Complete EU Law: Text, Cases, and Materials (5th edn)
Elspeth Berry, Barbara Bogusz, Matthew Homewood, and Sophie Strecker

5. Member State liability in damages

Elspeth Berry, Reader in Law, Nottingham Trent University, Barbara Bogusz, Lecturer in Law, University of Leicester, Matthew Homewood, Deputy Dean, Nottingham Trent University, and Sophie Strecker, Principal Lecturer in Law, Nottingham Trent University

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Abstract

Titles in the Complete series combine extracts from a very wide range of primary materials with clear explanatory text to provide readers with a complete introductory resource. This chapter considers the circumstances in which Member State liability will arise. The discussions cover in depth the establishment of the principle of State liability; the *Francovich* test governing the imposition of State liability; the development of the principle of State liability; the *Factortame* test governing the imposition of State liability; the relationship between State liability and direct effect/indirect effect; and the relationship between State liability and EU liability under Article 340 TFEU.

Keywords: EU law, Member States, Member State liability, Francovich test, Factortame test

Key Points

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

- explain the reasoning of the Court of Justice for establishing the principle of State liability in damages in Joined Cases C-6 & 9/90 *Francovich and others v Italy* [1991] ECR I-5357;
- explain the (different) conditions for liability set out in *Francovich* and Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame* (*'Factortame III'*) [1996] ECR I-1029 and identify the differences between them;
- identify the different types of breach of EU law so far held by the Court of Justice to give rise to State liability and the conditions for liability applicable to each;
- apply the conditions laid down in *Francovich* and *Factortame III* to a range of factual situations;
- analyse (in conjunction with Chapter 4) the relationship between State liability and direct and indirect effect; and
- analyse (in conjunction with Chapter 8) the relationship between the Court's jurisprudence on Member State liability and its jurisprudence on EU liability.

Introduction

The EU Treaties make no provision for a Member State that breaches EU law to be liable in damages to individuals or businesses who have thereby suffered loss, although there is provision for the EU Commission (see 2.3 on the Commission) to take enforcement proceedings to end the breach (Article 258 TFEU; see further 7.1). However, in a series of judgments dating from the early 1990s, the Court of Justice ruled that, if certain conditions are fulfilled, the Member State may be held liable in damages.

Like the doctrines of direct and indirect effect considered in Chapter 4, the rationale underlying the development of Member State liability in damages for breaches of EU law is the need to make the rights enshrined in EU law real and effective. If a Member State that breaches EU law could do so with impunity, it would have little incentive to refrain from such breaches, and the wronged party would have no redress.

Another similarity with direct and indirect effect is that State liability has been developed by the Court of Justice without any direct foundation in the Treaties, although Article 340 TFEU makes express provision for the European Union (EU) itself to be liable for damage caused by its institutions (see further Chapter 8) and the Court has drawn on its own jurisprudence under Article 340 TFEU in developing State liability in parallel.

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5.1 The meaning of 'Member State' for the purpose of damages claims

Before considering the circumstances in which Member State liability will arise, it is first necessary to give some guidance on the meaning of 'Member State' in this context. The jurisprudence of the Court of Justice indicates that breaches of EU law by any part of the State may give rise to liability. However, a particular Member State may require actions in respect of such liability to be brought against the specific part of the State which committed the breach. For example, in Case C-302/97 *Konle v Austria* [1999] ECR I-3099, Austrian law provided that damages claims arising out of infringements committed by part of the federal State could be brought only against that part of the State and not against the State as a whole. The Court of Justice accepted that, in a federal State, reparation for damage caused by breaches of EU law committed by a federated local authority need not be provided by the federal State itself. However, the State must ensure that individuals could obtain reparation for damage caused to them by breaches of EU law, regardless of which public authority was responsible for the breach and which public authority was, in principle, under the law of that State, responsible for making reparation. A Member State could not therefore plead the separation of powers that existed in its national legal system in order to avoid liability. In Case C-424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, the Court gave a similar ruling in relation to damage caused by breaches of EU law committed by a public law body (in that case, an association of public dental practitioners).

5.2 The establishment of the principle of State liability: *Francovich*

The principle of State liability for breach of EU law was first established by the Court of Justice in Joined Cases C-6 & 9/90 *Francovich and others v Italy* [1991] ECR I-5357. Francovich was owed wages by his employer, a company that had become insolvent. Italian law provided no remedy in these circumstances, but Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ 1980 L283/23, required each Member State to set up a scheme under which employees of insolvent companies would receive at least some of their outstanding wages. The problem for such employees in Italy was that the Italian government had failed to transpose the rights in the Directive into national law as it was legally obliged to do (see further 3.4.2). The Italian court made a reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure). The Court considered first whether the Directive could have direct effect.

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Thinking Point

> What three conditions must be satisfied in order for a Directive to have direct effect? (If you have difficulty answering this question, review 4.1.4.)

The Court held that since one of the three conditions for a Directive to have direct effect—that the Directive was sufficiently clear and precise—was not satisfied in *Francovich*, Francovich could not enforce Directive 80/987 directly. Its reasoning on this point was as follows.

Joined Cases C-6 & 9/90 *Francovich and others v Italy* [1991] ECR I-5357

> 12. It is therefore necessary to see whether the provisions of Directive 80/987 which determine the rights of employees are unconditional and sufficiently precise. There are three points to be considered: the identity of the persons entitled to the guarantee provided, the content of that guarantee and the identity of the person liable to provide the guarantee ...
>
> [...]
>
> 26. Accordingly, even though the provisions of the directive in question are sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as regards the content of that guarantee, those elements are not sufficient to enable individuals to rely on those provisions before the national courts. Those provisions do not identify the person liable to provide the guarantee, and the State cannot be considered liable on the sole ground that it has failed to take transposition measures within the prescribed period.

Review Question

> Why do you think that the Court did not consider the possibility of indirect effect in *Francovich*? (If you have difficulty with understanding the concept of 'indirect effect', review 4.2.)
>
> *Answer*: The Directive at issue in *Francovich* could not have indirect effect on the facts of this particular case because there was no relevant Italian legislation in accordance with which it could be construed.

The Court was thus faced with a problem: the EU had intended employees to have rights under the Directive, yet neither of the doctrines that the Court had previously developed to make rights effective—direct effect and indirect effect—were of assistance to make those employee rights effective here.

The Court's response was to develop an alternative solution to make those rights effective: it ruled that a Member State which breached its obligation to transpose a Directive by the deadline for its transposition could be held liable in damages to an individual who had suffered loss as a result. Its reasoning can be seen in the following extract.

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Joined Cases C-6 & 9/90 *Francovich and others v Italy* [1991] ECR I-5357

Liability of the State for loss and damage resulting from breach of its obligations

under Community law

[...]

(a) The existence of State liability as a matter of principle

31. It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law [now EU law] is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62 *Van Gend en Loos* [1963] ECR 1 and Case 6/64 *Costa v ENEL* [1964] ECR 585).

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

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

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

35. It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

36. A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the [EC] Treaty [now Article 4(3) TEU], under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify

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the unlawful consequences of a breach of Community law (see, in relation to the analogous provision of Article 86 of the ECSC Treaty, the judgment in Case 6/60 *Humblet v Belgium* [1990] ECR 559).

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

Review Question

What were the Court's arguments for establishing the principle of State liability in *Francovich* and what criticisms might be made of these arguments?

Answer: The Court held that the EU legal system was designed to give rights to individuals, that national courts must enforce these rights, and that the effectiveness of these rights would be impaired if there were no redress available from a State that breached those rights. It also cited the obligation of States under what is now Article 4(3) TEU (formerly Article 5 EC) to take all measures to ensure that they fulfilled their Treaty obligations, and explained that this included making good the consequences of a breach of these obligations.

It might be argued that the doctrines of direct and indirect effect make rights under EU law enforceable against any part of the State that has acted in breach of the substantive provisions of EU law—for example a local council that discriminates against its female employees—and that it is not necessary for the State to be liable further than this. Article 4(3) TEU leaves it to the State to decide on the appropriate methods of fulfilment of EU obligations; had the States wanted to provide for State liability in damages, they could have done so, and indeed the inclusion of Treaty provisions for EU liability (Article 340 TFEU) might imply that the omission of parallel provisions for State liability was deliberate.

5.3 The *Francovich* conditions governing the imposition of State liability

Having established the principle of State liability, the Court of Justice in *Francovich* then proceeded to specify the conditions according to which such liability would arise in a particular case.

Joined Cases C-6 & 9/90 *Francovich and others v Italy* [1991] ECR I-5357

(b) The conditions for State liability

38. Although State liability is thus required by Community law [now EU law], the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.

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39. Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the [EC] Treaty [now Article 288 TFEU] to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.

40. The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

41. Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.

[...]

44. In this case, the breach of Community law by a Member State by virtue of its failure to transpose Directive 80/987 within the prescribed period has been confirmed by a judgment of the Court. The result required by that directive entails the grant to employees of a right to a guarantee of payment of their unpaid wage claims. As is clear from the examination of the first part of the first question, the content of that right can be identified on the basis of the provisions of the directive.

45. Consequently, the national court must, in accordance with the national rules on liability, uphold the right of employees to obtain reparation of loss and damage caused to them as a result of failure to transpose the directive.

The Court thus laid down three conditions that must be satisfied before a State can be held liable in damages to an individual for its failure to transpose a Directive.

Review Question

> What were the three conditions laid down by the Court and how did the Court apply them in *Francovich*?
>
> *Answer*: The three conditions are that:
>
> (a) the result prescribed by the Directive must involve the grant of rights to individuals;
>
> (b) the content of those rights must be clear from the Directive; and
>
> (c) there must be a causal link between the breach of the State's obligation and the damage suffered by the individual.

On the facts of the case, the Court held that (1) the Directive gave rights to employees (to be paid their wages) and (2) the content of those rights (how much pay they were entitled to) was clear from the Directive. It left the referring national court to decide (3) the issue of causation—whether Francovich himself had suffered loss as a result of Italy's failure to transpose the Directive. The reason it did this is that while the application of the first two conditions is within the jurisdiction of the Court of Justice (see further 2.4) because they involve the
p. 170 interpretation ↵ of EU law (a particular Directive), the third condition requires the establishment of the facts and the application of EU law to those facts, which are matters for the national courts.

