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# The Principle of State Liability

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

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## Abstract

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The State liability principle has been established and developed through the case law of the European Court of Justice. These were revolutionary decisions in which the Court showed how dynamically it could develop Community law by interpreting the EC Treaty. It all started 1991 with the *Franovich* case in which the Court held that compensation to an individual suffering loss because of a breach of Community law by the State should be provided for as a matter of Community law. In order to justify the creation of the principle, the Court relied on the principle of effective and uniform application of Community law. This may be seen as an example of a new phase in the development of general principles, which strengthens the protection of individual rights even though the effectiveness of the system is the original idea behind the initial development. The principle has led to enhanced judicial protection of individual rights and could be the origin of a growing tendency towards a common tort law of Europe. Other similar principles could also be developed in the future. Considering the various and far-reaching effects of the State liability it is important to discuss whether the Court should use its power to develop general principles of this kind.

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## *Abbreviations*

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

# 1 Introductory points of departure

In the EU, individuals may today claim compensation from the State when it is held liable for a breach of Community law. This possible remedy has not always been available. The principle was laid down in the *Francoovich* case in 1991 and then further developed in a number of subsequent cases.<sup>1</sup> The case law that established the principle of State liability for breaches of Community law consists of some of the most important judgements that the European Court of Justice (ECJ) has delivered. Those were revolutionary decisions in which the Court showed how dynamically it could develop Community law by interpreting the EC Treaty<sup>2</sup>. The State Liability principle has had an important impact on ensuring the effective implementation of Community law and the protection of individual Community rights (the rights which persons or enterprises/companies can derive from Community law). Many discussions and writings regarding the State liability principle can be found in the doctrine.<sup>3</sup>

The purpose of this paper is to take a closer look at how the development of the State liability principle has enhanced the protection of individual Community rights and how it might continue to do so in the future. In order to discuss this subject, four different aspects will be investigated. First the paper will focus on the creation of the *State liability principle as a new kind of general principle*. It is important to understand the context in which the principle has been developed. Investigating this idea will give a better understanding of the principle itself and how new similar principles, which may have the same effect as the first by protecting Community rights, might be established in the future.

Secondly, the *establishment of the principle* and the conditions for liability to arise will be described. The following part will discuss *whether the State liability principle has affected the protection of Community rights* and how it might do so in the future. It is, for example, possible that the national and Community liability regimes could be harmonised, regarding the protection of Community rights, through the Court's case law. The paper will end with some concluding reflections.

## 2 The State Liability Principle in the light of General Principles of Community Law

There are two reasons for choosing to consider the State liability principle in the light of the general principles of Community law. First, State liability is a *new kind of general principle*. Compared to the “classic” general principles, such as the principles of proportionality and legitimacy, the creation of this general principle is something entirely different.

Secondly, the general principles of law play a fundamental role when dealing with non-contractual liability, both of the Community and the Member States. The area of tort law has not been harmonised in Community law. There are no directives or regulations determining when and how compensation is to be paid to individuals suffering loss from breaches of Community law. Article 288(2)[215(2)] EC<sup>4</sup> provides that the non-contractual liability of the Community shall make good any damage on its part *in accordance with the general principles common to the laws of the Member States*. The Court therefore relies on the general principles to establish the non-contractual liability of the Community and of the Member States. Hence, the Court developed the State liability principle by interpreting *Treaty provisions in the light of general principles of law*.<sup>5</sup> The increased application of various general principles by the European Court as well as by national courts in the Member States shows that they have a growing practical importance. In the process of EU integration and the expansion of activities falling within the competence of the European Union, common European principles are needed for the interpretation of the Treaty and for filling the gaps in new, unregulated areas. The development of common European legal principles could also lead to some kind of *jus commune*.<sup>6</sup> It would be good if the different Member States’ liability regimes were homogeneous regarding the protection of Community rights, not least due to the requirement of uniform application of Community law and the desire to protect individuals in the same way throughout the Community.

## General Principles of Community Law

The general principles of law that arise from the Treaties establishing the European Communities<sup>7</sup> and the legal systems of the Member States are an independent source of Community law. This has been achieved through the jurisprudence of the ECJ.<sup>8</sup> The Treaties originally had few if any standards against excessive encroachment of Community power upon the individual. This led the Court gradually to develop a body of general principles of law that exist in a *Rechtsstaat*. Among others, it has recognised the following principles as general principles of law: the protection of fundamental human rights, the principle of proportionality, the principle of legal certainty and the principle of protection of legitimate expectations, the principle of non discrimination, the right to a hearing, the rights of defence, transparency and access to documents.<sup>9</sup>

Once the principle has been established in Community law it may differ from the way it works in national law. The ECJ may apply a principle creatively, going further than national law. It can be extended, narrowed, restated or transformed during the “re-transplantation” as a general principle of Community law. Although these principles derive from the laws of the Member States, their content within the Community framework is determined by the distinct characteristics and needs of the Community legal order.<sup>10</sup>

The ECJ has recognised that the general principles of law are above secondary legislation in the hierarchy. They are indeed used to review and overrule acts adopted by the institutions. Whether they stand higher than the Treaties themselves is not as clear and different views have been expressed in the doctrine.<sup>11</sup> Although the general principles of law appear vague and general, the Court has deduced some very practical results from them.<sup>12</sup> It can rely on them as a legal basis for its judgments in the same way as on rules found in the written sources of law. They may be resorted to for the purpose of reviewing the legality or the validity of the acts of the institutions or interpreting and supplementing the provisions of the written Community law. Member States and Community institutions may also rely on them, once they have been established by the Court. As the general principles of law bind the Community institutions and, in many cases, also the public



authorities in the Member States, a breach of them may also give rise to tortious liability.<sup>13</sup> Whether they also bind private individuals is still an open question. So far the case law has not given an answer. The Court has been reluctant to accept that the general principles by themselves would impose obligations on individuals.<sup>14</sup>

Article 288(2) [215(2)] EC is the only article in the EC Treaties that expressly authorises the ECJ to apply general principles of law when deciding disputes submitted to it. General principles are also more recently recognised as a source of law with regard to fundamental rights in Article 6 para. 2 of the Treaty on European Union. As they are not regulated in the Treaty, the ECJ has developed and sometimes even “invented” general principles of Community law through a process of interpretation. It derives its power to apply general principles of law from Article 220[164] EC, which states that the Court of Justice shall ensure that, in the interpretation and application of the Treaty, the law is observed. The “law” that has to be observed seems to include not only what is laid down in the Treaties but also general principles and fundamental values embodied in the national constitutional traditions of the Member States.<sup>15</sup> As the ECJ has an exclusive power to interpret EC law with final binding authority, it is the only institution that can define the general principles of Community law. By relying on the general principles it can develop a notion of the rule of law appropriate to fill obvious gaps in the body of the law.<sup>16</sup> However, it has been argued that the Court sometimes goes too far in its interpretations and regulates areas that should be encompassed by the procedural autonomy of the Member States. The question is whether the Member States have empowered the Court to rely on general principles in order to extend the scope of application of Community law.<sup>17</sup> It can be hard to decide where the limit beyond which the Court cannot use these general principles should be drawn. In any case, the limits of the Community’s powers are more or less determined by the objectives pursued by the Treaty and the general principles can of course only be resorted to within that area.<sup>18</sup>

## State Liability - a New Kind of General Principle?

The State liability principle is a general principle that focuses on a new area. The earlier principles are based on the judicial traditions of the Member States and were usually developed in order to strengthen the rights of individuals. The State liability principle is, however, not based on the national laws of the Member States. Instead, the Court relied in the *Franovich* case<sup>19</sup> on the fundamental principle of effective and uniform application of Community law to justify the creation of Member State liability as a rule of Community law. It stated that the full effectiveness of Community rules would be impaired and that the protection of the rights which they grant would be weakened, if individuals were unable to obtain redress when their rights were infringed by a breach of Community law for which a Member State can be held responsible.<sup>20</sup> Although effectiveness was the key word, the establishment of the principle also led to stronger protection of individual rights. This may be seen as an example of a new phase in the development of general principles, which strengthens the protection of individual rights even though the effectiveness of the system is the original idea behind the initial development.

This approach was criticised by some Member States in the following case where the State liability principle was further developed, *Brasserie du Pêcheur*.<sup>21</sup> The German government argued that a general right of reparation for individuals could be created only by legislation. In its opinion another method would be incompatible with the allocation of powers between the Community institutions and Member States.<sup>22</sup> The Court dismissed that argument and held that the existence and extent of State liability for a breach of Community law is a question of interpretation of the Treaty which falls within the jurisdiction of the Court.<sup>23</sup> However, the Court based its decision in addition on “a general principle familiar to the legal systems of the Member States”. It stated that “*the principle of the non-contractual liability is simply an expression of the general principles familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused*”.<sup>24</sup> The Court still did not succeed in identifying the basis for State liability with sufficient clarity. Although it made a reference to principles common to the laws of the Member States, the principle

cannot be found there but rather in the distinct nature of Community law and the principle of supremacy.<sup>25</sup> However, by locating the principle of State liability to the only Treaty article that is expressly based on the general principles common to the Member States, the Court's reasoning brings to mind the way it earlier had introduced the idea of fundamental rights and general principles of law into Community law.<sup>26</sup>

The idea of paying compensation to the one who has suffered damage from a breach of law is of course known both in international and national law. Within the framework of international law, it is usually referred to as State responsibility. One State can be held liable towards another for the non-observance of obligations imposed on them by the international legal system.<sup>27</sup> International law does not, however, provide a possibility for individuals to claim damages. Whether a State may be liable for damages towards an individual for overriding its powers is also regulated in various ways in the national legislation of the Member States.<sup>28</sup> However, as Advocate General Léger stated in the *Hedley Lomas* case, there are no general principles that are truly common to the Member States as far as State liability for legislative action is concerned.<sup>29</sup> In many legal systems there is even a lack of such rules.<sup>30</sup> Before the *Franovich* judgment, nor could a State be held liable to pay damages for a loss caused to individuals by its breach of Community law. Therefore the establishment of State liability could be viewed as a *new kind* of general principle.<sup>31</sup> In contrast to the other general principles adopted by the Court this principle was not derived from the legal systems of the Member States as it does not exist in all Member States, at least not in the form it has been transformed into in Community law.

