An administrative act is of an individual and concrete character while a legislative act is of general application. Administrative acts are not of a normative character. Legal acts can either be of an individual nature (e.g. a decision) or of a normative nature (e.g. regulation). It is important to make this distinction, since a different test of liability is applicable to legislative measures of general application. In order for an application to be successful three criteria must be fulfilled,

- the act has to be unlawful,
- the plaintiff must have suffered damage and
- there has to be a causal link between the damage and the conduct.

In addition to that, the Court uses two different methods to decide whether the Community is liable for damages or not. In situations where the Community does not exercise a very wide discretion, the act in question will be assessed under a test of *reasonableness*. Thus, when dealing with administrative acts or legal acts of an individual nature, the question whether the defendant institution is liable or not will be decided depending on whether it acted reasonably.[133]

Another test will be used in situations where the Community has a wide discretion, in particular as regards legislative measures involving choices of economic policy. That is the case regarding legal acts of a normative nature. In order to decide whether the Community institution concerned has committed a wrongful act or omission in these cases, the ECJ formulated a test in the *Schöppenstedt* case.[134] It held that three conditions must be fulfilled in order for the Community to incur liability for damage suffered by individuals as consequence of that action:

- the breach has to be sufficiently serious,
- the rule violated has to be a superior rule of law and
- that rule must have the protection of the individual as an object.

The Court of First Instance has in a case held that "*a sufficiently serious breach of a superior rule of law occurs when the institutions manifestly and seriously disregards the limits of their discretionary power without demonstrating the existence of public interest of a higher order*".[135]

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[132] Van Gerven and others (1999) pp. 403-404.
[133] Ibid. p. 404, Tridimas (1999) p. 315.
[134] Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt*, see note 131 above, para. 11.
[135] Cases T-195/94 and T-202/94 *Quiller and Hausmann* v *Council and Commission*, para. 58.

In the *Brasserie du Pêcheur* case the Court explained why it used a less strict test regarding acts characterised by a wide discretion. It held that "*the exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests*".[136] Thus, in areas where the Community has a wide discretion, the individual will have to accept certain harmful effects as a result of a legislative measure without being able to obtain compensation even if the measure in question has been declared null and void. The conditions set out by the ECJ regarding the liability of Community institutions are similar to the ones applied on State liability. The non-contractual liability of the Member States is not, however, relied upon a Treaty Article but solely on the case law of the ECJ. In the following chapter I will focus on the outcome of certain cases in order to describe the scope and shape of this principle.

[136] *Brasserie du Pêcheur*, see note 1 above, at para. 45.

4 State Liability in Damages for a Breach of Community Law

4.1 The Establishment of the State Liability Principle

The State liability principle has been established and developed through the case law of the ECJ.[137] The first time that the ECJ fully addressed the question of State liability for a breach of Community law was in its landmark decision in the *Francovich* case, which was delivered on 19 November 1991.[138] One can wonder what led the Court to establish a principle of State liability at that particular moment. As described in the previous chapter, the Court had earlier enhanced the effective judicial protection in the field of interim relief through the *Factortame I* case.[139] In that case, the Court required a national court to use a remedy that was incompatible with national law by referring to the importance of the full effectiveness of Community law. Although the Court had earlier stated that Community law did not require the creation of new national remedies, here it in practice required exactly that. This case could therefore be seen as a start of the Court's new approach towards provisions of national remedies for a breach of Community law.[140]

The *Francovich* case arose out of Italy's failure to implement Council Directive 80/987 in due time. The directive is designed to guarantee employees the full payment of wages if their employer becomes insolvent. Andrea Francovich and several other employees suffered a great loss as a result of their employer's bankruptcy. Because the directive was not implemented in Italian legislation, they could not enjoy the protection that Community law was to provide for them. Therefore they sued the Italian State, claiming that it was liable to pay them the sum they would have obtained had the directive been in force. The Italian court sought a preliminary ruling under

[137] See chapter 2.6 where I have accounted for the legal basis that the Court has referred to in order to legitimate its action.
[138] *Francovich*, see note 1 above. The ECJ had already in its earlier case law visualised the possibility of claims against a Member State for compensation for breach of directly applicable rules of Community law. See e.g. Case 6/60, *Humblet* v *Belgian State*, [1960] ECR 599 at para. 569, where the ECJ held that a legislative or administrative measure, adopted by a Member State, contrary to Community law should not be valid and that the State should make reparation for any unlawful consequence and Case 60/75, *Russo* v *AIMA*, [1976] ECR 45, at para. 9 where the ECJ held that a Member State should compensate for damages caused by its own breach of Community Law. See also Temple Lang, *Judicial National Attitudes to Community Law and Consequences for the Evolving Community Law* in Access to Justice, A record of thoughts and ideas dealing with the interrelationship between national courts and Community law and courts, Sundström G. O. Z. and Kauppi M., (eds.) (1999), pp. 69-70.
[139] *Factortame I*, see note 123 above.
[140] Craig and de Búrca (1998) p. 237.

Article 234 [177] EC. The two most important questions put to the ECJ were whether the Italian State had to pay the sum because the provision in Directive 80/987 was directly effective, or whether the individual could claim the sum from the State as damages for a loss arising from its failure to implement the directive.[141]

The Court held that, because the provision in question did not specifically enough identify the institution that was to provide the compensation, it was not sufficiently clear to be directly effective. However, the Court stated that the full effect of Community rules would be undermined if there was no way to give compensation to individuals harmed by the Member State's breach of Community law. It continued by saying that it was a general principle, inherent in the scheme of the Treaty that Member States shall compensate the damages caused to individuals by a breach of Community law if the State can be held responsible. Three conditions for State liability, regarding a failure to implement a directive, were enumerated:

- the result required by the directive should involve rights conferred on individuals,
- the content of those rights must be clearly identifiable from the directive and
- a causal link between the breach of the State's obligation and the loss suffered by the individuals must exist.

The Court held that procedural rules to enforce individual EC rights against the State were to be determined by national law. It required, however, that the principles of effectiveness and non-discrimination were taken into account. This means that national rules must not render the reparation virtually impossible or excessively difficult and thus cannot be less favourable than those relating to similar national situations.[142]

The establishment of the State liability principle had a great impact on the effective protection of individual EC rights. As described in chapter 3, the principles of direct and indirect effect could not alone ensure the full and effective enforcement of Community law. This is especially true for directives, which are unable to create a horizontal direct effect although they are unconditional and sufficiently precise. Action against the State for damages is, however, independent of the principle of direct effect. It is not based on the infringement of effective Community provisions but on the State's failure to act in accordance with its obligations under Community law. Through the State liability principle, compensation is provided for as a matter of *Community law* and not as an optional national remedy.[143]

[141] *Francovich*, see note 1 above, paras. 1-7.
[142] Ibid. para. 43.
[143] Craig and de Búrca (1998) p. 238.

The *Francovich* case established the State liability principle but left several questions concerning the criteria for the application of the principle open. In the following I will look at case law subsequent to the *Francovich* judgement, that has clarified and developed the State liability principle.

4.2 Further Development of the State Liability Principle

4.2.1 The *Brasserie du Pêcheur* Case

It was not until in the judgement of the joined cases *Brasserie du Pêcheur and Factortame III* (often referred to as *Brasserie du Pêcheur*),[144] delivered in March 1996, that the ECJ answered some of the questions that the *Francovich* case had left open. The Court was here for the first time asked to judge upon the application of the principle of State liability for a breach of a directly effective provision of the EC Treaty.[145] Besides deciding on that matter, it also clarified the conditions for holding a State liable for breaches of Community law and discussed the actual extent of the reparation. The case law that concerns questions related to the substantive and procedural issues concerning a claim for damages will, however, not be examined in this chapter. I will instead look closer at this issue in chapter 5.4.2.

In the first case a French brewery, *Brasserie du Pêcheur*, was prohibited from exporting beer to Germany for several years because the German authorities considered that the beer did not comply with the purity requirements laid down by German law. The ECJ declared that this prohibition was contrary to the principle of free movement of goods according to Article 28[30] EC.[146] The second case, *Factortame III*, arose out of provisions in a British Act that did not comply with Article 43[52] EC. The Act introduced a new registration system for fishing boats with the result that fishermen of an origin other than British lost their right to fish.

In both cases the claimants sought damages from the State for the loss that the existence of the unlawful provisions had caused them. Therefore the first question that the Court answered was whether the State liability principle also obliged the Member States to compensate damage caused to individuals when the *national legislature* was

[144] *Brasserie du Pêcheur*, see note 1 above.
[145] After the *Francovich* case, the ECJ had repeated and applied the Francovich criteria for State liability in cases that concerned the non-implementation of directives, see e.g. Case 334/92, *Wagner Miret*, [1993] ECR I-6911, Case 91/92, *Faccini Dori*, see note 110 above and Case 192/94, *El Corte Inglés* v *Cristina Blázques Rivero*, [1996] ECR I-1281.
[146] Case 178/84, *Commission* v *Germany*, [1987] ECR 1227.

responsible for the infringement in question. Some of the national governments claimed that, according to the principle set out in the *Francovich* case, the action for damages would only be available for non-directly effective directives.[147] This argument was rejected by the ECJ. Instead it held that the right of individuals to rely on directly effective provisions of Community law in their national courts only gave a minimum guarantee of protection.[148] It then stated that the State liability principle is a general principle applicable to all cases where a Member State infringes Community law, irrespective of whether the breach concerns a provision of the EC Treaty, a regulation or the implementation of a directive. The Court continued by stating that the State will be liable irrespective of which organ of the State that is responsible for the breach and regardless of the internal division of powers between constitutional authorities.

Another important aspect that the ECJ addressed in *Brasserie du Pêcheur* was the specification of the conditions under which State liability can arise. The Court first stated that the conditions for liability depend on the nature of the breach of Community law.[149] It then made a reference to Article 288(2)[215(2)] EC and the Court's case law on non-contractual liability on the part of the Community (see chapter 3.4 above). It held that the rights of individuals should be protected similarly, irrespective of whether it is a national or Community authority that is responsible for the infringement. Making a parallel between Community and State liability means that the conditions for State liability to arise should also differ depending on the situation in which the wrongful act was taken. Thus, a restrictive approach to the liability of the State, according to the *Schöppenstedt* test,[150] was to be applied when the national authority acted in a field where it enjoyed a wide discretion, comparable to that of the Community institutions, in implementing Community policies.[151] In such circumstances the following conditions had to be fulfilled:

- the rule infringed must be intended to confer rights on individuals,
- the breach must be sufficiently serious and
- there must be a causal link between the breach and the damage.[152]

[147] (The German, Irish and Netherlands Governments), *Brasserie du Pêcheur*, see note 1 above, paras. 17-18.
[148] Ibid. para 20.
[149] Ibid. para. 38.
[150] Case 5/71, *Zuckerfabrik*, see note 131 above, *Francovich*, see note 1 above, para. 38
[151] *Brasserie du Pêcheur*, see note 1 above, paras.37-47.
[152] Ibid. para. 51.

As stated above in chapter 3.4, it is in order not to hinder the exercise of the legislative function that a less strict test is being used for acts characterised by a wide discretion.[153]

In most cases, the crucial question when deciding on State liability for a breach of Community law will be whether the infringement is *sufficiently serious* or not. When the Member State concerned has no or very little discretion, an infringement of Community law will easily constitute a sufficiently serious breach. However, in cases where the discretion is wider, it will take more before a breach is regarded to be sufficiently serious. This requirement makes it more difficult for applicants to succeed when the State infringes Community law in situations where it enjoys a wide discretion. Tesauro, Advocate General in the *Brasserie du Pêcheur* case, did recognise this aspect in his Opinion when he proposed that Community liability and State liability should be determined according to the same conditions. Despite that, he still held that the conditions for liability on the part of the Community and the Member States should be harmonised. In his opinion, according to the rule of law, the compensation that an individual can obtain for a breach of Community law should not depend on whether it was the Community or a Member State that committed the breach.[154]

What is then considered to be a *sufficiently serious* breach? The ECJ found that a breach of Community law was sufficiently serious when the Member State "*manifestly and gravely disregarded the limits on its discretion*". Moreover, it held that the limit of discretion is gravely disregarded if a prior Court judgement, finding an infringement of EC law, exists. Such a prior judgement is not, however, necessary for an individual who wishes to claim that an act or omission of the State constitutes a breach of Community law.[155] The gravity of the infringement must be established by the national courts. To provide guidance for what a national court should take into consideration when deciding whether a breach is sufficiently serious, the ECJ enumerated the following factors:

- the clarity and precision of the rule breached,
- the measure of discretion left by that rule to the national court,
- whether the infringement and the damage caused was intentional or involuntary and

[153] Van Gerven and others (1999) pp. 404-405.
[154] Opinion of Advocate-General Tesauro of 28 November 1995, in *Brasserie du Pêcheur*, see note 1 above, at paras. 64-67.
[155] *Brasserie du Pêcheur*, see note 1 above, paras 55-57,93.

- whether any error of law was excusable or inexcusable.[156]

The Court also held that the finding of a serious breach might involve objective and subjective factors that are connected with the concept of fault.[157] However, the conditions that give rise to liability do not depend on the examination of a fault criterion but on whether or not a sufficiently serious breach has been committed.

The use of the criterion of a *sufficiently serious breach* has been criticised. It is, of course, necessary to balance the need to ensure effective remedies for the enforcement of Community law and the interest of not holding public authorities liable for all acts contrary to Community law. The prospect of damages for strict liability could hinder Member States from performing their legislative and executive functions. Public bodies could for example become wary of taking any action without seeking legal advice. Thus, it is understandable that when the State enjoys a wide discretion, the requirements for holding it liable will be higher. On the other hand, the effective protection of individual rights could diminish if the *sufficiently serious* criterion meant that, in practice, it will be very hard for an applicant to obtain damages in these situations. That has often been the case when the test has been employed under Article 288(2)[215(2)] EC. Therefore, the *sufficiently serious* concept in the case law regarding Community liability has been criticised for being too protective towards the Community institutions. The negative result for applicants may, however, depend more on the way in which the ECJ has applied the test than on the test itself.[158]

According to Van Gerven, it is not correct to make an automatical link between the wide discretion that Community institutions enjoy when implementing Community policies and the discretion that Member States have under Community law. He compares, as an example, the scope of discretion the Council has when taking policy decisions with the scope of discretion Member States have when interpreting Community legal provisions or implementing existing policies.[159] He has proposed the use of the standard of *how a normally (or reasonably) diligent authority would have acted under the circumstances*, which he thinks that national courts could adopt more easily and understandably as they are more familiar with this concept than with the criterion of a *serious breach*.[160] Craig, however, objects to the argument that the discretion which Member States have under Community law differs so much from the discretion of the Community institutions. He describes several situations where

[156] Ibid, para. 56.
[157] Ibid. para. 78.
[158] Craig (1997) pp. 80, 84.
[159] Van Gerven (1996) pp. 517-19.
[160] Van Gerven, *Taking Article 215 EC Treaty Seriously*, in New Directions in European Public Law (1998) pp. 43-44.

