State Liability: In Search of a Dividing Line between National and European Law

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INTERFACE BETWEEN EU LAW AND NATIONAL LAW

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1 Introduction

When Member States violate Community law and affected persons bring a claim for damages, at first glance, there seems to be a clear and simple division of tasks between Community law and the ECJ on the one hand and national law and national courts on the other.

It is a principle of Community law that the Member States are obliged to make good losses and damages caused to individuals by breaches of Community law for which they can be held responsible. And it is for the national legal order to designate the competent courts and lay down the procedural rules for the relevant legal proceedings.

Indeed, a clear and simple division of tasks and competences. But is that really the case? Is it always easy to establish when Community law is involved and what is left to national law? And what is, by the way, the rationale behind this division of tasks?

2 The existence of state liability as a matter of principle

In Francovich, the ECJ ruled ‘that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible’ (paragraph 37; emphasis added by JHJ). What reasons did the ECJ give in establishing such a European-based state liability? Why did the Court feel it necessary to depart from its earlier case law? In 1976 the Court of Justice decided in Russo that the state’s liability for infringements of Community law was still a matter for national law.²

The basis for this liability was primarily found in Article 10 EC, under which the Member States are required to exercise their powers in accordance with Community law and in a spirit of Community loyalty. In Francovich, the Court stated that the principle of full effectiveness of Community law and the requirement of effective judicial protection must be regarded as the cornerstones of state liability under Community law. The principle of state liability, the Court stated, is inherent in the system of the Treaty:

‘The existence of State liability as a matter of principle

3) It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on

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² Case 60/75 Russo [1976] ECR 45.
individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62 Van Gend en Loos [1963] ECR 1 and Case 6/64 Costa v ENEL [1964] ECR 585).

32 Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see in particular the judgments in Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629, paragraph 16, and Case C-213/89 Factortame [1990] ECR I-2433, paragraph 19).

33 The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

34 The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.

35 It follows 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.

36 A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law (see, in relation to the analogous provision of Article 86 of the ECSC Treaty, the judgment in Case 6/60 Humblet v Belgium [1960] ECR 559).

37 It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

In Francovich, the Court of Justice made it clear that state liability was determined first and foremost by Community law. The basis for this liability was primarily found in Article 10 EC, under which the Member States are required to exercise their powers in accordance with Community law and in a spirit of Community loyalty. In Francovich, the Court stated that the principle of full effectiveness of Community law and the requirement of effective judicial protection must be regarded as the cornerstones of state liability under Community law.

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law. The principle of state liability, the Court stated, is inherent in the system of the Treaty.

National law questioning the doctrine of Francovich-liability ‘as such’ can not be accepted. It is the author’s opinion that there is no room at all for the Member States to limit the scope of liability, for instance, by excluding certain measures/actions of the national judiciary and/or the constitutional legislator.

In the early days, national courts only occasionally gave judgments which ignored Francovich liability.

In Greece, a judgment has been reported concerning the defective transposal of Directive 89/48. The Council of State (Symvoulio tis Epikrateias) did not comment on the problems of Francovich, even though the appellant had pleaded the liability of the State on account of the defective transposal. While recognising the obligation on the State to transpose the Directive, the Symvoulio tis Epikrateias found that it is for the legislature and the executive to choose the appropriate legal means of fulfilling that obligation and concludes that the courts have no jurisdiction to intervene in the matter, especially by acknowledging the civil liability of the State for the infringement of its Community obligations.

Recently, the ECJ was confronted with Italian legislation, which excluded all state liability for damage caused to individuals by an infringement of Community law committed by a national court adjudicating at last instance, where that infringement is the result of an interpretation of provisions of law or of an assessment of the facts and evidence carried out by that court. The ECJ made it very clear that this was unacceptable:

‘[...] to exclude all State liability in such circumstances on the ground that the infringement of Community law arises from an interpretation of provisions of law made by a court would be tantamount to rendering meaningless the principle laid down by the Court in the Köbler judgment. [...]’

