BRIDGING THE UNBRIDGEABLE: COMMUNITY AND NATIONAL TORT LAWS AFTER *FRANCOVICH* AND *BRASSERIE*[1]

W. VAN GERVEN*

IT has been believed for many years, indeed centuries, that the Channel between Great Britain and Continental Europe could be crossed only by boat. This belief has come to an end, albeit—at least for the time being—at a price which does not allow huge financial investments to be turned into a profit. The belief that in the legal field differences between English or Anglo-American common law and French and German—or, rather, Romanistic and Germanistic—legal systems are unbridgeable (or should I say "un-chunnelable"?) is even more widespread. That is the subject of this article: to show that differences between legal systems may, as a result of the European Union, be less unbridgeable than before, at least in certain areas of the law.

Rather than dealing with that subject in the abstract, I will focus on one, albeit a vast, field of the law, that of tort (or extra-contractual) liability. Moreover, rather than dealing with the subject from a strictly comparative point of view, I will (once again)[2] look at the impact on the national rules of the European Court's judgments in the *Francovich*[3] and post-*Francovich* cases[4] in conjunction with that Court's case law concerning the application of Article 215 of the EC Treaty. That means that I will focus mainly on liability for breaches of Community law on the part of public (national and Community) institutions. However, I will also discuss, albeit to a much lesser extent, the liability, under Community law, of individuals breaching Community legal rules, and the impact thereof on national laws.

* Professor at the Universities of Leuven and Maastricht and former Advocate-General at the European Court of Justice. This article is, basically, the text of a lecture given at the University of Durham on 24 Nov. 1995 and published in its initial (albeit updated) form by the Durham European Law Institute. The present text is a more recently (1 June 1996) updated, revised and amplified version.

1. The latter part of the title replaces that in the Durham version, " 'Who, then, ... is my neighbour' in Community law?", a reference to Lord Atkin's famous question in *Donoghue* v. *Stevenson* [1932] A.C. 562 (HL).

2. See my earlier contribution "Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies" (1995) 32 C.M.L.Rev. 679–702.

3. Joined cases C–6/90 and 9/90 *Francovich* [1991] E.C.R. 1–5357 confirmed in Case C–334/92 *Wagner Miret* [1993] E.C.R. I–6911.

4. Joined cases C–46/93 and 48/93 *Brasserie du Pêcheur* and *Factortame* and Case C–392/93 *British Telecommunications* (neither yet rep.).

I. THE UNBRIDGEABLE

DIFFERENCES between the legal systems on torts—even when limiting ourselves mainly to the three major legal systems (English, French and German law)—are considerable. That is true when one looks at the rules on torts in general (and thus in the first place on torts committed by individuals) and also, albeit to a lesser extent, when one looks at the more specific tort rules relating to government liability.[5] To exemplify these differences, let me refer first to four cable cases illustrating the important differences between general tort rules (that is, under English law, the rules on negligence), and then indicate how the more specific rules on breach of statutory duty and misfeasance on the part of public authorities may change that picture.

A. At First Sight, a Wide Diversity of National Tort Rules

The four cable cases referred to all relate to the problem of compensation, under the general rules on negligence, for purely economic or financial loss, that is, loss which is not directly consequential upon injury to property. From a perspective of Community law that kind of compensation raises the most important issue, since breaches of Community law are mainly breaches of economic laws that very often give rise to purely economic losses.

Let us start in England with *Spartan Steel*, decided by the Court of Appeal,[6] in which case the defendants' employees when digging up a road damaged an electric cable causing the plaintiffs' factory, which drew electricity from the power station owning the cable, to come to a temporary halt. As a result the plaintiffs had to pour molten metal out of their furnace. The Court of Appeal held that they were entitled to compensation for the physical damage to, and for the loss of profit on, the melt that was in the furnace at the time of the power cut, but not for the loss of profit on four further melts which could have been, but were not, completed during the power cut. The reasons given by Lord Denning for refusing to compensate the latter, held to be pure economic loss,[7] were mainly policy reasons. The underlying legal reason, though, is that the defendants did not owe a duty to the plaintiffs in respect of loss unconnected with their property.[8]

5. For a general overview, see Schockweiler, Wivenes and Godart, "Le régime de la responsabilité extra-contractuelle du fait d'actes juridiques dans la Communauté européenne" (1990) Rev.trim.eur. 27, 30 *et seq.*

6. *Spartan Steel & Alloys Ltd* v. *Martin & Co. (Contractors) Ltd* [1973] 1 Q.B. 27.

7. Pure economic loss is a rather vague concept. It does not cover e.g. loss of profits as the result of machinery damaged by negligence being out of operation, but covers loss of profits which is the result, as in *Spartan*, of the inability to sell the product damaged by the interruption of electricity supply due to negligence: see *Winfield & Jolowicz on Tort* (14th edn, by Rogers), pp.93–94.

8. *Idem*, p.94 and accompanying n.13.

The German Bundesgerichtshof has given judgment in various cable cases, one of which was decided by a judgment of 4 February 1964.[9] Here also the defendant's employees digging up a road caused a tree to fall upon a power cable as a result whereof the plaintiffs' chicken-breeding factory was left without electricity. The plaintiffs sought, and obtained, compensation for loss of profit on the 3,000 chicks which would have been produced from the 3,600 eggs that were incubating and were lost because of the stoppage of the machinery. However, in a later judgment in another cable case[10] the German Federal Court approved the Court of Appeal's refusal to grant damages to the owner of a plant who, because of a power interruption due to earth-removal operations carried out by the defendant, had to pay wages when no work could be done owing to the lack of current. The reason given therefor was that pure economic loss, as the lost wages were held to be, does not relate to one of the legal interests which are protected under section 823, paragraph 1, of the *Bürgerliches Gesetzbuch* (*BGB*).

Whereas under English and German law pure economic loss is not recoverable as it is not deemed, under the rules of negligence and under section 823, paragraph 1, of the *BGB* respectively, to be the object of a duty or a protected interest, French general tort law takes a completely different position. Indeed, under Article 1382 of the Civil Code, as interpreted by the Cour de cassation and analogously applied by the Conseil d'État, a legal remedy is granted against any interference with a legitimate interest. Pure economic loss is such an interest, as appears from a cable case decided by the French Conseil d'État on 2 June 1972.[11] In that case employees of the defendant company S.A.D.E., while performing work on the highway at Maison Laffite on behalf of Compagnie Générale des Eaux, cut a high-tension power cable with the result that the work at the manufacturing unit of Société Thomson had to be stopped for one hour and ten minutes. Thomson's claim against S.A.D.E. for loss of wages paid to its employees during the time they had to remain idle was first accepted by the administrative tribunal of Versailles[12] and then confirmed by the Conseil d'État (with the addition of interest) on the ground that the injury suffered by the plaintiff was the direct consequence of negligence in the course of work performed by the defendant's employees.

9. B.G.H.Z. 41, 123; N.J.W. 1964, 720.

10. Judgment of 12 July 1977, N.J.W. 977, 2208; J.Z. 1977, 721. English version by T. Weir reproduced in B. S. Markesinis, *The German Law of Torts* (3rd edn, 1994), p.184.

11. A.J.D.A. 1972 II Jur. 356 with the opinion of the *Commissaire du gouvernement*, M. Bertrand.

12. The administrative court, and therefore the Conseil d'État, was competent because the injury was suffered by the plaintiff, Société Thomson, in connection with the performance of "*travaux publics*" (work on the highway) by the defendant, S.A.D.E., performing the work on behalf of Compagnie Générale des Eaux, and not, in that specific case, because it was the beneficiary of contracted services rendered by the electricity company (which was not sued here because it could benefit from a waiver of liability in its contract with the plaintiff).

The last cable case which is mentioned here is one, out of several, decided by the Dutch Hoge Raad on 14 May 1958.[13] That was by far the most spectacular case, as it concerned pure economic loss suffered by a manufacturer of goods because of a power cut due to negligent action on the part of the Dutch air force authorities—which had allowed a military plane to dive in the neighbourhood of a high-tension power cable. First the Court of Appeal and then the Supreme Court held that the air force authorities had acted in breach of a duty of care which also existed in respect of the "neighbours" of the power line, as it was shown that the authorities had created a special danger for those relying on the supply of electricity by allowing the pilot to make a dive in that neighbourhood and without properly informing him of the special danger. Both Courts also accepted that there was a causal link between fault and harm as the injury was, under the circumstances of the case, to be foreseen in the normal course of events.[14]

This brief description may illustrate how different is the outcome, under four legal systems, of the question whether, and to what extent, pure economic loss must be compensated for under the general rules on negligence. Whereas the English and the German legal systems take in that respect the same restrictive position, albeit for different reasons, the French and the Dutch legal systems adopt a broader, more victim-friendly view. That does not mean, though, that pure economic loss can never be compensated under English and German law because, as we will see, there are under both these legal systems other headings of tort than the (more) general heading of negligence which can be counted on to make claims for pure economic loss succeed under certain circumstances. Furthermore, the fact that French and Dutch law *does* accept claims for pure economic loss under the general heading of tort does not preclude such claims from eventually failing on the ground of lack of causation. Interestingly enough, however, under both the latter legal systems the "floodgate" argument, so popular under English law, does not carry, or carries less, weight.[15]

B. Less Variety at Second Glance?

Pure economic loss may indeed give rise to compensation under the heading known as breach of statutory duty in England and under section 823, paragraph 2, of the *BGB* for breach of a protective norm (*Schutznorm*) in Germany. In the common law of England claims for compensation can be

13. N.J. 1961, No.570, p.1217; upholding the decision of the Court of Appeal of the Hague of 24 Jan. 1957.

14. See now Art.6:98 of the new Dutch Civil Code.

15. Under *ibid* the multiplicity of potential claims may be an element in holding that there is no causation.

brought both against a private individual and against a public authority and may allow compensation for pure economic loss *if* the statute which is breached can be construed as giving an action for damages for the benefit of the injured plaintiff. Under German law the same result is achieved by virtue of section 823, paragraph 2, subject, however, to one important difference: whereas under English law the construction of the statute is decisive not only for the scope of the remedy of compensation (including, e.g., compensation for pure economic loss) but *also* for the existence of the remedy itself, that is not so under German law, precisely because of section 823, paragraph 2, which states expressly that, in case of breach of a protective statute (that is, a statutory rule protecting the plaintiff), such breach gives rise to an action for damages to the extent that some fault can be imputed to the wrongdoer.[16] Furthermore, it should be noted that the fact that a statute is meant to protect the public *at large* does not imply that it was not also intended to protect a particular class of persons to which the plaintiff belongs.[17] The damage to be made good under these circumstances includes lost profit (see section 252 of the *BGB*).

In the German Civil Code there is a further provision, section 839 of the *BGB*, which deals with the liability of a civil servant for breach of an official duty owed to a third party. That section prevails over the provisions of the other more general clauses of the Code, like section 823, paragraphs 1 and 2, cited above. Whilst it is, in some respects, narrower in scope than these other clauses, it is broader in other respects; thus the possibility of obtaining compensation for pure economic loss. Although dealing only with the personal liability of the civil servant, it follows from Article 34 of the German Basic Law that liability in respect of the person to whom the duty is owed rests in principle on the State or the public body which employs the civil servant.[18] Under English law there is also a special tort, misfeasance in public office, that protects private persons against intentional unlawful conduct on the part of public authorities and allows them to obtain compensation, including for pure economic loss.[19] However, the scope of this tort is rather limited since it is necessary to prove malice or actual knowledge of the unlawfulness of an act "which has the foreseeable and actual consequence of injury".[20]

16. For a further discussion see Markesinis, *op. cit. supra* n.10, at pp.891 *et seq.*

17. *Idem*, p.892.

