

Non – contractual state liability in damages in the European Union

Abstract: Non-contractual state liability is another example of the seminal role of the European Court of Justice in the area of the development of the European Union law, since national governments seem at times to be unwilling to find and enforce clear solutions on sensitive issues that touch state sovereignty. The most important cases are mentioned in order to make an attempt to clarify the specific conditions for non-contractual state liability, the procedure needed and the final outcome or the practical results which are neither the most desirable nor the most uniform across the EU.

The phrase “judicial legislation” may justifiably be applied to the tendency of the European Court of Justice to interpret provisions of the treaties contrary to the letter of the law. This constitutes a matter that has generated considerable debate. Moreover, it has emerged that according to some scholars the court’s refusal to accept the natural meaning of treaty provisions has not occurred on an ad hoc or random basis and that it has taken place in pursuance of a settled and consistent policy of promoting European federalism, a policy which includes extension of the powers of the court itselfⁱ.

The recognition of a right to reparation for breach of Community law signalled the apotheosis of judicial intervention in the law of remedies and incorporated according to some all signs of constitution-buildingⁱⁱ. The issue of state liability arose in the context of the enforcement of European law and more specifically in the framework of national procedural autonomy and its partial erosion by the principles of equivalence and effectiveness.ⁱⁱⁱ The principle of national procedural autonomy provides that “it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing

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actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law”^{iv}. This principle is subject to the condition of non-discrimination which states that procedural circumstances required by national law may not be less favourable in the context of enforcement of Community norms than they are with regard to norms derived from domestic law as well as to the condition of effectiveness which requires national procedures not to be applied if their effect is to make it impossible in practice to exercise the rights derived from Community law which national courts are obliged to enforce^v.

The first case that appears to reveal the intentions of the European Court of Justice is *Factortame*, where the applicant argued that the provisions of the United Kingdom’s Merchant Shipping Act 1988 were contrary to Community law in that they effectively prevented several Spanish-owed fishing vessels from fishing against the United Kingdom’s quota under the terms of the common fisheries policy, contrary to article 43 TEC^{vi}.

The seminal decision^{vii} on grounds of state liability is *Francovich and Bonifaci* against Italy. The case arose from the failure of Italy to implement a directive found to be not directly effective. On the question whether it was possible for an individual to claim and obtain compensation for the loss suffered due to non implementation of the directive on behalf of the state, the European Court of Justice used article 10 of the Treaty and the principle of full effectiveness of Community law, in order to rule that “the principle whereby a state must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the state can be held responsible is inherent in the system of the treaty”^{viii}. We can observe how ECJ uses a treaty provision as a starting point to deduce a general principle and then based on that principle it goes down again and formulates a new rule.

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Hence, the ECJ gave little guidance as to the specific conditions for liability and held that these conditions could vary depending on the nature of the breach of Community law. In relation to non-implementation of a directive the result prescribed by the directive should entail the grant of rights to individuals; it should be possible to identify the content of those rights from the directive; and there should be a causal link between the breach of the state's obligation and the harm suffered by the injured party. It was then for the national law to determine the detailed procedural rules for such legal proceedings, subject to the caveat that such rules should not be less favourable than those relating to similar internal claims and should not be so framed as to make it virtually impossible or excessively difficult to obtain compensation^{ix}.

The Court's ruling in Francovich left open a number of particularly significant issues such as the application of the three conditions laid down therein to infringements of directly effective provisions of Community law, the relevance of the concept of fault which is not mentioned anywhere in the case in establishing the liability of Member States, the relationship between Member States' liability under Francovich and the tortious liability of Community institutions under article 215(2) TEC, the extent of the obligation of the Member States to accommodate Francovich type claims in their national law in order to provide effective and homogeneous remedies throughout the Community^x. In addition, we should take under consideration the nature of the relief which is usually financial but under certain circumstances it would be more effective to obtain a non-stipendiary remedy^{xi}.

A number of commentators broadly welcomed the Court's decision on the ground that it allegedly empowers citizens.^{xii} On the other hand, it is argued that effective judicial protection is used more to assure exact obedience from the states than to protect citizens^{xiii}. As a consequence, state liability is concerned principally

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with sanctions, not rights^{xiv}. It is probable that French administrative law, in which liability undoubtedly contains an element of sanction and in which there is lack of mandatory remedies, provided the pattern for the ECJ's sanctions theory of liability. Despite that, liability is also referred as a sanction within the framework of the specific Community rule that it purports to make effective and by extension if the court is willing, in the absence of action of the Community legislator, to lay down the procedural and the substantive conditions of legal remedies which are essential to guarantee the effective and sufficiently equal protection of the Community rights involved across the Community^{xv}.