The Italian court was therefore required to consider whether Francovich was among the employees who were given rights under the Directive (the content of those rights having been established by the Court of Justice) and, if he was, what loss he had suffered as a result of Italy's failure to transpose those rights into national law. This exercise necessitated a further reference by the Italian court to the Court of Justice, this time on the correct interpretation of the detail of the substantive provisions of the Directive. In Case C-479/93 *Francovich v Italy* (*'Francovich II'*) [1993] ECR I-3843, the Court of Justice ruled that the Directive applied only to those employees whose employer had been made subject to specified types of insolvency proceeding. Since the Italian court had found that, as a matter of Italian law, Francovich's employer could not be subjected to such proceedings, Francovich was not entitled to the protection of the Directive and thus was unable to prove that he had suffered any loss as a result of Italy's failure to transpose the Directive.

Note

> Before setting out the conditions for liability in *Francovich*, the Court stated that it was not laying down a single immutable set of conditions applicable to all possible breaches of EU law (*Francovich*, at para 38). Instead, the conditions to be applied would depend on the nature of the breach. In later cases involving different types of breaches from that at issue in *Francovich* (i.e. the failure to transpose a Directive), the Court has indeed laid down different conditions (see 5.5).

5.4 The development of the principle of State liability

5.4.1 Enactment of national legislation contrary to EU law: *Factortame III*

The judgment in *Francovich* may readily be seen as a logical development of the Court of Justice's previous jurisprudence establishing the principles of direct and indirect effect, in particular where the problem for the individual arises from the State's failure to transpose a Directive into national law. However, over subsequent years, the Court has developed the principle of State liability into a free-standing area of jurisprudence, often not involving Directives or indeed any explicit consideration of direct or indirect effect.

The Court's judgment in *Francovich* was, of course, based on the facts of that case. Although it established the principle of State liability in damages, it did so only in the context of a State's failure to transpose a Directive. After the judgment in *Francovich*, it was unclear whether Member States would incur liability in damages for
p. 171 any other sort of breach of EU law and, ↵ if so, what sort of breaches and under what conditions. However, the Court's comments in *Francovich* that the conditions for liability would vary according to the nature of the breach of EU law suggested that other kinds of breach might give rise to liability.

In Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame* (*'Factortame III'*) [1996] ECR I-1029, the Court was called upon to consider whether a State could be liable in damages for a very different kind of breach of EU law from that at issue in *Francovich*. One of the arguments put forward by the German and other governments that intervened in the case (on the possibility of intervention in preliminary reference proceedings, see 6.6) was that State liability was a possibility only where the provisions of EU law that had been breached were not directly effective. The Court rejected this argument for the reasons which appear in the following extract.

Thinking Point

> While reading the following extract, make a note of these reasons.

Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame* (*'Factortame III'*) [1996] ECR I-1029

18. The German, Irish and Netherlands Governments contend that Member States are required to make good loss or damage caused to individuals only where the provisions breached are not directly effective: in *Francovich and Others* the Court simply sought to fill a lacuna in the system for safeguarding rights of individuals. In so far as national law affords individuals a right of action enabling them to assert their rights under directly effective provisions of Community law [now EU law], it is unnecessary, where such provisions are breached, also to grant them a right to reparation founded directly on Community law.

19. That argument cannot be accepted.

20. The Court has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty (see, in particular, Case 168/85 *Commission v Italy* [1986] ECR 2945, [1988] 1 CMLR 580, paragraph 11, Case C-120/88 *Commission v Italy* [1991] ECR I-621, paragraph 10, and C-119/89 *Commission v Spain* [1991] ECR I-641, [1993] 1 CMLR 41, paragraph 9). The purpose of that right is to ensure that provisions of Community law prevail over national provisions. It cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State. As appears from paragraph 33 of the judgment in *Francovich and Others*, the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law.

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21. This will be so where an individual who is a victim of the non-transposition of a directive and is precluded from relying on certain of its provisions directly before the national court because they are insufficiently precise and unconditional, brings an action for damages against the defaulting Member State for breach of the third paragraph of Article 189 of the [EC] Treaty [now Article 288 TFEU]. In such circumstances, which obtained in the case of *Francovich and Others*, the purpose of reparation is to redress the injurious consequences of a Member State's failure to transpose a directive as far as beneficiaries of that directive are concerned.

22. It is all the more so in the event of infringement of a right directly conferred by a Community [now Union] provision upon which individuals are entitled to rely before the national courts. In that event, the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.

> 23. In this case, it is undisputed that the Community provisions at issue, namely Article 30 of the [EC] Treaty [now Article 34 TFEU] in Case C-46/93 and Article 52 [EC, now Article 49 TFEU] in Case C-48/93, have direct effect in the sense that they confer on individuals rights upon which they are entitled to rely directly before the national courts. Breach of such provisions may give rise to reparation.

The Court of Justice held that, in order to make EU law rights effective, it was essential that State liability in damages be available where direct effect did not afford a remedy (*Factortame III*, para 21). However, it considered that it was even more important to ensure that EU law rights that were directly effective in principle were also effective in practice, if necessary by making the State liable in damages (*Factortame III*, para 22).

In its judgment in *Factortame III*, the Court of Justice considered together two separate claims for damages: one brought by Spanish fishermen against the UK government and one brought by a French brewery against the German government. Both arose out of national legislation that conflicted with TEU provisions.

Factortame and other Spanish fishermen claimed damages from the UK government after the Merchant Shipping Act 1988, which had made it unlawful for them to fish in UK waters, was declared by the Court of Justice to be contrary to EU law (in Case C-221/89 *R v Secretary of State for Transport, ex p Factortame Ltd* (‘*Factortame II*’) [1991] ECR I-3905—see further 3.1.2 and 4.2.5). They alleged in particular that the provisions of the Act were contrary to what is now Article 49 TFEU (see further 12.1.1), which gives Member State nationals the right to establish themselves in another Member State as self-employed persons, and to set up and manage undertakings in another Member State. Brasserie du Pêcheur, a French brewery, claimed damages from the German government after a German prohibition on its exports was declared by the Court of Justice to be contrary to what is now Article 34 TFEU (see further 10.8).

In *Factortame III*, the Court of Justice held that the principle of Member State liability applied where a State had enacted legislation that was contrary to EU law.

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Note

> The *Factortame* litigation had already produced significant judgments concerning the supremacy of EU law. If you are unsure as to the importance of the judgments, review 3.1.2. This will help you to understand the nature of the claim for damages.

The Court’s rationale for imposing liability in *Factortame III* shows some development from its reasoning in *Francovich*, as is apparent from the following extract.

Thinking Point

> While reading the following extract, consider what element of the Court's reasoning had already been seen in its judgment in *Francovich*.

Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame* ('*Factortame III*') [1996] ECR I-1029

State Liability for Acts and Omissions of the National Legislature Contrary to

Community Law (First Question in both Case C-46/93 and Case C-48/93)

[...]

27. Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law [now EU law] by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164 of the [EC] Treaty [now Article 19 TEU] of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community [now Union] legal system and, where necessary, general principles common to the legal systems of the Member States.

28. Indeed, it is to the general principles common to the laws of the Member States that the second paragraph of Article 215 of the [EC] Treaty [now Article 340 TFEU] refers as the basis of the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties.

29. The principle of the non-contractual liability of the Community expressly laid down in Article 215 of the Treaty is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused. That provision also reflects the obligation on public authorities to make good damage caused in the performance of their duties.

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31. In view of the foregoing considerations, the Court held in *Francovich and Others*, at paragraph 35, that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty.

32. It follows that that principle holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach.

[...]

36. Consequently, the reply to the national courts must be that the principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the breach in question.

Review Question

> How did the reasoning used by the Court of Justice to justify the principle of State liability in *Factortame III* differ from its reasoning in *Francovich*?
>
> *Answer*: The Court referred in both cases to the Treaty obligation of Member States to ensure the fulfilment of EU law. However, whereas in *Francovich*—as also in much of its jurisprudence on direct and indirect effect (see further Chapter 4)—it stressed the need to make individual rights under EU law effective, in *Factortame III* it also argued that liability for breach of non-contractual obligations was a principle of EU law, as reflected in the express imposition of such liability on the EU itself in Article 340 TFEU (see further Chapter 8). The Court's assertion of a link between the liability of the EU and the liability of Member States has also had implications for the conditions governing State liability (see 5.5).

5.4.2 Incorrect transposition of Directives: *BT*

In Case C-392/93 *R v HM Treasury, ex p British Telecommunications plc* [1996] ECR I-1631, BT brought proceedings claiming that the UK had incorrectly transposed into national law Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1990 L297/1. The national court referred to the Court of Justice a number of questions on the possibility of Member State liability (see further Chapter 6 on the preliminary reference procedure). The Court held that the principles enunciated in *Francovich* and *Factortame III* applied also where a Member State had failed to transpose a Directive into national law correctly. In such circumstances, the State could therefore be liable for damages, as explained in the following extract.

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Case C-392/93 *R v HM Treasury, ex p British Telecommunications plc* [1996] ECR I-1631

Question 4

[...]

38. It should be recalled, as a preliminary point, that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty (judgments in *Francovich and Others* (Joined Cases C-6 & 9/90), [1993] 2 CMLR 66 and in *Brasserie du Pêcheur and Factortame* (Joined Cases C-46 & 48/93) [1996] 1 CMLR 889). It follows that that principle holds good for any case in which a Member State breaches Community law (*Brasserie du Pêcheur and Factortame*).

39. In the latter judgment the Court also ruled, with regard to a breach of Community law for which a Member State, acting in a field in which it has a wide discretion in taking legislative decisions, can be held responsible, 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.