A potential problem for the future is caused by critical case law of some national constitutional courts regarding the question of supremacy of European law, in

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4 With respect to the doctrine of direct effect the same can, and has been, said; cf. Jans, J.H., and J.M. Prinssen, ‘Direct Effect: Convergence or Divergence? A Comparative Perspective’ in Prinssen, J. M. and A. Schrauwen (eds.) Direct Effect; Rethinking a Classic of EC Legal Doctrine (Europa Law Publishing, Groningen 2002) at pp. 105-126.


6 Case C-173/03 Traghetti del Mediterraneo [2006] ECR I-5177. Cf. also Case C-470/03 A.G.M.-COS.MET Srl, Judgment of 17 April 2007, n.y.r. in the ECR.
particular, with respect to the national constitution. In line with this case law it cannot be ruled out that national courts will have some problems with respect to accepting state liability, if and when the infringement is caused by the national constitution.

The same kind of problems can be expected with respect to liability for infringements of EU third pillar law. From the judgment of the ECJ in Pupino, it emerges that the principle of loyal cooperation is also binding in the area of police and judicial cooperation in criminal matters. The Court concluded in this case that the national court is required to interpret national law as far as possible in the light of the wording and purpose of the framework decisions concerning criminal cooperation in the third pillar. Therefore, it could be argued that state liability, even though developed in the first pillar, also applies to acts of Member States in contravention of the obligations under the third pillar. However, in Germany, the Bundesverfassungsgericht, in its remarkable judgment on the European Arrest Warrant clearly has a different view on the consequences of third pillar law for the domestic legal order. In the light of this judgment it is difficult to see how the Bundesverfassungsgericht could accept, as a matter of European law, that infringements of state authorities of third pillar obligations result in liability to pay damages.

Future developments on these issues must be watched closely to see whether this proves to be the case.

3 Setting the conditions for Francovich-liability

3.1 Liability under more stringent conditions

Not only is the principle of state liability exclusively a matter of European law, the same can be said with respect to the three conditions of state liability: sufficiently serious breach, rights for individuals, causality between the breach of the obligation and the damage sustained. The reasons for that can be found in Brasserie. On the question if reparation can be made dependant of the existence of a on national law based principle of ‘fault’, the Court ruled:

‘The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order.’

Cf. also the contributions of J.M. Prinssen and N. Lavranos to this volume.

8 Case C-105/01 Pupino [2005] ECR I-5285.

Imposing supplementary conditions by national law cannot be accepted, as this would call the right to reparation itself in question. This line of reasoning was also followed by the Court in *Traghetti del Mediterraneo* already mentioned above.\(^\text{10}\) Italian law limited state liability for an infringement of Community law attributable to a national court adjudicating at last instance solely to cases of intentional fault and serious misconduct on the part of the court. The ECJ did not accept this either:

‘Accordingly, although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before state liability can be incurred for an infringement of Community law attributable to a national court adjudicating at last instance, under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law, as set out in paragraphs 53 to 56 of the *Köbler* judgment.’

3.2 Lowering the standards for liability

So, raising the standards for liability by reference to conditions based on national law, which goes beyond the three European conditions, is not acceptable. But what about lowering the standards? Once again a parallel can be drawn with the doctrine of direct effect.\(^\text{11}\) Provisions of Community law are directly effective if they pass the threshold of ‘unconditional and sufficiently precise’. Raising this threshold by national law/courts cannot be accepted; lowering this threshold can be allowed.

In *Brasserie du Pêcheur* and *Factortame*, the Court of Justice made it clear that Francovich liability implies a form of case-law driven minimum harmonisation. If Member States wish to operate a ‘more far-reaching’ system of liability, they are free to do so, though their freedom is in turn limited by the obligation of sincere cooperation laid down in Article 10 EC.\(^\text{12}\) This is above all relevant to countries such as the Netherlands, Spain and Belgium. Generally speaking, the system of state liability in these countries is more generous – in the sense that unlawful action by the state more readily gives rise to liability – than the European system.

In a Belgian case (concerning technical rules applied contrary to Article 28 EC), the *Cour de Cassation* (Court of Cassation) set aside the judgment of the lower court, holding that the acts of the administrative authority were to be

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\(^\text{10}\) Case C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177. Cf. also Case C-470/03 *A.G.M.-COS. MET* Srl, Judgment of 17 April 2007, n.y.r. in the ECR. This case concerned state liability as a result of conduct of state officials.