I wish to emphasise the importance of giving the State liability principle the status of being a general principle of law. Other principles that in general are not recognised in the Member States legal systems, such as the subsidiarity principle, are also not normally classified as general principles of EC law. However, the case law of the ECJ does not suggest that Member States should be strongly bound by the subsidiarity principle.<sup>32</sup> Contrary to that, the Court has in its case law clearly stated that the Member States are obliged to provide for the State liability principle in their national legal systems regarding violations of Community law. The influence of the State liability principle within EC law also speaks for the fact that it is a general principle of law.

The difference between general principles and specific rules is that general principles stand above secondary legislation. The fact that there is no Treaty article regulating State liability could make the principle less efficient if it was considered to be only a rule. Although such an article may be introduced in the future, this classification is still important for further development in the field of the remedy of compensation and generally in the field of judicial protection of individual EC rights. The principle is also more flexible to apply as an unwritten principle. General principles can be relied upon to supplement and refine Treaty provisions and thus have a gap-filling function. As a general principle of its own, it can now, for example, be relied on in the harmonisation process of national laws. National measures that implement Community law should also be interpreted in the light of the general principles. This means that a national court must interpret a provision of national law, which falls within the scope of Community law so as to comply with the State liability principle. Member States may most probably be liable for damages when failing to observe general principles of law. The State liability principle thus first provides for that possible remedy and then secondly, as a general principle, individuals could obtain compensation if it is violated.

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

### 3 Establishment of the State Liability Principle

The establishment of the State liability principle was the beginning of a new chapter in the field of enforcement of Community rights in the national jurisdictions.<sup>33</sup> It is, however, important to keep in mind that tort liability only is one aspect of the Community scheme of judicial protection. That protection finds its origin in the doctrine of direct effect, giving individuals the right to enforce sufficiently clear and unconditional Community provisions in national courts. Thus, rights that individuals derive from Community law may be invoked before national courts. That possibility is, however, quite useless unless sanctions and remedies are available for the enforcement. To strengthen the protection of individual rights, the Court therefore has required national courts to provide for adequate remedies for a breach of Community law. It developed remedies with the involvement of the national courts by balancing the need to respect the autonomy of the national legal systems and the need to ensure adequate enforcement and effectiveness of EC law.<sup>34</sup>

Setting aside a national rule or rendering it inapplicable because of a conflict with Community law is the foremost and most general remedy that national legal systems should ensure for individuals harmed by a breach of Community law. In addition to this remedy the Court developed the more specific remedies of restitution, interim relief and compensation.<sup>35</sup> The latter one concerns compensation to individuals who have suffered a loss as a consequence of a breach of Community law. Today there are two regimes of extra-contractual liability in Community law. The first regime governs the liability of Community institutions and their servants. Its legal basis is found in Article 288(2)[215(2)] EC. The second regime is a judge-made law that relates to the tortious liability of Member States for breaches of Community law.

## The *Francovich* Case

The State liability principle has been established and developed through the case law of the ECJ. The first time that the ECJ fully addressed the question of State liability for a breach of Community law was in its landmark decision in the *Francovich* case, which was delivered on 19 November 1991.<sup>36</sup> It arose out of Italy's failure to implement Council Directive 80/987 in due time. The directive is designed to guarantee employees the full payment of wages if their employer becomes insolvent. Andrea Francovich and several other employees suffered a great loss as a result of their employer's bankruptcy. Because the directive was not implemented in Italian legislation, they could not enjoy the protection that Community law was to provide for them. Therefore they sued the Italian State, claiming that it was liable to pay them the sum they would have obtained had the directive been in force. The Italian court sought a preliminary ruling under Article 234 [177] EC. The two most important questions put to the ECJ were whether the Italian State had to pay the sum because the provision in Directive 80/987 was directly effective, or whether the individual could claim the sum from the State as damages for a loss arising from its failure to implement the directive.<sup>37</sup>

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

- the result required by the directive should involve rights conferred on individuals,
- the content of those rights must be clearly identifiable from the directive and

- a causal link between the breach of the State's obligation and the loss suffered by the individuals must exist.

The Court held that procedural rules to enforce individual EC rights against the State were to be determined by national law. It required, however, that the principles of effectiveness and non-discrimination were taken into account. This meant that national rules must not render the reparation virtually impossible or excessively difficult and thus cannot be less favourable than those relating to similar national situations.<sup>38</sup>

The establishment of the State liability principle had a great impact on the effective protection of individual EC rights. The principles of direct and indirect effect could not alone ensure the full and effective enforcement of Community law. This is especially true for directives, which are unable to create a horizontal direct effect although they are unconditional and sufficiently precise. Action against the State for damages is, however, independent of the principle of direct effect. It is not based on the infringement of effective Community provisions but on the State's failure to act in accordance with its obligations under Community law. Through the State liability principle, compensation is provided for as a matter of *Community law* and not as an optional national remedy.<sup>39</sup>

### The *Brasserie du Pêcheur* Case

The *Franovich* case established the State liability principle but left several questions concerning the criteria for the application of the principle open. It was not until in the judgment of the joined cases *Brasserie du Pêcheur and Factortame III* (often referred to as *Brasserie du Pêcheur*),<sup>40</sup> delivered in March 1996, that the ECJ answered some of them. The Court was here for the first time asked to judge upon the application of the principle of State liability for a breach of a directly effective provision of the EC Treaty.<sup>41</sup> Besides deciding on that matter, it also clarified the conditions for holding a State liable for breaches of Community law and discussed the actual extent of the reparation. The case law that concerns questions related to the

substantive and procedural issues concerning a claim for damages will be examined later in chapter 4.

In both cases the claimants sought damages from the State for the loss that the existence of the unlawful provisions had caused them. Therefore the first question that the Court answered was whether the State liability principle also obliged the Member States to compensate damage caused to individuals when the *national legislature* was responsible for the infringement in question. Some of the national governments claimed that, according to the principle set out in the *Francovich* case, the action for damages would only be available for non-directly effective directives.<sup>42</sup> This argument was rejected by the ECJ. Instead it held that the right of individuals to rely on directly effective provisions of Community law in their national courts only gave a minimum guarantee of protection.<sup>43</sup> It then stated that the State liability principle is a general principle applicable to all cases where a Member State infringes Community law, irrespective of whether the breach concerns a provision of the EC Treaty, a regulation or the implementation of a directive. The Court continued by stating that the State will be liable irrespective of which organ of the State that is responsible for the breach and regardless of the internal division of powers between constitutional authorities.

Another important aspect that the ECJ addressed in *Brasserie du Pêcheur* was the specification of the conditions under which State liability can arise. The Court first stated that the conditions for liability depend on the nature of the breach of Community law.<sup>44</sup> It then made a reference to Article 288(2)[215(2)] EC and the Court's case law on non-contractual liability on the part of the Community. It held that the rights of individuals should be protected similarly, irrespective of whether it is a national or Community authority that is responsible for the infringement. Making a parallel between Community and State liability means that the conditions for State liability to arise should also differ depending on the situation in which the wrongful act was taken. Thus, a restrictive approach to the liability of the State, according to the *Schöppenstedt* test,<sup>45</sup> was to be applied when the national authority acted in a field where it enjoyed a wide discretion, comparable to that of the Community institutions, in implementing Community policies.<sup>46</sup> In such circumstances the following conditions had to be fulfilled:



- the rule infringed must be intended to confer rights on individuals,
- the breach must be sufficiently serious and
- there must be a causal link between the breach and the damage.<sup>47</sup>

It is in order not to hinder the exercise of the legislative function that a less strict test is being used for acts characterised by a wide discretion.<sup>48</sup>

*Brasserie du Pêcheur* broadened the concept and clarified the basis of the principle of State liability. After this judgment, no important change in the State liability concept has occurred. However, the case law following *Brasserie du Pêcheur* has specified the principles established therein.

## Sufficiently Serious Breach

In most cases, the crucial question when deciding on State liability for a breach of Community law will be whether the infringement is *sufficiently serious* or not. When the Member State concerned has no or very little discretion, an infringement of Community law will easily constitute a sufficiently serious breach. However, in cases where the discretion is wider, it will take more before a breach is regarded to be sufficiently serious. This requirement makes it more difficult for applicants to succeed when the State infringes Community law in situations where it enjoys a wide discretion. Tesauro, Advocate General in the *Brasserie du Pêcheur* case, did recognise this aspect in his Opinion when he proposed that Community liability and State liability should be determined according to the same conditions. Despite that, he still held that the conditions for liability on the part of the Community and the Member States should be harmonised. In his opinion, according to the rule of law, the compensation that an individual can obtain for a breach of Community law should not depend on whether it was the Community or a Member State that committed the breach.<sup>49</sup>

What is then considered to be a *sufficiently serious* breach? In the *Brasserie du Pêcheur* case,<sup>50</sup> the ECJ found that a breach of Community law was sufficiently serious when the Member State “*manifestly and gravely disregarded the limits on its discretion*”. Moreover, it held that the limit of discretion is gravely disregarded if a prior Court judgement, finding an infringement of

EC law, exists. Such a prior judgement is not, however, necessary for an individual who wishes to claim that an act or omission of the State constitutes a breach of Community law.<sup>51</sup> The gravity of the infringement must be established by the national courts. To provide guidance for what a national court should take into consideration when deciding whether a breach is sufficiently serious, the ECJ enumerated the following factors:

- the clarity and precision of the rule breached,
- the measure of discretion left by that rule to the national court,
- whether the infringement and the damage caused was intentional or involuntary and
- whether any error of law was excusable or inexcusable.<sup>52</sup>

The Court also held that the finding of a serious breach might involve objective and subjective factors that are connected with the concept of fault.<sup>53</sup> However, the conditions that give rise to liability do not depend on the examination of a fault criterion but on whether or not a sufficiently serious breach has been committed.

