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MASTER THESIS

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„Civil liability of Member States in the eye of the European Court of Justice“

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Bálint Horváth

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Betreut von / Supervisor:	Dr. Maria Sturm LLM.

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List of abbreviations

Treaty on the European Union as TEU

Treaty on the Functioning of the European Union as TFEU

European Court of Justice as ECJ or Court

Commission of the European Union as Commission

Council of the European Union as Council

N.V. Algemene Transport- en Expeditie Onderneming van Gend en Loos as Van Gend en Loos

Ente Nazionale Energia Elettrica as ENEL

Recommendation No. R (84) 15 on the committee of ministers to member states relating to public liability as Recommendation

Aktien-Zuckerfabrik Schöppenstedt as Schöppenstedt

Krohn & Co. Import-Export (GmbH & Co. KG) as Krohn

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Denkavit International BV as Denkavit

VITIC Amsterdam BV as VITIC

Voormeer BV as Voormeer

Traghetti del Mediterraneo SpA as TDM

Tirrenia di Navigazione as Tirenia

Italian Lira as LIT

I. Introduction

The complex subject of civil liability in relation of Member States has been always a popular topic among lawyers of the European Union, judges and academic commentators alike, who sometimes used to represent sharply contradictory[1] opinions.[2] In the beginning it soon turned out, that the Treaties regulate this topic very narrowly. Lack of preciseness and broad legislation gave rise to an opportunity for the European Court of Justice to fill in the gap with case law. Furthermore, some common initiatives[3] were carried out in order to coordinate Member States towards a mutual point, which resulted in construction of EU law on the topic. After a short historical review, my aim is to introduce the reader into the issue of civil liability of Member States primarily through ECJ case law by discussing a wide variety of classical and significant cases and to provide a comprehensive structure and general understanding in relation to the topic. These cases can be divided into three major groups constituting breaches of EU law, in particular cases that arose from ommission of transposition of EU Directives into national law, incorrect transpositions of a Directive and simply disregarding EU law by national legislation. Although a considerable amount of ECJ judgements and preliminary rulings are available, without guidance we can get lost in the deep easily. There might be thousands of relevant judgements that fall within the civil liability category, however I only would like to present a non-exhaustive list of cases, that are considered to be far the most important by law literature. The intentionally chosen cases, that I would like to analyse and discuss, step by step contributed to the improvement and enrichment of EU law governing State liability.

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[1] The two main concepts were Absolute Immunity and Functional Immunity on different levels.
[2] see Andrew Dickinson, Lindsay Rae, James P. Looman: State Immunity: Selected materials and commentary, Oxford Univ. Press, 2005., and Hazel Fox, Philippa Webb: The Law of State Immunity, Oxford, 2013.
[3] see eg.: Draft Convention respecting the Competence of Courts in regard to Foreign States, Harward Law School, 1932., and The European Convention on State Immunity, European Treaty Series No.74., 1972.

I would like to find answer for the following questions: How has the ECJ's opinion changed and developed about civil liability of Member States over decades? What was the case in the burden of a young EU and how is the topic approached today? I expect, that after analysation of these milestone cases the issue will be more clear.

II. State Immunity and need for modification

When it comes to civil liability, States' absolute immunity had been a prevailing concept until the 20th century. Pursuant to this approach, States simply could not be impeached for damages caused to individuals and legal entities, as Absolute Immunity doctrine is based on the idea, that legislation is sovereign expression of State power. In the early decades of 20th century there were some admirable rebel initiatives, as it came up due to economical growth and development, that Absolute Immunity is not sustainable any more.[4] Impeachment of State for damages came into being as a result of La Fleurette case in 1938.[5] La Fleurette was an undertaking, which dealt with manufacture of dairy products in France. and an act of parliament forbade to fabricate certain types of dairy products. As a result of this, the company suffered losses and sought for compensation. Afterwards, the idea of application civil liability rules in connection with a State was often used in relation of colony legislation and as a new tendency in cases when France missed to transpose international treaty details into national rules. According to this recent french theory[6], the State is liable for damages caused by legislation, if losses are considerable and they affect concrete individuals or groups of individuals and last but not least, particular statutory instrument did not

[4] Kecskés László: Európa-jogi tapasztalatok az állam jogszabályalkotással okozott károkért való felelősségének megalapozásához, In: Polgári Jogi Kodifikáció, V. évfolyam 4. szám, 2003. page 3-7.

[5] Conseil d'Etat, Assemblée, 14 janvier 1938., Case Sociéte anonyme des produits laitiers „La Fleurette", 51704 Lebon Collection

[6] Paula Giliker: Research Handbook on EU Tort Law, Edward Elgar Publishing, 2017. page 104-105.

exclude liability. The aforementioned single idea was soon picked up by others on international level and led to the born of two different doctrines. While followers of the first one completely rejected State liability, the others alleged that States have to be liable in some particular, but not all cases (the so called Functional Immunity concept). Functional immunity reflects and underlines a fact, namely that if a State is involved in a civil law relationship, it must leave behind public power and have to be considered and treated as an individual legal entity.[7]

Beyond judicial considerations and international sole examples, serious endeavours were made to push legislation towards Functional Immunity within the EU. Institutions, particularly the European Council were engaged dealing with the issue of civil liability of Member States in order to harmonize that field of law on european level. In 1964. Conference of Ministers of Justice sat in Dublin and determined to regulate the State Immunity issue with an international convention. Codification lasted for five years and finally, in 1972. during the seventh Conference of Ministers of Justice, which was held in Basel, European Convention on State Immunity[8] was ratificated. The cited Convention comprises a list of exemptions from immunity that led the European Union towards Functional Immunity. Although it was an official initiative, the Convention did not come up to expectations.[9]

In 1973. by joining the United Kingdom to the European Union collision between Absolute Immunity and Functional Immunity has arisen again. The UK signed the European Convention on State immunity, however they did not implement details as they were completely contraty to national provisions. In that time, law of the UK traditionally followed concept of Absolute Immunity, which resulted in severe arguments conducted with EU institutions. After a few years, doctrine of untouchable State seemed to be collapsed in the UK as well.[10] In 1978. State Immunity Act[11] came

[7] Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 3-7.
[8] European Treaty Series-No. 74-State Immunity, 16. V. 1972.
[9] Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 3-4.
[10] Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám) 2003. page 4.
[11] State Immunity Act, 1978., Chapter 33. In: International Legal Materials, Volume 17:1123

into force making some restrictions on immunity with a view of meeting the requirements of the European Union.[12]

III. Role of the European Court of Justice

Before I start analysing individual legal cases on the subject matter of State liability, I would like to show in the reader how important role the European Court of Justice has and in particular what devices are available for the ECJ to carry out its function.

Today, the judicial system of the European Union is represented by the European Court of Justice, the General Court and specialised courts. These courts has generally compulsory jurisdiction, which means, that neither States, nor Institutions or individuals can opt out. The ECJ comprises one judge from each Member State and is supported by eleven advocates-general, whose role is to act in complete impartiality and independence and to present detailed analysis of the facts of a particular case in a form of opinion. The General Court, also called as „Court of First Instance" consist of two judges from each Member State and has jurisdiction over actions for annulment, actions for failiure to act, actions for compensation for damage, staff disputes and arbitration cases. The General Court in substance reduces the work load of the ECJ and provides a right of appeal, however only on points of law. In exceptional cases, it may rule on questions referred for preliminary ruling, but if the case is expected to require a decision of principle, that may affect consistency of EU law, it can refer the case to the European Court of Justice.[13]

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[12] Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám) 2003. page 4.