\(^\text{12}\) Case C-511/03 *Ten Kate* [2005] ECR I-8979, paragraph 31 in particular.
assessed in the light of the general criteria of Belgian civil liability law, which were wider than those of Community law.\footnote{Belgian Court of Cassation, No. C.98.0477F. Reported in European Communities ‘XVIIIth Report on Monitoring the Application of Community Law’ COM(2001) 309.}

As regards Spain, the judgment of the \textit{Tribunal Supremo} (Supreme Court) in the CSD case is relevant.\footnote{Sentence of the \textit{Tribunal Supremo} (12/06/2003) on the Case C-390/99 \textit{Canal Satélite Digital SL} v. \textit{Administracion General del Estado} [2002] ECR I-607, as reported by Martínez Lage, S. and H. Brokelmann ‘The Liability of the Spanish State for Breach of EC Law: The Landmark Ruling of the Spanish Tribunal Supremo in the CanalSatelite Digital Case’ \textit{EL Rev} 2004, 29, p. 530.} This case concerned the liability of Spain for legislation concerning satellite television decoders. In a preliminary reference, the Court of Justice held this legislation to be incompatible with the rules on the free movement of goods.\footnote{Case C-390/99 \textit{Canal Satélite Digital} [2002] ECR I-607.} According to the \textit{Tribunal Supremo}:

\begin{quote}
’[...] the principle of state liability must always be interpreted extensively so as to favour the protection of the individual against the actions of the state. This interpretation derives on the one hand from the objective character of such liability under internal law and on the other hand from the fact that it is a means of mitigating the deficiencies of other channels of protection of these interests. It would not be reasonable to reduce the individual’s right to effective judicial protection to the benefit of the infringing state. The pro-individual interpretation of state liability can be inferred from the fact that the conditions set out by the Court of Justice do not prejudice the application of any less restrictive national rules. This is particularly important in the sphere of our national legal system, in which the institute of state liability is of an objective nature. It is therefore sufficient to be in presence of an individualised, illegal harm and of a causal link between the infringing act and the harm to engender this state liability.’\footnote{Use has been made of the English translation of the judgment as published in the \textit{EL Rev} 2004, 29, p. 530.} \end{quote}

In view of this, we must accept that extending the \textit{Francovich}-concept remedies other than just damages on the basis of national law is also allowed, as it is to extend the doctrine to liability for lawful acts\footnote{\textit{Cf.} on the matter of Community liability to pay damages for lawful acts Case C-237/98 P \textit{Dorsch Consult} [2000] ECR I-4549.} as well as establishing a system of personal liability for state officials.\footnote{Case C-470/03 \textit{A.G.M.·COS.MET Srl}, Judgment of 17 April 2007, n.y.r. in the ECR, paragraph 96 in particular.}

The reason for accepting more lenient liability conditions based on national law is, of course, an obvious one. More lenient conditions will ensure a more effective application of European rules in the national legal order.
4 Applying the principle and its conditions

The next question therefore is who decides whether the conditions for Francovich-liability are met or not? In Köbler, the Court ruled that it is, in principle, for the national courts to apply the criteria for establishing the liability of Member States for damage caused to individuals by breaches of Community law, in accordance with the guidelines laid down by the Court for the application of those criteria. Let us therefore have a look to see if this general statement of the ECJ is supported by its case law.

4.1 Serious breach

According to the Court in Brasserie it is the ‘sole jurisdiction’ jurisdiction for the national courts as to how to characterize the breaches of Community law at issue and the ECJ cannot substitute its assessment for that of the national courts. In Haim, the Court added that in order to determine whether such an infringement of Community law constitutes a sufficiently serious breach, a national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it and in accordance with the guidelines laid down by the Court.

The ECJ is indeed willing to provide the national courts the necessary guidance on which ‘factors’ they may take into consideration. They 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 the breach was excusable or not;
- whether a Community institution contributed towards the omission; and
- the adoption or retention of national measures or practices contrary to Community law.