The use of the criterion of a *sufficiently serious breach* has been criticised. It is, of course, necessary to balance the need to ensure effective remedies for the enforcement of Community law and the interest of not holding public authorities liable for all acts contrary to Community law. The prospect of damages for strict liability could hinder Member States from performing their legislative and executive functions. Public bodies could for example become wary of taking any action without seeking legal advice. Thus, it is understandable that when the State enjoys a wide discretion, the requirements for holding it liable will be higher. On the other hand, the effective protection of individual rights could diminish if the *sufficiently serious* criterion meant that, in practice, it will be very hard for an applicant to obtain damages in these situations. Van Gerven has, for example, proposed the use of the standard of *how a normally (or reasonably) diligent authority would have acted under the circumstances*, which he thinks that national courts could adopt more easily and understandably as they are more familiar with this concept than with the criterion of a *serious breach*.<sup>54</sup>

The case law on State liability delivered in the past few years has mostly concerned questions of how to determine whether a sufficiently serious breach has been committed or how to decide whether there is a causal link

between the breach and the sustained loss. I agree with those who hold that the scope of application of the serious breach test should be clarified. If the same test is applied to both acts of Community institutions and acts of Member States, it is essential that it is only employed in situations where the State really does enjoy a wide discretion to act. Although the ECJ has stated that this is a question for national courts to determine, it has continued to examine those questions several times.<sup>55</sup>

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

An infringement of a binding EC rule that confers rights on individuals and is clearly identifiable can lead to State liability. Until now, the ECJ has held Member States liable for infringements of rather specific rights which relate to claims for unpaid wages, powers to terminate a contract or immunities from the rules on public procurement.<sup>56</sup> As already stated above, the rule infringed does not have to be directly applicable. Both breaches of Treaty articles or provisions of secondary legislation can constitute liability for damages. It should also be possible to hold a Member State liable in damage for an infringement of a general principle.

Many cases regarding the liability of the Community concern a breach of a general principle. So far, some claims for loss suffered due to a breach of the principle of respect for legitimate expectations, have been successful.<sup>57</sup> In most cases concerning a breach of a general principle, the action has, however, been dismissed. There has been no successful action in damages for a breach of fundamental rights or the principle of proportionality.<sup>58</sup> No case law yet exists in which a Member State has been found liable to compensate an individual due to a breach of a general principle of Community law. However, in *Brasserie du Pêcheur* the Court held that the rights of individuals should be protected similarly irrespective of whether a national or Community authority is responsible for the infringement. Therefore it has been held that the State liability for breaches of Community law should also include infringements of general principles.<sup>59</sup> It has also

been discussed whether an individual can hold a Member State liable for the breach of an international agreement. It might be possible in certain cases but the ECJ is still in the process of defining its judicial policy on such liability.<sup>60</sup> Everything depends on what the ECJ will include in the concept of “rights granted to an individual”.

As already mentioned above, the ECJ made clear in *Brasserie du Pêcheur* that the State will be liable irrespective of what organ of the State that is responsible for the breach and regardless of the internal division of powers between constitutional authorities. Thus, liability can be imposed on the State for a breach by the national administration, legislature or the judiciary.<sup>61</sup> The term *judiciary* includes the courts and other judicial bodies fulfilling the requirement of Community law. The ECJ has in its case law considered the liability of the administrative (executive) and the legislature. It has not, however, yet considered the liability of the judiciary.<sup>62</sup> As we all know, Community law is supreme in the event of a conflict with national law and Member States shall take all appropriate measures to ensure fulfilment of their obligations according to the Treaty. Indeed, all public bodies, including the national courts, must respect Community law. Therefore they can be held liable when breaching it. Still, many are accustomed to judicial immunity from such liability as national courts often are prevented by their own law from awarding damages in these instances.<sup>63</sup> Thus, a national court may be reluctant to hold the judiciary liable for breaches of Community law. In the doctrine it has been held that the ECJ probably would be careful in holding the judiciary liable, in order not to obligate the Member States to seek preliminary rulings under a threat of liability for damages.<sup>64</sup> In order to understand the scope of administrative liability, the ECJ will need to clarify which bodies that are included within that concept.

## Conclusions

I will conclude this chapter by making a general summary in order to clarify the scope of the State liability principle as it stands today.

- *All types of infringements by the State are actionable.* Thus, a Member State can be held liable for a breach of Community law for infringements by the national legislature, the national administration and the judiciary.
- *The infringement must concern a binding EC rule.* Whether or not a provision has direct effect is not relevant. As long as it confers rights on individuals, which are clearly identifiable, a breach can lead to State liability.
- The State liability principle is applicable *irrespective of which organ of the State that commits the act or omission is responsible for the breach.* A Member State cannot, therefore, escape liability by pleading the distribution of powers and responsibilities between the bodies that exist in its national legal order or claiming that the public authority responsible for the breach of Community law did not have the necessary powers, knowledge, means or resources.
- In order to hold a State liable, *the infringement must comply with the following three conditions:* The rule infringed must be intended to confer rights on individuals, the breach must be sufficiently serious and there must be a causal link between the breach and the damage.
- These conditions are applicable to legislative actions and most probably also to administrative and judicial actions.
- In order to determine whether an infringement of Community law constitutes a *sufficiently serious breach*, a national court hearing a claim for reparation must take account of all factors, which characterise the situation put before it. It should also take into consideration the clarity and precision of the rule breached, the measure of discretion left by that rule to the national court, whether the infringement and the damage caused was intentional or involuntary and whether any error of law was excusable or inexcusable.
- The question of whether a right to compensation exists shall be determined according to the rules of Community law. However, *when ordering the compensation, the national court shall apply national rules of procedural law and national rules on liability for damages.* The national legal system must, however, comply with certain requirements established by the Court.

## 4 Effects of the Establishment of State Liability for the Protection of Individual EC Rights

### Private Enforcement

In order for individuals to enjoy their EC rights, it is important that Community law is fully implemented in the Member States. One of the Commission's main responsibilities is to supervise that rules are uniformly and properly applied in all the Member States.<sup>65</sup> According to Article 211[155] EC, the Commission shall “*ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied*”. When a Member State has failed to fulfil its obligation under Community law, the Commission can deliver a reasoned opinion under Article 226[169] EC that the State should comply with. If the State refuses to do so, the Commission can bring the matter before the ECJ. The Commission does not, however, have any obligation to sue a Member State. It can choose in which cases it finds it appropriate to take action.<sup>66</sup> As the Commission is a political institution, its actions are usually characterised by political considerations.<sup>67</sup>

Apart from the direct supervision carried out by the Commission, Member States' breaches of Community law are also supervised indirectly through the doctrine of direct effect and the possibility of requesting preliminary rulings under Article 234[177] EC. In practice, this indirect way of supervising the States is the most important instrument to ensure that Community law is applied correctly. The Commission's supervising role under Article 226[169] EC has become more selective over the years. According to one opinion expressed in the doctrine, the changing role of the Commission is a sign of a new development of the system of supervision

of Community law. Thus, the Commission's role in ensuring that Member States comply with Community law might diminish, leading to an increased supervision by what might be called "private enforcement".<sup>68</sup>

The State liability doctrine has had a significant impact on this development. It has guaranteed the protection of EC rights in a new way by adding an financial dimension to the system of remedies. The possibility to obtain damages will of course lead individuals to sue the State to a greater extent. Supervision of Community law by "private enforcement" will therefore probably increase. This "new order" could lead to a system where the Commission's responsibility as a supervisor is more of a political nature. Thus, the main responsibility for supervising the observance of Community law by the Member States would rest on the individual.<sup>69</sup> This view is, however, somewhat speculative. Still, a good example of it is provided by the Swedish case, *Volvo-service (Dick Edvinsson v Staten)*, described below.

## Impact of the State Liability Principle on National Legal Systems

In the *Brasserie du Pêcheur* case, the ECJ referred to principles common to the different legal systems when trying to identify the basis for establishing State liability.<sup>70</sup> It is, however, not always altogether clear whether individuals may claim damages under the Member States' national legislation when the State has breached the law. The EC State liability doctrine can therefore give individuals a much wider and stronger possibility to obtain damages from the State in cases where it has breached Community law than when it has breached national law.

In order to understand the impact that the State liability principle has had on the protection of individual EC rights, it is important to examine the protection against unlawful conduct of public authorities, provided for in the domestic legal systems of the Member States. Today, all Member States have rules on the liability of public authorities for a loss inflicted through fault or negligence in the exercise of public powers.<sup>71</sup> It seems to be an inherent principle in most Member States that the State can be held

liable for actions by its administrative institutions. It is, however, not so clear whether liability for legislative or judicial action exists. The conditions under which such liability may arise are often very severe and in some Member States, it practically does not exist at all. In many states it is impossible to impose liability upon a state for acts and omissions of the national legislature. In some countries such liability has in practice been excluded by virtue of national law (e.g. Belgium, the United Kingdom, Finland and Sweden). In other countries it is possible to hold the legislator liable but only under very strict conditions (e.g. Germany, Spain and Italy).<sup>72</sup> Thus, the possibility for an individual to bring action because of a fault in a decision by a court or the legislator can differ considerably from one Member State to another.

Within a Member State, there are often good reasons not to allow liability for legislative and judicial action. The lack of such rules may nevertheless be detrimental to the judicial protection of individual rights. On the other hand, according to the division of power within the State, Parliaments and courts of law cannot be subject to outside control within the State. The basis of Community law is, however, founded on a different concept that aims at ensuring the effective implementation and equal application of EC law. Therefore it needs to have means at its disposal other than those provided for in national laws. By establishing Member State liability for breaches of Community law, the ECJ has established its own system for the purpose of deciding which issues public authorities can be held responsible for. As already stated, this development has not only led to a more effective and uniform application of EC law but also enhanced the protection of individual EC rights. To use the words of Matthias Herdegen, "*the ECJ has, through its bold judgements on liability, made an important contribution towards weeding out anachronistic features still prevailing in many administrative laws*".<sup>73</sup>

In order to show the impact the State liability principle has had on national legal systems the State liability in Swedish legislation will first be examined. Then an overview of the situation in three other Member States, France, the United Kingdom and Germany, will be given. Both passages will focus on the recognition of liability for legislative or judicial acts or omissions by these national legal systems, since State liability for breaches of Community law and State liability for breaches of national provisions differ mostly from each other regarding these actions.