18. *Idem* pp.903 *et seq.* It does not normally allow reparation for loss or damage which is the consequence of a breach of Community law by the legislature, whose tasks relate, in principle, to the public at large and not to identifiable persons or classes of persons: para.71 of the ECJ's *Brasserie* judgment: see *infra*.

19. See Brealy and Hoskins, *Remedies in EC Law* (1994), p.76, mentioning also the possibility of exemplary damages. See in that respect para.89 of the *Brasserie* judgment, *idem*.

20. Brealy and Hoskins, *idem*, pp.75–76 citing Mann J in *Bourgoin*, *infra* n.48. Moreover, such an abuse is inconceivable in the case of the legislature: para.73 of the *Brasserie* judgment, *idem*.

For the rules on, e.g., breach of statutory duty to implement, under English law, the rules on negligence when it comes to compensating pure economic loss in situations such as the cable cases, there would need to be an Act from which a duty to compensate also loss of profits incurred by "neighbours" of the power line could be inferred. Thus, e.g., in a situation like the one at issue in the Dutch case, there is some Military Aviation Act in which Parliament has made clear its intention, or the courts have read such intention into the Act, to subject the authorities to liability in damages to the particular class of persons to which the plaintiff belongs.[21] Or (and perhaps more likely), in a situation like the one at issue in the French case, certainly when a claim is brought (unlike in the French case)[22] by the ratepayer (subscriber) against the electricity supplier, i.e. a public utilities corporation, because an Act imposes on the latter a statutory duty sounding in damages.[23] Under German law the situation may not be that different.[24] Furthermore, in the case of unlawful conduct on the part of public authorities, the tort of misfeasance in public office or section 839 of the *BGB* might eventually allow compensation for pure economic loss, provided that the other restrictive conditions for that application are fulfilled.

Here is not the place to pursue this comparative law analysis any further. But, of course, the variety (even when taking specific tort rules into account) which we have ascertained above is only the tip of the iceberg as, indeed, apart from the scope of protected interests, many other aspects are regulated differently—and, within many legal systems (like the German but also the French), also differently depending on whether individual or governmental liability is at issue. To name only a few: the notions of

21. At a certain point in time (until *Anns* v. *Merton London Borough Council* [1978] A.C. 728 was reversed by *Murphy* v. *Brentwood D.C.* [1991] 1 A.C. 398) it was not unlikely that the rules on negligence were evolving in the direction of the existence of a duty of care owed by public authorities, perhaps even to compensate pure economic loss, towards a person as remote as the purchaser of a house (which the public authority had inspected and, wrongfully, found safe and secure). See the discussion in T. Weir, *A Casebook on Tort* (7th edn, 1992), pp.39 *et seq.*

22. See *supra* n.11.

23. See e.g. in the case of a water authority required by an Act to assure that the water be wholesome *Read* v. *Croydon Corp.* [1983] 1 All E.R. 631 referred to by Weir, *idem*, p.167. However, even then only the ratepayer, and not his family, may found on the water company's duty to provide wholesome water: *idem*, p.169.

24. In the second German cable case judgment of 1977 referred to *supra* n.10, the Bundesgerichtshof examined as a matter of fact (and negatives the question) whether building ordinances could be held to be protective laws under s.823, para.2, *BGB* in favour of those paying for water supply who suffer economic loss through a lack of current due to damage to an electricity cable brought about by digging works performed on behalf of the local water authority. In that case another device, often used in German law, to help injured persons to obtain compensation even when tort rules do not allow it to be granted was examined (but rejected under the circumstances): that device consists in bringing the third person within the protective ambit of a contract concluded between other persons.

fault and unlawfulness, of vicarious liability, of causation; the defences which the defendant can raise against the plaintiff's claim; the measure and nature of compensation; the question of other remedies, such as injunctive relief. What we wish to consider now is the extent to which Community law is making inroads into (or, more in keeping with the title of this article, building bridges between) the national tort laws of the member States. This brings us first to the subject of legal—or, rather, judicial—remedies.

II. THE COMMUNITY BRIDGES

A. *The Community Law Requirement of Efficient Judicial Protection*

As is well known, it is a requirement of Community law that EU individuals, whether natural persons or legal entities, should be able to enforce the rights they derive from Community legal rules through judicial remedies which they can pursue mainly before domestic courts and thus in accordance with national law.[25] And indeed, as the European Court has said most explicitly in *Heylens* regarding the fundamental right of free access to employment which Article 48 of the EC Treaty confers on each worker in the Community: "the existence of a remedy of a judicial nature against any decision of a national authority ... is essential in order to secure for the individual effective protection for his right".[26] In its judgment the Court referred to an earlier decision in *Johnston* v. *Chief Constable of the Royal Ulster Constabulary*.[27] In that case the Court had to consider Article 6 of EC Council Directive 76/207, which requires member States to introduce such measures as are needed to enable persons who consider themselves wronged by discrimination on the basis of gender in respect of work conditions "to pursue their claims by judicial process". The Court held in its judgment in the case that "the requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions of the Member States" and that therefore a national provision which in any judicial proceeding grants conclusive effect to a Secretary of State's certificate that discrimination was necessary to protect public safety is "contrary to the principle of effective judicial control".

It does not suffice, however, that rights which EU citizens derive from Community law (hereafter "Community rights") are in each member State protected by judicial process *to some extent*. For that protection to

25. For a general overview, as an introduction to a discussion of *Francovich* as well as Art.215, para.2, EC *and* individual tort liability, see my article, "Non-Contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe" (1994) 1 Maastricht J. European and Community L. 6.

26. Case 222/86 [1987] E.C.R. 4047, para.14.

27. Case 222/84 [1986] E.C.R. 1651, 1683.

satisfy the uniform application of Community law in the member States—which is "a fundamental requirement of the Community legal order"[28]—it must also be sufficiently uniform, i.e. similar or of a comparable nature, in each of the member States. Only then is it possible to avoid judicial protection of Community rights varying considerably from one member State to another, thus depriving such rights of the equal substance which they are intended to have for all Community citizens alike. And indeed, it cannot be emphasised enough that equality of *rights*, and uniform application thereof throughout the Community, implies sufficiently harmonised *sanctions* guaranteeing the enforcement of those rights *and* sufficiently harmonised legal *remedies* enabling the enforcement of such rights and sanctions through the judicial process in an adequate *and* comparable manner in all the member States.[29]

Such sufficient harmonisation of judicial remedies in order to secure the uniform enforcement of Community rights which have, and must continue to have in their application, the same substance for all EU citizens enters into conflict at a certain point with the so-called principle of the autonomy of the member States in matters of procedural law.[30] That principle is founded on the long-standing position of the European Court,[31] as reiterated in *Francovich*: "In the absence of any Community legislation, it is a matter for the internal legal order of each Member State to determine the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law."[32] Unfortunately, however, the Court does not define what it means by procedural rules, and seems sometimes to take these terms as referring to the broader concept of legal remedies and, even more unfortunately, uses in *Francovich*, in respect of so-called "substantive conditions", a similar *renvoi* to the national laws of the member States

28. Joined cases C–143/88 and C–92/89 *Zuckerfabrik* [1991] E.C.R. I–415, para.26. See also *Brasserie*, *supra* n.4, at para.33, where the principle is relied on to hold member States liable for breaches of Community law by the legislature, since the obligation to make good damage cannot depend on domestic rules as to the division of powers between constitutional authorities.

29. Advocate-General Jacobs puts it as follows: "Community law has to be interpreted and applied uniformly in all the Member States. The need for uniformity has often been stressed but the explanation is quite simply that, in the absence of uniformity, there would be no Community law" ("Remedies in National Courts for the Enforcement of Community Rights", in *Liber Amicorum for Don Manuel Diez de Velasco* (1993), p.969; see also p.982). See further my *op. cit. supra* n.2, at pp.690–695 and R. Caranta, "Judicial Protection Against Member States: A New *Jus Commune* Takes Shape" (1995) 32 C.M.L.Rev. 703–726.

30. See T. Koopmans, "The Quest for Subsidiarity" and A. Barav, "Omnipotent Courts", in *Schermers Liber Amicorum*, Vol.II (1994), pp.50 and 268, respectively.

31. Starting with the ECJ's judgments in Case 33/76 *Rewe* and Case 45/76 *Comet* [1976] E.C.R. 1998 and 2053. For later judgments see the enumeration in the recent ECJ's judgment of 14 Dec. 1995 in Joined cases C–430/93 and C–431/93 *Van Schijndel* (not yet rep.), para.17.

32. *Supra* n.3, at para.42, and repeated in *Van Schijndel*, *ibid*, and in the judgment of the same date in Case C–312/93 *Peterbroeck* (not yet rep.), para.12.

provided only that such conditions (substantive and procedural) "may not be less favourable than those relating to similar internal claims and may not be so framed as to make it virtually impossible and excessively difficult to obtain compensation"[33] (i.e., in more general terms, to use the appropriate legal remedy).

The proviso cited above imposes two limitations on the member States' jurisdiction. Whilst the second (the so-called "effectiveness" principle) has the effect that Community rights are enforceable in all member States but achieves uniformity of application *only* at the level of an (almost absolute) minimum, the first (known as the "assimilation" or "equality" principle) constitutes a guarantee that Community rights are enforced in a similar manner as "internal claims", which implies that, if there is *no* judicial protection for the latter, there is none for Community claims either. The proviso does not achieve therefore the objective of an adequate and sufficiently harmonised level of judicial protection in all the member States. That objective can be achieved only if the European Court is willing, in the absence of action by the Community legislature, to lay down the procedural and, more important, 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.[34]

The lengths to which the European Court will go in harmonising conditions did not appear from the recent judgments in *Van Schijndel* and *Peterbroeck*,[35] which concerned matters of a procedural nature dealing with the compatibility with Community law of national rules whose effect is that the holder of an existing remedy is barred from exercising it. For those matters, the above-mentioned proviso requiring that the exercise of Community rights may not be rendered virtually impossible or excessively difficult may suffice as a guideline for national courts to know which national rules should be disapplied.[36] As for national rules concerning substantive conditions, national courts may need more guidance as they may wish to know in a more precise way the conditions for the remedy to arise

33. *Francovich*, *idem*, para.43. In the *Van Schijndel* and *Peterbroeck* judgments, *ibid*, there is no such *renvoi* in respect of substantive conditions, rightly so since these judgments relate clearly to procedural matters proper.

34. See my *op. cit. supra* n.2, at pp.692–694. See also, in respect of inadmissible procedural limitations, R. Koch, "Einwirkungen des Gemeinschaftsrechts auf das nationale Verfahrensrecht" (1995) E.U.Z.W. 78.

35. *Supra* nn.31 and 32.

36. See for a description of the Court's case-law Advocate-General Jacobs, *op. cit. supra* n.29 and his recent opinions in *Peterbroeck* and *Van Schijndel*, *ibid*, where he compares and distinguishes procedural rules of the type at issue in the latter cases and those at issue in *Simmenthal* (Case 106/77 [1978] E.C.R. 629) and *Factortame* (Case 213/89 [1990] E.C.R. I–2433). But see the ECJ's judgment in *Peterbroeck* where it finds the national rule incompatible because it limits the enforceability of Community rights too drastically (I would assume).

under Community law so as to be able to shape the remedies existing in their legal systems in accordance with the requirements of Community law.