Member State action, which is in breach of Community law, involves types of complex discretionary economic choices comparable to those of the ones that Community institutions sometimes have to make.[161] I think it is good that the same test is applied to both acts of Community institutions and acts of Member States. It is, however, important that the test is only employed in situations where the State really does enjoy a wide discretion to act. In many other cases the interest to protect the individual EC rights is more important. I therefore agree with Van Gerven in that the scope of application of the serious breach test should be clarified, so that it will only cover infringements which *manifestly and gravely* disregard the limits of the discretion of the State.[162]

In the *Brasserie du Pêcheur and Factortame III* case, the ECJ held that the Member States enjoyed a wide discretion in both cases. It then went on to look at the conditions required for liability to arise. The Court pointed out that the rules infringed (Articles 28 [30] and 43 [52] EC) were intended to confer rights on individuals. The following step was to examine the infringements in question. They were both found to be sufficiently serious. That conclusion was quite obvious, since the ECJ had, in both cases, previously made clear that the provisions in question were contrary to Community law. Finally, the Court stated that it was for the national courts to determine whether a causal link had been established in each case.[163]

4.2.2 Judgements Subsequent to *Brasserie du Pêcheur*

Brasserie du Pêcheur broadened the concept and clarified the basis of the principle of State liability. After this judgement, no important change in the State liability concept has occurred. However, the case law following *Brasserie du Pêcheur* has specified the principles established therein. I will here only comment on these cases.

In the *British Telecom* case[164] from 1996, the ECJ held that the conditions for liability to arise as set out in the *Brasserie du Pêcheur* case, were also applicable when a Member State (in this case the United Kingdom) had incorrectly transposed an article of a directive into national law. Considerations were taken to the wide discretion of the State in such a situation. That justified the use of the restrictive approach, which meant that the State could only be held liable if the breach in question was sufficiently serious. Although the Court had earlier stated that it was for the competent national

[161] Craig (1997) p. 81.
[162] Van Gerven, (1998), pp. 42-43.
[163] *Brasserie du Pêcheur*, see note 1 above, paras. 48-49, 77-80.
[164] Case 392/93, *British Telecommunications* [1996] ECR I-1631.

court to decide on that matter, it still examined whether or not such a breach was at stake. It found that the breach was not sufficiently serious to make the State liable for its mistake. The ECJ reached this conclusion by taking the following facts into consideration: the language in the Article was imprecise, there was a lack of case law of the Court regarding this matter and the Commission had not raised the issue when the regulation was adopted. Other Member States had also made the same mistake as the UK. Thus, the Court stated that the UK probably had acted in *good faith* and came to the conclusion that no manifest and grave disregard of the limits of the State's discretion had occurred.[165] This *good faith* test protects a State from being easily held liable for a breach of Community law when implementing secondary legislation incorrectly.

So far the ECJ had stated that the conditions for State liability to arise as set out in the *Brasserie du Pêcheur* case, should apply where the state action was legislative in nature and some significant measure of discretion existed. Whether it should also be applicable when the state action was administrative or executive was not yet decided. The *Hedley Lomas* case,[166] also delivered in 1996, arose out of the refusal of the British Ministry of Agriculture to grant licences for the export of live sheep to Spain. In this case, the breach was made by a national administration so the impugned act in question was executive rather than legislative. The ECJ indicated that that the State liability principle also applies to breaches of Community law which are the consequence of an administrative decision taken by a national administration. It also applied the conditions set out in *Brasserie du Pêcheur*, to decide whether the State was liable for damages or not. According to Craig, in his article "*Once More Unto the Breach: the Community, the State and Damage Liability*", this judgement seemed to confirm the view that the form of state action is not, in itself, necessary for the application of the test.[167] I think it is important to treat all forms of state action in the same way. I agree with Craig in that it can be difficult to make a distinction between the different forms of action. It is often entirely fortuitous whether a state operates through one medium or another and that the administrative executive discretionary power can be just as complex and problematic as the exercise of legislative discretion.[168] Depending on the extent of discretion exercised in each case, the competent court will have to decide whether the breach is sufficiently serious or not. In *Hedley Lomas*, the Court held that, when the Member State in question only had a

[165] Ibid. paras. 40-45.
[166] Case 5/94, *Hedley Lomas*, see note 90 above.
[167] Craig (1997) pp. 74-75.
[168] Ibid. p. 81.

considerably reduced or even no discretion, the mere infringement of Community law could be sufficient to establish the existence of a serious breach.[169]

In *Dillenkofer*[170], from 1996 as well, the ECJ held that a failure to implement a directive in due time constitutes *per se* a sufficiently serious breach. This decision finally made it clear that the conditions set out in *Brasserie du Pêcheur* for State liability to arise were the same as those laid down in *Francovich*, although the requirement of a sufficiently serious breach was not expressly mentioned in that case. In that judgement the ECJ also attempted to clarify the requirement that the directive must entail the grant to individuals of rights which are sufficiently identified in order for liability to arise as a result of a failure to implement it.[171] Parts of Community law that does not normally intend to grant specific rights to a category of individuals still can have a general aim of protecting individuals. This is often the case concerning directives on environmental law.[172] In the *Commission* v *Germany* case,[173] the ECJ declared that Germany had failed to fulfil its obligations under Community law by not properly implementing Article 10 of the Directive 80/778/EEC regarding the quality of ground water.[174] Advocate General Jacobs did in his Opinion of the case also look at the fact that the proceedings could serve to establish a basis for the liability of a Member State although that issue will be raised in a national court. An important question regarding the conditions for State liability to rise as a consequence of the violation of Community law in this case would be whether the directive did confer rights on individuals. Jacobs argued that it did in so far as its purpose is to protect public health and a failure to comply with it might endanger public health. In his opinion, individuals could therefore claim compensation for the incorrect implementation of an article of that directive.[175]

In the *Denkavit* judgement,[176] again from 1996, the ECJ gave further indications of what will constitute a sufficiently serious breach. The case concerned the incorrect implementation of a directive by Germany. The Court had decided on State liability in such a situation before, in the *British Telecom* case. In that judgement, the ECJ had

[169] *Hedlay Lomas*, see note 90 above, para 28.
[170] Joined Cases 178/94, 179/94, 188/94, 189/94 and 190/94, *Dillenkofer and Others* v *Germany* [1996] ECR I-4845.
[171] Ibid. paras 30-46.
[172] Van Gerven and others (1999) p. 445.
[173] Case 237/90, *Commission* v *Germany* [1992] ECR I-5973.
[174] Council Directive 80/778/EEC relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11).
[175] Opinion of Advocate- General Jacobs in Case 237/90, see note 173 above, at p. 15, ECR I-6005.

[176] Joined Cases 283/94, 291/94 and 292/94, *Denkavit International* v *Bundesamt für Finanzen*, [1996] ECR I-5063.

first stated that it was for the national court to decide whether the conditions for State liability to arise were fulfilled. However, it then continued by saying that, since it had all the facts, it would decide on the matter of a sufficiently serious breach itself. In the *Denkavit* case the ECJ did the same thing. The factors considered, in order to decide whether the breach was sufficiently serious or not, were also to a large extent the same as in *British Telecom*. In addition to them, the Court also held that an important factor for concluding that no serious breach was at stake was that the interpretation, although incorrect, was compatible with the objective set out in the directive.

In the *Brinkmann* case[177] from 1998, the outcome of the *Dillenkofer* case was, in my view, modified. In this case, the Danish authorities had classified a tobacco product incorrectly under a directive. The question was whether the case concerned the non-implementation or the misapplication of the directive. No legal rule had been adopted in order to implement the definitions in the directive. However, the Danish authorities had actually given an immediate but incorrect effect to the relevant provisions of the directive. The Court therefore chose to consider the situation as a misapplication of the directive, although it held that the directive was not properly incorporated into national law. Once again, the ECJ held that it had all the necessary information to decide if a sufficiently serious breach had been committed. It also examined whether a direct causal link between the breach and the damage existed. Thus, the Court decided to rule on both matters although it still held that, in principle, they should be decided by a national court.[178]

The Court referred to its judgement in *Dillenkofer* and held that a failure to take measures to implement a directive in due time constitutes *per se* a serious breach. Despite the non-implementation, the rules of the directive had in fact been applied. Although it was done incorrectly, the breach was not sufficiently serious. The Court justified that opinion by holding that it was hard to classify the tobacco according to the definitions set out in the directive and that the interpretation by the Danish authorities was not contrary to the aim of the directive. It is questionable whether the *Brinkmann* case has weakened the State liability principle regarding situations where the State has not implemented a directive in due time. Although it was held in *Dillenkofer* that the failure to implement the directive was sufficiently serious *per se*, the breach in *Brinkmann* was not considered to be that since the provisions were applied despite the non-implementation. Thus, a State can prevent strict liability for non-implementation of a directive if it still applies the provisions of the directive. One

[177] Case 319/96, *Brinkmann Tabakfabriken GmbH* v *Skatteministeriet*, Judgment of the Court of 24 September 1998.
[178] Ibid. paras 24-26.

could argue that the State should be held strictly liable in every case where it has not implemented a directive in due time. However, I think it is reasonable to treat the situations, where the Member State has done nothing to render a directive applicable in national law, differently from those where it in practice has tried to comply with the directive.

The case law on State liability delivered in the past few years have mostly concern questions of how to determine whether a sufficiently serious breach has been committed or how to decide whether there is a causal link between the breach and the sustained loss. Although the ECJ has stated that this is a question for national courts to determine, it has continued to examine those questions several times. In *Rechberger and Others* v *Austria* the ECJ held that a failure to transpose a single article of the directive within the prescribed period constitutes, in itself, a serious breach of Community law. That did not change even when all other provisions of the directive had been implemented correctly.[179]

In the *Kolne* v *Austria* case, the Court again held that it was, in principle, for the national courts to apply the criteria to establish the liability of Member States, in accordance with the guidelines laid down by the Court for the application of those criteria.[180] It also stated that Community law did not require Member States to make any changes in the distribution of powers and responsibilities between the public bodies, as long as the national procedural arrangements enabled individual EC rights to be effectively protected. Therefore, in Member States with a federal structure, reparation for damage caused to individuals by national measures in breach of EC law did not necessarily have to be provided for by the Federal State. The Court, however, underlined the fact that a Member State could not escape liability by referring to its distribution of powers and responsibilities between the national bodies.[181]

In the Swedish *Andersson* case[182], the question arose whether the State could be held liable, according to the Francovich doctrine, for the non-implementation of a directive during the period under which the State was only party to the Agreement on the European Economic Area. The Court answered that Community law did not enable individuals of an EFTA State, which later acceded to the EU, to claim damages from the State for a breach that occurred before the date of accession.[183]

[179] Case 140/97, *Rechberger and Others* v *Austria*, Judgment of the Court of 15 June 1999, paras. 51-52.
[180] Case 302/97, *Kolne* v *Austria* [1999] ECR I-3099, para 58.
[181] Ibid. paras 62-63.
[182] Case 321/97, *Andersson* v *Svenska Staten*, Judgment of the Court of 15 June 1999.
[183] Ibid. para. 46.

The criterion for determining whether a breach of Community law is sufficiently serious was one issue discussed in the *Haim* case.[184] The case concerned the Directive 76/686 on the mutual recognition of diplomas.[185] Haim, an Italian national and dental practioner, claimed that a German public-law body had breached Community law by refusing to enrol him on the register of German dental practioners. The ECJ held that account must be taken of the extent of the discretion enjoyed by the Member State concerned. The existence and scope of that discretion must be determined by reference to Community law and not by reference to national law.[186]

4.2.3 Infringement of Rules and Acts which can lead to State Liability

An infringement of a binding EC rule that confers rights on individuals and is clearly identifiable can lead to State liability. Until now, the ECJ has held Member States liable for infringements of rather specific rights which relate to claims for unpaid wages, powers to terminate a contract or immunities from the rules on public procurement.[187] As already stated above, the rule infringed does not have to be directly applicable. Both breaches of Treaty articles or provisions of secondary legislation can constitute liability for damages. It should also be possible to hold a Member State liable in damage for an infringement of a general principle. Many cases regarding the liability of the Community concern a breach of a general principle. So far, some claims for loss suffered due to a breach of the principle of respect for legitimate expectations, have been successful.[188] In most cases concerning a breach of a general principle, the action has, however, been dismissed. There has been no successful action in damages for a breach of fundamental rights or the principle of proportionality.[189] No case law yet exists in which a Member State has been found liable to compensate an individual due to a breach of a general principle of Community law. However, in *Brasserie du Pêcheur* the Court held that the rights of individuals should be protected similarly irrespective of whether a national or

[184] Case 424/97, *Haim* v *Kassenzahnärztliche Vereinigung Nordheim*, Judgment of the Court of 4 July, 2000.
[185] Council Directive 76/686 on the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practioners of denistry (OJ 1978 L 233, p. 1).
[186] Case 424/97, *Haim*, see note 184 above, para. 49.
[187] See e.g. cases *Francovich*, see note 1 above, *Faccini Dori* see note 110 above and *British Telecommunications*, see note 164 above, Van Gerven and others (1999), p. 445.
[188] See e.g. Joined Cases 104/89 and 37/90, *Mulder* v *Council and Commision (Mulder II)* [1992] ECR I-3061.
[189] See e.g. Case 59/83, *Biovilac* v *EEC* [1984] ECR 4057 (breach of a fundamental right) and Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL* v *Council and Commission* [1978] ECR 1209 (breach of the principle of proportionality).

Community authority is responsible for the infringement. Therefore it has been held that the State liability for breaches of Community law should also include infringements of general principles.[190] It has also been discussed whether an individual can hold a Member State liable for the breach of an international agreement. It might be possible in certain cases but the ECJ is still in the process of defining its judicial policy on such liability.[191] Everything depends on what the ECJ will include in the concept of "rights granted to an individual".

As already mentioned above, the ECJ made clear in *Brasserie du Pêcheur* that the State will be liable irrespective of what organ of the State that is responsible for the breach and regardless of the internal division of powers between constitutional authorities. Thus, liability can be imposed on the State for a breach by the national administration, legislature or the judiciary.[192] The term *judiciary* includes the courts and other judicial bodies fulfilling the requirement of Community law. The ECJ has in its case law considered the liability of the administrative (executive) and the legislature. It has not, however, yet considered the liability of the judiciary.[193] As we all know, Community law is supreme in the event of a conflict with national law and Member States shall take all appropriate measures to ensure fulfilment of their obligations according to the Treaty. Indeed, all public bodies, including the national courts, must respect Community law. Therefore they can be held liable when breaching it. Still, many are accustomed to judicial immunity from such liability as national courts often are prevented by their own law from awarding damages in these instances.[194] Thus, a national court could act reluctantly before holding the judiciary liable for breaches of Community law. In the doctrine it has been held that the ECJ probably would be careful in holding the judiciary liable, in order not to obligate the Member States to seek preliminary rulings under a threat of liability for damages.[195]

In order to understand the scope of administrative liability, the ECJ will need to clarify which bodies that are included within that concept. We all understand that the traditional governmental departments and public agencies are part of that concept. It

[190] Tridimas (1999) p. 23, see the discussion on the matter in section 2.5.
[191] Gasparon P., *The Transposition of the Principle of Member State Liability into the Contect of External Relations*, EJIL, Volume 10, Number 3,(1999) p. 606.
[192] *Brasserie du Pêcheur*, see note 1 above, para. 32, Craig (1997) p. 68, Aalto P., *Jäsenvaltion vahingonkorvausvastuu EY-oikeudessa*, (1999) pp. 103, 106-114, see the discussion on liability for national judiciary acts in 5.3.2.2.
[193] Aalto (1999), pp. 109,113.
[194] Craig (1997) p. 71, Temple Lang, *The Duties of National Authorities under Community Constitutional Law*, ELRev (1997) pp. 3-18, Melin M., *När skall man fråga EG-domstolen?*, JT Nr. 4 (2000), p. 864.
[195] Steiner J., *The Limits of State Liability for Breach of European Community Law*, EPL ,4 (1998) p. 92.

is, however, more difficult to say whether the executive covers all organs of the administration. The ECJ has taken a broad view of the state in cases concerning the indirect effect of directives (as shown above in section 3.2). Whether it will also expand the notion of the public body to include all kinds of organs of the state, regarding the liability of the executive, is still not clear.