Having stated the sole jurisdiction for the national courts to decide if, in the circumstances of the case, the breach has to be regarded as serious or not, the Court will not hesitate to be helpful. In Brasserie, the Court made it perfectly

19 Ibid., paragraph 100.
20 Ibid., paragraph 58 of the judgment. Cf. also Case C-302/97 Konle [1999] ECR 1-3099 where the Court ruled that it is in principle for the national courts to assess whether a breach of Community law is sufficiently serious for a Member State to incur non-contractual liability vis-à-vis an individual (paragraph 59) and C-224/01 Köbler v. Austrian Republic [2003] ECR I-10239 where the Court ruled that in order to determine whether the infringement is sufficiently serious [...], the competent national court, [...] must determine whether that infringement is manifest.
22 Cf. also Haim, paragraph 44 and Konle, paragraph 58 (as cited above).
clear that as regards the provisions of the German Biersteuergesetz relating to the designation of ‘Bier’, it would be difficult to regard the breach of Article 28 as an excusable error, since the incompatibility of such rules with Article 30 was manifest in the light of earlier decisions of the Court. On the other hand, however, the criteria available to the national legislature to determine whether the prohibition of the use of additives was contrary to Community law were significantly less conclusive. It is difficult to see any national court exercising its ‘sole jurisdiction’ and to come to opposite conclusions!

Sometimes however, the Court goes even further than in Brasserie and does not hesitate to apply the conditions itself. For instance in Brinkmann, the court ruled that in this instance the Court has all the information necessary in order to judge whether the facts presented are to be characterised as a sufficiently serious breach of Community law and, if appropriate, whether there is a causal link between the breach of the State’s obligation and the damage sustained.23

Indeed, it is ‘in principle’ up to the national court to determine whether the conditions for Francovich-liability are met or not. However, Brinkmann and British Telecom show that this is not a matter ‘of principle’!

4.2 Rights for individuals

It is, in the author’s opinion, quite clear that to qualify a rule of European law in terms of ‘rights for individuals’ is as such a matter of (interpretation of) European law in which the Member States and their courts, at the end of the day, do not have any discretion whatsoever. The rule infringed by the Member State contains ‘rights for individuals’ or not. Also the question who is in abstracto entitled to those rights is a question of interpretation of European law. However, it is for the national court to decide if the litigant in question falls within the protective scope of the European rule infringed.

For instance: in Brasserie, the Court ruled that Article 28 EC satisfies this condition and it must be assumed that all internal market-freedoms give rise to rights for individuals which the national courts must protect. In Dillenkofer the EC] ruled that Article 7 Directive 90/314 entails the grant to package travellers of rights guaranteeing the refund of money that they have paid over and their repatriation in the event of the organizer’s insolvency. By contrast, in Peter Paul, the Court ruled that the European Banking directives do not contain explicit provisions conferring rights on depositors in the event their deposits became unavailable as a result of defective supervision and that these directives cannot be regarded as conferring on individuals rights capable of giving rise to state liability on the basis of Community law.

However, this does not necessarily mean that the role of national courts in applying the ‘rights for individuals’ condition is a limited one. Lower courts in particular will have to apply this condition without guidance of the Court of Justice. The danger of diverging case law is a real one.

We may point at a recent judgment of the Dutch Gerechtshof Den Haag (The Hague appeal court) concerning Article 5 in combination with Annex III of the Nitrates Directive (91/676). Under this provision, Member States must establish and implement action programmes to reduce and prevent pollution caused by nitrates. The measures to be included in the action programmes must ensure that the amount of livestock manure applied to the land each year does not exceed 170 kg per hectare. In the view of the Gerechtshof, these provisions were not intended to confer rights on individuals, on the basis of which individuals could hold the state liable for the cost of purifying ground and surface water, or the cost of alternative drinking water. It held that the directive did not lay down the obligation to guarantee a particular quality of water, upon which individuals could base quality entitlements as against the state.

This judgment seems to be at odds with a decision of the French Tribunal administratif (administrative court) at Rennes. In 1995, the Tribunal d’instance (district court) at Guincamp had ordered the Société Suez Lyonnaise des Eaux to pay compensation to 176 subscribers to its drinking water distribution network on account of the excessive nitrate content of the water it distributed. The Société accordingly brought proceedings before the Tribunal administratif to obtain compensation for the State’s late transposal of Article 5 of Directive 91/676. The Tribunal accepted this argument and concluded that the state was liable.

