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CHAPTER 6

A Right to a Specific Remedy

*"I cannot but remind myself that it was the Member States which completely freely agreed the contractual rules underlying the system as a whole, and that the Member States are still the decisive protagonists in the process for the formulation of Community measures. Consequently to hold that liability exists for failure to fulfil obligations is tantamount simply to increasing the effectiveness of the system and does not involve any activity supplementing, let alone supplanting the legislature."*¹

*"A Member State's obligation to make reparation for the loss and damage so caused is subject to three conditions: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties ... While the right to reparation is founded directly on Community law where the three conditions set out above are fulfilled, the national law on liability provides the framework within which the State must make reparation for the consequences of the loss and damage caused, provided always that the conditions laid down by national law relating to reparation of loss and damage must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation"*².

A right to a specific remedy: State liability for breach of Community law

Community law requires a remedy in damages to be made available in the national courts to those parties who sustain loss as a result of breaches of Community rules by public authorities. This chapter traces the evolution of this new remedy in the case-law of the ECJ and examines its relationship with other national remedies. It also analyses the existing case law and its application in the UK courts³.

6.1 The recognition of the principle of State liability

The question was first addressed in *Francovich*⁴. A 1980 directive⁵ required Member States to create a guarantee fund designed to protect employees' wages in the event of their employers' insolvency. Italy failed to take any steps to implement the directive, a failure formally established in enforcement proceedings brought by the Commission⁶. Mr Francovich and Mrs Bonifaci were employed by firms, both of which had become insolvent. They brought proceedings in the Italian courts against the Italian State for payments in respect of unpaid salaries and wages or, in the alternative, damages. Their claims were based on the unimplemented directive. Both Italian courts referred questions to the ECJ. The Court held that the directive was clear and precise as to the beneficiary of the guarantee, but not clear and precise as to the identity of the person liable under the guarantee, and that the Italian State could not be regarded as the guarantee

institution merely because it had failed timeously to implement the directive⁷. So, an interested individual could *not* rely upon the directive to ask a national court to effectuate directly a right to payment against the State. However, the Court went on to establish that the Italian State was liable to pay damages.

The Court recalled that it had long been settled through its own case law dealing with the nature and effect of Community law that national courts responsible for the application of provisions of Community law are under a duty, in cases within their jurisdiction, to ensure that those provisions are given full and effective protection. Such protection would be called into question if individuals had no opportunity to obtain compensation where their rights were infringed owing to a breach by a Member State of its Community obligations. Therefore, Community law imposed an obligation on Member States to recompense individuals for loss caused by such a breach. "The principle... is inherent in the system of the Treaty"⁸. The Court also invoked Article 10 EC, but made *no* reference to the general principles common to the laws of the Member States, thereby indicating that this new remedy was a consequence of the unique nature of Community law and a requirement of primacy⁹.

If Community law required a Member State to make good loss incurred by individuals as a result of infringements of its Community obligations, the principle was not without qualifications. In *Francovich* the provisions of Community law infringed were contained in a directive. Hence the judgment reads:

"the result laid down in the directive involves the GRANTING OF RIGHTS FOR THE BENEFIT OF INDIVIDUALS and the SUBSTANCE OF THOSE RIGHTS must be IDENTIFIABLE ON THE BASIS OF THE PROVISIONS OF THE DIRECTIVE" ¹⁰.

Francovich was decided in a particular factual context: a total failure to transpose a directive, failure definitively established by the ECJ itself in a previous judgment. As a result it established that a Member State could be held liable for this type of infringement. Yet, because of this particular factual context many questions were not addressed. Thus, it was unclear whether a right in damages would lie also where transposition was incomplete, incorrect or belated, or whether bad faith was an essential component of the violation. Given that the breach had been established previously by the ECJ in an Article 226 judgment, issues such as how and by whom should the breach be identified or constituted could not be raised either. The difficult questions as to whether national courts themselves would also be competent to establish the existence of a breach and following which criteria were not addressed either. At least one thing could be deduced from *Francovich*, namely that the principle was not limited to directives, but could be extended to infringement of any Community right for the benefit of individuals. Since *Francovich* a series of decisions shed light on the different conditions under which Member States' actions can give rise to a right to reparation.

6.1.1 What is the fuss about?

Francovich did not come as a complete surprise. The idea that the Community legislature itself ought to establish a system of liability on the part of the Member States for failure to comply with Community law was proposed by the ECJ as early as 1975 in suggestions submitted for the Tindemans Report¹¹. There had been some case law anticipating *Francovich*. The Court had indicated the possibility of national courts hearing such claims and that State liability would draw the full consequences of an Article 226 EC action¹². Indeed it held that compliance by a Member State with its Community obligations after the date set in the reasoned opinion will not prevent a finding that the Member State was in breach of these obligations as the judgment

*"may be of substantive interest as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member States, the Community or private parties"*¹³.

There were further oblique references in *Russo*¹⁴:

"whenever damage has been caused through an infringement of Community law, the State is liable to the injured party of the consequences in the context of national law on the liability of the State."

Regardless, these cases alluded only to the possibility of such actions; *Francovich* went a stage further and imposed a duty on Member States to provide a remedy in damages and to make available a procedure by which individuals may claim damages in case of breach of Community law, where no such remedy and procedure was provided for under existing national rules. However, if, following *Francovich*, national courts, as organs of the State, are put under the obligation to provide a remedy in damages against the State, or even create it where it does not exist, for some national courts this new remedy simply means evolving further their own domestic law on public tort liability. Typically, the House of Lords had already been dealing with this issue¹⁵.

Part of the doctrine saw *Francovich* as the logical product of the ECJ case law:

*"seen from the perspective of the Community, one must inevitably wonder why it took more than 30 years for the Court to come to a conclusion which seems to be so inherent to the whole legal system"*¹⁶.

In this way *Francovich* simply constituted a further improvement in the protection afforded by the national legal systems¹⁷. This is true, inasmuch as *Francovich* involves no more difficulties for national courts than other requirements of the ECJ. The profound effect Community law has had on the exercise of judicial powers in the Member States has been explored before. Community law

is generally accepted as the superior norm in the various national legal systems, even when such recognition entails assault on constitutional fundamentals. Moreover, following *Francovich*, the party ultimately made liable is the party actually responsible for the mismatch between Community law and national law, whereas in other instances¹⁸, national courts have had to interpret national legislation in the light of Community law thereby placing burdens on private parties, who could not, on any view, be regarded as responsible for the failure to comply with Community obligations. By "shifting the means of enforcement of Community law"¹⁹, *Francovich* unquestionably introduces a fairness element.

It is tempting to argue that Member States have nothing to fear from the principle of State liability, provided they comply faithfully with the Community obligations they willingly undertook. Such a vision however overlooks the fact that not all Community obligations are regarded by the Member States as *willingly undertaken*.

