Complete EU Law: Text, Cases, and Materials (5th edn)
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8. EU liability in damages

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Abstract

Titles in the Complete series combine extracts from a wide range of primary materials with clear explanatory text to provide readers with a complete introductory resource. This chapter focuses on the non-contractual liability of the EU for damages. The discussions cover the jurisdiction of the EU Courts; the meaning of 'general principles common to the laws of the Member States'; wrongful acts by EU institutions; actual damage; causation; the relationship between actions for damages against the EU and actions for damages against Member States; and the relationship between actions for damages against the EU and actions against it for annulment of EU law.

Keywords: EU law, non-contractual liability, EU liability, Article 340 TFEU, wrongful acts, causation, damage, Member State liability

Key Points

By the end of this chapter, you should be able to:

- explain the meaning of the phrase ‘the general principles common to the laws of the Member States’ in Article 340 TFEU;
- identify examples of rules of law that the Court of Justice of the European Union (CJEU), i.e. the Court of Justice and the General Court, are likely to regard as being for the protection of individuals;
- analyse the jurisprudence on what constitutes a wrongful act for the purposes of Article 340 TFEU;
- apply the criteria for assessing whether a wrongful act by the European Union (EU) is ‘sufficiently serious’;
- analyse (in conjunction with Chapter 5) the relationship between the Court’s jurisprudence on EU liability and its jurisprudence on Member State liability; and
- analyse (in conjunction with Chapter 7) the relationship between an action under Article 340 TFEU and an action under Article 263 TFEU.

Introduction

The rules regarding the liability of the European Union (EU) in damages differ according to whether the claim is contractual or non-contractual. The primary rules governing both are set out in Article 340 TFEU.

Article 340 TFEU

> The contractual liability of the Union shall be governed by the law applicable to the contract.
>
> In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.
>
> Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.
>
> The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them.

p. 318 ↵ This chapter, for reasons that will become apparent, will concentrate on the non-contractual liability of the EU, but, before doing so, brief mention should be made of its contractual liability. Article 340 TFEU provides that the EU will incur contractual liability according to 'the law applicable to the contract'. In the absence of a fully developed EU contract law, this 'law' will be the law of a particular country (either a Member State or a third country), and so EU liability for breach of contract will be determined by the content of that (contract) law and not by EU law.

In contrast, the non-contractual liability of the EU is governed by EU law, as provided for by Article 340 TFEU. Acts that may give rise to non-contractual claims for damages against the EU include the adoption of defective legislation, negligence, and unjust enrichment.

Note

> If you have already studied actions for annulment under Article 263 TFEU (see Chapter 7), you may find that some of the applicants in Article 340 TFEU actions, or the factual scenarios giving rise to their claims, are familiar to you. This is because damages are often claimed as an additional remedy to annulment, for instance to compensate for losses incurred prior to the annulment of the measure that caused these losses. For example, the same facts gave rise to an action for annulment under Article 263 TFEU in Case 48/65 *Alfons Lütticke v Commission* [1966] ECR 19 (see 7.16.2) and to an action for damages in Case 4/69 *Alfons Lütticke v Commission* [1971] ECR 325 (see 8.3).

8.1 Jurisdiction of the EU Courts (the CJEU)

Jurisdiction to award damages under Article 340 TFEU is conferred by Articles 256(1) and 268 TFEU.

Thinking Point

> While reading the following two extracts, note which of the CJEU have jurisdiction over such claims.

Article 256(1) TFEU

> The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned ↵ to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding.
>
> Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.

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Article 268 TFEU

> The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

Thus the General Court (see further 2.4.2 on the General Court) has jurisdiction over claims under Article 340 TFEU, subject to a right of appeal to the Court of Justice (see further 2.4.1 on the Court of Justice).

8.2 Parties to Article 340 TFEU actions

An action under Article 340 TFEU may be brought by a natural or legal person. In addition, the General Court has held that an association may bring proceedings, but only where it has an interest of its own to assert which is distinct from that of its members or a right to compensation that has been assigned to it by others

(Case T-304/01 *Abad Pérez and others v Council and Commission* [2006] ECR II-4867, at para 52).

The appropriate defendant(s) will be the EU institution(s) against which the matter giving rise to liability is alleged. So where, as in Joined Cases 63–69/72 *Werhan and others v Council and Commission* [1973] ECR 1229, the Commission (see further 2.3 on the Commission) had proposed the legislation complained of and the Council (see further 2.2 on the Council) had enacted it (see further 3.5 on legislative procedures), it was appropriate for the claim to be bought against both the Commission and the Council. The Court of Justice expressly rejected the Commission's claim that it was the Commission's role to represent the EU in all claims against it regardless of which institution was the subject of the allegation.

In T-479/14 *Kendrion v Court of Justice* EU:T:2015:2, Kendrion sought damages from the EU in respect of the General Court's failure to give judgment within a reasonable time (in the earlier case of T-54/06 *Kendrion v Commission* EU:T:2011:667). Kendrion brought the claim against the CJEU, on the basis that the General Court was part of the CJEU. The CJEU argued that it should be replaced as defendant by the Commission, but the General Court held that where the EU was liable for the wrongdoing of one its institutions, it must be represented by the particular institution which had committed the act. Since Article 13 TEU provided that the
p. 320 CJEU was an EU institution, and Article 19 TEU provided that the CJEU comprised the ↵ General Court and the Court of Justice, it was therefore for the CJEU to represent the EU in this case. The General Court confirmed that there was no general principle that the EU should always be represented by the Commission in cases before the CJEU and that it was not bound by Advocate General Sharpston's Opinion in C-58/12 P *Gascogne Group v Commission* EU:C:2013:360 (see further 2.4.1 on Advocate Generals' Opinions), which had indicated that there was such a principle, but which had not been followed by the Court of Justice in that case and which, in any event, conflicted with Advocate General Poiares Maduro's Opinion in Joined Cases C-120 & 121/06 P *FIAMM and another v Council and Commission* [2008] ECR I-6513 (see also 8.4.4). The General Court rejected the argument that the impartiality and independence of the CJEU would be compromised were it to be the defendant in this case, noting that the CJEU had appeared as a litigant before the General Court and the Court of Justice on many previous occasions without its independence or impartiality being called into question. The General Court therefore concluded that the claim against the CJEU was admissible (although it went on to rule against the applicant on the merits).

8.3 The meaning of 'general principles common to the laws of the Member States'

Article 340 TFEU states that the non-contractual liability of the EU is to be determined 'in accordance with the general principles common to the laws of the Member States'. The meaning of this requirement was explained by the Court of Justice in its judgment in Case 4/69 *Alfons Lütticke GmbH v Commission* [1971] ECR 325.

Alfons Lütticke alleged that a German tax on its imports of milk and milk products was contrary to what is now Article 110 TFEU (see further 10.7), and requested that the Commission bring enforcement proceedings against the German government under Article 258 TFEU (see 2.3.3.1 and 7.1 on Commission enforcement actions). The Commission refused, and Alfons Lütticke brought an action under Articles 263 and 265 TFEU (see Chapter 7 on these Articles), seeking either annulment of the Commission's refusal to act or, in the

alternative, a finding that it had wrongfully failed to act. When this claim was rejected by the Court of Justice in Case 48/65 *Alfons Lütticke GmbH v Commission* [1966] ECR 19 (see 7.16.2), it brought an action under Article 340 TFEU to recover damages for the losses caused to it by the Commission's inaction (Case 4/69 *Alfons Lütticke GmbH v Commission* [1971] ECR 325).

Thinking Point

> Remember that the 'general principles' referred to in Article 340 TFEU are those that are 'common to the laws of the Member States'. If you have already studied your domestic law of tort/delict/civil wrongs, you may be able to predict the elements that have to be proved before damages will be awarded under Article 340 TFEU.

p. 321 ↵ While reading the following extract, note which 'general principles' were specified by the Court of Justice.

Case 4/69 *Alfons Lütticke v Commission* [1971] ECR 325

> 10. By virtue of the second paragraph of Article 215 [EC, now Article 340 TFEU] and the general principles to which this provision refers, the liability of the Community [now Union] presupposes the existence of a set of circumstances comprising actual damage, a causal link between the damage claimed and the conduct alleged against the institution, and the illegality of such conduct.

So, according to the Court of Justice in *Alfons Lütticke*, the reference to 'the general principles common to the law of the Member States' in Article 340 TFEU means that the EU will be liable in damages if three elements are proved. Thus there must have been:

- actual damage to the applicant (personal or property damage);
- wrongful conduct by a EU institution; and
- a causal link between the wrongful conduct and the damage.

In *Alfons Lütticke*, the Court of Justice held that damages would not be awarded because, on the facts, the Commission's conduct had not been wrongful. The Commission had previously required the German government to reduce the tax and had reasonably considered the reduced rate to be acceptable. It had therefore not failed in its task of supervising compliance with the EU rules on taxation.

Each of these three elements will now be examined in turn.

8.4 Wrongful acts by the EU institutions

8.4.1 An EU institution must be responsible for the act

Acts of the EU institutions include legislative acts such as Regulations, Directives, and Decisions, but not Treaties, because these are acts of the sovereign Member States and not of the EU (see further 3.4). Thus, in Case 169/73 *Compagnie Continentale France v Council* [1975] ECR 117 the Court of Justice ruled that where the act that allegedly caused harm to the applicant was in fact an Act of Accession, which was 'an integral part of the Treaty concluded between the original and the new Member States' (at para 16), this could not give rise to liability under Article 340 TFEU because no EU institutions were responsible. The General Court reiterated this point in Case T-113/96 *Dubois et Fils SA v Council and Commission* [1998] ECR II-125, in which it ruled that the EU Treaties were not acts of the institutions, but agreements by the Member States. They could not, therefore, give rise to liability on the part of the EU ↵ under Article 340 TFEU. (The Court of Justice subsequently dismissed the appeal in *Dubois* as unfounded: see Case C-95/98 *Dubois et Fils SA v Council and Commission* [1999] ECR I-4835.)

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8.4.2 Whether the act is wrongful

The distinction between an act that is wrongful, and one that is not, is crucial because only a wrongful act can give rise to liability in damages. However, as the jurisprudence demonstrates, it can be very difficult to identify where this distinction should be drawn. For example, in Joined Cases 19, 20, 25, & 30/69 *Richez-Parise and others v Commission* [1970] ECR 325 (see also 8.6 in relation to causation), a number of EU employees sought damages in respect of the impact of an incorrect calculation of their pension entitlement. The Court of Justice held that the provision of incorrect information to the applicants by the Commission did not itself constitute a wrongful act, but that the failure subsequently to correct it did.