B. Francovich*: A Vain Triumph for the Plaintiffs but not for Community Law*

Since the Court's judgment of 19 November 1991 in *Francovich* it is crystal clear "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".[37] Although the Court made that statement (and described the substantive conditions of liability) in respect of a breach of Community law consisting of the complete failure on the part of a member State to transpose a directive into national law within the prescribed period of time, it was obvious from the outset, because of the general terms used by the Court, that the same principle would apply in the case of other breaches of Community law on the part of national public authorities, albeit not necessarily under the same conditions (such conditions to depend, as the Court said, on the nature of the breach of Community law).[38]

The Court's acceptance in *Francovich* of the principle of State liability is to be seen as the last step (as yet?) in a long series of rulings aimed at giving full effect to Community law.[39] The remedy of compensation provided therein should be seen as an essential element of the legal protection of the individual's Community rights, not only in the case of those provisions that are *not* directly applicable but also in the case of those that are[40] since, as the Court said in its *Brasserie* judgment, the right to reparation is the "necessary corollary of the direct effect of the Community provisions whose breach caused the damage sustained".[41]

Although the *Francovich* judgment has been a vain triumph for the plaintiffs, Francovich and his colleagues,[42] it has not been so for Com-

37. *Francovich*, *supra* n.3, at para.35.

38. *Idem*, para.38.

39. The principle of *Francovich* liability is, together with the requirement of interpretation of national laws in conformity with directives, an essential element in the enforcement of Community rules laid down in directives which have not yet, or not fully or correctly, been implemented. Taken together these two doctrines render the refusal to acknowledge the horizontal direct effect of directives, as confirmed in *Paola Faccini Dori* (Case C–91/92 [1994] E.C.R. I–3325) and thereafter *El Corte Ingles* (Case C–192/94, not yet rep.), of little interest.

40. As already decided in Case C–188/89 *Foster* [1990] E.C.R. I–3313, paras.21–22.

41. *Brasserie* judgment, *supra* n.4, at para.22; discussed *infra*.

42. Indeed, in a later judgment of 9 Nov. 1993 Case C–479/93 *Francovich* v. *Italy* the ECJ has held that Francovich's claim for payment of salary arrears did not come within the scope of application of the directive, the non-implementation whereof had given rise to the *Fran-*

munity law—as can be seen from the applications in the post-*Francovich* cases and the ensuing opinions presented to the Court by its Advocates-General Léger[43] and Tesauro.[44] In these cases applications of the *Francovich* principle were sought after not only in respect of the incorrect (and allegedly *bona fide*) implementation of a directive (*British Telecommunications* and *Dillenkofer*) but also in respect of an individual decision on the part of a national administration that is allegedly in breach of a directly applicable Treaty provision (*Hedley Lomas*) and in respect of a legislative *act* (*Factortame*) and of a legislative *omission* (*Brasserie*) which the Court had found in earlier judgments to be in breach of directly applicable Treaty provisions.

C. Consistency Needed: Rather One (Two-Lane) Community Bridge than Two Separate Bridges

The principle of State liability itself was (or is) less at issue in these cases—it would have been an unexpected (and unfortunate) change if the Court had overruled its *Francovich* ruling—than the conditions under which such liability is to arise in each of these instances (more particularly when the breach is attributable to the legislature proper),[45] *and* the question of the extent to which the Court, in the absence of Community legislation, wanted itself to define (and therefore harmonise) the substantive conditions for State liability, and whether it wanted to do so taking account of its case law concerning the liability of Community institutions under Article 215, paragraph 2, of the EC Treaty.

Let me first address the latter point. As indicated on an earlier occasion,[46] it was to be hoped that the Court would follow the advice given by Advocate-General Misho in his opinion in *Francovich*[47] and reconcile its *Francovich* (and post-*Francovich*) case law with its case law on Article 215, paragraph 2, of the EC Treaty. Indeed, both sets of case law relate to extra-contractual liability for the same kind of breaches of Community law, the first on the part of national public authorities, the second on the

covich liability judgment, because Francovich's insolvent employer was not one against whom a collective procedure on behalf of the creditors could be brought under Italian law.

43. Opinion of 20 June 1995 in Case C-5/94 *Lomas* (not yet rep.).

44. Opinion of 28 Nov. 1995 in Joined cases C-46/93 and C-48/93, in Case C-392/93 (all *supra* n.4) and in Joined cases C-178 and 179/94, C-188, 189 and 190/94 (*Dillenkofer*) (all not yet rep.).

45. Also in *Francovich* the liability of the State (for non-implementation of a directive in that case) was acknowledged regardless of which State organ was responsible in the member State concerned for the infringement of Community law.

46. See my *op. cit. supra* n.25, at pp.37–38 and my opinion of 27 Oct. 1993 in Case C-128/92 *Banks* [1994] E.C.R. I-1212, paras.49 *et seq.* where I have tried to summarise the conditions for liability resulting from the Art.215, para.2, EC case law of the ECJ with a view to the *Francovich* liability.

47. At para.71 of his opinion in [1991] E.C.R. I-5000. But see Advocate-General Léger's opinion in *Hedley Lomas*, *supra* n.43, at paras.128 *et seq.* and 138 *et seq.*

part of Community institutions, and their respective civil servants. Would it not be odd, as Parker LJ remarked in *Bourgoin*,[48] for a member State to be held liable in damages when the Community itself would be liable only in the circumstances described in the *Schöppenstedt* formula (referred to below)?

Surely, there may be important differences between the two situations in that Community institutions, and in particular the Community legislature, will often act in a field "which is characterized by the exercise of a wide discretion"[49] whereas the national legislature, when promulgating or maintaining rules in a field of the law which comes within the ambit of Community law, rarely possesses discretionary powers as wide as those of the Community legislature.[50] In spite of these potential differences—which relate only to legislative acts and omissions—the general principle applicable in all situations (that is, of a normative *and* an individual nature) is that the public authority should behave as a normally reasonable and diligent authority being placed in the same kind of circumstances, which means that, in the case of discretionary (mostly legislative) powers on the part of Community or of national public authorities, liability is less likely to arise than in the case of non- or less discretionary powers. For, indeed, discretion implies by necessity some room for error and thus, in the case of wide discretion, liability should arise only in case of "a sufficiently flagrant [or serious] violation of a superior rule of law for the protection of the individual" (as the famous *Schöppenstedt* formula puts it).[51] The foregoing implies that, to give rise to liability, the infringement of Community law should be assessed by the competent judge (the European Court and the Court of First Instance in the case of Community institutions and the national courts in the case of national authorities) on a sliding scale, from a mere breach, or breach *simpliciter*, such as a clear-cut (inexcusable and unjustifiable) violation of a precise obligation as in *Francovich*—in which case the infringement concerned leads almost automatically to liability—to a breach committed in the exercise of wide discretionary powers, in which case the public authority is liable only in the event of a sufficiently serious breach, that is, when it has shown a "manifest and grave disregard of the limits on the exercise of its powers".[52]

48. *Bourgoin SA* v. *Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716.

49. Thus in Joined cases 83 and 94/76, 4, 15 and 40/44 *Bayerische HNL* [1978] E.C.R. 1209, para.6.

50. National legislatures have to respect all rules of Community law of whatever rank, the Community legislature will only have to respect general principles of Community law and Treaty provisions.

51. Case 5/71 *Schöppenstedt* [1971] E.C.R. 975, para.11 (the words between brackets refer to a change introduced into the formula by later judgments).

52. *Bayerische*, *supra* n.49; also Joined cases 104/89 and 37/90 *Mulder and Heinemann* [1992] E.C.R. I-3061, para.12.

In its *Brasserie* judgment the Court has now endorsed the principle of consistency between the two Community law regimes relating to extra-contractual liability, holding that:[53]

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

This ruling of the Court has to be seen in connection with its position in the preceding part of the judgment according to which the principle of State liability—of which the Court says that it is "the necessary corollary of the direct effect of the Community provisions whose breach caused the damage sustained"[54]—is an expression of a general principle familiar to the legal systems of the member States and also laid down in Article 215, paragraph 2, of the EC Treaty.[55] As a consequence thereof, "that principle holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach".[56] The link between the *Francovich* and the Article 215 liability regimes is indeed very helpful in supporting the view that conduct of the national legislature may also give rise to liability, as Article 215 also covers the liability of the Community for unlawful conduct of its legislature. At the same time it allows the Court to apply the strict approach taken towards the liability of the Community in the exercise of its legislative function (under the *Schöppenstedt* formula mentioned earlier) to the liability of the member States in the exercise of their legislative tasks.[57]

So far, so good. One may wonder, however, as explained later when discussing the concept of breach, whether the Court did not go (one bridge) too far in applying the same strict approach to the discretionary powers of national authorities when taking policy decisions *and* when interpreting Community legal rules.

53. *Brasserie* judgment, *supra* n.4, at para.42.

54. *Idem*, para.22. The Court thus explicitly acknowledges that "direct effect" and "State liability" are no alternative remedies, and rejects the position that "State liability" was recognised in *Francovich* only "to fill a lacuna in the system for safeguarding rights of individuals namely in case of not directly effective Community law provisions": para.22 *juncto* para.18.

55. *Idem*, para.29.

56. *Idem*, para.32. See also para.34 where international law is relied on as a precedent to hold the State liable irrespective of whether the breach is attributable to the legislature, the judiciary or the executive.

57. *Idem*, para.45 where the reasons for that strict approach are recalled: see *infra* n.89.

D. Harmonisation, Sufficient to Satisfy the Uniform Application of Community Law and Commensurate with the Nature of the Breach

The Court having decided in favour of consistency[58] between the two Community regimes of extra-contractual liability, it remains to be seen how far it is itself willing to go, in the absence of action by the Community legislature, in determining and harmonising[59] the conditions of State liability for breaches of Community law (in respect both of normal and of discretionary powers,[60] and in line with its Article 215, paragraph 2, case law).[61] Only when the Court is ready to go sufficiently far will its case law be able to satisfy the uniform application of Community law in the member States.[62]

Conditions of substantive law[63]—to be determined for each type of breach, depending on the nature thereof[64]—relate mainly to the three basic elements of tort liability (breach, causation and damage), the remedy of compensation (full or partial, in kind or by equivalence) and related remedies (injunctions, interim relief) and the defences which the defendant may raise against the plaintiff (e.g. contributory negligence and the duty to mitigate damage). The notion of breach raises many delicate questions, such as those concerning unlawfulness, subjective or objective fault, reasons for being excused as well as grounds of justification. Many of the questions have been dealt with in the above-mentioned opinions of Advocates-General Léger and Tesauro,[65] and some of them have in the meantime been answered in the *Brasserie* and *British Telecom* judgments of 5 and 26 March 1996.

58. For a discussion of the requirements of harmonisation, consistency and homogeneity, see my "Toward a Coherent Constitutional System within the European Union", 5th Bonner Europa-Symposium, *Die Verfassung der Europäischer Union* (1995) at pp.39 *et seq.*, also in (1996) European Public Law 81–101.

59. In *Brasserie*, *supra* n.4, the ECJ rejects the submission of the German government that a general right to reparation can be created only by legislation and not by judicial decision: see paras.24–30.

60. For an excellent overview of the Court's Art.215, para.2, EC case law both for individual and legislative measures, see J. Steiner, *Enforcing EC Law* (1995), pp.144 *et seq.*

61. *Brasserie*, *supra* n.4, at para.40.

62. As the Court explicitly said in *Zuckerfabrik*, *supra* n.28, at para.26, in respect of the remedy of interim relief, such uniform application is a fundamental requirement of the Community legal order. See also *Brasserie*, *idem*, para.33.

63. I am leaving aside conditions of a procedural nature: but see *Van Schijndel* and *Peterbroeck*, *supra* n.32 and accompanying text, and Jacobs, *op. cit. supra* n.29.