6.1.2 Securing compliance with obligations willingly undertaken?

In the Community system Member States are denied competence to decide on the actual competences they have transferred. The rationale for denying Member States such a competence is simple. If each Member State were to decide upon the competence issue according to its own criteria, a Europe of *'bananas republic à la carte'*²⁰ will ensue. In the Community, the ECJ alone has competence authoritatively to state not only the effect, but also the scope of Community law. From the ECJ perspective, by accepting the jurisdiction of the ECJ, the Member States (should) have accepted that the ECJ alone would have competence to categorise the Treaty, and competence to ascertain the nature and extent of Community obligations.

Still these fundamentals are now contested by some national supreme courts; and some national governments, as the revived disputes regarding the exercise of Community powers illustrate. National courts from time to time reassert their willingness to determine what is permissible interpretation and unacceptable amendment²¹. Supreme courts in particular insist they have retained jurisdiction to examine the exercise of Community powers to ensure that the Community has not exceeded the limits of the competence granted under the Treaties, in accordance with the various national Constitutional requirements²². The White Paper on "Partnership of Nations", whilst restating the UK Government's commitment to a strong and independent Court without which it would be impossible to ensure even application of Community law, proposed to revise the Treaty so as to give the Council the power to curtail what is perceived as an expansionist approach to competence.

In a number of situations, Member States are faced with an increasing number of substantive Community obligations which scope has been judicially widened. The true extent of Community obligations is sometimes difficult to embrace, as their substance is defined and refined as the process of integration

unfolds. A number of non-compliance situations can be traced back to breaches of Community obligations *in the making of which the Member States have not participated*.

*"In treating the substantive obligations contained in the Treaty, the Court has frequently been motivated by a particular vision of the evolution of the Common Market, the purity of which, although perhaps traceable to the Treaty, has not been shared by the Member States years later. Thus the Member States have found themselves faced with an increasing number of substantive Treaty obligations whose scope has been judicially widened by interpretatively assigning them direct effect; derogation measures by contrast have been subjected to a very restrictive interpretation. [...] Member States' understanding of the nature of the obligations imposed by the Treaty may have been different from the CONSTANTLY EVOLVING CONCEPTIONS OF THE COURT"*²³.

Community legislation is not always consensual either in fact, it is less and less consensual. This results from a combination of an extension of qualified majority voting, and package-dealing. In sum, not every Community obligation can be regarded as willingly undertaken. For that reason, it has been suggested that:

*"non compliance is not a phenomenon which always arises out of bad faith and can be tackled in every circumstance by judicial action"*²⁴.

Typically, *Factortame* raises fundamental queries about the ways in which the Community has been developing its Common Fisheries policy, and how it has failed to meet its – admittedly competing – objectives. In particular, one of its objectives was to "ensure a fair standard of living for the fishing community, in particular by increasing the individual earnings of persons engaged in fishing". Quite the opposite, the CFP has been seen in the UK as destroying entire fishing communities and contributing to serious socio-economic problems in the North Sea. Like the rest of the quota hopping saga, *Factortame* highlights how nothing can actually be done by a hard-pressed government to try and protect seriously depressed sectors of its economy. The CFP failings of which have been exposed for many years ²⁵ must continue to be applied by the Member States. On one view, however, the failure was not so much that of the Member States but that of the Community institutions and in particular that of the Commission. In the light of the other principles of Community law, it was clear that the quota system required the establishment of an EC register for fishing vessels, yet despite repeated calls from the UK and Denmark, the Commission failed to introduce a proposal for such an EC register for fishing vessels.

6.2 Clarifying or extending the principle?

Whereas *Francovich* established the principle that individuals were entitled to claim damages against the State, the exact scope of this principle remained ill-defined. German and British courts referred questions concerning the conditions under which Member States may incur liability for damage caused to individuals by breaches of Community law attributable to the legislature. In *Brasserie du Pêcheur*, an action was brought by a company – Brasserie du Pêcheur – against Germany for reparation of the loss suffered as a result of import restrictions the company faced *between 1981 and 1987*. The breach of Community law in that case was attributable to the legislature, which had failed to adapt national law to Article 28 EC. However, the illegality of the prohibition on marketing beers imported from other Member States which did not comply with the Rheinheitsgebot, and that on the prohibition of additives, was definitely established on 12 March 1987²⁶

In *Factortame*, a claim for damages had been made by individuals and companies covering expenses and losses incurred between 1 April and 2 November 1989 – the period during which under the Merchant Shipping Act 1988 they were deprived of their fishing rights²⁷. A claim was also made for exemplary damages for unconstitutional behaviour on the part of the public authorities.

In both cases, the national legislature was responsible for the infringement in question, the remedy sought was not readily available in the national legal system, and the relevant losses were all purely economic. The ECJ answered the questions raised in the two separate sets of proceedings in a single judgment.

6.2.1 Constitutional objections

Francovich did not come as a complete surprise, nor did it create a revolution for each and every national court, yet it was not welcomed with open arms. A number of constitutional objections were raised. In its observations in *Francovich*, the UK Government had observed that no basis existed in Community law for the proposition that an individual had a right to obtain damages in the domestic court from a Member State for losses sustained as a result of failure to comply with Community obligations. It further contended that the case law of the Court showed that the Treaty was not intended to create new remedies in the national courts to ensure observance of Community law²⁸. The same objections were raised again in *Factortame II*²⁹. To dismiss these objections, the ECJ relied on the need to answer the questions referred to it by national courts.

“Since the TREATY contains NO PROVISION expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164 of the Treaty, to ensure that in the INTERPRETATION and APPLICATION of the TREATY the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in

*particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.*³⁰"

The existence and extent of State liability for damage arising from violations of Community law are questions of Treaty interpretation which fall within the jurisdiction of the ECJ. A parallel needs drawn with *van Gend en Loos*, where the preliminary ruling procedure provided the legal basis to justify and legitimise the discovery by the European Court of the principle of direct effect. From the foregoing it can be seen that national courts constitute the lynchpin in the Community system, as without them, the ECJ could not have established the decentralised system of enforcement, nor would it have been able to devise its rules.

The other (German) constitutional objection according to which no compensation is available for a breach attributable to the legislature was also dismissed. The ECJ relied on its traditional³¹ approach – consistent with well-established public international law principles – which refuses to distinguish between the different organs of the State. It held that:

"the obligation to make good damage caused to individuals by breaches of Community law CANNOT BE DEPENDENT ON DOMESTIC RULES as to the division of powers between constitutional authorities³². [...], ALL State authorities are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals³³".