The Court of Justice first laid down the test for what constitutes a 'wrongful' act for the purposes of Article 340 TFEU in Case 5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975, in which a number of German sugar producers alleged that Regulation 769/68 imposing minimum and maximum prices for raw sugar, OJ 1968 L143/14, was, in its detail, discriminatory.

Thinking Point

> While reading the following extract, note the conditions that the Court of Justice laid down in order for the act to be considered 'wrongful' for the purposes of Article 340 TFEU.

Case 5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975

> 11. In the present case the non-contractual liability of the Community [now Union] presupposes at the very least the unlawful nature of the act alleged to be the cause of the damage. Where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Article 215 [now Article 340 TFEU], second paragraph, of the [EC] Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred. For the that reason the Court, in the present case, must first consider whether such a violation has occurred.

The Court of Justice held that the EU could not incur liability for legislative action involving measures of economic policy unless there had been a 'sufficiently flagrant violation of a superior rule of law for the protection of the individual' which had caused loss to the applicant. This has come to be known as 'the *Schöppenstedt* test'.

On the facts of *Schöppenstedt*, the Court refused to award damages on the ground that the different prices for sugar varied according to the development of the market and therefore there had not been a 'sufficiently flagrant violation' by the EU of the principle of non-discrimination.

p. 323 ↵ The Court has more often expressed the 'sufficiently flagrant violation' requirement as that of a 'sufficiently serious violation'. See, for example, the following extract from Joined Cases 83 & 94/76 and 4, 15, & 40/77 *Bayerische HNL and others v Council and Commission* [1978] ECR 120 (sometimes referred to as the *Second Skimmed Milk Powder* case).

Joined Cases 83 & 94/76 and 4, 15, & 40/77 *Bayerische HNL v Council and Commission* [1978] ECR 1209

> 4. The finding that a legislative measure such as the regulation in question is null and void is however insufficient by itself for the Community [now Union] to incur non-contractual liability for damage caused to individuals under the second paragraph of Article 215 of the EEC Treaty [now Article 340 TFEU]. The Court of Justice has consistently stated that the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.

The Court of Justice also used the 'sufficiently serious breach' wording in Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame Ltd and others* ('*Factortame III*') [1994] ECR I-1593, at para 51, when laying down the conditions applicable to Member State liability in damages for breach of EU law (see 5.4.1 and 5.5).

The Court has also moved towards omitting the word 'superior' when referring to a rule of law for the protection of the individual (see e.g. Case C-352/98 P *Bergaderm v Commission* [2000] ECR I-5291, at para 42).

A wrongful act therefore requires the following:

(1) the EU must have breached a rule of EU law which is for the protection of the individual; and

(2) that breach must be sufficiently serious.

These two elements will now be examined in greater detail.

8.4.2.1 The EU rule breached must be a rule of law for the protection of individuals

Such rules of law have been taken by the Court of Justice to include those general principles of EU law discussed at 3.4.5, such as legitimate expectation, legal certainty, equality and non-discrimination, and respect for fundamental rights.

For example, in Case 152/88 *Sofrimport SARL v Commission* [1990] ECR I-2477 (see also 7.8.2), which concerned the prohibition of import licences for Chilean apples by Commission Regulation (EEC) No 962/88 of 12 April 1988 suspending the issue of import licences for dessert apples originating in Chile, OJ 1988 L95/10, Commission Regulation (EEC) No 984/88 of 14 April 1988 amending Regulation (EEC) No 962/88 ..., OJ 1988 L98/37, and Commission Regulation (EEC) No 1040/88 of 20 April 1988 fixing quantities of imports of dessert
p. 324 apples originating in third countries, OJ 1988 L102/23, the Court of Justice imposed ↵ damages for breach of the legitimate expectation of the importers that goods in transit would be protected against the sudden introduction of such a prohibition. In Case 74/74 *CNTA v Commission* [1975] ECR 533, in which Regulation 189/72 of 26 January 1972 (published in the Official Journal on 28 January) abolished, without warning, compensation for the effect of exchange-rate fluctuations on trade in colza and rape seeds, the Court of Justice stated that there was a legitimate expectation that the compensation would not be withdrawn in relation to transactions that had already been entered into at the date of abolition of the compensation scheme and for which export licences fixing the amount of compensation in advance had already been obtained.

In Joined Cases 64 & 113/76 *Dumortier Frères SA and others v Council and Commission* [1979] ECR 309, at para 11, the Court of Justice ruled that the principle of equality was a superior rule of law for the protection of individuals, since it 'occupies a particularly important place among the rules of EU law intended to protect the interests of the individual'. The Court held that the principle had been breached by the abolition of refunds to maize gritz producers in circumstances in which producers of maize starch, which was in direct competition with maize gritz, continued to receive the refunds. In Joined Cases 83 & 94/76 and 4, 15, & 40/77 *Bayerische HNL and others v Council and Commission* [1978] ECR 120 (also discussed at 8.4.2.2 in relation to the seriousness of the breach), the Court ruled that Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feedingstuffs, OJ 1976 L67/18,

breached (though not sufficiently seriously) the principle of non-discrimination because it discriminated between different agricultural sectors (against non-dairy producers, who were obliged to purchase the stocks, and in favour of dairy producers, who were guaranteed sales at set prices). The Court held that it was 'impossible to disregard the importance of this prohibition [on discrimination] in the system of the Treaty' (*Bayerische*, at para 5).

In Joined Cases 5, 7, & 13–24/66 *Kampffmeyer and others v Commission* [1967] ECR 245 (see also 8.5.1 in relation to damage, 8.6 in relation to causation, and 8.9.2 on the possibility of a concurrent claim against the Member State) the Court of Justice ruled that the fact that the interests protected were of a general nature—in this case, free trade, support for the relevant markets, and the establishment of a single market (see further 1.4 and 10.1 on the single market)—did not preclude their protection from being for the ultimate protection of individuals. In *Kampffmeyer*, maize importers sought damages in respect of a Commission Decision of 3 October 1963 authorizing Germany to suspend import licences that had been annulled by the Court of Justice in Joined Cases 106–107/63 *Toepfer and another v Commission* [1965] ECR 405 (see 7.8.2). The Decision had been adopted in order to apply Regulation No 19/65/EEC of 2 March of the Council on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, OJ 1965 36/533, which provided that the Commission must investigate protective measures imposed by Member States. The Court of Justice held that in failing to investigate fully before adopting the Decision, the Commission had infringed the rule of law contained in the Regulation, which was for the protection of individuals.

However, not all EU laws constitute rules of law for the protection of individuals for the purposes of Article 340 TFEU. For example, in Case C-282/90 *Industrie- en Handelsonderneming Vreugdenhil BV v Commission* [1992] ECR I-1937 the Court held that the allocation of powers between the EU institutions did not constitute a rule of
p. 325 law for the protection of the individual. It ↵ therefore rejected the applicant's claim for damages in respect of losses caused by the Commission's amendment of Commission Regulation (EEC) No 1687/76 of 30 June 1976 laying down common detailed rules for verifying the use and/or destination of products from intervention, OJ 1976 L190/1, which waived import duties on certain goods, even though it had previously ruled that the amendment was illegal because the Commission had exceeded its powers (see Case 22/88 *Vreugdenhil and another v Minister van Landbouw en Visserij* [1989] ECR 2049).

Case C-282/90 *Industrie- en Handelsonderneming Vreugdenhil BV v Commission* [1992] ECR I-1937

> 20. In that context, it is sufficient to state that the aim of the system of the division of powers between the various Community [now Union] institutions is to ensure that the balance between the institutions provided for in the Treaty is maintained, and not to protect individuals.
>
> 21. Consequently, a failure to observe the balance between the institutions cannot be sufficient on its own to engage the Community's liability towards the traders concerned.
>
> 22. The position would be different if a Community measure were to be adopted which not only disregarded the division of powers between the institutions but also, in its substantive provisions, disregarded a superior rule of law protecting individuals.

8.4.2.2 The breach must be sufficiently serious

In Joined Cases 83 & 94/76 and 4, 15, & 40/77 *Bayerische HNL v Council and Commission* [1978] ECR 1209, Regulation 563/76 (see also 8.4.2.1) provided for the compulsory purchase of skimmed-milk powder for use in animal feedstuffs in order to reduce EU milk stocks, and poultry producers claimed damages against the EU for the resulting increases in the price of animal feed. Although the Court of Justice had already ruled, in Case 114/76 *Bela-Mühle v Grows-Farm* [1977] ECR 1211, that the Regulation was void because it imposed an obligation to purchase at a price that was disproportionate and constituted a discriminatory distribution of the burden of costs, the Court held that this breach of EU law was not sufficiently serious for the purposes of Article 340 TFEU, stating that individuals must accept 'within reasonable limits certain harmful effects on their economic interests'.

Thinking Point

> Before reading the following extract, consider the policy reasons that might have led the Court of Justice to restrict EU liability in damages to such a limited range of circumstances.

Joined Cases 83 & 94/76 and 4, 15, & 40/77 *Bayerische HNL v Council and Commission* [1978] ECR 1209

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> 5. In the present case there is no doubt that the prohibition on discrimination laid down in the second subparagraph of the third paragraph of Article 40 of the [EEC] Treaty [now Article 40 TFEU] and infringed by Regulation No 563/76 is in fact designed for the protection of the individual, and that it is impossible to disregard the importance of this prohibition in the system of the Treaty. To determine what conditions must be present in addition to such breach for the Community [now Union] to incur liability in accordance with the criterion laid down in the case-law of the Court of Justice it is necessary to take into consideration the principles in the legal systems of the Member States governing the liability of public authorities for damage caused to individuals by legislative measures. Although these principles vary considerably from one Member State to another, it is however possible to state that the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy. This restrictive view is explained by the consideration that the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals.
> 6. It follows from these considerations that individuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void. In a legislative field such as the one in question, in which one of the chief features is the exercise of a wide discretion essential for the implementation of the Common Agricultural Policy, the Community does not therefore incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.

In *Bayerische*, the Court of Justice argued that it was essential for the EU to have a wide discretion in adopting economic legislation and that the EU should not be hindered, in making economic policy, by the prospect of continual applications for damages.

In Joined Cases 116, 124, & 143/77 *Amylum, Tunnel and KSH v Council and Commission* [1979] ECR 3497 (see also later in this section), at para 19, the Court of Justice emphasized the relatively high threshold for a finding of a sufficiently serious breach and held that the Commission's 'errors' were not sufficiently serious, because its conduct could not be said to have been 'verging on the arbitrary'.