64. As the Court said in *Francovich*, *supra* n.3, at para.38, where it laid down the conditions in respect of full non-implementation of a directive, and confirmed in *Brasserie*, *supra* n.4, at para.38, where the Court specified the conditions in respect of unlawful conduct on the part of the national legislature.

65. See more particularly Advocate-General Tesauro's opinion in *Brasserie* and *Factortame*, *supra* n.44, at paras.70 *et seq.* See also my earlier opinion in *Banks*, *supra* n.46, where I tried to make use of the Court's Art.215, para.2, case law to define common conditions of substantive law regarding the liability of member States, of Community institutions *and* of individuals (the latter being raised in that case: see *infra*).

Before turning to the answers in these judgments I would like to make the following remarks, first in respect of *breach*. As indicated above, that notion should be determined depending on, and commensurately with, the nature of the breach and therefore on the basis of a sliding scale on which I see the following prototype situations (regardless of the author of the breach: Community or national, legislature or executive):

(1) breaches of duty *simpliciter*, as in the event of a breach of a precise and incapable of being misunderstood Community obligation (*obligation de résultat*);
(2) breaches consisting in the misinterpretation of sufficiently precise and reasonably clear Community rules that contain scope for normal interpretation only, taking into account the existing case law and the standing practice of the Community institutions;
(3) breaches consisting in the misinterpretation of open-ended, and therefore vague, notions and (sometimes unwritten) general principles which lend themselves to considerable scope for interpretation (so much so that, eventually, the Court itself may decide to limit the temporal effects of the interpretation which it attaches to the rule at issue in one of its judgments);
(4) breaches of Community rules which are so ambiguous or even misleading (raising therefore questions of concurrent liability on the part of the Community institutions) that misinterpretation is not at all unlikely;
(5) breaches committed in the exercise of broad discretionary powers, mostly in matters involving policy decisions of a general nature to be decided by the legislature or, in matters of an individual nature, implying the assessment of subjective elements (such as candidates' personal qualities) or of constantly changing economic conditions.[66]

In all five situations the question arises whether a breach of the Community rule is in itself sufficient for liability to arise, or whether something more is needed. As to the latter part of the question, the answer is that—apart from acceptable excuse or justification (see *infra*)—nothing more is needed under (1) or under (2) and (3) unless the defendant authority can show, in the latter two situations, that the erroneous interpretation was due to a *bona fide* misunderstanding which, in the circumstances of the

66. See also Advocate-General Léger's opinion in *Hedley Lomas*, *supra* n.43, at paras.135 *et seq.* and paras.152 *et seq.*, esp. para.160. In the earlier version of this article, as published by the Durham European Law Institute, I referred to the recent House of Lords decision in *X (minors)* v. *Bedfordshire* [1995] 1 All E.R. 353, where a rather similar effort is made, under English law, by Lord Browne-Wilkinson to distinguish between different categories of breach in the exercise of statutory powers by a public authority.

case, could also have been made by a normally diligent authority. Under (4) and (5), on the contrary, the answer to the question whether "something more" is needed seems to be in the affirmative and that the plaintiff will have to show that, depending on the degree of ambiguity or discretion,[67] the public authority was manifestly wrong in interpreting the ambiguous rules or has manifestly and gravely disregarded the limits on the exercise of its discretionary powers.

In deciding whether "something more" is present under the circumstances, the competent court will have to ascertain in each of these situations (even in the first, but then very exceptionally) whether the conduct amounting to breach can be excused for reasons which are beyond the control of the public authority concerned and thus amounting to *force majeure*, or on the basis of grounds of justification, such as the pursuit of conflicting policy considerations of general interest,[68] provided in both instances that such reasons for being excused or grounds of justification are acceptable under Community law. That is not the case, as appears from the Court's case law on Article 169 of the EC Treaty, for delays due to the (mal)functioning of the legislative process in a member State. Finally, for an individual to be able to obtain compensation, the breach of Community law must relate to a rule which (e.g. because of its direct effect) intends to give rights or legal protection to the individual concerned.[69]

Second, in respect of *causation* (and defences) reference should be made to the Court's case law relating to Article 215, paragraph 2, according to which proof must be furnished of a direct causal link, the Court having indicated, however, that from that Article there cannot be "deduce[d] an obligation to make good every harmful consequence, even a remote one, of unlawful legislation".[70] As for events breaking the chain of causation, it must be determined with the help again of Article 215, paragraph 2, case law, how far account must be taken of the conduct of the

67. As said before, the discretion on the part of the legislature of member States will, as a general rule, be less wide than that of the Community legislature. That is specifically the case when the member State's discretion is restricted to selecting, and implementing, one out of a limited number of (rather well-defined) options as prescribed e.g. in a directive.

68. See e.g. under Art.215, para.2, Case C–152/88 *Sofrimport* [1990] E.C.R. I–2477, para.29 where the Court refers to the potential existence (absent in that case) of a countervailing higher public interest to justify the breach.

69. That point has been decided both in respect of liability under Art.215, para.2, EC (see Joined cases 5, 7 and 13–24/66 *Kampffmeyer* [1967] E.C.R. 245) and under *Francovich* (the first condition in para.40 of the judgment).

70. Joined cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier Frères* [1979] E.C.R. 3091, para.21. See also the recent decision of the CFI in Case T–168/94 *Blackspur DIY* (1995, not yet rep.).

injured party,[71] more particularly its failure to mitigate or avoid the damage,[72] in particular by making prompt use of available legal remedies,[73] as well as of the wrongful conduct of third persons, in particular other (Community or national) public authorities.[74]

Third, in respect of *damage* and the remedy of compensation, it seems clear that pure economic loss should be recoverable as a matter of principle (provided that it is not purely speculative)[75] since damage occurring as a result of breaches of Community law will more often consist of financial losses (*lucrum cessans* and interest)[76] than damage to property or to the person.[77] Apart from that, the Court has already held in respect of Article 215, paragraph 2, that it suffices to show "imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed" and that in order "to prevent even greater damage it may prove necessary to bring the matter before the Court as soon as the cause of damage is certain".[78] As to the assessment of the damage, the Court has indicated that in special circumstances account may be taken of "the sampling methods habitually used in economic surveys [which] make it possible to reach acceptable approximations provided that the basic facts are sufficiently reliable".[79]

Then there is the crucial (and delicate) question of the *measure of compensation*: should all (certain and actual) damage be compensated, or will partial compensation suffice? Under the Article 215, paragraph 2, case law full compensation seems to have been accepted as a general rule,[80] subject to certain limitations in cases of liability for legislative acts, since the Court accepts that individuals should under certain circumstances—

71. See Case 145/83 *Adams* v. *Commission* [1985] E.C.R. 3539.

72. Thus *Bayerische*, *supra* n.49, at para.6. See also Steiner, *op. cit. supra* n.60, at pp.148–149 and 151.

73. See *Brasserie* judgment, *supra* n.4, and Advocate-General Tesauro's opinion, *supra* n.44, at paras.97 *et seq.*

74. See Joined cases 116, 124/77 *Amylum* [1979] E.C.R. 3497. This defence raises difficult questions of a procedural nature. Cf. W. Wils, "Concurrent Liability of the Community and a Member State" (1992) 17 E.L.Rev. 191 *et seq.*

75. See Steiner, *op. cit. supra* n.60, at p.151 where less straightforward judgments are cited as well.

76. See the Court's judgment in *Mulder and Heinemann*, *supra* n.52, at para.26 and also my opinion, para.47. The Court has in the meantime acknowledged that point explicitly in *Brasserie*, *supra* n.4, at para.87. See also *infra*.

77. See for a situation of potential immaterial damage to the person Joined cases 169/83 and 136/84 *Leussink-Brummelhuis* [1986] E.C.R. 2801. Cf. also Case 53/84 *Adams* v. *Commission*, *supra* n.71.

78. Joined cases 56–60/74 *Kampffmeyer* [1976] E.C.R. 711, para.6 and further references in the opinion in *Banks*, *supra* n.46, at para.51, note 138. The Court referred thereby to the majority of legal systems in the member State "which recognize an action for declaration of liability based on future damage which is sufficiently certain".

79. Joined cases 29, 31, 36, 39–47, 50 and 51/63 *S.A. Laminoirs* [1965] E.C.R. 911, 939.

80. See e.g. *Mulder and Heinemann*, *supra* n.52, where in paras.23–36 the rules on full compensation are neatly and thoroughly applied.

thus, e.g., if the damage does not exceed the normal entrepreneurial risk—themselves be liable for, within reasonable limits, the harmful consequences of such acts.[81] Should that be different in cases where the liability of member States is at issue? Whatever the answer to that question, it must be consistent with the ruling which the Court has given in *Marshall II*, albeit in a different context: that of violating the prohibition on sex discrimination in Directive 76/207. The Court—not following on that point its advocate-general, who had opted for adequate (not necessarily full) compensation provided that the essential elements of damage (*damnum emergens*, *lucrum cessans*, intangible damage and interest) were taken into account—ruled in that case:[82]

> When financial compensation is the measure adopted in order to achieve the objective indicated above [that is, in a situation where equal treatment should be restored, either by reinstating or, in the alternative, granting financial compensation for the loss and damage sustained], it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules.

I am deducing from this that the answer to the question of full or partial compensation "depends on the function which the remedy fulfils, as a sanction, within the framework of the specific Community rule that it purports to make effective".[83] In *Francovich*, where the breached rule of the directive secured the payment of a specified amount of money, compensation had therefore to be equal to that amount. In *Marshall II* it had to be equal to the alternative remedy of reinstatement of the victim of discrimination. In cases of violation of directly enforceable Treaty provisions prohibiting discrimination on the basis of nationality, it must therefore be capable of restoring a situation where no discrimination would have occurred. However, as is shown by the Court's Article 215, paragraph 2, case law, damage resulting from unlawful legislative acts may remain uncompensated, to the extent that it does not exceed the boundaries of normal (entrepreneurial) risk-taking on the part of the plaintiff, or when there are other reasons for leaving the loss with the plaintiff, within reasonable limits.[84]

81. See *Bayerische*, *supra* n.49, at para.6. See also Steiner, *op. cit. supra* n.60, at pp.148–149 and 151.

82. Case C–271/91 *Marshall II* [1993] E.C.R. I–4367, para.26; the words between brackets are taken from para.25. See my opinion in that case [1993] E.C.R. I–4381, paras.14–19.

83. See my *op. cit. supra* n.2, at p.694. See also Curtin and Mortelmans, "Application and Enforcement of Community Law by the Member States ...", in *Schermers*, *supra* n.30, at pp.451 *et seq.*

84. *Bayerische*, *supra* n.49, at para.6.