## Sweden

The Swedish rules on the non-contractual liability of the State are found in the Tort Liability Act that holds that the State and other public bodies shall compensate damage caused by fault and negligence in the exercise of public powers.<sup>74</sup> This general rule is, however, not applicable to all actions of public authorities. The Tort Liability Act *excludes the possibility to claim damages for measures of the national legislature and the supreme courts* (the Supreme Court and the Supreme Administrative Court).<sup>75</sup> In practice, this provision has not had great significance since it is very rarely used. The reason it is still included in the Tort Liability Act has its origin in the Swedish Constitution and its lack of separation of powers. According to that order, the judiciary power to examine the legislator should be very limited. Another reason to exclude the possibility to claim damages from the Supreme Court is the lack of a suitable institution that could decide on matters of that kind. The provision does not, however, create an absolute obstacle for the injured individual. There are possibilities to use extraordinary remedies, such as review in a new trial.<sup>76</sup>

In 1996 the Swedish Department of Justice established a special Commission (hereinafter referred to as the Swedish Commission) to analyse the question of the non-contractual liability of the State and local authorities for breaches of EC law. It found that the provision stating that the legislator and the supreme courts could not be held liable for damages was contradictory to the EC doctrine on State liability.<sup>77</sup> The ECJ had indeed dismissed the application of national rules that excluded compensation for legislative acts or omissions. The Swedish Commission therefore suggested that this rule in the Tort Liability Act should be repealed. This opinion was also expressed in the doctrine.<sup>78</sup> However, the proposal of the Swedish Commission did not lead to any amendments in the Swedish Tort Liability Act. This did not, of course, limit the right to claim damages for a breach of EC law in accordance with the conditions set by the ECJ.

After the *Francoovich* case, the Swedish State has been held liable in many cases for a breach of Community law.<sup>79</sup> In Sweden, an individual who wants to claim damages from the State can either sue it in court or demand compensation from the Chancellor of Justice (JK).<sup>80</sup> The Swedish State has so far mainly been held liable for *failing to implement directives correctly*. The

wrongful implementation of Council Directive 80/987, on the protection of employees in the event of the insolvency of their employer, led to many claims of damages that were admitted.<sup>81</sup> In another case the State was found liable for the incorrect implementation of a directive in the field of taxes.<sup>82</sup>

The enactment of legislation contrary to Community law has also led to claims for damages against the Swedish State.<sup>83</sup> The liability of the Swedish State for *judiciary acts* has recently materialised in a case where the Supreme Court did not apply for a preliminary ruling although it probably should have done so.<sup>84</sup> I have not found any cases decided in Sweden or in other Member States where this aspect of State liability has been reviewed before. The decision of the Chancellor of Justice will therefore be very important and interesting. Because of the importance of this case it will be examined in more detail.

In the *DS Lam v Volvo* case (hereinafter referred to as the *Volvo service* case),<sup>85</sup> Volvo sued a company, *DS Lam* for offering “Volvo service” although it was not authorised by Volvo to repair their cars. The question was whether this behaviour was permitted or not under the Council Directive to approximate the laws of the Member States relating to trade marks (the trademark directive).<sup>86</sup> The Swedish Supreme Court had to decide whether the use of the name Volvo, in this case, fell within an exemption provided for in Article 6 of the trademark directive. The plaintiff requested the Court to seek a preliminary ruling regarding this interpretation. It interpreted the Article without seeking a preliminary ruling and came to the conclusion that *DS Lam* had infringed the Volvo trademark. Some months later, the ECJ answered a preliminary ruling that concerned a similar issue in Austria, the *BMW* case.<sup>87</sup> In that case, the exemption in Article 6 was, however, interpreted differently.<sup>88</sup> The ECJ found that the use of a trademark, such as in the *Volvo service* case, is permitted under the Directive unless the proprietor of the trademark had suffered *serious damage*. In the *Volvo service* case, Volvo never held that the damage was of a serious nature.

Thus, the outcome for *DS Lam* would have been completely different if the Supreme Court had requested a preliminary ruling or, at least, had waited and decided the case after the preliminary ruling concerning the same issue had been delivered. Unfortunately the judgement partly led to the bankruptcy of *DS Lam*. The managing director, *Dick Edvinsson*, was held to be personally liable. He complained to the Chancellor of Justice

(JK) and contended that the Supreme Court had breached Community law by not requesting a preliminary ruling although it was unclear how the trademark directive should be interpreted.<sup>89</sup> The Swedish State should therefore be held liable for the damage he suffered as a result of the judgement by the Supreme Court. In the doctrine, the Supreme Court has been criticised regarding this case.<sup>90</sup>

The *Volvo service* case is unique since we know that the ECJ would have interpreted the matter differently and that this would have led to another result for the defendant. According to the conditions laid down in the *CILFIT* case<sup>91</sup>, the court does not have to request a preliminary ruling when there is no reasonable doubt as to how a Community provision should be interpreted.<sup>92</sup> In this case, reasonable doubt existed, at least because an Austrian court brought a similar case into the ECJ at the time the Supreme Administrative Court made its decision. In order for the Supreme Administrative Court to exclude all reasonable doubt, it should have waited for the ECJ to give its answer regarding the *BMW* case. It did nevertheless not do so. Instead it delivered its judgement a couple of months before the ECJ made its decision in the *BMW* case. Therefore it is reasonable to hold that a breach of Community law was committed. The State should be liable for damages caused by this failure if the conditions set out by the ECJ regarding State liability are fulfilled. The question will probably be whether the violation was sufficiently clear and serious or not. A Supreme Court does not enjoy a wide discretion when deciding that it does not need to ask the ECJ for guidance in interpreting Community law. The conditions laid down in the *CILFIT* case are rather restrictive and demanding as regards whether a court can decide that the matter concerns an *acte d'aire*. Considering the narrow extent of the discretion in this case, the requirement under the State liability criteria for a sufficiently serious breach is less strict.

If the Chancellor of Justice finds that the Swedish State is liable for the breach, committed by the Supreme Court, it will be a very important step towards an enhanced judicial protection of individual EC rights. For the first time, at least as far as I know, a Member State will be held liable for a violation of Community law for infringements by the national judiciary. If the Chancellor does not find that a violation has been committed, the situation will be quite awkward. Edvinsson will then probably sue the State in a national court.<sup>93</sup> That would mean that a court of first instance has to

decide whether or not the Supreme Court has breached Community law. If the case goes as far as to the Supreme Court, it has to decide itself whether its earlier actions were justifiable. One can ask whether this scenario provides for a fair trial?

The actions taken by Edvinsson in this case are a good example of how the possibility to claim damages for a breach of Community law results in a better protection of individual Community rights. It also illustrates how the Member States' obligation to respect Community law is being supervised by individuals, as described above.

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

In *French tort law*, public authorities are liable whenever an administrative action is found to be unlawful. However, an Act of Parliament can only lead to fault-based liability in certain circumstances. French law is also reluctant to recognise liability of the State for judicial acts. The possibility does exist but only in cases where there is gross negligence by the judicial power or denial of justice by the civil courts.<sup>94</sup> According to the French government, French courts have through their case law made French law compatible with the State liability doctrine set out in the case law of the ECJ. However, although breaches of Community law can raise fault-based liability for legislative acts, the Conseil d'État is reluctant to declare Acts of Parliament to be in breach of EC provisions.

In *English law*, the tort rules concerning public authorities are by large the same tort rules as those applicable to individuals.<sup>95</sup> They are based on fault or negligence and breach of statutory duty.<sup>96</sup> All negligent State action does not, however, give rise to liability for the State. Liability for wrongful legislative or judicial acts is exceptional. Acts of Parliament enacted within the sovereign power of Parliament cannot give rise to liability. Parliamentary supremacy is a characteristic feature of the British constitutional system. It means that courts do not have the power to review the compatibility of a law with some other legal document and set aside acts of Parliament. This constitutional feature dates back to a time when the law was to a large

extent developed by the courts through the Common law system, which was the most important source of law.<sup>97</sup> Today, however, written legislation has become a main source of law in the UK. When Parliament regulates new areas without being subject to any outside control, the interest of the individual can of course be harmed.

The influence of EC law has led to a restriction of parliamentary supremacy as showed in the *Factortame I* case,<sup>98</sup> when an English court for the first time refused to apply an Act of Parliament. Because of Community law, provisions of Parliamentary act, which are in conflict with directly applicable Community law, may now also give rise to liability.<sup>99</sup> The principle of parliamentary supremacy was also modified by the enactment of the Human Rights Act in 1998, through which the ECHR is incorporated into English national law to a large part. Although this Act does not give the courts the power to strike down legislation it allows them to report to the Parliament that a certain law violates the ECHR.<sup>100</sup> According to Nergelius in his article *Parliamentary Supremacy Under Attack*, this development “*may serve to illustrate tendencies of general interest in the contemporary constitutional development*”.<sup>101</sup> Although the judgments on State liability from the ECJ were not the reason behind the enactment of the Human Rights Act, it is fair to believe that they have contributed to a change of the whole legal environment in the UK in a way that has led to a new view on Parliamentary supremacy. The impact of EC law, ECHR and the enactment of the Human Rights Act have together changed the relation between the courts and Parliament in the UK and enhanced the legal position of the basic individual rights. Liability for judicial actions may arise under English law but only under the exceptional circumstance when judicial officers have acted in bad faith, knowing they have no jurisdiction.<sup>102</sup>

In contrast to English law, *German law* contains separate liability rules concerning civil servants (including members of the judiciary) and other public bodies for breaches of official duty committed by their officials. Nor does it automatically exclude the liability of the legislature. However, the German State will only be responsible if the act or omission is referable to an individual situation. It means that a special relationship between a specific person (or a group of persons) and the infringed official duty must exist in order for liability to arise. This requirement normally excludes liability for wrongs committed by the legislature as enactment of legislation normally concerns general and abstract rules. It is therefore not compatible with

Community law.<sup>103</sup> The ECJ stated in the *Brasserie du Pêcheur* case that this condition would in practice make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law. That is because the measures Community law usually obliges national legislature to take, relate to the public at large and not to identifiable persons or groups of persons.<sup>104</sup> Liability for judicial acts exists but arises only when the breach of duty committed by the judicial officer constitutes a criminal offence.<sup>105</sup>

### *Conclusions*

In the *Brasserie du Pêcheur* case, the ECJ dismissed the application of national rules that excluded compensation for legislative acts or omissions.<sup>106</sup> It also stated that national rules such as the German rule, allowing compensation only if the legislative body was under a duty towards the plaintiff, and the English rule, requiring proof of misfeasance in public office for liability to arise even though such misuse of power might be impossible to prove in the case of the legislature, could prevent individuals from deriving the full benefits of the Community law.<sup>107</sup> As far as I know, the *Francovich* case and subsequent judgements have not yet led to any legislative measures in the Member States. Claims for compensation have, however, been put forward by individuals against States after they have suffered damage from infringements of EC rules.<sup>108</sup>

The ECJ made it clear in the *Brasserie du Pêcheur* judgment that the Member States are obliged to make good damage caused to individuals by *all* violations of Community law, including infringements by legislative or judicial acts.<sup>109</sup> As we have seen, State liability for legislative and judicial acts does not exist or is only recognised in certain circumstances under Swedish, French, English and German law. Thus, the ECJ judgments on State liability have had an important impact by recognising liability for these acts when they infringe Community law. So far, there have been several cases in the Member States where the State has been found liable for a breach of Community law by a legislative act. As far as I know, State liability has not yet been recognised in a case where a State has been found liable for damages because a national court has negligently misapplied

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

## Influence of Community Law on National Tort Laws

Although the Member States in general comply with the State liability principle established by the ECJ, they do not seem to have made any changes in their national legislation. The influence of Community law may, however, lead to such changes in the future. The reason for that is the interaction between domestic law and Community law that takes place when constructing a coherent system of remedies for the protection of Community rights. This interaction may lead to the harmonisation of national tort laws.