Why the question whether liability could be incurred in relation to the legislative activity needed asked is rather puzzling since *Francovich* had already established a principle of State liability for acts of the legislature, in that case, not a positive act, but an omission by the legislature³⁴. In addition, national – and in particular German – courts are aware that the Court has consistently regarded *all State authorities as bound* by Community obligations. No defence based on national Constitutional difficulties³⁵, nor any national interests exceptions have ever been accepted by the ECJ³⁶. Finally, even if the legislature is a vital part of the system of government, it is simply an organ of the State. Classification of the powers of an organ as "legislative" or otherwise, is merely a matter of internal organisation and local custom. The main hurdle to liability for acts of the legislature is to determine *when* the breach of duty entails an actionable wrong. All the same, national courts have a duty to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation³⁷.

6.2.2 The legal basis

The bases for State liability are the principles inherent in the Community legal order³⁸: the full effectiveness of Community rules, the effective protection of the rights which they confer³⁹ and the obligation to co-operate imposed on the Member States by Article 10 EC which, from *Humblet*⁴⁰, included the obligation, for national courts, to nullify the unlawful consequences of a breach of Community law. In *Brasserie du Pêcheur* reference was further made to the general principles common to the legal systems of the Member States.

6.2.3 State Liability and other available remedies

The relationship between this new remedy and existing ones was another issue the Court was asked to address. The Court held that the principle of State liability also applied to breaches of Community provisions which are directly effective⁴¹.

"The rights of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty"⁴² [...] The purpose of that right is to ensure that provisions of Community law prevail over national provisions. It cannot in every case secure for individuals the benefit of the rights conferred on them by Community law and in particular, avoid their sustaining damage. "the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law [...] the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained".⁴³

In this way, the ECJ confirmed that direct effect can be regarded simply as one of the mechanisms available to ensure the effective operation of Community rules and/or the effective protection of individual's Community rights. From a practical perspective this raises the question as to whether individuals would be best advised to pursue an action for damages against the State for breach of Community law in preference to an alternative remedy available under national law. As was seen earlier, national rules of procedure can limit the protection of Community rights. For example, where traders seek reimbursement of sums levied in breach of Community law, they may need to adduce evidence that the burden of the charge illegally levied has not been passed on to another person⁴⁴; an action for payments of benefits due retrospectively under Community law, but denied under defective national legislation, is barred by a national rule restricting the retroactive effect of a claim for benefit. Can individuals be advised that an action for damages against the State should be sought in preference to any other remedy? Such advice may be given only if there is evidence that the limits which can be placed by national law on such an action

for damages are less restrictive than the limits which can be placed by national law on other remedies. National courts come to be confronted with exactly these types of issues when enforcing Community law.

The issue of co-existence of remedy was considered in *Sutton*⁴⁵ in relation to amounts due by way of social security benefits – interest on arrears of a social security benefit. Under English law, no interest is payable on arrears of social security benefits in respect of a period prior to the decision of the competent body in favour of the claimant. In this case, the ECJ held that neither Article 6 of Directive 79/7 nor Directive 76/207 required that an individual be able to obtain interest on arrears of a social security benefit such as invalid care allowance, even when the delay in payment of the benefit was the result of discrimination prohibited⁴⁶, since payment of interest on arrears of benefits cannot be regarded as compensatory in nature. But the ECJ went on to consider whether the right to payment of interest on arrears of social security benefits flows from the principle of State liability for breach of Community law, and found that it did not.

State liability has been referred to as an alternative remedy, yet whether it constitutes a more desirable option remains unclear given that national law may impose limits on its exercise⁴⁷. If Community law itself imposes a principle of State liability, this remedy has to be applied, nationally. It follows that the significance of this remedy⁴⁸ is, in practice, dependent on national courts: mitigation of loss, causation, limitation periods, etc will be assessed in accordance with domestic rules, and the ECJ will be called to elaborate further on what is or is not an acceptable national limitation. Ultimately the lack of uniformity resulting from reliance on divergent national law should prompt the adoption of common rules in this area, a neat illustration of the tension between the needs for effective and uniform protection of Community rights and respect of national diversity⁴⁹.

6.3 Conditions

The claim in reparation is founded on Community law. Accordingly, it falls to national courts to verify whether or not the Community conditions governing State liability for a breach of Community law are fulfilled. Other than that, the claim in reparation must be pursued in accordance with national rules and procedures provided that these satisfy the principles of non-discrimination and effectiveness. These Community conditions are that the rule of law infringed must have been intended to confer rights on individuals, the breach must be sufficiently serious, and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

6.3.1 Individual rights:

In *Brasserie du Pêcheur*, the ECJ held that this condition was "manifestly satisfied" in the case of Articles 28 & 43 EC, implying that directly effective provisions of Community law grant correlative rights to individuals. On the other hand, *Francovich* established that provisions which do not have direct effect may yet be capable of granting rights to individuals. This confirms that direct effect has ceased to be a determinant of the existence of individual rights to become a method of enforcement of Community rights⁵⁰. This condition seems to be most problematic as it is dependent on the approach to the concept of individual rights⁵¹. Not all Community obligations undertaken by the Member States involve the creation of individual rights, unless the view is taken that Community law grants individuals a right to ensure that Member States comply with each and every Community obligation. It is suggested that such a view could find support in the fact that the legal basis for State liability is Article 10 EC.

In the UK, on at least two occasions, the courts found that this condition was not met.

First In *Bowden*⁵², a trawler fisherman who harvested mussel, sought to rely on the Bathing Waters Directive, the Shellfish Waters Directive and the Urban Waste Water Directive 1991⁵³ and on allegations that breaches of these directives amounted to a public nuisance as a result of which he had suffered special damage over and above that suffered by the general public. The judge found against the plaintiff because he was quite satisfied that none of the three environmental directives involved conferred on him any personal right. On appeal it was confirmed that the judge had applied the right principles to the Bathing Water Directive and the Urban Waste Water Directive, and that Mr Bowden was not entitled to any special rights arising under either of them since he was not directly affected by either. As for the Shellfish Waters Directive, it was accepted that it did grant special rights to mollusc fishermen, and the appellant was allowed to restore this particular statement of claim⁵⁴.