E. Harmonisation According to Brasserie *(and* Factortame*)*

As already mentioned, the European Court has answered some of the questions referred to above in *Brasserie* and *Factortame* and, to a lesser extent, in *British Telecom* in respect of breaches committed by member States in the exercise of *legislative* powers. The answers given relate mainly to the concept of breach (and fault) and the extent of reparation. Those relating to breach are discussed below[85] whereas those in respect of the remedies available under national law to obtain redress, and the extent of reparation, are dealt with in a later section when discussing the impact of the judgments on national rules. It may suffice here to say that the Court leaves the latter questions to the national courts but subject to the familiar limitations stemming from the principles of equality with national claims and (minimal) effectiveness, i.e. rendering reparation not altogether or virtually impossible, *and* not without specifying that the extent of reparation must be commensurate with the damage sustained so as to ensure the effective protection of the plaintiff's rights.[86]

The Court's ruling on the liability conditions in *Brasserie* starts with a reference to "the full effectiveness of Community rules and the effective protection of the rights which they confer" and, in that connection, with a reminder of "the obligation to cooperate imposed on the Member States by Article 5 of the Treaty".[87] The Court then goes on to explain, as already pointed out, why the liability of member States and that of Community institutions must be based on the same principles,[88] and that the strict approach[89] taken towards the liability of Community institutions in the exercise of legislative activities must therefore also be applied to member States acting in similar circumstances. After that the Court examines whether in both *Brasserie* and *Factortame* the member State concerned acted in a field where it had wide discretion. Distinguishing the situation in *Francovich*, where the member State was under a precise obligation to achieve a particular result,[90] from that in *Brasserie* and *Factortame*, the

85. As to causation, the Court indicates that the causal link must be direct but leaves the determination thereof to the national courts (*Brasserie*, *supra* n.4, at para.65), which may find some elements of interpretation in the Court's Art.215 EC case law the Court having taken the position that both Community liability legal systems are based on similar principles. See text accompanying *supra* nn.70–74.

86. *Idem*, paras.67 and 82 *et seq*. As described above, the latter point is in line with previous case law of the Court. As to the "familiar" principles of equality and effectiveness, see text accompanying *supra* nn.30–36.

87. *Idem*, para.39.

88. *Idem*, paras.40–42.

89. By the strict approach is meant an approach full of understanding for the public authorities and thus restrictive for the plaintiffs. In *idem*, para.45 the Court recalls the reasons for that strict approach, namely not to hinder the legislative function and to respect the exercise of wide discretion in a legislative context.

90. Thus leaving, as the Court says, a considerably reduced margin of discretion to the member States (cf. *idem*, para.46). That statement should be understood to mean: no discretion at all as to the fact that the directive must be implemented within a given period, and a

Court acknowledges that in the latter situations the member State possessed a wide discretion, viz. when laying down rules, in the absence of Community harmonisation, on the quality of beer or, respectively, when registering vessels (a matter left in the present state of the law to the member States) and regulating fishing, a sector allowing a margin of discretion to the member States.[91]

In such circumstances (that is, in situations involving choices when adopting legislative measures) the Court says that three conditions must be met:[92] the rule of law infringed must be intended to confer rights on individuals (a condition manifestly satisfied in the case of directly effective Treaty provisions);[93] the breach must be sufficiently serious; and there must be a direct link between the breach and the damage—a condition which is for the national courts to determine.[94] Regarding the second, and crucial, condition the Court states that the decisive test for finding a sufficiently serious breach is "whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion"[95] (that is, the *Schöppenstedt* formula referred to above). The Court then continues:[96]

> 56 The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.
>
> 57 On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the

limited discretion to choose, from the alternatives left open by the directive, the one which the member State concerned finds the most appropriate.

91. *Idem*, paras.48–49.

92. *Idem*, para.51. Obviously, there is a fourth condition for liability to arise—to wit that the plaintiff has suffered injury or damage.

93. *Idem*, para.54.

94. *Idem*, para.65. See *supra* n.85.

95. *Idem*, para.55.

96. It appears from *idem*, para.58 read in conjunction with para.41 of the *British Telecom* judgment, *supra* n.4, that the Court will assess itself whether the facts amount to a sufficiently serious breach of Community law (on the part of the member State) when it has all the necessary information (as in *British Telecom*) whereas otherwise it will only "indicate a number of concrete circumstances which the national courts might take into account" (as in *Brasserie* and *Factortame*).

> Court on the matter from which it is clear that the conduct in question constituted an infringement.
>
> 58 While, in the present cases, the Court cannot substitute its assessment for that of the national courts, which have sole jurisdiction to find the facts in the main proceedings and decide how to characterize the breaches of Community law at issue, it will be helpful to indicate a number of circumstances which the national courts might take into account.

F. The Principle of State Liability after Brasserie *and Outside* Francovich*, a Vain Triumph for Community Law as well?*

It would seem to follow from paragraph 56 quoted above that one may only be absolutely sure that a sufficiently serious breach of Community law is present—in situations other than *Francovich*,[97] that is, in situations where the public authority is not acting in a field where it has no, or only a considerably reduced, margin of discretion—*when* the rule breached is clear and precise (as it was not in *British Telecom*), *and* when there is no wide measure of discretion, *and* when the infringement and damage caused were intentional (or at least more than involuntary), *and* the error of law was inexcusable, *and* a Community institution has not contributed towards the infringement, *and* national measures or practices contrary to Community law have been adopted or maintained (as is the case when the breach has been continued despite a judgment finding the infringement established[98] or when an order of the President of the Court is not complied with immediately).[99]

Obviously, the foregoing reading of the judgment is an untenable exaggeration (for which I apologise) since not all of the circumstances cited by the Court have to be satisfied in order to find serious breach. Nevertheless, the absence of any one of them may prevent the finding of such a breach, which may show that the Court's approach severely restricts situations in which liability may arise. Consequently, the question may be asked whether the principle of liability, as applied by *Brasserie*, has not been rendered devoid of practical significance outside the *Francovich* situation. The reason that question may arise is not because the Court has, for the conduct of member States too, chosen to apply the *Schöppenstedt* formula as the decisive test for legislative measures involving wide discretion "in particular as regards legislative measures involving choices of economic policy".[100]

97. That situation being dealt with separately in para.46 of the *Brasserie* judgment, *idem*; but see *supra* n.90.

98. *Idem*, para.57.

99. *Idem*, para.64.

100. Cf. *idem*, para.45. To which category one might add in my view (see text following *supra* n.65) the situation where the authority has to make value judgments or to assess complex economic situations.

That ruling is to be applauded. However, in *Brasserie* the Court now uses that formula to cover situations which do not involve policy choices but are related to the interpretation of legal rules—and which are also defined by the Court as situations in which the member States have a wide discretion[101]—whereas one might have preferred a more qualified approach.[102]

The foregoing can be illustrated by recalling the concrete circumstances on which the Court made its findings in *Brasserie*, *Factortame* and *British Telecom*. In *Brasserie* the Court regarded the German provisions concerning the purity of beer that prohibited the marketing, under the designation "Bier", of beers imported from other member States as a breach of Article 30 that, in the light of its earlier case law, could not be condoned by reason of an excusable error,[103] whereas such an error was found to condone the German authorities' retention of the provisions prohibiting the import of beers containing additives, in which field Community law was held to be significantly less conclusive.[104] As to the *Factortame* litigation, the Court regarded the UK provisions making the registration of fishing vessels subject to a nationality condition as "constitut[ing] direct discrimination manifestly contrary to Community law", whilst it regarded the provisions laying down residence and domicile conditions for vessel owners and operators as being based possibly on an erroneous but justifiable UK interpretation of Community policy and Community law.[105] Finally, in *British Telecom* the Court held that the UK interpretation of an imprecisely worded directive provision (which interpretation was found by the Court to be wrong) had been made "in good faith and on the basis of arguments which are not entirely devoid of substance"; since that interpretation "was also shared by other Member States, [it] was not manifestly contrary to the wording of the directive or to the objective pursued by it".[106]

Using, for all these situations, the test of "sufficiently serious breach" which has been created by the Court for situations involving policy choices—instead of applying, as suggested earlier,[107] a more qualified approach apt to take account of the various forms of wrongful conduct on the part of public authorities, and not only of the legislature—seems to be

101. *Idem*, para.47.

102. I realise that the Court found itself in a difficult situation, having to choose between those advocating the reversal, or at least non-extension, of the *Francovich* ruling and those preferring a more generous approach for the plaintiffs suffering damage from legislative action. As for myself I believe that the Court was right in applying the *Schöppenstedt* formula in situations involving policy decisions (and the like: see *supra* n.101) for which it was created, but not for situations involving interpretation of legal rules.

103. *Brasserie* judgment, *supra* n.4, at para.59.

104. *Ibid.*

105. *Idem*, paras.61–63.

106. *British Telecom* judgment, *supra* n.4, at para.43.

107. See para. of text ending with *supra* n.66.

a departure from the earlier announcement of the Court in *Francovich* that "the conditions under which [State] liability gives rise to reparation depend on the nature of the breach of Community law".[108] It may actually lead to virtual immunity for *any* kind of conduct on the part of the legislature which does not manifestly fly in the face of Community law, as in the case of direct discrimination. The only exception in respect of legislative measures where the "sufficiently serious breach" test is not used, at least not explicitly, seems to be the *Francovich* situation, that is, when a directive has not been implemented *at all* within the prescribed period. Taking account of the Court's judgment in *Wagner Miret*[109] and of Advocate-General Tesauro's opinion in *Dillenkofer*,[110] it would seem that this is due to the fact that a sufficiently serious breach will be easily, if not automatically, accepted to be present in such a situation, even though the member State concerned might be able to plead a certain degree of good faith.[111] In the meantime the Court has broadened the "*Francovich*-exception", indicating in its *Hedley Lomas* judgment of 23 May 1996 that the *Francovich* ruling also applies in respect of individual decisions taken by a member State, that is

> where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion [since also in such a situation] the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

Of course, member States are allowed to apply in their legal systems a test which is more generous to the plaintiff than the "sufficiently serious breach" test to assess breaches of Community law on the part of national authorities. They are even required to do so, according to the Court's case law, if they use that more generous test for similar breaches of national law.[112] However, that does not comply with the principle of uniform application of Community law in all the member States—a principle that the Court itself has described as a fundamental requirement of the Community legal order.[113]

108. *Francovich*, *supra* n.3, at para.38.
109. Case C-334/92 [1993] E.C.R. I-6911.
110. Referred to in *supra* n.44.
111. As indicated before, in *Brasserie*, *supra* n.4, at para.46, the Court cited the *Francovich* situation as an example of a situation where the member State's margin of discretion is reduced "sometimes to a considerable degree". Nevertheless, in para. 56 of the judgment, *idem*, "the measure of discretion" is quoted as one of the elements in assessing the presence of a sufficiently serious breach. Why, then, not bring the *Francovich* situation entirely under the general decisive test defined in para.55 of *Brasserie*, by the same token as "direct discrimination" is held to come "manifestly" under the test in *Brasserie*, at para.61?
112. Thus, *idem*, paras.66–67, to be compared with para.79 which indicates that member States may not use tests which are less demanding for the authorities, e.g. by requiring that "fault" be proved by the plaintiff above and beyond a sufficiently serious breach.
113. See *supra* n.62.

G. The Banks *Situation: Also a Principle of Community Law Liability for Individuals?*

All the foregoing relates to the Court's case law regarding the principle of liability of member States and Community institutions. However, some years ago, the English High Court submitted to the European Court (in *Banks* v. *British Coal Corporation*)[114] a whole series of questions concerning the interpretation mainly of the antitrust articles of the ECSC Treaty (Articles 65 and 66, paragraph 7) but also of the corresponding articles of the EC Treaty (Articles 85 and 86). One of those questions was whether the national courts have, by virtue of Community law, the power or even the obligation to award damages in order to make good the harm which individuals have suffered as a consequence of an infringement of the aforementioned provisions on the part of *other individuals*. In its judgment of 13 April 1994 the Court decided, contrary to the opinion of its advocate-general, that the relevant provisions of the ECSC Treaty are, unlike their EC Treaty counterparts, not directly effective and that, in the absence of a Commission decision finding an infringement on the part of the defendants, Article 65 of the ECSC Treaty did not give rise to any rights which national courts must protect.[115] As to infringements of Articles 85 and 86 of the EC Treaty, which *are* directly effective, the Court did not answer the question because the ECSC Treaty, and not the EC Treaty, was the legal framework for considering the activity (extraction of unworked coal) at issue.