However, while the public policy rationale for a conservative approach to the award of damages still exists, the Court of Justice has, in recent years, taken a slightly less restrictive approach to such action, by aligning the criteria for assessing whether the breach is sufficiently serious with that laid down in Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame Ltd and others* (*'Factortame III'*) [1994] ECR I-1593 (see 5.4.1 and 5.5), rather than focusing on previously considered criteria such as the number of persons affected and the seriousness of the impact on them.

This approach can be seen in Case C-352/98 P *Bergaderm v Commission* [2000] ECR I-5291, in which the Commission had adopted Council Directive 93/35/EEC of 14 June 1993 amending for the sixth time Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products, OJ 1993
p. 327 L151/32 (the Cosmetics Directive), to restrict the ↵ use of certain chemicals in cosmetics. Bergaderm was the producer of Bergasol, a product that contained one of the restricted chemicals. It subsequently went into liquidation and brought an action under Article 340 TFEU, claiming that Directive 93/35 had caused it significant financial loss and resulted in its liquidation. It argued that since the *Schöppenstedt* test (see 8.4.2), which defined a wrongful act as one involving a sufficiently serious breach of a superior rule of law, only applied to legislative measures involving choices of economic policy, it did not apply to Directive 93/35. That Directive exclusively concerned Bergasol and was therefore to be regarded as an individual administrative act rather than a general legislative act, so that the strict *Schöppenstedt* test did not apply. However, the Court rejected this argument for the reasons which appear in the following extract.

Case C-325/98 P *Bergaderm v Commission* [2000] ECR I-5291

41. The Court has stated that the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law [now EU law] cannot, in the absence of particular justification, differ from those governing the liability of the Community [now Union] 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 (*Brasserie du Pêcheur and Factortame* [Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame Ltd and others* (*'Factortame III'*) [1994] ECR I-1593], paragraph 42).

42. As regards Member State liability for damage caused to individuals, the Court has held that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (*Brasserie du Pêcheur and Factortame*, paragraph 51).

43. As to the second condition, as regards both Community liability under Article 215 of the [EC] Treaty [now Article 340 TFEU] and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion (*Brasserie du Pêcheur and Factortame*, paragraph 55; and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94, C-190/94 *Dillenkofer and Others v Germany* [1996] ECR I-4845, paragraph 25).

44. Where the Member State or the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see, to that effect, Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 28).

45. It is therefore necessary to examine whether, in the present case, as the appellants assert, the Court of First Instance erred in law in its examination of the way in which the Commission exercised its discretion when it adopted the Adaptation Directive.

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46. In that regard, the Court finds that the general or individual nature of a measure taken by an institution is not a decisive criterion for identifying the limits of the discretion enjoyed by the institution in question.

47. It follows that the first ground of appeal, which is based exclusively on the categorisation of the Adaptation Directive as an individual measure, has in any event no bearing on the issue and must be rejected.

The Court of Justice in *Bergaderm* ruled that whether the Directive could be categorized as a general or individual measure was, in fact, irrelevant. The key issue was the extent of the discretion permitted to the EU, and that discretion was not determined by the general or individual nature of the measure. The Court restated the *Schöppenstedt* test as providing that a right to damages arose only if:

- a rule of law intended to confer rights on individuals had been breached;
- the breach was sufficiently serious; and
- there was a direct causal link between the breach by the EU and the damage sustained by the applicant.

Similarly, in Case C-390/95 P *Antillean Rice Mills NV v Commission* [199] ECR I-769, the Court held that the form of the alleged measure—in that case, a Decision—did not affect the EU's liability under Article 340 TFEU.

The decisive test for whether the breach is sufficiently serious is thus, as the Court of Justice has stated on many occasions, whether the institution concerned has 'manifestly and gravely disregarded the limits on the exercise of its powers' (e.g. in Joined Cases 83 & 94/76 and 4, 15, & 40/77 *Bayerische HNL and others v Council and Commission* [1978] ECR 120, at para 6) or 'manifestly and gravely disregarded the limits on its discretion' (e.g. in Case C-325/98 P *Bergaderm v Commission* [2000] ECR I-5291, at para 43). In *Bergaderm*, the Court of Justice noted a number of more specific factors that will be relevant to the assessment of whether a breach is sufficiently serious, including those laid down in the context of Member State liability in damages in Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame Ltd and others* ('*Factortame III*') [1994] ECR I-1593 (see 5.4.1 and 5.5).

Thinking Point

> If you have already studied the topic of Member State liability in damages (see Chapter 5), try to recall the criteria laid down by the Court in *Factortame III* for assessing whether a breach of law by a Member State is 'sufficiently serious'.
>
> In any event, while reading the following extract note the criteria that the Court of Justice laid down in *Bergaderm* for assessing whether a breach of law by the EU is sufficiently serious.

p. 329

Case C-325/98 P *Bergaderm v Commission* [2000] ECR I-5291

> 39. The second paragraph of Article 215 of the [EC] Treaty [now Article 340 TFEU] provides that, in the case of non-contractual liability, the Community [now Union] is, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants in the performance of their duties.
>
> 40. The system of rules which the Court has worked out with regard to that provision takes into account, *inter alia*, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 43).

In *Bergaderm*, the Court of Justice stated that the following criteria, which replicated some of those laid down by it in *Factortame III*, were indicative of the seriousness of any breach:

- the complexity of the factual situations to be regulated;
- the difficulties in the application or interpretation of the legal texts; and
- the margin of discretion available to the EU institution that adopted the act at issue.

Since the Court cited Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame Ltd and others* (*'Factortame III'*) [1994] ECR I-1593 directly, it is likely that the other criteria referred to in *Factortame III* also apply to Article 340 TFEU claims, namely:

- whether the infringement and the damage caused was intentional or involuntary; and
- whether any error of law was excusable or inexcusable.

However, despite some relaxation of the *Schöppenstedt* test in line with the *Factortame III* test for State liability, the threshold for Article 340 TFEU claims remains high—as indeed is that for State liability claims (see Chapter 5). In T-343/13 *CN v European Parliament* EU:T:2015:926, the applicant, an official of the EU Council (see further 2.2 on the Council), had submitted a petition to the European Parliament (see 11.2.3 on such petitions) on the subject of the support given to disabled family members of EU officials, difficulties encountered by officials with health problems, and the mishandling of his case by the Council. The Parliament, which subsequently rejected the petition, published details of it on its website, including the official's name, the fact he was suffering from a serious illness, and the fact that his son had a severe disability. The applicant sought damages in respect of the Parliament's conduct, but the General Court dismissed his claim, holding that there had been no sufficiently serious breach of EU law by the Parliament (and no causal link between the Parliament's acts and the damage suffered by the applicant) (see further 8.5.1 on the damage suffered). The Court noted that the applicant had been given information as to the publication of petitions and the possibility of requesting anonymity, and that when he submitted his application, he had given consent to

p. 330 publication. The right to petition was an instrument of democratic participation that was intended to be ↵ transparent in order to generate public debate, and the applicant's illness and his son's disability were central to the petition and not incidental to it. The Court also held that there was no right to removal of the information, given that its publication was lawful and that the applicant had given his consent. Since the Parliament's decision to remove it was therefore merely a courtesy to the applicant, it had not been required to do this immediately, but only within a reasonable period, which it had done. The Court concluded that the Parliament had not been guilty of a sufficiently serious breach, noting, perhaps rather harshly, that the applicant could not invoke any unlawfulness in relation to his son's rights because there was no evidence that he was his son's legal representative or had been authorized to bring the claim on his behalf.

Where the EU institution has a wide discretion, it is unlikely that a breach will be sufficiently serious. For example, in Case T-212/03 *My Travel v Commission* [2008] ECR II-1967, at para 40, the General Court (see further 2.4.2 on the General Court) noted the 'complex' and 'delicate' nature of EU competition policy, and the correspondingly 'considerable degree of discretion' exercised by the EU, and concluded that the Commission's errors in exercising that discretion were not sufficiently serious. In Joined Cases 116 & 124/77 *Amylum NV and Tunnel Refineries Ltd v Council and Commission* [1979] ECR 3497 and Case 43/77 *KSH NV v Council and Commission* [1979] ECR 3583 (see also earlier), the Court of Justice noted, at para 13, that 'the exercise of a wide discretion [was] essential for the implementation of the Common Agricultural Policy', and concluded that the Council and the Commission had not seriously disregarded the limits on this discretion. Similarly, in Case T-16/04 *Arcelor Mittal v Parliament and Council* [2010] ECR II-211, the General Court noted the importance of the EU having a wide discretion in environmental policy, and concluded that this broad discretion had not been manifestly or gravely disregarded by the Commission. Its reasoning can be seen in the following extract.

Case T-16/04 *Arcelor v Parliament and Council* [2010] ECR II-211

> 143. In that regard, it must be pointed out, in the context of the present case, that a possible sufficiently serious breach of the rules of law at issue must be based on a manifest and serious failure to have regard for the limits of the broad discretion enjoyed by the Community [now Union] legislature when exercising its powers on environmental issues under Article 174 EC and 175 EC [now Articles 191 and 192 TFEU] … The exercise of that discretionary power implies first, the need for the Community legislature to anticipate and evaluate ecological, scientific, technical and economic changes of a complex and uncertain nature and, second, the balancing and arbitration by that legislature of the various objectives, principles and interests set out in Article 174 EC … In the contested directive, that is reflected in the establishment of a series of objectives and sub-objectives which are in part contradictory …

In Case 120/86 *Mulder v Minister van Landbouw en Visserij* (*'Mulder I'*) [1988] ECR 2321 and Case 170/86 *Von Deetzen v Hauptzollamt Hamburg-Jonas* [1988] ECR 2355, the Court of Justice awarded damages for losses resulting from the exclusion of certain producers from the milk quota system by Council Regulation (EEC) No

1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products
p. 331 and for the conversion ↵ of dairy herds, OJ 1977 L131/1 (for the facts of this case, see further 8.5.2.1). However, the Court refused to award damages for losses resulting from a subsequent Regulation, Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, OJ 1984 L90/13, which allocated quotas to the previously excluded producers, but on a less generous basis than those given to the other producers. It based its refusal on the fact that the Commission enjoyed a wide discretion in this area, which it had not exceeded, and so the breach of the producers' legitimate expectation was insufficiently serious.

