



Faculty of Law
Lund University

The Non-Contractual Liability of the
EC

by

Johan Sahlstrand

January 1999

Tutor: Professor Carl Michael Quitzow

TABLE OF CONTENTS

SUMMARY	2
ABBREVIATIONS	4
1. INTRODUCTION	5
1.1 Subject	5
1.2 Purpose	5
1.3 Material	6
1.4 Method	6
1.5 Disposition	7
2. AN ANALYSIS OF ART 215(2)	8
2.1 The scope of Art 215(2)	8
2.2 Non-contractual liability	8
2.3 Acts on part of the institutions/servants	9
2.4 General principles common to the laws of the Member States	10
3. CONCURRENT LIABILITY: THE COMMUNITY VIS-À-VIS MEMBER STATES	12
3.1 The jurisdiction of the ECJ	12
3.2 The jurisdiction of the national court	13
3.3 Concurrent liability	14
3.3.1 Action for restitution	14
3.3.2 Action for a certain advantage	15
3.3.3 Action for unliquidated damages	15
3.3.4 Commentary	16
4. ADMISSIBILITY	18
4.1 The relationship between annulment and compensation	18
4.2 The Applicant	19
4.3 The Defendant	20
4.4 Limitation period	20

4.5 Other objections as to the admissibility	21
4.6 Commentary	22
5. THE BASIC ELEMENTS OF NON-CONTRACTUAL LIABILITY	23
5.1 Liability of the EC	23
5.2 State liability according to public international law	24
5.3 An attributable act	24
5.3.1 Acts attributed to the Community	24
5.3.2 Acts attributable to the State	25
5.4 Is fault a necessary requirement?	26
5.4.1 Definition of fault	26
5.4.2 Fault under the ESCS Treaty	26
5.4.3 Fault under the laws of the Member States	27
5.4.4 Fault under public international law	28
5.4.5 Case law study	28
5.5 The occurrence of a strict liability	30
5.6 Damage	32
5.6.1 Certain and specific	33
5.6.2 Proven	34
5.6.3 Quantifiable	34
5.6.4 Damage due to an act of a State	36
5.7 A causal link	37
5.7.1 Direct, immediate and exclusive connection	37
5.7.2. Duty to mitigate losses and contributory negligence	38
5.7.3 Causality under public international law	39
6. LIABILITY FOR ACTS OF EC SERVANTS	40
6.1 Internal and direct relationship	40
6.2 The interrelationship between Art 215 and the Protocol on the Privileges and Immunities of the EC	41
6.3 Comparative research	42
7. LIABILITY FOR ADMINISTRATIVE ACTS	44
7.1 Definition of an administrative act	44
7.2 Case law	45
7.3 Commentary	47
8. LIABILITY FOR LEGISLATIVE ACTS	49
8.1 The Schöppenstedt Formula	49
8.1.1 Economic policy	50

8.1.2 Superior rule of law designed to protect individuals	51
8.1.3 Sufficiently serious violation	52

9. CONCLUSIONS	56
-----------------------	-----------

Summary

The formulation of the principle under Art 215(2) that the Community shall make good any harm caused by its servants and institutions, has allowed the ECJ to formulate the conditions for the non-contractual liability at its own wide discretion. The reference in the Article to the "*general principles common to the laws of the member states*" has only constituted a guideline for the ECJ. Instead the Court has tried to build its own system by drawing on principles common to the different legal systems in the EC. The three general conditions which seem to be present in all Member States, namely inflicting conduct, damage and causal link, can also be found in the case law of the ECJ.

The application of Art 215(2) is a matter within the exclusive jurisdiction of the ECJ, while violations of valid Community law by a national authority is a question for the national court. In the latter case there is though a possibility for the national court to ask for a preliminary ruling under Art 177. It is only when damage is contributed by both the Community institution and the Member State authority, i.e. EC secondary legislation is *invalid* and the national authority has acted in reliance of this legislation, that the question of concurrent jurisdiction/liability arises.

In the thesis I have chosen to divide the acts into three different categories namely, individual, administrative and legislative acts. This division is though not always applied by the ECJ and it can be quite difficult to assign a specific act to one of the categories. As regards liability for individual acts, i.e. acts of its servants, the jurisprudence of the ECJ has, just as other legal systems, demanded some kind of connection between the act and the duty of the servant. In the context of Community law the vital issue is here whether there exists an internal and direct relationship. It is important to be able to separate administrative acts from legislative acts since the latter involves a test of a certain formula, "the Schöppenstedt formula", which is quite difficult for the applicant to fulfil. While an administrative act is of an individual and concrete character, a legislative act is of general application. Liability for legislative acts is the most important area since a majority of the applications before the ECJ concerns legislative measures. The ECJ has here looked to the corresponding legislation in the Member States and determined that the individual will have to tolerate some kind of damage and that the Community will not be liable unless the breach by the institution is of a serious nature.

Despite the unwillingness of the ECJ to make clear and profound statements in its judgements, the question whether there exists a criterion of culpability or wrongfulness in order to render the Community liable has to be answered in the affirmative. Especially concerning legislative acts, where the Schöppenstedt formula is applicable, it seems as if some kind of negligence on behalf of the Community institution has to be present.

The ECJ has tried to set up the same conditions for Member State liability for breaches of Community law as those governing the Community liability. This is quite logical since it shouldn't really matter for the liability question whether the inflicting measure is attributable to a Community institution or a national authority. Still the practical result is that an applicant usually has a better case in an action for damages before a national court due to a national act in breach of Community law. As the ECJ has formulated the test for non-contractual liability as requiring a "flagrant and grave disregard of the limits of the authority's/institution's discretion" and since the Commission usually has a wider discretion than a national authority, it is easier for the applicant to show a sufficiently serious breach on behalf of the national authority than on behalf of the Community institution.

Abbreviations

CAP	Common Agricultural Policy
CFI	Court of First Instance
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
Euratom	European Atomic Energy Community
ICJ	International Court of Justice
ILC	International Law Commission
SkL	Skadeståndslagen

1. Introduction

1.1 Subject

The subject of my thesis is the non-contractual liability of the European Community. In all legal systems there are rules governing the situations where governmental non-contractual liability is brought to the fore, i.e. when a public authority exercises its official duties in a way causing damage. Under the EC Treaty the governmental non-contractual liability is to be determined “*in accordance with the general principles common to the laws of the Member States*”. It is self-evident that the catalogue of remedies available for the individual would be incomplete unless an article about non-contractual liability was added to the Treaty. Action for annulment under Art 173 or the possibility for a national court under Art 177 to ask for a preliminary ruling does not give the individual a right to compensation for Community action which harms him. During the integration process the individual alone has little chance to influence the measures adopted and the interests of an undertaking may often be contrary, at least in the short run, to the wider EC policies and objectives. Therefore, the possibility to claim damages under Art 215 is an important instrument to protect those who suffer adverse consequences as a result of an act attributable to the Community.

In the past few years the focus on the recently developed jurisprudence concerning State liability for breach of Community law has given a new dimension to the rules governing the non-contractual liability of the European Community. I think that these two remedies are interrelated and that the knowledge of one will simplify the understanding of the other.

Therefore, it is my ambition in this thesis to determine the legal position of the European Court of Justice and seek to present established principles, as I understand them at January 1999 as regards the non-contractual liability of the European Community.

1.2 Purpose

The main purpose of this thesis is to determine under which conditions the Community can be held liable under Art 215(2). During this journey the reader will notice that the thesis is of a descriptive nature combined with analysing comments where it's appropriate and that the thesis aims to cover

most of the issues concerning the non-contractual liability of the EC. Some of the important problems that will be explored are the issues whether fault is a necessary element of the liability of the EC and to what extent the conditions of liability of Member States in breach of Community law are equal to those governing the liability of the EC institutions. I will also deal with the jurisdiction of the ECJ in these matters and give an account of situations where the problem of concurrent liability arises between a Member State and the EC. Further, I will try to spot the most common objections to the admissibility of the application which the defendant institution tries to raise and also try to find out which one of the criteria of admissibility that is the hardest for the applicant to fulfil. Since I consider that the thesis will be more interesting if there is some kind of comparative study involved, I will in certain chapters give an account of liability according to public international law and compare some of the legal systems of the EC Members.

1.3 Material

Since there doesn't exist any secondary legislation directly implementing Article 215(2) the thesis will above all be based on the case law of the ECJ. Many of the important landmarks of the jurisprudence of the ECJ date back to the 60s and 70s while recent case law mainly has confirmed the older principles. Therefore, the reader will notice that the emphasis of this thesis will be on the early case law. This shouldn't though be interpreted as if claims for damages under Art 215(2) have declined in number and importance during the last ten years. I have also tried to collect information and standpoints from books and legal journals in order to easier comprehend decisions of the European Court of Justice. The importance of a special case is not always self-evident since I have noticed that different authors seldom have the same view as to the interpretation of a judgement.

1.4 Method

The thesis is to a large extent a result of a going through and analysis of the case law under Art 215(2). Here also the Opinions of various Advocate Generals are of great importance since the ECJ is cautious in its reasoning and seldom says more than the case itself requires. Where it is appropriate I will give an account of the facts of the case in question whereas in other cases I will only refer to a short passage in the reasoning of the ECJ.

I often make use of quotations from the reasoning of the ECJ respectively the various Opinions of the Advocate Generals, since I feel that it's better if the reader can take part of the primary source and consequently form his own opinion based on first hand material.

1.5 Disposition

In the first three chapters I will describe some formal requirements governing the Art 215(2) such as admissibility and jurisdiction, and also make a short analysis of the wording of the Article. After this introduction I will deal with the more substantial issues as regards what kind of conditions the ECJ has required in order for an action to be successful. In this respect there will be a description of the fundamental criteria that are necessary for liability to arise and also an attempt to divide the harmful acts of the institutions into different categories.

Also in the other two Communities, the Euratom Treaty and the ECSC Treaty, there exist rules concerning this area which are very much alike those governing the EC Treaty under Art 215(2). However, I will only deal with the Treaty of Euratom and the Treaty of ECSC when this can be enlightening for the case law under the Art 215 of the EC Treaty.

2. An analysis of Art 215(2)

According to Art 215(2) of the EC Treaty:

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.¹

2.1 The scope of Art 215(2)

The drawing up of Article 215(2) gives the ECJ a wide discretion to interpret and work out the criteria for when damages may be claimed. In its case law the ECJ has been a little cautious about letting the Article function as a sink for actions brought by individuals to recover losses caused by governmental action. The ECJ has therefore had to set up rules governing when an application is admissible. (see chapter 4) Still it's proven to be a lot easier to have locus standi under an action for damages than fulfilling all the criteria under an action for annulment. The ECJ will not tolerate that the applicant tries to circumvent the articles providing for an action for annulment. If the application is inadmissible under an action for annulment and the action for damages concerns the same illegality and has the same financial purpose then the ECJ will normally reject an application for damages due to a measure that was not challenged in time by an action for annulment.² However, an annulment or declaration of invalidity is by no means a prerequisite of a successful action under Art 215(2).³

2.2 Non-contractual liability

The Treaty doesn't give any definition of "*non-contractual liability*". The drafters of the Treaty probably wanted to ensure that all categories of acts, except from those involving contractual liability, would be comprised by the paragraph and that it wasn't limited to a narrow formulation.

¹ According to the Amsterdam Treaty this provision will have the same wording but will be found under Art 288.

² Case 59/65 Schrekenberg v Commission [1966] ECR 543 p. 550.

³ Case 175/84, Krohn & Co GmbH & Co KG v Commission [1986] ECR 753.

The term used in Article 215(2) “*non-contractual liability*” aims at the administrative or governmental liability in contrast to civil law liability.⁴ As the Article provides that liability is limited to acts of its servants committed “*in the performance of their duties*”, injury caused outside this sector is a matter of civil law and therefore falls outside the scope of this Article. Instead this kind of liability is to be determined by the national court in accordance with the *lex loci delicti*. As we will see later the dividing line between these two areas is not always easy to establish.

The first paragraph of the Article deals with contractual liability and provides that this kind of liability shall be governed by the law applicable to the contract in question. In contrast to paragraph 2, dealing with the non-contractual liability, it doesn’t require the ECJ to adopt any special system of law. Instead the law applicable to the contract will be determined by the body of law normally known as the conflict of laws or private international law.

2.3 Acts on part of the institutions/servants

According to the text of Art 215(2) the Community can on the one hand be liable for acts of its institutions, on the other for acts of its servants, so called vicarious liability.

When the acts are attributable to the institution as such, damage may be caused through,

- legislative measures; the adoption of unlawful acts having legal effect or the failure to adopt a binding act when under a duty to do so.
- failures of administration and
- other action or statement which inflicts loss.⁵

These acts are not attributable to the activities of any specific person and are therefore anonymous. The administrative organ is consequently defective itself whereas as regards vicarious liability an individual servant causes damage through his acting, e.g. he acts outside his competence. This latter liability arises as a consequence of a servant’s act or omission as opposed to maladministration. Regardless of whether the act is attributable to the organ or a specific person the institution involved will be the defendant so that the Community is represented by the alleged institution.

⁴ Toth p.382.

⁵ Steiner p.462.