[13] Katarína Kalesná: (Danube: Law, Economics and Social Issues Review, volume 9, issue 4) 2018. page261-263., and Article 19 TEU and Articles 252-256-263-265-268-270-272-274 and 267 TFEU

The most important task of the ECJ is to ensure, that EU law is uniformly interpreted and applied within the European Union and to secure that Member States and Institutions are governed by EU law. The European Court of Justice is in general competent –among more- to rule on actions brought by a Member State, an Institution or natural or legal person. Furthermore, it is for the ECJ to provide preliminary rulings at request of national courts or tribunals concerning interpretation of EU law and about validity of acts adopted by the institutions.[14]

To bear in mind the aim of my Master Thesis, I would like to put emphasis on preliminary ruling as a major tool in the field of State liability. Preliminary rulings are procedures that create dialoge between the ECJ and courts and tribunals of Member States through which application and interpretation of EU law become the same in every State. Lower courts and tribunals may, supreme courts and tribunals are obliged to submit questions to the European Court of Justice if in a particular case those questions arose in relation to EU law. Although there is an explicit legal background, that governs a preliminary ruling procedure, the European Court of Justice in early times were strongly criticised during carrying out the interpretation function.[15] Preliminary rulings also provide an opportunity for the ECJ to fill in regulatory gaps found in the Treaties, which include development and createtion of general principles of law concerning protection of human rights and fundamental freedoms. For instance, concerning State liability, when the Treaties provide no rule expressly and specifically, which would govern consequences of breaches of EU law by Member States, it is for the ECJ to rule on such question in accordance with generally accepted methods of interpretation paying attention to fundamental principles of EU legal system and general principles common to national legal systems. Before I start to discuss individual cases, I would like to present two principles, namely supremacy over national law and direct effectiveness which constituted legal grounds for individual claims concerning State liability and in this way, they are of great importance.[16]

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[14] Article 19 TEU

[15] see Van Gend en Loos versus Nederlandse Administratie der Belastingen (Case 26/62), Aktien Zuczkerfabrik Shöppenstedt versus Council of the European Communities (Case 5/71) and Costa versus Enel (Case 6/64) cases

[16] Katarína Kalesná: Preliminary Ruling of the ECJ and the Akcenta Case, In: Danube: Law, Economics and Social Issues Review, volume 9, issue 4, 2018. page261-263.., and Brasserie du Pecheur SA v Federal

IV. Direct effect and Supranationality

1. Van Gend en Loos versus Nederlandse Administratie der Belastingen

Facts of the case

N.V. Algemene Transport- en Expeditie Onderneming van Gend en Loos (hereinafter referred to as Van Gend en Loos) was a company, which dealt with importation of urea formaldehyde from Federal Republic of Germany into the Netherlands. A newly issued list of tariff duties, which contained the imported product in question entered into force on 1st march 1960. That list was based on the adoption of the Brussels nomenclature, which was ratified in the Netherlands in 1959. and increased import duty from 3% to 8% relating to consigned quantity. Due to provisions of list on tariff duties, Van Gend en Loos was charged with increased duty on 9th September 1960.[17] Van Gend en Loos raised an objection agaist the decision, but it was dismissed by Inspector of Customs and Excise at Zaandam on the grounds, that the objection only implied increased rate, not application of tariff provisions. An appeal was submitted against the decision to Tariefcommissie in 1961. After hearings, the Tariefcommissie soon got wise to a fact, that a case in process might affect interpretation of the EEC Treaty. Pursuant to this recognition, it decided to suspend proceeding and referred two questions for preliminary ruling to the European Court of Justice.[18] In the first question,

Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others Joined Cases C-46/93 and C-48/93, 1996. [ECJ] page 2., and Article 267 TFEU
[17] Van Gend en Loos v Nederlandse Administratie der Belastingen Case 26/62., 1963, [ECJ] page 1-5.
[18] Case 26/62., 1963, [ECJ] page 5.

Tariefcommissie asked the ECJ whether Article 12 of EEC Treaty[19] has to be interpreted as to has direct effect, and individuals has the right to rely upon them before national courts. The substance of second question was, if an applied increased duty is contrary to the prohibition embodied by Article 12 of EEC Treaty.[20]

Considerations

Van Gend en Loos repeated its previous argument before the ECJ stating, that an imposition of increased duty rate violated provisions laid down in Article 12 of EEC Treaty, which prohibited any increase concerning existing duties. The company complained, that invoked Article has no need for any further measures from the side of Member States, that is individuals can rely upon this rule in case of infringement before national courts. Van Gend en Loos also mentioned the idea, that EEC Treaty intended to confer rights on individuals alike.[21]

Government of the Netherlands argued, that only Member States and the Comission are entitled to make an initiative in case of infringement of EU law. Furthermore, individuals had no right to approach the ECJ. In addition to this, Government of the Netherlands interpreted Article 12 of EEC Treaty in a way, which imposes obligations on Member States who have wide discretion to decide how to meet with its requirements.[22] According to the opinion of Belgian Government (who was also affected in the dispute), the ECJ had no right to give answer for the first question as only national courts are authorised to determine under national constitutional law, which international treaty prevails. Morover, they rejected the concept of direct effect as well. Both of them came to the conclusion, that the ECJ is not entitled to investigate the

[19] Article 12. EEC Treaty (Rome version): „Member States shall refrain from introducing between themselves any new customs duties on imports or export sor any charges having equivalent effect, and from increasing those which they already apply in their trade with each other."
[20] Case 26/62., 1963, [ECJ] page 3.
[21] Azoulai Loic, Miguel Poiares Maduro: The Past and Puture of EU law: The Classics of EU law Revisited on the 50th Anniversary of the Rome Treaty, Hart Publishing, 2010. page 35.
[22] Case 26/62., 1963, [ECJ] page 7-8.

referred questions in form of preliminary ruling as they imply application of national rules and not interpretation of EU law.[23]

ECJ opinion and assessment

The European Court of Justice did not share the opinions of governments concerning lack of jurisdiction. It held, that the questions referred had the aim of EU law interpretation based on their wording. The ECJ made it’s investigation of EU law by considering spirit, general shame and wording of those provisions and made often-cited key statements, which are of great importance affecting the whole subsequent case law.[24]

„The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independetnly of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."[25]

The ECJ referred to the fact, that the functioning of the common market was of direct concern to interested Member States in the Community. Moreover, the Treaty must be considered to be more, than an intertational agreement, which creates obligations between contracting States. Furthermore, the ECJ supported its finding with the fact, that preamble of the Treaty refers not only to governments, but to people alike. In addition to this, ECJ paid some attention to critics in relation of procedure and interpretation. [26]

It held, that „the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and nationals."[27]

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[23] Case 26/62., 1963, [ECJ] page 6. and 8.
[24] Case 26/62., 1963, [ECJ] page 11-12.
[25] Case 26/62., 1963, [ECJ] page 12.
[26] Azoulai Loic, Miguel Poiares Maduro, Hart Publishing, 2010. page 35-36.
[27] Azoulai Loic, Miguel Poiares Maduro, Hart Publishing, 2010., page 36.

Pursuant to finding of the ECJ, Article 12 of EEC Treaty created a clear and unconditional prohibition of customs duties and charges, which do not need any implementation measures from the side of Member States. All in all, the ECJ introduced principle of direct effect, which considered to be the first major step towards recognition of special status of the EEC Treaty. Although it was clearly justified, that Article 12 of EEC Treaty prevails over national law, the biggest defect of judgement is said to be omission of supremacy declaration. [28] Here should be noted that the definitions of direct applicability and direct effectiveness must be distingueshed from each other. While the first means, that there is no need for further implementation measures from the side of the Member States, such as transformation, the latter refers to a rule based on which an individual may found a claim before a competent national court or dicertly before the European Court of Justice.[29] The doctrine of supremacy leads us towards to Costa versus Enel case, which did not take long to come.

2. Costa versus Enel

Facts of the case

Flaminio Costa had interest in the electricity market. He was a shareholder of Edison Volta company and an electricity consumer as well. From 1962. onwards the Italian Republic nationalized the whole production and distribution of electric energy with several acts of parliaments creating a comprehensive organisation, namely the Ente Nazionale Energia Elettrica (hereinafter referred to as ENEL). With Edison Volta, all of the electricity business entities were trasferred to ENEL.[30] After receiving an electricity bill of 1925 lire from ENEL, Mr Costa claimed before Giudice Conciliatore (court in

[28] Azoulai Loic, Miguel Poiares Maduro, Hart Publishing, 2010. page 36.
[29] Jürgen Basedow: European Union Law, In: International Encyclopedia of the Social & Behavioral Sciences, Elsevier, 2015., page 266.
[30] Costa v Enel Case 6/64., 1964, [ECJ] page 3.

Milan), that italian law by which ENEL was established is contrary to provisions of EEC Treaty. He invoked Article 93, 102, 53 and 37, that affect fields of State aids, distortion of competition, establishment and State undertakings. The Court decided to stay proceeding and on one hand referred question to the European Court of Justice for preliminary ruling, on the other to the Italian Constitutional Court.[31]

Considerations

Mr. Costa pointed out, that in this case, Italy should have started consultations about nationalization of businesses. He considered nationalization of a whole economic activity had an aim to create more favourable conditions for the beneficials on expense of nationalized entities. Moreover, intoducing any new restrictions on the right of establishment, for instance nationalization of an economic sector was incompatible with Article 53 EEC Treaty[32]. From the view of Mr. Costa, a creation of commercial monopoly establishing ENEL by nationalization as an intentional act of Member State had the same restrictive effect on import as protective duties or quantitative restrictions.[33]

The Italian government took the view, that national court cannot seek for preliminary ruling of the ECJ in such case, when the only thing it has to do is application of national law. Moreover, Italian government claimed, that the ECJ is not authorised to decide on an initial of a national of Member State, whether italian national law was in conformitiy with EU law. Pursuant to their opinion –in complete line with argument of the Netherlands submitted in case Van Gend en Loos-, the only admissible procedure for interpretation of EU law could be launched by Member States or the Commission. In addition to this, ENEL and Italian government submitted, that establishing a public service intended to meet public utility conditions laid down in the