In *Three Rivers*⁵⁵, damages were claimed against the Bank of England based on breach of a directive on banking supervision, as part of the proceedings brought by many thousands of depositors against the Bank of England following the winding-up of the Bank of Credit and Commerce International SA ("BCCI"). It was held that although the directive did impose a supervisory duty on the regulator, it did not confer on individuals a right to effective supervision. This was confirmed in the House of Lords which held that the Directive did not give individuals a right to damages against the State which they may assert in the national courts. In 1980 the Bank of England ("the Bank"), acting as the supervisory authority for the purposes of the Banking Act 1979 (which transposed the Directive into national law), had authorised BCCI to carry on the business of a licensed deposit-taking institution. In 1991, at the Bank's request, the High Court appointed receivers to the BCCI. This decision entailed the closure of BCCI in the United Kingdom and considerable losses for thousands of deposi-

tors. The collapse of BCCI was mainly due to fraud on a vast scale perpetrated at senior level within BCCI. The depositors then sued the Bank on the basis of, firstly, the tort of misfeasance in public office – they claimed that certain senior officials had acted in bad faith by giving an authorisation to BCCI when it was illegal, by turning a blind eye to what went on after the authorisation had been granted and by failing to take the necessary measures to close BCCI down – and, secondly, of Directive 77/780. As regards the complaint based on the Directive, the House of Lords held that the Community instrument did not impose obligations on the Member States that created rights on which individuals could base actions for damages. It was not necessary to recognise such rights in order to achieve the purpose of the Directive, which is a first step towards the approximation of laws on the business of credit institution in the Community and seeks to remove the obstacles to the freedom of establishment while recognising the need for rules to protect savings. According to the House of Lords, the Directive merely required the competent authorities to co-operate where a credit institution pursues its business in one or more Member States other than that where its registered office is situated; it did not go so far as to impose supervisory obligations on the competent authority within each Member State. Applying the *acte clair* doctrine, the House of Lords gave its decision without referring the matter to the Court for a preliminary ruling. Whether the ECJ, if asked, would have decided that the objective of the Directive was to protect savings and not just to create a level playing field between credit institutions operating in more than one Member State, and that this objective of protection was meant to create individual rights, remains a matter of speculation at this stage.

6.3.2 A sufficiently serious breach

In *Francovich*, the Court had affirmed that

“the conditions under which State liability give rise to a right to compensation depended on the NATURE OF THE BREACH of Community law giving rise to the harm”⁵⁶.

In *Brasserie du Pêcheur*, the ECJ affirmed the need for liability for legislative measures of the Member States and of the Community institutions to be assessed according to the same standard, since 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 damage⁵⁷. As a result it held:

“where Member States act in a field where there is a WIDE DISCRETION, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be INTENDED TO CONFER RIGHTS ON INDIVIDUALS; the BREACH must be SUFFICIENTLY SERIOUS; and there must be a direct CAUSAL LINK between the

*breach of the obligation resting on the State and the damage sustained by the injured parties."*⁵⁸

The Court explained that the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member States, just like the Community institutions, have *manifestly and gravely* disregarded the limits on their discretionary powers.⁵⁹ A breach of Community law which will have *persisted* despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case law of the Court on the matter from which it is clear that the conduct in question constituted an infringement, would constitute a sufficiently serious breach⁶⁰.

The Court also elaborated on the factors which can be taken into account by national courts in assessing whether or not a breach would be a sufficiently serious one. These include *inter alia*, the *clarity* and *precision* of the rule breached, the measure of *discretion* left by that rule to the national or Community authorities, whether the infringement and the damage caused was *intentional or involuntary*, whether any *error of law* was excusable or inexcusable and the fact that the *Community institutions* may have *contributed* towards the omission or retention of national measures or practices contrary to Community law.⁶¹ The Court held that these factors were similar to those that were developed when it constructed a system of rules with regard to Article 288 EC. In that context the ECJ took into account *inter alia* the *complexity* of the situations to be regulated, the *difficulties* in *interpretation* and *application* of the texts, and the *margin of discretion* available to the author of the act in question⁶². All these considerations led to the rather strict approach taken towards the liability of the Community in the exercise of its legislative activities⁶³, so much so that in the sectors coming within the economic policy of the Community, individuals have been required to accept certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds, *even where that measure had been declared null and void*⁶⁴. This rather restrictive approach has been justified in the following way:

*"the exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the GENERAL INTEREST of the Community requires legislative measures to be adopted which may adversely affect INDIVIDUAL INTERESTS"*⁶⁵.

These considerations echo similar concerns which had been raised in the English courts long before the introduction of the principle of State liability for breach of Community law:

"the undesirability, in areas in which choices of action depend on judgment, that Member states should be hindered in taking legislative action by the prospect of actions for damages if their judgment should ultimately be held to be wrong, unless

the action taken constitutes a grave and manifest disregard of the limits on the exercise of its powers, i.e. is an abuse of such powers."⁶⁶

In *Factortame* the ECJ case law on liability of the Community institutions was extensively considered by the Divisional court, the Court of Appeal and also by the House of Lords.⁶⁷ The latter decided that the Act has been deliberately adopted: it was not an unintentional and "excusable" breach; it was "a sufficiently serious breach" in that it was a manifest and grave disregard of the limits of the United Kingdom's discretion.

Certainly the coherence of legal protection of individuals requires that the award of damages by a national court for breach of Community law by a Member State be subject to the same conditions as an award of damages by the ECJ for infringement of Community law by a Community institution. Such coherence would avoid situations where Member States may incur liability for breach of Community law by one of its authorities in circumstances where the non-contractual liability of the Community would not arise. Furthermore such consistency appears desirable in the light of the fact that the Community liability regime is, by virtue of Article 288 EC, meant to flow from the general principles common to the laws of the Member States. Finally, such coherence appears necessary in the light of cases like *Asteris*⁶⁸ where the Court held that a judgment of the Court holding that the Community is not liable in damages in respect of the illegality of an act of its institutions "precludes a national authority which merely implemented the Community legislative measure and was not responsible for its unlawfulness from being held liable on the same grounds".

At the same time the alignment of State liability on the regime governing the non-contractual liability of the Community institutions indicates that not too much hope should be put in the capacity of national courts to find Member States liable for breach of Community law. To be sure, the ECJ restrictive approach to breach, causation and loss⁶⁹ in the context of determining the liability of the Community institution has meant that few such claims have been successful, so much so that some commentators have remarked that individual protection is not a central concern at Community level⁷⁰. Unless coherence means a relaxation of the Community institutions regime, State liability will be incurred only exceptionally. This in turn begs the question how this new remedy could improve the effective protection of individuals' rights. Yet the effective protection of individual protection was cited by the ECJ has one of the legal bases for the development of this new remedy.

6.3.2.1. The measure of discretion left by a Community measure

In many areas, Member States do not have a wide discretion when acting in fields governed by Community law. Therefore the ECJ has also held that these strict conditions need not apply. In areas where Member States have no discretion, a serious breach may be constituted even in the absence of a "grave and

manifest disregard for the limits of powers." The snag here is for national courts consists in ascertaining the extent of the discretion left by a particular Community instrument.