In his opinion the advocate-general, having accepted the direct effect of both the ECSC and EC provisions, did examine the question. He came to the conclusion that the principle of liability—of which the Court had said, in respect of infringements by a member State, that it followed from the general system of the Treaty and its fundamental principles—does also obtain in the event of infringements by individuals of Community law provisions which (like Articles 85 and 86 of the EC Treaty) impose direct obligations upon them. Indeed, if the possibility of obtaining reparation were denied in such a situation, the full effect of the Treaty would be equally impaired.[116]

Now the Court has held in *Brasserie* that State liability also arises in the event of infringements of directly effective Treaty provisions and that the right to reparation is the necessary corollary of the direct effect of the provisions whose breach caused the damage sustained,[117] I see no reason

114. Case 128/92 [1994] E.C.R. I–1209.

115. *Idem*, para.17. That is in line with the ruling of the Court later in *Brasserie*, *supra* n.4, at paras.51–52, where the first-stated condition for State liability is that the infringed rule of law must be intended to confer rights on individuals. See also *supra*.

116. See my opinion at [1994] E.C.R. I–1209, 1249, para.43. See also D. Waelbroeck, "Treaty Violations and Liability of Member States and the European Community: Convergence or Divergence?", in *Schermers*, *supra* n.30, at p.475 with further references.

117. *Brasserie*, *supra* n.4, at para.22.

why liability should not arise also, as a matter of Community law, in the event of infringements by individuals of Treaty provisions which, like Articles 85 and 86 of the EC Treaty, impose specific obligations upon those individuals.[118] In both cases liability arises for the same reasons: because of the binding legal nature of the Treaty provision and the general principle of the full effectiveness of Community law.[119] If that is so, it would then be for Community law, as in the case of State and Community liability, to lay down the constitutive conditions of such private law liability in order to ensure the uniform enforcement throughout the Community of basic prohibitions such as Articles 85 and 86. Obviously, such conditions, e.g. in respect of breach and damage, should not necessarily be the same as those prevailing in the case of State liability (as shown by some legal systems—particularly the French, with its fully fledged system of administrative courts applying more or less distinct tort rules). At least one obvious difference should be mentioned here: that is, the absence, on the part of individuals, of a situation relating to the exercise of legislative powers involving policy decisions, even though the practical significance of that difference has been reduced now that the Court has held in *Brasserie* that a situation of wide discretion may also exist regarding questions of interpretation of legal rules—a situation that may also confront individuals.

The Court may, soon enough, have to decide the liability issue on behalf of individuals. Take as an example the case of Mr Bosman, the Belgian football player in favour of whom the Court recently declared that not only certain discriminations on the basis of nationality but also so-called transfer rules contained in the regulations of sports organisations and which restrict the free movement of players between member States are inconsistent with Article 48 of the EC Treaty.[120] Assume that Bosman now claims damages before a national court and that such court wants to know (from the European Court) whether it has the obligation as a matter of Community law, and under what conditions, to award damages in order to make good the loss which Bosman suffered. Since Article 48 has direct effect also horizontally,[121] i.e. against a sports organisation of a private law nature, the liability question for infringements of a directly applicable

118. In other words Treaty provisions having direct effect also horizontally, that is, between individuals.

119. Cf. Jo Shaw, "Decentralization and Law Enforcement in EC Competition Law" (1995) 15 Legal Studies 128, 143–144. In *Brasserie*, *supra* n.4, at para.39 the ECJ has declared in the meantime that "the full effectiveness of Community rules and the effective protection of the rights which they confer form the [first] basis for State liability". The same obviously holds true for the liability of individuals breaching obligations which Community law imposes upon them.

120. C–415/93 (1995, not yet rep.), judgment of 15 Dec.

121. The horizontal character of Art.48 EC also comprises the application of the grounds of justification contained in Art.56; see *Bosman*, *idem*, para.85.

Treaty provision committed by individuals or associations bound to respect the prohibitions contained therein would then have to be decided by the Court. If the Court were to accept liability in principle, it would have to decide further whether a distinction must be made between infringements consisting of discrimination on the basis of nationality and those consisting of hindering free movement by restrictive transfer rules—for which the Court has limited the temporal effect of its ruling,[122] thus making it likely that the infringement was based on a *bona fide* misinterpretation of Community law.

III. INROADS INTO THE MAINLAND

EVEN though Community law is "like an incoming tide. It flows into the estuaries and up to the rivers", as Lord Denning once described the impact of Community law on English law,[123] that does not mean that only the estuary of the Thames will be flooded. Moreover, there is also an outgoing tide, which will cause the estuaries of the Elbe and those of the Seine to be flooded with elements of the common law in so far as Community law is based on general principles common to the legal systems of *all* the member States, including the United Kingdom and Ireland.

How far the domestic laws of the member States will have to accommodate the principles laid down by the European Court in respect of State (and eventually individual) liability in tort for infringements of Community law depends in the first place on the requirements which Community law (according to the Court's case law) imposes, and in the second place on the status of the tort liability rules in the member States. A description of the obstacles which liability rules in England, Germany and France present for the acceptance of *State* liability—particularly in respect of so-called "legislative wrong"—is to be found, for English and German law, in Advocate-General Tesauro's *Brasserie* and *Factortame* opinion[124] and, for French law, in Advocate-General Léger's *Hedley Lomas* opinion.[125]

A. The Estuary of the Thames ...

As for English law, in his *Brasserie* and *Factortame* opinion Advocate-General Tesauro emphasises the following characteristics with regard to conduct of the legislature proper which is in breach of a directly effective EC Treaty provision: (1) "State liability in damages is a creation of case law. In particular, the same wrongs [individual torts] leading to civil liabil-

122. *Idem*, para.145.
123. Lord Denning MR in the English Court of Appeal's judgment of 22 May 1974 in *Bulmer* v. *Bollinger* [1974] 3 W.L.R. 202, [1974] 2 All E.R. 1226.
124. *Supra* n.44, at paras.4 and 7.
125. *Supra* n.43, at paras.115–127.

ity have been used in so far as they lend themselves to cover conduct of the public authorities";[126] (2) "damages may be awarded where loss or damage is due to a negligent breach committed in the exercise of administrative or legislative activity (tort of negligence)".[127] Since, however, there must be a "duty of care" on the public authority, which is held not to exist in the case of pure economic loss,[128] reparation of that type of harm may be impossible. (3) Claiming liability on the basis of breach of statutory duty has a limited chance only "in so far as the prevalent view is that the possibility of obtaining administrative remedies designed to ensure that the law is complied with precludes bringing an action for damages" albeit that "the existence of liability in damages for infringements of Community law was affirmed ... but only in the case of 'ordinary civil actions' " (with reference to *Garden Cottage*).[129] (4) The tort of "misfeasance in public office", which is the only one, among the individual torts named so far, that relates specifically to conduct of public authorities, requires "intentional unlawful conduct [which] makes the possibility of obtaining damages a remote one, even where the loss or damage arises out of infringements of Community law".[130]

Allow me to add some comments.

(1) It is a matter for national law to choose the tort heading which suits best the requirements laid down in the Court's case law regarding the conditions for State liability to arise. In *Garden Cottage*[131] Lord Diplock was of the opinion that, in the case of liability of an *individual* (legal entity) for infringing Article 86 of the EC Treaty, there was no need to invent a new cause of action in English private law, in addition to breach of statutory duty, in order to impose sanctions on such an infringement. That supposes, in the words of Lord Diplock, that a breach of the duty imposed by Article 86 can "be categorised in English law as a breach of a statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the Common Market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty". It is also up to the national courts to decide whether that line of

126. *Supra* n.44, at para.7, first indent.

127. *Idem*, second indent (fn. omitted).

128. That is, loss not directly consequential on damage to property or the person: see *supra*.

129. *Supra* n.44, at para.7, third indent (fnn. omitted). See the reference to *Garden Cottage*, *infra* n.131.

130. *Idem*, fourth indent. Follow references to *Bourgoin*, *supra* n.48, and a footnote to *Kirklees Metropolitan Borough Council* v. *Wickes Building Supplies Limited* [1992] 3 W.L.R. 170, in particular at 188, where the House of Lords itself has questioned whether *Bourgoin* was correctly decided. After the ECJ's decision in *Francovich*, *Bourgoin* seems to be overruled (see *infra* n.132). However, Parker LJ's considerations in respect of the necessity of equal treatment of Community institutions under Art.215 EC and national public authorities are not overruled and may have contributed to convincing the ECJ to opt in *Brasserie*, as shown *supra*, for consistency between the two Community tort liability legal systems.

131. *Garden Cottage Foods Ltd* v. *Milk Marketing Board* [1984] 1 A.C. 130.

reasoning can also be followed in the event of infringements of EC Treaty provisions, such as Articles 30, 52 and 59, by the legislature.

(2) Whatever the tort heading chosen, the conditions for its application under national law have to be adapted to the requirements of Community law as laid down in the European Court's case law. That implies that, if the tort of "breach of statutory duty" is chosen, it must then allow an action, even as regards acts or omissions of the legislature, for the reparation of loss, including pure economic loss, resulting from the infringement of a rule of Community law. In that connection it must be emphasised that it is *not* for the national courts, as might be inferred from Lord Diplock's words cited above, but for the Community courts to decide, in view of the application of national rules, whether the infringed Community rule, such as Article 86, contains a statutory duty that is imposed "also for the benefit of private individuals to whom loss or damage is caused". That depends indeed on the intention of the Community legislature, which at the end of the day is to be interpreted by the Community judge. If the tort of "misfeasance in public office" were to be chosen (instead of breach of statutory duty), as the Court of Appeal did in *Bourgoin* (Oliver LJ dissenting),[132] then the rules governing that specific tort must again be adapted (that is, "disapplied") so as to allow reparation, also in the event of legislative wrong and for pure economic losses, in a situation where no "misfeasance" in the English sense of the word is proved, *if* that is what Community law requires. And, indeed, in *Brasserie* the Court has explicitly said so by stating that "any condition ... requiring proof of misfeasance in public office, such an abuse of power being inconceivable in the case of the legislature" must be set aside, as it makes it "impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law". For the same reason national rules which lead to "[t]otal exclusion of loss of profit as a head of damage"[133] must be set aside.

(3) In the same vein, and more generally, any condition requiring "fault" (whether intentional or negligent) imposed by national law for liability to arise on the part of the organ of the State to which an infringement of Community law is attributable must be set aside to the extent that it is inconsistent with (meaning—as the Court says in *Brasserie*—that it goes beyond the requirement of a sufficiently serious breach of) Community law, since "imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order".[134] In other words, and as said earlier, national

132. *Supra* n.48. In *Kirklees*, *supra* n.130, the House of Lords, *per* Lord Goff, doubted whether *Bourgoin* can be considered good law after *Francovich*.

133. *Brasserie*, *supra* n.4, at paras.73 and 87 respectively.

134. *Idem*, para.79.

laws may impose rules broadening the liability of public authorities for breaches of Community law but not rules restricting such liability below the level required by the case law of the Court.[135]

(4) That the English rules on breach of statutory duty are also apt to be construed in accordance with the requirements of Community law, were the European Court to lay down in its future case law the principle of liability of individuals for breaches of Community law, is shown by the House of Lords *Garden Cottage* decision in which an infringement of Article 86 of the EC Treaty was at issue (see *supra* comment *(1)*).