In Case 20/88 *Roquette Frères v Commission* [1989] ECR 1553 (see also 8.9.2), Roquette Frères claimed damages for the effects of Commission Regulation (EEC) 652/76 of 24 March 1976 changing the monetary compensatory amounts following changes in exchange rates for the French franc, OJ 1976 L79/4, which had provided for compensation to be given for the effect of exchange-rate fluctuations but had been declared invalid by the Court of Justice in Case 145/79 *Roquette Frères SA v French Customs Administration* [1980] ECR 2917. Roquette Frères alleged that it had been required to make compensatory payments to the French authorities on the basis of the invalid Regulations and, further, that it had been placed at a disadvantage to its competitors as a result.

Thinking Point

> While reading the following extract, consider why the Court of Justice held that the breach of the rule of law (on compensation amounts) was insufficiently serious.

Case 20/88 *Roquette Frères v Commission* [1989] ECR 1553

> 24. It is therefore necessary to consider the nature of the rule which, according to the judgment in Case 145/79, was infringed by the fixing of the monetary compensatory amounts applicable to starch products. It is contained, for the most part, in Article 2(2) of Regulation No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (Official Journal, English Special Edition 1971 (I), p. 257), the basic regulation concerning monetary compensatory amounts. Under that provision, the monetary compensatory amounts applicable to products processed from maize or wheat must be equal to the incidence, on the product concerned, of the application of the compensatory amount to the price of the basic product.
>
> 25. The Court has admitted that the calculation of that incidence raised difficult technical and economic problems regarding products whose manufacturing process and composition might vary in different regions of the Community. However, it took the view that the Commission, in fixing the monetary compensatory amounts applicable to starch products, had made errors of calculation resulting in the fixing of amounts much higher than those corresponding to the incidence of the amounts
p. 332 applicable to the basic products and that it had thus exceeded the limits of its discretion. Those errors related in particular to the supply price of the maize and wheat used for the production of starch, the total of the amounts applicable to all the by-products obtained from the same quantity of maize or wheat in a specified manufacturing process, and the alignment of the amounts applicable to potato starch with those applicable to maize starch.
>
> 26. It is apparent from the foregoing considerations that the fixing of the contested monetary compensatory amounts resulted from a technical error which, even if it led de facto to unequal treatment for certain producers established in countries with weak currencies, cannot be considered to constitute a serious breach of a superior rule of law for the protection of the individual or a manifest and grave disregard by the Commission of the limits of its discretion.

Even though it had previously declared the Regulation to be invalid, the Court of Justice held that this did not constitute a sufficiently serious breach of a rule of law for the protection of individuals. The applicant's loss had been caused by the Commission's use in the Regulation of an incorrect basis for calculation, but this was merely a 'technical error' (*Roquette Frères*, at para 26), and did not amount to a manifest and grave disregard of the Commission's powers.

However, in policy areas in which the EU has little or no discretion, *any* infringement of the rule of law at issue will be regarded as sufficiently serious. This reflects the Court's approach to Member State liability as outlined in Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame Ltd and others* ('*Factortame III*') [1994] ECR I-1593 and Case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553 (see 5.4.3 and 5.5.1).

A good example of this is Case C-472/00 *Commission v Fresh Marine Company A/S* [2003] ECR I-7541 (see also 8.5.2.2), in which the Commission had imposed **anti-dumping** duties on salmon imports, including those of the applicant Fresh Marine, a Norwegian salmon producer.

anti-dumping

A non-EU producer is described as 'dumping' a product on the EU market if it exports it into the EU at prices lower than the product's normal value on the producer's domestic market. EU law permits the Commission to impose anti-dumping duties on such imports if they are causing injury to the EU industry concerned.

Fresh Marine brought an action for damages on the ground that it had given an undertaking not to import salmon into the EU at prices below a certain level and was therefore not engaged in dumping its products on the EU market contrary to EU law. It had supplied the Commission with a report demonstrating its compliance with its undertaking, but the Commission had then inaccurately amended the report.

Thinking Point

> While reading the following extract, consider the limits that applied to the Commission's discretion in this area and why the Court of Justice considered these to have been exceeded.

Case C-472/00 P *Commission v Fresh Marine Company A/S* [2003] ECR I-7541

p. 333

> 26. As regards the second condition, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see, inter alia, *Bergaderm and Goupil*, paragraphs 43 and 44, and *Commission v Camar and Tico*, paragraph 54).
>
> 27. Therefore, the determining factor in deciding whether there has been such an infringement is not the general or individual nature of the act in question but the discretion available to the institution concerned (see, to that effect, *Bergaderm and Goupil*, paragraph 46, and *Commission v Camar and Tico*, paragraph 55).

In *Fresh Marine*, the Court of Justice noted that the Commission's power to impose anti-dumping duties was limited by the requirements that it must have grounds to believe that the undertaking given by Fresh Marine had been breached. and that it must act on the basis of the best information available. Since the information available indicated that the undertaking had been complied with and the Commission had then amended that information without checking its amendment with the applicant, the Commission must be taken to have exceeded the limits on its discretion.

However, care must be taken in determining that the institution has indeed little or no discretion. In C-337/15 P *Staelen v European Ombudsman* EU:C:2017:256, the Court of Justice rejected the ruling by the General Court that the EU Ombudsman (on the Ombudsman, see further 2.1.2.3) had no discretion as to whether to respect the principle of diligence in a particular case and therefore that mere breach of that principle amounted to a sufficiently serious breach of EU law. The Court of Justice held that the Ombudsman had a wide discretion and was merely under an obligation to use her best endeavours, and thus only in exceptional circumstances would a person be able to demonstrate that the Ombudsman had committed a sufficiently serious breach of EU law. It was therefore necessary to examine whether the Ombudsman had gravely and manifestly disregarded the limits on her discretion, taking into account whether she had shown an obvious lack of care in the conduct of the investigation, whether it was excusable or inexcusable, and whether the conclusions drawn from her examination were inappropriate and unreasonable.

Review Question

Suppose that Squirrel plc and Nutkin Ltd are UK producers of garden bird feeders and bird food. For many years, they received an EU subsidy pursuant to the (fictitious) Wildlife Regulation, but Nutkin's payments ceased without warning last week because the Regulation had been amended by the Commission to exclude producers with fewer than 100 employees. Nutkin has only 99 employees. Squirrel, which has 101 employees, is continuing to receive the subsidy. Advise Nutkin as to whether the Commission has committed a wrongful act for the purposes of Article 340 TFEU.

Answer: Article 340 TFEU provides that the EU may be liable in damages for the acts of its institutions, such as the Commission, according to the general principles common to the laws of the Member States. In Case 4/69 *Alfons Lütticke v Commission* [1971] ECR 325, the Court of Justice ruled that these principles required proof of a wrongful act, damage, and a causal link.

p. 334 ↵ In Joined Cases 83 & 94/76 and 4, 15, & 40/77 *Bayerische HNL and others v Council and Commission* [1978] ECR 120, the Court of Justice held that an act was wrongful for the purposes of Article 340 TFEU only if there had been a sufficiently serious breach of a rule of law for the protection of individuals. Here, it is possible that there has been discrimination as between smaller and larger producers, given that no objective reason for such a difference of treatment is apparent. There may also be a breach of the principle of legitimate expectation, given that the subsidy was terminated without warning.

However, the breach of either principle must be sufficiently serious according to the factors laid down in Case C-352/98 P *Bergaderm v Commission* [2000] ECR I-5291 by reference to Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame Ltd and others* (*'Factortame III'*) [1994] ECR I-1593. These include the complexity of the situations to be regulated, the difficulties in the application or interpretation of the legal texts, the margin of discretion available to the EU institution that adopted the act at issue, whether the infringement was intentional or involuntary, and whether any error of law was excusable or inexcusable.

Although there is no evidence of complex law or factual situations here, the extent of the discretion regarding subsidies is likely to be wide, given that these come from public funds and are given to commercial producers. Further information is required about any reason for the difference in treatment of different producers, but the sudden withdrawal of the subsidy may go beyond even the Commission's wide discretion in this area.

In any event, Nutkin will also need to prove damage and causation.

8.4.3 Wrongful acts by EU servants

Article 340 TFEU (set out in the Introduction to this chapter) provides that the EU must make good any damage caused not only by the wrongful acts of its institutions, but also by those of its 'servants [e.g. its employees or agents] in the performance of their duties'.

The key issue here is whether the act is committed in the performance of the servant's EU duties; if it is not, the EU will not incur liability. This requirement has been interpreted strictly, as can been seen in Case 9/69 *Sayag v Leduc* [1969] ECR 329. In that case, Leduc was injured in a road traffic accident caused by an EU official, Sayag, who was driving his private car en route to a location where he was required to carry out work for the EU. The Court of Justice held that Sayag's wrongful act had not been committed in the performance of his duties because driving a car did not directly accomplish the EU's tasks, and therefore the immunity given to EU officials and servants in the performance of their duties did not apply. Although this case involved the issue of immunity rather than an Article 340 TFEU claim, the Court's interpretation of the phrase 'in the performance of their duties' is equally relevant to Article 340 TFEU claims.

8.4.4 Acts that are not wrongful

The possibility of EU liability in damages even in the absence of a wrongful act has been mooted, but not yet accepted, by the Court of Justice. The General Court (e.g. in Case T-383/00 *Beamglow v Parliament, Council and Commission* [2005] ECR II-5459, at para 174) (see further 2.4.2 on the General Court) and Advocate General
p. 335 Poiares Maduro (in his Opinion in ↵ Joined Cases C-120–121/06 P *FIAMM and another v Council and Commission* [2008] ECR I-6513) (see further 2.4 on Advocate Generals' Opinions), both argued that the EU could, in exceptional circumstances, be liable even in the absence of a wrongful act, albeit with the former concluding that the circumstances of the case were not in fact exceptional. However, although the Court of Justice, in Case C-237/98 *Dorsch Consult v Council and Commission* [2000] ECR I-4549, had discussed some of the conditions under which no-fault liability could be incurred, it subsequently held in *FIAMM*, at para 169, that it had done so solely 'in the event of the principle of [EU] liability for a lawful act being recognised in [EU] law' and rejected the existence of such liability at the current time.

8.5 Actual damage

8.5.1 Proof of loss

An applicant under Article 340 TFEU must be able to prove the existence and extent of the damage suffered. As the General Court noted in T-343/13 *CN v European Parliament* EU:T:2015:926 (see further 8.4.2), purely hypothetical and indeterminate damage does not give rise to a right to compensation; the damage suffered must be actual and certain. A good example of this requirement can be seen in Case 253/84 *GAEC v Council and Commission* [1987] ECR 123, in which subsidies had been provided to German farmers pursuant to Council Decision 84/361/EEC of 30 June 1984 concerning an aid granted to farmers in the Federal Republic of Germany, OJ 1984 L185/41. Aggrieved French farmers brought an action under Article 340 TFEU, claiming damages for losses caused to them by competition from subsidized German milk, poultry, and cattle products.