However, the dividing line between these two different categories is not so easy to establish since the institutions act through their servants. Therefore, a considerable overlap exists.⁶ Still it is very important to separate these categories since the applicant as regards liability on the part of the institution, does not have to point out the servant responsible and even more important, it doesn't matter whether any particular servant was responsible. If this category did not exist then it would virtually be impossible for an applicant to claim damages for omissions, i.e. a failure to act.⁷

Employees working at the different institutions aren't all so-called civil servants of the institutions but also auxiliary and local staff. These employees aren't subject to the EC Staff Regulations. National laws govern their contractual rights and obligations. Therefore the liability of these employees will not be subject to Art 215(2).⁸

There may also be a third group of acts for which the Community can be held liable. If the Community has delegated governmental powers to an agency or body, liability will depend on whether the agency/body is autonomous vis-à-vis the Community. If its status is not of that kind and provided that the acts of that body are of governmental nature the Community may consequently be vicariously liable.⁹

2.4 General principles common to the laws of the Member States

The Article requires the ECJ to apply *general principles common to the laws of the member states*. This direction is much similar to art 38(1)(c) of the Statute of the International Court of Justice, which allows the ICJ to consider "the general principles of law recognised by civilised nations" as a source of international law. As we will see later the general principles governing the non-contractual liability differ between the various Member States and therefore this expression is ambiguous as it suggests that the Member States have the same solutions for this area. According to M. Lagrange, a former Advocate General of the ECJ, this expression,

"cannot be understood as applying to their legal principles, which they in no way hold in common: this is merely a diplomatic formula, such as is

⁶ Hartley p.472.

⁷ Ibid. 472.

⁸ Lasok p.40.

⁹ Craig p.514.

often to be found in international treaties, and which only makes sense insofar as it refers to certain equitable principles, which are indeed widespread and are normally to be met with in any Rechtsstaat.”¹⁰

The question then arises whether these principles have to be common to all the Member States or if it is enough that a majority of the Member States is familiar with them. The ICJ has interpreted Art 381c in its statute as allowing it to focus on the law of States who represent the mainstream of jurisprudence in the area involved.¹¹ The ECJ has basically chosen the same approach even if the ECJ seldom makes an explicit reference to any of the legal system of the Member States. As the laws of the Member States differ considerably on State liability, the ECJ has tried to build its own system by drawing on principles common to the different legal systems in the EC.¹² The ECJ hasn't therefore felt obliged to look for the lowest common denominator so that only where the rules of each and every Member State involve liability, the Community would consequently be liable. In spite of the relatively lack of signs on any real comparative research by the ECJ, the Advocate General sometimes makes an ambitious investigation in order to find this lowest common denominator of the Member states.¹³

The vague formulation of Art 215(2) has thus allowed the ECJ to work out the general conditions for non-contractual liability. In doing so the ECJ has mainly looked back on its earlier case law surrounding Art 40 of the ESCS Treaty. In formulating these rules, following conditions have appeared in the case law of the ECJ in order for an application to be successful. There has to be present,

- an unlawful act
- damage to the plaintiff
- a causal link between the two

These conditions will be examined in chapter 5.

¹⁰ Lagrange p.32.

¹¹ Lasok p.41.

¹² Steiner p.461.

¹³ Case 5/71 Aktien-Zuckerfabrik Schöppenstedt v Council [1971] ECR 975 at p.989.

3. Concurrent liability: The Community vis-à-vis Member States

3.1 The jurisdiction of the ECJ

The Community must consequently make good damage caused by its institutions or by its servants and non-contractual liability may be enforced by means of an action for damages brought before the ECJ. The jurisdiction for the ECJ in these matters is provided by Art 178 which sets out,

The Court of Justice shall have jurisdiction in disputes relating to the compensation for damage provided for in the second paragraph of Article 215.

According to decision 93/350 the Court of First Instance has jurisdiction over all non-contractual liability cases from August 1993 except for those brought by a Member State or a Community institution.¹⁴ Over 50% of the cases brought before the CFI under 1997 dealt with the non-contractual liability of the EC.¹⁵ This high percentage implies that actions for damages under Art 215 play an important role for the protection of the individual. For simplicity reasons I will, despite decision 93/350, refer to the ECJ as the proper remedy since most cases that will be dealt with in my thesis were decided before 1993.

The application of Art 215 is a matter within the exclusive jurisdiction of the ECJ and leaves no room for any jurisdiction of the national courts. The reasons for this are quite clear. On the one hand this exclusive jurisdiction is essential for a uniform liability of the Community covering all the Member States, on the other when determining the liability of the Community this often involves questions of Community policy which the ECJ is more competent to handle than the national court.¹⁶

¹⁴ Weatherhill p.190.

¹⁵ <http://curia.eu.int/sv/stat/index.htm>

¹⁶ Wils pp.191ff.

However, as the application of Community legislation is often left to the Member States, there can arise situations where for example an individual feels that he has been mistreated by a national body applying a Community regulation, and it is unclear whether the applicant can bring an action against the Member State in its national court or against the Community before the ECJ. Sometimes there is even a possibility that both remedies are available. I will now try to give an account for these different situations.

3.2 The jurisdiction of the national court

The ECJ has held that national courts retain jurisdiction to hear claims for compensation for damage caused to individuals by national authorities in implementing *valid* Community law. This is a consequence of the Treaty not giving an individual any right to bring an action against a Member State before the ECJ and the lack of power of the ECJ to interpret or apply national laws or the power to declare national laws illegal.

Thus if a national institution applies a Community measure wrongly the competent remedy is the national court. During this kind of national action all procedural conditions are to be governed by national law. As regards the substantive law the national law will also here be applicable but when the law of the Member State is lacking a possibility for the individual to claim damages for injury caused by Member State's violation of Community law then the principles of the Treaty are important. The Frankovich case¹⁷ added a new dimension to the jurisprudence of the ECJ concerning remedies for breach of EC law, i.e. a claim in damages for breach of Community law. The ECJ held that it follows directly from Community law that Member States may be liable toward private parties for breach of valid Community law. Thus the fact that a similar provision is lacking in the national laws is not decisive for the right to compensation. This very important landmark in the jurisprudence of the ECJ was followed by a number of cases that elaborated the criteria further for when the State has to make good damage.¹⁸

Consequently the Community is not liable if a national authority acts in violation of *valid* Community legislation. Instead it is the national court which has to determine whether the Member State can be liable in accordance with the relevant national law and maybe ask for a preliminary

¹⁷ Joined Cases C-6 and C-9/90, Frankovich and Bonofaci v Italy [1991] ECR I-5357.

¹⁸ See Joined cases C-46/93 Brasserie du Pêcheur and C-48/93 Factortame III [1996] ECR I-1029

ruling under Art 177.¹⁹ It is thus very unlikely that concurrent liability may arise in this kind of cases.

3.3 Concurrent liability

However, the Community is liable if its secondary legislation is *invalid* and the national authority has acted in reliance of this legislation. Here concurrent liability is brought to the fore.

There are three different categories which can be distinguished,

- actions for restitution of an amount unduly paid to the national authority,
- actions for a certain advantage unlawfully not received from the national authority and
- actions for unliquidated damages.²⁰

3.3.1 Action for restitution

In this first category the unlawfulness of the duty usually is due to a Community measure of an unlawful nature, which has been applied by the authorities of the Member State. There is also a possibility that there has been a joint decision taken by a Member State and a Community institution, usually the Commission, which is unlawful. Joint decisions are usually used when a Member State takes safeguards measures with the explicit approval of the Commission.²¹ There is today no possibility for an applicant to institute proceedings against the Community and the Member State jointly when damage is contributed by both the Community and the Member State. Instead the applicant has to bring actions separately respectively before the ECJ and the national court.

There have been a lot of opportunities for the ECJ to work out principles for when an action for restitution of an amount unduly paid to a national authority is admissible before the ECJ. In Case *Kampffmeyer*²² the ECJ for the first time ruled that the applicant first has to bring action against the Member State before the national court, before he can bring an action before the ECJ against the Community. In this case the applicant had already brought an action before the national court in Germany but those proceedings had been stayed, when he tried to start proceedings before the ECJ calling for the restitution of levies paid to the German authorities and also compensation for contracts cancelled. The decision of the ECJ in this

¹⁹ Case 101/78 *Granaria/Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623.

²⁰ *Shaw* p.221.

²¹ *Wils* p.199.

²² Cases 5, 7 & 13-24/66 *Firma E. Kampffmeyer v Commission* [1967] ECR 245.

case is quite logical since it's the competence of the national court to order restitution. In Case Haegmann²³ the levies unlike Kampffmeyer had been paid into the Community funds but the ECJ nevertheless held that undertakings should begin their action against the unlawful conduct on the part of the Community by challenging the national implementing measures. In this case the applicant was seeking the annulment of a Commission Decision refusing to return levies paid to the German authorities by the applicant as a result of an allegedly invalid regulation.

This doctrine "exhaustion of remedies" was later followed in a number of cases.²⁴ The doctrine is clearly an example of the wish of ECJ to reduce its workload and make use of the national courts whenever this is possible and consistent with EC law. Thus in order for a claim concerning the return of duties unlawfully paid to national authorities to be admissible before the ECJ, the applicant has first to bring an action before the national court, even if the sums have been paid into Community funds.

3.3.2 Action for a certain advantage

As regards the second category, concerning e.g. refusal of the national authority to make a payment to the applicant who was entitled to it, the ECJ has been a little bit ambiguous in its case law. On the one hand the ECJ has had a stringent attitude towards the admissibility. Claims before the ECJ were held inadmissible in a couple of cases on the grounds that the applicants should have brought their actions before their national court.²⁵ However, there is a number of other cases which suggests that an action for sums unlawfully withheld by a national authority may be brought either before national courts or the ECJ.²⁶ Due to this uncertainty the applicant had better start raising a claim before the national ECJ unless he seeks additional damages to the specified sum unlawfully withheld. This automatically leads us to the last category.

3.3.3 Action for unliquidated damages

In Krohn²⁷ the undertaking brought an action before both the national court and the ECJ. In the proceedings before the national court, Krohn & Co

²³ Case 96/71 Haegmann v Commission [1972] ECR 1005.

²⁴ See e.g. Case 26/74 Roquette v Commission [1976] ECR 677.

²⁵ See Cases 46/75 IBC v Commission [1976] ECR 65 and Cases 67-85/75 Lesieur Cotelte et Associés SA v Commission [1976] ECR 391.

²⁶ Cases 9&11/71 Compagnie d'Approvisionnement de Transport SA v Commission [1972] ECR 391, Case 43/72 Merkur Aussenhandel GmbH v Commission [1973] ECR 1055, Case 74/74 CNTA v Commission [1975] ECR 533..

²⁷ Case Krohn supra note 3.

called for an annulment of the refusal to grant the disputed licence and an injunction so that it could get hold of the necessary licences, whereas it before the ECJ claimed compensation for financial losses due to the German authority's refusal to issue import licences. The ECJ held that even if the refusal to issue licenses came from the national authority, the unlawful conduct was still attributed to the Community. Further the ECJ held that the admissibility was dependent on the possibility for the undertaking to bring a successful claim before the national court. This would only be possible if national rights of action provide an effective means of protection so that these rights are capable of resulting in compensation for the damage involved. In this case where the unlawful act was attributable to the Commission, there was no real chance that the applicant's claim would be successful before a national court and therefore the application was admissible. Thus if the exhaustion of national remedies could not possibly lead to compensation for the damage alleged, then the applicant is entitled to bring an action before the ECJ.

3.3.4 Commentary

A distinction must consequently be made between the cases where the Member State only functions as an agent for the Community and where an unlawful decision has been taken jointly by the Member State and the Community. If the facts are similar to the circumstances of the Krohn case, then an action in tort as regards unliquidated damages against the Community before the ECJ is always admissible. This is self-evident as the applicant has no real case in front of a national court.²⁸ As a consequence the applicant has to bring two separate actions if he claims both restitution and damages. A claim, for e.g. the return of sums unlawfully paid to a national authority, has to be brought against that collecting authority before a national court, whereas the claim for unliquidated damages for losses suffered as a result of illegal Community action has to be brought before the ECJ since it is attributable to the Community. The latter claim is not a right which can be "exhausted" before a national court.²⁹

If the unlawful decision is taken jointly by the Community and the Member State, then the Kampffmeyer judgement is applicable. In line with the reasoning in that case the action against the Community is admissible as both the Member State and the Community might be liable in tort. However, there is no single forum that can be addressed by the applicant when both the Community and the Member State have contributed to the damage by

²⁸ Wils p.203.

²⁹ Case Roquette supra note 24.

means of a joint act. Instead the ECJ will stay its proceedings and wait for the national court to give its ruling on the question of national damages. The ECJ has preferred this model as the compensation for the applicant otherwise could be excessive or too little.³⁰ It is arguable if this kind of secondary liability theory has any support from the Treaty itself. Why should not the Community and the Member State share the burden? This would be natural since according to most legal systems of the Member States, joint liability exists which means that one party can recover those sums which are excessive in relation to its liability from the other party.³¹

As shown by the case law it is not an easy task for the applicant to turn to the right remedy and know whether the harmful conduct is attributable to the Member State or the Community. This task isn't facilitated by the fact that EC legislation is often dependent on the co-operation and action of the Member States in order to reinforce and supervise the different rules.

³⁰ Wils p.203.

³¹ Lysén II p.105

4. Admissibility

Quite often the defendant institution claims that the application is inadmissible and therefore should be dismissed. The ECJ has normally to consider all sorts of objections as to the admissibility, which the defendant tries to put forward. These objections are seldom successful even if there are certain criteria the applicant has to fulfil.