B. ... But also of the Elbe ...[136]

The omission on the part of the administration to amend a rule or practice which is incompatible with a directly effective EC Treaty provision may lead under German law to compensation on behalf of the State, pursuant to section 839 of the German Civil Code in conjunction with Article 34 of the Basic Law, if the damage is caused by a breach of an official duty committed wilfully or negligently by a civil servant in the exercise of a public office. Furthermore, "the applicability of the rules in question depends on the further requirement that the official duty breached should be 'referable to the third party' [*Drittbezogenheit*], which means that the State is responsible only for breaches of official duties the exercise of which is expressly directed at a third party and therefore has the aim of protecting a right of the third party".[137] It is precisely the latter requirement which is normally absent in the case of a legislative wrong—that is, in the event of an omission on the part of the legislature proper to amend an Act which is in conflict with Community law—because the legislature normally imposes burdens concerning the common good "which do not relate in particular to any individual or class of individual(s) capable of being regarded as third parties for the purposes of the provisions adverted to".[138]

135. The same holds true for the extent of reparation: see *idem*, para.89 regarding the award of exemplary damages under English law.

136. The Elbe rather than the (better-known) Rhine as the estuaries of the latter are not located in Germany but in the Netherlands.

137. See Advocate-General Tesauro's opinion, *supra* n.44, at para.4. See e.g. the Bundesgerichtshof's decision (B.G.H.Z. 56, 40), where also the second cause of action referred to in the next fn. is dealt with.

138. *Ibid.* I am leaving aside here a second cause of action, discussed in *ibid*, which is typical for German law according to which State liability may also arise "on account of an unlawful act of the public authority which is capable of being equated with expropriation" (*ibid*). I am also leaving aside questions in respect of liability of the administration under the same provisions (Art.34 Basic Law and s.839 Civil Code) because of a wrong consisting of applying an Act which it knew was inconsistent with directly effective Community law, and therefore in not applying Community law. See on these and other points, J. Geiger, "Die Entwicklung eines Europäischen Staatshaftungsrecht" (1993) D.V.B.L. para.465. See also, in connection with the Community directive at issue in *Dillenkofer*, S. Leible and O. Sosnitza, "MP Travel Line, EG-Recht und Staatshaftung" (1993) M.D.R. 1159.

Here also, as in respect of English law, the application of Community law will require that the remedies provided under national law, such as those based on section 839 of the *BGB*, should be enlarged by way of interpretation or disapplication of some of the provisions contained therein, so that the legal protection of rights which individuals derive from Community law can be adequately assured. That is precisely the case, as the Court pointed out in *Brasserie*, for the condition imposed by national law "which makes reparation dependent upon the legislature's act or omission being referable to an individual situation", as that 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, since the tasks falling to the national legislature relate, in principle, to the public at large and not to identifiable persons or classes of persons".[139] That also holds true for national legislation which "generally limit[s] the obligation to make reparation to damage done to certain, specifically protected individual interests, for example property", therefore totally excluding loss of profit as a head of damage.[140]

C. ... And of the Seine ...

In his opinion in *Hedley Lomas* Advocate-General Léger explains the evolution which the case law of the French administrative courts has shown in recent years in respect of liability for unlawful conduct on the part of the State resulting from a breach of Community law, more particularly when the State is acting in its legislative capacity.[141] Once the French administrative courts, and particularly the Conseil d'État,[142] had abandoned their reluctance to recognise the supremacy of Community law, it was an easy matter for them to reach the conclusion that breaches of Community law by virtue of administrative acts gave rise to State liability and therefore to an action for (any kind of) damages.[143] Nevertheless, in these decisions the Conseil d'État "avoided laying down the principle of liability of the State, in its legislative capacity, for failure to transpose a directive. It derived State liability from a fault committed by the administrative authorities in the application of domestic legislation contrary to Com-

139. *Brasserie*, *supra* n.4, at para.71. The fact that such limitation also applies, under that national legal system, to breaches of "higher-ranking national provisions"—as in Germany under provisions of the Basic Law—is no valid justification: *idem*, paras.69–72.

140. *Idem*, paras.86–87.

141. *Supra* n.43, at paras.112 *et seq*.

142. In its *Nicolo* judgment of 20 Oct. 1989, J.C.P. 89, ed. G, II, 21371 and thereafter, also in respect of Community directives, in its *Rothmans France and Philip Morris France* decision of 28 Feb. 1992 as well as in the judgment referred to *infra* n.143, both reported in A.J.D.A. 1992–3, pp.224–226, with the opinion of Ms Laroque, *Commissaire du gouvernement*, p.210.

143. Thus in its judgment, also of 28 Feb. 1992 in *Arizona Tobacco Products and Philip Morris France*, *idem*, p.225.

munity law."[144] Subsequently, however, the Administrative Court of Appeal of Paris took a further step by holding in its judgment of 1 July 1992 in *Société Dangeville*[145] that the State taken as a whole was responsible for the breach of Community law (in that case the non-transposition of a directive) without specifying the State organ to which the breach could be attributed, and that therefore the State as such had to make good the loss resulting from the unlawful situation ("*situation illicite*").[146] If that decision is confirmed by the Conseil d'État, French law has already adapted itself, it would seem, to the requirement of fully effective application of the principle of State liability for breaches of Community law, irrespective of whether the damage is attributable to the legislature or to the administration. In his opinion in *Hedley Lomas* Advocate-General Léger approves that evolution because, as he says, "the existence of an action for damages cannot be dependent on internal rules separating the powers of the legislature, the administration and the courts".[147]

All the above relates to inroads to be made into the English, German and French legal systems as regards the liability of the State for breaches of Community law. If the principle of liability were also accepted by the European Court, as a matter of Community law, in the event of breaches of Community law by individuals, then such inroads should also occur in relation to the rules on torts committed by individuals. That this should not necessarily create more problems is illustrated, as already pointed out, by the House of Lords decision in *Garden Cottage*,[148] where the tort of "breach of statutory duty" was found to give a sufficient legal basis to grant compensation in the event of a breach of Article 86 of the EC Treaty (Lord Wilberforce dissenting).[149]

IV. PRESERVING THE MAINLAND(S): THE QUEST FOR HOMOGENEITY

THE recent case law of the European Court, and in particular its *Brasserie* judgment, has led, as shown above, to consistency between the two Community regimes of tort liability and to some harmonisation in the member States of the rules on State liability. As a further consequence it may lead to more homogeneity (or "convergence" as it is sometimes called),[150] by

144. Advocate-General Léger's opinion, *supra* n.43, at para.119. See also with further references Barav, *op. cit. supra* n.30, at pp.294 *et seq.*

145. Droit fiscal (1992), No.1665, p.1420; R.J.F., 8–9 (1992), No.1280. See also the decision of (the 2nd division of the) same Court of 12 Nov. 1992, *Johnny Walker*, R.J.F., 3 (1993) No.469.

146. See further Advocate-General Léger's opinion, *supra* n.43, at paras.123–127.

147. *Idem*, para.114. He points out, though, that under "purely" French law, so to speak, liability of the legislature proper is not accepted: *idem*, para.125.

148. *Supra* n.131. For a discussion, see Brealy and Hoskins, *op. cit. supra* n.19, at pp.63–65.

149. For subsequent cases see *idem*, p.65.

150. See the writings of J. Schwarze who has strongly advocated the concept in relation to administrative law (a.o. in *European Administrative Law* (1992) discussed by I. Ward, "The Anomalous, the Wrong and the Unhappy: UK Administrative Law in a European Perspec-

which I refer to bringing closer to one another legal rules which, within the same member State, deal with similar situations but under different bodies of rules. As explained elsewhere,[151] such a need for homogeneity exists in respect of, on the one hand, rules existing in areas of the domestic laws of the member States which have been modified pursuant to requirements of Community law in order to harmonise them with laws existing in the other member States and, on the other, rules existing in the same areas of the domestic laws of the member States that remain unchanged as they continue to govern purely national situations unaffected by Community law. The reason national laws within a specific area of the law (e.g. corporate law) are only partly affected (only specific types of corporations being envisaged), and far from systematically and coherently changed, is that Community institutions are authorised, only within their limited sphere of jurisdiction, to harmonise certain areas of the laws of the member States in view of a specific objective defined in the Community Treaties. Therefore, national rules falling outside the parameter of harmonisation remain unchanged even though they are dealing with the same types of issue. The disparities resulting from this state of affairs "may give rise to a new form of discrimination [because of the] insistence [in the European Court's case law] on an effective judicial remedy for the enforcement of Community rights [which] may result paradoxically in discrimination, in the national courts against those whose rights arise on the basis of national law alone".[152] To avoid this discrimination in legal protection an effort must be made to maintain a sufficient degree of homogeneity between rules or, rather, remedies enforcing rights in similar situations, of which some are and some are not affected by Community law.

A by now famous example of such an effort, in the field of legal remedies intended to ensure the protection of Community rights, and more particularly in respect of interim relief, is to be found in the judgment of the House of Lords in *M.* v. *Home Office*.[153] In that judgment the House of Lords, *per* Lord Woolf, considered it to be "an unhappy situation" that by virtue of Community law an interim injunction may be granted, even against the Crown, when Community law rights of individuals risk being impaired but not in purely national law matters even though in such instances the rights of individuals might be impaired as much. To prevent such undesirable disparity in the legal protection of individuals the House of Lords held in its decision, "following extensive argument concerning

tive" (1994) 45 N. Ireland Legal Q. 46, in relation to the decision in *M.* v. *Home Office*, mentioned further in the text).

151. See my *op. cit. supra* n.2.

152. Jacobs, *op. cit. supra* n.29, at p.983.

153. [1993] 3 W.L.R. 433, [1993] 3 All E.R. 537. See also in the same case Lord Donaldson, speaking in the Court of Appeal [1992] 4 All E.R. 139 referred to and discussed with further references in Ward, *op. cit. supra* n.150, at pp.49 *et seq.*

the history of injunctive relief in civil and criminal proceedings in England and Wales",[154] that section 31 of the Supreme Court Act 1981 should be interpreted so as to give the English courts jurisdiction to grant interim injunctions against the Crown in situations governed purely by domestic law.[155] In its earlier decision in *Woolwich Building Society* v. *Inland Revenue Commissioners (No.2)* the House of Lords, *per* Lord Goff, had observed, in the same vein but then in respect of the remedy of restitution, "that, at a time when Community law is becoming increasingly important, it would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under Community law".[156]

The same need for homogeneity may very well appear in respect of the remedy of compensation, more particularly in respect of injury caused by a member State in a *Factortame* or *Brasserie* situation, that is, when the infringement of Community law, by act or omission, is to be imputed to Parliament. To the extent that, as a consequence of Community law, national Acts (such as section 839 of the German *BGB*) or judicial rules (as in England and France) will have to be disapplied in order to allow State liability to arise even when the infringement is attributable to the legislature, the question may present itself whether under national law—and *not* because, i.e. as a requirement, of Community law[157]—such rules should not also be set aside in purely national matters for reasons of equal legal protection.

Here is not the place to pursue the quest for homogeneity, or convergence, any further. Let me just point out that homogeneity, as hereinbefore understood, may, in the words of Advocate-General Jacobs, "lead indirectly to a higher level of protection for the rights of the individual, even outside the field of Community law".[158] In other words, whenever legal protection is upgraded in a member State for the sake of harmonisation in areas covered by Community law, the quest for homogeneity will have the effect that the same upgrading takes place in that same member State in respect of similar matters of pure internal law, thus leading to an overall improvement of the quality of legal protection of individuals.

V. A NEW TASK OF STRATEGIC IMPORTANCE FOR COMPARATIVE LAW

TRADITIONAL comparative law is about comparing legal systems in different countries. Its importance is considered to be limited because

154. Thus Steiner, *op. cit. supra* n.60.

155. In an earlier decision, of 20 Dec. 1990, the Spanish Tribunal Supremo Contensioso-administrativo had already considered, "in the wake of *Factortame*, that effective judicial protection must necessarily include a right to interim protection" (Barav. *op. cit. supra* n.30, at p.301 with references in n.169).