Thinking Point

> While reading the following extract, consider why the Court of Justice rejected the claim in respect of sales of milk and poultry.

Case 253/84 *GAEC v Council and Commission* [1987] ECR 123

> 11. The preliminary observation may be made that GAEC maintains that the damage for which compensation is sought arose because the aid granted to German farmers by virtue of Decision 84/361 enabled those farmers to reduce their prices and hence to increase very substantially their exports to France of beef and veal, milk and poultry, triggering a fall in prices on the French market.
> 12. As regards the fact of the damage, although GAEC provisionally set an estimate of FF 60 000 on the damage which it allegedly suffered in respect of all of its products up to the date on which the application was brought, it has since provided no particulars of its losses on sales of milk and poultry, even though the Court asked it to provide figures, at least for the second half of 1984, for the damage suffered by it as a result of the discrimination caused by the contested aid.
> 13. In those circumstances it must be held that, as far as milk and poultry are concerned, GAEC has not proved that it has suffered damage.

p. 336

The Court of Justice held that, in respect of sales of milk and poultry, actual damage was not proved because the farmers had produced no evidence of their losses. (The result of their claim for losses in respect of cattle products is discussed at 8.6.)

However, as the General Court noted in T-343/13 *CN v European Parliament* EU:T:2015:926 (see also 8.4.2.2), as long as the existence of the damage can be proved, compensation may be awarded even if there is uncertainty as to the exact quantification of the damage.

Thinking Point

> When reading the following extract, make a note of the Court's summary of the relevant principles and their application to the facts at issue.

T-343/13 *CN v European Parliament* EU:T:2015:926

> 118. It should first be recalled that, according to case-law, with regard to the condition that damage must have been suffered, such damage must be actual and certain. By contrast, purely hypothetical and indeterminate damage does not give a right to compensation (judgment of 28 April 2010 in *BST v Commission*, T-452/05, ECR, EU:T:2010:167, paragraph 165). However, the requirement relating to the existence of certain damage is met where the damage is imminent and foreseeable with sufficient certainty, even if the damage cannot yet be precisely assessed (judgment of 14 January 1987 in *Zuckerfabrik Bedburg and Others v Council and Commission*, 281/84, ECR, EU:C:1987:3, paragraph 14).
>
> 119. It is for the party seeking to establish the European Union's liability to adduce proof as to the existence or extent of the damage alleged and to establish a sufficiently direct causal link between that damage and the conduct complained of on the part of the institution concerned (judgment in *BST v Commission*, cited in paragraph 118 above, EU:T:2010:167, paragraph 167).
>
> 120. The Parliament does not dispute the existence of the material damage claimed by the applicant, namely the fees for his legal counsel, if unlawful conduct were to exist.
>
> 121. With regard to non-material damage, on the other hand, the applicant has not demonstrated the existence of such damage. He has merely claimed that the Parliament's dismissive and dilatory attitude hurt him deeply and caused him considerable stress, without providing any evidence in support of this claim. Consequently, it cannot be accepted.
>
> 122. Accordingly, the applicant's arguments relating to the existence of non-material damage must be rejected.

p. 337

The General Court in *CN* held that the requirement that the damage must be actual and certain could be satisfied so long as the applicant was able to prove with sufficient certainty that the damage was imminent and foreseeable, even if it could not yet be assessed precisely. On the facts, the defendant European Parliament had accepted that the applicant had suffered material damage in the form of fees for legal counsel (who had been instructed to contact the Parliament to require it to remove the sensitive information about the applicant from its website). However, the applicant had failed to provide evidence of non-material damage; it was not enough merely to claim that the Parliament's dismissive and dilatory attitude had caused him emotional pain and stress.

The applicant in Case C-243/05 P *Agraz and others v Commission* [2006] ECR 10833, however, was more successful. In that case, the Commission had incorrectly calculated the production aid payable to EU tomato producers under Commission Regulation (EC) No 1519/2000 of 12 July 2000 setting for the 2000/01 marketing

year the minimum price and the amount of production aid for processed tomato products, OJ 2000 L174/29, because it had failed to take account of Chinese tomato prices. The Court of Justice held that although the exact impact that taking those prices into account would have had was uncertain, it would inevitably have put the applicants in a better position. The Court concluded that, even though the damage could not be exactly quantified, it was possible to put an economic value on it for the purposes of awarding damages under Article 340 TFEU. Similarly, in C-611/12 P *Giordano v Commission* EU:C:2014:2282, the Court held that the damage caused to fishermen by the Commission's withdrawal of their quota for catching bluefin tuna was not hypothetical merely because they might have been unable to catch their quota for other reasons, although any such inability might have a bearing on the extent of the damage.

8.5.2 Reduction in damages

Even where an applicant is able to prove the loss that it claims to have sustained, the level of damages awarded may be less than the actual loss if the applicant has been guilty of contributory negligence or has failed to mitigate its loss.

Both of these principles also exist in English law.

Thinking Point

> From your own knowledge of domestic law, try to explain, or give an example of, one or both of these principles.

p. 338 ↵ In the English law of tort, it has been established that a claimant who has contributed through their own negligence either to the tort, or to the resulting damage, may be expected to bear some or all of their own loss. For example, damages awarded to a claimant injured in a road traffic accident may be reduced if it is shown that they contributed to the accident by driving too fast, or contributed to the extent of the resulting damage by failing to wear a seat belt.

In both contract and tort, English law recognizes that a claimant should do their best to minimize the loss that they have suffered as a result of the tort or breach of contract. If the claimant does not do so, then in effect they have brought some of their loss upon themselves and should therefore bear a proportion of it. In the example of a claimant injured in a road traffic accident, damages awarded in respect of lost earnings while the claimant is unable to undertake their normal work may be reduced if they fail to take reasonable alternative work.

The use of both principles in EU law is similar.

8.5.2.1 The duty to mitigate any loss

The *Mulder* litigation (already discussed at 8.4.2.2 in relation to wrongful acts) involved a dispute concerning the allocation by the EU of milk quotas (the amount of milk that a particular undertaking could produce without incurring a levy). Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, OJ 1984 L90/13, did not allocate any milk quotas at all to those producers that had not produced any milk in the previous year as a result of an EU agreement aimed at reducing overproduction. Those producers were therefore disadvantaged by the terms of the Regulation, and they successfully applied for its partial annulment under Article 263 TFEU (see 7.3–7.14) on the ground of breach of their legitimate expectation that they would be able to resume milk production when the agreement came to an end (Case 120/86 *Mulder v Minister van Landbouw en Visserij* (*'Mulder I'*) [1988] ECR 2321; Case 170/86 *Von Deetzen v Hauptzollamt Hamburg-Jonas* [1988] ECR 2355).

In the light of this judgment, the EU introduced Council Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation (EEC) No 857/84 adopting general rules for the application of the levy referred to in article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, OJ 1989 L84/2, to provide quotas for these producers, but at a lower rate than for other producers. This too was held to be invalid on the ground that it was discriminatory (Case C-189/89 *Spagl v Hauptzollamt Rosenheim* [1990] ECR I-4539; Case C-217/89 *Pastätter v Haupzollamt Bad Reichenhall* [1990] ECR I-4585).

The producers subsequently brought an action for damages under Article 340 TFEU. The Court held that only reduced damages would be awarded in respect of the first Regulation (Regulation 857/84), and none at all would be awarded in relation to the second Regulation (Regulation 764/89) because the allocation of a lower (as opposed to no) quotas was not a sufficiently serious breach (see 8.4.2).

Thinking Point

> While reading the following extract, consider why the Court of Justice reduced the damages awarded.

p. 339

Joined Cases C-104/89 & 37/90 *Mulder v Council and Commission* (*'Mulder II'*) [1992] ECR I-3061

> 33. As regards income from any replacement activities which is to be deducted from the hypothetical income referred to above, it must be noted that that income must be taken to include not only that which the applicants actually obtained from replacement activities, but also that income which they could have obtained had they reasonably engaged in such activities. This conclusion must be reached in the light of a general principle common to the legal systems of the Member States to the effect that the injured party must show reasonable diligence in limiting the extent of his loss or risk having to bear the damage himself. Any operating losses incurred by the applicants in carrying out such a replacement activity cannot be attributed to the Community [now Union], since the origin of such losses does not lie in the effects of the Community rules.

The Court of Justice reduced the damages awarded because the producers could reasonably be expected to have earned some profits by undertaking alternative activities. It therefore reduced the damages awarded by the amount of those notional profits.

8.5.2.2 Contributory negligence

In Case C-472/00 *Commission v Fresh Marine Company A/S* [2003] ECR I-7541 (already discussed at 8.4.2.2 in relation to wrongful acts), the applicant brought an action for damages on the ground that anti-dumping duties had been imposed on its products even though it had given an undertaking not to import products at prices below a certain level and was therefore not engaged in 'dumping' products in the EU market. It had supplied the Commission with a report indicating its compliance with its undertaking, but the Commission had then amended the report. The Court of Justice held that the amendment constituted a wrongful act (see 8.4.2), but reduced the damages awarded on account of Fresh Marine's contributory negligence. It ruled that although the Commission had acted wrongfully in amending the report after it had been submitted, Fresh Marine itself had been negligent in submitting a report that did not contain the explanations necessary to understand it correctly. The fact that each party was equally responsible for the losses incurred by Fresh Marine prior to it providing the further explanations required led the Court to reduce by half the damages awarded in respect of losses incurred up to that point. Damages in respect of losses incurred by Fresh Marine subsequent to its provision of further information were awarded in full.

In Case 145/83 *Adams v Commission* [1985] ECR 3539, Adams had supplied the Commission with confidential information concerning breaches of EU competition law (see further Chapter 15 on the Commission's role in enforcing EU competition law) by his employer, Roche. In the course of proceedings against Roche, the Commission passed papers to it that enabled it to identify Adams as the source of the leaked information. The Commission then failed to warn Adams that Roche was planning to prosecute him and, when Adams returned to Switzerland, he was arrested and convicted of industrial espionage under Swiss law.

p. 340 ↵ Adams brought a claim for damages under Article 340 TFEU, based on the Commission's wrongful acts in revealing sensitive documents and failing to warn him that it had done this. The Court of Justice awarded damages for Adams's loss of earnings and loss of reputation as a result of his conviction and imprisonment, which it attributed to the Commission's wrongful actions in allowing him to be identified and in failing to warn him that his identity was known by Roche. However, it reduced those damages on grounds of Adams's contributory negligence.