One can observe two ways in which national tort law may be affected. First, *more advantageous rules concerning compensation for damage may be applicable when the breach by the State concerns EC law*. The ECJ could use a model in one legal system that provides for compensation for all kinds of damage regarding the protection of a certain interest. Individuals in countries with stricter rules on compensation regarding such an interest would then still be able to claim damages from the State if the breach concerned EC law. That would, however, not be possible in strictly national cases when the national rules do not provide for such a remedy. Thus, an individual could for example obtain damages for a pure economic loss in cases where EC law has been violated even though this kind of remedy does not exist in the national legal system. The fact that national law will be influenced in this

way gives individuals a better protection of rights granted by Community law than for the rights they have under national law.

The fact that the remedial protection afforded to rights based on Community law and rights which are purely based on national law differ is not fair from the individual's point of view. The second way that national law could be affected is therefore through the *spillover effect on national rules of the rules that the ECJ requires national courts to apply in Community cases*. A domestic legal system could therefore be influenced, with respect to liability for non-contractual damages, even beyond the responsibility based on EC law.<sup>110</sup>

### *Case Law of the ECJ defining the Right to Reparation*

The ECJ has set out the core principles and conditions concerning State liability. However, the principle of State liability needs to be shaped through the domestic legal systems. In *Brasserie du Pêcheur* and other cases concerning State liability subsequent to it, the ECJ has held that the substantive and procedural issues concerning a claim for damages in a national court are to be defined by the Member State.<sup>111</sup> National laws provide for detailed and varied procedural and substantive provisions concerning time limits, causation, and mitigation of loss and assessment of damage.<sup>112</sup>

The Court requires, however, that the domestic rules on the extent of reparation comply with certain conditions, in order for Community law to be applicable in an efficient and uniform way throughout the Member States. During this process of interaction between Community and national law, the ECJ must make a balance between the effective protection of Community rights and the procedural autonomy of the national legal systems. The principle of the efficiency of Community law (*l'effet utile*) sets the following requirements for national court proceedings:

- they must not make it impossible or excessively difficult to obtain reparation, and
- the applicable national laws must not be less favourable than those relating to similar cases based on domestic law.<sup>113</sup>



By referring to these conditions, the ECJ may in fact require that a particular remedy is available to individuals or that certain rules should be applied in cases that concern Community law although such rules do not exist in domestic law. It can also demand a national court to set aside national rules that limit the availability of a certain remedy.<sup>114</sup> A good example of a case where the ECJ has dismissed the application of certain rules of national law is the *Brasserie du Pêcheur* case. In that judgement the Court held that the following rules could prevent individuals from deriving the full benefit of Community law: a German rule that generally leads to the exclusion of a pure economic loss, an English rule requiring proof of misfeasance in public office for liability to arise, even though such misuse of power might be impossible to prove in the case of the legislature, and a German rule allowing compensation only if the legislative body is under a duty towards the plaintiff.<sup>115</sup>

The Court therefore influences the material contents of the national tort law when the case concerns Community law even if it leaves many issues to the national courts to decide. By doing so, there are some situations where an individual can be compensated differently depending on whether the right breached is one guaranteed by the Community or by the national state. The ruling out of the use of provisions of law limiting compensation to a maximum amount in the *Nils Draehmpaehl* case,<sup>116</sup> the recognition of the importance of paying interest on damages in the *Marshall II* case<sup>117</sup> or stating that the reparation should include the loss of profit and specific damages in the *Brasserie du Pêcheur* case show that harmonisation of national tort laws could enhance the protection of individual rights.

### *Harmonisation of National Tort Laws*

Judicial harmonisation has so far been limited to the extra-contractual liability of public authorities. The *Brasserie du Pêcheur* case and case law subsequent to it illustrate how the influence of Community law is felt in the area of tort liability on the part of the State. The harmonising effects in the field of the legal remedy of compensation for harm caused will, however, most probably also extend to harmonisation of national tort laws in general.

There are considerable variations between Member States national tort laws. Provisions regarding questions of fault, cause, the amount of reparation, damage to be compensated and so on may differ. As an example one can compare three major legal systems, French, English and German law.

In—*French tort law* all rights and interests are in principle protected. In principle, no restrictions regarding the kind of interest, group of persons or relationship to be protected exist. The French approach is very generous from the plaintiff's point of view. If he or she only proves fault, damage and a causal link, compensation can be claimed. Limitation as to the group of protected persons does not even exist. Therefore secondary victims or the dependants of primary victims may be compensated. This generous attitude is also reflected in the types of damages, which are recoverable. As French law allows all legitimate interests to be protected it also provides for full compensation for all injuries to such interests, covering all kinds of material and non-material injury.<sup>118</sup>

*English and German tort law regimes* have a more restrictive approach compared with the French one. They impose limitations at the very outset on the kind of rights or group of persons that are protected. Damages may only be claimed by those who belong to the group of persons intended to be protected by the tort provisions.<sup>119</sup>

French, English and German law all provide for compensation for all kinds of injury caused to primary victims by a tortious act or omission interfering with *bodily integrity, health and freedom*. Under each system, the broad categories of material and non-material damage are, however, distinguished. Contrary to the French system, not all types of damage are recoverable under English and German law. Those systems are both reluctant to award damages for non-material injury other than pain and suffering. While the English and German tort regimes follow a restrictive approach, for example, in respect of full compensation or pure economic loss, the French system is very generous in allowing claims for all kinds of damages with no limitation as to the group of protected persons.

As already stated, the ECJ influences national tort law by referring to the principles of efficiency and non-discrimination. As the Court will turn to the national legal systems to develop the substantive conditions, a legal system in one Member State might influence another one. The Court will probably continue to set out the conditions in a more precise way, in order

for Community law to be applied uniformly throughout the Member States. This will leave less discretion to national legal systems to apply their own rules.<sup>120</sup> This interaction between Community and national law is leading to a harmonisation of national tort rules within the European Union. Due to the differences of the underlying ideas in the various systems, the impact of harmonisation could be of great importance in the future. Thus, this development will probably lead to an improved legal protection of individual rights in a Member State.

In the process of harmonisation of national tort laws, the distinction between Community and national rules may also diminish. It has been argued that national law could be influenced also in *cases that do not have a Community law component*. National courts are, of course, under no obligation to apply EC law in purely national situations. They may, however, consider it in order to avoid the application of different sets of rules depending on whether the rule breached is a rule of Community law or a rule of domestic law. EC law could also be of assistance for the purpose of developing national law. Thus, it is possible that Community law has a spillover impact on national tort rules regarding situations with no Community dimension. At the very least, the impact on national law in cases with a Community element will make national courts aware of the EC law approach and mindful of its potential.<sup>121</sup>

Time will tell whether domestic law will develop along the lines described above. Changes in purely national situations will, of course, depend upon the general view in a Member State concerning the correctness of the Community test itself. If that view is accepted, then the case law of the Court may be the origin of a growing tendency towards a common tort law of Europe.<sup>122</sup> How far that development goes depends on the scope and contents of rights which Community law confers upon individuals and to what extent the ECJ will demand changes in national law in order to secure the observance of those rights.<sup>123</sup> In order to create a new *jus commune* it is important to trace the development of a set of rules that should be common to all Member States.<sup>124</sup> Therefore, comparative studies of national rules are of great importance. In the field of remedies, when individual rights are enforced, it should not be assumed that one legal system provides for the best solutions. Instead the approach to a legal problem should be open, acknowledging that all legal systems of the Member States may be of help.

## Possible Future Developments

Through the case law of the ECJ, the scope of the State liability principle and its conditions have been defined. I believe that the Court will continue to develop, re-examine and clarify these issues in interaction with national law. The effects of the establishment of State Liability could also lead to the creation of a new principle regarding individual liability. There are opinions in the doctrine according to which the *Francoovich* judgement could be interpreted extensively, recognising that an individual, who has violated a directly enforceable obligation imposed by Community law, may be held liable.<sup>125</sup> As stated above, that judgement was reasoned by making reference to the principle of full effectiveness of Community rules, the effective protection of EC rights and the requirement for Member States to take all appropriate measures to ensure the fulfilment of their obligations. The need to protect Community rights effectively implies that liability for infringements of Community law should not be limited to cases where a State can be held liable, when a directly effective right has been infringed. Treaty Articles 81[85] and 82[86] EC, prohibiting enterprises from concluding cartel agreements or abusing a dominant position, are good examples of such provisions. The infringement of these competition rules may result in the imposition of fines. There is, however, no Community remedy for *third parties* suffering loss from that infringement to claim compensation from the individual who has failed to comply with these provisions. National law can naturally provide for such a non-contractual liability for individuals. According to the principle of non-discrimination, national courts are obliged to provide the same remedies regarding the protection of Community rights as those available for similar breaches under national law. In the absence of Community provisions, claims regarding compensation for a breach of Community law will therefore be based on remedies found in national law. It is, however, argued that *Community law* should serve as a basis for individual liability in damages in the same way as it does in State liability cases. If individuals can only resort to national law in these situations there will be variations in the level of protection because of the differences between the national legal systems. The principle of non-discrimination is also useless in situations where national law does not

acknowledge the non-contractual liability of individuals in such a situation. Many authors therefore think that the ECJ should establish individual liability for a breach of directly effective Community rights.