156. [1993] A.C. 70, [1992] 3 W.L.R. 366.

157. See my *op. cit. supra* n.58.

158. *Op. cit. supra* n.29, at p.983.

foreign laws are not binding.[159] Certainly the study of comparative law has many advantages, as described by Zweigert and Kötz:[160] thanks to comparative law, legislators may be able to make better laws for their own jurisdiction, lawyers interpreting national laws may, in case of gaps or ambiguities, draw on solutions functioning in other countries in order to improve their own legal system, teachers may use it to give students and themselves a better insight into their own legal system and, finally, comparative law can and will be of assistance to prepare projects for the international unification of law. However, all these functions and aims are useful but not indispensable, in that they *assist* legislators, lawyers and teachers to carry out their work—which can also be performed, albeit presumably less well, without the assistance of comparative law.[161] They are all of a "persuasive nature".[162]

Comparative law is lately often understood to refer not only to external but also internal comparative law, by which is meant the comparison of legal orders or systems existing *within* the same country, either because different legal orders—such as international, supranational, national, regional and local legal orders—function alongside one another on the same territory, or because different sets of rules (such as common law and equity, civil and administrative tort liability rules) relating to similar problems function within the same national legal order in that country.[163] The pursuit of consistency, on the level of Community law, between tort liability regimes relating to breaches of Community law by Community institutions and by public authorities of member States relates to the area of internal comparative law; and also the pursuit of homogeneity within the same national legal system between matters affected, and matters not affected, by Community law relates to that area. Harmonisation measures through legislative or judicial intervention relate, on the contrary, to external rather than internal comparative law, as they are inspired by differences between the laws of different States, differences which they aim to reduce.

159. Thus Vranken in *Algemeen Deel* ("General Part") in the famous (Dutch) *Asser* commentary (1995), p.132.

160. In their excellent book *An Introduction to Comparative Law* (2nd rev. edn, trans. by T. Weir, 1987), pp.2 *et seq.*, esp. 11–27.

161. In the 3rd edn of the German (original) text of the book *Einführung in die Rechtsvergleichung* (1996), Zweigert and Kötz add a new function: the need to develop a common European civil law (pp.14 and 27–31). See also Kötz, "Comparative Legal Research and Its Function in the Development of Harmonized Law. The European perspective", in M. Jareborg (Ed.), *Towards Universal Law* (1995), pp.21–36.

162. Vranken, *op. cit. supra* n.159, at p.140.

163. *Idem*, pp.124 *et seq.* There is, of course, a nuance: international, supranational and national rules, applicable within the same territory, belong to different (but intertwined) legal orders; national, regional and local (e.g. municipal) rules pertain to the same legal order but function, vertically, on a different level; common law and equity, civil and administrative rules function vertically on the same level but, horizontally, in different compartments.

The point I want to make here, mainly as regards harmonisation, is that comparative law has become within the European Union an indispensable instrument, in respect of both the elaboration of harmonised rules at Community level and the implementation and enforcement thereof at national level—thus, and more particularly in the area of the law discussed in this article, because of the requirement to place at the disposal of individuals legal remedies to enable them to protect their rights.

As for the elaboration of uniform Community rules, whether of a statutory or of a judicial nature (i.e. through regulations or directives or through the case law of the Community courts), it is obvious that such "uniformisation" (or, rather, harmonisation) has to be carried out on the basis of comparative research. That is what Article 215, paragraph 2, of the EC Treaty explicitly says in respect of the extra-contractual liability of Community institutions by referring to "the general principles common to the laws of the Member States", and that is also true, as the European Court has explicitly acknowledged in *Brasserie*, for the elaboration of *Francovich/Brasserie* liability rules relating to breaches of Community law by member States.[164] If such preliminary comparative research is not carried out, chances will be that the harmonisation process is badly received, and implemented, in the member States whose legal system has not been adequately taken into account. The need for comparative research is even more acute, now that the legal systems of the 15 member States belong to four different legal families (Romanistic, Germanic, common law and Nordic).

Also for the implementation of harmonised Community legal rules in the member States there is a need for both the Community institutions and the member States to compare the means by which Community law, in particular directives, is implemented in each of the member States. Member States are bound by virtue of Article 5 of the EC Treaty to co-operate and "to abstain from any measure which could jeopardize the attainment of the objectives of this Treaty". For a member State to stay below the level of sufficiently harmonised implementation, as interpreted by the Community institutions *and* the other member States, constitutes most certainly a breach of that member State's obligation to co-operate which can be corrected either through direct action before the Court on the basis of Articles 169 and 170 of the EC Treaty or indirectly, with the help of the national courts acting at the request of individuals whose Community rights are impaired, on the basis of the doctrines of direct effect and of interpretation in conformity with directives.

164. *Brasserie*, *supra* n.4, at para.27. It is precisely for that reason, i.e. because both Community law liability systems have the same source, namely general principles common to the laws of the member States, that they have to be consistent with each other.

That brings us to the enforcement of harmonised Community legal rules. Since the national courts are required, also by virtue of Article 5, to protect the Community rights of individuals in a sufficiently adequate *and* uniform way throughout the Community, and, moreover, in a way no less favourable than "purely" national rights,[165] these courts will have to verify whether the substantive and procedural conditions of the legal remedies available in their member State, as compared with those available in other member States and in other sectors of their own law, do comply with the minimum requirements which Community law imposes to ensure a (sufficiently) effective and uniform application of Community law in all the member States.

The foregoing shows that comparative law (understood in its external *and* internal dimensions) has become, within the European Union, an indispensable instrument if one takes the requirement of compliance with Community law *and* of equal legal protection as seriously as one should.

VI. CONCLUSIONS

THE first conclusion is that, thanks to the integration of member States within the European Union, the large differences between national legal systems tend to be reduced, especially in the field of legal remedies and more particularly as regards the legal remedy of imposing tort liability on public authorities. As shown, this tendency towards convergence has so far yielded important results in respect of the liability of the legislature proper and the right to obtain compensation for pure economic loss. At the same time the differences between the two Community tort law systems—for breaches by Community institutions and for those by member States—and, within each national legal system, between tort rules applicable in the event of breaches of Community law and those applicable in the event of similar breaches of (higher ranking) national law tend to be reduced as well. The fortunate effect of all this is an overall improvement in legal protection.

The second conclusion concerns the level of harmonisation which the Court wants to reach as regards the principle of State liability. In the present state of the Court's case law, the lengths to which it will go in harmonising the conditions which must be fulfilled to found a right to reparation are not clear. Whereas the Court is ready to define the first condition (i.e. that the infringed rule must be intended to confer rights), and is also ready to define the concept of breach, it has left the task of defining the notion of

165. This requirement imposed by Community law (see e.g. *idem*, para.67) leads to homogeneity within the national legal order in that Community rights, in the event that they are less protected than national rights, must be protected in the same way as (pure) national rights. As explained above, further homogeneity is achieved when the protection of national rights, if less protected than Community rights, is upgraded to match the protection of Community rights for reasons of equal treatment under national law.

(direct) causation to the national courts. The Court has also left it to national courts to designate the remedies and procedural devices through which the national legal system must ensure compensation, and to determine the extent to which reparation must be available, except that, regarding both these points, the Court has recalled the principle of equality requiring Community and purely national claims to be treated equally and the principle of minimal effectiveness, which prohibits making the use of the remedy impossible or excessively difficult.[166] As regards the extent of compensation, however, the Court adds that reparation must be commensurate with the loss or damage sustained and that the plaintiff must show reasonable diligence in order to avoid the loss or damage, or limit its extent.

The third conclusion relates to the Court's intention, as declared in *Francovich*, to specify the conditions for State liability to arise depending on the nature of the breach. That said, however, the Court has not made entirely clear how far it will go in its effort to differentiate between prototype situations. The judgments rendered by the Court until now related, with one exception, to acts or omissions in the exercise of legislative powers either in transposing a directive into national law or in enacting or maintaining legislation in breach of directly applicable Treaty provisions. The exception is the judgment in *Hedley Lomas* relating to an individual decision taken by a national administration. In all these judgments, including the last, the Court uses as a decisive test, explicitly or implicitly, whether the breach of Community law was "sufficiently serious", and has accepted that "the mere infringement of Community law" is sufficient to establish the existence of such a breach: in the event of a complete, or virtually complete, failure to transpose a directive within the prescribed period (*Francovich*, *Wagner Miret*); and in the event of maintaining or enacting legislation (*Brasserie*, *Factortame*), or taking an individual decision (*Hedley Lomas*), that is manifestly incompatible with basic and directly applicable Community rules. On the other hand *no* such sufficiently serious breach is present when the incorrect implementation of a directive is based on an interpretation made in good faith and not manifestly contrary to the wording, or the objective, of the directive (*British Telecom*),[167] or when maintaining or enacting legislation is not manifestly contrary to Community law because, at the time of the breach, the criteria for determining the incompatibility were inconclusive (*Brasserie*) or the

166. *Idem*, paras.67 and 89. It is on the basis of the second requirement that the Court orders national legal systems to allow compensation for breaches attributable to the legislature (paras.68 *et seq.*) and not to exclude totally loss of profit as a head of damage (para.87).

167. The judgment of the Court to be rendered soon in *Dillenkofer* (*supra* n.44) may, it is hoped, shed additional light.

state of Community policy and law was uncertain (*Factortame*). The lack of differentiation in the Court's case law is due to the fact that, in distinguishing between different kinds of breaches, it has so far adopted as the main element of differentiation the existence of a wide or reduced margin of discretion. That element is obviously of great significance when it comes to scrutinising policy decisions but not, or not necessarily in the same way as the Court seems to understand, when it comes to determining liability in disputes which concern the interpretation of legal rules. One may wonder whether the criterion of "sufficiently serious breach" is not too blunt to differentiate sufficiently between breaches of Community law, created as it first was for assessing the use of wide discretion in matters of policy or of decision-making involving value judgments,[168] and whether it will not in some instances limit the legal protection of injured persons too severely and in others impose too much of a burden on public authorities.[169]

The fourth conclusion is that sooner or later the Court may be confronted with questions concerning the principle of liability, as a matter of Community law, on the part of individuals who have breached specific obligations imposed upon them by that law. If the Court were to accept that principle it will also need to specify the conditions to be fulfilled for such (private law) tort liability to arise, setting in motion here also a quest for harmonisation between the legal systems of the member States and possibly also for homogeneity, within the legal system of each member State, between rules operating in different areas of the law.

The fifth and final conclusion is that comparative law, in its double (external and internal) dimension, has taken on within the European Union a new task which is of strategic importance in the field of legal remedies: to ensure a sufficiently uniform and adequate level of legal protection.

168. It would be interesting to know whether the Court, in preparing its judgments in *Brasserie*, *British Telecom*, *Hedley Lomas* and *Dillenkofer*, has had the benefit (apart from the excellent overview given in the article cited *supra* n.5) of a comparative analysis of the legal systems of the member States relating to the important issues of tort liability raised in these cases, but seen in the wider context of the general laws on tort.

169. Limit the legal protection too severely: when the criterion is applied to situations of interpretation of legal rules; burdening public authorities too much: when it is applied too indistinctly, or automatically, in situations of non-implementation of directives. Although the Court's viewpoint that the concept of (subjective?) fault is to be avoided seems to be well taken, the criterion of a "reasonably diligent authority acting under similar circumstances" might have been more appropriate.