Thinking Point

> While reading the following extract, consider how the Court of Justice applied the principle of contributory negligence to the facts of the case.

Case 145/83 *Adams v Commission* [1985] ECR 3539

> 53. It must therefore be concluded that in principle the Community [now Union] is bound to make good the damage resulting from the discovery of the applicant's identity by means of the documents handed over to Roche by the Commission. It must however be recognised that the extent of the Commission's liability is diminished by reason of the applicant's own negligence. The applicant failed to inform the Commission that it was possible to infer his identity as the informant from the documents themselves, although he was in the best position to appreciate and to avert that risk. Nor did he ask the Commission to keep him informed of the progress of the investigation of Roche, and in particular of any use that might be made of the documents for that purpose. Lastly, he went back to Switzerland without attempting to make any inquiries in that respect, although he must have been aware of the risks to which his conduct towards his former employer had exposed him with regard to Swiss legislation.
>
> 54. Consequently, the applicant himself contributed significantly to the damage which he suffered. In assessing the conduct of the Commission on the one hand and that of the applicant on the other, the court considers it equitable to apportion responsibility for that damage equally between the two parties.
>
> 55. It follows from all the foregoing considerations that the Commission must be ordered to compensate the applicant to the extent of one half of the damage suffered by him as a result of the fact that he was identified as the source of information regarding Roche's anti-competitive practices. ...

The Court of Justice reduced the damages awarded by half as a result of Adams's contributory negligence in failing to warn the Commission that he could be identified from the documents or to ask that he be kept informed of progress in the case, and in returning to Switzerland without inquiring as to the current status of the proceedings and the use of the documentation. This judgment appears to be rather harsh, both in its finding of the existence of contributory negligence and in its decision on the impact of that contributory
p. 341 negligence. However, ↵ as discussed at 8.4.2 (see in particular Joined Cases 83 & 94/76 and 4, 15, & 40/77 *Bayerische HNL and others v Council and Commission* [1978] ECR 120), there are public policy reasons for taking a restrictive approach to the award of damages against the EU.

Review Question

> Refer back to the previous review question. Suppose that Nutkin Ltd wishes to claim damages for the loss of subsidy, consequent loss of profit, and the cost of making all five members of staff employed in its garden bird feeder and bird food division redundant. Advise Nutkin as to whether these heads of damage are likely to be recoverable under Article 340 TFEU.
>
> NOTE: The requirements of Article 340 TFEU and the application to the facts of the detailed requirements of a wrongful act are as outlined in the answer to the previous review question.
>
> *Answer*: In relation to the issue of damage, the Court of Justice has held that existence of damage must be proved (Case 253/84 *GAEC v Council and Commission* [1987] ECR 123). This will be straightforward in relation to the loss of the subsidy that has been withdrawn by the Commission. The redundancies and associated costs should also be capable of proof. However, it is not clear from the facts that there has been any loss of profit as yet and any such losses would need to be proved in order for damages to be awarded in respect of them. It may not be necessary for the loss of profit to have occurred, but Nutkin must be able to prove that such loss is imminent and foreseeable with a reasonable degree of certainty.
>
> There is also a duty to mitigate losses as far as reasonable. For example, given that Nutkin employs only a tiny fraction of its staff in the affected division of its business (five out of 99), it might be possible to redeploy some of them.
>
> Finally, if Nutkin itself has contributed to its damage (e.g. as in Case C-472/00 *Commission v Fresh Marine Company A/S* [2003] ECR I-7541), then the damages awarded may be reduced. However, there is no evidence of contributory negligence on the facts here.
>
> In any event, Nutkin will also need to prove causation.

8.6 Causation

The applicant must prove that the wrongful act actually caused their loss. The CJEU will not simply assume the existence of a causal link just because a wrongful act by the EU and loss to the applicant have been proved.

Although the French farmers in Case 253/84 *GAEC v Council and Commission* [1987] ECR 123 produced statistics to prove their damage in respect of reduced prices for beef and veal (unlike their losses in relation to milk and poultry—see 8.5.1), they failed to show causation because there was evidence that prices of these products had already decreased prior to the subsidy to the competing German producers being provided, due to other factors.

The test for causation is a strict one, as can be seen from Joined Cases 64 & 113/76 *Dumortier Frères SA and others v Council and Commission* [1979] ECR 309, in which refunds to maize gritz producers were abolished while producers of maize starch, which was in direct competition with maize gritz, continued to receive the refunds.

p. 342 ↵ The maize gritz producers claimed compensation under Article 340 TFEU for:

(1) the loss of refunds

(2) lost sales

(3) the resulting factory closures by two producers and bankruptcy of one.

Thinking Point

> While reading the following extract, note whether claim 1 and/or claim 2 resulted in an award of damages by the Court of Justice and why. (The ruling in relation to claim 3 is discussed further later.)

Joined Cases 64 & 113/76 *Dumortier Frères SA and others v Council and Commission* [1979] ECR 309

> 14. This said, it is necessary to go on to examine the damage resulting from the discrimination to which the gritz producers were subjected. The origin of the damage complained of by the applicants lies in the abolition by the Council of the refunds which would have been paid to the gritz producers if equality of treatment with the producers of maize starch had been observed. Hence, the amount of those refunds must provide a yardstick for the assessment of the damage suffered.
>
> [...]
>
> 18. It follows that the loss for which the applicants must be compensated has to be calculated on the basis of its being equivalent to the refunds which would have been paid to them if, during the period from 1 August 1975 to 19 October 1977 the use of maize for the manufacture of gritz used by the brewing industry had conferred a right to the same refunds as the use of maize for the manufacture of starch; an exception will have to be made for the quantities of maize used for the manufacture of gritz which was sold at prices increased by the amount of the unpaid refunds under contracts guaranteeing the buyer the benefit of any re-introduction of the refunds.
>
> 19. Some of the applicants have also submitted claims for compensation for certain additional items of damage which they claim to have suffered.
>
> 20. In the case of the two maize processors established in the north of France, the further damage lies particularly in a substantial fall in their sales to breweries. Although it is beyond dispute that the figures submitted by the applicants clearly show such a fall, that fact can hardly be ascribed to the absence of refunds. In fact, as has already been said, the applicants have insisted on the fact that the selling prices of gritz were not increased on account of the abolition of the refunds. On the contrary, as the Court recognised when examining the development of the prices, the gritz producers chose to sell at a loss in order to retain their markets, and not to increase their prices at the risk of losing those markets. Thus the inequality which existed between gritz and starch as regards the granting of refunds was not reflected in the selling prices. If in spite of that commercial policy the gritz producers' sales fell, the reason for this must be sought in something other than the inequality caused by the abolition of the refunds.

p. 343 ↵ The Court of Justice ruled that damages should be awarded only in respect of the lost refunds. However, the reduction in sales could not be attributed to the withdrawal of the refunds, since the producers had not chosen to pass on the loss of refunds in increased prices.

In Joined Cases 19, 20, 25, & 30/69 *Richez-Parise and others v Commission* [1970] ECR 325 (see also 8.4.2 in relation to the existence of a wrongful act), a number of EU employees sought damages in respect of the impact of an incorrect calculation of their pension entitlement. The Court of Justice held that the applicants had failed to prove that they had relied on the incorrect information when making their requests to retire and so were not entitled to reinstatement in their posts. However, it considered that the incorrect information could have caused them to fail to apply for other benefits available to them and so the Court ordered that the limitation period on such applications be deemed not to have expired.

It can be observed from Joined Cases 64 & 113/76 *Dumortier Frères SA and others v Council and Commission* [1979] ECR 309 (just discussed) that not only must causation be proved, but also it must be sufficiently direct. As previously explained, the producers successfully claimed compensation for the lost refunds, but failed to prove that their lost sales had been caused by the Commission's action. They also claimed for the factory closures by two producers and the bankruptcy of one.

Thinking Point

> While reading the following extract, consider why the Court of Justice ruled that the factory closures and bankruptcy were insufficiently direct to be recoverable.

Joined Cases 64 & 113/76 *Dumortier Frères SA and others v Council and Commission* [1979] ECR 309

> 21. In the case of certain other applicants the further damage alleged is of a different nature. Two undertakings were forced to close their factories and a third had to commence insolvency proceedings. The Council argued that the origin of the difficulties experienced by those undertakings is to be found in the circumstances peculiar to each of them, such as the obsolescence of their plant and managerial or financial problems. The data supplied by the parties on that question in the course of the proceedings are not such as to establish the true causes of the further damage alleged. However, it is sufficient to state that even if it were assumed that the abolition of the refunds exacerbated the difficulties encountered by those applicants, those difficulties would not be a sufficiently direct consequence of the unlawful conduct of the Council to render the Community [now Union] liable to make good the damage. In the field of non-contractual liability of public authorities for legislative measures, the principles common to the laws of the Member States to which the second paragraph of Article 215 of the EEC Treaty [now Article 340 TFEU] refers cannot be relied on to deduce an obligation to make good every harmful consequence, even a remote one, of unlawful legislation.
>
> 22. It follows that the claims for compensation for the further damage alleged cannot be upheld.

p. 344 ↵ The Court of Justice held that even if the abolition of refunds by the Commission had exacerbated the problems of certain producers, the factory closures and bankruptcy were not a sufficiently direct result of the loss of the refunds to render the EU liable in damages. There was no obligation to make good every unfortunate consequence, however remote, of unlawful legislation.

A further illustration of the difficulty of proving causation is provided by Joined Cases 5, 7, & 13–24/66 *Kampffmeyer v Commission* [1967] ECR 245, which concerned a Commission Decision of 3 October 1963 approving a German ban on maize imports, which had come into force on 1 October. The Decision was subsequently annulled by the Court of Justice (in Joined Cases 106–107/63 *Toepfer and another v Commission* [1965] ECR 405—see 7.8.2; see also 8.4.2 in relation to the existence of a wrongful act). Had the ban not been in force, imports made on 1 October would—very unusually—have been subject to a zero-rate import levy (in other words, no levy at all), and importers who had applied for a licence on this date alleged that they had suffered damage as a result of the Decision, because they had missed the opportunity to import maize without having to pay a levy. The Court held that only some of the alleged damage had been caused by the Decision.

First, importers which had entered into contracts after 1 October were aware of the German ban introduced on that date and could not claim that the resulting unavailability of the zero levy for their imports had caused any loss to them.

Second, importers which had entered into contracts to purchase maize on 1 October and chosen to fulfil them could be awarded damages in respect of the higher levies that they had had to pay in order to do so, but only after they had proved that they had exhausted all possibilities for claiming reimbursement of the wrongfully charged levy from the German government (see further 8.9.2 on the possibility of a concurrent claim against the Member State).