This case was criticised on the ground of administrative technique enforcement and on constitutional grounds^{xvi}. As to the first criticism it is observed that there was no thought given to the question of who would actually benefit from the imposition of state liability, how national courts would apply the new remedy and that in any case, this doctrine is not the solution to the existing problem of enforcement. On the constitutional ground, the court was accused for privileging the rule of law over political systems of accountability, since Member State's liability should firstly be treated as problem of political enforcement.

Once it has created this new cause of action, the European Court had to fill in the details. Hence, ECJ expressly rejected certain limitations on liability in a way that it extended beyond the context of non-implementation of directives and covered a variety of different types of breach of Community law. The leading case is *Brasserie du Pêcheur* where a French firm had been forced to discontinue exports of beer to Germany in 1981 because German law, which was challenged as contrary to article 28 TEC, did not allow beer to be lawfully marketed as 'beer' if it did not comply with the German specifications on the ingredients. According to the judgement, liability does

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not only arise only when the Community provision is not directly effective. The state is also liable for violation of Community law by the legislator. A prior ruling on the compliance of national law with Community law in an enforcement action under article 226 EC is not a necessary^{xvii}. The Court followed Advocate General Tesouro who argued that the test for state and Community liability should be linked, rested on article 288(2) TEC and the previous case law of the court. What is known as the “Schöppenstedt formula” is applied which includes three requirements: the rule of Community law infringed must be one 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.

As far as causation is concerned, it seems to be clear that national courts have the competence to determine whether a direct causal link between the breach of an obligation resting on the state and the damage sustained by the injured parties exists. However, this means that the national court must determine whether causation exists on the facts. It does not mean that the rules governing causation depend exclusively on national law. Causation as a legal notion can be defined under Community law and therefore it is ultimately for the ECJ to determine^{xviii}. At the very least, the Court will disregard the national rules of causation which do not provide an effective standard of protection^{xix}. In fact, the court has not elaborated any systematic principles of causation but has approached the issue on a case by case basis. It is argued that despite the general statement in *Brasserie du Pêcheur*, state liability in damages is based on principles analogous to those governing liability of the Community institutions, so far no apparent attempt has been made by the Court to borrow from its case law on article 228 (2) TEC with regard to causation^{xx}.

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In determining whether the Member States have “manifestly and gravely disregarded the limits of its discretion” and the threshold of seriousness of breach has been reached, ECJ in *Brasserie du Pêcheur* (paragraphs 56-7) laid down a number of guidelines to be taken into account by the national court^{xxi}. It has been claimed that there is evidence to prove that, other things being equal, the margin of discretion enjoyed by the Member States is in an inverse relationship with the likelihood of establishing a serious breach. The less the margin of discretion left to the national authorities by the Community rules, the easier it would be to establish that a breach of those rules is serious^{xxii}. Furthermore, there is a series of cases to confirm that the seriousness of breach is qualitative rather than quantitative^{xxiii}.

Since then, the perhaps most significant expansion of state liability occurred in *Köbler v Austria*, in which the ECJ controversially ruled that the state could, under certain circumstances, be liable in damages in respect of rulings by national court adjudicating in last instance infringing Community law under the same three requirements applied in the other cases of state liability. The Court once again used the principle of full effectiveness of Community rules and the need of protecting the rights of individuals to support its position. It provided a number of arguments to answer the important issues arising from the case such as the question of legal certainty, the independence of the judiciary and the risk of the diminution of the judicial authority. The ECJ emphasised the distinction between the review of judicial decision which would be against the *res judicata* and the order for reparation of damages which does not constitute a declaration of invalidity of the decision of the last instance court. In addition, the parties will not be the same since the application is directed against the state which would not have been a party to the original action. Also the object of the new proceedings will not be the same since the applicant in the

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new proceeding demands reparation for violation of Community law. Then, ECJ pointed out that state liability in this case cannot be translated as personal liability of the judge and as a result the independence of the judiciary is not affected. As far as the question of the risk of limiting the judicial authority is concerned, the European Court stresses in paragraph 43 that “the existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary”.

It is worth mentioning that the Köbler decision can have a number of significant importance consequences for domestic legal orders as well as for the relationship between national courts and ECJ under article 234 TEC.^{xxiv} For instance, the German Constitutional Court has ruled that in exceptional cases it might refuse to accept rulings of the ECJ in the Brunner Case^{xxv}. Theoretically one could envisage a scenario where a decision of the German Constitutional Court could be challenged under the Köbler case law. A first instance judge might be forced to choose between loyalty to the German Constitutional Court and to the ECJ. By the same token, the judicial protection is not effective since it adds more procedural entanglements, is more time-consuming and finally it is held that the tax payers will just “pick up the bill” without making the state more conscious^{xxvi}. It is argued that the decision upsets the domestic legal hierarchy: the High Court would be obliged to question the correctness of a decision of the House of Lords made a few months earlier and by extension if this last decision is challenged in a higher court, then perhaps a group of Law Lords will end up ruling on the judgment of their colleagues^{xxvii}.