In *Lomas*⁷¹, MAFF refused to grant export licences for live sheep destined for slaughter in Spain on the ground that treatment in Spanish slaughterhouses was contrary to Directive 74/577. This refusal was challenged as contrary to Article 29 EC and a claim for damages was also made. On a reference from the High Court, the ECJ considered that the ban could not be justified under Article 30. The ECJ further held that, according to well-established case law, recourse to Article 30 is no longer possible where a directive provides for harmonisation measures. The ECJ refused to accept that the principle of pre-emption of Member State's action in the presence of a Community measure could be affected by the fact that the Directive did not lay down any Community procedure for monitoring compliance with its provisions. Given the absence of any discretion, the *mere infringement* of Community law was sufficient to establish the existence of a sufficiently serious breach.

However the pre-emption doctrine is no longer what it used to be. Originally, there was a reasonably clear cut principle; once the Community had legislated, Member States were pre-empted from taking unilateral action. Then, a discernible pattern developed, whereby more flexibility was fed into Community decision-making in the form of derogations⁷², exemptions and options⁷³. This in turn has meant that there are different ways in which Community obligations can leave a margin of discretion. These include the capacity to maintain or introduce national legislation in areas where the Community has legislated⁷⁴ or to set higher standards than those laid down in a Community measure⁷⁵, the possibility of delaying the entry into force of the Community measure⁷⁶ and the use of options and exemptions⁷⁷. In matters such as social protection, consumer protection and environmental protection, the Treaty⁷⁸ now expressly leaves Member States the freedom to maintain or introduce more stringent measures than those laid down in the Community harmonisation measures. As a result, it is no longer necessary in these fields to have minimum harmonisation clauses included in the specific Community instruments, and the extent of the discretion will need to be ascertained by reference to the legal basis for the adoption of the Community measure. Even in areas where Community intervention appears exhaustive, there may be residual competence. So for example, "where there is a regulation on the common organisation of the market in a given sector the Member States are under an obligation to refrain from taking any measures which might undermine or create exceptions to it⁷⁹."

At the same time, the ECJ has recognised that "the establishment of a common organisation of the agricultural markets does not prevent the Member States from applying national rules intended to attain an objective relating to the general interest other than those covered by the common organisation even if those rules are likely to have an effect on the functioning of the common market in the sector concerned"⁸⁰. That means that national courts may be called once

it is established whether the general interest pursued by the implementing measure is one of the objectives already covered by the Community measure. If it is, then the Member State has no discretion; if it is not then the situation is deemed to be one where the Member States has a discretion. Consequently only a sufficiently serious breach can trigger liability. In view of the fact that establishing whether or not there is residual competence and/or discretion left by a particular Community instrument is in itself an issue which often requires to be referred⁸¹, it is questionable whether in such circumstances a breach could ever be a sufficiently serious one.

6.3.2.2 Excusable and inexcusable error of law

In *Dillenkofer*⁸² purchasers of package travel who never left for their destination or had to return from their destination at their own expense following insolvency of tour operators, could not secure reimbursement of their holidays or of the expenses incurred and brought actions for compensation based on Article 7 of the package travel Directive⁸³. They argued that the belated transposition of the Directive had meant that they were not protected against the insolvency of tour operators as required by Article 7 of the Directive.

This Article reads:

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

The ECJ found that within the prescribed period for implementation, the national legislature has done no more than adopt the necessary legal framework for requiring organisers by law to provide sufficient evidence of security. Further, it held that full implementation entailed a guarantee to purchasers of package travel of a refund of the money paid and repatriation in the event of the tour operator's insolvency. Consequently, the ECJ considered that Germany had failed to implement the Directive. A failure to fully transpose a directive within the prescribed period qualifies as a serious breach of Community law. From the foregoing it can be seen that in this case Germany had interpreted the requirements of the Directive in a different way than that of the ECJ, which as will be apparent elaborated on the substance of the obligation contained in Article 7.

By contrast in *BT*⁸⁴, although Article 8(1) of Directive 90/531 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors had been incorrectly transposed, the ECJ found that there has not been a sufficiently serious breach of Community law. It was for the contracting entities themselves, and not for the UK, to determine which telecommunications services were to be excluded from the scope of the Directive in implementation of Article 8(1), a finding in direct contradiction with the fact that the ECJ has made clear that under the Treaty the addressees of Direc-

tives are only the Member States. The ECJ found that Article 8 was imprecisely worded and that the interpretation given to it in good faith by the Member State in question, albeit erroneous, was not *manifestly contrary* to the wording of the directive or to the objective pursued by it. In view of that, the UK was not obliged to pay BT compensation for damage suffered by it as a result of the error of interpretation committed.

6.3.2.3 The nature of the rule breached

In *Brasserie du Pêcheur*, no reference was made to the nature of the rule infringed. But, it is clear that it can play an important role in assessing the gravity of the breach. Thus, the Divisional Court in *Factortame* held: "It is common ground that the prohibition of discrimination on grounds of nationality is one of the fundamental principles of the Treaty"⁸⁵, and the Court of Appeal also found that a direct breach of a fundamental principle such as non discrimination on grounds of nationality "will almost inevitably create a liability for damages"⁸⁶. The House of Lords similarly attached great weight to the fact that the relevant rule of Community law was not to be found in an ambiguous directive but in a clear and fundamental provision of the Treaty⁸⁷.

6.3.3 A direct causal link

In *Brasserie du Pêcheur*⁸⁸, the ECJ held:

"it is for the national courts to determine whether there is a direct causal link between the breach of the obligation borne by the State and the damage sustained by the injured parties."

National courts are entitled to rely on their approach to causation. Causation can be used as a way of exonerating the Member States. In *Brasserie du Pêcheur*, the Bundesgerichtshof⁸⁹ relied on the distinction drawn by the ECJ between the maintenance in force of German legislation prohibiting the marketing under the designation 'Bier' of beers imported from other Member States, which was found to constitute a sufficiently serious breach, and the prohibition on the use of additives, which was not. It then found that the import restrictions had been taken solely to deal with enforcing the prohibition on using unlawful additives. Therefore, the requirement of a direct causal connection between the infringing act and the damage was not satisfied as regards the breach of the Treaty relating to the use of the designation 'Bier'. In *Factortame*, the final settlement was reached out of court.

*Gallagher*⁹⁰ provides an illustration of the way in which the English courts approach causation. The case involved a claim for damages for wrongful exclusion resulting from an incorrect transposition of the requirements Directive

64/221 in the Prevention of Terrorism (Temporary Provisions) Act 1989⁹¹. It was held that causation is an issue to be decided on the balance of probabilities. The plaintiff must show on the balance of probabilities that the injury for which he seeks compensation was caused by the unlawful conduct of which he complains. The Court of Appeal was satisfied that Mr Gallagher had established a breach of Community law, but found that he had failed to show that such breach probably caused him to be excluded from the UK, when he would not otherwise have been excluded. So failure to implement a directive, failure which deprives an individual of fundamental procedural safeguards, cannot give rise to an action for damages if, on the balance of probabilities, exclusion would have taken place irrespective of whether or not these procedural requirements had been complied with. While it may be the case that all too often violations of procedural obligations cannot give rise to an easily quantifiable damage, this is an issue quite separate from assessing whether the requirements of causation are met. The right to see that a procedure is adhered to is quite separate from the fact that deportation would have taken place irrespective of whether the proper procedure had been followed. State liability therefore appears of little use to remedy breaches of Community procedural obligations.