Third, importers which had entered into contracts on 1 October but then chosen to repudiate them could be awarded damages in respect of penalties payable for breach of contract, since these were 'a direct consequence' (*Kampffmeyer*, at 265) of the Commission's wrongful act. However, damages for loss of profit to this third category of importers would be limited (to an amount equivalent to 10 per cent of the sums that the importers would have paid by way of levy if they had carried out the contracts), since the alleged loss of profit on the repudiated contracts was 'based on facts of an essentially speculative nature' (*Kampffmeyer*, at 266).

Finally, importers which had merely applied for import licences on 1 October and had proceeded no further with their proposed transactions could not claim compensation for loss of profits resulting from transactions that had never commenced because 'imports in which there was a mere intention to engage lack any substantial character capable of giving rise to compensation for loss of profits' (*Kampffmeyer*, at 267). In other words, such alleged losses could neither be proved (see further 8.5.1 on the requirement to prove damage) nor proved to have been caused by the Commission's wrongful act.

Review Question

Refer back to the previous review questions. Remember that Nutkin wishes to claim damages for the loss of subsidy, consequent loss of profit, and the cost of making all five members of staff employed in its garden bird feeders and bird food division redundant. Advise Nutkin:

(a) on whether it is likely to be able to satisfy the requirement of Article 340 TFEU as to causation; and

p. 345 (b) in conclusion, on its likely chances of success in an action for damages against the Commission under Article 340 TFEU.

NOTE: The requirements of Article 340 TFEU and the application to the facts of the requirements of a wrongful act and damage are as outlined in the answers to the previous review questions.

Answer: In relation to the issue of causation, the Court of Justice has held that it must be proved (Case 253/84 *GAEC v Council and Commission* [1987] ECR 123). This will be straightforward in relation to the loss of the subsidy which has been withdrawn by the Commission. However, it is not clear from the facts whether the loss of profit (if any) and the redundancies have been caused by the allegedly wrongful act. In any event, it may be that the redundancies are too remote a consequence of the EU's actions, as in Joined Cases 64 & 113/76 *Dumortier Frères SA and others v Council and Commission* [1979] ECR 309.

In summary, it may be that the only loss that can be proved to have been suffered as a result of the Commission's act is the amount of the subsidy. If there has been a sufficiently serious breach of the principle of discrimination (see the answer to the first review question in this chapter), the full amount of the lost subsidy will be recoverable. However, if the only sufficiently serious breach is that of the principle of legitimate expectation (see the answer to the first review question in this chapter), the amount recoverable will be limited to the subsidy that would have been payable during a reasonable notice period prior to its removal.

8.7 Unjust enrichment

Article 340 TFEU does not expressly refer to the possibility of an action against the EU for unjust enrichment, but the Court of Justice recognized this possibility in Case C-47/07 P *Masdar (UK) Ltd v Commission* [2008] ECR I-9761. In that case, the Court noted (at para 44) that 'the general principles common to the laws of the Member States' included the principle that 'a person who has suffered a loss which increases the wealth of another person without there being any legal basis for that enrichment has the right, as a general rule, to restitution from the person enriched, up to the amount of the loss'. The Court held that since such an action was, by definition, non-contractual, it was necessary to allow it to be pursued under Article 340 TFEU.

However, the rules governing liability were not the same as those applicable to other non-contractual actions (see 8.3, 8.4, 8.5, and 8.6)—namely, unlawful conduct by the EU, damage, and a causal link between the conduct and the damage. Neither unlawful conduct nor, indeed, any conduct at all on the part of the EU, was required; instead, an applicant must prove enrichment on the part of the defendant for which there was no valid legal basis, and impoverishment on the part of the applicant which was linked to that enrichment.

The Court has held that enrichment cannot be categorized as unjust where it derives from contractual obligations. In *Masdar*, the Commission had contracted with a company, Helmico, for Helmico to provide services in relation to certain Moldovan and Russian projects. Helmico then entered into contracts with Masdar under which it subcontracted some of those services to Masdar. After finding Helmico guilty of fraud in the performance of the contracts, the Commission ceased to pay Helmico and requested the return of funds paid. Masdar brought an action for damages against the Commission under Article 340 TFEU. The Court of
p. 346 Justice upheld ↵ the ruling of the General Court (see further 2.4.2 on the General Court) that any enrichment of the Commission, or impoverishment of Masdar, arose from their contracts with Helmico and therefore could not be categorized as unjust. The Court noted, however, that Masdar was entitled to bring, and indeed had brought, an action against Helmico for breach of contract.

8.8 Time limits

Under Article 46 of the Statute of the Court of Justice, an applicant has five years from the event giving rise to the claim in which to bring an action under Article 340 TFEU, and this period will be suspended by any other Court of Justice proceedings.

Consolidated version of the Statute of the Court of Justice of the European Union

Article 46

> Proceedings against the Union in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Union. In the latter event the proceedings must be instituted within the period of two months provided for in Article 263 of the Treaty on the Functioning of the European Union; the provisions of the second paragraph of Article 265 of the Treaty on the Functioning of the European Union shall apply where appropriate.
>
> This Article shall also apply to proceedings against the European Central Bank regarding non-contractual liability.

The Court of Justice has interpreted this to mean that an applicant may bring an action within five years from the day on which the damage materialized (Joined Cases 256, 257, 265, & 267/80 and 5/81 *Birra Wührer and others v Council and Commission* [1982] ECR 85, para 10).

8.9 The relationship between Article 340 TFEU and other actions

8.9.1 Other actions against the EU

The success of an action under Article 340 TFEU is independent of any other action under EU law, for example under Article 263 TFEU (see 7.3–7.14), Article 265 TFEU (see 7.16), or Article 267 TFEU (see Chapter 6), so that it
p. 347 is irrelevant whether another action has been ↵ brought and whether any action brought has been successful. Indeed, Article 266 TFEU expressly provides that the EU's obligations resulting from a successful application for annulment under Article 263 TFEU, or from a declaration of failure to act under Article 265 TFEU, do not affect any obligation that it might also incur under Article 340 TFEU.

Article 266 TFEU

> The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.
>
> This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

In Case 175/84 *Krohn v Commission* [1986] ECR 753 (see also 8.9.2 in relation to concurrent actions against Member States) the Commission had, by Decisions of 23 November and 21 December 1982, authorized the German authorities to refuse to grant an import licence to Krohn for Thai manioc. Krohn brought an action for damages under Article 340 TFEU after it had become time barred from bringing an action for annulment of the individual Decisions under Article 263 TFEU (see further 7.3–7.14). The Court of Justice held that the action under Article 340 TFEU was nonetheless admissible because it was an autonomous form of action with a particular purpose to fulfil (*Krohn*, at para 32). The fact that the time limit for an action under Article 263 TFEU had passed and that the Decisions had thereby become definitively valid was irrelevant.

In Case 4/69 *Alfons Lütticke v Commission* [1971] ECR 325, the Court of Justice emphasized the independent nature of the action under Article 340 TFEU even in circumstances in which such an action, if successful, would have a similar result to that of a successful action under another Article.

Case 4/69 *Alfons Lütticke v Commission* [1971] ECR 325

> 6. The action for damages provided for by Article 178 [EC, now Article 268 TFEU] and the second paragraph of Article 215 [EC, now Article 340 TFEU] was established by the Treaty as an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use, conceived with a view to its specific purpose. It would be contrary to the independent nature of this action as well as to the efficacy of the general system of forms of action created by the Treaty to regard as a ground of inadmissibility the fact that, in certain circumstances, an action for damages might lead to a result similar to that of an action for failure to act under Article 175 [EC, now Article 264 TFEU].

However, as noted in the Introduction to this chapter, it is nonetheless common for a measure that is the subject of Article 340 TFEU proceedings to have also been the subject of proceedings under Article 263 TFEU (see Chapter 7).

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8.9.2 Concurrent action against a Member State

Where an EU measure is implemented by a Member State, the potential exists for the EU and the Member State each to be concurrently liable for damage caused to the applicant. Concurrent liability is rare, and in most cases only the EU or the Member State, and not both, will be liable. For example, in Case 96/71 *Haegeman v Commission* [1972] ECR 1005, the Court of Justice ruled that where national authorities had imposed a levy on the applicant's imports pursuant to Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organisation of the market in wine, OJ 1970 L99/1, the applicant should bring its claim for a refund of the levy and compensation for the consequential losses against the national authorities. The claim should therefore be brought in the national courts, but those courts could make a reference to the Court of Justice for a ruling on the validity of the underlying Regulation (see 6.6. on the making of such a reference).

However, in some cases, concurrent liability will arise. In such cases, the Court of Justice has ruled that if the primary liability appears to be that of the Member State, as in Joined Cases 5, 7, & 13–24/66 *Kampffmeyer v Commission* [1967] ECR 245 (see 8.4.2 on the existence of a wrongful act, 8.5.1 on damage, and 8.6 on causation), the applicant must exhaust its rights of action against the national authorities before the Court of Justice will issue final judgment as to any EU liability in damages. In its reasoning on this point, the Court in *Kampffmeyer* stated that '[i]t is necessary to avoid the applicants' being insufficiently or excessively compensated for the same damage by the different assessment of two different courts applying different rules of law' (*Kampffmeyer*, at 266). This concern has been repeated by the CJEU on many occasions. Nonetheless, as the Court of Justice has made clear in cases such as Case 20/88 *Roquette Frères v Commission* [1989] ECR 1553 (for the facts of this case, see 8.4.2) and Case 175/84 *Krohn v Commission* [1987] ECR 97 (see also 8.9.1), this applies only where the right of action against the national authorities could *effectively* compensate the applicant. If it

cannot, an action under Article 340 TFEU should not be made dependent on first exhausting national remedies. This important qualification was stated clearly by the court in *Roquette Frères* in the following extract.