40. Those same conditions must be applicable to the situation, taken as its hypothesis by the national court, in which a Member State incorrectly transposes a Community [now Union] directive into national law. A restrictive approach to State liability is justified in such a situation, for the reasons already given by the Court to justify the strict approach to non-contractual liability of Community institutions or Member States when exercising legislative functions in areas covered by Community law where the institution or State has a wide discretion—in particular, the concern to ensure that the exercise of legislative functions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests (see, in particular, the judgments in Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *HNL and Others v EC Council and EC Commission* [1978] ECR 1209, and in *Brasserie du Pêcheur and Factortame*).

Thinking Point

> How does the Court's judgment in *BT* enhance its existing jurisprudence on the direct and indirect effect of Directives? If you have difficulty in answering this question, you may need to review Chapter 4.

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5.4.3 Administrative breaches: *Hedley Lomas*

In Case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553 (see also 5.5.2) the UK had developed a policy of refusing to grant licences for the export of live animals to Spain on the ground that Spanish slaughterhouses were not complying with Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter, OJ 1974 L316/10. Hedley Lomas, a sheep exporter, sought damages from the British government on the basis of its breach of what is now Article 35 TFEU on the free movement of goods (see further 10.8). Even though the alleged breach consisted not of legislation, but of only an administrative practice or policy, the Court of Justice held that the UK government could be liable in damages, as the Court explained in the following extract.

Case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas* [1996] ECR I-2553

> 24. The principle of State liability for loss and damage caused to individuals as a result of breaches of Community law [now EU law] for which the State can be held responsible is inherent in the system of the Treaty: *Francovich and Others* (Joined Cases C-6 & 9/90) [1993] 2 CMLR 66, and *Brasserie du Pêcheur and Factortame* (Joined Cases C-46 & 48/93) [1996] 1 CMLR 889. Furthermore, the conditions under which State liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss or damage (*Francovich and Others, Brasserie du Pêcheur and Factortame*).
>
> 25. In the case of a breach of Community law attributable to a Member State acting in a field in which it has a wide discretion to make legislative choices the Court has held, at paragraph [51] of its judgment in *Brasserie du Pêcheur and Factortame*, that such a right to reparation must be recognised 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.
>
> 26. Those three conditions are also applicable in the circumstances of this case.
>
> [...]
>
> 32. The answer to the third question must therefore be that a Member State has an obligation to make reparation for the damage caused to an individual by a refusal to issue an export licence in breach of Article 34 of the [EC] Treaty [now Article 35 TFEU] where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the State must make good the consequences of the loss or damage caused by a breach of Community law attributable to it, in accordance with its domestic law on liability. However, the conditions laid down by the applicable domestic laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

p. 177

5.4.4 Judicial breaches: *Köbler*

The possibility of liability for acts of the judiciary had been signalled by the Court of Justice in *Factortame III*, as can be seen from the following extract.

Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame* (*'Factortame III'*) [1996] ECR I-1029

> 33. In addition, in view of the fundamental requirement of the Community [now Union] legal order that Community law be uniformly applied (see, in particular, Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* and *Zuckerfabrik Soest* [1991] ECR I-415, paragraph 26), the obligation to make good damage caused to individuals by breaches of Community law [now EU law] cannot depend on domestic rules as to the division of powers between constitutional authorities.
>
> 34. As the Advocate General points out in paragraph 38 of his Opinion, in international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.

However, it was not until Case C-224/01 *Köbler v Austria* [2003] ECR I-10239 that the Court of Justice had the opportunity to rule directly on the issue. Köbler alleged that an increment payable to university professors with 15 years' service in Austrian universities was discriminatory, because no account was taken of periods of service in universities in other Member States. The Austrian Verwaltungsgerichtshof (its Supreme Administrative Court) dismissed his claim. Köbler then brought an action for damages against the Austrian State on the grounds that the Austrian court's judgment infringed EU law.

The Court of Justice noted in *Köbler* (at paras 48 and 49) that the principle of State liability for the judiciary was accepted in most Member States and had also been recognized by the European Court of Human Rights (on the role of this court, see further 9.1, 9.5.2, and 9.6). The Court of Justice held that, as a matter of EU law, a Member State could, in certain circumstances, be liable in damages for the acts of its judiciary adjudicating at last instance. Its rationale appears in the following extract.

Thinking Point

> While reading the following extract, consider why the Court believed it to be so important that damages be available in respect of judicial breaches of EU law. Why did it argue that this applied specifically to the judgments of courts of last instance?

p. 178

Case C-224/01 *Köbler v Austria* [2003] ECR I-10239

Principle of State liability

30. First, as the Court has repeatedly held, the principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of Community law [now EU law] for which the State is responsible is inherent in the system of the Treaty (Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; *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* (*'Factortame III'*) [1996] ECR I-1029], paragraph 31; Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 38; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20, Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, paragraph 106 and *Haim* [Case C-424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123], paragraph 26).

31. The Court has also held that that principle applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach (*Brasserie du Pêcheur* and *Factortame*, cited above, paragraph 32; Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 62 and *Haim*, cited above, paragraph 27).

32. In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply *a fortiori* in the Community [now Union] legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals (*Brasserie du Pêcheur* and *Factortame*, cited above, paragraph 34).

33. In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.

34. It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a

> final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights.
>
> 35. Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article 234 EC [now Article 267 TFEU] a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.
>
> p. 179
>
> 36. Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance (see in that connection *Brasserie du Pêcheur* and *Factortame*, cited above, paragraph 35).

In *Köbler,* the Court of Justice held that the principle of State liability applied regardless of whether the breach was committed by the legislature, the executive, or the judiciary. The essential role played by the judiciary in protecting rights under EU law meant that the effectiveness of EU law would be undermined if damages were not available to individuals whose rights were affected by breaches of EU law committed by the judiciary. Where such a breach was committed by a court which was a court of last instance, individuals would have no other remedy against the judgment.

In the course of its judgment in *Köbler,* the Court of Justice refuted a number of arguments put forward by the Austrian and other governments that intervened in the case (on the possibility of such interventions, see 6.6) to object to the extension of the principle of State liability to breaches of EU law committed by national courts.

First, the Court rejected the suggestion that the availability of an action in damages against the State in respect of the acts of its judiciary would interfere with the principle of ***res judicata***.

res judicata

Res judicata is the principle that once a civil matter has been judicially decided and no further appeals are possible, the decision is final and the issue cannot be litigated again.

Thinking Point

> While reading the following extract, consider why the Court rejected this argument.

Case C-224/01 *Köbler v Austria* [2003] ECR I-10239

> 37. Certain of the governments which submitted observations in these proceedings claimed that the principle of State liability for damage caused to individuals by infringements of Community law [now EU law] could not be applied to decisions of a national court adjudicating at last instance. In that connection arguments were put forward based, in particular, on the principle of legal certainty and, more specifically, the principle of *res judicata*, the independence and authority of the judiciary and the absence of a court competent to determine disputes relating to State liability for such decisions.
>
> 38. In that regard the importance of the principle of *res judicata* cannot be disputed (see judgment in *Eco Swiss*, cited above, paragraph 46). In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question.
>
> p. 180
> 39. However, it should be borne in mind that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community [now Union] legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage.
>
> 40. It follows that the principle of *res judicata* does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance.

The Court pointed out that imposing liability in damages in relation to an incorrect judgment did not directly impact on that judgment or its legal status. An action for damages was an entirely separate action. In C-234/04 *Kopferer* EU:C:2006:178 the Court of Justice held that EU law did not require a national court to disapply a national law which made a judicial decision final, even if disapplication would enable the national court to remedy a breach of EU law caused by that decision. In Case C-453/00 *Kühne & Heitz NV v Productschap voor Pluimvee en Eieren* [2004] ECR I-837 the Court of Justice was asked to rule on whether an administrative (rather than a judicial) decision could be reopened where it became evident that it had been based on a flawed

interpretation of EU law. The Court held that the duty of cooperation between the Member States and the EU, as set out in what is now Article 4(3) TEU, imposed an obligation on a domestic administrative body to reopen its decision if:

- it had the power to do so as a matter of national law;
- its decision had become final as a result of a judgment of a national court ruling at final instance;
- that judgment was, in the light of a later Court of Justice ruling, based on a misinterpretation of EU law and had been given without a preliminary reference being made under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure); and
- the person concerned had complained to the administrative body immediately after becoming aware of the Court of Justice ruling.

Second, in *Köbler,* the Court also rejected the suggestion that State liability for the acts of the judiciary would weaken judicial independence. Indeed, according to the Court, judicial authority would be strengthened by the possibility of State liability, as explained in the following extract.

p. 181

Case C-224/01 *Köbler v Austria* [2003] ECR I-10239

> 41. Nor can the arguments based on the independence and authority of the judiciary be upheld.
>
> 42. As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law [now EU law] does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.
>
> 43. As to the argument based on the risk of a diminution of the authority of a court adjudicating at last instance owing to the fact that its final decisions could by implication be called in question in proceedings in which the State may be rendered liable for such decisions, the existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary.

In C-160/14 *Ferreira da Silva e Brito and others v Portugal* EU:C:2015:565 (for the facts of this case, see later in this section), the defendant State raised a third objection to the principle of State liability for breaches of EU law by national courts—that of **legal certainty**.

legal certainty

Legal certainty is the principle that the law must be clear and foreseeable, so that persons subject to that law can foresee the legal consequence of their actions and regulate their conduct accordingly.

As can be seen in the following extract, the Court of Justice rejected this argument on the basis that the need for legal certainty should not frustrate the operation of the principle of State liability, or prevent an individual asserting their EU law rights.

C-160/14 *Ferreira da Silva e Brito and others v Portugal* EU:C:2015:565

> 56. As regards the argument concerning infringement of the principle of legal certainty, it must be stated that, even if this principle may be taken into account in a legal situation such as that at issue in the main proceedings, it cannot frustrate the principle that the State should be liable for loss and damage caused to individuals as a result of infringements of EU law which are attributable to it.
>
> 57. To take account of the principle of legal certainty would mean that, where a decision given by a court adjudicating at last instance is based on an interpretation of EU law that is manifestly incorrect, an individual would be prevented from asserting the rights that he may derive from the EU legal order and, in particular, those that stem from the principle of State liability.