The question regarding individual liability has not yet been answered. It was, however, raised before the Court in the *Banks* case.<sup>126</sup> In this case the private coal producer and licensee, Banks, sued the state-owned enterprise, British Coal, which had issued the license, for demanding very high royalties while the prices for coal were very low. Banks claimed that this conduct violated certain Articles of the ECSC Treaty, or alternatively Articles 81[85] and 82[86] EEC. One question referred to the ECJ was whether national courts had the power and/or obligation under Community law to award damages caused by a breach of directly effective provisions of the EC Treaty, where a private undertaking is responsible.

In his Opinion, Advocate General Van Gerven argued for the establishment of individual liability for breaches of directly effective Community provisions. He referred to the *Franovich* case and the general basis that was used in the judgment to establish State liability.<sup>127</sup> On the basis of that judgement he held that national courts are obliged to award damages for the loss that one undertaking has suffered as the result of another undertaking's breach of a directly effective provision of Community law. He held that the full effect of the Treaties would be impaired if such a right did not exist.<sup>128</sup> The Court applied the ECSC Treaty since it was the legal framework for the examination of licences for the extraction of unworked coal. In order for its provisions to be directly applicable, a decision by the Commission finding an infringement was necessary. The lack of such a decision in this case allowed the Court to avoid the question of individual liability. According to Van Gerven, the relevant provisions in the case were, however, directly enforceable and therefore British Coal should have been held liable for damages.<sup>129</sup> In his various contributions he has continued to support the idea of individual liability. He has stated that the right to reparation is the necessary corollary of the direct effect of the provisions whose breach has caused the individual damage and that the ECJ must acknowledge this principle and lay down the substantive provisions that will govern this liability. Many have agreed with his view, at least regarding violations of the prohibitions of anti-competitive behaviour in Articles 81[85] and 82[86] EC.<sup>130</sup> The harmonising effects, which the ECJ's case law already

has in respect of national laws on State liability, would then be extended to national laws on torts committed by individuals.

I believe that the ECJ will establish a principle of individual liability in the future. A complete system for judicial protection should provide for a remedy for breaches committed by individuals of directly enforceable obligations imposed on them by Community law.<sup>131</sup> I agree with the opinion that the *Franovich* case could be interpreted extensively so that the principle of effectiveness also could create such liability. That would be the logical continuation of the case law establishing State liability. The reason why the ECJ did not acknowledge this principle in the *Banks* case was probably because of the differences regarding the division of competence between the EC and the ECSC Treaties.<sup>132</sup> I believe, however, that the Court would not be willing to treat individuals suffering damage in the event of infringements by individuals of directly effective Community provisions differently than those experiencing loss because of a breach by the State.

As stated above, through the State Liability principle Community law may influence national law. The same might be true for the development of Community liability, according to Article 288(2)[215(2)] EC, on the State liability doctrine or vice versa. These two liability regimes of liability for breaches of Community law could either be harmonised or differ to a larger extent in the future. Some authors have been critical stating that Article 288(2)[215(2)] EC is ill-suited to State liability which calls for a stricter test. According to that opinion, the State liability regime is too onerous because the test imposes too heavy a burden on the Member States.<sup>133</sup> The question therefore is whether the seriousness demanded of a violation to give rise to liability will be judged, in part, in the light of case law on Article 288(2)[215(2)] EC. Seriousness is there assessed on the basis of both the circumstances relating to the breach and those relating to the damage caused.<sup>134</sup>

In the future it is also possible that the State liability principle will be included in the EC Treaty. In my opinion it is a good idea as long as the possible new article generally acknowledges the principle without diminishing the Court's possibilities to develop it further in a flexible manner. Such a new article in the EC Treaty would give the principle an even stronger foundation and make it visible to the citizens of the EU.

## 5 Concluding Reflections

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

The interaction between Community and national law regarding the substantive and procedural issues concerning a claim for damages will eventually not only diminish the disparities between Community and national provisions of State liability, but also the disparities in the national tort laws in general. This development could lead to harmonising effects in the field of national tort laws. A comparative overview of the general provisions in French, English and German tort law showed that the possibilities to claim non-contractual damage differed between the three systems. If the ECJ chooses to specify the conditions concerning the claim for damages by using the model of a country with a generous approach to compensate loss it would result in a better protection of individual EC rights than the protection of national rights in Member States with a more restrictive attitude. This has, for example, been the case regarding compensation for a pure economic loss. Again, these disparities between the protection of Community-based and purely national rights might influence national law outside the field of Community law. In order to make a common system of judicial protection regarding the remedy of

compensation work, there must be a continuing co-operation between national courts and the ECJ.

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

The establishment of the State liability principle seems to indicate that a *new phase in the development of general principles has begun as the ECJ applies principles based on the need of Community law to have an effective and uniform application*. Through its interpretations of Community provisions, it reads in new obligations into the Treaty. As regards the various and far-reaching effects that the State liability principle has had and may lead to in the future, it is essential that its legal basis is accepted throughout the Member States. Most legal commentators have welcomed the Court's case law on State liability as it is considered to be an effective remedy for the enforcement of Community obligations imposed upon Member States. The fact that Member States have complied with the judgments concerning State liability implies that they also have accepted the fact that they can be held liable for their violations of Community law. However, it is not evident that the principle of effectiveness will be enough to justify the future developments that this principle could lead to, or the establishment of other general principles of this new kind, e.g. a principle of individual liability.

As these principles are indeed invented by the ECJ one may ask whether it should use its power to develop general principles of this kind. The



political consequence is that the scope of the principle of co-operation in Article 10[5] EC is widening. The Court has certainly shown boldness in interpreting the Treaty provisions and general principles as far the efficiency of Community law and the legal protection of the Community rights of individuals are concerned. The question is to what extent the ECJ can read in new obligations into the Treaty that are not explicitly contained therein. Have the Member States empowered the Court to rely on general principles in order to extend the scope of application of Community law and act as a driving force towards a *ius commune* for Europe? Many have criticised the ECJ for an unjustified judicial activism or “judicial legislation” saying that the European Union will be developed through the judgements of the ECJ instead of political decisions. Such a development does not comply with the legal traditions of some Member States, e.g. the Nordic countries.

It is in this context important to note that the Community Treaties were drafted so that they would gradually evolve, in due course, into the constitution of a wholly new kind of association of States. That is why they did not contain many of the provisions which would naturally be included in a constitution. Therefore basic principles, such as the primacy of Community law, had to be developed by the judge-made law. In order to establish a common market, an economic and monetary union and promote the aims expressed in Article 2[2] EC, Community law must be effectively and correctly applied and uniformly interpreted. This is to a large extent achieved because of the efficient, centralised and unifying mechanism that the ECJ provides. Thus, the ECJ is essential for the functioning of the Community. I agree with Leif Sevón, judge in the ECJ, who stated that *weakening the judicial system of the Community would cause considerable harm to the Community and might affect its entire functioning*.<sup>135</sup>

I consider the criticism of the ECJ for judicial activism to be unjust. I understand that its power to read in new obligations into the Treaty could be used in a dangerous way, regulating important issues that should be decided on a political level. However, when the ECJ has acted in revolutionary way, it has done so when the efficiency of Community law and the legal protection of individual Community rights were at issue. The impact of the case law of the ECJ will for example be much less important in the area of contract law than in the area of tort law since contractual liability is, under Community law, far from being a remedy of the same

significance as tort liability. According to Article 249[189] EC, some rules of Community law are directly applicable in national courts. It was therefore inevitable that the ECJ would eventually clarify what national courts should do to apply the rules in question correctly and enhance the possibilities of individuals to enforce their EC rights. As long as the ECJ only acts in this far-reaching dynamic way when these issues are at stake, I believe that all Member States should support this kind of a development of Community law. Nor has anyone criticised the Court for one of its most striking piece of judicial legislation, namely the finding that fundamental human rights are part of Community law.<sup>136</sup> The Member States may, of course, also confirm or amend some of the legal principles, which have been developed in the case law by changes in the Treaty. They did not, however, use the opportunity they had in the negotiations on the Treaties of Maastricht and Amsterdam for example to amend the Treaty Articles dealing with the position of the ECJ or the principles it has developed. Since nothing was included in the Treaty, I assume that most Member States support the role that ECJ plays in developing Community law. The fact that the Community has been moving towards a more and more developed Union and towards the completion of the internal market, also makes Member States more open to a dynamic development of Community law. The Court should, however, to a larger extent state in its judgments the legal and policy reasons which have led it to more far-reaching conclusions. It could more often refer to Article 10[5] EC as the legal basis of its judgments. That would be a means of educating and informing the Member States, including its politicians, and a way to protect the Court from unnecessary accusations of “judicial legislation”.

In this paper I have spoken for an enhanced judicial protection of Community rights. I have not, however, discussed what sort of rights Community law protects. Some believe that it only includes rights of corporations involving economic interests. It is true that individual Community rights can protect an interest that, from the national point of view, may not be defended. One illustration of this is a company that produces sweets and claims for damages from the State for not being allowed to use a component which is accepted under Community law but is classified as very dangerous or unhealthy under national law. However, individual rights such as human rights and the protection of legitimate expectations

are also included in Community law. Recent developments, such as the likely adoption of the Charter of Fundamental Rights, also show that these general principles are being emphasised to a larger extent. The introduction of State liability might eventually lead for example to liability for the non-implementation of legitimate welfare expectations, perhaps based on social human rights.<sup>137</sup>

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

## Footnotes

<sup>1</sup> Joined Cases 6/90 and 9/90 *Francovich v Italy*, [1991] ECR I-5357, Joined Cases 46 and 48/93 *Brasserie du Pêcheur v. Germany and the Queen v Secretary of State for Transport, ex parte Factortame Ltd.* [1996] ECR I-1029.

<sup>2</sup> Treaty establishing the European Community, hereinafter referred to as the EC Treaty.

<sup>3</sup> See e.g. the contributions in Beatson J. and Tridimas T. (eds.), *New Directions in European Public Law* (1998), Craig P., *Once More unto the Breach: The Community, the State and Damages Liability* 113 LQR 67 (1997), Van Gerven W., *Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie*, 45 ICLQ 507, (1996), Wathélet M. and Van Raepenbusch S., *La responsabilité des États Membres en cas de violation du droit Communautaire. Vers un alignement de la responsabilité de l'État sur celle de la Communauté ou l'inverse?*, 33 CDE 13 (1997).