4.3 Conclusions

In this chapter I have accounted for the case law concerning the establishment and development of the State liability principle. I will conclude by making a general summary in order to clarify the scope of the principle as it stands today.

- *All types of infringements by the State are actionable*. Thus, a Member State can be held liable for a breach of Community law for infringements by the national legislature, the national administration and the judiciary.

- *The infringement must concern a binding EC rule*. Whether or not a provision has direct effect is not relevant. As long as it confers rights on individuals, which are clearly identifiable, a breach can lead to State liability.

- The State liability principle is applicable *irrespective of which organ of the State that commits the act or omission is responsible for the breach*. A Member State cannot, therefore, escape liability by pleading the distribution of powers and responsibilities between the bodies that exist in its national legal order or claiming that the public authority responsible for the breach of Community law did not have the necessary powers, knowledge, means or resources.

- In order to hold a State liable, *the infringement must comply with the following three conditions*: The rule infringed must be intended to confer rights on individuals, the breach must be sufficiently serious and there must be a causal link between the breach and the damage.

- These conditions are applicable to legislative actions and most probably also to administrative and judicial actions.

- In order to determine whether an infringement of Community law constitutes a *sufficiently serious breach*, a national court hearing a claim for reparation must take account of all factors, which characterise the situation put before it. It should

also take into consideration the clarity and precision of the rule breached, the measure of discretion left by that rule to the national court, whether the infringement and the damage caused was intentional or involuntary and whether any error of law was excusable or inexcusable. If the Member State in question only had a considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach. That is, however, not necessarily the case.

- The question of whether a right to compensation exists shall be determined according to the rules of Community law. However, *when ordering the compensation, the national court shall apply national rules of procedural law* and national rules on liability for damages. The national legal system must, however, comply with certain requirements established by the Court. This matter will be examined in chapter 5.4.

5 Effects of the Establishment of State Liability for the Protection of Individual EC Rights

5.1 Introduction

The State liability principle has had and will continue to have a very important impact on the protection of individual EC rights. In the following, I will examine three different consequences of the establishment of the principle. Firstly, by the State liability principle individuals were given an important *role in supervising that the Member States comply with Community law*. This development will be described in more detail in section 5.2.

Secondly, *individuals were given a right to obtain damages for a loss due to a breach by the State of their EC rights*. In the *Brasserie du Pêcheur* case, the ECJ referred to principles common to the different legal systems when trying to identify the basis for establishing State liability.[196] As will be described below, however, it is not always that clear whether individuals may claim damages under the Member States' national legislation when the State has breached the law. The EC State liability doctrine can therefore give individuals a much wider and stronger possibility to obtain damages from the State in cases where it has breached Community law than when it has breached national law. I will examine this matter more closely in section 5.3.

The State liability principle could also have effects on the national legal systems, which will *enhance the judicial protection of individual rights generally*. If citizens are afforded a stronger protection against unlawful conduct by public authorities regarding their EC rights, they will be treated differently depending on whether the violation concerned EC law or national law. Thus, by developing a better protection of individual EC rights against wrongful acts by the State, Community law provides an example that Member States might or might not want to follow even in cases purely regulated by national law, falling outside of the scope of Community law. Thus, the principle of State liability does not only create a right to damages but also, to a certain extent, *establishes the material contents of and harmonises national tort law*. This final consequence that the establishment of the State liability principle might have will be dealt with in section 5.4.

[196] *Brasserie du Pêcheur*, see note 1 above, para. 28.

5.2 Private Enforcement

In order for individuals to enjoy their EC rights, it is important that Community law is fully implemented in the Member States. One of the Commission's main responsibilities is to supervise that rules are uniformly and properly applied in all the Member States.[197] According to Article 211[155] EC, the Commission shall "*ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied*". When a Member State has failed to fulfil its obligation under Community law, the Commission can deliver a reasoned opinion under Article 226[169] EC that the State should comply with. If the State refuses to do so, the Commission can bring the matter before the ECJ. The Commission does not, however, have any obligation to sue a Member State. It can choose in which cases it finds it appropriate to take action.[198] As the Commission is a political institution, its actions are usually characterised by political considerations.[199]

Apart from the direct supervision carried out by the Commission, Member States' breaches of Community law are also supervised indirectly through the doctrine of direct effect and the possibility to request for preliminary rulings under Article 234[177] EC. In practice, this indirect way of supervising the States is the most important instrument to ensure that Community law is applied correctly. The Commission's supervising role under Article 226[169] EC has become more selective during the years. According to one opinion expressed in the doctrine, the changing role of the Commission is a sign of a new development of the system of supervision of Community law.[200] Thus, the Commission's role in controlling that Member States comply with Community law might diminish, leading to an increased supervision by what might be called "private enforcement". In the USA, the supervision of a State's compliance with individual rights, guaranteed by the Constitution, is to a large extent exercised through "private enforcement".[201]

The State liability doctrine has had a significant impact on this development. It has guaranteed the protection of EC rights in a new way by adding an economical dimension to the system of remedies. The possibility to obtain damages will of course lead individuals to sue the State to a larger extent. Supervision of Community law by "private enforcement" will therefore probably increase. This "new order" could lead

[197] Craig and de Búrca (1998) p. 54.
[198] Melin (2000) p. 864.
[199] Quitzow C. M. ,"*Private enforcement"i EG-rätten- en studie av medlemsstaternas skadeståndsansvar i samband med överträdelser av gemenskapsregler*, JT Nr 3 (1996/97) p. 682.
[200] Ibid.
[201] Ibid. p. 694.

to a system where the Commission's responsibility as a supervisor is more of a political nature. Thus, the main responsibility for supervising the observance of Community law by the Member States would rest on the individual.[202] This view is, however, somewhat speculative. Still, a good example of it is provided for in the Swedish case, *Volvo-service (Dick Edvinsson* v *Staten)*, described in section 5.3.2.2.

5.3 Impact of the State Liability Principle on National Legal Systems

5.3.1 Introduction

In order to understand the impact that the State liability principle has had on the protection of individual EC rights, it is important to examine closer the protection against unlawful conduct of public authorities, provided for in the domestic legal systems of the Member States. The phenomenon of State liability, as it is regulated in the legal systems of the Member States today, is quite new. According to the idealistic theories of constitutional law in the 19th century, the sovereignty of the State over all other institutions meant that actions of the State were not open for judicial review. This conception is often referred to with the expression that " the King can do no wrong".[203]

Today, all Member States have rules on the liability of public authorities for a loss inflicted through fault or negligence in the exercise of public powers.[204] However, the way in which the liability of the State and other public bodies is regulated varies from one Member State to another. In certain states there are legislative rules concerning the matter (e.g. Austria, Belgium, and Sweden) whereas in others it is regulated through case law (e.g. France and Ireland).

The State can break the law through wrongful administrative, legislative or judicial acts. However, this does not mean that individuals, according to their domestic legal systems, have a right to claim damages for all kinds of breaches. As already stated above, it seems to be an inherent principle in most Member States that the State can be held liable for actions by its administrative institutions. It is not as clear whether liability for judicial action exists. The conditions under which such liability may arise are often very severe and in some Member States, it practically does not exist at all. In many states it is also impossible to impose liability upon a state for acts and omissions

[202] Ibid. pp. 682,695.
[203] Bertil Bengtsson, *Skadestånd vid myndighetsutövning I*, Lund 1976, p. 10.
[204] Quitzow (1996/97) p.683.

of the national legislature. In some countries such liability has in practice been excluded by virtue of national law (e.g. Belgium, the United Kingdom, Finland and Sweden). In other countries it is possible to hold the legislator liable but only under very strict conditions (e.g. Germany, Spain and Italy).[205] Thus, the possibility for an individual to bring action because of a fault in a decision by a court or the legislator can differ considerably from one Member State to another.

Within a Member State, there are often good reasons not to allow liability for legislative and judicial action. The lack of such rules may nevertheless be detrimental to the judicial protection of individual rights. On the other hand, according to the division of power within the State, Parliaments and courts of law cannot be subject to outside control within the State. The basis of Community law is, however, founded on a different concept that aims at ensuring the effective implementation and equal application of EC law. Therefore it needs to have means at its disposal other than those provided for in national laws. By establishing Member State liability for breaches of Community law, the ECJ has established its own system for the purpose of deciding which issues public authorities can be held responsible for. As already stated, this development has not only led to a more effective and uniform application of EC law but also enhanced the protection of individual EC rights. To use the words of Matthias Herdegen, " *the ECJ has, through its bold judgements on liability, made an important contribution towards weeding out anachronistic features still prevailing in many administrative laws*".[206]

In the *Brasserie du Pêcheur* case, the ECJ dismissed the application of national rules that excluded compensation for legislative acts or omissions.[207] It also stated that national rules such as the German rule, allowing compensation only if the legislative body was under a duty towards the plaintiff, and the English rule, requiring proof of misfeasance in public office for liability to arise even though such misuse of power might be impossible to prove in the case of the legislature, could prevent individuals from deriving the full benefits of the Community law.[208] As far as I know, the *Francovich* case and subsequent judgements have not yet led to any legislative measures in the Member States. Claims for compensation have, however, been put

[205] Aalto (1999) pp. 37-38 who refers to Schockweiler F., Wivenes G., and Godart J. M., *Le régime de la responsabilité extra-contractuelle du fait d'actes juridique dans la Communauté européenne*, RTDE 1990, pp27-74.
[206] Herdegen (2000) p. 15.
[207] *Brasserie du Pêcheur*, se not 1 above, at paras. 71-72.
[208] Ibid., paras 71, 73 and 87-88, Van Gerven and others (1999) pp. 438-439.

forward by individuals against States after they have suffered damage from infringements of EC rules.[209]

In the following I will first examine State liability in Swedish legislation. I will describe how State liability is regulated, whether the legislation is compatible with EC law after the *Francovich* judgement and if this judgement has led to any changes improving the protection of individual EC rights. I will continue by giving an overview of the situation in three other Member States: France, the United Kingdom and Germany. I will focus on the recognition of liability for legislative or judicial acts or omissions by these national legal systems, since State liability for breaches of Community law and State liability for breaches of national provisions differ mostly from each other regarding these actions.

5.3.2 Sweden

5.3.2.1 General description of the situation before the *Francovich* judgement

The Swedish rules on the non-contractual liability of the State and the local authorities were introduced by the Tort Liability Actin 1972.[210] Provisions regarding liability in specific fields can also be found in some other Acts but those will not be examined in this thesis. One of the reasons to regulate the matter through separate rules was to give the individual a better and clearer position in situations where the public authorities exceeded their competence.[211] According to Chapter 3, Article 2 of the Tort Liability Act, the State and other public bodies shall compensate damage caused by fault and negligence in the exercise of public powers. The notion of the State and public bodies is broad and includes e.g. the church. Measures of public, regional and local authorities as well as civil servants and bodies that offer public services can all make a public authority liable.[212] When the State is held liable, it is obliged to compensate damage caused to the person, or property and a pure economic loss. Before the introduction of the Tort Liability Act of 1972, the possibility to get compensation for economic loss only existed in certain very well defined areas.[213]

[209] SOU 1997:194, *Det allmännas skadeståndsansvar vid övertädelse av EG-regler*, pp. 99-105, e.g. see all the cases mentioned in chapter 4 above and chapter 5.3.2.2 below.
[210] Skadeståndslagen 1972:207.
[211] SOU 1997: 194, p. 128.
[212] SOU 1997:194, pp. 129-130.
[213] Karlgren H, *Skadeståndsrätt* (1968) p. 205.

The general rule in Article 2 is, however, not applicable to all actions of public authorities. Chapter 3, Article 7 of the Tort Liability Act *excludes the possibility to claim damages for measures of the national legislature and the supreme courts* (the Supreme Court and the Supreme Administrative Court). In practice, this provision has not had a big significance since it is very rarely used. The reason it is still included in the Tort Liability Act has its origin in the Swedish Constitution and its lack of separation of powers. According to that order, the judiciary power to examine the legislator should be very limited. Another reason to exclude the possibility to claim damages from the Supreme Court is the lack of a suitable institution that could decide on that kind of matters. The provision does not, however, create an absolute obstacle for the injured individual. There are possibilities to use extraordinary remedies, such as review in a new trial.[214]

The Swedish Department of Justice did in 1996 engage a special Commission (hereinafter referred to as the Swedish Commission) with an assignment to analyse the question of the non-contractual liability of the State and local authorities for breaches of EC law. The Swedish Commission found that Swedish law on the liability of the State appeared to ensure the same legal protection as the EC rules on the liability of Member States. Even though there were some differences, a fundamental consensus between the two systems still existed. Therefore all disparities did not necessarily require changes in the Swedish legislation. One difference was, however, apparent. The fact that the legislator and the supreme courts could not be held liable for damages was contradictory to the EC doctrine on State liability.[215] The ECJ had indeed dismissed the application of national rules that excluded compensation for legislative acts or omissions. The Swedish Commission therefore suggested that the rule laid down in Chapter 3, Article 7 of the Tort Liability Act should be repealed. Otherwise a victim of the legislator's mistake or incorrect application of law would be treated differently depending on whether the matter concerned Community law or national law. The Swedish Commission further proposed that the Tort Liability Act should clearly state that it also applies to actions for compensation due to infringements of EC law.[216] The opinion that Chapter 3, Article 7 should either be repealed or amended has also been expressed in the doctrine.[217]

[214] SOU 1997:194, p. 146.
[215] Ibid. pp. 20, 136-137.
[216] Ibid. p. 21.
[217] See e.g. Quitzow (1996/97) p. 700 where he holds that Chapter 3 Article 7 of the Tort Liability Act could render enforcement of EC rights more difficult for individuals. Axén M. also wants to amend or repeal the provision in *Statens skadeståndsansvar vid brott mot EG-rätten*, SvJT (1997) p. 171, Bengtsson B. states in his Commitment (Remiss): SOU 1997:194, Ju98/655, pp. 1-2. that it might be acceptable to revoke the provision to the extent that it concerns decisions by the Swedish Parliament and the Government.

5.3.2.2 Measures taken in order for national law to comply with EC law

The proposal of the Swedish Commission did not lead to any amendments in the Swedish Tort Liability Act. This did not, of course, limit the right to claim damages for a breach of EC law in accordance with the conditions set by the ECJ. That right is indeed guaranteed by the Community legal order which is, as we all know, superior to national legislation. Changing the law would, however, have been a good way to clarify the position that individuals have vis-à-vis the State and to diminish the disparity between possibilities to claim damages depending on whether it is Community or national law which has been breached.