6.4 The extent of the reparation

It has already been pointed out that once the national courts have verified whether the Community conditions are satisfied, the claim in reparation has to be pursued in accordance with national rules and procedures provided that these satisfy the principles of non-discrimination and effectiveness⁹².

This has meant that the award of damages has been influenced by Community law in a number of ways. Compensation must be commensurate with the loss or damage sustained. Given that many Community rights are, essentially, economic rights, the loss or damage sustained are often going to be, by nature, purely economic. Therefore, any national rule "not including loss of profit is not compatible with Community law⁹³". It follows that national rules governing the extent of reparation will have to be adapted so as to ensure that loss of profit is compensated⁹⁴. The ways in which national rules governing the recovery of pure economic loss may require adaptation has been analysed⁹⁵.

Other than these Community law influences, damages are governed by national law, and the ECJ has made no reference to the principles governing damages as developed in its case law on the non contractual-liability of the Community institutions, whereby losses are only recoverable if they are certain, specific, proven and quantifiable.

6.4.1. The award of exemplary damages

Such damages are based on domestic law. In *Brasserie du Pêcheur* the ECJ relied on the Divisional Court findings that the public authorities acted oppressively, arbitrarily or unconstitutionally, and held that:

"in so far as such conduct may constitute or aggravate a breach of Community law, an award of exemplary damages pursuant to a claim or an action founded on Community law cannot be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law"⁹⁶.

The High Court, when applying this ruling, did not award the damages as the assimilation principle did not require it. They held that they did not have to award punitive damages as they would not do so in a similar case under English law. In English law the correct nature of State liability for a breach of Community law is best understood as a breach of statutory duty. As regards breaches of statutory duty, the English law is that unless the statute expressly provides it, punitive damages cannot be awarded. It was further observed that:

"for English law to give the remedy of penal damages for breaches of Community law would decrease the move towards uniformity, it would involve distinctions between the practice of national courts and the liabilities of different Member States and between the Community the UK and the Community institutions, and would accordingly in itself be potentially discriminatory since litigants in England would be treated differently from those elsewhere. ...it would risk introducing into the law of Community obligations anomalies and conflicts which do not at present exist and would not serve a useful purpose."⁹⁷

6.4.2 Mitigation

National courts may inquire whether the injured person showed reasonable care so as to avoid the loss or damage or to mitigate it⁹⁸. A package traveller who has paid the whole travel price cannot be regarded as acting negligently simply because he has not taken advantage of the possibility of not paying more than 10% of the total travel price before obtaining the travelling documents⁹⁹.

6.5 State liability for breach of Community law in the UK courts¹⁰⁰: finding the right cause of action

Considerations of the UK approach to the different aspects of this remedy have been discussed at various junctures in this chapter. Accordingly this section will limit itself to discussing the way State liability developed in the UK prior to *Francovich*. That system bore two stigmas: (i) the way in which Community law

was introduced into the legal systems of the UK and (ii) the procedural differences between public and private law remedies.¹⁰¹

(i) Suggestions that breaches of specific provisions of Community law might constitute new heads of tort in English law were made on several occasions.¹⁰² These suggestions were based on the fact that under the European Community Act rights arising under Community law were referred to as "*enforceable Community rights*" and not as rights arising under UK law. Still, a breach of Community law was classified under existing causes of action: either a remedy in damages for the tort of breach of statutory duty or the tort of misfeasance in public office. Breach of statutory duty is available where it is apparent that the obligation or prohibition is imposed in the statute for the benefit or protection of a particular class or individuals or where the statute creates a public law right and a particular member of the public suffers in a different way.

(ii) The second issue related to whether the rights conferred by Community law should be classified as public law rights, a breach of which could only be sanctioned through proceedings established for judicial review, or as rights sounding in private law.

Prior to *Francovich*, the fact that breaches of Community law could give rise to actions for damages had been considered by the English Courts in a number of circumstances. However the first case on damages against public authorities was *Bourgoin*¹⁰³. Indeed the proceedings in *Garden Cottage Food* concerned the activities of the Milk Marketing Board *qua* an undertaking allegedly breaching Community competition rules rather than in its quality as a statutory organisation. Against the State, the only remedy available was misfeasance in public office. In *Bourgoin*¹⁰⁴, the Court of Appeal held that the State was not required as a matter of English or Community law to compensate the victims of acts which had been found by the Court of Justice to be contrary to Community law, unless the Minister were shown to have acted in the knowledge that the act in question was invalid and with the intention or knowledge that it would injure the claimants.

Today, the position is that whilst it can be said that the cause of action is *sui generis*, it is of a character of a breach of statutory duty.

6.6 Conclusion

This new Community remedy is as yet undeveloped and dependent on national rules. Further, it is unlikely to be of much consequence for many different types of Community obligations which at the moment suffer from an enforcement gap in national courts. This is because one of the Community conditions for this new remedy is that the provision infringed was intended to confer rights on individuals.

The Commission is trying to play some role in giving life to this new remedy, by publicising the fact that injured citizens have the right to bring proceedings

before national courts. This illustrates how the centralised and decentralised systems of enforcement can be complementary:

"At the end of the day, one of the best ways of combating recidivism in cases where the Court of Justice has already given judgment against the offender is to inform the public of their rights to compensation under the law as stated by the Court of Justice. The Court gives individuals the possibility of applying to the national courts for damages to compensate for infringements of Community law or failure to transpose directives. The legal profession is by now familiar with this ruling and its consequences for litigants who suffer loss as a result of a Member State's failure to comply with Community law, but individuals and firms are less familiar"¹⁰⁵.

Accordingly, the Commission is proposing to publish press releases announcing the termination of infringement cases and making clear that the termination does not affect the rights of individuals who have sustained loss nor such actions for compensation as they may have brought in the national courts. The Commission has also announced it will publish an interpretative communication on the right to seek damages for loss sustained as a result of an infringement of Community law by a Member State. This may be helpful for national courts.

The ECJ case law on State liability for breach of Community law also serves to illustrate how "the dividing line which separates interpretation and application can be perilously thin"¹⁰⁶, and how on occasion, the division of function established under Article 234 EC simply cannot be applied in practice. In some cases¹⁰⁷, the ECJ decided itself on conditions of liability *in concreto*, to the effect that the referring national court has been left with deciding only whether the requirements of causation were met¹⁰⁸.