4.1 The relationship between annulment and compensation

The individual's right to bring an action for annulment under Art 173 is limited since it is very difficult for e.g. an undertaking to comply with the conditions under the article. First of all the measure must constitute an act that can be challenged, secondly the person challenging must have locus standi to do so, and thirdly the challenge must be brought within the two months of time limit. Therefore, the big question rises whether an action for annulment under Art 173(4) is a pre-requisite for a successful action for damages under Art 215(2).

According to Art 176(2) the obligations which the institution, whose act has been declared void, has to fulfil in order to comply with the ruling of the ECJ, "*...shall not affect any obligation which may result from the application of the second paragraph of Article 215*". It is easy to interpret this paragraph as meaning that the remedy under Art 215 is totally independent from an action for annulment under Art 173 in conjunction with Articles 174 and 176. However, in its early case law the ECJ had a different view. In the Plauman case³² the ECJ held that the action for damages was not an independent remedy and that any claim for damages would only be admissible after a previously successful action of annulment. This ruling had harmful consequences for the individual's locus standi. For example the limitation period of five years provided by Art 215 would be of no value for the applicant.³³ Instead he would have to comply with the two-month rule under Art 173 in order to have locus standi.³⁴

Seven years later the ECJ decided to change its ruling. In Case Lütticke³⁵ the ECJ held,

³² Case 25/62 Plauman v Commission [1963] ECR 95.

³³ Art 43 of the Protocol on the Statute of the ECJ of Justice.

³⁴ Schermers et al, Mead p.111.

³⁵ Case 4/69 Lütticke v Commission [1971] ECR 325.

"...Article 178 and the second paragraph of Article 215 was established by the Treaty as an independent form of action...//...It would be contrary to the independent nature of this action as well as to the efficiency of the general system of forms of action created by the Treaty to regard as a ground for inadmissibility the fact that, in certain circumstances, an action for damages might lead to a result similar to that of an action for failure to act under Article 175."

This about-turn was later followed in a number of cases³⁶ and today liability under Article 215(2) functions as an independent, autonomous remedy from those provided by Art 173 and 175 concerning the area of judicial review. In order to be successful nowadays, the applicant needs neither first to bring an action for annulment or failure to act, nor to show that he would have had locus standi for such an action.³⁷ Still the ECJ will not tolerate that the applicant tries to circumvent the provision concerning annulment by using the remedy for damages when an action for annulment would be the normal and proper remedy. When an action for damages has the same purpose as an action for judicial review, i.e. it concerns the same illegality and has the same financial end in view, the ECJ has proven reluctant to deal with the matter.³⁸ It is e.g. not possible for an applicant to start a procedure under Art 215(2) just because he has missed the time-bar under the remedy of annulment.

4.2 The Applicant

Under Art 215(2) any person, natural or legal, may bring an action against the EC. The restrictive rules of judicial review under Art 173 are not applicable here and there is no limitation whatsoever concerning nationality, residence or place of establishment etc. Also an undertaking that has its registered office in a non-member State can start an action under Art 215(2). The same applies concerning the ECSC Treaty and the Euratom Treaty. Has a Member State the same right to institute an action? A dispute between a non-member State and the EC concerning the Community's non contractual liability would certainly not take place before the ECJ as this matter would be governed by the rules of public international law and not in accordance with the principles common to the laws of the Member States. Bearing in mind that according to decision 93/350 the CFI has jurisdiction over all liability cases from August 1993 except for those *brought by a*

³⁶ Case Schöppenstedt supra note 13 and Jones.

³⁷ For an other view on this matter see Schermers et al, Mead's reasoning at page 110, who interpret the Courts statement as a sign for that the Plaumann doctrine is still considered to apply in certain circumstances.

³⁸ Case Schreckenbergs supra note 2 at p 550.

Member State or a Community institution, it seems as if the Member State has that kind of right.

4.3 The Defendant

According to Article 215 the Community is the one to be held responsible in a case of non-contractual liability. However, even if the Community constitutes a legal person, it acts through its institutions and therefore it is one of these that will be the defendant in the proceedings under Article 215. In the Werhahn case³⁹ the ECJ held

“...it is in the interests of a good administration of justice that where Community liability is involved by reason of the act of one of its institutions, it should be represented before the ECJ by the institution or institutions against which the matter giving rise to liability is alleged.”

Where e.g. both the Commission and the Council are involved, the first for having made the proposal and the other for having adopted the proposal, it is possible for the applicant to initiate proceedings against just one of them or both institutions.

4.4 Limitation period

According to Article 43 of the Statute of the European Court of Justice an action for damages under Art 215 is not possible after a period of five years from the date on which the event giving rise to liability has occurred.⁴⁰ There are a number of issues that can be of relevance here. Does it matter that the injured person did not know of the event giving rise hereto until the time-period had expired and when does the time period stop to run? The ECJ has held that the time period does not start to elapse until all the requirements governing an obligation to provide compensation for damage are satisfied. The decisive criterion is here whether the damage has materialised and not the date of publication or the entry into force of the legislation that is in question.⁴¹ Further, the time limitation does not start until the applicant could have become aware of the harmful event. In the famous Adams case⁴² the applicant did not start a procedure before the ECJ

³⁹ Case 63-9/72 Werhahn v Council and Commission[1973] ECR 1229 at para 7.

⁴⁰ Art. 44 of the Protocol on the Statute of the Court of Justice of Euratom and Art. 40 of the Protocol on the Statute of the Court of Justice of the ECSC.

⁴¹ Cases 256,257,265&267/80 &5/81 Birra Wührer SpA v Council and Commission [1982] ECR 85 at para 10.

⁴² Case 145/83 Adams v Commission [1985] ECR 3539 at p.3591. For a further account see 7.2.

until 9 years after the event causing the damage. Still the ECJ regarded the application as admissible, so it seems that the ECJ has accepted a kind of subjective criterion which is able to postpone the start of the time period. This reasoning is in line with the position of the ECJ regarding actions for annulment. The ECJ has here consistently held that the limitation period of two months does not start to run until the applicant has been able fully to ascertain his legal position.⁴³

As regards the interruption of the time period, the Article 43 of the ECJ Statute says that *"...The period of limitation shall be interrupted if proceedings are instituted before the Court or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Community..."* Regarding the latter, it is likely that the time period won't be interrupted if the applicant lodges a complaint erroneously addressed to the wrong institution.⁴⁴ If the application has the right addressee and the parties can't reach an agreement, the limitation period may only be interrupted if an action is brought under Art 215(2) within the period of two months provided for in Art 173 and Art 175. If this kind of subsequent action is not instituted within this time limit, then there will be no interruption and the limitation period of five years will proceed.

4.5 Other objections as to the admissibility

The defendant sometimes objects that the application is inadmissible since it is incomplete. The ECJ has proven to be quite generous as regards the possibility for the applicant to provide additional information during the proceedings if the institution defence isn't hampered by that defect of the application.⁴⁵

Another objection as to the admissibility concerns whether the damage already should be possible to precisely assess. In Case *Zuckerfabrik*⁴⁶ the ECJ held

"The Court has consistently held that Article 215 of the Treaty does not prevent the Court from being asked to declare the Community liable for imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed."

This statement clearly shows that the institution will not have any success raising this kind of objection.

⁴³ Schermers et al, Heukels p.90.

⁴⁴ Case *Werhahn* supra note 39.

⁴⁵ E.g. Case *CNTA* supra note 26 at para 4.

⁴⁶ Case 281/84 *Zuckerfabrik Bedburg v Council* [1987] ECR 49 at 89.

4.6 Commentary

In the light of the above account of the relatively generous approach concerning the admissibility of a claim for damages, it is easy to understand why an injured person will prefer an action under Art 215(2) instead of turning to a national court. Considering that the procedure before a national court with the possibility to appeal twice, probably will take longer than the procedure before the ECJ and considering that it is only the national court of last resort that has an obligation to make a reference to the ECJ under Art 177, the choice is quite easy. And if the case before the national court finally turns out to be unsuccessful the applicant must take into consideration the limitation period of five years. Additionally a comparison between the Art 177 procedure and the Art 215 procedure, reveals that the applicant has much more control of the Art 215 procedure since he isn't dependant on the formulation of the questions by the national court and will be given a full hearing.

These considerations are probably some of the reasons for the reluctance of the ECJ to award damages. By narrowing the conditions for successful claims the ECJ has tried to prevent a floodgate problem.

5. The basic elements of non-contractual liability

In the following chapter I will deal with both liability of the Community and liability according to public international law. Where appropriate I will also make an account of the legal rules of various Member States.

In most legal system there are three basic requirements which have to be present in order to raise the question of non-contractual liability,

- an unlawful act
- damage and
- a causal link between damage and conduct.

5.1 Liability of the EC

As the provision concerning the non-contractual liability of the EC has more or less left it to the ECJ to determine how these requirements should be formulated, the ECJ has looked back to both its previous case-law under Art 40 of the ECSC Treaty and the rules governing the liability of the Member States. In a long line of judgements the ECJ has thus held

*“By virtue of the second paragraph of Article 215 and the general principles to which this provision refers, the liability of the Community presupposes the existence of a set of circumstances comprising actual damage, a causal link between the damage claimed and the conduct alleged against the institution, and the illegality of such conduct.”*⁴⁷

In more recent cases the ECJ has held

“...according to settled case-law, the Community’s non-contractual liability under the second paragraph of Article 215 of the Treaty is dependant on the coincidence of a series of conditions as regards the unlawfulness of the acts alleged against the Community institutions, the fact of damage and the

⁴⁷ Case Lütticke supra note 35 at p.337.

*existence of a causal link between the conduct of the institution concerned and the damage complained of.”*⁴⁸

Therefore it seems as if all three elements must be proved for liability to rise.

5.2 State liability according to public international law⁴⁹

States can also be held liable for acts harming another State or an international body/organisation provided that there exists a legal duty to repair the harm. Through the years international law has developed through treaties, customary law and general principles of civilised nations under which the States are legal subjects. The international responsibility of States is founded on the principle of legal equality i.e. no State is superior to another and they are all independent and therefore have to compensate one another if harm is caused by the breach. The rules of public international law are very important since there will be no international responsibility if not a breach of public international law has taken place. It is quite insignificant whether the harmful act constitutes a positive act or an omission. In order to find out whether a violation of an international rule has taken place one has to look into the concrete situation and try to spot the rules embracing the individual case. Not every breach may incur liability. It is not sufficient that the injured State has a mere interest, instead the breach of duty must relate to a legal right attributable to the injured State. The State can be responsible for all sorts of activities ranging from legislative and constitutional acts to administrative and physical acts.

5.3 An attributable act

5.3.1 Acts attributed to the Community

First of all there has to be an act on behalf of the Community which has inflicted the damage. The meaning of act is widely interpreted. It ranges from a physical act (e.g. driving a car) an act intended to have legal effect (e.g. refusal to grant an import licence), to oral messages and other acts

⁴⁸ Case T-168/94 Blackspur DIY Ltd v. Council and Commission [1995] ECR II-2627, Case C-308/87 Grifoni v EAEC [1990] ECR I-1203 para 6, Case C-146/91 KYDEP v Council and Commission [1994] ECR I-4199, para19 and Cases 197 to 200/80 etc. Ludwigshafener Walzmühle v. Council and Commission [1981] ECR 3211 at p.3246.

⁴⁹ Lysén pp.53ff.

which are able to cause damage. Even omissions (a failure to act) can raise the question of liability of the Community, provided that there was a duty to act.⁵⁰

Even if the ECJ doesn't explicitly distinguish between the different acts, the border line is important to draw since, as we will see later, it is much more difficult theoretically for an applicant to fulfil the substantive criteria as regards normative acts compared to administrative and individual acts. The harmful acts can be divided into three different categories,

- acts of EC servants, i.e. individual acts,
- administrative acts and
- legislative acts

I will discuss these three categories in detail under chapter 6-8.

5.3.2 Acts attributable to the State⁵¹

In order for a claim to be successful under public international law the act must naturally be attributable to the State alleged to have caused the damage. The State itself can't perform any activities but is represented by natural or legal persons. So the main issue is whether an act of an organ or an individual can be attributable to the State. This is the case if the natural person legally represents the State. In addition, the State may also be responsible for acts of other legal persons of public international law which represent the State. The rules to govern this kind of determination are the rules of public international law. Consequently, it is unimportant what position the organ acting on behalf of its State has in the hierarchy of the State and whether the organ is representing the legislative, judicial or executive power of government. Still a State can't escape responsibility by referring to domestic rules or principles because the State must bear the responsibility for the misconduct of its servants.

There are some legitimate defences for illegal acts. These defences should be narrowly interpreted since they are exceptions to the main rule. The defence may result in a reduction of damages or even a total exclusion of responsibility. The best way to apply these exceptions is probably to let them function as a justification for the illegal behaviour but still regard the act attributable to the State as a breach of duty. The ILC has instead taken the view that the illegal behaviour is precluded by reason of the defence.⁵² In

⁵⁰ Hartley p.471.

⁵¹ Lysén pp.81ff.

⁵² See chapter V Circumstances precluding Wrongfulness.

Articles 29-34 of the Draft Articles the ILC has made a non-exhausting list of those defences that can be successfully invoked namely consent, countermeasures, force majeure, distress, state of necessity and self-defence. Corresponding defences are not represented in the case law of the ECJ under Art 215(2). It seems as if there doesn't exist any similar possibility for the Community institutions to defend themselves by claiming these kinds of exceptions.