After the *Francovich* case, the Swedish State has been held liable in many cases for a breach of Community law. (As noted above, although the State can be held liable for administrative, legislative and judicial wrongs, I will only consider the latter ones.) In Sweden, an individual who wants to claim damages from the State can either sue it in court or demand compensation from the Chancellor of Justice (JK).[218] The Swedish State has so far mainly been held liable for *failing to implement directives correctly*. The wrongful implementation of Council Directive 80/987, on the protection of employees in the event of the insolvency of their employer, led to many claims of damages that were admitted.[219] In another case the State was found liable for the incorrect implementation of a directive in the field of taxes by Solna District Court (Solna Tingsrätt).[220]

The *enactment of legislation contrary to Community* law has also led to claims for damages against the Swedish State. In 1996, the Act that regulated energy tax[221] was amended in order to prevent users of Swedish cars from buying oil subject to a very low tax from Finland. This provision was incompatible with Article 8 of Council Directive 92/12. Individuals therefore claimed damages for the economic loss they had suffered for not being able to buy the cheaper oil during the period when the Swedish Act was in force. The Chancellor of Justice held that the breach by the State was sufficiently clear and serious to constitute liability on the part of the State.[222] Today more than 1450 individuals have obtained damages from the State.[223]

[218] SOU 1997:194.
[219] According to SOU 1997:194, p. 92 the Chancellor of Justice has until September 1997, on behalf of the Swedish State, both in proceedings before the courts and outside, admitted claims for damages in more than 250 cases.
[220] Case T 360/96.
[221] Lagen (1994:1776) om skatt på energi.
[222] Decision by the Chancellor of Justice 1998-02-20, Dnr 2319-97-44.
[223] Statement by Britt-Marie Lundberg, attorney at the Chancellor of Justice.

The liability of the Swedish State for *judiciary acts* has recently materialised in a case where the Supreme Court did not apply for a preliminary ruling although it probably should have done so.[224] I have not found any cases decided in Sweden or in other Member States where this aspect of State liability has been reviewed before. The decision of the Chancellor of Justice will therefore be very important and interesting. Because of the importance of this case I will examine it in more detail.

In the *DS Larm* v *Volvo* case (hereinafter referred to as the *Volvo service* case),[225] Volvo sued a company, *DS Larm* for offering "Volvo service" although it was not authorised by Volvo to repair their cars. The question was whether this behaviour was permitted or not under the Council Directive to approximate the laws of the Member States relating to trade marks (hereinafter referred to as the trademark directive).[226] Article 6 of that directive states the following:" *the trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade, indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services provided he uses them in accordance with honest practices in industrial or commercial matters*". The Swedish Supreme Court had to decide whether the use of the name Volvo, in this case, fell within the exemption in Article 6. The plaintiff requested the Court to seek a preliminary ruling regarding this interpretation. It interpreted the Article without seeking for a preliminary ruling and came to the conclusion that *DS Larm* had infringed the Volvo trademark. Some months later, the ECJ answered a preliminary ruling that concerned a similar issue in Austria, the *BMW* case[227] In that case, the exemption in Article 6 was, however, interpreted differently.[228] The ECJ found that the use of a trademark, such as in the *Volvo service* case, is permitted under the Directive unless the proprietor of the trademark had suffered *serious damage*. In the *Volvo service* case, Volvo never held that the damage was of a serious nature.

Thus, the outcome for *DS Larm* would have been completely different if the Supreme Court had requested a preliminary ruling or, at least, had waited and decided the case

[224] Case NJA 1998 s. 474 that led to a claim for damage from the State at the Chancellor of Justice, *Dick Edvinsson* v *the Swedish State*, Dnr 3634-99-40.
[225] NJA 1998 s 474, see supra note.
[226] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, Official Journal L 040.
[227] Case 63/97, *BMW* v *Deenik*, [1999]ECR I- 905.
[228] Nergelius, *Förvaltningsprocess, normprövning och europarätt*, (2000) p. 71. Karlsson and Hägglund disagree although they also criticise the Supreme Court for not requesting a preliminary ruling, Karlsson K. and Hägglund F., *En kartläggning av Sveriges fem första år med EF-rätt*, ERT (1999), p. 458.

after the preliminary ruling concerning the same issue had been delivered. Unfortunately the judgement partly led to the bankruptcy of *DS Larm*. The managing director, *Dick Edvinsson*, was held to be personally liable. He complained to the Chancellor of Justice (JK) and contended that the Supreme Court had breached Community law by not requesting a preliminary ruling although it was unclear how the trademark directive should be interpreted.[229] The Swedish State should therefore be held liable for the damage he suffered as a result of the judgement by the Supreme Court. In the doctrine, the Supreme Court has been criticised regarding this case.[230]

It is, in this context, necessary to look closer at the obligation of national courts to request preliminary rulings under Article 234[177] EC.[231] According to this article, a national court *may* request the ECJ to give a ruling on a question on the interpretation of Community law. However, if that court will take the final decision, and no other remedies under national law exists after its judgement, that court *shall* bring the matter before the ECJ when it is uncertain of the application of EC law. Thus, the supreme courts have less discretion than the lower courts when deciding whether or not it is capable of interpreting Community law correctly. In certain cases, courts that do not deliver the final judgement should still request preliminary rulings. That could for example be the case when the possibility to appeal only exists in theory or if the question concerns the validity of a Community legal act, since it can only be nullified by the ECJ.[232] I will here, however, focus on the obligation of the supreme courts to request a preliminary ruling.

It is the responsibility for such a court to request preliminary rulings. It should observe Community law *ex officio* in the same way that national procedural law prescribes courts to *ex officio* observe national law. Parties in a case can request the court to bring a question to the ECJ. They have, however, no possibility to force the court to do so if it chooses not to. Nor can individuals ask the ECJ for a preliminary ruling themselves. What can then individuals do when a court has failed to submit a question to the ECJ? One possibility is to *turn to the Commission* and hope that it will take action under Article 226[169] EC, as described in section 5.2. As already stated there, the Commission has no obligation to bring a Member State that has failed to

[229] Case number 3646-99-40, the case has not yet been decided but the Chancellor of Justice will probably deliver a decision within this year, 2000 (conversation with attorney G. Lövgren Söderberg at the Chancellor of Justice who said that a decision in the case will not be delivered before this thesis is written, 001107).
[230] Bernitz U, *Svenska domare kämpar mot EG-rätten i det tysta*, DI, 26.10 1999, Karlsson and Hägglund (1999) p. 458, Nergelius, *Förvaltningsprocess, normprövning och europarätt*, (2000) p. 71.
[231] The right for a national court to request for a preliminary ruling is expressily stated in SFS 1997:895, *Lag om rätt för svensk domstol att begära förhandsavgörane från europeiska gemenskapernas domstol i vissa fall*.
[232] Melin (2000), p. 861.

fulfil an obligation under the Treaty before the ECJ. Politically, it would be quite sensitive to accuse a Member State for not fulfilling its duties by not deciding to request a preliminary ruling. Therefore, the Commission would probably be reluctant to take action in such cases. Temple Lang has also criticised the Commission for being slow to take action under Article 266[169] EC and criticise judgements of national courts in cases were they might well have done so.[233]

The other possibility for individuals is to *sue the State in a national court for breaking Community law by a failure to request a preliminary ruling*. In such a case individuals would probably have to show that they have suffered loss because a national rule has not been applied in compliance with Community law, as a direct consequence of the court's failure to bring the question to the ECJ.[234]

As stated before, according to Article 220[164] EC, the ECJ has an exclusive power to interpret EC law with final binding authority. The idea behind the possibility to request a preliminary ruling is that national courts and the ECJ should collaborate in order for the application of Community law to be uniform throughout the different Member States. The proper functioning of this system would, however, be endangered if national courts turned to the ECJ every time a case involved Community law. When does then a court, against whose decision there is no judicial remedy under national law, have to bring a question concerning the interpretation of Community law before the ECJ? In the *CILFIT*[235] case it was decided that it is required to do so unless it is established that

- the question raised is irrelevant or
- the Community provision in question has already been interpreted by the Court (the so called *acte éclairé* doctrine) or
- the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions (the so called *acte claire* doctrine).[236] The national court must also be convinced that the matter is equally obvious to the courts of the other Member States and to the ECJ.[237]

[233] Temple Lang in *Judicial Review in European Union Law*, in Honour of Lord Slynn of Hadley, David O'Keeffe (ed.), (2000), p. 272 where he refers to the judgment of the Swedish Supreme Court in the case, NJA 1996 s. 668, after the judgment of the Case 43/95, *Data Delecta*, [1996] ECR I-4461.
[234] Melin (2000), p. 864.
[235] Case 283/81, *Srl CILFIT* v. *Ministry of Health*, [1982] ECR 3415.
[236] Ibid. para. 21, Nergelius, *Förvaltningsprocess, normprövning och europarätt*, (2000) p. 42.
[237] Ibid. para 16.

Whether or not a question is irrelevant is for the national court to decide.[238] The limit of discretion of a national final court not to request a preliminary ruling is narrow. It has to take into consideration the different language versions of the Community provisions in question and the use of terminology peculiar to Community law. It also has to place every provision of Community law within its proper context with regard to the objectives of Community law and the state of its evolution in relation to the provision in question.[239] Although the *CILFIT* criteria are criticised for being too strict and a discussion regarding a change of these requirements has taken place, these restrictive rules still are in force. Thus, national courts do not enjoy much room when deciding whether a matter in question is an *acte clair* or not. David Edward, judge in the ECJ, has pointed at the terms of the Article 234[177] EC. According to him, the restrictive approach to allow a greater degree of latitude to national supreme courts does not lie in the requirements set out in *CILFIT* but in the text that does not leave room for an *acte clair* unless there is *no doubt* that a decision on the question is not necessary to enable the court to give a judgment. Therefore the text of the Treaty article probably needs to be amended before the *CILFIT* criteria may be relaxed.[240]

The workload of the ECJ is heavy and if requests for preliminary rulings continue to increase, as they probably will when the EU expands, the system will not anymore work effectively. A discussion on how to change the system is taking place in the doctrine and within the ECJ. The introduction of a request for appeal or the establishment of some kind of regional Community courts have for example been proposed but so far nothing has been decided. Thus, the responsibility of national courts to control Community law is increasing and in the future it is desirable that they only ask for preliminary rulings in cases of general importance.[241]

During the five years that Sweden has been a Member State of the EU there have been around 30 requests for preliminary rulings to the ECJ. Compared with Austria, that has referred more than 50 cases, 35 of them only in 1997, this is not a large number.[242] In the doctrine it has been held that the supreme courts should have referred questions in several more cases and that the fact that they have not has led to

[238] See Cases 7/97, *Oscar Bronner*, ECR I 1998, p. 7791 and 200/97, *Ecotrade*, ECR 1998 I p. 7907.
[239] O'Neill A. and Cullen P., *Enforcing Community Law Rights in Scotland*, Course Papers,June 22, (1999) at http://www.eurolawscot.co.uk/individual.cfm?ID=30.
[240] Edward D. in *Judicial Review in European Union Law*, in Honour of Lord Slynn of Hadley, O'Keeffe D. (ed.), (2000), pp. 122-123.
[241] Andersson T., *Vid pärleporten eller Styx? EG-domstolen i nyckelposition*, ERT (1999), pp. 213-18, Melin (2000), p. 865, these question were e.g. discussed on a conference on " Revising the Judicial Architecture of the European Union" in the Collège d'Europe in Brügge 19-20.11 1999, Nergelius, *Förvaltningsprocess, normprövning och europarätt*, (2000), p. 43.
[242] Bernitz U., DI 26.10 (1999), Nergelius, p. 65, Karlsson and Hägglund (1999) p. 458.

judgements were Community law has been incorrectly applied.[243] I will here, however, only describe one of these judgements, since it is so significant, and then focus on the earlier mentioned *Volvo service* case.

The judgement in question is the *Barsebäck* case.[244] Although it is a very complex case it will here only be described briefly.[245] It arose from a politically controversial decision by the government to close one of Sweden's 12 reactors in a nuclear power station by 1 July 1998. Despite the fact that there are state run units, the government chose to close Barsebäck 1, which is licensed by a private company, Barsebäck Kraft. Sydkraft AB is the parent company of Barsebäck Kraft. This decision raised e.g. questions on proportionality, competition law and the relation to Community law. The government was e.g. criticised for choosing to close a reactor owned by a private company instead of one of its own. Sydkraft contended that the Swedish Government's decision to shut down Barsebäck 1 contravened the Swedish Constitution and EC law. The Supreme Administrative Court, however, after granting interim relief in May 1998 finally upheld the government's decision to close down Barsebäck 1 in its judgement of June 1999. It was then criticised for interpreting Community law in uncertain areas by itself instead of asking the ECJ for a preliminary ruling. Nergelius has pointed out that the Court did not even consider how the *acte claire* doctrine according to the *CILFIT* case should be interpreted and applied in such an important case, which he finds quite sensational.[246] It is very likely that the ECJ would have interpreted the matter differently. This judgement made Sydkraft notify Sweden to the EU Commission for failing to fulfil its obligations under the EC Treaty by not securing a preliminary ruling from the ECJ. The Commission chose to consider the case although it did not bring the matter before the ECJ.[247] Thus, the Swedish government found itself in an embarrassing situation. It had to make a statement on whether the Supreme Administrative Court made a mistake when reviewing its own decision to close Barsebäck. The State made a reference to the findings of the Supreme Administrative Court in its judgement.[248] The situation led to negotiations between the Government and Sydkraft about a voluntary closure of Barsebäck. In December 1999, shareholders of Sydkraft approved an agreement reached between the Swedish Government and Sydkraft

[243] Eliasson D., Abrahamsson O. and Mattson D., *Community Directives: Effects, Efficiency and Justiciability in Sweden*, SvJT 1998, p. 219 and forward, Karlsson and Hägglund (1999) p. 457, Nergelius, *Förvaltningsprocess, normprövning och europarätt*, (2000), p. 65 and forward.
[244] RÅ 1999 ref 76.
[245] See Nergelius, *Förvaltningsprocess, normprövning och europarätt*,(2000), chapter 5.4 p. 102 for a full description and analyze of the case.
[246] Ibid. p. 118.
[247] Nr 99/4952, SG (99) A/11419 also D/15755, see Nergelius, ibid. p. 119.
[248] Writing of 21 oktober 1999, N1999/10631/ESB, see Nergelius, ibid., Bernitz, DI 26.10 (1999).

regarding a premature decommissioning of Barsebäck's reactor 1 that provided for full compensation to Sydkraft.[249] This agreement was then also approved by the Swedish parliament. It would have been interesting to see whether Sydkraft had succeeded in claiming damages from the State for a breach of Community law in this case. However, because of the settlement between the government and Sydkraft, such a claim will probably not be presented. Nor is it possible to know what impact the intervention of the Commission in fact had for the settlement between the Swedish government and Sydkraft to be reached. It may, however, be assumed that it contributed to a solution which was beneficial for Sydkraft.