The importance of the principle of State liability for acts of its judiciary, as established in *Köbler*, was emphasized by the Court of Justice in Case C-173/03 *Traghetti del Mediterraneo SpA v Italy* [2006] ECR I-5177. In that case, a dispute arose as to the legality of certain provisions of Italian law restricting State liability for damage caused by a decision of a national court adjudicating at last instance. The Court referred to its
p. 182 reasoning in *Köbler* (at paras 33–36) ↵ before applying that reasoning to the facts of *Traghetti*. It considered, first, the exclusion under Italian law of liability arising from an interpretation of the law by a court. Its reasoning appears in the following extract.

Case C-173/03 *Traghetti del Mediterraneo SpA v Italy* [2006] ECR I-5177

31. Basing its reasoning in that respect, inter alia, on the essential role played by the judiciary in the protection of the rights derived by individuals from Community [now Union] rules and on the fact that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law [now EU law], the Court infers that the protection of those rights would be weakened—and the full effectiveness of the Community rules conferring such rights would be brought into question—if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance (see *Köbler*, paragraphs 33 to 36).

32. It is true that, having regard to the specific nature of the judicial function and to the legitimate requirements of legal certainty, State liability in such a case is not unlimited. As the Court has held, State liability can be incurred only in the exceptional case where the national court adjudicating at last instance has manifestly infringed the applicable law. In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it, which include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC [now Article 267 TFEU] (*Köbler*, paragraphs 53 to 55).

33. Analogous considerations linked to the need to guarantee effective judicial protection to individuals of the rights conferred on them by Community law similarly preclude State liability not being incurred solely because an infringement of Community law attributable to a national court adjudicating at last instance arises from the interpretation of provisions of law made by that court.

34. On the one hand, interpretation of provisions of law forms part of the very essence of judicial activity since, whatever the sphere of activity considered, a court faced with divergent or conflicting arguments must normally interpret the relevant legal rules —of national and/or Community law—in order to resolve the dispute brought before it.

35. On the other hand, it is not inconceivable that a manifest infringement of Community law might be committed precisely in the exercise of such work of interpretation if, for example, the court gives a substantive or procedural rule of Community law a manifestly incorrect meaning, particularly in the light of the

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relevant case-law of the Court on the subject (see, in that regard, *Köbler*, paragraph 56), or where it interprets national law in such a way that in practice it leads to an infringement of the applicable Community law.

36. As the Advocate General observed in point 52 of his Opinion, to exclude all State liability in such circumstances on the ground that the infringement of Community law arises from an interpretation of provisions of law made by a court would be tantamount to rendering meaningless the principle laid down by the Court in the *Köbler* judgment. That remark is even more apposite in the case of courts adjudicating at last instance, which are responsible, at national level, for ensuring that rules of law are given a uniform interpretation.

Review Question

Why did the Court rule that national restrictions on liability arising from an interpretation of law by a national court were contrary to EU law?

Answer: The Court held that the interpretation of law was an integral part of the work of the courts and that errors in such interpretation could constitute a serious breach of EU law. Given the importance of the judiciary in protecting individual rights, and the fact that a court of last instance was the final judicial body able to provide such protection in a particular case, the exclusion of State liability for any infringement of an individual's rights by such a court would impair the effectiveness of EU law and would render the judgment in *Köbler* meaningless.

The Court in *Traghetti* next considered the exclusion under Italian law of liability arising from an inaccurate assessment of the facts or evidence by a court.

Thinking Point

While reading the following extract, consider in what respects the Court's reasoning on this issue was 'analogous' (*Traghetti*, at para 37) to its reasoning on the exclusion of liability for errors of interpretation.

Case C-173/03 *Traghetti del Mediterraneo SpA v Italy* [2006] ECR I-5177

37. An analogous conclusion must be drawn with regard to legislation which in a general manner excludes all State liability where the infringement attributable to a court of that State arises from its assessment of the facts and evidence.

38. On the one hand, such an assessment constitutes, like the interpretation of provisions of law, another essential aspect of the judicial function since, regardless of the interpretation adopted by the national court seised of a particular case, the application of those provisions to that case will often depend on the assessment which the court has made of the facts and the value and relevance of the evidence adduced for that purpose by the parties to the dispute.

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39. On the other hand, such an assessment—which sometimes requires complex analysis—may also lead, in certain cases, to a manifest infringement of the applicable law, whether that assessment is made in the context of the application of specific provisions relating to the burden of proof or the weight or admissibility of the evidence, or in the context of the application of provisions which require a legal characterisation of the facts.

40. To exclude, in such circumstances, any possibility that State liability might be incurred where the infringement allegedly committed by the national court relates to the assessment which it made of facts or evidence would also amount to depriving the principle set out in the *Köbler* judgment of all practical effect with regard to manifest infringements of Community law [now EU law] for which courts adjudicating at last instance were responsible.

41. As the Advocate General observed in points 87 to 89 of his Opinion, that is especially the case in the State aid sector. To exclude, in that sector, all State liability on the ground that an infringement of Community law committed by a national court is the result of an assessment of the facts is likely to lead to a weakening of the procedural guarantees available to individuals, in that the protection of the rights which they derive from the relevant provisions of the Treaty depends, to a great extent, on successive operations of legal classification of the facts. Were State liability to be wholly excluded by reason of the assessments of facts carried out by a court, those individuals would have no judicial protection if a national court adjudicating at last instance committed a manifest error in its review of the above operations of legal classification of facts.

Finally, the Court considered the limitation of liability under Italian law to cases of intentional fault and serious misconduct by the court. Its reasoning appears in the following extract.

Case C-173/03 *Traghetti del Mediterraneo SpA v Italy* [2006] ECR I-5177

> 42. With regard, finally, to the limitation of State liability to cases of intentional fault and serious misconduct on the part of the court, it should be recalled, as was pointed out in paragraph 32 of this judgment, that the Court held, in the *Köbler* judgment, that State liability for damage caused to individuals by reason of an infringement of Community law [now EU law] attributable to a national court adjudicating at last instance could be incurred in the exceptional case where that court manifestly infringed the applicable law.
>
> 43. Such manifest infringement is to be assessed, inter alia, in the light of a number of criteria, such as the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, and the non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC [now Article 267 TFEU]; it is in any event presumed where the decision involved is made in manifest disregard of the case-law of the Court on the subject (*Köbler*, paragraphs 53 to 56).
>
> 44. Accordingly, although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred for an infringement of Community law attributable to a national court adjudicating at last instance, under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law, as set out in paragraphs 53 to 56 of the *Köbler* judgment.

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Review Question

> To what extent, if any, did the Court of Justice in *Traghetti* permit a Member State to restrict its liability in damages in the event of a sufficiently serious breach of EU law by that State's supreme court?
>
> *Answer*: The Court reiterated that the conditions governing such liability were those laid down in *Köbler*. Although a Member State could clarify the criteria for liability in its domestic law, 'under no circumstances' could it impose stricter conditions than those laid down in *Köbler* so as to make a successful claim for damages more difficult.

A different type of domestic restriction on State liability was at issue in C-160/14 *Ferreira da Silva e Brito and others v Portugal* EU:C:2015:565 (also discussed earlier in this section), in which the applicants were dismissed when their employer, an airline, was wound up. Another airline subsequently began to operate some of its

flights, using its assets and employing some of its former employees. The applicants sought to enforce their rights under Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ 1977 L61/26. The Portuguese Supreme Court of Justice dismissed their claim, having refused to make a preliminary reference to the Court of Justice (see further Chapter 6 on preliminary references). The applicants brought proceedings against the State for damages in relation to what they alleged was a serious breach of EU law by the national court, consisting of its incorrect interpretation of the Directive and its refusal to make a mandatory reference (on mandatory references, see 6.5). Under Portuguese law, such a claim for damages could be made only if the court judgment causing the loss had been set aside. The national court made a reference to the Court of Justice, which ruled that where the conditions for State liability were satisfied—which was a matter for the national courts to determine—the remedy to be awarded was governed by national law so long as the requirements laid down by national law in relation to the remedy were not excessively difficult to obtain (the principle of effectiveness, discussed further at 4.3.2). The Portuguese law at issue was liable to make it excessively difficult to obtain reparation because the setting aside of the wrongful judgment was, in practice, impossible. That law was therefore contrary to EU law and should not be applied in the domestic proceedings against the State.

5.5 The development of the conditions governing the imposition of State liability: the *Factortame III* conditions

In *Francovich*, the Court of Justice had indicated that the conditions for liability could differ according to the nature of the breach. In *Factortame III*, having held that the principle of Member State liability applied in circumstances different from those in *Francovich*, the Court laid down a set of conditions that did indeed differ from those that it had applied in *Francovich* and which are set out in the following extract.

Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame* (*'Factortame III'*) [1996] ECR I-1029

> 51. In such circumstances, Community law [now EU 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.
>
> This second set of conditions have been ruled by the Court of Justice to govern State liability for a number of different types of breach of EU law by a Member State: the enactment of national legislation which is contrary to EU law (for example, *Factortame III*), the incorrect transposition of a Directive (for example, *BT*), administrative breaches (for example, *Hedley Lomas*), and judicial breaches (for example, *Köbler*).

Review Question

> What three conditions for liability were set out by the Court in *Factortame III*?
>
> *Answer*: The conditions were that:
>
> (a) the rule of EU law infringed must be intended to confer rights on individuals;
>
> (b) the breach must be sufficiently serious; and
>
> (c) there must be a causal link between the breach of the State's obligation and the damage suffered by the individual.

These three conditions will be examined in more detail at 5.5.1–5.5.3. However, before doing this, it is important to note that, in laying down those conditions, the Court of Justice drew explicitly on its existing jurisprudence on EU liability in damages under Article 340 TFEU (see Chapter 8).

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Thinking Point

> While reading the following extract, consider which features of its existing jurisprudence under Article 340 TFEU the Court drew on when developing Member State liability in *Factortame III*.

Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame* (*'Factortame III'*) [1996] ECR I-1029

> Conditions under which the State may Incur Liability for Acts and Omissions of the National Legislature Contrary to Community Law (Second Question in Case C-46/93 and First Question in Case C-48/93)
>
> [...]
>
> 38. Although Community law [now EU law] imposes State liability, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage (*Francovich and Others*, paragraph 38).
>
> 39. In order to determine those conditions, account should first be taken of the principles inherent in the Community [now Union] legal order which form the basis for State liability, namely, first, the full effectiveness of Community rules and the effective protection of the rights which they confer and, second, the obligation to cooperate imposed on Member States by Article 5 of the [EC] Treaty [now Article 4(3) TEU] (*Francovich and Others*, paragraphs 31 to 36).
>
> 40. In addition, as the Commission and the several governments which submitted observations have emphasized, it is pertinent to refer to the Court's case-law on non-contractual liability on the part of the Community.
>
> 41. First, the second paragraph of Article 215 of the [EC] Treaty [now Article 340 TFEU] refers, as regards the non-contractual liability of the Community, to the general principles common to the laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of Community law.
>
> 42. Second, the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.
>
> 43. The system of rules which the Court has worked out with regard to Article 215 of the Treaty, particularly in relation to liability for legislative measures, 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.

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44. Thus, in developing its case-law on the non-contractual liability of the Community, in particular as regards legislative measures involving choices of economic policy, the Court has had regard to the wide discretion available to the institutions in implementing Community policies.

45. The strict approach taken towards the liability of the Community in the exercise of its legislative activities is due to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterized by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (Joined Cases 83, 94/76, and 4, 15, & 40/77) *HNL and Others v Council and Commission* [1978] ECR 1209, paragraphs 5 and 6).

46. That said, the national legislature—like the Community institutions—does not systematically have a wide discretion when it acts in a field governed by Community law. Community law may impose upon it obligations to achieve a particular result or obligations to act or refrain from acting which reduce its margin of discretion, sometimes to a considerable degree. This is so, for instance, where, as in the circumstances to which the judgment in *Francovich and Others* relates, Article 189 of the [EC] Treaty [now Article 288 TFEU] places the Member State under an obligation to take, within a given period, all the measures needed in order to achieve the result required by a directive. In such a case, the fact that it is for the national legislature to take the necessary measures has no bearing on the Member State's liability for failing to transpose the directive.

47. In contrast, where a Member State acts in a field where it has a wide discretion, comparable to that of the Community institutions in implementing Community policies, the conditions under which it may incur liability must, in principle, be the same as those under which the Community institutions incur liability in a comparable situation.

[...]

49. As regards the facts of Case C-48/93, the United Kingdom legislature also had a wide discretion. The legislation at issue was concerned, first, with the registration of vessels, a field which, in view of the state of development of Community law, falls within the jurisdiction of the Member States and, secondly, with regulating fishing, a sector in which implementation of the common fisheries policy leaves a margin of discretion to the Member States.

50. Consequently, in each case the German and United Kingdom legislatures were faced with situations involving choices comparable to those made by the Community institutions when they adopt legislative measures pursuant to a Community policy. ...

> 51. Firstly, those conditions satisfy the requirements of the full effectiveness of the rules of Community law and of the effective protection of the rights which those rules confer.
>
> 52. Secondly, those conditions correspond in substance to those defined by the Court in relation to Article 215 in its case law on liability of the Community for damage caused to individuals by unlawful legislative measures adopted by its institutions.

p. 189 ↵ In *Factortame III*, the Court of Justice considered that the conditions governing State liability in damages for breach of EU law should be the same as those governing the liability of the EU itself under Article 340 TFEU (see Chapter 8). Thus the clarity of the EU law breached, and the extent of the State's discretion, were relevant to whether it should be made liable in damages.

5.5.1 The EU law breached must be intended to confer rights on individuals

The *Factortame III* conditions require an applicant to prove that the EU law which has been breached confers rights on individuals. For example, in the *Factortame III* case itself, the Court of Justice accepted that what is now Article 49 TFEU (formerly Article 43 EC), which provides that Member State nationals may move to another Member State as self-employed persons or in order to manage a business, conferred rights on individuals that national courts must protect.

In Case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas* [1996] ECR I-2553, the Court of Justice reached a similar conclusion on Article 35 TFEU, which prohibits Member States from restricting exports (see further 10.8).

Thinking Point

> What 'rights' does Article 35 TFEU provide and for which 'individuals'?

Case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas* [1996] ECR I-2553

> 27. As regards the first condition, as is clear from the answer given to the first question, the United Kingdom's refusal to issue an export licence to Hedley Lomas constituted a quantitative restriction on exports contrary to Article 34 of the [EC] Treaty [now Article 35 TFEU] which could not be justified under Article 36 [EC, now Article 36 TFEU]. Whilst Article 34 imposes a prohibition on Member States, it also creates rights for individuals which the national courts must protect (*Pigs Marketing Board v Redmond* (Case 83/78) [1978] ECR 2347).

In *AD v Secretary of State for the Home Department* [2015] EWHC 663 (QB), [2016] 2 CMLR 37 (see also 5.5.2), the applicant's claim for asylum in the UK was rejected and he was deported back to Mongolia, where he was detained before trial, convicted, and imprisoned. He subsequently escaped and returned to the UK, where his second asylum claim was granted. He then claimed damages from the UK government for its failure to
p. 190 implement the Qualification Directive on the criteria for refugee status (Council Directive 2004/83/EC ↵ of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 2004 L304/12) and the Procedure Directive on the procedure for granting refugee status (Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005 L326/13). The High Court of England and Wales held that the Qualification Directive granted rights to individuals to be granted refugee status if the criteria were met.

5.5.2 The breach must be sufficiently serious

In *Factortame III*, the Court of Justice stated that the decisive test for finding a breach of EU law to be sufficiently serious was whether the Member State had 'manifestly and gravely disregarded the limits on its discretion' (*Factortame III*, at para 55). The Court also provided in *Factortame III* (at para 56) a list of factors that the national court should take into consideration in assessing whether the breach was sufficiently serious:

(a) the clarity and precision of the rule breached;

(b) the measure of discretion left by that rule to the national or EU authorities;

(c) whether the infringement and the damage caused were intentional or involuntary;

(d) whether any error of law was excusable or inexcusable;

(e) the fact that the position taken by an EU institution may have contributed towards the omission; and

(f) the adoption or retention of national measures or practices contrary to EU law.

The Court in *Köbler* laid down an additional criterion for establishing the existence of a sufficiently serious breach in cases involving judicial breaches:

(g) non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under Article 267 TFEU (see further Chapter 6 on Article 267 TFEU).

It can readily be seen that the first factor on the list, the clarity and precision of the EU law that has been breached, is crucial. If it is clear, then it is likely that any infringement was intentional and that any error of law is inexcusable—and thus that the breach is sufficiently serious. If the law breached is unclear in its terms, then it may be easier to argue that the infringement was involuntary and that any error of law is excusable—and thus that the breach is not sufficiently serious. A lack of clarity may also give greater scope for arguing that the State has wide discretion, again supporting the conclusion that any breach by it is not sufficiently serious.

The Court's application of this list of factors in the *Factortame III* case itself, as set out in the following extract, provides a useful example of how they should be used to support an argument on a particular set of facts that there is—or is not—a sufficiently serious breach.

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Joined Cases C-46 & 48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame* (*'Factortame III'*) [1996] ECR I-1029

54. The first condition is manifestly satisfied in the case of Article 30 of the [EC] Treaty [now Article 34 TFEU], the relevant provision in Case C-46/93, and in the case of Article 52 [EC, now Article 49 TFEU], the relevant provision in Case C-48/93. Whilst Article 30 imposes a prohibition on Member States, it nevertheless gives rise to rights for individuals which the national courts must protect (Case 74/76 *Iannelli & Volpi v Meroni* [1977] ECR 557, [1977] 2 CMLR 688, paragraph 13). Likewise, the essence of Article 52 is to confer rights on individuals (Case 2/74 *Reyners* [1974] ECR 631, [1974] 2 CMLR 305, paragraph 25).

55. As to the second condition, as regards both Community [now Union] liability under Article 215 [EC, now Article 340 TFEU] and Member State liability for breaches of Community law [now EU 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.

[...]

61. The decision of the United Kingdom legislature to introduce in the Merchant Shipping Act 1988 provisions relating to the conditions for the registration of fishing vessels has to be assessed differently in the case of the provisions making registration subject to a nationality condition, which constitute direct discrimination manifestly contrary to Community law, and in the case of the provisions laying down residence and domicile conditions for vessel owners and operators.

62. The latter conditions are prima facie incompatible with Article 52 of the Treaty in particular, but the United Kingdom sought to justify them in terms of the objectives of the common fisheries policy. In the judgment in *Factortame II*, cited above, the Court rejected that justification.

63. In order to determine whether the breach of Article 52 thus committed by the United Kingdom was sufficiently serious, the national court might take into account, *inter alia*, the legal disputes relating to particular features of the common fisheries policy, the attitude of the Commission, which made its position known to the United Kingdom in good time, and the assessments as to the state of certainty of Community law made by the national courts in the interim proceedings brought by individuals affected by the Merchant Shipping Act.

64. Lastly, consideration should be given to the assertion made by Rawlings (Trawling) Ltd, the 37th claimant in Case C-48/93, that the United Kingdom failed to adopt immediately the measures needed to comply with the Order of the President of the

> Court of 10 October 1989 in *EC Commission v United Kingdom* (cited above), and that this needlessly increased the loss it sustained. If this allegation—which was certainly contested by the United Kingdom at the hearing—should prove correct, it should be regarded by the national court as constituting in itself a manifest and, therefore, sufficiently serious breach of Community law.

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Review Question

> Why did the Court in *Factortame III* consider the UK's breach of Article 52 EC (now Article 49 TFEU) to be 'sufficiently serious'?
>
> *Answer*: To summarize briefly, the Court took into account:
>
> - the previous legal disputes concerning the Common Fisheries Policy (CFP), which had clarified the law;
> - the fact that the EU Commission had made known to the UK at an early stage its view that the measures were in breach of EU law;
> - the fact that the national courts hearing the case had considered EU law to be clear in this respect; and
> - the allegation that the UK had failed to comply promptly with the judgment of the Court pursuant to Article 258 TFEU proceedings brought against the UK by the EU Commission (see further 7.1 on the enforcement procedure under Article 258 TFEU), which, if true, in itself indicated that the UK had breached EU law to a sufficiently serious extent.