5.4 Is fault a necessary requirement?

Another issue under this section is whether there is some kind of requirement of fault or if plain illegality will suffice.

5.4.1 Definition of fault

Fault means that the "official holder" has violated his official duty in a blameworthy matter (intentionally or negligently) or expressed in other words, fault involves a conduct which falls short of that of a normal prudent person.⁵³ Consequently, there doesn't have to be any involvement of bad faith or malice to establish fault. Examples of fault are failure to adopt the necessary procedures for the proper and efficient functioning of the service or the giving of false information to the public. Also a legislative measure that infringes a legal principle, e.g. the non-discrimination rule, may constitute fault.

5.4.2 Fault under the ESCS Treaty

Under the ECSC Treaty the basis for the Community's non-contractual liability is a "wrongful act or omission on the part of the Community" or a "personal wrong" by a Community servant. Therefore fault is explicitly a condition for the Community liability to arise in matters falling under the ECSC Treaty. In actions brought under art 40 of the ECSC, expressions like "normal diligence" and "lack of prudence" are usually used in order to establish fault.⁵⁴

There are different opinions concerning the influence of the ECSC Treaty on the working out and interpretation of Art 215(2) of the EC Treaty. However, it is quite clear that the drafters of the Treaty of Rome deliberately chose to

⁵³ Stuart p.500.

⁵⁴ Ibid para p. 500.

not use the wording from the ESCS Treaty as they did not follow the original proposal of the drafting Committee: “*The Community shall make good damage caused by a non-contractual fault of its institutions*”.⁵⁵

5.4.3 Fault under the laws of the Member States

Even if Art 215(2) of the EC Treaty therefore doesn't mention any requirement of fault, there is a direct reference to the “*general principles common to the laws of the Member States*”. Since these laws usually set up some condition of fault in order to hold the relevant public authority responsible, the result should be the same as an application of the Art. 40 of the ECSC Treaty.⁵⁶

The concept of wrongful act or omission that can be found in Art 40 under the ECSC Treaty represents the notion of *faute de service* and *faute personnelle* that can be found in the French legal system and which was borrowed directly from French administrative law. Even if the same expression can't be found in Art 215 under the EC Treaty, at least it indicates that the French legal system has played an important role in Community law.

Consequently, according to the French legal system, fault is a necessary requirement for non-contractual liability. There is though one exception. The administrative Courts have in some cases recognised risk as a ground for liability instead of a wrongful act. If the risk inherent in an activity of the State is above normal, the individual should not have to bear the consequences. Instead the State will be liable.⁵⁷

Through a reform in 1972 liability for the administrative organs in Sweden was introduced.⁵⁸ Earlier, a person injured by the public authority by reason of some wrongdoing of its servant, had to bring an action against the servant himself. The new rules meant that the public employer was liable for acts of its servants and at the same time the obligation for the servant to repair the harm was mitigated.⁵⁹ According to the wording of 3kap2§ SkL fault or negligence is necessary for liability to rise. As regards the possibility to raise a claim for damages against the highest State authorities or ECJ of appeals, the chances for a successful claim is small since annulment or change of the harmful decision is a prerequisite for such an action.(3kap7§ SkL)

⁵⁵ Ibid para p.500.

⁵⁶ Hartley p.469.

⁵⁷ Lagrange p.16.

⁵⁸ Skadeståndslagen 3kap 2§.

⁵⁹ Bengtsson p.11.

5.4.4 Fault under public international law⁶⁰

Also in the area of public international law the question arises whether fault is a necessary requirement for the responsibility of the State. There are a number of reasons for claiming that fault does not have to be shown in order for a claim to be successful. First of all to maintain that some kind of negligence or intent have to be present would for sure undermine the scope of international responsibility both from a procedural and material aspect as proving fault is not an easy task for the injured State. Secondly, in the light of the extensive scope of State activities in modern time and the fundamental differences between States as to the hierarchy and structure of its public life, it is not appropriate to make use of the concept of subjective responsibility. Thirdly both the case law and the opinions of modern legal writers suggest that fault is not a necessary requirement for international responsibility. The legal status is however rather uncertain.

5.4.5 Case law study

Although the ECJ rarely has dealt with the issue of whether fault is a necessary element of the EC liability, it has throughout its case law used different phrases in its reasoning concerning the conduct of the institution involved. In a few cases the ECJ has used the expression "*wrongful act or omission*", which rightly should be understood as involving at least some kind of fault, e.g. negligence.⁶¹ Still the ECJ doesn't elaborate further under which circumstances the requirement of fault will appear. In other cases the ECJ has claimed that "*the non-contractual liability of the Community presupposes at the very least the unlawful nature of the act alleged to be the cause of the damage*".⁶² This suggests that there are cases in which there also have to exist some kind of blameworthiness attributable to the Community in order for the ECJ to hold the Community liable. In most cases though the ECJ as mentioned earlier usually begins its reasoning by stating that

"...in order for the Community to incur non-contractual liability for an unlawful act a number of conditions must be met as regards the

⁶⁰ Lysén pp.90ff.

⁶¹ Case 238/78 Ireks Arkady v Council & Commission (Quellmehl & Gritz)[1979] ECR 2955.at p.262.

⁶² Stuart p.500.

unlawfulness of the conduct alleged against the institutions, the existence of damage...”⁶³

or by stating that

*“As the Court has consistently held it follows from the second paragraph of Art 215 that the Commission may incur non-contractual liability and the right to compensation for damage suffered may arise only if a series of conditions regarding the illegality of the alleged conduct of the institutions, the reality of the damage...”*⁶⁴

Normally the ECJ begins its reasoning by dealing with the question of illegality. If the measure in question isn't unlawful then the ECJ is content with dismissing the action without examining the other two requirements, namely damage and causality.⁶⁵ If the action concerns a legislative act the ECJ will apply a certain formula. According to the formula, which will be dealt with under chapter 8, the Community is liable for legislative acts, involving choices of economic policy, only if a sufficient flagrant violation of a superior rule of law for the protection of the individual has occurred. As soon as this Schöppenstedt formula is fulfilled, it implies that there is some kind of illegality involved as the act is contrary to law, i.e. the violation of a superior rule of law.⁶⁶ And when the ECJ finds the measure to be a sufficiently serious breach of a superior rule of law for the protection of the individuals, fault is normally implied and the ECJ doesn't investigate the matter any further.⁶⁷

Shaw states that *“It is implicit in the Court's case law that fault is a necessary element of liability”* without going any deeper in the subject.⁶⁸ Maybe one can find support for this view in a number of staff cases where the ECJ has applied a test of wrongfulness after establishing that any illegality couldn't be detected. In these cases the ECJ investigated whether the act in question contained superfluous criticisms of the person referred to in it. The actions failed as this kind of criticism couldn't be detected but still

⁶³ Joined cases 197-200, 243, 245 and 247/80 Ludwigshafener Walzmühle v Council and Commission [1981] ECR 3211 at p 3246 and Case 59/83 Biovilac v EEC [1984] ECR 4057 at p. 4075.

⁶⁴ Case C-55/90 Cato v Commission [1992] ECR I-2533 and Case C-200/89 FUNOC v Commission [1990] ECR I-3669.

⁶⁵ Case Merkur supra note 26 at p.1074.

⁶⁶ Stuart p.506.

⁶⁷ Report p.208. See 8.1.3 "Sufficiently serious violation".

⁶⁸ Shaw p.212.

it indicates that wrongfulness will suffice in order for holding the Community liable where illegality can't be found.⁶⁹

In another staff case the ECJ didn't even try the illegality of the conduct of the institution but investigated whether any fault was involved.

*“It must therefore be held that when the Commission undertakes to organise holiday camps for the children of its officials and other employees and to arrange insurance for the children to cover the injury resulting from any accident which they may sustain in such camps, it has a duty to ensure that holidays in those camps take place under the appropriate conditions and that if an accident occurs compensation will be provided in full. If the institution fails to do so, as in this instance, its conduct must be regarded as a wrongful act or omission for which it is liable.”*⁷⁰

It is questionable whether it is possible to draw any conclusions from the considerations in these staff cases concerning the general non-contractual liability of the EC. Maybe the rulings are examples of isolated occurrences owing to the special nature of the cases.

Due to the lack of any requirement of fault as regards the ECJ's standard definition of liability in its case law and due to the lack of a corresponding rule in the Art 215(2) as in the Art 40 of the ECSC Treaty, it is difficult to determine whether there today exist any requirement of fault for the liability of the EC to arise. I will examine this issue further in chapter 7 and 8.

5.5 The occurrence of a strict liability

Another aspect of legislative measures is whether *lawful* such, i.e. where there is neither unlawfulness nor fault, can give rise to the non-contractual liability of the EC, the so called principle of objective or strict liability.⁷¹

In Case Biovilac⁷² the ECJ got the opportunity to rule on this issue. After having failed to fulfil the Schöppenstedt formula, the applicant contended in its alternative claim that even in the absence of any illegality, the Community is liable if, as a consequence of general measures which are lawful in themselves, these have particularly affected and harmed him. The applicant relied on the German law concept of “Sonderopfer” (special sacrifice) and the French law concept of “rupture de l'égalité devant les charges publiques” (unequal discharge of public burdens). The ECJ held that

⁶⁹ Cases 35/62 and 16/63 Leroy v. HA [1963] ECR 197 at p 207, Case 84/63 De vos van Steenwijk v. Commission [1964] ECR 321 at 334.

⁷⁰ Case 131/81 Berti v. Commission [1982] ECR 3493 at p. 3504.

⁷¹ Toth p.388.

⁷² Case Biovilac supra note 63.

“...an action for damages brought under Art 215 of the Treaty for unlawful legislative action cannot succeed unless the damage alleged by the applicant exceeds the limits of the economic risks inherent in operating in the sector concerned. That principle would have to be applied a fortiori if the concept of liability without fault were accepted in Community law. In this case those limits were not exceeded...”⁷³

Based on this formulation it’s hard to say what the position of the ECJ is on this matter. The ECJ was able to avoid the important problem as it stated that the injury didn’t exceed the limits of the risk inherent in the activity and therefore did not have to deal with this issue. But by using the words “*if the concept of liability without fault were accepted*” it seems as if the ECJ will not accept so called strict liability, unless there are some really good reasons for this. This would be consistent with the otherwise so stringent case law regarding the liability of the EC. Furthermore the reasoning indicates that there in fact exists a condition of fault in the case law of the ECJ.

In Cases 9, 11/71⁷⁴ the Advocate-General, while not excluding the possibility of the existence of strict liability in Community law, stated,

“Nothing in the present state of the Court’s case law would allow one to affirm that the Community could incur liability independently of all illegality and all fault.”

In contrast to this statement Advocate General Lenz was of the opinion in the Christmas butter cases⁷⁵ that liability for lawful acts do exist. As an answer to the alternative claim of the applicants that on the basis of the principle of legitimate expectation they were entitled to compensation even if the Commissions conduct could be regarded as lawful, he stated

“I am inclined to answer that question in the affirmative if the Community, through lawful conduct in favour of butter producers, pushed margarine producers...//...into a crisis which threatened their existence. The Community has a responsibility not merely to the butter producers, but also to the margarine producers. When, for overriding political reasons, the margarine producers are required to make such a sacrifice, they must receive appropriate compensation for it.”

Consequently, the Advocate General was positive as regards an action for damages based on lawful acts provided that there existed a threat to the very

⁷³ Ibid para, p.4087-8.

⁷⁴ Case Compaigne d’Approvisionnement supra note 26 at p.425.

⁷⁵ Joined cases 279, 280, 285 and 286/84 Walter Rau Lebensmittelwerke and Others v Commission 1987 ECR 1069 at 1114.

survival of the applicants. As the applicants didn't claim that they were required to make such a sacrifice the AG didn't hold the Community liable on the basis of strict liability. The Court didn't deal with the principle of legitimate expectation and consequently not with the question of liability for lawful acts.

There is nothing in the text of the Art 215(2) that rules out the possibility of liability regardless of any illegality or fault. Additionally, since the Article dealing with the non-contractual liability of the EC refers to the general principles common to the laws of the Member States, there is no reason for a stricter test than that used in the Member States. As the e.g. French, German and Spanish systems hold a claim for damages for valid legislative acts admissible, the ECJ should take this into consideration when dealing with this matter. Other reasons for a less stringent attitude are the lack of democratic control in the Community system and the existence of fundamental rights. These rights may also entail a right to be compensated for damage as a consequence of a legislative valid act as seen in the Christmas butter cases.⁷⁶

On the other hand, an action for damages for lawful measures might be, if admissible, subject to the Schöppenstedt formula since there is nothing in this test that says that its application is restricted to only illegal acts. Hopefully the ECJ will have the opportunity in the future to rule on this matter.

5.6 Damage

The next requisite that has to be fulfilled, after establishing that there exists an act (or omission) attributable to the Community, is that the applicant must have suffered damage from the act concerned. The text of Art 215(2) doesn't mention any special conditions that have to be fulfilled but only says that the Community is under a duty to *make good any damage*. The ECJ has therefore to a large extent looked into the Member States' rules governing issues of damages. According to the case law it is possible to distinguish three different requirements for a loss to be recoverable. The damage must be

- certain and specific,
- proven and
- quantifiable.⁷⁷

⁷⁶ Report p.209.