As regards the *Volvo service* case, an important question is whether the Supreme Administrative Court failed to comply with its obligation under the Treaty by not referring the question of how to interpret the Trademark directive to the ECJ. This case is unique since we know that the ECJ would have interpreted the matter differently and that this would have led to another result for the defendant. Nergelius holds in his book *Förvaltningsprocess, normprövning och Europarätt*, that according to the conditions laid down in the *CILFIT* case, the court does not have to request a preliminary ruling when there is no reasonable doubt as to how a Community provision should be interpreted.[250] In this case, reasonable doubt existed, at least because an Austrian court brought a similar case into the ECJ at the time the Supreme Administrative Court made its decision. In order for the Supreme Administrative Court to exclude all reasonable doubt, it should have waited for the ECJ to give its answer regarding the *BMW* case. It did nevertheless not do so. Instead it delivered its judgement a couple of months before the ECJ made its decision in the *BMW* case. Therefore, I think that a breach of Community law was committed. The State should be liable for damages caused by this failure if the conditions set out by the ECJ regarding State liability are fulfilled. The question will probably be whether the violation was sufficiently clear and serious or not. As already stated above, a Supreme Court does not enjoy a wide discretion when deciding that it does not need to ask the ECJ for guidance in interpreting Community law. The conditions laid down in the *CILFIT* case are rather restrictive and do demand quite a lot before a court can decide that the matter concerns an *acte claire*. Considering the narrow extent of the discretion in this case, the requirement under the State liability criteria for a sufficiently serious breach is less strict.

[249] Home page of Sydkraft, *the juridicial process*, http://www1.sydkraft.se/bkab/eng/juridici.htm.

[250] Nergelius, *Förvaltningsprocess, normprövning och europarätt*,(2000), p. 67.

If the Chancellor of Justice finds that the Swedish State is liable for the breach, committed by the Supreme Court, it will be a very important step towards an enhanced judicial protection of individual EC rights. For the first time, at least as far as I know, a Member State will be held liable for a violation of Community law for infringements by the national judiciary. If the Chancellor does not find that a violation has been committed, the situation will be quite awkward. Edvinsson will then probably sue the State in a national court.[251] That would mean that a court in first instance has to decide whether or not the Supreme Court has breached Community law. If the case goes as far as to the Supreme Court, it has to decide itself whether its earlier actions were justifiable. One can ask whether this scenario provides for a fair trial?

The actions taken by Edvinsson in this case are a good example of how the possibility to claim damages for a breach of Community law results in a better protection of individual Community rights. It also illustrates how the Member States' obligation to respect Community law is being supervised by individuals, as described above in section 5.2. The lawyer representing Edvinsson, Mats Björkenfeldt, did try to make the Commission aware of the alleged breach of Community law which Edvinsson claims that the Supreme Court is held liable for in this case without any success so far at least.[252] In the *Barsebäck* case the notification to the Commission, however, probably led to an advantageous solution for the individual.

In this section I have examined State liability in the Swedish legislation. I will now see how the same issue is regulated in some other Member States.

5.3.3 Overview of State Liability in France, the United Kingdom and Germany

In *French tort law*, there are two different bodies of liability rules. One applies on claims against or between public authorities and the other on relations between individuals. Public authorities are liable whenever an administrative action is found to be unlawful. Liability can also, in certain circumstances, rise even when the action taken has been lawful. The idea is that actions undertaken by a public authority in the general interest, which impose a special burden on a particular person or group of

[251] Conversation with attorney Mats Björkenfeldt in October 2000.
[252] Conversation with Mats Björkenfeldt, 001114, where he said that he had sent a letter to the Commission to report that the Supreme Court had breached Community law when failing to request for a preliminary ruling in the *Volvo-service* case. 21.1 2000 he received a letter from the Commission stating that his complaint had been registered at 99/533, SG (99) AI15080/2. He has not heard anything from the Commission after that.

persons, should entail compensation for those who suffered damages. This strict liability usually applies when the scope of a general rule has become wider than it originally was intended to be. The authority can, however, exclude the right to compensation from the outset. This is often the case when legislative actions are at hand. Apart from these certain circumstances, an Act of Parliament cannot lead to fault-based liability. Thus, French law does not in general recognise liability for legislative acts. French law is also reluctant to recognise liability of the State for judicial acts. The possibility does exist but only in cases where there is gross negligence by the judicial power or denial of justice by the civil courts.[253] It is interesting to note here that in Belgian law, which is influenced, by French law, a concept of gross negligence is not used when examining judicial liability. Under Belgian law, the liability of the State can be engaged by any of its organs, including the judiciary acting in its judicial function. In a case from 1991, it was held that a judicial finding that a company is bankrupt could engage the liability of the State if it is found to be wrong on appeal. The act under review has to be withdrawn, amended or annulled by a final decision.[254]

According to the French government, French courts have through their case law made French law compatible with the State liability doctrine set out in the case law of the ECJ. In the *Nicolo* case,[255] the Conseil d'État accepted that it could review the compatibility of Acts of Parliament with Community law and set them aside if they were proved incompatible. However, although breaches of Community law can raise fault-based liability for legislative acts, the Conseil d'État is reluctant to declare Acts of Parliament to be in breach of EC provisions. In the *Société Arizona Tobacco Products* case,[256] it was declared that the State was liable for a wrongful application of an Act of Parliament in breach of a Community directive and therefore had to compensate the tobacco companies who had suffered loss due to the infringement. The Conseil d'État chose, however, to hold the competent Minister instead of the legislature proper liable. It is probably only possible to hold the legislature liable as such in cases when the Act itself is the source of the harm, or when the Minister has no discretion whatsoever in applying an Act.[257]

There are no separate tort rules concerning public authorities in *British law*. The only exception is the rarely used provision on misfeasance in public office. Thus, the rules

[253] Van Gerven and others (1999), pp. 364-365, 380, SOU 1997:194, p. 102.
[254] *De Kayser* v *Belgian State*, Cour de cassation/Hof van Cassatie 19 December 1991, AC 1991-92, 364, Pas. 1992.I.316, Van Gerven and others (1999) pp. 374-376.
[255] CÉ, 20 October 1989, *Nicolo*, Leb 1989.
[256] CÉ, 28 February 19922, *Société Arizona Tobacco Products et SA Philip Morris France*.
[257]Van Gerven and others (1999), pp. 364-365, SOU 1997:194, p. 102.

on the conduct of public authorities are by large the same tort rules as those applicable to individuals.[258] They are based on fault or negligence and breach of statutory duty.[259] All negligent State action does not, however, give rise to liability for the State. Liability for wrongful legislative or judicial acts is exceptional. Acts of Parliament enacted within the sovereign power of Parliament cannot give rise to liability. Liability for judicial actions may arise under British law but only under the exceptional circumstance when judicial officers have acted in bad faith, knowing they have no jurisdiction.[260]

In this context, it is interesting to look closer at the parliamentary supremacy that is one characteristic feature of the British constitutional system. It means that courts do not have the power to review the compatibility of a law with some other legal document and set aside acts of Parliament. This constitutional feature has existed in the UK for a very long time. After the Glorious Revolution in 1688-89, the Parliament became superior to all other bodies of the state. However, legislation was then an exception. The law was to a large extent developed by the courts through the Common law system, which was the most important source of law.[261] Today, however, written legislation has become a main source of law in the UK. When Parliament regulates new areas without being subject to any outside control, the interest of the individual can of course be harmed. The fact that written legislation has become more common was one reason why a debate on the lack of protection of individual rights started in the 1970's. The discussion, which was intensified in the 1980's focused on the fact that individuals had no remedies to challenge the Acts of Parliament. Although the UK was party to the European Convention on Human Rights, a Bill of Rights within the domestic legal system did not exist.[262]

Another problem that the principle of parliamentary supremacy causes, is in relation to Community law that is superior to all national laws in the Member States. This issue is partly regulated through the European Communities Act of 1972, which states that British courts have to interpret domestic law in the light of Community law. Nothing is, however, mentioned about what should be done if Parliament enacts legislation contrary to EC law. Many think that the courts, in the name of the principle of supremacy, would still have to apply national law instead of Community law.[263]

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[258] Van Gerven and others (1999), p. 378, SOU 1993:55, *Det allmännas skadeståndsansvar*, p. 125.
[259] Van Gerven, *Bridging the Gap between Community and National Laws: Towards a Principle of Homogenity in the Field of Legal Remedies?* CMLRev., Vol. 32 (1995), p. 696.
[260] Van Gerven and others (1999) p. 380, SOU 1993:55, p. 126.
[261] Nergelius, *Parliamentary Supremacy Under Attack: The British Constitution Revisited*, in Berggren, Karlson and Nergelius (eds.), Why Constitutions matter (2000) pp. 108-110.
[262] Ibid. p. 113.
[263] Ibid., p. 111.

However, as already mentioned in chapter 3.3.2, the influence of EC law led to a restriction of the parliamentary supremacy in the *Factortame I* case,[264] when a British court for the first time refused to apply an Act of Parliament. Because of Community law, provisions of Parliamentary acts, which are in conflict with directly applicable Community law, may now also give rise to liability.[265] In 1997, the British government started also an investigation on what effects the judgements of the ECJ regarding the principle of State liability could have on the British legislation. The common view was then, however, that British legislation was in conformity with Community law and, as far as I know, no amendments have been made.[266] Despite that understanding, Community law will have the same impact on the liability for judicial acts as it has had on the liability for legislative acts.[267]

The debate, starting in the 1970's on the legal position of the basic individual rights in British law did eventually lead to the enactment of the Human Rights Act in 1998, through which the ECHR is incorporated into British national law to a large part. It entered into force in October, 2000.[268] This Act does not give the courts the power to strike down legislation.[269] Still, it modifies the principle of parliamentary supremacy, by giving the courts power to report to the Parliament that a certain law violates the ECHR. What then made a legal tradition that has existed for 300 years, change at this point of time? One reason is probably the election of the Labour Party in 1997. The long ongoing discussion that started in the 1970's influenced the standpoint of the Labour Party regarding the incorporation of the ECHR into British law. Both the Tory Party and the Labour Party had been hostile (for different reasons) against it. However, the Labour Party finally changed its position and proposed important constitutional changes in its electoral campaign in 1997.[270]

At this point, one may wonder why I mention this development in a chapter on the effect that the State liability principle, developed by the ECJ, has had on domestic legal systems. That is because I believe it is interesting to look at this change in a Member State that has had such a long tradition of parliamentary supremacy, something that is hard to hold on to in relation to the Community legal order. According to Nergelius in his article *Parliamentary Supremacy Under Attack*, this development "*may serve to illustrate tendencies of general interest in the*

[264] Case *Factortame 1* case 213/89, see note 123 above.
[265] Van Gerven and others (1999) p. 349.
[266] SOU 1997:194, p. 101.
[267] Van Gerven and others (1999) p. 381.
[268] Nergelius, *Parliamentary Supremacy Under Attack: The British Constitution Revisited*, p. 117.
[269] Ibid. p. 125.
[270] Ibid. pp. 114-115, 128.

contemporary constitutional development".[271] Although the judgements on State liability from the ECJ were not the reason behind the enactment of the Human Rights Act, I cannot help believe that they have contributed to a change of the whole legal environment in the UK in a way that has led to a new view on parliamentary supremacy. The impact of EC law, ECHR and the enactment of the Human Rights Act have together changed the relation between the courts and Parliament in the UK.

In contrast to British law, *German law* contains separate liability rules concerning civil servants (including members of the judiciary) and other public bodies for breaches of official duty committed by their officials. Nor does it automatically exclude the liability of the legislature. However, the German State will only be responsible if the act or omission is referable to an individual situation. It means that a special relationship between a specific person (or a group of persons) and the infringed official duty must exist in order for liability to arise. This requirement normally excludes liability for wrongs committed by the legislature as enactment of legislation normally concern general and abstract rules. It is therefore not compatible with Community law.[272] The ECJ stated in the *Brasserie du Pêcheur* case that this condition would in practice make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law. That is because the measures Community law usually obliges national legislature to take, relate to the public at large and not to identifiable persons or groups of persons.[273] Liability for judicial acts exists but arises only when the breach of duty committed by the judicial officer constitutes in a criminal offence.[274]

5.3.4 Conclusions

The ECJ made it clear in the *Brasserie du Pêcheur* judgement that the Member States are obliged to make good damage caused to individuals by all violations of Community law, including infringements by legislative or judicial acts.[275] As we have seen, State liability for legislative and judicial acts does not exist or is only recognised in certain circumstances under Swedish, French, British and German law. Thus, the ECJ judgements on State liability have had an important impact by recognising liability for these acts when they infringe Community law. So far, there have been several cases in the Member States where the State has been found liable for a breach of Community law by a legislative act. As far as I know, State liability has not yet

[271] Ibid. p. 107.
[272] Van Gerven and others (1999), pp. 377, 380.
[273] *Brasserie du Pêcheur*, see note 1 above, para. 71.
[274] Van Gerven and others (1999) p. 381.
[275] *Brasserie du Pêcheur*, see note 1 above at paras. 16, 31-32.

been recognised in a case where a State has been found liable for damages because a national court has negligently misapplied Community law. Although there are no practical examples, it has been established by the ECJ, as stated before, that also judicial acts can lead to State liability. In order for Community law to have an effective and uniform application and to protect individual EC rights, it is indeed very important that the courts apply Community law correctly. The possibility to request a preliminary ruling is the only way through which the courts can be sure, in difficult situations, that they are not making any mistakes. Thus, it is necessary that the courts comply with their obligations under the Treaty and, if not, are held liable to compensate damage caused by their actions. Regarding the lack of such cases, it will be very interesting to see the outcome of the Swedish *Volvo service* case.

Although the Member States in general comply with the State liability principle established by the ECJ, they do not seem to have made any changes in their national legislation. As described above, the Swedish Commission suggested that the Swedish Tort Liability Act should be amended in order not to treat individuals differently depending on whether the matter concerns Community law or national law. Although many authors have been of the same opinion, the law has never been amended. The State liability principle could, however, in the future have a spillover effect and lead to changes in national legislation as well. I will examine this matter in the following section.

5.4 Influence of Community Law on National Tort Laws

5.4.1 Introduction

Procedural law has not been harmonised within the Community framework. Therefore the ECJ has to rely on national courts for the construction of a coherent system of remedies for the protection of Community rights. Thus, the right to reparation will be defined through both Community and national law. However, by referring to the principles of efficiency and non-discrimination, the ECJ may compel the national courts to apply certain rules that are not applicable according to national law, in cases that involve Community law. The question is then which rules the ECJ will require the national courts to apply. Are they rules found in the Member States legal systems or completely new provisions developed by the ECJ?

When establishing the State liability principle, the ECJ showed that it is able to develop principles that are not common to all Member States, by relying on the principle of effective and uniform application of Community law. However, the ECJ will in most cases turn to the Member States' domestic legal system to find an inspiration and legal basis for applying a principle. As stated in chapter 2, these principles do not have to be common to all Member States. It is normally enough if a majority of the countries are familiar with them. Thus, the ECJ can, within the sphere of Community law, through its case law make principles of tort law in one Member State applicable in another Member State whose legal system does not provide for such rules.

We can notice an interaction between domestic law and Community law that can affect national tort law in two ways. Firstly, *more advantageous rules concerning compensation for damage may be applicable when the breach by the State concerns EC law*. The ECJ could use a model in one legal system that provides for compensation for all kinds of damage regarding the protection of a certain interest. Individuals in countries with stricter rules on compensation regarding such an interest would then still be able to claim damages from the State if the breach concerned EC law. That would, however, not be possible in strictly national cases when the national rules do not provide for such a remedy. Thus, an individual could for example obtain damages for a pure economic loss in cases where EC law has been violated even though this kind of remedy does not exist in the national legal system.[276] The fact that national law will be influenced in this way gives individuals a better protection of rights granted by Community law than for the rights they have under national law.