[31] Azoulai Loic, Miguel Poiares Maduro, Hart Publishing, 2010., page 36.
[32] Article 53. of EEC Treaty (Rome version): „Member States shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in this Treaty."
[33] Case 6/64., 1964, [ECJ] page 2-5.

italian constitution would not affect competition adversely, as it is applied to every businesses acting in the same field. In this way, there was no distortion of competition within the meaning of Article 102[34] of EEC Treaty.[35] Moreover, they argued, that establishing ENEL by nationalization was not vorbidden in Article 93 of EEC Treaty[36]. As far as Article 53 of the EEC Treaty is concerned, they stated that its object is to treat national and foreign businesses alike, which is not violated by ENEL by equally excluding them from energy sector. In relation of Article 37 of the EEC Treaty[37] ensuring free market, the italian government claimed, that operating a public service or public concessions using limited resources (public services) is not concerned.[38]

ECJ opinion and assessment

As regards complaints made on investigation of compatibility, the ECJ pointed out, that although questions referred were „imperfectly formulated", they probably implied interpretation of EU law. Based on this finding, ECJ had right not to make decision on validity of italian law but to provide interpretation of EU law.[39] As far as the substance is concerned, the ECJ clearly distinguished general international treaties from EEC Treaty, which has created its own legal system, that has special legal status which has never existed before. When EEC Treaty entered into force, it became an integral part of legal system of the Member States, whose courts are bound to apply it. The Community was created for unlimited duration having its own institutions,

[34] Article 102. (1) of EEC Treaty (Rome version): „Where there is reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative acticon may cause distortion within the meaning of Article 101, a Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the Stetes concerned such measures as may be appropriate to avoid the distortion in question."

[35] Case 6/64., 1964, [ECJ] page 3-4.

[36] Article 93. (1) of EEC Treaty (Rome version): „The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market."

[37] Article 37 of EEC Treaty (Rome version) in essence prohibits State monopolies and restrictions on imports

[38] Case 6/64., 1964, [ECJ] page 2-4.

[39] Case 6/64., 1964, [ECJ] page 6-7.

personality, legal capacity and ability of being represented internationally. Power of the Community derives from Member States, who transferred their powers and limited their sovereign rights, albeit within limited fields.[40] The ECJ found, that the relationship of national law and EU law should be desribed as follows:

„The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty…"[41]

Furthermore, „the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overriden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."[42]

The ECJ after clarification of the nature of EU law investigated Articles of EEC treaty in question, particularly whether they have direct effect or if they create individual rights which national courts must protect.[43]

The European Court of Justice held, that Article 102 of EEC Treaty lays down obligations concerning distortion of competition and consultations, which only affect Member States and the Commission. In conclusion, it does not have intention to confer rights on individuals that must be protected or appreciated by national tribunals. Similarly, Article 93 of EEC Treaty only imposes obligation on the Commission regarding functioning of the common market, that does not create rights for individuals to refer to its provisions.[44]

On the other hand, pursuant to the opinion of the ECJ, Article 53 of EEC Treaty, which prohibits introduction of any new restriction on the rights of establishment constitutes a Community rule capable of creating individual rights, that must be protected by national courts. The aim of the Article is to ensure equal treatment in

[40] Case 6/64., 1964, [ECJ] page 7.
[41] Case 6/64., 1964, [ECJ] page 8., and Azoulai Loic, Miguel Poiares Maduro, Hart Publishing, 2010. page 37.
[42] Case 6/64., 1964, [ECJ] page 8., and Azoulai Loic, Miguel Poiares Maduro, Hart Publishing, 2010. page 37.
[43] Case 6/64., 1964, [ECJ] page 8.
[44] Case 6/64., 1964, [ECJ] page 8-10.

pursuing activities concerning foreigners and nationals in a particular Member State. Moreover, as Article 37 of EEC Treaty prohibits any new measure, that have an object or effect of discrimination between nationals of Member States regarding conditions under which goods are produced and marketed by means of monopolies. This provision also constitues a rule, which creates and confers rights on individuals, that must be protected by national courts, as commercial product of abovementioned monopol bodies is capable to be subject of competition between Member States.[45] The doctrine of primacy of EU law over national law was further developed in Simmenthal I and II cases[46], where the ECJ supplemented the concept in a way, that if a national provision is incompatible with EU law, it would not affect the validity of such rule, however it must be merely inapplicable. Furthermore, the establishment of hierarchy between norms of the European Union and national legislation was supported. The European Union is considered to be a unique legal system of shared suvereignty and it is founded on the grounds that enable shared excercise of public powers.[47]

V. Recommendation of the Council of Europe on State liability

On expense of several negotiations and exchange of thoughts, the Council of Europe eventually adopted Recommendation No. R (84) 15 on public liability (hereinafter referred to as Recommendation), which was a landmark in development process leading legal thinking towards doctrine of Functional Immunity. The significance of the Recommendation is, that Member States of the European Union could finally reach a common point on State liability, which gave the opportunity to

[45] Case 6/64., 1964, [ECJ] page 12-13.
[46] Simmenthal SpA v Ministero delle Finanze Italiano, Case 35/76, [ECJ], 1976. and Administrazione delle Finanze dello Stato v Simmenthal SpA, Case 106/77., [ECJ], 1978.
[47] Azoulai Loic, Miguel Poiares Maduro, Hart Publishing, 2010. page 39-60.

further improvement and provided grounds for justifications in subsequent legal cases[48] before the European Court of Justice.

The Council reflected on the fact, that public authorities affect individuals' rights, liberties and interests in an increasing way and as a result of this they may cause damage and losses, thus there was a need for harmonisation in that field of law in order to achieve unity. The Council suggested, that Member States should follow principles laid down in the Recommendation and to examine the question, whether it was necessary to set up „appropriate machinery" and financial funds to contribute to the realization of desired objectives. A new feature of the Recommendation was, that beyond physical and non-regulatory acts it extended the scope for normative acts of regulatory authority as well. The main idea was to provide reparation in the event, when public authorities cause damage with their acts.[49]

The Recommendation provided, that the grounds of State liability shall be the attributability, that showed rather features of objective liability. Moreover, when the act was considered to be unlawful, attributability must be presumed. This principle should be applied, when a damage caused to individuals by public authorities was exceptional or the act itself was exceptional.[50]

The principle should also be applied in such case, if these conditions were not met, but it would be apparently unfair to let the individual bear the damage. The Recommendation provided opportunity to reduce or reject reparation in the event, when the victim contributed to the damage by failiure to use legal remedies or a third party contributed to the damage respectively. On the other hand, making it obligatory to use administrative conciliation in order to seek for compensation should be considered to inadmissible. It was suggested, that reparation in general should be made in full, however, compensation between margins of discretion may be only in part. Furthermore, decisions that granted reparation should be implemented as quickly as possible and time limits governing public liability claims cannot hinder the excercise of

[48] See Schöppenstedt, Francovich and Brasserie cases.
[49] Recommendation No. R (84) 15 on the committee of ministers to member states relating to public liability page 1-2, and Kecskés (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 7.
[50] Recommendation No. R (84) 15, page 2, and Kecskés (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 7-8.

that right. Finally, nationality of the victim, who suffered damage cannot be subject to discrimination.[51]

Although it follows from the nature of this kind of act of the European Union that recommendations have no binding effect[52], the provisions laid down in this one constituted legal source and the ECJ strongly relied upon it in early cases.

VI. Civil liability of MemberStates

As we can see, the European Court of Justice made essential findings in the previous two said to be classical cases. In judgement of Van Gend en Loos, the ECJ reflected on the fact, that EEC Treaty not only imposed obligations but also conferred rights on individuals that must be protected and appreciated creating doctrine of direct effect. These statements were improved in Costa versus Enel case introducing concept of supremacy, which in particular means, that EU law cannot be overriden by national law. It was important to discuss these cases, because subsequent claimes raised by individuals concerning civil liability of Member States were based on the abovementioned findings constituting legal grounds for them. Moreover, contents of the ECJ's judgements and preliminary rulings made in the future were strongly influenced by these statements. In this chapter I would like to show in what were the initial beliefs about civil liability of Members States and how has view of the ECJ developed over decades.

[51] Recommendation No. R (84) 15, page 2-3.
[52] Jürgen Basedow: (International Encyclopedia of the Social & Behavioral Sciences, Elsevier) 2015., page 266.