⁷⁷ Toth p.23.

5.6.1 Certain and specific

In Case Kampffmeyer⁷⁸, the defendant institutions tried to claim that it was only possible to award compensation if the damage had actually occurred. However, the ECJ held that the Community can be liable for

*“...imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed.”*⁷⁹

The ECJ justified this opinion by saying that it might be necessary to bring an action immediately before the ECJ in order to prevent even greater damage. Consequently, it is possible for a claimant to get a judgement on the liability of the Community and later specify the sum of compensation.⁸⁰ Another interesting aspect of this case is that the ECJ also tried to base the ruling on a comparative analysis of the Member States’ corresponding legislation instead of following its case law developed under the ECSC Treaty.⁸¹ Because of the lack of rules governing the Community liability the ECJ thus made use of *the general principles common to the laws of the Member States*.

In addition to being certain, the damage must also be *specific* i.e. it has to affect the individual’s interest in a special and an individual way. So if a measure affects every Community undertaking in a negative but equal way and these disadvantages are normal for the measure concerned, then no damages will be awarded. It is up to the applicant to show that the damage incurred is greater than the disadvantages normally inherent in the system from which the measure came.⁸² Additionally, the ECJ has dealt with the issue whether an undertaking has to consider certain risks in its activities and therefore will be denied the possibility to claim damages. In the Biovilac case⁸³ the ECJ held that

“an action for damages brought under Article 215 of the Treaty for unlawful legislative action cannot succeed unless the damage alleged by the applicant exceeds the limits of the economic risks inherent in operating in the sector concerned.”

⁷⁸ Case 56-60/74 Kampffmeyer v Commission and Council [1976] ECR 711, para 6.

⁷⁹ See also Case Biovilac supra note 63.

⁸⁰ Case Kampffmeyer supra note 78 at p.741.

⁸¹ Ibid para, para 6.

⁸² Joined cases 14,16,17,20,24,26 and 27/60 and 1/61, Meroni v. High Authority, [1961] ECR 161 at p.166-167. Joined cases 9 and 58/65, San Michele v ECSC High Authority [1967] ECR 27.

⁸³ Case Biovilac supra note 63 at p.4080-81.

Thus the ECJ will not accept claims for damages arising from commercial risks. However, if the measure in question is striking extra hard on a certain category of undertakings, then the ECJ may be willing to award damages. In several cases the ECJ has held that where the applicants have suffered "direct, special and abnormal" damage they are entitled to compensation.⁸⁴

5.6.2 Proven

Even where there has been established liability of the Community the applicant must prove that the measure in question has caused loss. This is not an easy task for the individual and the ECJ has in a number of cases dismissed the application due to the applicant's failure to prove damage.⁸⁵ In the Roquette case⁸⁶ the applicant produced statistics intended to show that the action of the Commission led to damage for the applicant. The ECJ held that overall figures, showing disadvantageous trends in trade that are not unquestionable, are not enough to establish damage. In another case the ECJ rejected subjective economic considerations which were dependent upon the applicant's conduct of business and as such could not be verified and therefore did not comply with the burden of proof.⁸⁷ Even if the case law of the ECJ suggests that it can be very difficult for the applicant to satisfy the requirements laid out, the defendant institution must collaborate and hand out documents that only the institution possesses and that can be of help and support for the ECJ's ruling.⁸⁸

5.6.3 Quantifiable

Due to the lack of successful claims and because of the unwillingness of the ECJ to lay down any concrete rules as regards what types of damages that will be compensated, it is not easy to determine to what extent an applicant can be compensated under Art 215(2). However, an analysis of the few successful actions gives us some clue as to what kind of losses will be comprised by Art 215(2).

The requirement of the damage as quantifiable means that the claim for compensation must be sufficiently concrete so that it can be expressed in a

⁸⁴ Case Biovilac supra note 63 and Schöppenstedt supra note 13.

⁸⁵ Case 26/68 Fux v Commission [1969] ECR 145 at para 33.

⁸⁶ Case Roquette supra note 24 at para 23.

⁸⁷ Joined cases 197-200/80 Ludwigshafener Walzmühle v Council and Commission [1981] ECR 3211 at para 50.

⁸⁸ Toth at p.27.

specific sum of money.⁸⁹ In Case Zuckerfabrik⁹⁰ it was held that only compensation by payment of money is admissible.

It is not always possible to determine the exact amount of money corresponding to the damage. In these cases the ECJ is willing to accept approximations if they are realistic and are based on reliable sources.⁹¹

The ECJ is positive concerning compensation for financial losses. It is common for most legal systems to divide financial losses into two different categories,

- direct loss (*damnum emergens*) e.g. expenses/payments and
- consequential loss (*lucrum cessans*) e.g. penalties paid for the cancellation of contract and lost profits.⁹²

The ECJ has rewarded damages for both these categories in accordance with the practise established in the Member States even if it does not always divide the losses into these two different categories. As regards the latter it is more difficult to estimate the proper amount of damage corresponding to the loss of profit and this has also been reflected in the case law of the ECJ. In case *Kampffmeyer*⁹³, grain dealers brought an action for sustained losses from cancellation of transactions following the refusal of import licences. The ECJ rewarded damages for the applicants who had concluded contracts to buy grain and had cancelled them after the Commission having supported the decision of the German authorities to refuse import licences. But they only got 10% of their claim as the ECJ was of the opinion that they may be regarded as having been aware of the abnormal speculative nature of the transaction involved in their purchase of maize and consequently by cancelling the transactions concerned they avoided any commercial risk. Those who had never concluded contracts because of the unlawful act of the Community to refuse permits were denied damages at all.

So even if the ECJ granted damages for loss of profit, the ruling seems to be a little harsh. First of all the reduction of 90% because of the risk involved in this kind of business seems to be excessive. And why should grain dealers waiting for the permits before concluding the contracts be judged harder than the former? A careful businessman will usually show this kind of behaviour.

⁸⁹ Ibid para, p.27 and Case 1/55 *Antoine Kergall v Common Assembly of the European Coal and Steel Community* page [1955] at p.159. Here the ECJ could not accept the existence of quantifiable damage

⁹⁰ Case Zuckerfabrik supra note 46.

⁹¹ Toth at p.28.

⁹² Lasok p.49.

⁹³ Case *Kampffmeyer* supra note 22.

In case Dumortier, which will be dealt with below, the claims for compensation for consequential loss, i.e. the cost for closing down factories and initiating insolvency proceedings, were denied since these losses were too remote.

When the applicant is basing his claim on the concept of legitimate expectations it does not guarantee any making of profits. Instead the concept should be understood as ensuring that losses are not suffered because of an unexpected change in his legal position.

An interesting aspect of the Ireks case⁹⁴ is that the ECJ did not reject the defendant institution's argument that no damages should be awarded if the applicant has been compensated by passing on the cost to the consumers. In this case though, the ECJ was of the opinion that the facts did not permit the conclusion to be drawn that the applicant actually passed on, or could have passed on, the loss resulting from the abolition of the refunds in its selling prices. This reasoning has been heavily criticised by Toth.⁹⁵

In later cases the ECJ has shown a more positive approach as regards awarding damages for loss of profit.⁹⁶

The damage is not always of an economic character. In cases of non-material damage the ECJ has also granted compensation, mostly though concerning staff cases. Examples of non-material damage that have been awarded are shock, uneasiness and psychological and non-physical consequences of an accident.⁹⁷

5.6.4 Damage due to an act of a State⁹⁸

The most important role for international responsibility is to compensate for injuries sustained. However, in the context of international responsibility it is questionable whether also the breach itself is sufficient to activate the responsibility of the State regardless of any real damage. This kind of damage is normally called legal damage as opposed to material and moral damage. According to the Draft Articles of ILC (Article 3) legal damage is possible since its Articles don't mention any requirement of damage. The very breach itself of an international rule would therefore suffice to render the State responsible. These Articles are though only guidelines and it is

⁹⁴ Case Quellmehl & Gritz supra note 61.

⁹⁵ Toth at p.29f.

⁹⁶ See Cases T-195/94 and T-202/94 Quiller and Hausmann v Council and Commission.

⁹⁷ Ibid para p.30.

⁹⁸ Lysén pp.96ff.

more probable that there has to exist some kind of material damage e.g. an air-craft shot down by mistake or moral damage e.g. a vessel illegally trespassing the territory of another State. It is not always that the reparation will have to consist of money. A formal apology will in many cases be higher rated by the injured State.

5.7 A causal link

After having established on the one hand an act attributable to the Community, on the other damage, the applicant has to prove that there exists a relationship between the act and the damage, i.e. a causal link.

5.7.1 Direct, immediate and exclusive connection

First of all, a causal link does not exist when the same damage would have occurred even without the act/omission of the Community. However, it is not certain that the opposite is true, i.e. that whenever the act/omission is necessary for the damage, a causal link exists. The ECJ has in several cases held that the causal connection must be direct, immediate and exclusive.⁹⁹ These requirements are a result of the desire of the ECJ not to accept liability of the Community when there are other causes involved. This means that whenever there are several circumstances that all are necessary for the damage, and the act or omission of the Community is only one of these, it is not certain that the ECJ will acknowledge a causal link between the act and the damage.

In fact “direct, immediate and exclusive causality” involves a demand that the damage must have arisen directly from the conduct of the institution and that the occurrence of the damage is not dependent on other causes.

These considerations are illustrated in a few cases where some of the applicants were not satisfied with the successfully recovered refunds which had been unlawfully withheld as a result of an invalid regulation but also tried to recover further losses.¹⁰⁰ They claimed that they were forced to close their factories and had to commence insolvency proceedings due to the conduct of the Council. The ECJ held,

“... The data supplied by the parties on that question in the course of the proceedings are not such as to establish the true causes of the further damage alleged. However, it is sufficient to state that even if it were

⁹⁹ Case 18/60 Worms v High Authority [1962] ECR 195 at 206 and Joined Cases 29,31,36,39-47,50 and 51/63 Usines de la Providence v High Authority[1965] ECR 911 at 944.

¹⁰⁰ Cases 64,113/76, 167,239/78, 27,28,45/79 Dumortier Frères SA v. Council [1979] ECR 3091 at p.3117.

assumed that the abolition of the refunds exacerbated the difficulties encountered by those applicants, those difficulties would not be a sufficiently direct consequence of the unlawful conduct of the Council to render the Community liable to make good the damage.”

The ECJ went on to say that Article 215,

“cannot be relied on to deduce an obligation to make good every harmful consequence, even a remote one, of unlawful legislation.”

As usual the reasoning of the ECJ is short. The ECJ doesn't elaborate further as to what kind of consequences that will be regarded as remote and avoids the problem of trying to determine under which conditions a consequence of a measure is regarded as a direct one. Is e.g. predictability of the consequence a necessary criterion for a causal connection?

5.7.2. Duty to mitigate losses and contributory negligence

As shown, the approach chosen by the ECJ makes it quite difficult for the applicant to succeed in claiming additional damages to loss of production. The ECJ makes use of the concepts of the duty to mitigate losses and contributory negligence. It applies the test of *bonus pater familias*, which in the commercial area can be considered as involving a duty to act as a prudent businessman. If this duty is not fulfilled, the link of causality may be broken.¹⁰¹ However, the exact extension of the duty to mitigate losses is not certain. So much is clear though that the injured person will have to take action in order to mitigate continuing damage and in some way protest against a conduct of the Community that inflicts him injuries and which he is aware of.¹⁰² The ECJ has also held that if the applicant ought to have anticipated, or could have anticipated the conduct, e.g. the adoption of special measures, which eventually caused the loss, this will effect his chances for a successful action.¹⁰³

Case *Kampffmeyer* suggests that a failure to use available remedies in order to mitigate the damage can be regarded as contributory negligence and thus hinder a successful action.¹⁰⁴ In addition to this, as seen before in the *Quellmehl and Gritz* case, the duty to mitigate losses can even involve that a producer has to pass on his losses to his customers e.g. when the damage is resulting from the abolition of production refunds.

¹⁰¹ Craig p.535 and Toth p.325.

¹⁰² Case 58/75 *Sergy v. Commission* [1976] ECR 1154 at p.1162.

¹⁰³ Case *Biolivac* supra note 63 at p.4081.

¹⁰⁴ Case *Kampffmeyer* supra note 78 at p.741.

The chain of causation will also be broken if a Member State contributes with an act or omission. However, if the Commission has illegally failed to supervise the conduct of the Member State so that the contribution of the Member State was possible, then this failure will be the causal link and the Commission can be held responsible.¹⁰⁵

Contributory negligence can result in either the dismissal of the application or the reduction of compensation.¹⁰⁶

As interest is common to the legal systems of the Member States, the ECJ has generally awarded interest.¹⁰⁷

5.7.3 Causality under public international law

Causal link between the act or omission and the alleged damage is a necessary element for liability to rise also under public international law. In the case law of the ICJ there are signs of a stringent attitude concerning the causality. When causality is weak the alleged pecuniary loss will at least be limited. Also in the Draft Articles of ILC causation is explicitly mentioned. Art 44(1) says that

“The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act...”

¹⁰⁵ Toth p.32.

¹⁰⁶ Case Adams supra note 42 at p.3592.

¹⁰⁷ Cases Dumortier supra note 100 at p.3118.

6. Liability for acts of EC servants

In the following three chapters I will deal with the different acts that can be distinguished in the case law of the ECJ namely,

- acts of EC servants,
- administrative acts and
- legislative acts.