The fact that the remedial protection afforded to rights based on Community law and rights which are purely based on national law differ is not fair from the individual's point of view. Thus, the second way that national law could be affected is through the *spillover effect on national rules of the rules which the ECJ requires national courts to apply in Community cases.* A domestic legal system could therefore be influenced, with respect to liability for non-contractual damages, even beyond the responsibility based on EC law.[277]

In this chapter I will examine how this interaction between national and Community law can lead to the *harmonisation of national tort laws.* I will first give account of the case law of the ECJ in areas where some of the material contents of tort law in State liability cases has been established. I will then have a closer look at the different

[276] See e.g. section 5.4.3 below.

scopes of protection in the Member States' tort laws. By comparing the similarities or differences in the various systems, I will be able to examine whether a harmonisation of national tort laws could enhance the protection of individual rights. Finally, I will describe why this development is possible in the future.

5.4.2 Case Law of the ECJ defining the Right to Reparation

As described above, the ECJ has set out the core principles and conditions concerning State liability. However, the principle of State liability needs to be shaped through the domestic legal systems. In *Brasserie du Pêcheur* and other cases concerning State liability subsequent to it, the ECJ has held that the substantive and procedural issues concerning a claim for damages in a national court are to be defined by the Member State.[278] National laws provide for detailed and varied procedural and substantive provisions concerning time limits, causation, and mitigation of loss and assessment of damage.[279] During this process of interaction between Community and national law, the ECJ must make a balance between the effective protection of Community rights and the procedural autonomy of the national legal systems.

The Court requires, however, that the domestic rules on the extent of reparation comply with certain conditions, in order for Community law to be applicable in an efficient and uniform way throughout the Member States. This principle of the efficiency of Community law (*l'effet utile*) sets the following requirements for national court proceedings:

- they must not make it impossible or excessively difficult to obtain reparation, and
- the applicable national laws must not be less favourable than those relating to similar cases based on domestic law.[280]

By referring to these conditions, the ECJ may in fact require that a particular remedy is available to individuals or that certain rules should be applied in cases that concern Community law although such rules do not exist in domestic law. It can also demand a national court to set aside national rules which limit the availability of a certain remedy.[281] A good example of a case where the ECJ has dismissed the application of certain rules of national law is the *Brasserie du Pêcheur* case. In that judgement the Court held that the following rules could prevent individuals from deriving the full

[277] Rissanen K., *An Area of Justice and the European Union*, ERT 1, (1999) p. 93.
[278] *Brasserie du Pêcheur*, see note 1 above at para. 67.
[279] Craig and De Búrca, (1998), p. 248.
[280] *Brasserie du Pêcheur*, see note 1 above, at para. 67.

[281] *Brasserie du Pêcheur*, see note 1 above, at paras. 71-72.

benefit of Community law: a German rule that generally leads to the exclusion of a pure economic loss, an British rule requiring proof of misfeasance in public office for liability to arise, even though such misuse of power might be impossible to prove in the case of the legislature, and a German rule allowing compensation only if the legislative body is under a duty towards the plaintiff.[282]

In the *Brasserie du Pêcheur* case, the ECJ clarified how the extent of damage should be decided. It permitted restrictions as long as they satisfied the conditions of equivalence and effectiveness. It held that reparation for loss and damage caused to individuals as a result of Community law must be commensurate with the loss or damage sustained, in order to ensure that the individual rights are effectively protected. The ECJ does not permit the use of provisions of law limiting compensation to a maximum amount. Imposition of a ceiling for the total amount of compensation was ruled out in the *Nils Draehmpaehl* case.[283] In the *Brasserie du Pêcheur* case the Court further ruled that reparation should include the loss of profit and specific damages, for example exemplary damages, where national law provides for such claims. For example, national rules, which make adequate compensation of pure economic loss impossible, will have to be set aside. A total exclusion of loss of profits or the restriction of damages to a certain specific interest only, such as property, would not comply with the principle of effectiveness. The Court stated that the national court may ascertain whether the injured person has shown reasonable diligence to avoid or limit the damage and also, if the legal remedies available were used, when determining the damage. Thus, the damaged party shall take reasonable care to limit the extent of the loss or damage.[284]

The question of whether an individual is entitled to interest on damages has also been considered in the case law of the ECJ. In the *Marshall II* case,[285] the importance of paying interest on damages was recognised. The Court stated that full compensation for the loss and damage sustained cannot leave out certain account factors such as the passing of time. Thus, the award of interest must be seen as an essential component of compensation.[286]

[282] Ibid. at paras. 87-8, 73 and 71-72, see also above, section 5.3.1.
[283] Case 180/95, *Draehmpaehl* v *Urrania Immobilienservice*, [1997] ECR I-0000.
[284] *Brasserie du Pêcheur*, see note 1 above at paras. 82-89, 94, Craig and de Búrca(1998), pp. 247-248.
[285] Case 271/91, *Marshall* v *Southhampton & South West Area Health Authority (Marshall II)*, [1993] ECR I-4367.
[286] Ibid. para 23.

Another important case regarding the conditions imposed by national law on the right to reparation is the *Palmisani* case.[287] This case arose out of the measures Italy took after the *Francovich* judgement, to provide compensation to those who had suffered from its failure to implement Directive 80/987. It adopted a Decree stating that actions for damages must be brought within a period of one year from the date on which it entered into force. In *Palmisani,* this time limit was alleged to be less favourable than the prescription period of five years applicable on an ordinary action for damages regulated by the Italian Civil Code. The ECJ did not find that the one-year time limit was a threat to the principle of effectiveness, since it did not make it excessively difficult to get compensation. The Court nevertheless held that the limit could be contrary to the principle of equivalence. Despite that, it left the question on whether the one-year provision was compatible with the requirement of equivalence to the national court to decide. Thus, it afforded a wide margin of discretion to the national court.

The ECJ can decide whether the exercise of a Community claim offers enough protection. However, when examining the requirement of equivalence, a comparison with the domestic rules applicable to a similar situation must be done. In this respect, national courts are probably more competent to determine the matter. This could explain why the ECJ seems to be prepared to give national courts more space in matters concerning the principle of equivalence than it does in respect of the requirement of efficiency and minimum protection.[288]

The cases described in this section mostly concern the cause of action and the extent of reparation. However, they illustrate how the substantive and procedural issues concerning a claim for damages are decided by the ECJ in State liability cases. The Court definitively influences the material contents of the national tort law when the case concerns Community law. However, it also leaves many issues to the national courts to decide.

5.4.3 Scope of Protection of Individual Rights in National Tort Laws

As described in section 5.3, there are important differences regarding the rules dealing with State liability between the Member States. Therefore it is not surprising that considerable variations between their national tort laws in general also exist. In the

[287] Case 261/95, *Palmisani* v *INPS*, Judgment of 10 July, 1997.
[288] Tridimas, *Epilogue:Recent Developments in the Law relating to State Liability in Damages* in European Public Law, (1997), pp. 183-184.

following, I will make a brief overview of the tort legislation in France, the United Kingdom and Germany as they represent the three major legal systems. They approach questions of fault, cause, the amount of reparation and damage to be compensated differently. I will not make a distinction between substantive and procedural rules as they cannot be defined precisely and may vary from one legal system to another.[289]

The general provisions of *French tort law* are found in Articles 1382 and 1383 of the Civil Code. According to them, all rights and interests are in principle protected. They contain no limitations on the scope or nature of protection unless the rights and interests are clearly illicit. Thus, no restrictions regarding the kind of interest, group of persons or relationship to be protected exist. The French approach is very generous from the plaintiff's point of view. If he or she only proves fault, damage and a causal link, compensation can be claimed. No limitation as to the group of protected persons exists. Even secondary victims or the dependants of primary victims may be compensated. This generous attitude is also reflected in the types of damages, which are recoverable. As French law allows all legitimate interests to be protected it also provides for full compensation for all injuries to such interests. This full compensation (*réparation intégrale*) covers all kinds of material and non-material injury such as pain, suffering, aesthetic damage, loss of amenity and damage to one's reputation. French law also regards the loss of a chance as certain damage.[290]

British and German tort law regimes have a more restrictive approach compared with the French one. They impose limitations at the very outset on the kind of rights or the group of persons that are protected.[291] British law has, through its Common law, developed specific forms of tortious liability, each protecting a particular interest against a specific form of encroachment. The more general tort of negligence may be invoked in situations where some interest is not protected by a specific type of tort. The tort of negligence is, however, more restrictive as it requires that the person held liable for negligence has been under a duty of care owed to the group of persons to which the victim belongs.[292]

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[289] Van Gerven, *Bridging the Gap between Community and National Laws: Towards a Principle of Homogenity in the field of legal remedies?* (1995) pp. 693, 695. The book by Van Gerven and others, *Case, Materials and Text on National, Supranational and International Tort Law, Scope of Protection*, is the first part of a casebook on Torts in the *Casebooks for the Common Law of Europe* series. Its aim is to help to uncover the common roots of the different legal systems.
[290] Van Gerven and others (1999), pp. 31-32, 36, 52-53.
[291] Ibid. p. 32.
[292] Ibid. pp. 16-17, 53.

The rules governing liability under German law are to be found in §§ 823(1), 823(2) and 826 BGB. A victim can only claim damages if the injury affects one of the interests protected under these three general provisions. Those interests are life, body health freedom and ownership. Other rights protected through the legal system are also included. Each one of these three general clauses only protects a limited class of persons. Under both British and German tort laws, damages may only be claimed by those who belong to the group of persons intended to be protected by the tort provisions.[293]

It is interesting to examine the protected interest and persons in these different legal systems. I will therefore look closer at the protection against direct harm to the person and the protection of ownership and property rights. French, British and German law all provide for compensation for all kinds of injury caused to primary victims by a tortious act or omission interfering with *bodily integrity, health and freedom*. Under each system, the broad categories of material and non-material damage are, however, distinguished. Contrary to the French system, not all types of damage are recoverable under British and German law. Those systems are both reluctant to award damages for non-material injury other than pain and suffering. Under British law for example, it is hard to obtain compensation for mental injury suffered by a primary or secondary victim if the harm has been caused unintentionally. The success of a secondary victim also depends on whether a relationship of proximity exists between the claimant and the party said to owe the duty. In German law, liability for the mental pain and suffering of a plaintiff who is not directly involved in the accident, depends on whether the pain can be considered as an illness.[294] As already stated above, French law provides for full compensation for the harm suffered. British and German law, however, limit claims on the part of third persons.

All of the described tort regimes afford *protection against interference with ownership or other property rights* in the form of damage to property. The three systems also contain a form of strict liability protection in disputes involving land between neighbours. However, they differ in cases where the interference does not lead to material damage to the property but where the plaintiff suffers pure economic damage. British law does not allow claims for damages for a pure economic loss in general. It is only possible under certain circumstances. The loss must be resulting from a physical injury to the plaintiff or a damage to his property. Nor does German law usually allow tort claims for a pure economic loss. However, these rules have

[293] Ibid. pp. 37, 53.

[294] Ibid. pp. 166-167.

been interpreted in a flexible way. Despite the general reluctance to afford compensation for a pure economic loss in the UK and Germany, there are situations where it is possible to get it. In the UK, the plaintiff can try to base his case on rules concerning a specific type of tort which allow compensation for such a loss. Although the British provisions on negligence are clearly not designed to protect economic interests, there are several other tort regimes that protect economic interests against interference, e.g. interference with trade by unlawful means. Some specific economic interests are also protected against interference under a number of enactments that impose a duty of care. Thus, the relationship between the plaintiff and the defendant will have a determining factor on whether the plaintiff receives compensation for economic loss. German law protects economic interests from interference in another way by focusing on the quality of the conduct. Under German law it is inappropriate to preclude the compensation for a pure economic loss when the conduct of the defendant is especially reprehensible. Needless to say, the French tort rules recognise a pure economic compensation, as all types of loss are equally protected.[295]

On the basis of this overview on the French, British and German tort rules we can see that all three systems protect life, mental and physical health, bodily integrity and the right to property. Also harm to a person or property resulting in economic loss tends to be compensated if the loss is caused by negligent professional conduct. However, the systems also have considerable differences. While the British and German tort regimes follow a restrictive approach, for example, in respect of full compensation or pure economic loss, the French system is very generous in allowing claims for all kinds of damages with no limitation as to the group of protected persons. One can wonder which one of these different approaches is most favourable to the individual. I am not, however, interested in examining which system that, in general, is best for the protection of individual rights. In order to answer that question one would have to consider several aspects, such as social security and private insurance schemes, and examine the boundaries between contract and tort law. Limitations on the compensation of a pure economic loss may for example be mitigated by a broad application of the rules on contractual liability. Tort law is also to a large extent based on moral and ethical grounds and is used to direct and control the behaviour of individuals in the common interest. It is, however, interesting to note how jurisdictions which have recently adopted new legislation (e.g. the Netherlands, Italy, Portugal and Greece) are trying to find a compromise between the French, British and German approaches. By doing so they avoid the general and virtually unlimited scope

[295] Ibid. pp.246-250, 295-297.

of protection under French law but do not either use the overly restrictive model of British and German tort law.[296]

5.4.4 Harmonisation of National Tort Laws

Due to the large integration process that is taking place within the European Union, the harmonisation of legal rules is, to a large extent, necessary. Harmonisation takes place trough both legislative measures and decisions of the ECJ when it interprets Community legal rules. National tort rules have been harmonised by legislation within the EU in the field of motor vehicle insurance, environmental law and consumer law, where the directive on liability for defective products is one of the most important contributions.[297] I will not, however, analyse these legislative measures. I will instead focus on the way in which the ECJ may influence the harmonisation process through its case law. The purpose of this thesis is indeed to examine how the establishment of the State liability principle by the Court has enhanced the judicial protection of Community rights.