<sup>4</sup> In this paper articles in the EC Treaty will be referred to according to their new numbering after the Treaty of Amsterdam came into force. The previous numbering will be put in brackets.

- <sup>5</sup> Toth A. G., *Human Rights as General Principles of Law, in the Past and in the Future*, in *General Principles of Law*, Bernitz U. and Nergelius J. (eds.), (2000) pp. 75-77.
- <sup>6</sup> Nergelius J., *General Principles of Community Law in the Future: Some Remarks on their Scope, Application and Legitimacy*, in *General Principles of European Community Law* (2000), p.223.
- <sup>7</sup> *The Treaty of European Coal and Steel Community (ECSC), European Economic Community (EES) and the European Atomic Energy Community (EURATOM)*.
- <sup>8</sup> Hartely T., *The Foundations of the European Community Law*, Oxford (1994), p. 130.
- <sup>9</sup> Herdegen M., *The Origins and Development of the General Principles of Community Law*, in *General Principles of Community Law* (2000), pp. 3-4. The principle of proportionality is now to be found in Article 5[3b] EC and in the “Protocol on the application of the principles of subsidiarity and proportionality”.
- <sup>10</sup> Tridimas T., *The General Principles of EC Law* (1999), pp. 3-4.
- <sup>11</sup> Toth (2000) p. 76, Tridimas (1999), p. 33.
- <sup>12</sup> Temple Lang, J., *Legal Certainty and Legitimate Expectations as General Principles of Law*, in *General Principles of Community Law* (2000), p. 164.
- <sup>13</sup> In the areas where the Community enjoys exclusive competence by virtue of a Treaty provision, it is accepted that, in principle, Member States may not enact legislation on their own initiative even in the absence of Community measures. At least national measures in such an area, where permitted at all, are subject to review on the grounds of a breach of a general principle. The binding effect of general principles does not, however, extend to national measures, which do not affect Community legislation in areas where the Community has competence but has not exercised it.
- Whether national implementing legislation leads to a breach of a general principle is a matter for the national court to decide, if necessary on the basis of guidance given by the Court of Justice under Article 234[177] EC, Tridimas (1999) pp. 17, 23-26.
- <sup>14</sup> *Ibid.* pp. 31-32.
- <sup>15</sup> Herdegen (2000), p.16, Hartley (1994), p. 131.
- <sup>16</sup> Toth (2000), p. 79.
- <sup>17</sup> Herdegen (2000), p. 5.
- <sup>18</sup> See Article 2[2], 3[3], 5[3b] and 7[4] EC, Toth (2000), p.78.
- <sup>19</sup> Francovich, see note 1 above.
- <sup>20</sup> *Ibid.* para. 33.
- <sup>21</sup> *Brasserie du Pêcheur*, see note 1 above.
- <sup>22</sup> *Ibid.* para. 24.

<sup>23</sup> *Ibid.* para. 25.

<sup>24</sup> *Ibid.* para. 29.

<sup>25</sup> Tridimas (1999), p. 325.

<sup>26</sup> Craig P. and de Bøerca G., *EC Law- Text, Cases and Materials* (1998), p. 240.

<sup>27</sup> Lysén G., *State Responsibility and International Liability of States for Lawful Acts- A discussion of Principles* (1997), pp. 53-54.

<sup>28</sup> See chapter 4 below.

<sup>29</sup> Case 5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas Ltd.*, [1996] ECR I-2553, at 2579.

<sup>30</sup> See chapter 4 below.

<sup>31</sup> Toth (2000) p.78.

<sup>32</sup> de Bøerca, *Proportionality and Subsidiarity as General Principles of Law*, in *General Principles of European Community Law*, (2000) pp. 95-96.

<sup>33</sup> Tridimas, *Epilogue: Recent Developments in the Law relating to State Liability in Damages, New Directions in European Public Law*, Beatson and Tridimas (eds.) (1998) p. 191.

<sup>34</sup> Craig and de Bøerca (1998) pp. 226, 252.

<sup>35</sup> Van Gerven, *Of Rights, Remedies and Procedures*, *CML Rev.* (2000) p. 503.

<sup>36</sup> Francovich, see note 1 above. The ECJ had already in its earlier case law visualised the possibility of claims against a Member State for compensation for breach of directly applicable rules of Community law. See e.g. Case 6/60, *Humblet v Belgian State*, [1960] ECR 599 at para. 569, where the ECJ held that a legislative or administrative measure, adopted by a Member State, contrary to Community law should not be valid and that the State should make reparation for any unlawful consequence and Case 60/75, *Russo v AIMA*, [1976] ECR 45, at para. 9 where the ECJ held that a Member State should compensate for damages caused by its own breach of Community Law. See also Temple Lang, *Judicial National Attitudes to Community Law and Consequences for the Evolving Community Law in Access to Justice, A record of thoughts and ideas dealing with the interrelationship between national courts and Community law and courts*, Sundström G. O. Z. and Kauppi M., (eds.) (1999), pp. 69-70.

<sup>37</sup> Francovich, see note 1 above, paras. 1-7.

<sup>38</sup> *Ibid.* para. 43.

<sup>39</sup> Craig and de Bøerca (1998) p. 238.

<sup>40</sup> *Brasserie du Pêcheur*, see note 1 above.

<sup>41</sup> After the Francovich case, the ECJ had repeated and applied the Francovich criteria for State liability in cases that concerned the non-implementation of directives, see e.g. Case 334/92, *Wagner Miret*, [1993] ECR I-6911, Case 91/92 *Dori v. Recreb Srl* [1994]

ECR I-3325 and Case 192/94, *El Corte Inglés v Cristina Blázquez Rivero*, [1996] ECR I-1281.

<sup>42</sup> The German, Irish and Netherlands Governments, *Brasserie du Pêcheur*, see note 1 above, paras. 17-18.

<sup>43</sup> *Ibid.* para 20.

<sup>44</sup> *Ibid.* para. 38.

<sup>45</sup> Case 5/71, *Aktien Zuckerfabrik Schöppenstedt v. Council* [1971] ECR 975, *Francovich*, see note 1 above, para. 38

<sup>46</sup> *Brasserie du Pêcheur*, see note 1 above, paras.37-47.

<sup>47</sup> *Ibid.* para. 51.

<sup>48</sup> Van Gerven W., Lever J., Larouche P., von Bar C., Viney G., *Cases, Materials and Text on National, Supranational and International Tort Law, Scope of Protection, Common Law of Europe* Casebooks, Torts, (1999) pp. 404-405.

<sup>49</sup> Opinion of Advocate-General Tesauro of 28 November 1995, in *Brasserie du Pêcheur*, see note 1 above, at paras. 64-67.

<sup>50</sup> *Brasserie du Pêcheur*, see note 1 above.

<sup>51</sup> *Ibid.*, paras 55-57,93.

<sup>52</sup> *Ibid.*, para. 56.

<sup>53</sup> *Ibid.* para. 78.

<sup>54</sup> Van Gerven, *Taking Article 215 EC Treaty Seriously*, in *New Directions in European Public Law* (1998) pp. 43-44.

<sup>55</sup> For judgements subsequent to *Brasserie du Pêcheur*, see e.g. Case 392/93, *British Telecommunications* [1996] ECR I-1631 where the ECJ held that the conditions for liability to arise as set out in the *Brasserie du Pêcheur* case, were also applicable when a Member had incorrectly transposed an article of a directive into national law, the *parte Hedley Lomas Case*, see note 29 above, where the ECJ indicated that that the State liability principle also applies to breaches of Community law which are the consequence of an administrative decision taken by a national administration, the joined Cases 178/94, 179/94, 188/94, 189/94 and 190/94, *Dillenkofer and Others v Germany* [1996] ECR I-4845 where the ECJ held that a failure to implement a directive in due time constitutes per se a sufficiently serious breach, the joined Cases 283/94, 291/94 and 292/94, *Denkavit International v Bundesamt für Finanzen*, [1996] ECR I-5063 where the ECJ gave further indications of what will constitute a sufficiently serious breach, Case 319/96, *Brinkmann Tabakfabriken GmbH v Skatteministeriet*, Judgment of the Court of 24 September 1998, Case 140/97, *Rechberger and Others v Austria*, Judgment of the Court of 15 June 1999, paras. 51-52, Case 302/97, *Kolne v Austria* [1999] ECR I-3099, Case 321/97, *Andersson v Svenska Staten*, Judgment of the Court of 15 June 1999 and Case 424/97, *Haim v Kassenzahnärztliche Vereinigung Nordheim*, Judgment of the

Court of 4 July, 2000 where the ECJ again held that when determining the criterion for whether a breach of Community law is sufficiently serious, account that is taken of the extent of the discretion enjoyed by the Member State must be determined by reference to Community law and not by reference to national law.

- <sup>56</sup> See e.g. cases *Francovich*, see note 1 above, *Faccini Dori* see note 41 above and *British Telecommunications*, see note 55 above, *Van Gerven and others* (1999), p. 445.
- <sup>57</sup> See e.g. *Joined Cases 104/89 and 37/90, Mulder v Council and Commission (Mulder II)* [1992] ECR I-3061.
- <sup>58</sup> See e.g. *Case 59/83, Biovilac v EEC* [1984] ECR 4057 (breach of a fundamental right) and *Joined Cases 83 and 94/76, 4, 15 and 40/77 HNL v Council and Commission* [1978] ECR 1209 (breach of the principle of proportionality).
- <sup>59</sup> *Tridimas* (1999) p. 23.
- <sup>60</sup> *Gasparon P., The Transposition of the Principle of Member State Liability into the Context of External Relations, EJIL, Volume 10, Number 3, (1999) p. 606.*
- <sup>61</sup> *Brasserie du Pêcheur*, see note 1 above, para. 32, *Craig* (1997) p. 68, *Aalto P., Jäsenvaltion vahingonkorvausvastuu EY-oikeudessa*, (1999) pp. 103, 106-114.
- <sup>62</sup> *Aalto* (1999), pp. 109, 113.
- <sup>63</sup> *Craig* (1997) p. 71, *Temple Lang, The Duties of National Authorities under Community Constitutional Law, ELRev* (1997) pp. 3-18, *Melin M., När skall man fråga EG-domstolen?*, *JT Nr. 4* (2000), p. 864.
- <sup>64</sup> *Steiner J., The Limits of State Liability for Breach of European Community Law, EPL* ,4 (1998) p. 92.
- <sup>65</sup> *Craig and de Boerca* (1998) p. 54.
- <sup>66</sup> *Melin* (2000) p. 864.
- <sup>67</sup> *Quitow C. M., "Private enforcement" i EG-rätten- en studie av medlemsstaternas skadeståndsansvar i samband med överträdelse av gemenskapsregler, JT Nr 3* (1996/97) p. 682.
- <sup>68</sup> *Ibid.* p. 694.
- <sup>69</sup> *Ibid.* pp. 682, 695.
- <sup>70</sup> *Brasserie du Pêcheur*, see note 1 above, para. 28.
- <sup>71</sup> *Quitow* (1996/97) p. 683.
- <sup>72</sup> *Aalto* (1999) pp. 37-38 who refers to *Schockweiler F., Wivenes G., and Godart J. M., Le régime de la responsabilité extra-contractuelle du fait d'actes juridique dans la Communauté européenne, RTDE* 1990, pp. 27-74.
- <sup>73</sup> *Herdegen* (2000) p. 15.