Case 20/88 *Roquette Frères v Commission* [1989] ECR 1553

> 5. The Court has consistently held that the action for compensation provided for in Article 178 [now Article 268 TFEU] and the second paragraph of Article 215 [now Article 340 TFEU] of the EEC Treaty was introduced as an autonomous form of action with a particular purpose to fulfil within the system of remedies. Although its admissibility may be conditional in certain cases on the prior exhaustion of the remedies available under domestic law for obtaining satisfaction from the national authorities, it is essential, in order for that condition to apply, that those remedies under domestic law effectively ensure protection for individuals aggrieved by measures of Community [now Union] institutions (judgments of 12 April 1984 in Case 281/82 *Unifiex v Commission and Council* [1984] ECR 1969, and of 26 February 1986 in Case 175/84 *Krohn v Commission* [1986] ECR 753).

p. 349 ↵ In *Roquette Frères*, the Court of Justice held that the potential remedies under French law were not available in this case because the Court itself had previously ruled, in Case 145/79 *Roquette Frères SA v French Customs Administration* [1980] ECR 2917, that although the EU Regulations fixing the compensatory amounts were invalid, the amounts charged in the period prior to the date of its judgment could not be challenged. No national remedy could therefore effectively ensure reparation for the damage suffered by Roquette Frères. In *Krohn*, the Court similarly held that the annulment by the German authorities of their decision to refuse Krohn an import licence would not adequately compensate it for its inability to import goods prior to the annulment and so an action under Article 340 TFEU should not be made dependent on first exhausting national remedies.

It is important to note that the possibility or existence of a claim in the national courts does not render a claim in the CJEU inadmissible, or even prevent the CJEU from commencing to hear the case, but only prevents them giving final judgment. The extent to which the CJEU will examine the claim prior to the judgment of the national court being given was considered in T-317/12 *Holcim v Commission* EU:T:2014:782. In that case, the applicant company, Holcim, owned greenhouse gas emission allowances under an EU scheme for trading in such allowances. When these allowances were stolen, Holcim asked the Commission (see 2.3 on the Commission) to freeze the allowance, but the Commission refused to do so. Holcim then sought damages in relation to the Commission's conduct. The General Court noted that Holcim had also sought damages from the Romanian authorities in the Romanian courts, which gave rise to the risk of Holcim being compensated twice for the same damage. However, it also noted that the CJEU had developed approaches to avoid such consequences, both at the admissibility stage (i.e. the decision as to whether the case can be heard at all) and at the merits stage (i.e. the decision, after the case is heard, as to whether the applicant's claim should be upheld) of the case.

Thinking Point

> When reading the following extract, consider what these approaches are.

Case T-317/12 *Holcim v Commission* EU:T:2014:782

A—Effect on the admissibility of the present action of bringing an action for damages before a Romanian court

> 73. By the judgment in Case 20/88 *Roquette frères v Commission* [1989] ECR 1553 (at paragraph 15), the Court held that the admissibility of an action for compensation provided for in Article 268 TFEU and the second paragraph of Article 340 TFEU may be conditional in certain cases on the prior exhaustion of the remedies available under domestic law for obtaining satisfaction from the national authorities, provided that those remedies under domestic law effectively ensure protection for the individuals concerned in that they are capable of resulting in compensation for the damage alleged.
>
> p. 350 74. In that formulation of the principle, the use of the verb 'may' shows that the non-exhaustion of 'remedies available under domestic law for obtaining satisfaction from the national authorities' must not automatically lead to a finding of inadmissibility by the EU judicature. It may result in the inadmissibility of an action only 'in certain cases'.
>
> 75. Admittedly, those cases were not defined in the judgment in *Roquette frères v Commission*, cited in paragraph 73 above (paragraph 15). However, the Court considers that there is only one situation in which the fact that a final ruling has not been given on the action for damages brought before the national court necessarily implies that the action for compensation brought before the EU judicature is inadmissible. This is where that fact precludes the latter from identifying the nature and quantum of the damage pleaded before it, with the result that the requirements of Article 44(1)(c) of the Rules of Procedure are not complied with (see the case-law set out in paragraph 55 above).
>
> [...]

B—Effect on the examination of the substance of the present action of bringing

an action for damages before a Romanian court

> […]
>
> 79. According to the case-law, where (i) a person has brought two actions before the EU judicature seeking compensation for the same damage, one against a national authority, before a national court, and the other against an EU institution or body, and (ii) there is a likelihood that, because of the different assessments of that damage by the two different courts, the person in question may be insufficiently or excessively compensated, the EU judicature must, before deciding on the amount of the damage, wait until the national court has given final judgment on the action brought before it (see, to that effect, Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others v Commission* [1967] 245, at p. 266; Case 30/66 *Becher v Commission* [1967] ECR 285, at p. 300, and Case T-138/03 *É.R. and Others v Council and Commission* [2006] ECR II-4923, paragraph 42).
>
> 80. Thus, in such a case, the EU judicature must wait until the national court has given judgment before ruling on the existence and the quantum of any damage. Nor can it adjudicate in the meantime on the causal link between the conduct alleged against the European Union and the damage invoked. On the other hand, it may, even before the national court has given its ruling, determine whether the conduct alleged is capable of giving rise to non-contractual liability on the part of the European Union. Moreover, in the judgment in *Kampffmeyer and Others v Commission* (at p. 262), cited in paragraph 79 above, before staying proceedings, the Court of Justice adjudicated on whether there was 'a wrongful act or omission capable of giving rise to liability on the part of the Community'.
>
> […]

On the admissibility point, the General Court held that a pending case in the national courts would make a claim for damages in the CJEU inadmissible in only one situation—where the lack of a final domestic ruling made it impossible for the CJEU to identify the nature and quantum of the damage alleged. That was not the case here. On the merits point, the General Court held that where there was a pending case in the national
p. 351 court, the CJEU were obliged ↵ to wait for judgment before ruling on the nature and quantum of damage, and on the causal link between the allegedly wrongful conduct of the EU and the damage, because of the risk that the applicant would be insufficiently or excessively compensated as a result of different assessments of damage by the two courts. However, in contrast, the CJEU could make a decision on whether there was a wrongful act capable of giving rise to non-contractual liability on the part of the EU even before the national court had adjudicated.

8.10 The impact of Brexit

Actions for damages against the EU institutions may be brought by individuals or businesses outside the EU and so such actions will continue to be available to UK residents and businesses now that the UK has left the EU (see further Chapter 16 and 3.1), although, in practice, the likelihood of British businesses or individuals being adversely affected by EU law will be reduced.

8.11 Conclusions

In order for the EU to be liable in damages, an applicant must prove that it has suffered loss and that this is due to a wrongful act by an EU institution or servant. In the former scenario, the applicant must also prove that there has been a sufficiently serious breach of a rule of law for the protection of the individual. The Court of Justice has applied these requirements strictly and, as a result, there has been no opening of the floodgates to EU liability. There are, of course, policy reasons behind its narrow interpretation of Article 340 TFEU: the EU institutions should not be unduly restricted in their legislative activities by the threat of litigation, and indeed the cost to the EU—and therefore ultimately to the citizens of the Member States—would be too great were a wider interpretation to be adopted. Whether a correct balance has been achieved between policy considerations and providing justice for those adversely affected by EU measures is a matter of opinion, but this question has assumed greater importance with the development of Member State liability on principles similar to those in Article 340 TFEU (see further Chapter 5).

Although the rules on Member State liability (discussed in Chapter 5) have been developed from those applicable to EU liability, the former have also influenced the latter. This can be seen in the explicit adoption by the Court of Justice in Case C-352/98 P *Bergaderm v Commission* [2000] ECR I-5291 of the criteria laid down in Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame Ltd and others* (‘*Factortame III*’) [1994] ECR I-1593 (discussed at 5.4.1, 5.5, and 5.5.2) as to what constitutes a sufficiently serious breach, and in the adoption in Case C-472/00 *Commission v Fresh Marine Company A/S* [2003] ECR I-7541 (see 8.4.2 on the existence of a wrongful act and 8.5.2 in relation to damage) of the principle outlined in *Factortame III* and in Case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553 (see 5.4.3 and 5.5.1) that where the defendant has little or no discretion, any breach of EU law will be sufficiently serious.

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Summary

- Article 340 TFEU provides that the European Union (EU) is liable for the acts of its institutions and servants according to the *general principles* common to the laws of the Member States.
- In *Alfons Lütticke*, the Court of Justice interpreted these general principles as requiring proof of a wrongful act that has caused damage to the applicant.

- Whether an act is wrongful depends on whether there has been a sufficiently serious breach of a rule of law for the protection of individuals (*Bayerische*; *Bergaderm*).
- Rules of law for the protection of individuals include most Treaty Articles and the general principles of EU law recognized by the Court of Justice, such as non-discrimination, legitimate expectation, and fundamental human rights.
- Whether a breach is sufficiently serious depends on the complexity of the situations being regulated, the clarity of the law, the margin of discretion available to the EU institution that adopted the act at issue, whether the infringement was intentional or involuntary, and whether any error of law was excusable or inexcusable (*Bergaderm*, applying *Factortame III*).

Brexit

- Brexit does not affect the availability of a damages action against the EU to UK businesses and individuals as a matter of principle, but in practice it is likely to be of much less relevance.

Further Reading

Articles

PL Athanassiou, 'Non-Contractual Liability under the Single Supervisory Mechanism: Key Features and Grey Areas' (2015) 30 (7) JIBLR 382

Critically analyses the law relating to the non-contractual liability of the European Central Bank (ECB), which is based on Article 340 TFEU.

T Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down?' (2001) 38 CML Rev 301–32

Compares the development of EU and Member State liability in damages, with particular reference to *Bergaderm*.

N Vogiatzis, 'The EU's liability owing to the conduct of the European Ombudsman revisited: *European Ombudsman v Staelen*' (2018) 55 (4) CML Rev 1251, esp 1262–73

Discusses the *Staelen* judgment.

Book chapters

A Biondi and M Farley, 'Article 288(2) EC: The Appropriate Forum and Concurrent Liability', in *The Right to Damages in European Law* (Alpen aan den Rijn: Kluwer, 2009), ch 4

Examines the interaction between EU and State liability.

A Biondi and M Farley, 'Non-Contractual Liability in Damages: Article 288(2) EC', in *The Right to Damages in European Law*, (Alpen aan den Rijn: Kluwer, 2009), ch 3

Thoroughly analyses the jurisprudence on EU liability.

AG Toth, 'The Concepts of Damage and Causality as Elements of Non-Contractual Liability', in T Heukels and AM McDonnell (eds), *The Action for Damages in Community Law* (Alpen aan den Rijn: Kluwer, 1997), ch 10

Discusses the requirements of damage and causation.

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EU Publications

European Parliament Briefing, 'Court of Justice at work: Action for damages against the EU' (2018)
https://europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI(2018)630333_EN.pdf *<https://europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI(2018)630333_EN.pdf>*

Question

Critically discuss the development by the Court of Justice of the 'general principles' referred to in Article 340 TFEU.

Visit the online resources for an outline answer to this question *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-8-guidance-on-answering-assessment-questions?options=showName>***, and additional self-test questions** *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-8-self-test-questions?options=showName>* **with feedback.**

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