In my opinion, there are two main causes for any divergent case law at national level. The first one is that the case law of the ECJ on this condition is not always predictable, has an ad hoc character and it looks as if the Court’s case law is still developing. The second one has to do with similar, but not identical, concepts in national liability law, like Schutznorm in Germany and the ‘relativity-principle’ in Dutch law. It is quite natural for national courts to apply these doctrines also with respect to Francovich-claims.

4.3 Causality

The third condition that must be fulfilled before a Member State can be held liable is that there must be a direct causal link between the breach and the damage suffered. However, it is not clear to what extent this requirement can and may be interpreted along national law lines. With a reference to Brasserie, I would like to submit that a national, more stringent causality than the requirement of ‘a direct causal link’ would question the right on

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reparation itself. The problem however, is that it is not quite clear what the exact meaning is of ‘a direct causal link’. One cannot say that there is a fully developed European doctrine on causality.

It is clear from *Brasserie du Pêcheur* and subsequent case law that it is for the national courts to determine whether there is a causal link in a given case. In *Norbrook Laboratories*, the decision was explicitly left to the national court. This is indeed a textbook approach.

There are, however, cases where the ECJ decided the question of causality itself. In *Brinkmann Tabakfabriken*, for example, the Court held that there was no direct causal link between the breach and the damage. In *Rechberger*, the national court had already found that there was a causal link, but the Court of Justice nevertheless expressed a concurring opinion. As yet, the Court’s case law does not seem to have established a constant line and further decisions will have to be awaited.

There is very little reported national case law on the requirement of a direct causal link. In *Re Burns’s Application for Judicial Review*, the claimant, under threat of redundancy, had agreed to work on a night shift and subsequently asked to be transferred to a day shift. When her employer refused, she resigned on medical grounds. Having established that the claimant was to be regarded as a night worker, the High Court decided that failure to transpose Directive 93/104 on the organisation of working time automatically constituted a serious breach of Community law, with the result that the United Kingdom had a duty to compensate the claimant for any resulting injury. In the instant case, however, she had not established that she would have been able to force her employer to transfer her to day work and thus keep her job if she had been able to rely on provisions transposing the rights conferred by the directive into national law.

The issue of causation was also considered in another UK case. There, the Court of Appeal ruled that the plaintiff was not entitled to be compensated for a lost chance.

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26 *Brasserie*, paragraph 65: ‘it is for the national courts to determine whether there is a direct causal link between the breach of the obligation borne by the State and the damage sustained by the injured parties’. Cf. also Case C-5/94 *Hedley Lomas* [1996] ECR I-2553 (paragraph 30).


29 Case C-140/97 *Rechberger* [1999] ECR I-3499, paragraphs 73 et seq.


4.4 Summing up

The general statement by the ECJ in its case law that it is, in principle, for the national courts to apply the criteria for establishing the liability of Member States for damage caused to individuals by breaches of Community law may be correct. However, for a good understanding of the case law, it is necessary to make a distinction between the conditions ‘serious breach’ and ‘causal link’ on the one hand and ‘rights for individuals’ on the other. Assessing a breach as being ‘serious’ or not is a matter of applying the law; the same can be said with respect to assessing if there is a causal link or not.

Whether the rule infringed contains ‘rights for individuals’ is more a matter of interpreting then of applying European law. And, therefore it is ultimately the ECJ who has to decide on this issue. For the national court it only has to decide whether the plaintiff in question falls within the protective scope (as defined by European law) of the rule infringed.

5 Applying procedural rules

The rulings of the Court in cases like Rewe/Comet make clear that some national differences are to be considered inherent in Community law. In the absence of specific Community rules, it is for the Member States to determine the competent courts and applicable procedural rules for legal proceedings relevant to the enforcement of Community law. The two well-known basic conditions of the so-called Rewe-test are that these rules may not be less favourable than those relating to similar ‘domestic’ remedies (principle of non-discrimination) and that these rules may not make the exercise of Community rights virtually impossible or excessively difficult (principle of effectiveness). It must be acknowledged that the case law of the ECJ in Rewe/Comet implies the legitimacy of national differences concerning the modalities of applying the direct effect doctrine. In the light of this case law, it is not surprising at all that the Court ruled in Francovich that:

‘it is for the internal legal order of each Member State to designate 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’ (paragraph 42).