- <sup>74</sup> Skadeståndslagen 1972:207, Chapter 3, Article 2.
- <sup>75</sup> *Ibid.*, Chapter 3, Article 7.
- <sup>76</sup> SOU 1997:194, Det allmännas skadeståndsansvar vid överträdelse av EG-regler, p. 146.
- <sup>77</sup> *Ibid.* pp. 20, 136-137.
- <sup>78</sup> See e.g. Quitzow (1996/97) p. 700 where he holds that Chapter 3 Article 7 of the Tort Liability Act could render enforcement of EC rights more difficult for individuals. Axén M. also wants to amend or repeal the provision in Statens skadeståndsansvar vid brott mot EG-rätten, SvJT (1997) p. 171, Bengtsson B. states in his Commitment (Remiss): SOU 1997:194, Ju98/655, pp. 1-2. that it might be acceptable to revoke the provision to the extent that it concerns decisions by the Swedish Parliament and the Government.
- <sup>79</sup> As noted above, although the State can be held liable for administrative, legislative and judicial wrongs, only the latter ones will be considered here.
- <sup>80</sup> SOU 1997:194.
- <sup>81</sup> According to SOU 1997:194, p. 92 the Chancellor of Justice had up to September 1997, on behalf of the Swedish State, both in proceedings before the courts and outside, admitted claims for damages in more than 250 cases.
- <sup>82</sup> Case T 360/96.
- <sup>83</sup> See e.g. Decision by the Chancellor of Justice 1998-02-20, Dnr 2319-97-44.
- <sup>84</sup> Case NJA 1998 s. 474 that led to a claim for damage from the State at the Chancellor of Justice, Dick Edvinsson v the Swedish State, Dnr 3634-99-40.
- <sup>85</sup> NJA 1998 s 474, see *supra* note.
- <sup>86</sup> First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, Official Journal L 040.
- <sup>87</sup> Case 63/97, BMW v Deenik, [1999]ECR I- 905.
- <sup>88</sup> Nergelius, Förvaltningsprocess, normprövning och europarätt, (2000) p. 71. Karlsson and Hägglund disagree although they also criticise the Supreme Court for not requesting a preliminary ruling, Karlsson K. and Hägglund F., En kartläggning av Sveriges fem första år med EF-rätt, ERT (1999), p. 458.
- <sup>89</sup> Case number 3646-99-40, the case has not yet been decided but the Chancellor of Justice will probably deliver a decision within this year, 2000 (conversation with attorney G. Lövgren Söderberg at the Chancellor of Justice who said that a decision in the case will not be delivered before this paper is written, 001107).
- <sup>90</sup> Bernitz U, Svenska domare kämpar mot EG-rätten i det tysta, DI, 26.10 1999, Karlsson and Hägglund (1999) p. 458, Nergelius, Förvaltningsprocess, normprövning och europarätt, (2000) p. 71.



- <sup>91</sup> Case 283/81, Srl CILFIT v. Ministry of Health, [1982] ECR 3415. A court, against whose decision there is no judicial remedy under national law, has to bring a question concerning the interpretation of Community law before the ECJ unless the question raised is irrelevant, the Community provision in question has already been interpreted by the Court (*acte éclairé*) or the correct application of Community law is so obvious as to leave no scope for any reasonable doubt (*acte clair*).
- <sup>92</sup> Nergelius, *Förvaltningsprocess, normprövning och europarätt*, (2000), p. 67.
- <sup>93</sup> Conversation with attorney Mats Björkenfeldt in October 2000.
- <sup>94</sup> Van Gerven and others (1999), pp. 364-365, 380, SOU 1997:194, p. 102. It is interesting to note here that in Belgian law, which is influenced, by French law, a concept of gross negligence is not used when examining judicial liability. Under Belgian law, the liability of the State can be engaged by any of its organs, including the judiciary acting in its judicial function. In a case from 1991, it was held that a judicial finding that a company is bankrupt could engage the liability of the State if it is found to be wrong on appeal. The act under review has to be withdrawn, amended or annulled by a final decision, see *De Kayser v Belgian State*, Cour de cassation/Hof van Cassatie 19 December 1991, AC 1991-92, 364, Pas. 1992.I.316, Van Gerven and others (1999) pp. 374-376.
- <sup>95</sup> Van Gerven and others (1999), p. 378, SOU 1993:55, *Det allmännas skadeståndsansvar*, p. 125.
- <sup>96</sup> Van Gerven, *Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?* CMLRev., Vol. 32 (1995), p. 696.
- <sup>97</sup> Nergelius, *Parliamentary Supremacy Under Attack: The British Constitution Revisited*, in Berggren, Karlson and Nergelius (eds.), *Why Constitutions matter* (2000) pp. 108-110.
- <sup>98</sup> Case 213/89, *R v Secretary of State for Transport, ex parte Factortame Ltd. & others (Factortame I)* [1990] ECR I-2433.
- <sup>99</sup> Van Gerven and others (1999) p. 349.
- <sup>100</sup> Nergelius, *Parliamentary Supremacy Under Attack: The British Constitution Revisited* in Berggren, Karlson and Nergelius (eds.), *Why Constitutions matter* (1999), p. 117,125.
- <sup>101</sup> *Ibid.* p. 107.
- <sup>102</sup> Van Gerven and others (1999) p. 380, SOU 1993:55, p. 126.
- <sup>103</sup> Van Gerven and others (1999), pp. 377, 380.
- <sup>104</sup> *Brasserie du Pêcheur*, see note 1 above, para. 71.
- <sup>105</sup> Van Gerven and others (1999) p. 381.
- <sup>106</sup> *Brasserie du Pêcheur*, see note 1 above, at paras. 71-72.
- <sup>107</sup> *Ibid.*, paras 71, 73 and 87-88, Van Gerven and others (1999) pp. 438-439.

- <sup>108</sup> SOU 1997:194, pp. 99-105.
- <sup>109</sup> Brasserie du Pêcheur, see note 1 above at paras. 16, 31-32.
- <sup>110</sup> Rissanen K., An Area of Justice and the European Union, ERT 1, (1999) p. 93.
- <sup>111</sup> Brasserie du Pêcheur, see note 1 above at para. 67.
- <sup>112</sup> Craig and De Boerca, (1998), p. 248.
- <sup>113</sup> Brasserie du Pêcheur, see note 1 above, at para. 67.
- <sup>114</sup> Ibid., at paras. 71-72.
- <sup>115</sup> Ibid. at paras. 87-8, 73 and 71-72.
- <sup>116</sup> Case 180/95, Draehmpaehl v Urrania Immobilienservice, [1997] ECR I-0000.
- <sup>117</sup> Case 271/91, Marshall v Southhampton & South West Area Health Authority ( Marshall II), [1993] ECR I-4367.
- <sup>118</sup> Van Gerven and others (1999), pp. 31-32, 36, 52-53.
- <sup>119</sup> Ibid. pp. 16-17, 32, 37, 53.
- <sup>120</sup> Van Gerven, The Case-law of the European Court of Justice and National Courts as a Contribution to the Europeanisation of Private Law, European Review of Private Law (1995), p. 369.
- <sup>121</sup> Van Gerven and others (1999), p.11, Craig, The Domestic Liability of Public Authorities in Damages: Lessons from the European Community? in New Directions in European Public Law (1998) pp. 80, 84, 89.
- <sup>122</sup> Van Gerven and others (1999), p. 480. Craig (1998) pp. 89-90.
- <sup>123</sup> Van Gerven, (1995) p. 698.
- <sup>124</sup> Caranta R, Judicial Protection against Member States: A New Jus Commune takes shape, CMLRev. Volume 32 (1995) p.703.
- <sup>125</sup> See Van Gerven (1995) p. 699, Van Gerven and others (1999), Quitzow (1996/97) p.696.
- <sup>126</sup> Case 128/92, Banks v British Coal, [1994] ECR I-1209.
- <sup>127</sup> Francovich, see note 1 above, at paras. 33-36.
- <sup>128</sup> Case 128/92 see note 126, Advocate General Van Gerven's Opinion at p. 1212, para 36-45.
- <sup>129</sup> Case 128/92, see note 126 above.
- <sup>130</sup> E.g. Advocate General Léger agreed with the view of Van Gerven in his opinion in the Hedley Lomas case, Case 5/94, see note 29, Advocate General Léger's Opinion at p. 2556, Quitzow (1996/97).
- <sup>131</sup> Van Gerven and others (1999) p. 481.

- <sup>132</sup> Quitzow (1996/97), p. 698.
- <sup>133</sup> Craig (1998) p. 77-79, 84-85, Van Gerven and others (1999), p. 478.
- <sup>134</sup> See Joined Cases 104/89 and 37/90, Mulder v Council and Commission (Mulder II) [1992] ECR I-3061
- <sup>135</sup> Speech delivered by Leif Sevón, The changing role of the Court of Justice in the integration of Europe, 000313.
- <sup>136</sup> Temple Lang, see note 322 above.
- <sup>137</sup> Wilhelmsson T., Private Law 2000: Small Stories on Morality through Liability, in From Dissonance to Sense: Welfare State expectations, Privatisation and Private Law, Wilhelmsson T. and Hurri S., (1999) p. 241.

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