In Case C-392/93 *R v HM Treasury, ex p British Telecommunications plc* [1996] ECR I-1631, the Court of Justice held that the breach was not sufficiently serious because the UK's interpretation of the Directive on which the flawed national transposing measures were based was a reasonable, though incorrect, interpretation in the circumstances.

Thinking Point

> While reading the following extract, consider why the Court reached this conclusion.

Case C-392/93 *R v HM Treasury, ex p British Telecommunications plc* [1996] ECR I-1631

41. Whilst it is in principle for the national courts to verify whether or not the conditions governing State liability for a breach of Community law [now EU law] are fulfilled, in the present case the Court has all the necessary information to assess whether the facts amount to a sufficiently serious breach of Community law.

42. According to the case law of the Court, a breach is sufficiently serious where, in the exercise of its legislative powers, an institution or a Member State has manifestly and gravely disregarded the limits on the exercise of its powers (judgments in *HNL and Others v EC Council and EC Commission* [Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *HNL and Others v EC Council and EC Commission* [1978] ECR 1209], and in *Brasserie du Pêcheur* and *Factortame*). Factors which the competent court may take into consideration include the clarity and precision of the rule breached (*Brasserie du Pêcheur* and *Factortame*).

43. In the present case, Article 8(1) is imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it by the Court in this judgment, the interpretation given to it by the United Kingdom in good faith and on the basis of
p. 193 arguments which are not entirely devoid of substance. That interpretation, which was also shared by other Member States, was not manifestly contrary to the wording of the directive or to the objective pursued by it.

44. Moreover, no guidance was available to the United Kingdom from case law of the Court as to the interpretation of the provision at issue, nor did the Commission raise the matter when the 1992 Regulations were adopted.

45. In those circumstances, the fact that a Member State, when transposing the directive into national law, thought it necessary itself to determine which services were to be excluded from its scope in implementation of Article 8, albeit in breach of that provision, cannot be regarded as a sufficiently serious breach of Community law of the kind intended by the Court in its judgment in *Brasserie du Pêcheur* and *Factortame*.

46. The answer to Question 4 must therefore be that Community law does not require a Member State which, in transposing the directive into national law, has itself determined which services of a contracting entity are to be excluded from its scope in implementation of Article 8, to compensate that entity for any loss suffered by it as a result of the error committed by the State.

The Court concluded in *BT* that the EU legislation at issue was unclear and that there was no appropriate case law for the UK to consult for clarification. Further, the Commission had not raised any objection when the UK adopted its transposing measures. The UK did not, therefore, incur liability in damages.

The Court came to a similar conclusion in Joined Cases C-283, 291, & 292/94 *Denkavit International BV and VITIC Amsterdam BV and Voormeer BV v Bundesamt für Finanzen* [1996] ECR I-5063 (see also 5.5.3). In that case, the German government had failed to correctly transpose Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ 1990 L225/6. The Court ruled that this breach of EU law was not sufficiently serious to give rise to liability in damages because the rule breached (the Directive) was not clear and precise. Almost all Member States had adopted the same, incorrect, interpretation as Germany and there had been no case law from the Court of Justice giving guidance as to how this Directive was to be interpreted.

In *R v Secretary of State for the Home Department, ex p Gallagher* [1996] 2 CMLR 951, the Court of Appeal of England and Wales examined the seriousness of a breach of EU law by the UK government in the light of the Court of Justice's ruling earlier in the same proceedings (in Case C-175/94 *R v Secretary of State for the Home Department, ex p Gallagher* [1995] ECR I-4253) that the procedure laid down by the Prevention of Terrorism (Temporary Provisions) Act 1989 for the exclusion from the UK of suspected terrorists was contrary to Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ 1964 56/850 (repealed by Directive 2004/38/EC of the European Parliament and of the Council of 29
p. 194 April 2004 on the right of citizens ↵ of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L158/77—see Chapter 11). Gallagher had been arrested and excluded from the UK under the 1989 Act on the ground that he had been involved in acts of terrorism, but his subsequent claim for damages from the UK government was rejected by the Court of Appeal. Applying the *Factortame III* test, it ruled that the UK's breach of EU law was not sufficiently serious and had not, in any event, caused loss to Gallagher (see 5.5.3). Its reasoning as to why the breach was not sufficiently serious appears in the following extract.

R v Secretary of State for the Home Department, ex p Gallagher [1996] 2 CMLR 951, Court of Appeal

> 26. If, as we have concluded, it is necessary for Mr Gallagher to show that the United Kingdom's breach in failing correctly to transpose the Directive into domestic law was 'sufficiently serious', we conclude that he has failed to do so. McCullough J at first instance and Hirst LJ in the Court of Appeal did not consider it arguable that Schedule 2 of the 1989 Act in its unamended form violated Community law [now EU law]. In the Court of Appeal Farquharson LJ regarded Mr Gallagher's complaint as technical, and Steyn LJ went no further than to say that he did not regard it as self-evident that the argument advanced on behalf of Mr Gallagher should necessarily be regarded as technical. There is nothing to suggest that the United Kingdom wilfully deprived suspects of rights which the Directive was intended to confer, and the original statutory procedure (if operated fairly and in good faith) was one which could well be thought to give effective protection. While the chronology in Schedule 2 departed from that prescribed in the Directive, and could thus be described as 'manifest', we do not think the departure can be described as 'grave': the subject of an order was not obviously worse off as a result, and might be better; although notified to the Commission no objection had been taken to the United Kingdom measure; and three judges held there was no violation of Community law. There was authority of the Court of Justice which showed that expulsion should not precede reference to the competent authority (*Pecastaing v Belgium* (Case 98/79) [1980] ECR 691), but under Schedule 2 in its unamended form the subject of an order could, if he exercised his statutory rights, avoid expulsion until his case had been duly reconsidered.
>
> 27. After the argument in this appeal had been concluded, the Court of Justice gave judgment in *R v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Limited* (Case C-5/94) [1996] All ER (EC) 493. The background to the case was a Council directive prescribing minimum standards for the humane slaughter of cattle. The Ministry refused Hedley Lomas a licence to export sheep for slaughter in a named Spanish slaughterhouse, thereby admittedly imposing a quantitative restriction on exports, on the ground that some Spanish slaughterhouses did not comply with the standards required by the Directive. This was held to be a breach of Community law, and the question of compensation accordingly arose.
>
> [...]
>
> 29. The contrast with the present case is in our view obvious. Here, the United Kingdom certainly was called upon to make a legislative choice, and certainly did enjoy a measure of discretion. The choice made, although wrong, was not obviously wrong in

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> substance. It was not, as in *Hedley Lomas*, committing what was on its face a blatant breach of the Treaty, without any evidence on which it could rely to justify its conduct. The present case was not one of 'mere infringement'.

Review Question

> What factors did the Court of Appeal take into account in ruling that the breach in *Gallagher* was not sufficiently serious?
>
> *Answer*: The Court of Appeal noted that persons subject to the 1989 Act were not 'obviously worse off' as a result of the breach, the Commission had not objected to the Act when notified of it, and the UK had enjoyed a measure of discretion which it had not blatantly exceeded.

A further example is provided by *AD v Secretary of State for the Home Department* [2015] EWHC 663 (QB), [2016] 2 CMLR 37 (for the facts of this case, see 5.5.1). The High Court of England and Wales held that the alleged breaches in relation to the rejection of the applicant's first claim for asylum were not sufficiently serious because, even if the decision had been wrong, the errors had been excusable, and the Secretary of State had not manifestly and grossly disregarded the limits on her powers. She had had regard to the applicant's principal claims, but also to the fact that he could reasonably relocate within Mongolia to places where his human rights would not be threatened, and to the fact that he could expect a fair trial. (The applicant had, at that time, failed to highlight the poor conditions of pretrial detention that were relevant to the success of his second asylum claim.)

There are, however, circumstances in which a careful application of the detailed criteria laid down by the Court of Justice in *Factortame III*, as seen in the cases just discussed, is not necessary.

First, the Court of Justice in Case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas* [1996] ECR I-2553 (see 5.4.3 for the facts of this case) held that the Member States had no discretion as to whether to comply with what is now Article 35 TFEU on the free movement of goods (see 10.8), and so any infringement of that Article must automatically be a sufficiently serious breach.

This is open to criticism both as a general principle and on the facts of the case.

In principle, the whole idea of according the automatic status of a 'sufficiently serious breach' to certain breaches is problematic because the main element of the *Factortame III* test—and the feature that distinguishes it from *Francovich* (see further 5.6)—is the very examination of *whether* there has been a sufficiently serious breach, and yet the Court appears to be prepared to omit that examination on a rather arbitrary basis.

In practice, it is problematic because Member States do, in fact, have a discretion over the implementation of Article 35, because they can restrict the free movement of goods if one of the exceptions contained in Article 36 TFEU applies (see further 10.8.11). In *Hedley Lomas*, the UK had argued that one of these exceptions did

p. 196 indeed apply. Admittedly, the Court of ↵ Justice did not accept this argument, but it seems a little unjust for the Court then to rule that since the UK had been wrong to consider that an exception under Article 36 applied, it had had no discretion in the application of Article 35 and must therefore be guilty of a sufficiently serious breach. There was no evidence that the UK could have known that its interpretation of Article 36 was incorrect until the Court of Justice gave judgment in the case itself.

In contrast, a fairer approach by the Court can be seen in *Köbler*, in which the Court of Justice concluded that although the national court had reached an incorrect conclusion and refused to make a reference, its infringement of EU law on the free movement of persons (see further Chapter 11) was not sufficiently serious. This was because EU law did not expressly state whether discrimination such as that at issue on the facts could be justified, this point had not been dealt with previously by the Court, and the answer was not obvious. Secondly, in *Factortame III*, the Court noted that a breach of EU law would clearly be sufficiently serious if that breach had persisted despite the existence of a judgment confirming the existence of a breach, or a preliminary ruling (see further Chapter 6 on the preliminary reference procedure), or settled case law of the Court from which it was clear that the conduct in question constituted a breach.