Endnotes

- ¹ Advocate General Tesouro's opinion in Cases C-46/93 & C-48/93 *Brasserie du Pêcheur S.A v. Germany; and R v. Secretary of State for Transport ex parte Factortame* [1996] ECR I-1029, hereafter *Brasserie du Pêcheur* at para. 26.
- ² Case C-66/95 *R v. Secretary of State for Social security ex parte E. Sutton* [1997] ECR I-2163, paras. 32 & 33.
- ³ For a useful web site on State liability see <http://www.unimaas.nl/~egmilieu/dossier/francovi.htm>.
- ⁴ Cases C-6 & 9/90 *Francovich and others v. Italy* [1991] ECR I-5357.
- ⁵ Directive 80/987 OJ 1980, L283/23.
- ⁶ Case 22/87 *Commission v. Italy* [1989] ECR 143.
- ⁷ *Francovich* para. 26.
- ⁸ *Ibid.* para. 35.
- ⁹ C. Haguenau *op. cit.*
- ¹⁰ *Ibid.* para. 40.
- ¹¹ Bull. EC 9/75 p. 19.
- ¹² See also A.G. Mischo's suggestion in *Francovich*.
- ¹³ Case 39/72 *Commission v. Italy* [1973] ECR 101 emphasis added; Case 309/84 *Commission v. Italy* [1986] ECR 599; Case 154/85 *Commission v. Italy* [1987] ECR 2717, Case C-249/88 *Commission v. Belgium* [1991] ECR I-1275. For Article 86 ECSC Treaty see Case 6/60 *Humblet v. Belgium* [1960] ECR 559.
- ¹⁴ Case 69/75 *Russo v. Aima* [1976] ECR 45, para. 9, Case 6/60 *Humblet v. Belgium* [1960] ECR 559; Case 106 to 120/87 *Asteris* [1988] ECR 5515.
- ¹⁵ N. Green & A. Barav, "National Damages in the National Courts for Breach of Community Law" (1986) 6 YEL 55.
- ¹⁶ M. Waelbroeck, "Treaty violations and liability of Member States and the EC: Convergence or Divergence" in D. Curtin, T. Heukels (eds.) *The Institutional Dynamics of European Integration*.
- ¹⁷ A.G. Tesouro para. 32 in *Brasserie du Pêcheur*. See fn 1, J. Coppel, "Rights, Duties, and the end of Marshall" (1994) 57 MLR 859.
- ¹⁸ Case C-32/93 *Webb v. EMO Air Cargo Ltd* [1994] ECR I-3567.
- ¹⁹ J. Steiner, "From direct effect to *Francovich*" (1993) 18 ELR 3.
- ²⁰ N. Reich, "Judge-made 'Europe a la carte': Some remarks on Recent conflicts between European and German Constitutional law provoked by the Bananas Litigation" (1996) 7 EJIL 103 at 111.
- ²¹ *Brunner v. The European Union Treaty (Maastricht-Urteil)* [1994] 1 CMLR 57 paras 49, 55 and 99, also Case 92/308 DC 9 April 1992, [1993] 3 CMLR 345; S. Weatherill *Law and Integration in the European Union*, and Chapter II for a discussion of the UK courts challenge of the ECJ authority.
- ²² C. Boch: "Home Thoughts from Abroad" in *In Search of New Constitutions Hume Papers on Public Policy* (EUP 1994), pp. 28-52.
- ²³ See J. Weiler, "The White Paper and the Application of Community Law" in Bieber & Others '1992: One European Market? at 347.
- ²⁴ P.P. Craig, "Francovich, Remedies and the Scope of Damages Liability" (1993) 109 LQR 595.
- ²⁵ The Green paper on reform of the CFP – COM (2001) 135 – contains another and up to date overview of the failings and failure of the exercise by the Community institutions of their exclusive competence in this field.
- ²⁶ Case 178/94 *Commission v. Germany* (Reinheitsgebot) [1987] ECR 1227.

- ²⁷ Although the provisions of the Merchant Shipping Act were only declared incompatible with Community law in Case C-221/89 [1991] ECR I-3905 on 25 July 1991, they were amended earlier following the Order of the Court to suspend the application of the Statute after the Commission's application for interim measures requiring such suspension.
- ²⁸ *Francovich* at p. 5368 quoting Case 158/80 *Rewe v. Hauptzollamt Kiel* [1981] ECR 1805.
- ²⁹ Where the German Government argued that a general right to reparation for individuals could only be created by legislation.
- ³⁰ Para 27, emphasis added.
- ³¹ An approach consistently applied in relation to Article 226 EC. In such actions, the ECJ has consistently held that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its Community obligations. The overall responsibility of each State for any failure to comply with Community law has always precluded the argument that the breach was brought about by another organ or institution of the State which is independent of the Government.
- ³² Para. 33.
- ³³ Para. 34.
- ³⁴ The Community institutions' omission to legislate falls within the concept of 'legislative activity'; Case 14/78 *Denkavit* [1978] ECR 2497.
- ³⁵ Case 77/69 *Commission v. Belgium* [1970] ECR 237.
- ³⁶ E.g. Case 128/78 *Commission v. UK* [1979] ECR 419.
- ³⁷ Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 62.
- ³⁸ Para. 39.
- ³⁹ Para 52.
- ⁴⁰ Case 6/60 *Humblet v. Belgium* [1960] ECR 559.
- ⁴¹ A principle which did not surprise many. J. Steiner in particular argued that the breakthrough in *Francovich* laid not so much in the fact that individuals were entitled to claim damages against the State, but in the fact that their claim to compensation was independent of the principle of direct effect, J. Steiner "From direct effect to *Francovich* (1993) 18 ELR 3 at p. 21.
- ⁴² Para. 20.
- ⁴³ Para 22.
- ⁴⁴ C-192/95 to C-218/95 *Société Comateb v. Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165.
- ⁴⁵ Case C-66/95 *R v. Secretary of State for Social security ex parte E. Sutton* [1997] ECR I-2163.
- ⁴⁶ Para. 27.
- ⁴⁷ Case C-261/95 *Palsimani* [1997] ECR I-1883 is a good case in point.
- ⁴⁸ So far C. Harlow's prediction of 'an illusion of remedy' in "*Francovich and the Problem of the Disobedient State*" (1996) 2 ELJ 199 at 222 seems accurate, and certainly was for Andrea Francovich.
- ⁴⁹ This is further discussed in Chapter 8.
- ⁵⁰ See Chapter 4.
- ⁵¹ See J. Jans, *European Environmental Law* (Kluwer 1995) pp. 187-189.
- ⁵² *Bowden v. South West Water Services Ltd* [1998] 3 CMLR 330.
- ⁵³ Respectively Directive 76/160/EEC, Directive 79/923/EEC and Directive 91/271/EEC.
- ⁵⁴ What happened to this claim is unknown.
- ⁵⁵ *Three Rivers DC v. Bank of England* [1997] 3 CMLR 429.