Obviously, it is the Court’s opinion that applying national procedural law is not in violation of the principle of full effectiveness. At least, not as a matter of principle, because the Court follows with the well known statement, that:

33 Cf. also Case C-470/03 A.G.M.-COS.MET Srl, Judgment of 17 April 2007, n.y.r. in the ECR, paragraph 89.
'the substantive\textsuperscript{34} and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation' (paragraph 43).

With this the ECJ accepts that applying the doctrine of state liability may differ from one Member State to the next\textsuperscript{35} as long as these differences in national law fall within the scope of ‘not virtually impossible or excessively difficult’. Let us therefore have a look at what kind of differences are acceptable or not.

5.1 The qualification of the remedy according national law

National procedural law can be regarded as ‘the vehicle’ used to apply the \textit{Francovich}-doctrine. Therefore, it is not unimportant how to qualify, in the context of national liability law, a \textit{Francovich}-based claim. In some Member States, the applicable national procedural rules are dependant on the qualification of such a claim.

In England, for instance, it is established case law to regard liability for breach of Community law as ‘a breach of statutory duty’.\textsuperscript{36} For the scope of reparation, it does make a difference if the claim is based on negligence or as a breach of statutory duty.\textsuperscript{37}

In Germany, however, legal theorists have great difficulty specifying the precise nature of liability for breach of Community law in national law terms. A decision of the \textit{Bundesgerichtshof} (Federal Court) even gives rise to the suspicion that this liability must, to a certain extent, be regarded as a ‘separate’ matter from the ‘ordinary’ law on unlawful acts by public authorities.

National limitation periods within which actions for reparation must be brought, in principle, also can be applied ‘normally’, in other words, subject to the requirements of non-discrimination and effectiveness. This is another reason why it is very important to determine how an action for reparation based on the \textit{Francovich} doctrine is classified. In one of the follow-up decisions after \textit{Factortame}, an English court had to decide whether or not an infringement of the EC Treaty, in conjunction with the European Communities Act 1972, should

\textsuperscript{34} To the present author, it is not quite clear what the ECJ exactly means with ‘substantive’ provisions.

\textsuperscript{35} Cf. also van Gerven, W., ‘Of Rights, Remedies and Procedures’, [2000] CML Rev, p. 501, in particular at pp. 504-505, who makes it perfectly clear that the requirement of ‘uniform application’ of Community does not preclude all national differences.


\textsuperscript{37} See also the Opinion of AG Tesauro in Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and \textit{Factortame} [1996] ECR I-1029.
be classified as a breach of statutory duty. This classification would also determine what period of limitation would apply, six years or twelve.38

5.2 Extent of the reparation

In *Brasserie*, the Court ruled that in the absence of relevant Community provisions, it is for the domestic legal system of each Member State, subject to *Rewe/Comet*, to set the criteria for determining the extent of reparation. This reparation must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights, according to the ECJ *Brasserie du Pêcheur & Factortame*.

In particular, in order to determine the loss or damage for which reparation may be granted, the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.39

Indeed, it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself. In principle, this is to be decided on the basis of national law. On the other hand, the Court makes it quite clear that not every limitation will be acceptable.

In *Brasserie*, the Court also ruled that as for the various heads of damage are concerned, Community law imposes no specific criteria. It is for the national court to rule on those heads of damage in accordance with the domestic law which it applies.40 In *Brasserie*, the ECJ ruled also that substantive and procedural conditions laid down by national law on reparation of damage are able to take account of the requirements of the principle of legal certainty. With respect to the question of interest, the ECJ refers to national law: the *Sutton*-case41 shows that:

‘it has been settled law that, while the right to reparation is founded directly on Community law where the three conditions set out above are fulfilled, the national law on liability provides the framework within which the State must make reparation for the consequences of the loss and damage caused, provided always that the conditions laid down by national law relating to reparation of loss and damage must not be less favourable than those relating to similar domestic claims and

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38 *R v. Secretary of State for Transport, Ex parte Factortame Ltd and others* (No. 7) [2001] High Court of Justice (England and Wales, QBD (Technology and Construction Court) 1 WLR 942, [2001] CMLR 1, p. 1191.


must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation’.