As the national courts are bound to apply the decisions of the ECJ, they must accomodate their interpretation of national law on torts in accordance with the requirements of efficiency and non-discrimination in cases *which have a Community law component*. In order to give full effect to the enforcement of individual EC rights, national courts may also have to refrain from applying national rules which are incompatible with the conditions laid down by the ECJ regarding the liability of States for breaches of Community law. The Court will probably continue to set out the conditions in a more precise way, in order for Community law to be applied uniformly throughout the Member States. This will leave less discretion to national legal systems to apply their own rules.[298]

So far judicial harmonisation has been limited to the extra-contractual liability of public authorities as described in chapter 5.3 and 5.4.2. The *Brasserie du Pêcheur* case and case law subsequent to it illustrate how the influence of Community law is felt in the area of tort liability on the part of the State. The harmonizing effects in the

[296] Ibid. pp. 54-55.
[297] Ibid. pp. 10-12, see Directives, 72/166, 84/5, and 90/232 regarding motor vehicle insurance, Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment of 21 June, 1993, ETS No. 150 which so far has been signed by nine Member States and Directive 85/374 of 25 July 1985 regarding product liability. For the interested reader, see further Alpa, G., *European Community Resolutions and the Codification of "Private Law"*, European Review of Private Law, Volume 8, No. 2, 2000, pp. 321-333.
[298] Van Gerven, *The Case-law of the European Court of Justice and National Courts as a Contribution to the Europeanisation of Private Law*, European Review of Private Law (1995), p. 369.

field of the legal remedy of compensation for harm caused will, however, most probably also extend to harmonisation of national tort laws in general. The distinction between public and private tort should not prevent the application of general rules of tort law. One might argue that a distinction has to be made between the tort regime applying to private persons and that applying to public authorities. This distinction is not, however, made in Common law (see above, chapter 5.3.3). If the ECJ in the future extends the State liability doctrine to individuals as well, all national tort rules will be subject to harmonisation (see the discussion on this question in chapter 6).[299]

In the process of harmonisation of national tort laws, the distinction between Community and national rules may also diminish. It has been argued that national law could be influenced also in *cases that do not have a Community law component*. National courts are, of course, under no obligation to apply EC law in purely national situations. They may, however, consider it in order to avoid the application of different sets of rules depending on whether the rule breached is a rule of Community law or a rule of domestic law. EC law could also be of assistance for the purpose of developing national law. Thus, it is possible that Community law has a spillover impact on national tort rules regarding situations with no Community dimension. At the very least, the impact on national law in cases with a Community element will make national courts aware of the EC law approach and mindful of its potential.[300]

Van Gerven calls this impact of Community law on national laws the ”*communitarization*” of national laws. According to him, it is not unlikely that changes mandated by Community law will provoke further change in national law because of the necessity to maintain harmony between situations where national law is affected by Community law and purely national cases. Craig is of the same opinion and has in his article *The Domestic Liability of Public Authorities in Damages* presented his argument with respect to British law on State liability. He criticises the British system where a plaintiff, in order to succeed, must be capable of fitting his claim into one of the recognised causes of action which exist, such as negligence. It can be hard for an individual to receive compensation for all breaches of a right granted to him because of the difficulties existing when trying to fit certain fact patterns within the established causes of action. Reforms of the system have therefore been proposed. According to Craig, the British torts regime has something to learn from the ECJ´s approach to the problems of State liability. The latter one provides, for

[299] Ibid. p. 370
[300] Van Gerven and others (1999), p.11, Craig, *The Domestic Liability of Public Authorities in Damages: Lessons from the European Community?* in New Directions in European Public Law (1998) pp. 80, 84, 89.

example, for a way of adding to or modifying the existing heads of liability without thereby imposing excessive burdens upon the public authorities.[301] Another example of discussions in the doctrine of amending national tort law in cases with no Community element is the suggestions in the Swedish doctrine to amend the Swedish Tort Liability Act.[302]

Time will tell whether domestic law will develop along the lines described above. Changes in purely national situations will, of course, depend upon the general view in a Member State concerning the correctness of the Community test itself. If that view is accepted, then the case law of the Court may be the origin of a growing tendency towards a common tort law of Europe.[303] How far that development goes depends on the scope and contents of rights which Community law confers upon individuals and to what extent the ECJ will demand national law to change in order to secure the observance of those rights.[304] In order to create a new *jus commune* it is important to trace the development of a set of rules that should be common to all Member States.[305] Therefore, comparative studies of national rules are of great importance. In the field of remedies, when individual rights are enforced, it should not be assumed that one legal system provides for the best solutions. Instead the approach to a legal problem should be open, acknowledging that all legal systems of the Member States may be of help.

5.4.5 Conclusions

The development described above shows that the ECJ influences national tort law by referring to the principles of efficiency and non-discrimination. The first principle is relied on when conditions under which a remedy must be granted are formulated. It may require that individuals can claim a particular remedy or that the national courts set aside national rules which limit the availability of a certain remedy in cases concerning a breach of Community law. The latter principle provides a better protection of Community rights when national legal protection is higher for claims under national law than for similar claims concerning Community law. The impact of these principles has positive effects on the enhanced protection of individual EC

[301] Ibid.
[302] See above, chapter 5.3.2.1.
[303] Van Gerven and others (1999), p. 480.Craig (1998) pp. 89-90.
[304] Van Gerven, *Bridging the gap between the Community and the national laws: Towards a principle of homogenity in the field of legal remedies?* (1995) p. 698.
[305] Caranta R, *Judicial Protection against Member States: A New Jus Commune takes shape*, CMLRev. Volume 32 (1995) p.703.

rights and, in some situations, it might even influence the protection of purely national rights.

The ECJ has in its case law begun to interpret tort law in a uniform way, through the elaboration of the substantive conditions of Community law under which extra-contractual liability is to arise in the event of violations of Community legal rules. It will probably also continue to do so in the future.[306] As the Court will turn to the national legal systems to develop these conditions, a legal system in one Member State might influence another one. The overview of the national tort laws in France, the United Kingdom and Germany illustrates the great differences in tort law that exist between the various legal systems. Whereas the French system is very generous, allowing compensation for all types of loss without restrictions regarding the kind of interest, groups of persons or relationships to be protected, the regimes in the UK and Germany have a much more restrictive attitude. This interaction between Community and national law is leading to a harmonisation of national tort rules within the European Union. Due to the differences of the underlying ideas in the various systems, the impact of harmonisation could be of great importance in the future. Thus, this development will probably lead to an improved legal protection of individual rights in a Member State.

[306] Van Gerven, *ECJ case-law as a means of unification of private law?*, European Review of Private Law, Volume 5, No. 3 (1997) p. 300.

6 Possible Developments in the Future

In chapter 5, the effects that the establishment of the State liability principle has led to regarding a better protection of individual EC rights have been examined. I have described how individuals have been given an important role in supervising that the Member States comply with Community law, through the possibility to claim damages from the State for its breach of Community law. Further, I have accounted for the effects that State liability has had on the national legal systems, such as the development of a common tort law. Some examples have been provided in order to illustrate how this development has taken place. However, to a large extent only time will tell whether the State liability principle will create these consequences in the future. I have thus already discussed some of the most important possible future developments. In this chapter I will therefore only describe one important effect that the State liability principle might have in the future and then very briefly refer to other interesting developments that could take place.

There are opinions in the doctrine according to which the *Francovich* judgement could be interpreted extensively, recognising that *an individual, who has violated a directly enforceable obligation imposed by Community law, may be held liable*.[307] As stated above, that judgement was reasoned by making reference to the principle of full effectiveness of Community rules, the effective protection of EC rights and the requirement for Member States to take all appropriate measures to ensure the fulfilment of their obligations. The need to protect Community rights effectively implies that liability for infringements of Community law should not be limited to cases where a State can be held liable, when a directly effective right has been infringed. Treaty Articles 81[85] and 82[86] EC, prohibiting enterprises from concluding cartel agreements or abusing a dominant position, are good examples of such provisions. The infringement of these competition rules may result in the imposition of fines. There is, however, no Community remedy for *third parties* suffering loss from that infringement to claim compensation from the individual who has failed to comply with these provisions. National law can naturally provide for such a non-contractual liability for individuals. According to the principle of non-discrimination, national courts are obliged to provide the same remedies regarding the

[307] See e.g. Van Gerven, ibid., Van Gerven, *Bridging the gap between the Community and the national laws: Towards a principle of homogenity in the field of legal remedies?* (1995) p. 699, Van Gerven and others (1999), Quitzow (1996/97) p.696.

protection of Community rights as those available for similar breaches under national law. In the absence of Community provisions, claims regarding compensation for a breach of Community law will therefore be based on remedies found in national law. It is, however, argued that *Community law* should serve as a basis for individual liability in damages in the same way as it does in State liability cases. If individuals can only resort to national law in these situations there will be variations in the level of protection because of the differences between the national legal systems. The principle of non-discrimination is also useless in situations where national law does not acknowledge the non-contractual liability of individuals in such a situation. Many authors therefore think that the ECJ should establish individual liability for a breach of directly effective Community rights.

The question regarding individual liability has not yet been answered. It was, however, raised before the Court in the *Banks* case.[308] In this case the private coal producer and licensee, Banks, sued the state owned, British Coal, which had issued the license, for demanding very high royalties while the prices for coal were very low. Banks claimed that this conduct violated certain Articles of the ECSC Treaty, or alternatively Articles 81[85] and 82[86] EEC. One question referred to the ECJ was whether national courts had the power and/or obligation under Community law to award damages caused by a breach of directly effective provisions of the EC Treaty, where a private undertaking is responsible.

Advocate General Van Gerven did in his opinion argue for the establishment of individual liability for breaches of directly effective Community provisions. He referred to the *Francovich* case and the general basis that was used in the judgement to establish State liability.[309] On the basis of that judgement he held that national courts are obliged to award damages for the loss that one undertaking has suffered as the result of an other undertaking´s breach of a directly effective provision of Community law. He held that the full effect of the Treaties would be impaired if such a right did not exist.[310] The Court applied the ECSC Treaty since it was the legal framework for the examination of licences for the extraction of unworked coal. In order for its provisions to be directly applicable, a decision by the Commission finding an infringement was necessary. The lack of such a decision in this case allowed the Court to avoid the question of individual liability. According to Van Gerven, the relevant provisions in the case were, however, directly enforceable and

[308] Case 128/92, *Banks* v *British Coal*, [1994] ECR I-1209.
[309] *Francovich*, see note 1 above, at paras. 33-36.
[310] Case 128/92 see note 308, Advocate General Van Gerven's Opinion at p. 1212, para 36-45.

therefore British Coal should have been held liable for damages.[311] In his various contributions he has continued to support the idea of individual liability. He has stated that the right to reparation is the necessary corollary of the direct effect of the provisions whose breach has caused the individual damage and that the ECJ must acknowledge this principle and lay down the substantive provisions that will govern this liability. Many have agreed with his view, at least regarding violations of the prohibitions of anti-competitive behaviour in Articles 81[85] and 82[86] EC.[312] The harmonising effects, which the ECJ´s case law already has in respect of national laws on State liability, would then be extended to national laws on torts committed by individuals.

I believe that the ECJ will establish a principle of individual liability in the future. A complete system for judicial protection should provide for a remedy for breaches committed by individuals of directly enforceable obligations imposed on them by Community law.[313] I agree with the opinion that the *Francovich* case could be interpreted extensively so that the principle of effectiveness also could create such liability. That would be the logical continuation of the case law establishing State liability. The reason for that the ECJ did not acknowledge this principle in the *Banks* case was probably because of the differences regarding the division of competence between the EC and the ECSC Treaties.[314] I believe, however, that the Court would not be willing to treat individuals suffering damage in the event of infringements by individuals of directly effective Community provisions differently than those experiencing loss because of a breach by the State.

Through the case law of the ECJ, the scope of the State liability principle and its conditions have been defined. I believe that the Court will continue to develop, re-examine and clarify these issues in interaction with national law. *The following conditions are probably going to be further developed:*

- The meaning of the criterion "a sufficiently serious breach" when deciding whether a Member State has "manifestly and gravely disregarded" the limits on its discretion.
- The content of a superior legal rule intended to confer rights on individuals.
- The scope of the directness required in order to establish the causal link between the breach and loss.

[311] Case 128/92, see note 308 above.
[312] E.g. Advocate General Léger agreed with the view of Van Gerven in his opinion in the *Hedley Lomas* case, Case 5/94, see note 90, Advocate General Léger's Opinion at p. 2556, Quitzow (1996/97).
[313] Van Gerven and others (1999) p. 481.
[314] Quitzow (1996/97), p. 698.

- The conditions required for damages in order to be recoverable, e.g. how far losses caused indirectly can be recovered as compensation.
- Whether "the actual extent of reparation" requires full or only adequate compensation.
- The conduct required of an injured person in order for him to show " reasonable diligence".[315]

Above I have accounted for the interaction between Community and national law. It is also interesting to look at *the influence that the development of Community liability, according to Article 288(2)[215(2)] EC, has on the State liability doctrine or vice versa*. As already stated, a parallel between these two Community tort regimes for extra-contractual liability was made in the *Brasserie du Pêcheur* case. In that judgement it was stated that the Community rights of individuals should be protected similarly, irrespective of whether it is a national or Community authority which is responsible for the infringement.[316] Van Gerven has, however, criticised the reference in *Brasserie du Pêcheur* to Article 288[215] EC in his article *Taking Article 215 EC Treaty Seriously*.[317] In his opinion it is too limited in scope and in practice the protection of individual Community rights varies depending on which Community tort regime that is applicable. He therefore suggests that the consistency between both Community law regimes of tort liability should be pursued, not only in respect of the condition of breach but also in respect of the other conditions for liability to arise and regarding the remedy of compensation.[318] As the liability of the Community authorities falls outside the scope of this thesis, I will not here analyse how this regime in practice differs from the State liability principle. It is, however, important to notice that these two liability regimes of liability for breaches of Community law might be harmonised in the same way as the Community and national tort liability regimes.[319] Another possibility is that these two liability regimes will differ to a larger extent in the future. Some authors have been critical stating that Article 288(2)[215(2)] EC is illsuited to State liability which calls for a stricter test. According to that opinion, the State liability regime is too onerous because the test imposes too heavy a burden on the Member States.[320] The question therefore is whether the seriousness demanded of a violation to give rise to liability will be judged, in part, in the light from the case law on Article 288(2)[215(2)] EC.

[315] Van Gerven and others (1999).
[316] *Brasserie du Pêcheur*, see note 1 above, at para. 42.
[317] Van Gerven, *Taking Article 215(2) EC Seriously* (1998) pp. 35-47, see also Wathelet and Van Raepenbusch (1997).
[318] Van Gerven, *Taking Article 215(2) EC Seriously* (1998) p 44.
[319] Van Gerven and others (1999), p. 478.
[320] Craig (1998) p. 77-79, 84-85.

Seriousness is there assessed both from the circumstances relating to the breach and those relating to the damage caused.[321]

In the future it is also possible that *the State liability principle will be included in the EC Treaty*. Member States have in recent years had opportunities in the negotiations on the Treaties of Maastricht and Amsterdam to alter the Treaty Articles dealing with the principle of State liability.[322] During the Intergovernmental Conference, which led to the Treaty of Amsterdam, the United Kingdom wanted to include such a provision in the Treaty. Several Member States probably, to a certain degree, fear that the ECJ continues to develop this remedy on the basis of the principle of effectiveness of Community law and giving it a wider scope of application than they are ready to accept. The idea behind the UK's proposal was therefore probably to reduce the Member States' exposure to liability. This draft Article on damage was not, however, supported by other States and the Treaty does not contain any rules on State liability. Thus, today it is still the case law of the ECJ that is relied upon in this area. The reluctance of the other Member States to control the Court's development of the State liability principle in such a way implies that they have accepted that they can be held liable for their breaches of Community law. In the future it is, however, possible that the State liability principle is going to be part of the EC Treaty. In my opinion it is a good idea as long as the possible new article generally acknowledges the principle without diminishing the Court's possibilities to develop it further in a flexible manner. Such a new article in the EC Treaty would give the principle an even stronger foundation and make it visible to the citizens of the EU.

[321] See case 104/89, *Mulder* 1992, ECR I 3061 at p. 3104, see above, chapter 4.3.1.

[322] Temple Lang, *Judicial National Attitudes to Community Law and Consequences for the Evolving Community Law* in Access to Justice, A record of thoughts and ideas dealing with the interrelationship between national courts and Community law and courts (1999), p. 100.

7 Conclusions

This thesis has described the State liability principle as a new kind of general principle, which enhances the judicial protection of individual rights and could change the national tort laws. Before expressing my final concluding remarks, I will, however, make a brief summary of what has been stated so far.