A rather different problem with the application of the 'sufficiently serious breach' requirement, at least in English law, was highlighted by the UK's Supreme Court in *R (Chester) v Secretary of State for Justice and another; McGeoch v The Lord President of the Council and another* [2013] UKSC 63, [2013] 3 WLR 1076. In these joined cases, two convicted prisoners challenged the ban under English law on prisoner voting and sought damages from the UK government. The Supreme Court held that the ban did not infringe EU law and that, even if it had done, damages would not be awarded. In relation to the seriousness of the breach, it made the following comments (*per* Lord Mance).

R (Chester) v Secretary of State for Justice and another; McGeoch v The Lord President of the Council and another [2013] UKSC 63, [2013] 3 WLR 1076

> 79. The second condition is that the breach was sufficiently serious. This in turn depends, under European law, on whether Parliament, the relevant United Kingdom authority, can be said manifestly and gravely to have disregarded the limits on its discretion. This must be judged taking into consideration
>
> 'the clarity and precision of the rule breached; the measure of discretion left by that rule to the national or Community authorities; whether the infringement and the damage caused was intentional or involuntary; whether any error of law was excusable or inexcusable': para 77 above.
>
> In relation to voting by convicted prisoners, the United Kingdom legislature enjoyed a wide margin of discretion. Further, this is in a context where there has been and remains a considerable lack of certainty about what the parameters of that discretion may be. This is evident from a reading of the Strasbourg case law, particularly the two *Hirst* judgments, the chamber judgment in *Frodl* v *Austria* [Application No 20201/04 (2011)] 52 EHRR 267 and the ↵ Grand Chamber judgment overruling the chamber judgment in *Scoppola* [*Scoppola v Italy (No 3)* Application No 126/05 [2012] ECHR 868], in which the European Court of Human Rights has sought to identify the relevant considerations and to apply them to particular facts. Accordingly, it is clearly very arguable that this condition is not met.

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5.5.3 Causation of damage

The issue of causation is, in principle, for the national court to determine on the facts (although, on occasion, the Court of Justice has asserted that it has the necessary information to do this itself (see, for example, Joined Cases C-283, 291, & 292/94 *Denkavit International BV and VITIC Amsterdam BV and Voormeer BV v Bundesamt für Finanzen* [1996] ECR I-5063, at para 49)). A good example of such a determination is provided by *Gallagher* (discussed at 5.5.2), in which the Court of Appeal of England and Wales ruled that, in addition to the fact that the breach of EU law was not sufficiently serious, there was no causal link between the breach and Gallagher's losses.

Thinking Point

> Why did the Court of Justice consider that even if the UK had properly transposed the Directive into national law, Gallagher could—and indeed would—have been lawfully excluded from the UK?

R v Secretary of State for the Home Department, ex p Gallagher [1996] 2 CMLR 951, Court of Appeal

> 19. There is nothing whatever to suggest that the Home Secretary's decision would have been any different had he awaited receipt of Mr Gallagher's representations and the report of the nominated person before making an exclusion order. The evidence is clear that after receiving the report and learning the effect of the representations the Home Secretary considered the case *de novo*, which must be taken to mean that he had an open mind. It was because of the unlikelihood that the order of events could have made any substantial difference to the outcome that the members of the Court of Appeal in February 1994, with varying degrees of emphasis, regarded Mr Gallagher's complaint as being, or at least appearing, technical. Had the nominated person favoured revocation and the Home Secretary exclusion, it might be plausible to suggest that the nominated person's opinion would have been more influential if it had preceded the making of any decision; but here the nominated person and the Home Secretary were of one mind. It is in our view clear that even if the procedure prescribed in the current Regulations had been followed, the outcome would have been the same; it is, however, probable that in such event Mr Gallagher would have been detained longer.
>
> 20. This is not a case in which Mr Gallagher is entitled to be compensated for the loss of a chance of securing a favourable result. … Mr Gallagher has established a breach of Community law [now EU law], but he cannot show that that breach probably caused him to be excluded from the United Kingdom when he would not otherwise have been excluded.

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Another helpful example of the application of the requirement of causation to the facts is provided by Case C-319/96 *Brinkmann Tabakfabriken GmbH v Skatteministeriet* [1998] ECR I-5255 (see also 5.6), in which the applicant argued that the Danish government was responsible for two related breaches of EU law. First, it had failed to transpose the relevant provisions of the Second VAT Directive (Second Council Directive 67/228/EEC of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes, OJ 1967 L1303/67) into Danish law. Second, although the Danish tax authorities had implemented those provisions in practice, they had done so incorrectly. The Court of Justice held, first, that the failure to transpose the

Directive into Danish law had not caused Brinkmann's loss, because the Danish tax authorities had immediately implemented the provisions of the Directive in practice and therefore the lack of legislation had not caused the damage alleged by Brinkmann. It held, second, that the damage had indeed been caused by the tax authority's incorrect interpretation of the Directive, but that this interpretation was not manifestly contrary to the wording or the aim of the Directive and so the breach of EU law was not sufficiently serious to give rise to liability.

The Court of Justice has made it clear that the chain of causation will not be broken by the possibility of the applicant making an alternative claim via direct effect (see 4.1). In Case C-150/99 *Stockholm Lindöpark v Sweden* [2001] ECR I-493, the Court noted that the fact that the provisions of the Sixth VAT Directive (Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes, OJ 1977 L145/1), which Sweden had failed to transpose correctly into national law, were sufficiently clear to be capable of having direct effect might '[a]t first sight' suggest that an action for State liability in damages 'does not seem necessary' (*Stockholm Lindöpark*, at para 35). However, the Court went on to point out that it had established the possibility of an action against the State for damages to be inherent in the EU Treaties and that, on the facts, Sweden was guilty of a sufficiently serious breach of EU law.

As to the losses that can be claimed to have been caused by a breach of EU law, the Court of Justice in *Factortame III* stated that, in determining the extent of the loss or damage for which compensation would be awarded, the national court should have regard to 'whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit ↵ its extent and whether, in particular, he availed himself in time of all the legal remedies available to him' (*Factortame III*, at para 84)—in other words, that the applicant must mitigate their loss.

5.6 Comparing the conditions for liability

Although the *Francovich* and *Factortame III* conditions for State liability are different, the differences are more apparent than real, as the Court of Justice itself concluded in Joined Cases C-178, 179, & 188–90/94 *Dillenkofer and others v Germany* [1996] 3 CMLR 469, a case involving the German government's failure to transpose the Package Travel Directive (Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements ..., OJ 2015 L326/1) into its national law.

Thinking Point

> While reading the following extract, consider what similarities and differences between the *Francovich* and *Factortame III* tests were noted by the Court of Justice.

Joined Cases C-178, 179, & 188–90/94 *Dillenkofer and others v Germany* [1996] ECR I-4845

22. Moreover, it is clear from the *Francovich* case which, like [*Brasserie du Pêcheur* and *Factortame, British Telecommunications*, and *Hedley Lomas*], concerned non-transposition of a directive within the prescribed period, that the full effectiveness of the third paragraph of Article 189 of the [EC] Treaty [now Article 288 TFEU] requires that there should be a right to reparation where the result prescribed by the directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State's obligation and the loss and damage suffered by the injured parties.

23. In substance, the conditions laid down in that group of judgments are the same, since the condition that there should be a sufficiently serious breach, although not expressly mentioned in *Francovich*, was nevertheless evident from the circumstances of that case.

24. When the court held that the conditions under which State liability gives rise to a right to reparation depended on the nature of the breach of Community law [now EU law] causing the damage, that meant that those conditions are to be applied according to each type of situation.

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25. On the one hand, a breach of Community law is sufficiently serious if a Community [now Union] institution or a Member State, in the exercise of its rule-making powers, manifestly and gravely disregards the limits on those powers (see *HNL and Others v EC Council and EC Commission* (Joined Cases 83 & 94/76, 4, 15 & 40/77) [1978] ECR 1209; *Brasserie du Pêcheur and Factortame*; and *British Telecommunications*). On the other hand, if, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see *Hedley Lomas*).

26. So where, as in *Francovich*, a Member State fails, in breach of the third paragraph of Article 189 of the Treaty, to take any of the measures necessary to achieve the result prescribed by a directive within the period it lays down, that Member State manifestly and gravely disregards the limits on its discretion.

27. Consequently, such a breach gives rise to a right to reparation on the part of individuals if the result prescribed by the directive entails the grant of rights to them, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State's obligation and the loss and damage suffered by the injured parties: no other conditions need be taken into consideration.

> 28. In particular, reparation of that loss and damage cannot depend on a prior finding by the Court of an infringement of Community law attributable to the State (see *Brasserie du Pêcheur*, paragraphs 94 to 96), nor on the existence of intentional fault or negligence on the part of the organ of the State to which the infringement is attributable (see paragraphs 75 to 80 of the same judgment).
>
> 29. The reply to Questions 8, 9, 10, 11 and 12 must therefore be that failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State's obligation and the loss and damage suffered.

In *Dillenkofer*, the Court of Justice observed that both sets of conditions effectively required (1) a sufficiently serious breach of (2) a rule of law that gave rights to individuals, which (3) caused loss to the applicant. The key difference between them, according to the Court, was that instead of expressly requiring a sufficiently serious breach as per the *Factortame III* test, the *Francovich* test required the total non-transposition of a
p. 201 Directive, which can be seen simply ↵ as an obvious example of a sufficiently serious breach. The requirement in *Francovich* that the Directive give rights to individuals is effectively the same as the requirement in *Factortame III* that the rule of law be for the protection of individuals. The *Francovich* test can thus be seen as a very particular example of the broader test that the Court of Justice subsequently developed in *Factortame III*.