It is not common that an action for damages is based on a negligent individual act. As mentioned before the reason for this is probably because it is easier for an applicant to claim damages for an act attributable to the institution as he doesn't have to point out the specific servant and furthermore, most acts of the Community are collective acts.

6.1 Internal and direct relationship

Not every act performed by a servant will constitute an act performed in his duty. There has to be a connection between the act performed and his duties. In the Sayag cases¹⁰⁸ the ECJ had the opportunity to establish what is regarded as an act performed in the course of an official's duties. In these cases a servant used his private car for transport during the course of his duties and he obtained a travel order which enabled him to claim the expenses for the trip from the Community. During this trip an accident occurred and his passenger was injured. The Commission had waived his immunity and proceedings before the Belgian ECJ had been instituted against him. The ECJ held:

*"By referring at one and the same time to damage caused by the institutions and to that caused by the servants of the Community, Article 188 indicates that the Community is only liable for those acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions."*¹⁰⁹

¹⁰⁸ First Sayag case 5/68 [1968] ECR 395 at p.336. See also Second Sayag case 9/69 [1969] ECR 329.

¹⁰⁹ Art 188 of the Euroatom Treaty is equivalent to art 215(2) of the EC Treaty.

According to the ECJ the driving of a private car (on official business) did not constitute an act in the performance of the servant's duties within the meaning of the second paragraph of Article 188 of the Treaty unless the Community otherwise would be unable to carry out the tasks entrusted to it, e.g. in the case of force majeure or in other exceptional circumstances.

Vicarious liability does not either seem to cover acts which are performed in the course of the so called civil life of the EC, i.e. acts which aren't an expression of the governmental or administrative daily life, e.g. administration of Community assets.¹¹⁰

The conclusion to be drawn is that there has to exist an internal and direct relationship between the act concerned and the tasks entrusted to the institutions. This expression is, according to the Sayag cases, narrowly interpreted. Unless this relationship exists the injured person will have to start a procedure before the national court holding the defendant liable under his personal capacity under national law. (However, then the immunity of the servant may hinder a successful claim) The Sayag cases involved the driving of a car. It is more doubtful whether the ECJ will apply exactly the same criteria when determining other acts of the servants.

6.2 The interrelationship between Art 215 and the Protocol on the Privileges and Immunities of the EC

As mentioned before according to Art 215(2) the Community shall make good any damage caused by its servants *in the performance of their duties*. Due to the wording it is obvious that there are actions for which the Community is not liable as they are outside the scope of Art 215(2) and therefore not official acts attributable to the Community. For these private acts the servant is liable in his personal capacity, and the law applicable is the law of the Member State concerned and the remedy is the national court.¹¹¹ As the Treaty does not define the meaning of an "official act", it can be of some help when determining the exact boundaries of their duties to look into "the Protocol on the Privileges and Immunities of the EC." According to art 12 of this Protocol,

"... officials and other servants of the Communities shall ... be immune from legal proceedings in respect of acts performed by them in their official capacity ..."

¹¹⁰ Toth p.382.

¹¹¹ Craig p.513.

This wording is not identical to the one found in Art 215(2) which speaks of “*in the performance of their duties*” and it is therefore not certain whether the different expressions have the same meaning. It would of course be convenient if the two expressions coincided, so that where the Community can’t be held responsible for an act of its servant because it is outside the performance of his duty, the servant involved will not enjoy immunity according to Art 12 of the Protocol and therefore an action can be brought against him in his personal capacity. According to Schermers¹¹² “*The phrases “in their official capacity” and “in the performance of their duties” are so close that it must lead to confusion to give them substantially different meanings.*”

One of the aims of the Protocol is to exclude the jurisdiction of national Courts of Member States so that the official activity of the Community and its servants may be carried out in full freedom in accordance with the task entrusted to the Community. Since Art. 12 of the Protocol only applies to acts performed in the servants’ official capacity, the Community will probably be asked to waive the immunity under Art 18 of this Protocol if the servant invokes his immunity and the act is in his personal capacity. If the Community does not do so the act will be deemed to be attributable to the Community and consequently can be held liable under Article 215. However, according to the Sayag case such waiver does not prejudice the liability of the Community. This estimation is autonomous and is governed by the rules set up by the ECJ.¹¹³

The personal liability of the servants towards the Communities is governed by the Staff Regulations and the Conditions of Employment and is subject to the jurisdiction of the ECJ.¹¹⁴

6.3 Comparative research

It seems as if all the Member States accept that the public authority can be held liable for acts of its servants even if the applicable rules in that context range from private law to separate principles. On the other hand the formulation of the necessary connection for liability to arise between the act of its servants and the tasks assigned to him differs considerably.

The German rules are in a class of their own as its case law implies a very restrictive attitude towards liability. There has to be an “innerer Zusammenhang” that shows the act and the performance of the duties to be necessarily indissociable. This internal connection is not easy to establish

¹¹² Schermers p.80.

¹¹³ Smit p.6-120.

¹¹⁴ Arts 40(2) ECSC, 215(3) EC, 188(3).

since the object of the act has to be inherent in the performance of the task and the object and the act have to be strongly linked.

However, in the other legal systems the Member States have showed themselves willing to accept a fairly wide interpretation of the notion of "acting in the performance of his duties".

In the French legal system administrative Courts have jurisdiction over the liability of the State, whereas the ordinary Courts have jurisdiction over the personal liability of the official. It is accepted that the State can be liable for both acts of the Civil Service and acts of a single official. The latter can also be personally liable provided that the act is personally wrongful. This personal liability exists on the one hand when the act is unrelated to his duties and on the other when the act is abnormal but still committed in connection with the performance of his duties. The division of jurisdiction between administrative and ordinary Courts becomes less important as regards the latter case since in these situations the State and the particular official can be jointly liable provided the service in question involved some kind of fault, e.g. lack of supervision.¹¹⁵

Under Italian law, as in most legal systems of the Member States, the acts of the servants are attributable to the State organ under certain circumstances. According to the opinion of Advocate General Mr Gand, "*liability is incurred under Italian law by an act which may be attributed to the public authority for which the servant is acting even if the act is fraudulent.*"¹¹⁶

¹¹⁵ Lagrange p.15.

¹¹⁶ Case Sayag supra note 108 at p.340.

7. Liability for administrative acts

7.1 Definition of an administrative act

As we will see later, it is important to differ between liability for legislative acts respectively administrative acts since, according to the Schöppenstedt formula, the former involve additional criteria that have to be met by the applicant. The most characteristic difference between these two acts is that administrative acts are not of a normative character. According to German law, which has had great influence on the outline of EC legislation, an administrative act is of an individual and concrete character while a legislative act is of general application. Accordingly, in the context of EC legislation, administrative acts usually constitute individual decisions, whereas legislative acts take the form of regulations and directives. The Schöppenstedt formula is only applicable to legislative measures of general application that involve choices of economic policy. A legislative act lays down general rules that apply to an indefinite category of persons. Therefore, as regards liability for individual acts, e.g. decisions, the formula is not applicable, as they are only binding on their addressee.¹¹⁷ Consequently, in order to determine the status of an act it is necessary to ascertain whether the measure in question is of individual concern to specific persons.

There is a legal duty of good administration on the institutions and theoretically any malfunction within this duty would activate the liability of the EC.¹¹⁸ Examples on administrative acts that can incur liability are e.g. defective departmental organisation, giving false information, failure to give necessary information to the public, lack of adequate supervision of subordinate officials or outside bodies to whom functions have been delegated, and decision making without investigating the facts.¹¹⁹

However, not every act that doesn't live up to so called good administration will result in a successful claim of damages.

¹¹⁷ Hartley p.487. See also Case Sofrimport 152/88, [1990] ECR I-2477.

¹¹⁸ Ibid para, p.480.

¹¹⁹ Toth p.319 and Ibid para p.480.

7.2 Case law

Most cases in this area concern information issues. These cases range from unlawful refusal to inform to unlawful supply of information.¹²⁰ In a case concerning alleged unlawful omission to inform, the applicants brought actions against the Commission for compensation for damage suffered as a result of the presence of adulterated wine on the wine market.¹²¹ Several persons had died after drinking Italian wine containing methanol and the applicants considered that the Commission was guilty of a wrongful act or omission. They complained inter alia of bad management and failure to supervise the wine market. The ECJ held that the applicants had not succeeded in establishing unlawful conduct on the part of the Commission.

In a case concerning the liability for erroneous information the applicants brought an action against the Community for disseminating or causing to be disseminated incorrect and incomplete information.¹²² This alleged conduct concerning the EEC-China Business Week wrongly led the applicants to believe that they were able to conclude contracts with Chinese participants and therefore caused them to suffer loss in travel expenses. The ECJ again went through the criteria for holding the Community liable under Art 215(2) and then held

“...the Commission was under no obligation to advise the participants in such an event of the fact that certain quotas for textiles had been used up. Accordingly, it cannot be contended that the Commission acted unlawfully by disseminating the information concerned in the manner in which it did so”

There are also some examples of alleged abusive application of powers. In several cases the applicant has argued that the Commission has wrongly tried to use its powers in order to affect and control different tender procedures. So far the ECJ has never held the Commission liable for this kind of alleged conduct.¹²³

In two cases, however, the ECJ has recognised the Community’s liability in principle.

¹²⁰ Case 169/73 *Compagnie Continentale France v Council* [1975] ECR 117 at para 20-21 and Case 56/77 *Agence européenne d’intérims v Commission* [1978] ECR 2215 at para 53.

¹²¹ Case 326/86 and 66/88 *Franchesconi v Commission*

¹²² Case 353/88 *Briantex and Di Domenico v Commission* [1989] ECR 3623.

¹²³ See e.g. Case 118/83 *CMC v Commission* and Case C-257/90 *Italsolar v Commission*.

In the Adams case¹²⁴, Mr Adams, a former employee at the company Hoffman-La Roche, brought an action against the Commission for compensation for damage which he claimed to have suffered as a result of wrongful acts or omissions on the part of the Commission, or of its servants in the performance of their duties, which led to his arrest, detention and conviction in Switzerland. The actions respective omissions that he claimed had damaged him were the following,

- The disclosure of the applicant's identity by the Commission to the company involved constituting a breach of the duty of confidentiality.
- The handing over of edited photocopies by the Commission to the staff of the company enabling the company to identify the applicant as the main suspect in the complaint which it lodged with the Swiss prosecutor's office.
- The omission not to inform and warn the applicant after having found out that the company was trying to discover who the informant was and preparing to lay a complaint against the informant.

The ECJ dismissed the first ground since the applicant already had admitted to the Swiss police that he was the informer at the time for disclosure by the Commission. As regards the second ground the ECJ held that the Commission had been imprudent in handing over the copies to the company without having consulted the applicant. However, whether this action was sufficient to give rise to the Commission's liability was not necessary to decide according to the ECJ, since the Commission failed to fulfil its obligation according to the third ground.

"...the Commission was under a duty to take every possible step to warn the applicant, thereby enabling him to make his own arrangements...//...It must therefore be concluded that, by failing to make all reasonable efforts to pass on to the applicant the information which was available to it ...//... the Commission has incurred liability towards the applicant in respect of that damage." (para 42 and 44)

In my view the ECJ held the Commission liable for damage caused by the institution as such and not for vicarious responsibility because there is nothing in the judgement that suggests that the ECJ focused on any particular servant when determining the liability of the institution according to the applicant's third ground. This case has nevertheless been used in literature as an example of vicarious liability. The case is though a good example on how the Commission can be held responsible for wrongful omissions.

¹²⁴ Case Adams supra note 42.

In case *Kampffmeyer* the ECJ found the conduct of the Commission to constitute a wrongful act or omission capable of giving rise to liability on the part of the Community. The question of illegality had already been established in earlier cases. The Commission's improper application of a regulation caused damage to the interests of the applicants who had acted in reliance on the correctness of the provided information. This judgement implies that both illegality and culpability have to be present in order for a claim to be successful.

7.3 Commentary

As shown, there have been very few successful applications concerning liability for administrative acts. Even if the conditions for liability for administrative acts should be easier to fulfil than meeting the criterion under the *Shöppenstedt* formula as regards liability for legislative acts, the ECJ has usually rejected the claims. Sometimes it has even run over the opinion of the Advocate General.¹²⁵ However, it is arguable whether this stringent attitude is owing to a condition of some kind of culpability set up by the ECJ. It would be quite natural if the liability for administrative acts was dependant on the presence of some kind of wrongfulness as it is common in most Member States that governmental liability for administrative acts won't arise as soon as e.g. an interpretation of a statute is questionable. As we saw under 5.4.3 e.g. the Swedish "Skadeståndslagen" demands in addition that there has been some kind of culpa involved.

Fault as a necessary requirement for liability under Art 215 has also been stated by some of the Advocate Generals. In the *Plauman* case Advocate General Roemer was of the opinion that "*...a claim founded upon administrative liability can lie only if a fault or wrongful conduct in the sense of "faute de service" is proved*". Advocate General Trabucchi stressed in the *Roquette* case that when examining the different criteria for liability, it is vital to determine "*...whether there exists the subjective condition of liability, namely, whether there is any misconduct to be discerned in the action of the Commission arising from its having acted negligently and without due care and circumspection.*"

If these considerations are the underlying reasons for the ECJ unwillingness to award damages for liability for administrative acts, then it is quite striking that there seldom can be detected any signs on these important issues in the

¹²⁵ See Case C-55/90 *Cato v Commission* [1992] ECR I-4199 where the Advocate General Darmon held that the Commission had not performed its supervisory task in a proper way.

reasoning of the ECJ. However, it's quite a usual phenomenon in the jurisprudence of the ECJ that it seldom gives any long explanations to its findings. Furthermore, the judgements are always unanimous, i.e. no different opinions can be detected. Thus, in my opinion the ECJ indirectly applies a test of culpability. This conclusion would also be in line with the case law developed under the ECSC Treaty.