- ⁵⁶ *Francovich* para. 48.
- ⁵⁷ *Brasserie du Pecheur* para. 52.
- ⁵⁸ *Ibid.* para. 51.
- ⁵⁹ *Ibid* para 42.
- ⁶⁰ Para. 57.
- ⁶¹ Para. 56.
- ⁶² Para. 43.
- ⁶³ Case 5/71 *Zuckerfabrik Schoeppenstedt v. Council* [1971] ECR 975.
- ⁶⁴ Joined cases 83/76 and others *Bayereische HNL Vermehrungsbetriebe GmbH and others v. Council and Commission* [1978] ECR 1209, para. 6.
- ⁶⁵ Para. 45.
- ⁶⁶ *Bourgoin* [1986] 1 CMLR 267.
- ⁶⁷ [1997] 1 CMLR 971, paras 101-120, [1999] 3 WLR 1062; [1999] 2 All ER 640.
- ⁶⁸ Cases 106 to 120/87 *Asteris* [1988] ECR 5515, para. 18.
- ⁶⁹ *Steiner & Woods* 5th edition pp. 460-476.
- ⁷⁰ Wathelet & Rapenbuch, "La Responsabilité des Etats Membres en cas de violation du droit Communautaire: Vers un Alignement de la Responsabilité de l'Etat sur celle de la Communauté ou l'inverse?" (1997) *Cahiers de Droit Européen* 13.
- ⁷¹ Case C-5/94 *R v. MAAF ex parte H. Lomas* [1996] ECR I-2553.
- ⁷² For example by resort to Article 15 EC.
- ⁷³ M. Dougan, "Minimum Harmonisation and the Internal Market" (2000), 32 CMLRev 853; P. Slot, "Harmonisation" (1996) 21 ELRev. 378; S. Weatherill, "Beyond preemption? Shared competence and constitutional change in the European Community" in O'Keefe and Twomey (Eds.), *Legal Issues of the Maastricht Treaty* (Wiley, 1994).
- ⁷⁴ Provided for in Article 95 (4) EC.
- ⁷⁵ Article 8 of the Directive on Unfair Terms in Consumer Contracts provides that "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area provided by this directive, to ensure a maximum degree of protection for the consumer".
- ⁷⁶ The Protection of Young People at Work Directive provided that Member States should adopt the measures necessary to prohibit work by children. Yet, Article 4 (2) permitted this prohibition to be set aside in certain circumstances, e.g. for light work, and left considerable scope for differing national legislation. Furthermore, delayed implementation was possible for some Member States. Thus, the United Kingdom was permitted a further four years. Similar provisions were included in the Directive providing for a general right of information and consultation of workers.
- ⁷⁷ The Product Liability Directive includes a provision which states that "the producer shall be liable for damage caused by a defect in his product". The Directive also provides that Member States can decide whether or not a defence should be available. Accordingly Member States were free to decide whether or not to adopt a system of strict liability for producers. Article 7 of Directive 90/220/EEC now repealed by Directive 2001/18/EC on the deliberate release into the environment of GMOs provided that "where a Member State considers it appropriate, it may provide that groups of the public shall be consulted on any aspect of the proposed deliberate release". Thus Member States could, subject to respect for the other conditions laid down in the Directive, authorise a release of GMO without holding a consultation process.
- ⁷⁸ Respectively Articles 137 (5), 153 (5) and 176 EC.

- ⁷⁹ Case 83/78 *Redmond* [1978] ECR 2347, para. 56; Case C-1/96 *Compassion In World Farming* [1998] ECR I-1251, para. 41.
- ⁸⁰ Joined Cases 141/81 to 143/81 *Holdijk* [1982] ECR 1299, para. 12; Case 118/86 *Nertsvoederfabriek Nederland* [1987] ECR 3883, para. 12, and Case C-309/96 *Annibaldi* [1997] ECR I-7493, para. 20.
- ⁸¹ Case C-462/01, *Ulf Hammarsten*.
- ⁸² Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 [1996] ECR I-4845.
- ⁸³ Council Directive 90/314, OJ 1990, L158/59.
- ⁸⁴ C-392/93 *R. v. HMT ex parte BT* [1996] ECR I-1631.
- ⁸⁵ [1998] 1 CMLR 1353.
- ⁸⁶ [1998] 3 CMLR 192, at 215.
- ⁸⁷ [1999] 3 WLR 1062.
- ⁸⁸ Para. 65.
- ⁸⁹ [1997] 1 CMLR 971.
- ⁹⁰ *R. v. Secretary of State for the Home Department ex parte Gallagher* [1996] 2 CMLR 951.
- ⁹¹ Previously established by the ECJ in case C-175/94 [1995] ECR 4253.
- ⁹² Case C-46/93 & 48/93, para. 67.
- ⁹³ Para. 90.
- ⁹⁴ Para. 87.
- ⁹⁵ W. van Gerven, "Bridging the unbridgeable: Community and national tort laws" (1996) ICLQ 507 examines compensation for pure economic loss under the general rules on negligence in the Dutch, English, French and German systems.
- ⁹⁶ Para. 89.
- ⁹⁷ [1998] 1 CMLR 1353.
- ⁹⁸ *Brasserie du Pêcheur* para. 84.
- ⁹⁹ *Dillenkoffer* para. 73.
- ¹⁰⁰ J. Convery, "State Liability in the U.K. after *Brasserie du Pêcheur*" (1997) 34 CMLRev. 603.
- ¹⁰¹ J. Usher. "La sanction des Infractions au droit communautaire." FIDE 1992 pg 389 at 391.
- ¹⁰² Per Lord Denning MR in *Application dis Gaz v. Falsk Veritas* [1974] chap 381 and see Usher *op. cit.* at 392 and by Lord Wilberforce in his dissenting opinion in *Garden Cottage Foods v. Milk Marketing Board* [1983] 3 AllER 777 at 783.
- ¹⁰³ *Bourgoin v. MAFF* [1986] QB 716.
- ¹⁰⁴ *Bourgoin v. MAFF* [1986] QB 716.
- ¹⁰⁵ COM (2002) 625.
- ¹⁰⁶ Craig & de Burca, *EC Law* at 400.
- ¹⁰⁷ Para 41 of *British Telecommunications* or paras. 27-30 of *Hedley Lomas*.
- ¹⁰⁸ Although in *Brinkman*, the ECJ decided on causation.