Case C-319/96 *Brinkmann Tabakfabriken GmbH v Skatteministeriet* [1998] ECR I-5255 (see also 5.5.3) provides a further example of the interplay between the two tests. To recap, the Danish government was potentially responsible for two breaches: it had failed to transpose the Second VAT Directive into Danish law; and its tax authorities, which had nonetheless immediately implemented the provisions of the Directive in practice, had done so incorrectly. There was thus both a *Francovich*-type breach (the government's failure to transpose the Directive into national law) and a *Hedley Lomas*-type breach (the failure of the tax authorities to apply the Directive correctly in practice). The Court of Justice first cited *Dillenkofer* on the principle of liability for failure to transpose a Directive, noting that '[i]t is true that failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of [EU] law' (*Brinkmann*, at para 28), and examined whether this breach had caused Brinkmann's loss (see 5.5.3). It then examined the issue of whether the subsequent incorrect interpretation of the Directive by the tax authorities was a sufficiently serious breach according to the *Factortame III* test (see further 5.5.2).

The key points of the development of the Court of Justice's jurisprudence in the area of State liability are summarized in Table 5.1.

Table 5.1 Summary of Court of Justice jurisprudence on State liability

Type of breach	Case establishing the principle of liability	Case setting out conditions governing liability
Failure to transpose a Directive (at all) (automatically regarded as a sufficiently serious breach)	*Francovich*	*Francovich* (but similar to *Factortame III*)
Enactment of domestic legislation that conflicts with EU law	*Factortame III*	*Factortame III*
Failure to transpose a Directive correctly	*BT*	*Factortame III*
Administrative policy that conflicts with EU law	*Hedley Lomas*	*Factortame III*
Judgment by a court of last instance that makes an error of EU law, having failed to make a preliminary reference	*Köbler*	*Factortame III*

The methodology of the Court of Justice in establishing whether liability exists in principle and then applying the appropriate test to establish whether it exists in practice is summarized in Figure 5.1.

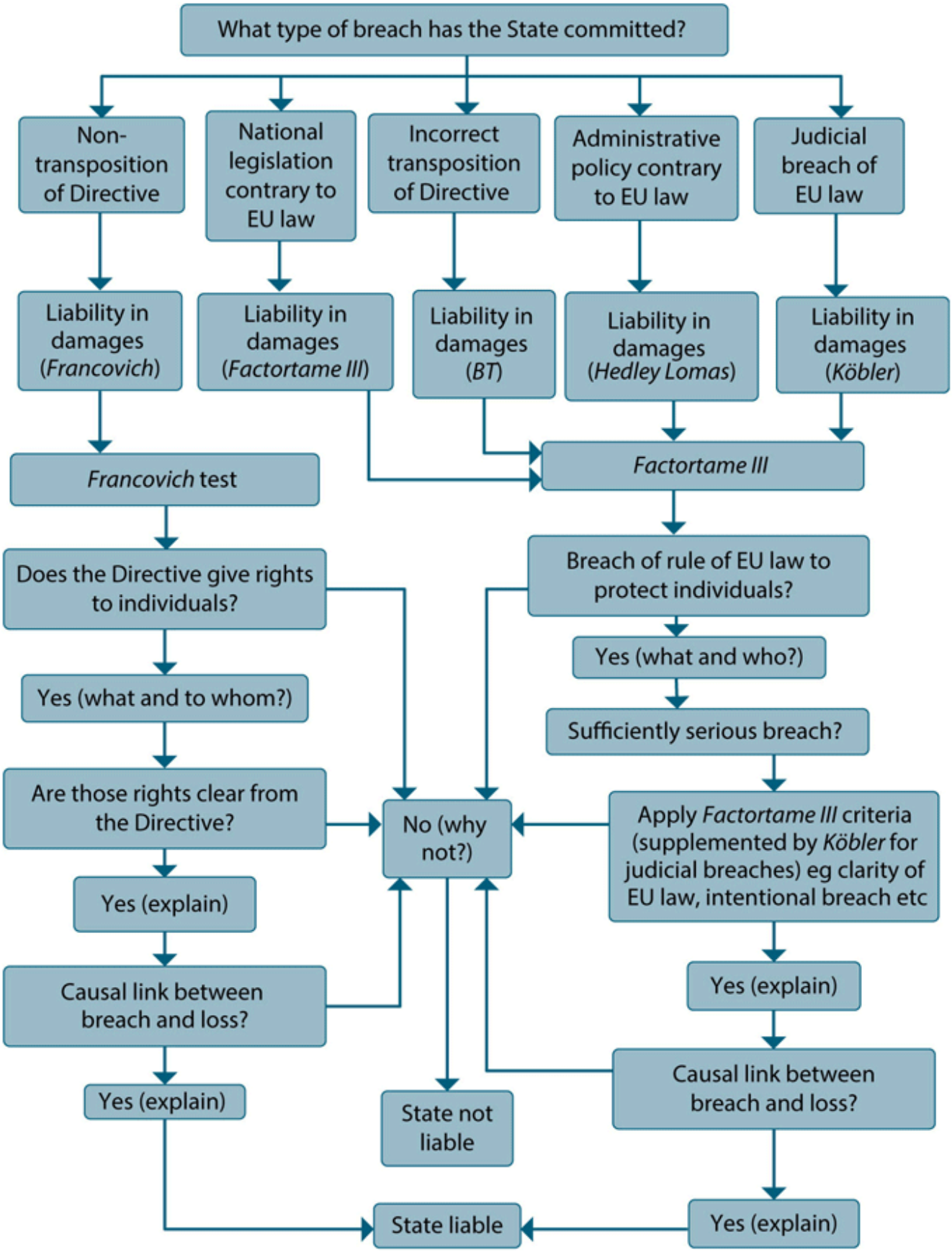

Figure 5.1 Identifying the existence of State liability in a particular scenario

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5.7 Concurrent action against the EU

In some scenarios, individuals or businesses might potentially have not only a claim in damages against the Member State in the national courts, but also a claim in damages against the EU itself in the EU Courts (see Chapter 8 on damages claims against the EU). This possibility is discussed in detail at 8.9.2.

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5.8 The impact of Brexit

When the UK left the EU (see further Chapter 16 and 3.1), the UK government ceased to be vulnerable to actions for EU Member State liability in damages. The European Union (Withdrawal) Act 2018 (see further 16.2.2) provides explicitly (at Sched 1, para 4) that 'There is no right in domestic law on or after [the end of the transition period] to damages in accordance with the rule in *Francovich*' (which may be taken to include all Member State liability claims), with the exception of proceedings relating to anything that occurred before the end of the transition period and which were begun within two years from that date (Sched 8, para 39(7)).

5.9 Conclusions

The principle of State liability in damages for breach of EU law has been developed by the Court of Justice in order to make the rights granted by EU law effective, and as a response to the inadequacies of direct and indirect effect (see Chapter 4). It may thus be seen as a further step in the process begun by the Court when it developed the doctrine of direct effect, and continued by it when it developed the doctrine of indirect effect. The principle of State liability developed by the Court also has some parallels to the principle of EU liability stated in Article 340 TFEU (see Chapter 8). However, it has now grown into its own separate, albeit related, area of jurisprudence.

Summary

- Where the Member State's breach consists of a failure to transpose a Directive, it will incur liability if the Directive gives rights to individuals, the content of those rights is clear from the Directive, and the State's breach caused loss to the applicant (*Francovich*).
- Where the Member State's breach consists of the enactment of national legislation that is contrary to EU law (*Factortame III*), incorrect transposition of a Directive (*BT*), administrative practices or policies that are contrary to EU law (*Hedley Lomas*), or a wrongful judgment on EU law by a court of last instance after a refusal to make a reference under Article 267 TFEU (*Köbler*), the State will incur liability if the law breached is for the protection of individuals, is sufficiently serious, and has caused loss to the applicant (*Factortame III*).

Brexit

- Brexit means that the principle of Member State liability ceases to apply to the UK.

Further Reading

Articles

G Anagnostaras, 'The Allocation of Responsibility in State Liability Actions for Breach of Community Law: A Modern Gordian Knot?' (2001) 26(2) EL Rev 139

p. 204 ↵ Comprehensively reviews and comments on the pre-*Köbler* jurisprudence on the range of public bodies whose acts can give rise to liability on the part of the State.

RW Davis, 'Liability in Damages for a Breach of Community Law: Some Reflections on the Question of Who to Sue and the Concept of "the State"' (2006) 31(1) EL Rev 69

Discusses the variety of public bodies whose acts can give rise to State liability.

M Dougan, 'Addressing Issues of Protective Scope within the *Francovich* Right to Reparation' (2017) 13(1) ECL Review 124

Examines the purpose and nature of the *Francovich* State liability claim.

D Nassimpian, '… And We Keep on Meeting: (De)Fragmenting State Liability' (2007) 32(6) EL Rev 819

Considers State liability in the context of the Court of Justice's wider commitment to ensuring effective judicial protection, for example under Article 263 TFEU.

S Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?' (2006) 17(2) EBL Rev 299

Analyses the conditions for State liability and their relationship to direct effect.

J Steiner, 'From Direct Effects to *Francovich*: Shifting Means of Enforcement of Community Law' (1993) 18 EL Rev 3

Examines the relationship between direct effect, indirect effect, and State liability.

Questions

[*Note*: The following scenario is the same as that set out at the end of Chapter 4, but the questions are different.]

Rashid works for Humber plc, an Irish company created to build and operate a railway bridge across the Shannon estuary in Ireland. It is authorized to do so under s 1 of Ireland's (fictitious) Estuary Bridges Act 2012, which also gives it powers to regulate the connecting train service.

(Fictitious) Directive 2020/2020 requires Member States to take all measures necessary to ensure that bridge workers are provided with appropriate safety equipment, including hard hats. The Act merely provides that licence holders must ensure that their employees are aware of safety hazards and are advised to wear appropriate clothing.

Rashid sustained a serious head injury when a cable fell on him during construction of the bridge and, as a result, is unfit to work. He claims that his injury was caused by Humber plc's failure to provide workers with hard hats. Humber plc claims that it had made Rashid aware of the risks and had advised him to wear a hard hat, although the company itself did not provide them. It argues that the Act requires only the provision of information and advice.

1. Advise Rashid as to whether he has any cause of action against the Irish government.
2. How, if at all, would your answer to question 1 differ if the Estuary Bridges Act were dated 2021?

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-5-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-5-self-test-questions?options=showName>* **with feedback.**

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