8. Liability for legislative acts

When it comes to liability for legislative measures the Community just as the Member States has good reasons for restricting the possibility for individuals to claim damages.

In the HNL cases¹²⁶ the ECJ gave its opinion on whether there exists any conformity between the different legal systems in Europe concerning this issue.

"...it is necessary to take into consideration the principles in the legal systems of the Member States governing the liability of public authorities for damage caused to individuals by legislative measures. Although these principles vary considerably from one Member State to another, it is however possible to state that the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy. This restrictive view is explained by the consideration that the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals."

If the ECJ has proven to be reluctant to award damages for acts of the servants or administrative acts, it is nothing compared to the strict rules developed concerning liability for legislative acts, i.e. acts which have legal effect. This area is the most important one of the non-contractual liability of the EC as most of the cases brought before the ECJ deal with these acts.

8.1 The Schöppenstedt Formula

In Case Schöppenstedt¹²⁷ the ECJ for the first time expressly dealt with the issue whether the Community could incur liability for legislative acts under Art 215(2). This case is also important for another reason since the ECJ outlined certain stringent conditions for the liability of the Community when the measure in question involves *choices of economic policy*. In this area it is therefore not sufficiently enough for Community liability to arise that the act is unlawful or that an institution has failed to adopt a binding act when under a duty to do so.

¹²⁶ Joined cases 83, 94/76 & 4, 15, 40/77 Bayerische HNL v Council and Commission [1978] ECR 1209 at p. 1224.

¹²⁷ Case Scöppenstedt supra note 13.

The applicant, a raw sugar factory, brought action under Art 215(2) for compensation for loss of income caused by Regulation 769/68 of the Council laying down the measures needed to offset the difference between the national sugar prices and the prices valid from 1 July 1968. The applicant claimed that the regulation was in breach of Article 40(3), which lays down rules concerning a common price policy based on common criteria and uniform methods of calculation, in that it was discriminatory in the way in which it established the pricing policy for the product.

The ECJ held

“In the present case the non-contractual liability of the Community presupposes at the very least the unlawful nature of the act alleged to be the cause of damage. Where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Article 215, second paragraph, of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred.”

The applicant’s claim was dismissed as the ECJ held that such a violation hadn’t taken place in this case. I will now try to define the following criteria,

- economic policy
- superior rule of law designed to protect individuals
- sufficiently serious violation

8.1.1 Economic policy

To begin with it is interesting to find out what the concept of “economic policy” means. The ECJ rarely defines this in its considerations, but usually economic policy implies that the Community has discretionary power in the matter at issue. The best example of this is probably the Common Agricultural Policy in which the Community has a very wide discretion.¹²⁸ However, most legislative measures involve choices of economic policy as the institutions of the Community in most areas have been attributed exclusive powers which involve an element of discretionary decision-making.¹²⁹ The question can though be raised whether the statement of the ECJ that the Schöppenstedt formula only applies to legislative acts involving choices of economic policy, is still relevant, as the Community has been attributed a wider substantive scope of decision-making not limited

¹²⁸ Smit p 6-138.2

¹²⁹ Furthermore, it can also be held that economic considerations are always inherent in the different policy areas, also when environmental and social issues are in question.

to economic policies since that judgement. Maybe the decisive criterion should be solely that of legislative act.

8.1.2 Superior rule of law designed to protect individuals

The ECJ held that the facts of the Schöppenstedt case didn't prove any breach of a superior rule of law and rejected the applicant's argument that the difference between the prices constituted discrimination.

The ECJ didn't elaborate further what it exactly meant by "*superior rule of law for the protection of the individual*" but it has been interpreted as a reference to the general principles and fundamental rights that have been developed in the case law of the ECJ and certain provisions in primary and secondary legislation.¹³⁰ It is inherent in the expression that these superior rules are placed in the top of a hierarchy of rules according to which the illegality of the measure in question is tested. E.g. a regulation must not be contrary to a Treaty provision. The list can be made long over rules that are regarded as superior rules of law. It ranges from Treaty provisions, e.g. freedom of movements of workers and goods, to general principles as non-retroactivity, proportionality and legal certainty. I will focus on the perhaps two most important superior rules of law since these have been successfully invoked in a number of cases namely,

- the protection of legitimate expectation and
- the principle of equality.

The protection of legitimate expectation

In the CNTA case¹³¹ the ECJ held that if there is no overriding public interest, the Community is liable if the Commission has violated a superior rule of law. The breach of a higher ranked rule of law was in this case the failure to include transitional measures in a regulation for the protection of the confidence that a trader might legitimately have had in the Community rules. The Commission had abolished with immediate effect and without warning the application of compensatory amounts in a specific sector that caused certain traders damage. This case is one of the few examples of successful actions where the ECJ held the Community liable to pay damages to private plaintiffs who suffer injury as a result of a normative act.¹³²

¹³⁰ Shaw p.216.

¹³¹ Case CNTA supra note 45 at p.533.

¹³² See also Joined cases C-104/89 and C-37/90, Mulder et al. and Heinemann v Commission [1992] ECR I-3061 at para 15, and Case C-152/88, Sofrimport v. Commission [1992] ECR I-153 at para 26.

The principle of equality

Another successful action that has already been discussed is the Quellmehl case¹³³ where the ECJ referred to the principle of equality,

*"...The principle of equality, embodied in particular in the second subparagraph of Article 40(3) of the EEC Treaty, which prohibits any discrimination in the common organisation of the agricultural markets, occupies a particularly important place among the rules of Community law intended to protect the interests of the individual."*¹³⁴

The ECJ then went on to contend that the infringement of the principle affected a limited and clearly defined group of commercial operators and that also the damage alleged by the applicants went beyond the bounds of the economic risks inherent in the activities involved.

The criterion that the superior rule of law that has been violated also should be for the *protection of the individual* has been widely interpreted. In most cases where it was established that a superior rule of law was infringed, the ECJ has determined that the rule was aimed at the protection of the individual. In view of the case law it seems as if the ECJ will accept a rule being for the protection of the individual as soon as it is possible to define a category of people that will benefit from the rule in question. This is not dependent on whether the application of the rules of law in question is of direct and individual concern.

8.1.3 Sufficiently serious violation

For liability to rise it is not enough that there is a violation of a superior rule of law designed to protect individuals. According to the Schöppenstedt formula the breach must additionally be sufficiently serious. Later case law of the ECJ suggests that there are three different circumstances that are important for the estimation of the seriousness of the violation.

- The number of affected parties and the extent to which the group is well-defined.
- The damage in relation to the normal economic risks.
- The lack of an adequate justification.

¹³³ Case Quellmehl & Gritz supra note 61.

¹³⁴ Ibid para, p. 2973.

The HNL Cases¹³⁵, is an illustrative example how the first two circumstances are important for the judgement. First of all the ECJ held that the measure in question affected a very wide category of traders which in turn lessened the effect on the individual undertakings. Secondly, the damage to the applicants was relatively small and thirdly, the effects of the regulation didn't exceed the bounds of economic risks inherent in the activities of the agricultural sectors concerned. So despite of the declaration of the ECJ that the regulation involved was null and void, the application was dismissed as unfounded.

There are some cases that suggest that it is not enough that the measure has affected a small group of people and that the damage is beyond the normal economic risk of the business.¹³⁶ The ECJ sometimes demands additionally that the defendant's behaviour was verging on the arbitrary.¹³⁷ Another expression for this is when the ECJ states that liability can only arise when there is an absence of an adequate justification. In CNTA v. Commission¹³⁸ the ECJ held that in the absence of an overriding matter of public interest, the Community is liable when it has violated a superior rule of law. An arbitrary element when exercising its power was obviously present in this case.

Sometimes the ECJ holds that the Community does not incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers. This vague phrase does not constitute an additionally criterion. Instead it comprises the above mentioned specific criteria that the ECJ usually uses when determining the seriousness of the breach.¹³⁹

In a recent case the Court of First Instance held

“A sufficiently serious breach of a superior rule of law occurs when the institutions manifestly and seriously disregard the limits of their discretionary power without demonstrating the existence of public interest of a higher order. It is settled case-law that a breach of that kind occurs where the Community legislature fails to take into consideration a clearly

¹³⁵ Case 94/76 HNL v Council and Commission [1978] ECR 1209 at p1225 para 7.

¹³⁶ Case 143/77 Koninklijke Scholten-Honig v Council and Commission [1979] ECR 3583 at para 16-17 and Cases 116&124/77 Amylum v Council and Commission [1978] ECR 893 at para 20-21 and Case 20/88 Roquette frères v Commission [1989] ECR 1553 at para 26.

¹³⁷ See Amylum case at para 20-21.

¹³⁸ Case CNTA supra note 44 at para 4.

¹³⁹ Case Quellmaehl & Gritz supra note 61, para 6-7.

*distinct category of economic operators, particularly if the measure taken is unforeseeable and falls outside the bounds of normal economic risks”*¹⁴⁰

It follows from these considerations that in areas where the Community has a wide discretion, e.g. the CAP, the individual will have to accept certain harmful effects on its business 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.

It is quite interesting to observe that the phrase *”manifestly and seriously disregard the limits of their discretionary power”* can also be found in the more recently developed case law regarding the right to damages enforceable by individuals in their national courts against Member States.

As mentioned before the ECJ has held that it follows directly from Community law that Member States may be liable toward private parties for breach of valid Community law. In case Dillenkofer¹⁴¹ the ECJ went through the conditions that had previously been formulated in cases Francovich, Brasserie du Pêcheur and Hedley Lomas namely,

- the rule infringed must have been intended to confer rights on individuals,
- the breach must be sufficiently serious (the judgement of Francovich, however, does not mention this condition) and
- there must exist a direct causal link between the breach and the damage sustained.

The ECJ therefore made clear that the nature of the breach of Community law is clearly vital for the right to compensation. The decisive test for determining the sufficiently seriousness of the breach in question is whether the Member State, in the exercise of its rule-making powers, manifestly and gravely disregarded those powers, i.e. a fault-test. So in matters where the State has a wide discretion, some kind of fault is needed to activate the liability of the State. However, in areas where the Member State only has limited discretion, e.g. where the Community rule at issue is precise and unconditional, the mere infringement of that rule would be regarded as a sufficiently serious breach. In those cases there is no need for a prior finding by the ECJ of existence of fault or negligence on the part of the organ of the Member State concerned.

¹⁴⁰ Cases T-195/94 and T-202/94 Quiller and Hausmann v Council and Commission para 58.

¹⁴¹ Joined Cases C-178 to 179/94, C-188 to 190/94 Dillenkofer and Others v Federal Republic of Germany.

The judgement in the Dillenkofer case can be interpreted as a support for an existing strict liability for Member States as regards breach of Community law, due to the very few possibilities for the Member State to make discretionary judgements. Quitzow states that, the condition "grave" is fulfilled if a national authority has disregarded or misjudged Community rules, which lay down precise and unconditional duties according to either the jurisprudence of the ECJ or the wording of the rule in question.¹⁴²

According to Quitzow there today exists a difference between the liability of the Community under Art 215 and the liability of the Member States. While the former seems to constitute some kind of culpa liability the latter is close to constituting strict liability. This opinion is contrary to the statement in *Brasserie du Pêcheur* where the ECJ held,

"...the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage." (para 42.)

However, it seems as if the ECJ in fact has failed in its attempt to assimilate the conditions under which the Member State may incur liability with those governing Art 215. As the institutions of the Community have a wider margin of discretion than the Member States in many areas the applicant usually has to prove that the behaviour of the institution constituted a manifest and grave disregard of the limits on its discretion. This is also reflected in the restrictive case law on Art 215.

As shown, when liability concerns legislative acts, it will neither be sufficient that the measure in question is unlawful nor that the omission to act was unlawful. The ECJ has stringent criteria concerning the extent of the liability of the EC and will apply the Schöppenstedt formula whenever the action concerns legislative measures involving choices of economic policy.

¹⁴² Quitzow at p.700.

9. Conclusions

As shown the ECJ has been relatively liberal concerning the criteria for an admissible claim. Any person has the right to institute proceedings against the Community and the limitation period is no less than five years, starting to elapse first as the applicant is in a position to become aware of the harmful event giving rise to the liability. Further, the former doubts about Art 215(2) as constituting an independent remedy from a previous successful action of annulment under Art 173 are today scattered, as the ECJ has held that the action for damages was introduced as an autonomous form of action with a particular purpose to fulfil within the system of actions.

As regards concurrent liability, this issue only seems to arise when the Community legislation at issue is invalid and the implementation and application of these rules are involving the national authorities. As we have seen the ECJ applies the doctrine "exhaustion of remedies", as regards actions for restitution and also to a certain extent concerning actions for certain advantages, in order to reduce its workload. As to actions for unliquidated damages, the proper remedy is the ECJ, since where the damage is attributable to the EC institutions, there is no point in claiming compensation before a national court. The national authority has namely only acted as an agent for the Community and the national court will therefore not reward damages. The lack of a single forum, where the applicant can institute proceedings against the Community and the Member State jointly, has certainly not made it easy for the individual to enforce his rights. Instead the applicant has to cope with the task of finding out which remedy is the proper one and in the worst scenario institute actions before two different remedies.