Similarly to the other general principles of law, the State liability principle has been developed through the case law of the ECJ. The Court's competence to interpret EC law with final binding authority gives it this power to develop Community law in a dynamic way, filling obvious gaps in the body of law. The general principles of law are normally derived from the common legal traditions of the Member States. There are, however, no general principles that are truly common to the Member States as far as the State liability principle set out in the case law of the ECJ is concerned. All Member States have some kind of rules on liability of public authorities for a loss inflicted through fault or negligence in the exercise of public powers. However, such liability only concerns to a limited extent the liability for legislative and judicial acts. In most Member States, the conditions under which that liability may arise are very severe and often it is even impossible to impose such liability upon a state. In contrast, the State liability for the a breach of Community provisions includes all types of infringements by the State irrespectively of whether the infringement is made by the national administration, the legislature or the judiciary. Although the Court referred to the general principles familiar to the legal systems of the Member States when clarifying the conditions for State liability in the *Brasserie du Pêcheur* case, the principle cannot be found there but rather in the distinct nature of Community law and the principle of its supremacy. Thus, the establishment of the State liability principle arises out of the principle of the full effectiveness of Community rules, the effective protection of Community rights and the principle of co-operation in Article 10[5] EC, that requires the Member States to take all appropriate measures to ensure the fulfilment of their obligations. Therefore I have considered this principle to be a new kind of general principle of law. Although effectiveness of the Community system is the original idea behind its development, the establishment of this kind of a principle also leads to a stronger protection of individual rights.

The protection of individual rights through the remedy of compensation is one part of the whole Community scheme of judicial protection. That protection finds its origin in the doctrine of direct effect, giving individuals the right to enforce sufficiently clear and unconditional Community provisions in national courts. Thus, rights that

individuals derive from Community law may be invoked before national courts. That possibility is, however, quite useless unless sanctions and remedies are available for the enforcement. To strengthen the protection of individual rights, the Court therefore has required national courts to provide for the general remedy of rendering a national rule inapplicable because of a conflict with Community law. Also more specific remedies have been developed such as restitution, interim relief and compensation. There are two regimes of extra-contractual liability in Community law. The first one concerns the liability of Community institutions and finds its legal basis in the Treaty, Article 288(2)[215(2)] EC. The other one is, of course, the liability for Member States for a breach of Community law.

The State liability principle has been established and developed through the case law of the ECJ. It all started with the *Francovich* case in which the Court held that compensation to an individual suffering loss because of a breach of Community law by the State should be provided for as a matter of *Community law*. The following important judgement was the *Brasserie du Pêcheur* case where the conditions for such liability to arise were clarified. It was stated that in order for a State to be liable, the rule infringed must be intended to confer rights on individuals, the breach must be sufficiently serious and there must be a causal link between the breach and the damage. Whether the breach is considered to be sufficiently serious or not depends on the scope of discretion that the Member State enjoys in the situation in which the violation occurs. If it only has a considerably reduced or even no discretion the mere infringement of Community law may be enough to establish the existence of a sufficiently serious breach. On the other hand, when a Member State enjoys a wide discretion, the requirements for holding it liable will be higher.

Thus, the question whether a right to compensation exists shall be determined according to the rules of Community law. The substantive and procedural issues concerning a claim for damages in a national court are, however, to be defined by the Member State. The ECJ may nevertheless intervene and require certain provisions to be applicable with reference to the principle of efficiency and non- discrimination. The State liability principle is therefore developed through an interaction of Community and national law. No important change in the State liability concept has occurred after the *Brasserie du Pêcheur* case. Nevertheless, the State liability principle has been specified in subsequent judgements. All types of infringements by the State are actionable irrespectively of the organ of the State that is responsible for the breach. The ECJ has in its case law considered the liability of the administrative and the legislature. It has nevertheless, as far as I know, considered the liability of the judiciary. The liability of the Swedish State for a judiciary act has recently

materialised in the *Volvo service* case.[323] The plaintiff has claimed damage from the State holding that the Supreme Court failed to comply with its obligation under the Treaty by not referring the question of how to interpret the Trademark directive to the ECJ. The lack of such cases in other Member States will make the outcome of this case very interesting.

The establishment of the State liability principle has led to an enhanced protection of individual rights. The fact that individuals can sue the State for damages will lead to a greater supervision of the Member States' compliance with Community law. Thus, Community rules will, to a larger extent, be uniformly and properly applied throughout the Community. An overview of the State liability in the Swedish, French, British and German legal systems allowed me to conclude that the State liability doctrine of the Community is wider in scope than the rules on the liability of public authorities in the Member States. Therefore, individuals are given a more advantageous possibility to receive compensation in cases where the State has breached Community law than in cases where it has violated national law. It is not desirable to have these disparities between the remedial protection afforded to rights based on Community law and rights purely based on national law within a Member State. The Community doctrine could therefore also influence national law on State liability regarding strictly national situations.

The interaction between Community and national law regarding the substantive and procedural issues concerning a claim for damages will eventually not only diminish the disparities between Community and national provisions of State liability, but also the disparities in the national tort laws in general. This development could lead to harmonising effects in the field of national tort laws. A comparative overview of the general provisions in French, British and German tort law showed that the possibilities to claim non-contractual damage differed between the three systems. When the ECJ specifies the conditions concerning the claim for damages, it could use the model of a country with a generous approach to compensate loss. A practical example of this is the compensation for a pure economic loss. Whereas the French tort regime provides for such compensation, the British law does not allow the recovery of a pure economic loss in general and German law is also reluctant to allow such compensation. The ECJ has, however, prohibited provisions that generally lead to the exclusion of a pure economic loss. Therefore, such damages are also possible to obtain in the UK and Germany regarding loss for violations of Community law. As this example shows, the development results in a better protection of individual EC

[323] Case NJA 1998 s. 474 that led to a claim for damage from the State at the Chancellor of Justice.

rights than the protection of national rights in Member States with a more restrictive attitude. Again, these disparities between the protection of Community-based and purely national rights might influence national law outside the field of Community law. In order to make a common system of judicial protection regarding the remedy of compensation work, there must be a continuing co-operation between national courts and the ECJ.

The case law of the ECJ could be the origin of a growing tendency towards a common tort law of Europe. In order to create that, it is important to trace the development of a set of rules that should be common to all Member States. That is also true regarding the development of a *jus commune* for the judicial protection of individual Community rights in general. Further harmonisation with the support of the Member States in this area will develop Community law and promote its uniform application. Comparative studies of general principles of private law for a common ground in the national legal systems will be of great importance since they may serve as the foundation of an emerging common law for Europe. It is important to note that we are discussing a harmonisation and not unification of national laws. The similarities and differences between national laws are indeed part of the cultural heritage that the Community shall contribute to, according to Article 151[128] EC. Thus, if a sufficiently high level of uniform application of Community law is to be readily accepted by the Member States, it should be based on *general principles common to the laws of the national legal systems*.

As described in chapter 2, the general principles applied by the ECJ have earlier been derived by the Court from the common national legal traditions, and then "re-transplanted" into Community law. The fact that they originate in some form from a national legal system probably makes it easier for that legal order to adjust to the principles although they have been shaped by the ECJ. However, no real reference to common traditions in domestic legal systems is possible to make regarding the State liability principle. When the ECJ established the State liability principle in the *Francovich* case, it based its decision on the principle of the full effectiveness of Community rules and Article 10[5] EC. This decision was revolutionary and has been referred to as having constitutional status. The ECJ did indeed, through its interpretation, read in new obligations for the Member States into the EC Treaty. This approach led to severe criticism by some Member States in the following important case regarding the State liability principle, *Brasserie du Pêcheur*. That fact probably made the Court refer to the general principles familiar to the legal systems of the Member States in that judgement. However, no legal system in the Member States contains the same rules on State liability as the ones developed by the ECJ. Therefore,

I consider that the legal basis in the *Brasserie du Pêcheur* case in fact was the same as in the *Francovich* case, namely the principle of the effectiveness of Community rules and the rights, which they confer. The provision which legitimates this demand is Article 10[5] EC, which requires Member States to take all appropriate measures to ensure fulfilment of their obligations under the EC Treaty. The application of this article allows the Court to give more weight to the principle of effectiveness.

As regards the various and far-reaching effects that the State liability principle has had and may lead to in the future, it is essential that its legal basis is accepted throughout the Member States. Most legal commentators have welcomed the Court's case law on State liability as it is considered to be an effective remedy for the enforcement of Community obligations imposed upon a Member States. The fact that Member States have complied with the judgements concerning State liability implies that they also have accepted the fact that they can be held liable for their violations of Community law. However, it is not evident that the principle of effectiveness will be enough to justify the future developments that this principle could lead to, or the establishment of other general principles of this new kind, e.g. a principle of individual liability. These principles are indeed invented by the ECJ. The question, therefore, is whether the ECJ should use its power to develop general principles of this kind.

Before discussing the role of the ECJ, I wish to emphasise the importance of giving the State liability principle the status of being a general principle of law. Other principles that in general are not recognised in the Member States legal systems, such as the subsidiarity principle, are not either normally classified as general principles of EC law. However, the case law of the ECJ does not suggest that Member States should be strongly bound by the subsidiarity principle.[324] Contrary to that, the Court has in its case law clearly stated that the Member States are obliged to provide for the State liability principle in their national legal systems regarding violations of Community law. The influence of the State liability principle within EC law also speaks for the fact that it is a general principle of law. The difference between general principles and specific rules is that general principles stand above secondary legislation. The fact that there is no Treaty article regulating State liability could make the principle less efficient if it only was considered a rule. Although such an article may be introduced in the future, this classification is still important for the further development in the field of the remedy of compensation and generally in the field of judicial protection of individual EC rights. The principle is also more flexible to apply

as an unwritten principle. Chapter 2 described how general principles can be relied upon to supplement and refine Treaty provisions and thus have a gap-filling function. As we know, that was the case when State liability was established. As a general principle of its own, it can now, for example, be relied on in the harmonisation process of national laws. National measures that implement Community law should also be interpreted in the light of the general principles. This means that a national court must interpret a provision of national law, which falls within the scope of Community law so as to comply with the State liability principle. Member States may most probably be liable for damages when failing to observe general principles of law. The State liability principle thus first provides for that possible remedy and then secondly, as a general principle, individuals could obtain compensation if it is violated.

The establishment of the State liability principle seems to indicate that a *new phase in the development of general principles has begun as the ECJ applies principles based on the need of Community law to have an effective and uniform application*. Through its interpretations of Community provisions, it reads in new obligations into the Treaty. The political consequence of this is that the scope of the principle of co-operation in Article 10[5] EC is widening. The Court has certainly shown boldness in interpreting the Treaty provisions and general principles as far the efficiency of Community law and the legal protection of the Community rights of individuals are concerned. The question is to what extent the ECJ can read in new obligations into the Treaty that are not explicitly contained therein. Have the Member States empowered the Court to rely on general principles in order to extend the scope of application of Community law and act as a driving force towards a *jus commune* for Europe? Many have criticised the ECJ for an unjustified judicial activism or "judicial legislation". Recently the Finnish Minister for Foreign Affairs, Mr. Erkki Tuomioja, expressed his concern regarding the power of the ECJ and the tendency that the European Union will be developed through its judgements instead of political decisions. Such a development does not comply with the legal traditions of some Member States, e.g. the Nordic countries.[325]

It is in this context important to note that the Community Treaties were drafted so that they would gradually evolve, in due course, into the constitution of a wholly new kind of association of States. That is why they did not contain many of the provisions which would naturally be included in a constitution. Therefore basic principles, such

[324] de Búrca, *Proportionality and Subsidiarity as General Principles of Law,* in General Principles of European Community Law, (2000) pp. 95-96.
[325] Hufvudstadsbladet, 001102.

as the primacy of Community law, had to be developed by the judge-made law. In order to establish a common market, an economic and monetary union and promote the aims expressed in Article 2[2] EC, Community law must be effectively and correctly applied and uniformly interpreted. This is to a large extent achieved because of the efficient, centralised and unifying mechanism that the ECJ provide. Thus, the ECJ is essential for the functioning of the Community. I agree with Leif Sevón , judge in the ECJ, who stated that *weakening the judicial system of the Community would cause considerable harm to the Community and might affect its entire functioning*. [326]

I consider the criticism of the ECJ for judicial activism to be unjust. I understand that its power to read in new obligations into the Treaty could be used in a dangerous way, regulating important issues that should be decided on a political level. However, when the ECJ has acted in revolutionary way, it has done so when the efficiency of Community law and the legal protection of individual Community rights were at issue. The impact of the case law of the ECJ will for example be much less important in the area of contract law than in the area of tort law since contractual liability is, under Community law, far from being a remedy of the same significance as tort liability. According to Article 249[189] EC, some rules of Community law are directly applicable in national courts. It was therefore inevitable that the ECJ would eventually clarify what national courts should do to apply the rules in question correctly and enhance the possibilities of individuals to enforce their EC rights. As long as the ECJ only acts in this far-reaching dynamic way when these issues are at stake, I believe that all Member States should support this kind of a development of Community law. Nor has anyone criticised the Court for one of its most striking piece of judicial legislation, namely the finding that fundamental human rights are part of Community law.[327] The Member States may, of course, also confirm or amend some of the legal principles, which have been developed in the case law by changes in the Treaty. They did, however, not use the opportunity they had in the negotiations on the Treaties of Maastricht and Amsterdam for example to amend the Treaty Articles dealing with the position of the ECJ or the principles it has developed. Since nothing was included in the Treaty, I assume that most Member States support the role the that ECJ plays in developing Community law. The fact that the Community has been moving towards a more and more developed Union and towards the completion of the internal market, also makes Member States more open to a dynamic development of Community law. The Court should, however, to a larger extent state in its judgements the legal and policy reasons which have led it to more far-reaching conclusions. It

[326] Speech delivered by Leif Sevòn, *The changing role of the Court of Justice in the integration of Europe*, 000313.
[327] Temple Lang, see note 322 above.

could more often refer to Article 10[5] EC as the legal basis of its judgements. That would be a means of educating and informing the Member States, including its politicians, and a way to protect the Court from unnecessary accusations of "judicial legislation".

In this thesis I have spoken for an enhanced judicial protection of Community rights. I have not, however, discussed what sort of rights Community law protects. Some believe that it only includes rights of corporations involving economic interests. It is true that individual Community rights can protect an interest that, from the national point of view, may not be defended. One illustration of this is a company that produces sweets and claims for damages from the State for not being allowed to use a component which is accepted under Community law but is classified as very dangerous or unhealthy under national law. However, individual rights such as human rights and the protection of legitimate expectations are also included in Community law. Recent developments, such as the likely adoption of the Charter of Fundamental Rights, also show that these general principles are being emphasised to a larger extent. The introduction of State liability might eventually lead for example to liability for the non-implementation of legitimate welfare expectations, perhaps based on social human rights.[328]

It is, however, up to the Member States to decide on a political level what rights should be included in Community law. My intention in this thesis is to underline the fact that since Community law does grant rights to individuals, these individuals shall be given the ability to enforce them. National courts must therefore give these rights complete protection. It is evident that individuals need to have the same opportunities, irrespective of their nationality, whenever a right has been infringed. The Member States will not change the protection of individual EC rights in their domestic legal system merely out of kindness. Still, infringements of Community law are not infrequent. The role of the ECJ is therefore essential for protecting individual EC rights and putting a pressure on Member States to take necessary measures in their national legislation.

[328] Wilhelmsson T., *Private Law 2000: Small Sories on Morality through Liability*, in From Dissonance to Sense: Welfare State expectations, Privatisation and Private Law, Wilhelmsson T. and Hurri S., (1999) p. 241.

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