1. Aktien-Zuckerfabrik Schöppenstedt versus Council of the European Communities

Facts of the case

Aktien-Zuckerfabrik Schöppenstedt (hereinafter referred to as Schöppenstedt) was a company in Federal Republic of Germany, who dealt with production of raw sugar. In 1968. the national organisation of the market in sugar was replaced by the common organisation of the market in sugar based on the Councils Regulation No 1009/67. As a result of this, new sugar prices were introduced making difference between white and raw sugar. Provisions of the cited Regulation provided compensation for businesses in case of losses caused by fixed prices, except where losses are considered to be marginal.[53] Schöppenstedt complained, that prices used until 30th June 1968, when cited Regulation came into force were considerably higher, than the new ones from that day onwards. Schöppenstedt claimed, that difference between the two prices were not marginal. Due to this argumentation, the company lodged an application to the ECJ in order to force the Council to pay compensation.[54]

Considerations

Schöppenstedt argued, that the Coucil was guilty based on wrongful act or omission by disregarding certain protective provisions of EU law, when it adopted the

[53] Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities Case 5/71., 1971, [ECJ] pages 1-3.
[54] Kecskés (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 4.

Regulation, however the company only sought for damages equal to difference between old and newly applied prices and not its complete losses. Schöppenstedt stated, that due to Article 37 of EEC Treaty, the Council have to introduce appropriate measures to compensate for differences between prices. Moreover, provisions of the adopted Regulation infringed Article 40 of EEC Treaty[55] too. Based on the cited Article, unequal treatment for instance in relation of raw sugar factories as similar undertakings are prohibited. Unequal treatment is embodied by the fact, that the Regulation only takes into account price difference concerning white sugar.[56]

The Concil considered the proceeding inadmissible. Pursuant to its opinion, Schöppenstedt chose a wrong device in order to obtain compensation as the company was not entitled to bring an action for damages before the ECJ. The Council claimed, that action for annulment is an instrument available for individuals in such case, when a regulation is claimed to be illegal. In substance, the Council submitted, that the Regulation takes into account compensation for raw sugar as well. Furthermore, prices laid down in provisions are only frames and the exact applied price depends on features of the market. The Council stated, that there could be no discrimination, as prices were applicable in all of the Member States in which previous prices fell wihtin the newly intoduced price framework, which prescribed limits for white and raw sugar alike. In addition to this, the Council investigated prices in the german market and came to the conclusion, that Schöppenstedt used categories of target, market and intervention prices in a wrong way, which caused defect in calculating its losses.[57]

The Council referred to the fact, that the rules of the Regulation allow Member States to grant compensation suffered as a consequence of the new price framework system, however Federal Republic of Germany did not carry out this right. Finally, the

[55] Article 40 (1) of EEC Treaty (Rome version): „Member States shall develop the common agricultural policy by degrees during the transitional period and shall bring it into force by the end of that period at latest."
Article 40 (3) of EEC Treaty (Rome version): „…The common organisation shall be limited to pursuit of the objectives set out in Article 39. and shall exclude any discrimination between producer sor consumers within the Community. Any common price policy shall be based on common criteria and uniform methods of calculation.…"
[56] Case 5/71., 1971, [ECJ] page 2-7.
[57] Case 5/71., 1971, [ECJ] page 3-7.

Council refused to infringe provisions of the Treaty as there was no founded factor, that would constitute wrongful act or omission.[58]

ECJ opinion and assessment

The ECJ held, that differences caused by introduction new prices as a result of the Regulation did not constitute discrimination under Article 40 of EEC Treaty, as it was a consequence of a new system of common organisation of the market regarding sugar. Moreover, the price framework only prescribed minimum and maximum values, whithin which the exact level of prices depends on the development of a particular market. Furthermore, calculation method of a granted compensation concerning raw sugar was based on that of rules regulating white sugar. Because of the abovementioned, the ECJ dismissed the application as unfounded.[59] In conclusion, Schöppenstedt was unsuccessful in seeking for compensation, however, findings of the ECJ in this case were the first step towards declaration of civil liability of Member States.[60]

First of all, the ECJ stated, that a claimant can seek for compensation, when it suffered losses as a result of an EU regulation issued by the Council even if that claimant has no legitimacy to launch an action for annulment provided by Article 173 of EEC Treaty. Under provisions of cited Article, the ECJ has jurisdiction over actions brought by a Member State, the Council or the Commission, which subject matter is lack of competence, infringement of an essential procedural requirement, infringement of EEC Treaty or any rule of law relating to its application or misuse of power. By this finding, the ECJ construed requirements laid down in Article 173 of EEC Treaty extensively in favour of individuals.[61]

[58] Case 5/71., 1971, [ECJ] page 7-8.
[59] Case 5/71., 1971, [ECJ] page 9-12.
[60] Kecskés (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 4-5.
[61] Kecskés (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 4-6.

As regards individuals, they are eligible to institute proceedings -under same conditions- against an act addressed to them. Furthermore, individuals can also launch proceedings against a regulatory act, which is of direct concern to them and does not require implementing measures, that is of direct effect.[62]

The most relevant finding of the ECJ is probably the following in which every word has significance:

> „In the present case the non-contractual liability of the Community pressupposes at the very least the unlawful nature of the act alleged to be the cause of the damage. Where legislative action involving measures of economic polici is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Article 215, second paragraph of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred."[63]

With the abovementioned statement, the ECJ introduced a Test, that has never existed before and became popular under name of 'Schöppenstedt formula'.[64] Although the European Court of Justice set fundamental grounds paving the way to State liability, the judgement made in Schöppenstedt case was often subject to criticism. First of all, Scholars expressed the idea several times, that case-law rather protects Institutions and not individuals. Moreover, it was said, that the Test which governs assessment of liability tends to be too restrictive and in this way the construction developed by the ECJ offers less and less protection for individuals. Furthermore, some problem arose concerning hierarchy between sources of EU law and the relationship between liability of EU Institutions and that of Member States also needed some kind of rethinking.[65]

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[62] Case 5/71., 1971, [ECJ] page 5.
[63] Jill Wakefield: Judicial Protection through the Use of Article 288(2) EC, European Monographs 36, 2002. page 49. and Case 5/71., 1971, [ECJ] page 10.
[64] Jill Wakefield: Judicial Protection through the Use of Article 288(2) EC, European Monographs 36, 2002. page 49.
[65] Aalto Pekka: Public Liability in EU Law: Brasserie, Bergaderm and Beyond, Hart Publishing, 2011. page 86.

2. Krohn & Co. versus Commission of the European Communities

Facts of the case

Krohn & Co. Import-Export (GmbH & Co. KG) was an undertaking located in Hamburg, Germany (hereinafter referred to as Krohn) which dealt with –among more- import and wholesale trade of cereals and animal feedingstuffs. The company was engaged in Asia too, as it imported manioc from Thailand.[66] On 19th July 1982. a Cooperation Agreement was concluded between the European Economic Community and the Kingdom of Thailand on manioc production, marketing and trade and was approved by a decision of the Council.[67] The Cooperation Agreement prescribed annual quotas, that limited the quantities of manioc imported into the European Economic Community. The preferential rate of import levy was 6 percent. Pursuant to provisions of Article 1 and 5 of the Cooperation Agreement, Thailand undertook to manage its exports to the EEC on covered products in a way, which ensures that quotas laid down annually shall not be exceeded. Moreover, the EEC made its own arrangements for the authorities of Member States in order to establish a double check system obliging them to issue import licences. On 22nd July 1982. Regulation No 2029/82 was adopted by the Commission, which contained these detailed rules for implementing the import arrangements. The aforementioned rules were only applicable to products listed in subheading '07.06 A' of the Common Customs Tariff, that were exported from Thailand in 1982.[68] Pursuant to provisions of Article 4,7 and 9 of the cited Regulation, applications for import licences in case of products, which fall within the scope of that subheading of the Common Customs Tariff should be submitted to the competent

[66] Krohn & Co. v Commission of the European Communities Case 175/84., 1986, [ECJ] page 1-2.
[67] Case 175/84., 1986, [ECJ] page 2., and Krohn & Co v Commission of the European Communities, Case 175/84., 1987, [ECJ] page 3.
[68] Case 175/84., 1986, [ECJ] page 2-3., and Case 175/84., 1987, [ECJ] page 3-4.

authorities of Member States. Furthermore, the authorities were required to transfer specified information to the Commission and to issue the desired import licence. Due to Article 7 of Cooperation Agreement, competent authorities must deny issuing licences, if „the Commission has informed the competent authorities of the Member State by telex that the conditions laid down in the Cooperation Agreement have not been fulfilled."[69]

On 16th November 1982. Krohn asked the Bundesanstalt Fuer Landwirtschaftliche Marktordnung (Federal Office for the Organisation of Agricultural Markets) relying on Regulation No 2029/82 to provide with five import licences concerning importation of 54895472 kg manioc from Thailand. The company attached export certificates to the request, that had been issued on 18th August and 7th September 1982.[70] The Commission detected the different dates, that relates to issue of Thai export certificates and Krohns request for import licences. According to this, the Commission decided to supervise and investigate, if the regarding conditions of the Cooperation Agreement between the EEC and Thailand were fulfilled. The Commission asked Krohn through Bundesanstalt to provide details of the following information:

- date on which the manioc was shipped in Thailand,
- name of the ship on which the product was transported,
- the date and place at which customs formalities were expected to be completed.[71]

The Bundesanstalt soon transmitted the request to the company by telex messages, however Krohn refused to furnish the required information. As a result of Krohns conduct, the Bundesanstalt –cooperating with and taking into consideration of the Commissions opinion- made a decision and refused to issue any of the wanted import licences.[72]

On 25th May 1983., Krohn brought an action before Verwaltungsgericht, Frankfurt am Main (Administrative Court) seeking for annulment of the decision and

[69] Case 175/84., 1986, [ECJ] page 2-3.
[70] Case 175/84., 1987, [ECJ] page 2., and Case 175/84., 1986, [ECJ] page 3.
[71] Case 175/84., 1986, [ECJ] page 3.
[72] Case 175/84., 1986, [ECJ] page 4.

for an order obliging Bundesanstalt to provide with the import licences. Moreover, Krohn also submitted a request for compensation to the Commission on 6th June 1983. The company argued, that the refusal of the Commission to allow issue of import licences incurred losses and was illegal. After Krohns submission was rejected, the legal case soon found itself before the European Court of Justice.[73]

Considerations

As the pleadings both affected admissibility and substance of the case and they were in correspondence with each other, I decided to discuss the two separated judgements together.

Krohn claimed, that it suffered considerable losses pursuant to the failure of issue import licences. In addition to this, the company stated that it fulfilled all of the conditions and prescriptions laid down in relevant rules with a view of being entitled to get import licences. Furthermore, Krohn considered, that the additional requirements imposed by the Commission were completely unlawful.[74] As far as theoretical part of the case is concerned, Krohn contended, that the Commission had to be considered the source of the contested national decision and in essence the cause of suffered losses as the european institution acted under provisions of Regulation No 2029/82 giving instructions to Bundesanstalt. According to the applicant, an action for compensation provided by Article 215 of the EEC Treaty is not conditional upon rights of action under national law.[75]

The Commission strongly criticised the procedure and considered it as inadmissible because of the followings. Firstly, the Commission argued, that on the basis on Articles 178 and 215 of the EEC Treaty, the European Court of Justice is neither eligible to assess validity of decisions made by national institutions within the

[73] Case 175/84., 1986, [ECJ] page 4.
[74] Case 175/84., 1986, [ECJ] page 4.
[75] Case 175/84., 1986, [ECJ] page 5-8.

framework of the Common Agricultural Policy, nor has the right to investigate financial consequences of such national decisions in relation to individuals. The argument was supported by several previous judgements of the ECJ.[76] Secondly, the Commission considered, that an application for compensation under the cited Articles of the EEC Treaty could only be approvable, if the applicant had previously exhausted all of the national remedies, which would enable it to seek for annulment of decisions by national courts. Although, the Commission acknowledged, that Krohn has brought an action before the competent national court, the procedure has not been finished yet, the rights of the applicant provided by national law has not been exhausted. Thirdly, the Commission paid attention to the fact, that Krohn did not bring an action for annulment against telex instructions given to the Bundesanstalt and these guidelines therefore become definitive. The argument was supported with an ECJ finding stated in judgement of 15th July 1963 in Case 25/62 Plaumann versus Commission, due to which an application for compensation is inadmissible, if it has a purpose to nullify the legal effects on an individual decision that has become definitive.[77]

ECJ opinion and assessment

The European Court of Justice pointed out, that Articles 178 and 215 of the EEC Treaty only make it possible to award compensation for damage caused by Community Institutions or by their servants during performance of their duties, that is when damage is capable of giving rise to non-contractual liability on the side of the EEC. In this case, it had to be examined, whether the alleged unlawful conduct could be attributable to an EEC Institution or not. The ECJ held, that provisions of Regulation No 2029/82 not only grant the Commission the right to give an opinion in a particular case to national institutions, but prescribes to insist that such national institutions should refuse request that do not comply with conditions laid down in Cooperation Agreement. It follows, that the conduct resulted in damage to the applicant was attributable not to the

[76] see Hans-Otto Wagner GmbH v Commission, Case 12/79, [ECJ], 1979., Sucrimex v Commission, Case 133/79, [ECJ], 1980., and Interagra v Commission, Case 217/81, [ECJ], 1982.
[77] Case 175/84., 1986, [ECJ] page 5-8.

Bundesanstalt, who acted with a view to the guidelines of the Commission, but to the Commission itself. Based on the aforementioned, the ECJ held, that it has jurisdiction and decided to handle with the action brought by Krohn.[78]

The ECJ held referring to case law, that application for compensation under Articles 178 and 215 of the EEC Treaty „was introduced as an autonomous form of action with a particular purpose to fulfil within the system of actions and subject to conditions on its use dictated by its specific nature." Moreover, these actions must be examined from the view of the whole system of the EEC Treaty, that grants legal protection for individuals and „such an action may in certain cases be dependent on the exhaustion of a national rights of action available to obtain the annulment of a national authority's decision." It is also required for those national rights of action to provide effective means of protection for individuals and must be capable of incurring compensation for damage caused. In this particular case, according to the ECJ, the admissibility of action launched by Krohn cannot be conditional on the exhaustion of national rights of action available against the decision of the Bundesanstalt, that is such an action for annulment cannot exclude the right of the applicant to seek for compensation and bring an action before the Court. The ECJ argued, that action for compensation differs from action for annulment, as its purpose is not to make particular decision null and void, but to recover damage caused by an institution. Based on the abovementioned, the Court rejected objections raised by the Commission against admissibility and decided to consider the substance of the case.[79] The most significant finding of the ECJ in this case is considered to be the distinguished instruments of action for annulment and compensation under EU law by nature, which will show great importance in latter judgements concerning civil liability of Member States.[80]

The European Court of Justice eventually rejected the submission of Krohn after assessment of the substance based on the followings. The ECJ considered prescriptions of Regulation No 2029/82 in relation to the Commission as a type of warranty against abusive conduct. Since several import licences issued previously were still valid at the time, when Cooperation Agreement entered into force, this fact gave rise to a risk, that

[78] Case 175/84., 1986, [ECJ] page 5-8.
[79] Case 175/84., 1986, [ECJ] page 5-8.
[80] Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 5.

these import licences of manioc quantities would be used twice in order to double importation to the EEC. The Court also held, that in this case there was a doubt about subject of import licences and the request of the Commission for additional information in order to ascertain about legality was lawful and necessary under provisions of the Regulation. In this way, the decision of the Commission, which caused damage to Krohn was not unlawful and as a result, the application was dismissed.[81]

3. Andrea Francovich, Danila Bonifaci and Others versus Italian Republic

Facts of the case

An interesting feature of these joined cases, that in contrary to previous cases discussed, private individuals were involved instead of business entities. Andrea Francovich, the plaintiff to Case C-6/90 was an employee of CDN Elettronica SnC in Vicenza. As he only received sporadic wages in return for his work, Mr. Francovich brought an action before the Pretura di Vicenza (national court). As a result of the proceeding, the employer company was ordered to pay approximately 6 million LIT to the plaintiff. Although the sum was awarded, Mr. Francovich stayed unable to have the judgement enforced even before the Tribunale di Vicenza (national court of appeal). After rejection, he relied upon provisions of Directive 80/987[82] and sought for guarantees of the Italian State or alternatively compensation.[83]

In the other case, Danila Bonifaci brought proceedings before Pretura di Bassano del Grappa (national court) with 33 other employees together. They all had been

[81] Case 175/84., 1987, [ECJ] page 8.