5.3 How to allocate liability internally

The Court had already said in as many words in Brasserie du Pêcheur that the principle of state liability for damage caused to individuals as a result of breaches of Community law holds good ‘whatever be the organ of the State’. It was thus clear that breaches of Community law by municipalities, provinces, Länder and other subnational authorities, autonomous or otherwise, may give rise to liability. Later decisions confirmed this conclusion. This raises the question of what the relationship is between liability of the State and liability of subnational authorities. According to the Court, this question is governed not by Community law, but primarily by national law. In Haim II, the Court ruled:

‘that Community law does not preclude a public-law body, in addition to the Member State itself, from being liable to make reparation for loss and damage caused to individuals as a result of measures which it took in breach of Community law.’

This observation answers the question: is it always the state that has to make reparation? The answer is: no, not necessarily, as long as the injured party obtains reparation for his loss and damage. In other words, it is the result that counts: if a public authority has infringed Community law, the individual that has suffered damage as a result must be able to obtain reparation. How that result is achieved is apparently less interesting from a Community law point of view, as could already be implied from the Konle judgment.

5.4 Violating the Rewe/Comet rule of effectiveness

There are only few examples where the ECJ found that national law violated the principle of effectiveness. In Brasserie (paragraph 71), the ECJ ruled on the condition imposed by German law where a law is in breach of higher-ranking national provisions, which makes reparation dependent upon the legislature’s act or omission being referable to an individual situation. This 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 person. Also, in Brasserie (paragraph 73) the Court ruled on the condition imposed by English law on state

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44 Case C-302/97 Konle [1999] ECR I-3099, paragraphs 63-64.
liability requiring proof of misfeasance in public office. Such an abuse of power being inconceivable in the case of the legislature is also such as in practice to make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law where the breach is attributable to the national legislature. This case law in particular illustrates that there is a fine line between questioning the principle of state liability and its conditions as such (a priori not acceptable) and national procedural rules governing claims for reparation (prima facie acceptable).

6 Concluding remarks

In the introduction, I argued that it is a principle of Community law that the Member States are obliged to make good on losses and damages caused to individuals by breaches of Community law for which they can be held responsible. And, that it is for the national legal order to designate the competent courts and lay down the procedural rules for the relevant legal proceedings.

The case law presented in this paper show that is not as simple as that. I would like to submit that an action for Francovich-liability is very much a mixed European/national type of remedy.

The ‘European’ part of the remedy rest on the following two pillars:
- national law affecting the scope of Francovich-liability ‘as such’ cannot be accepted. In other words, there is no room at all for the Member States to limit the scope of liability, for instance, by excluding certain measures/ actions of the national judiciary and/or the constitutional legislator;
- imposing supplementary conditions for liability by national law are not acceptable, as this would call the right to reparation itself in question.

The ‘national’ part of the remedy rest on the following:
- it is for the national courts to apply the criteria for establishing the liability of Member States for damage caused to individuals by breaches of Community law;
- it is for the national legal order of the Member States to designate 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.

Mixed elements are illustrated by the following:
- lowering the standards for liability on the basis of national law is fully acceptable;
- extending the Francovich-concept to other remedies than just damages on the basis of national law is also allowed;
- although it is ‘in principle’ to the national court to determine whether the conditions for Francovich-liability are met or not, case law shows that this
is not a matter ‘of principle’. The ECJ, if it feels necessary to do so, does not refrain from applying the conditions itself;

• whether the rule infringed contains ‘rights for individuals’ is more a matter of interpreting then of applying European law. And, therefore, it is ultimately the ECJ who has to decide on this issue;

• there is an inherent danger that national courts, lower courts in particular, involved in applying Community-defined concepts on state liability will, in absence of guidance by the ECJ, be tempted to have recourse to similar concepts (e.g. on causation and Schutznorm) in national law;

• there is a thin line between questioning the principle of state liability and its conditions as such (a priori not acceptable) and national procedural rules governing claims for reparation (prima facie acceptable).