Regardless of the nature of the inflicting behaviour, ranging from individual acts to legislative measures, damage and a causal link have to be present. The applicant must prove that the damage is certain and specific, the latter involving a condition of affecting the interest of the individual in a special and individual way. Concerning the nature of the injury there is in fact only one requirement. The claim for compensation must be sufficiently concrete so that it can be expressed in a specific sum of money. As an estimation of *lucrum cessans* normally is harder to make the ECJ has often rejected these kinds of claims. Causality has also to be present, i.e. a causal link between the act and the damage is necessary for a successful claim. The criteria "*direct, immediate and exclusive*" that are inherent in the causality moment imply that compensation for remote harmful consequences is hard to get.

Further, the ECJ is inclined to consider possible contributory negligence and the applicant's duty to mitigate losses.

As regards individual acts, the ECJ has required, just as the laws of the Member States, that some kind of connection between the act and the duty of the servant is present. In the context of Community law the vital issue is whether there exists an internal and direct relationship. If this kind of connection is lacking the servant will be personally liable since, according to the Protocol on the Privileges and Immunities of the EC, officials are only immune from legal proceedings in respect of acts performed in their official capacity. Despite the different wording of this Protocol compared to Art 215 which speaks of "*in the performance of their duties*", it's my view that these two expressions have the same meaning and therefore shouldn't be a reason for confusion.

It seems as if liability for administrative acts will be dependent on whether there is some kind of culpability present attributable to the institution involved, even if the ECJ doesn't expressly state this in its considerations. This conclusion is probably relevant also for legislative acts since the Schöppenstedt formula speaks of a sufficiently serious breach, which can be regarded as involving some kind of condition of wrongfulness. The formula also requires a violation of a superior rule of law, i.e. an illegal act. The expression "*economic policy*" in the formula seems to have lost its importance since the Community's competence and scope of decision-making have expanded since the Schöppenstedt judgement and is now also covering so called non-economical issues, e.g. the environment. Furthermore, it can be held that all policies are related to some kind of economic considerations.

Even if the ECJ theoretically has assimilated the conditions for Community liability and Member State liability the practical result is of a total different nature. For even if the conditions for a sufficiently serious breach seem to be the same for both remedies, namely "flagrant and grave disregard of the limits on its discretion", this kind of fault test only applies to violations of a Member State in areas where the national authority involved has the same kind of wide discretion as that of the Community legislator. As soon as a specific duty is imposed on a Member State, which automatically reduces its discretion, the test isn't applicable. Instead the mere infringement of Community law will suffice to constitute a sufficiently serious breach, i.e. a test of strict liability. The credibility of the ECJ is therefore weakened as there are no convincing reasons for having a more restrictive attitude towards the possibility for successful actions under Art 215 compared to

State liability in damages for breach of Community law. Whether these repercussions were intentional is hard to say. Maybe the ECJ justifies this result by considering a breach of Community law of a Member State to constitute a bigger threat to the development of the Common market and individual protection than corresponding act of an institution. Many voices have already been raised against the unfairness of today's legal position concerning the non-contractual liability. The ECJ will certainly have the opportunity in the future to adjust its position in these matters and maybe then the conditions on the liability of the EC respectively the Member States will be levelled out.

Consequently the European Court of Justice has developed a very restrictive approach concerning action for damages under Art 215. There are of course obvious reasons for this. First of all, due to the heavy impact the different measures of the administrative authority have on the public, there is always a risk that some individuals will get damaged as the decisions are usually taken in the general interest and with much discretion. If the Community was held liable each time a measure had adverse economic consequences on an undertaking this would obstruct the administrative process. Another reason for this approach is that the workload of the ECJ is immense and the ECJ has neither the time nor the resources to deal with an increase in applications which would probably be the result if the criteria for liability would loosen up. There are also some signs of economical considerations in the reasoning. Quite often the ECJ states that in order for the applicant to be successful "*the damage must exceed the limits of the economic risks inherent in operating in the sector*". Thus it seems as if *law and economics* are inherent in the case law. This is not so surprising as the Court's jurisprudence through the years has shown clear signs on not only judicial reasoning but also underlying economical as well as political considerations. The ECJ/CFI is more than just an ordinary court, for one thing because the Community law is a very special kind of legal system, a *sui generis*. Whenever the integration work has declined because of fundamental differences of opinion between the Member States, the ECJ has taken the role as a promoter and continued the co-operation and development through its jurisprudence. The best example of this is probably the judgement in Case Van Gend en Loos where the ECJ set out the doctrine of direct effect of Community law.¹⁴³ This ruling was certainly not in line with the intentions of the Member States when they signed the Treaty.

¹⁴³ Case 26/62 NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.

Today's legal status concerning the non-contractual liability of the Community can be summarised in the following way. An application for compensation because of some inflicting behaviour attributable to the Community will normally be regarded as admissible but the applicants will have a much tougher task to convince the ECJ that they are entitled to compensation. Maybe this stringent attitude will loosen up in the future as a response to the case law under Member State liability for breach of Community law.

Bibliography

Books

- Bengtsson**, "Det allmännas ansvar enligt skadeståndslagen", Norstedts Förlag, Stockholm, Sweden, 1990. (quot. Bengtsson)
- Craig/de Búrca**, "EC Law Text Cases & Materials", Oxford University Press, New York, United States, 1995. (quot. Craig)
- Hartley**, "The Foundations of European Community Law", Oxford University Press, New York, United States, 1994. (quot. Hartley)
- Hellner**, "Skadeståndsrätt", Juristförlaget, Stockholm, Sweden, 1996 5th ed. (quot. Hellner)
- Lasok/Bridge**, "Law & Institutions of the European Community", Butterworths, London, England 4th ed. (quot. Lasok)
- Lysén**, "State responsibility and international liability of states for lawful acts", Iustus förlag, Göteborg, Sweden, 1997. (quot. Lysén)
- Schermers et al.**, "Non-contractual liability of the European Communities", Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1988. (quot. Schermers et al)
- Shaw**, "European Community Law", The MacMillan Press, London, England, 1993. (quot. Shaw)
- Smit/Herzog**, "The Law of the European Community", Matthew Bender & Co, New York, United States, vol 5, 1998. (quot. Smit)
- Steiner**, "Textbook on EC Law", Blackstone Press Limited, London, England, 1994 5th ed. (quot. Steiner)
- Toth**, "The Oxford Encyclopaedia of European Community Law", Clarendon Press, Oxford, England, 1990. (quot. Toth)
- Weatherhill/Beaumont**, "EC Law", Penguin Group, London, England, 1995. (quot. Weatherhill)

Articles

Capelli/Nehls, “Die ausservertragliche Haftung der Europäischen Gemeinschaft...”, *Europarecht-Heft 2-1997* p.132. (quot. Capelli)

Conference Report on the Non-Contractual Liability of the European Communities, 25 *CML Rev.* 207 (1988). (quot. Report)

Jones, “The Non-Contractual Liability of the EEC and the Availability of an alternative Remedy in the National Courts,” (1981/1) *LIEI* 1. (quot. Jones)

Lagrange, “The Non-Contractual Liability of the Community in the E.C.S.C. and in the E.E.C.,” 3 *CML Rev.* 10 (1965-66). (quot. Lagrange)

Lysén, “Three questions on the non-contractual liability of the EEC” (1985/2) *LIEI* 86. (quot. Lysén II)

Quitow, ”Private enforcement” i EG-rätten - en studie av medlemsstaternas skadeståndsansvar i samband med överträdelser av gemenskapsregler, *Juridisk tidskrift* 1996/97:2 s.682-700. (quot. Quitow)

Stuart, “The ”Non-Contractual” liability of the European Economic Community”, 12 *CML Rev.* 493 (1975). (quot. Stuart)

Wils, “Concurrent liability of the Community and a Member State”, *ELR* 1992/17 p.191. (quot. Wils)

Internet

Verksamhetsstatistik för förstainstansrätten

<http://curia.eu.int/sv/stat/index.htm> (1999-01-10)

Table of cases

Chronological

Case 1/55 Antoine Kergall v Common Assembly of the European Coal and Steel Community [1955] ECR 151
Joined Cases 14,16,17,20,24,26 and 27/60 and 1/61, Meroni v. High Authority, [1961] ECR 161
Case 18/60 Worms v High Authority [1962] ECR 195
Case 25/62 Plauman v Commission [1963] ECR 95
Case 26/62 NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.
Cases 35/62 and 16/63 Leroy v. HA [1963] ECR 197
Joined Cases 29,31,36,39-47,50 and 51/63 Usines de la Providence v High Authority [1965] ECR 911
Case 84/63 De vos van Steenwijk v. Commission [1964] ECR 321
Joined Cases 9 and 58/65, San Michele v ECSC High Authority [1967] ECR 27
Case 59/65 Schreckenbergh v Commission [1966] ECR 543
Cases 5, 7 & 13-24/66 Firma E. Kampffmeyer v Commission [1967] ECR 245
Case 5/68 Sayag v. Leduc [1968] ECR 395
Case 26/68 Fux v Commission [1969] ECR 145
Case 9/69 Second Sayag [1969] ECR 329.
Case 4/69 Lütticke v Commission [1971] ECR 325
Case 5/71 Aktien-Zuckerfabrik Schöppenstedt v Council [1971] ECR 975
Cases 9&11/71 Compagnie d'Approvisionnement de Transport SA v Commission [1972] ECR 391
Case 96/71 Haeggmann v Commission [1972] ECR 1005.
Case 43/72 Merkur Aussenhandel GmbH v Commission [1973] ECR 1055
Case 63-9/72 Werhahn v Council and Commission [1973] ECR 1229
Case 169/73 Compagnie Continentale France v Council [1975] ECR 117
Case 26/74 Roquette Frères v Commission [1976] ECR 677
Case 56-60/74 Kampffmeyer v Commission and Council [1976] ECR 711
Case 74/74 CNTA v Commission [1975] ECR 533
Cases 46/75 IBC v Commission [1976] ECR 65
Case 58/75 Sergy v. Commission [1976] ECR 1154
Cases 67-85/75 Lesieur Cotelle et Associés SA v Commission [1976] ECR 391
Cases 64,113/76, 167,239/78, 27,28,45/79 Dumortier Frères SA v. Council [1979] ECR 3091
Joined Cases 83, 94/76 & 4, 15, 40/77 Bayerische HNL v Council and Commission [1978] ECR 1209
Case 56/77 Agence européenne d'intérim v Commission [1978] ECR 2215
Cases 116&124/77 Amylum v Council and Commission [1978] ECR 893
Case 143/77 Koninklijke Scholten-Honig v Council and Commission [1979] ECR 3583
Case 101/78 Granaria/Hoofdproduktschap voor Akkerbouwprodukten [1979] ECR 623
Case 238/78 Ireks-Arkady v Council & Commission (Quellmehl & Gritz) [1979] ECR 2955
Joined Cases 197-200, 243, 245 and 247/80 Ludwigshafener Walzmühle v Council and Commission [1981] ECR 3211
Cases 256,257,265&267/80 &5/81 Birra Wührer SpA v Council and Commission [1982] ECR 85
Case 131/81 Berti v. Commission [1982] ECR 3493
Case 59/83 Biovilac v EEC [1984] ECR 4057
Case 118/83 CMC v Commission
Case 145/83 Adams v Commission [1985] ECR 3539
Case 175/84, Krohn & Co GmbH & Co KG v Commission [1986] ECR 753.

Joined cases 279, 280, 285 and 286/84 Walter Rau Lebensmittelwerke and Others v Commission [1987] ECR 1069
Case 281/84 Zuckerfabrik Bedburg v Council [1987] ECR 49
Case 265/85 Van den Bergh en Jurgens v. Commission [1987] ECR 1155
Case 326/86 and 66/88 Franchesconi v Commission [1989] ECR 2087
Case C-308/87 Grifoni v EAEC [1990] ECR I-1203
Case 20/88 Roquette frères v Commission [1989] ECR 1553
Case 152/88, Sofrimopt [1990] ECR I-2477.
Case C-152/88, Sofrimport v. Commission [1992] ECR I-153
Case 353/88 Briantex and Di Domenico v Commission [1989] ECR 3623
Joined Cases C-104/89 and C-37/90, Mulder et al. and Heinemann v Commission [1992] ECR I-3061
Case C-200/89 FUNOC v Commission [1990] ECR I-3669
Joined Cases C-6 and C-9/90, Frankovich and Bonofaci v Italy [1991] ECR I-5357
Case C-55/90 Cato v Commission [1992] ECR I-2533
Case C-257/90 Italsolar v Commission.
Case C-146/91 KYDEP v Council and Commission [1994] ECR I-4199
Joined Cases C-46/93 Brasserie du Pêcheur and C-48/93 Factortame III [1996] ECR I-1029
Case T-168/94 Blackspur DIY Ltd v. Council and Commission [1995] ECR II-2627
Joined Cases C-178 to 179/94, C-188 to 190/94 Dillenkofer and Others v Federal Republic of Germany
Cases T-195/94 and T-202/94 Quiller and Hausmann v Council and Commission.