[82] 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

[83] Andrea Francovich, Danila Bonifaci and others v Italian Republic Joined Cases C-6/90 and C-9/90., 1991, [ECJ] page 4-5.

employed by Gaia Confezioni Srl, which became insolvent on 5th April 1985. When employment contracts were terminated, the company owed the applicants with more than 253 million LIT. Moreover, after five years they sill did not get their wages. As a consequence, Danila Bonifaci and the other employees brought proceedings directly against the Italian Republic. The plaintiffs sought for arrears of pay up to at least for the last three months under provisions of Directive 80/987 or alternatively to get compensation.[84]

On 20th October 1980. a Directive of the Council was issued on the approximation of the laws of the Member States regarding protection of employees in the event of insolvency of their employers. The Directive intended to provide guarantee for employees –among more- in such cases as payment of unpaid wage applications. Pursuant to the provisions of this Directive, Member States were obliged to introduce appropriate regulations and administrative provisions in order to transpose the content into their national laws by the time of 23rd October 1983. The Italian Republic failed to fulfill its obligations, which was confirmed by judgement (C-22/87 Commission versus Italy) of the European Court of Justice in 1989.[85]

Directive 80/987 determined features of persons who are entitled to guarantee. Moreover, it regulated the scope of that guarantee and the identity of the person who is liable to provide the guarantee in the following way. Provisions of the Directive should be applied to claims of employees, that arise from contracts of employment or employment relationships and existing against employers who are in a state of insolvency. It is also defined by Article 2(1), whether an employer can considered to be insolvent, however Member States enjoy a discretion in determining concepts of employer and employee. Pursuant to the exception clause, Member States remain free to exclude certain claims of employees under certain conditions. In addition to this, appropriate measures had to be taken in order to ensure payment of outstanding claims as a result of contracts of employment or employment relationships and relating to pay for the period prior to a date determined by a Member State. With other words, Article 3

[84] Joined Cases C-6/90 and C-9/90, 1991, [ECJ] page 5.
[85] Joined Cases C-6/90 and C-9/90, 1991, [ECJ] page 4.

of Directive 80/987 also leaves the right on the side of Member States to determine the date from which payment of claims are ensured:

- date on which the employer is deemed to be insolvent
- date of notice about dismissal trasmitted to the employee as a result of the employers insolvency
- date on which employment contract or relationship with the employee ceased on account of the employers insolvency.[86]

As regards Article 4, liability period may be restricted up to three months or eight weeks, however these periods must be calculated in accordance with rules of the Directive. In order to avoid payments to go beyond social objective of the Directive and prevention of abusive conducts, Member States may set a cap on liability. Article 5 of the Directive about identity of persons who bear liability povided the following:

„Member States shall lay down detailed rules for the organization, financing and operation of the guarantee institutions, complying with the following principles in particular:

(a) the assets of the institutions shall be independent of the employers's operating capital and be inaccessible to proceedings for insolvency
(b) employers shall contribute to financing, unless it is fully covered by the public authorities
(c) the institutions' liabilities shall naot depend on whether or not obligations to contribute to financing have been fulfilled."[87]

National courts concerned referred questions to the ECJ for a preliminary ruling. In substance, national courts asked, whether private individuals adversely affected as a result of failiure of Member State to implement provisions of the Directive are eligible to force that State to give effect to those provisions, which are sufficiently precise and unconditional. With the additional questions, the inquiry affected direct effect of provisions of the Directive conferring rights on employees and as additional topic, the existence and scope of liability of a Member State for damage caused by breaching its obligations under Community law.[88]

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[86] 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, Article 1-4.
[87] Council Directive 80/987/EEC, Article 5.
[88] Joined Cases C-6/90 and C-9/90, 1991, [ECJ] page 5.

Considerations

The plaintiffs relied on prescriptions of Directive 80/987 stating that it is possible to determine the minimum guarantee under the provisions. The basis of their claims were, that they took the date which entails the least liability for the guarantee institution, namely the date on which the employer went insolvent. Italian Republic claimed, that the ultimately liable entity is not determined by rules of the Directive. Moreover, as Italy failed to implement content of Directive 80/987, details did not became integral part of italian law. On these grounds, Italy wanted the application to be rejected.[89]

ECJ opinion and assessment

The European Court of Justice investigated substance of the case from two separated aspects, in particular the direct effect of provisions of the directive which determine the rights of employees and the liability of the State for loss and damage caused by breaching its obligations under Community law. First of all, the ECJ held, that a Member State, which has failed to introduce implementing measures prescribed by a directive in time is not entitled to rely on its own failure against individuals. Moreover, if the subject matter of a directive is unconditional and sufficiently precise in case of absence of implementing measures, those provisions that confer rights on individuals can be invoked against any national laws that are incompatible with the directive.[90] As regards provisions of the Directive 80/987, the ECJ took the view, that it clarifies subject matter (employee, employer, insolvency) in a sufficiently precise and unconditional way, so a national court is able to determine, whether or not a person should be considered as beneficial of the Directive. Furthermore, pursuant to the choice of Member States in determining certain periods in relation of guarantees, it is always

[89] Joined Cases C-6/90 and C-9/90, 1991, [ECJ] page 5-8.
[90] Azoulai Loic, Miguel Poiares Maduro, Hart Publishing, 2010., page 409.

possible to decide to what extent the Member State could have reduced the guarantee in the name of avoidance of abuse depending on the date which it would have chosen if it had transposed the Directive. The Court therefore stated, that rules concerning content of guarantee is also unconditional and sufficiently precise. In contrary to the aforementioned, the Court pointed out, that a guarantee system established under provisions of the Directive in question may be organised and operated by the Member States, however it cannot mean that a State can be considered as a person liable for unpaid wages. As rules of the Directive do not identify explicitly the person liable to provide guarantees, the Italian Republic cannot be deemed liable on the sole ground, that it has failed to transpose provisions within the prescribed period. Due to this finding, the ECJ held, that rules of this Directive are not enforceable by individuals before national courts even if Italy failed to take implementing measures in time.[91]

The European Court of Justiced continued the assessment with topics of wheter State liability as a matter of principle exists and what are the conditions and scope incurred. The ECJ invoked its findings laid down in previous judgements have already been discussed stating, 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." EU law is not only intended to impose obligations, but to confer rights upon individuals, which become part of their legal heritage. „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."[92] Moreover, national courts must ensure, that provisions of Community law should take full effect and they must protect the rights, which EU law confers on individuals. „The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible." The possibility of reparation from the side of a Member State is particularly indispensable in this case

[91] Joined Cases C-6/90 and C-9/90, 1991, [ECJ] page 4-8.
[92] Joined Cases C-6/90 and C-9/90, 1991, [ECJ] page 8., Judgement of 5.2.1963., Case 26/62 and Judgement of 15.7.1964., Case 6/64.

as enforceability of Community law depends on transposition measures conducted by a Member State. Therefore, the ECJ held, that a State must be liable for loss caused to individuals as a result of a breach of Community law for which that State can be considered responsible is an inherent, integral part of the system of the Treay established.[93]

The European Court of Justice also invoked provisions of Article 5 of the Treaty, under which Member States are required to take all appropriate general or particular measures to ensure fulfilment of their obligations under Community law. In law literature[94], this Article is often cited as 'fidelity clause'.[95] The ECJ firstly in this judgement made it clear, that apart from secondary sources of EU law, a Member State, who breaches Community law (fidelity clause) by omitting compulsory transposition measures and as a result of which individuals suffer damages, that Member State bear liability and must make good losses.[96]

Regarding conditions for State liability, the Court stated, that they depend on the nature of the breach of Community law, which resulted in loss and damage. As full effectiveness of Community law assumes right to reparation, three conditions must be fulfilled. If these requirements are met, individuals' right to get compensation is a right founded directly on Community law.[97] The ECJ between the developed margins of Schöppenstedt-formula[98], determined these conditions as follows:

- result prescribed by the directive must have the intention of conferring rights on individuals,

[93] Joined Cases C-6/90 and C-9/90, 1991, [ECJ] page 7-8., and W. Van Gerven: Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie, International and comparative Law Quartely Vol 45, 1996.page 516., and Azoulai Loic, Miguel Poiares Maduro, Hart Publishing, 2010., page 408.

[94] see Anthony Arnull, Catherine Barnand, Michael Dougan and Eleanor Spaventa: A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood, Hart Publishing, 2011. page 574.

[95] Article 5 of EEC Treaty (after Single European Act): „Member States shall take all appropriate measures, wheter general or particular, to ensure fulfilment of the obligation arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

[96] Joined Cases C-6/90 and C-9/90, 1991, [ECJ] page 8., and Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 9.

[97] Joined Cases C-6/90 and C-9/90, 1991, [ECJ] page 9.

[98] Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 8-10.

- the exact content of those rights can be determined based on provisions of the directive,
- existence of a causal link between breach of the obligation of States and the loss suffered by the individual.[99]

The European Court of Justice further stated, that „the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation”.[100]

As breach of Community law from the side of the Italian Republic was confirmed in a judgement previously and the provisions of Directive 80/987 intended to grant guarantee for employees in case of insolvency of their employer, the ECJ held, that the Member State has to make good loss and damage caused to individuals by failure to transpose that Directive.[101] In Francovich judgement, the European Court of Justice declared for the first time expressis verbis the liability of a Member State on non-contractual basis and in this way it has a key relevance in relation of the topic. However, apart from the dogmatical breakthrough, the subsequent history and aftermath of these findings and of the judgement in its entirety was a bit contradictory. Mr. Francovich and the other plaintiffs brought proceedings for compensation against Italy[102], which ended in a dismissal by the European Court of Justice in 1995. In that judgement, the Court held, that creditors pursuant to national insolvency provisions of Italy were not allowed to launch claims againts the company collectively. The Post-Francovich effect, that means the subsequent life of the judgement can be described by a phenomenom of serious increase in enquiry for State liability. In the UK and Federal Republic of Germany, Francovich case were accompanied by „legal panic”, in particular as those legislations stood completely on the side of Absolute State Immunity at the beginning of the process. Some authors think, that the Court took a rather large step forwards. That was the reason why the idea of approximation of national laws concerning State liability and liability of EU Institutions was expressed.[103] Between the

[99] Joined Cases C-6/90 and C-9/90, 1991, [ECJ] page 9.
[100] Joined Cases C-6/90 and C-9/90, 1991, [ECJ] page 9-10., and W. Van Gerven (International and comparative Law Quartely Vol 45.) 1996. page 514-515.
[101] Joined Cases C-6/90 and C-9/90, 1991, [ECJ] page 9-10., and W. Van Gerven (International and comparative Law Quartely Vol 45.) 1996. page 514-515.
[102] Andrea Francovich v Italian Republic, Judgement of 9.11.1995. Case C-479/93., 1995, [ECJ]
[103] Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám) 2003. page 9-10.

burdens of Post-Francovich effect, I would like to introduce the reader into cases Brasserie, British Telecommunications, Hedley Lomas and Dillenkofer to analyse how the case law enriched and developed on concept of State liability.