Overall, taking all these points under consideration, we should realize that the European Court created this remedy because Member States sometimes fail to comply

with Community law. However, since the discretion of the national courts is quite significant, the effectiveness of the right to damages depends on the willingness of the courts to apply it in good faith. According to statistics, only countries with fairly good records for compliance make use of this legal remedy^{xxviii}. Following cases^{xxix} reveal clearly the strong and stable will of the ECJ to build a harmonized system of non-contractual state liability in the European Union, especially as far as administrative and legislative acts are concerned, despite the inherent difficulties that it has to face while endeavouring to define the nature of the national measure and the manifest infringement of the Community rule. Despite the strong criticism that such a case-law has faced, it is a reality we can not deny and its significant social, legal, transnational implications should be taken very carefully into consideration by the member-states concerned.

ⁱ Hartley T. C., *The European Court, Judicial Objectivity and the Constitution of the European Union*, 1996, 112 LQR, 95

ⁱⁱ Tridimas T., *Liability for breach of Community law: growing up and mellowing down?*, 2001, 38 CMLR p.301

ⁱⁱⁱ Hartley T.C., *European Union Law in a global context*, Cambridge 2004, p.211

^{iv} Case 39/73, 1973 ECR p.1039

Case 45/76, 1976 ECR p.2043

^v Chalmers D., Hadjiemmanuil C., Monti G., Tomkins A., *European Union Law*, Cambridge 2007, p.391

^{vi} Case C-213/89, 1990, ECR I-2433

^{vii} Craig P., *Francovich, Remedies and the scope of Damages Liability*, 1993, 109 LQR 595

^{viii} Cases C-6/90& C-9/90, 1991 ECR I-5357

^{ix} Craig P. *European Administrative Law*, 2006 Oxford, p.816

^x Emiliou N., *State Liability under Community law: shedding more light on the Francovich principle?*, 1996, 21 E. L. Rev. 399

^{xi} Dougan M. *The Francovich Right to reparation: the contours of Community remedial competence*, 6 *European Public law* (2000), p.103

^{xii} Szyszczek E., *making Europe more relevant to its citizens*, 1996, 21 *European Law Review*, p.35
Steiner J., *from direct effects to Francovich: more effective means of enforcement of Community law*, 1993, 18 *European Law Review* 3

^{xiii} Caranta R., *Judicial Protection against Member States: a new Jus commune takes shape*, 1995, 32 *Common Market Law Review* 703, p. 710

- ^{xiv} Harlow C., *State Liability: tort law and beyond*, OUP 2004, p.56-8
- ^{xv} Van Gerven, *Bridging the gap between Community and national laws: towards a principle of homogeneity in th field of legal remedies?*, 1995, 32 *Common Market Law Review* 679, p.694
- ^{xvi} Harlow c., *Francovich and the problem of Disobedient State*, 1996, 2 *European Law Journal* 199, p.204-7
- ^{xvii} Hartley T.C., *European Union Law in a global context*, Cambridge 2004, p.211
- ^{xviii} Tridimas T., *Liability for breach of Community law: growing up and mellowing down?*, 2001, 38 *CMLR* p.313
- ^{xix} Tridimas T., *Liability for breach of Community law: growing up and mellowing down?*, 2001, 38 *CMLR* p.310
- ^{xx} Van Gerven, *Taking article 215 (2) EC seriously*, in Beatson& Tridimas eds, *New Directions in European Public Law*, 1998 Hart Publishing, p. 35-48
- ^{xxi} Hartley T.C., *Hartley T.C., European Union Law in a global context*, Cambridge 2004, p.212
- ^{xxii} Tridimas T., *Liability for breach of Community law: growing up and mellowing down?*, 2001, 38 *CMLR* p.311
- ^{xxiii} Case C-392/93, 1996 ECR I-1631
Case C-140/97, 1999 ECR I-3499, paragraph 52
- ^{xxiv} Wattel P., *Kobler, CILFIT and Welthgrove: we can't go on meeting like this*, 2004, 41*CMLR*, p.177
- ^{xxv} *Brunner v. European Union treaty* [1994] 1 *CMLR* [24]
- ^{xxvi} Wattel P., *Kobler, CILFIT and Welthgrove: we can't go on meeting like this*, 2004, 41*CMLR*, p.187
- ^{xxvii} Scott H.& Barber N., *State liability under Francovich for decisions of national courts*, 2004, 120 *Law Quarterly review*, p.404-5
- ^{xxviii} Hartley T.C., *European Union Law in a global context*, Cambridge 2004, p.214
- ^{xxix} C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, C-173/03 *Traghetti del Mediterraneo SpA v. Italy* [2006] ECR I-5177