4. Brasserie du Pecheur SA versus Federal Republic of Germany and The Queen versus Secretary of State for Transport, ex parte: Factortame Ltd. and Others

Facts of the cases

Brasserie du Pecheur (hereinafter referred to as Brasserie) was a french company, which had its registered office in Schiltingheim and was operating on the beer market. From 1981. onwards, the business entity was forced to cease exportation of beer to Germany as german authorities found, that the beer in question did not comply with purity requirement prescribed by national law. The Commission brought infringement proceedings against the Federal Republic of Germany basically on grounds of quantitative restrictions and in conclusion, the ECJ took the view, that prohibition on marketing beers imported from another Member State, where they were lawfully manufactured but did not comply with local provisions was incompatible with EU law. On the basis of that judgement, Brasserie brought an action against Federal Republic of Germany in order to acquire reparation of the loss suffered due to import restrictions between 1981. and 1987.[104]

[104] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 1-7.

In the other case, companies and private individuals were interested in the field of fishing industry. By the year 1989. Merchant Shipping Act[105] came into force introducing a new registration system for fishing boats. The cited Act imposed registration obligation concerning vessels including those already registered before, in line with conditions relating to nationality, residence and domicile of owners. According to provisions of Merchant Shipping Act, those fishing boats which did not comply with requirements laid down were deprived of the right to fish.[106] Factortame and Others, private individuals and companies incorporated under the law of the UK, directors and shareholders alike (up to 97 claimants) brought actions before national courts. They alleged, that particular provisions of Merchant Shipping Act were incompatible with EU law. The case was discussed before High Court of Justice, the Queen's Bench Division and the Divisional Court as well. The European Court of Justice confirmed, that some rules of registration system introduced by the Act in question were contrary to EU law. As a result of this, the Commission brought infringement proceedings against the UK, which ended in suspension of application of the disputed provisions and amendments. Although the problems were seemingly solved, the claimants assessed their damage directly resulted from legislation of the UK and sought for compensation.[107] Both of the national courts affected in the cases, namely Bundesgerichtshof and Divisional Court referred questions for preliminary ruling to the Court. In essence, these questions affected topics such as State liability for acts and omissions of national legislature[108] contrary to EU law, conditions of such liability and extent of the period covered by reparation.[109]

[105] The Merchant Shipping Act, London, United Kingdom, Her Majesty's Stationery Office, 1988.
[106] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 1-8.
[107] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 7-8. and Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 11-13.
[108] Takis Tridimas, Jack Beatson: New directions in European Public law, Hart Publishing, 1998. page 15.
[109] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 8-17.

Considerations

In the first case, arguments of Brasserie were strongly based on Article 30[110] of the Treaty, which prohibits quantitative restrictions between Member States. According to the company, conduct of Federal Republic of Germany constituted such restriction by denying importation of beer lawfully manufactured in France but was in contrary to national rules concerning content. As regards compensation, Federal Republic of Germany refused to grant it. They argued, that the State can only be considered to be liable, if a third party would be capable of being regarded as beneficiary of the obligation in question breached. In other words, State is only liable for breach of obligations deemed in favour of a third party.[111] In the second case, the UK argued, that implementation of the common fisheries policy leaves a wide discretion to Member States concerning national legislation, that is the State acted in a field concerning which the European Union conferred upon it rights to introduce and carry out appropriate measures.[112]

ECJ opinion and assessment

In my opinion, Brasserie and Factortame joined cases are probably the most considerable and of the greatest significance in the field of liability of Member States. The European Court of Justice wisely followed its previous case law and in the developing process, these cases constituted a mile stone. Findings previously laid down by the Court through preliminary rulings in other judgements can be found in the justification. Moreover, these considerations were again subject to further improvement and supplementation. The issues occured in these cases, such as State liability for acts

[110] Article 30 of EEC Treaty (Maastricht version): „Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States."
[111] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 6.
[112] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 13-14.

and ommissions of the national legislature, conditions of that liability and the extent of liability and period covered by reparation were discussed by the ECJ separately.

The Court started the assessment with the question of State liability repeating the idea pronounced in Francovich case pursuant to which it is a principle of EU law or with other words the principle is inherent in the system of the Treaty, that Member States are obliged to make good loss and damage caused to individuals by breaches of rules of it, if they can be held responsible for such conduct.[113] Moreover, the full effectiveness of EU law would be deprived of its power, if individuals were unable to acquire redress, when their rights were violated by infringement of EU law.[114] The ECJ took the view in line with findings of Francovich and Costa cases, that individuals have right to rely on provisions of EU law that have direct effect[115] and the rights conferred upon individuals must be protected by national courts.

On the other hand, „the right of individuals to rely on directly effective provisions before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of Community law.[116] That right, whose purpose is to ensure that provisions of Community law prevail over national provisions, 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."[117]

As regards nature of conduct, the ECJ pointed out, that an unlawful act or ommission would give rise to an obligation to make good losses, that is acting intentionally or negligently has no importance. Furthermore, Community legal order requires, that this obligation imposed on Member States cannot depend on domestic rules, in particular on the concept of division of powers between constitutional authorities. Based on this finding, the Court introduced an innovation concerning the issue of assessment of State liability regarding persons and institutions that can be held liable. Pursuant to this, a State must be viewed as a single entity, irrespective of whether the breach which gave rise to losses suffered by individuals are attributable to legislature, the judiciary or the executive power. In addition to this, it is justified by the

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[113] Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 9., and Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 2. and 9.
[114] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 9.
[115] Aalto Pekka, 2011. page 158., and Takis Tridimas, Jack Beatson, 1998. page 21.
[116] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 9.
[117] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 2. and 9-10.

fact, that all State organs and insitutions are bound to comply with EU law, when they perfom their habitual tasks especially when a situation is directly covered by EU law. [118]

The ECJ reflected on the fact, that the Treaty does not contain provisions, that expressly and specifically determine the consequences of breaches of EU law by Member States, however, the Treaty empowers the ECJ to provide interpretation and ensure uniform application of EU law. In the eye of the European Court of Justice –as another innovation compared to previous cases- it is the task of the ECJ to rule on question of consequences of inviolating EU law in line with generally accepted methods of interpretation, in particular by reference to fundamental principles of EU legal system and general principles common to the legal systems of the Member States.[119]

In order to define conditions under which a State can be held liable for breaching EU law, the ECJ relied upon its previous finding also from Francovich case, that is the conditions depend on the nature of violation. Several apects should be taken into consideration in general, such as principles inherent in the Community legal order, which form basis for liability, in particular, the full effectiveness of EU law, effective protection of the rights, which they confer on individuals and the well cited obligation of cooperation concerning Member States prescribed in Article 5 of the Treaty. Moreover, the national court shall assess clarity and precision of the breached rule, the measure of discretion left by that rule on national or EU organs and whether any error of law was excusable or inexcusable. Type of infringement should also be taken into consideration, that is whether it was intentional or involuntary.[120]

This was the first judgement, in which the ECJ pointed out and emphasised similarities between liability of EU institutions and those of Member States in an interesting way making its overriding deductions.[121]

„Reference should also be made to the rules which have been defined on non-contractual liability on the part of the Community, in so far as…they were constructed on the basis of the general principles common to the laws of the Member States and it is not appropriate, in the absence of particular justification, to have different rules governing the

[118] Aalto Pekka, 2011. page 155., and Joined Cases C-46/93 and C-48/93, 1996 [ECJ] page 11. and Takis Tridimas, Jack Beatson, 1998. page 15.
[119] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 2. and 10.
[120] Joined Cases C-46/93 and C-48/93, 1996 [ECJ] page 2. and 13.
[121] Takis Tridimas, Jack Beatson, 1998. page 23.

liability of the Community and the liability of Member States in like circumstances, since the protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority of a Community authority is responsible for the damage."[122]

Based on the developed Schöppenstedt formula, EU law provides compensation if the rule, which was infringed confers rights on individuals, that breach is considered to be sufficiently serious, and whether there is a direct causal link between breach of obligation on the side of a Member State and damage suffered by those individuals. It follows, that if the EU is liable for damage caused to individuals by unlawful legislative measures adopted by its institutions, where the breach of EU law is sufficiently serious, a Member State must bear responsibility for legislation in a comparable situation, where the limits of discretion left on it was manifestly and gravely disregarded.[123]

After discussion of the conditions playing role in the assessment of State liability, a question would arise about substantive and procedural law governing a situation in which a Member State must make good consequences of the loss or damage caused to individuals. The European Court of Justice also provided a comprehensive ruling on this topic relying on its previous case law, however the theory was hereby significantly supplemented. In such a situation, when a State can be held liable for violation of EU law, it has to grant compensation in accordance with national law on liability. On the other hand, those conditions and rules laid down by the applicable national law cannot be less favourable, than those governing similar domestic claims. In addition to this, national law cannot be restricted in a way, which in practice would make it impossible or excessively difficult to obtain reparation and a national court cannot make compensation for loss conditional on intentional or negligent nature of conduct of a State going beyond issue of a sufficiently serious breach of EU law. A test to investigate whether a Member State manifestly and gravely disregarded limits of conferred discretion should be carried out by assessing definition of 'sufficiently serious' in a particular case. There are numerous factors that a competent court must take into consideration, such as clarity and precision of the rule that has been breached and the measure of discretion left by that rule to organs of a State. Moreover, whether

[122] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 2. and 9-5.
[123] Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003., page 15. and Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 13., and Takis Tridimas, Jack Beatson, 1998. page 16 and 20.

the infringement and damage caused was intentional or involuntary also would play an important role. Furthermore, type of error of law, namely if it was excusable or inexcusable shall be regarded. Lastly, a fact whether the position taken by an EU institution contributed to the ommission and the adoption or retention of national measures or practices were incompatible with EU law has to be discussed. A particular situation concerning violation, in which a breach of EU law has been still continuous despite a fact, that a judgement or preliminary ruling found out the infringement must be held sufficiently serious in any time.[124]

The ruling given by the ECJ affected the question of extent and time period covered by compensation granted by Member States for loss or damage caused to individuals as a result of having breached EU law. These findings –that were not accessible before- made clarity in the field of compensation. A compensation in such case must be commensurate with the loss or damage sustained. If there are no EU provisions governing the issue, it is for the domestic legal system to set criteria for determining the extent of reparation. In contrast, those criteria are not allowed to be less favourable either, then those applying to similar claims based on domestic rules and cannot be suitable to make it impossible or excessively difficult to get compensation.[125] The European Court of Justice extended definition and especially content of damage stating, that loss of profits suffered by individuals must be included, otherwise national laws that preclude this category would be incompatible with EU law. In addition to this, specific damages such as exemplary damages must be possible to be awarded due to claims based on EU law if those damages could be awarded pursuant to similar actions founded on national law.[126] Similarly, the obligation of Member States to make good loss or damage caused to individuals as a result of infringement of EU law attributable to the State cannot be limited to damage suffered after the delivery of a judgement in which the ECJ confirmed that breach.[127]

The justification was founded on a rather theoretical soil in the following way:

[124] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 2-3. and 11-13., and Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 15.
[125] Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 14-15., and Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 3. and 16-18.
[126] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 3. and 16-18.
[127] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 3. and 16-18.

„Since the right to reparation under Community law exists where the requisite conditions are satisfied, to allow the obligation of the Member State concerned to make reparation to be confined to loss or damage sustained after delivery of a judgment of the Court finding the infringement in question would amount to calling in question the right to reparation cenferred by the Community legal order.”[128]

In addition to this, making compensation conditional on prerequisite that there must have been a prior finding issued by the ECJ which confirms breach of EU law attributable to a State is also impossible, as it would contrary to the principle of the effectiveness of EU law. Moreover, rights conferred upon individuals by EU law, that provisions have direct effect in national legal systems of Member States cannot depend on assessment and action of EU institutions, in particular the Commission.[129]

Based on the abovementioned ruling, which is of key significance in the assessment of subsequent cases affecting State liability, the European Court of Justice took the view in these particular joined cases, that Article 30 and 52 of the Treaty have direct effect. It must be interpreted in a way, that they confer rights on individuals, who can rely on them directly before national courts and breach of these provisions may entail obligation of compensation. As regards national legislature, both of Federal Republic of Germany and the UK had a wide margin of discretion in the scope of laying down rules on the quality of beer put on the market and implementation of the common fisheries policy provided by the fact of absence of EU harmonization. Violation of Article 30 of the Treaty was an inexcusable error founded on previous case law especially Cassis de Dijon[130]. Likewise, provisions that make registration subject to a nationality condition constituting direct discrimination is considered to be incompatible with EU law.[131] Pursuant to the decisive test to investigate whether the conduct of UK legislature was sufficiently serious, the national court should take into account legal disputes relating to particular features of the common fisheries policy, attitude of the Commission expressing its opinion towards the UK in reasonable time and of course the

[128] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 3. and 16-17.
[129] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 3.
[130]Rewe-Zentral AG v Bundesmonopolverwaltung für Brantwein, 1979, [ECJ] page 17. (also known as Cassis de Dijon): „The concept of measures having an effect equivalent to quantitative restrictions on imports contained in Article 30 of the EEC Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned.”
[131] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 2. and 10-11.

assessments laid down in the interim proceedings. The competent national court might pay additional attention to the fact, that the UK failed to comply with order of the president of the ECJ to adopt appropriate interim measures immediately, which caused an increased loss suffered by individuals who were affected.[132] Although the European Court of Justice reflected on the major topics that should be investigated and evaluated, it was left for national courts to determine if there was a direct causal link between the breach of the obligation imposed on the UK and the damage suffered by individuals.[133] The European Court of Justice held, that the particular provision in german law, which made reparation dependent on the act or omission of the legislature being referable to an individual situation is such a rule that in practice made it impossible or extremely difficult to get effective compensation as a result of breach of EU law, and because of this it is inadmissible. Incompatibility of such rule with EU law is founded on the concept, that it obstructs the obligation of national courts to ensure full effectiveness of EU law by guaranteeing effective protection for rights of individuals. Similarly, any existing provision in the law of the UK, that requires proof of misfeasance in public office concerning State liability must be deemed to be such a practise that make it impossible or extremely difficult to obtain effective compensation for loss or damage in a comparable situation. As regards extent of compensation, total exlusion of loss of profit or exemplary damages would incompatible with EU law.[134]

[132] Takis Tridimas, Jack Beatson, 1998. page 22.
[133] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 14.
[134] Joined Cases C-46/93 and C-48/93, 1996, [ECJ] page 1-2. and 15-18.

5. British Telecommunications Plc. versus H. M. Treasury

Facts of the case

Brithish Telecommunications Plc. (hereinafter referred to as BT.) was a joint stock limited liability company acting in telecommunication market and was set up under the British Telecommunications Act in 1984. The former company, which previously was in a monopol situation in running telecommunications systems on almost the entire national soil transferred all of its property including rights and obligations as well to BT. By the Act issued in 1984. the government granted BT, and to another undertaking, Mercury the necessary licences in the field of fixed-link telecommunications services and intended to ensure more efficient competition. As a result of this, the two companies obtained the exclusive right to operate services until the year 1990. Although BT controlled approximately 90% of telecommunications business, the government sold off its shareholdings from the company by 1993. and provided several licences for other undertakings. The licence previously granted for BT imposed upon the company the obligation to provide voice telephony services throughout the UK. Moreover, BT was the only licensee, that was subject to price cap concerning tariff changes. In 1992., Council Directive 90/531/EEC on procurement procedures of entities operating in the water, energy, transport and telecommunications sectors was transposed into british law. Provisions of Acts of Parliaments based on that directive, especially implemented content of Article 8[135] excluded almost all of the

[135] Council Directive 90/531/EEC on procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. Article 8:
1, „This directive shall not apply to contracts which contracting entities…award for purchases intended exclusively to enable them to provide one or more telecommunications services where other entities are free to offer the same services in the same geographical area and under substantially the same conditions."
2, „ The contracting entities shall notify the Commission at its request of any services they regard as covered by the exclusion referred to in paragraph 1. The Commission may periodically publish the list of

business entities in the telecommunications sector from the obligation of supply telecommunications services. Pursuant to national regulation, almost only BT remained subject to that Directive concerning basic voice-telephony services, basic data-transmission services, private leased circuits and maritime services.[136] BT sought for annulment of the national provisions that implemented Article 8 of Directive 90/531/EEC and for compensation before the Divisional Court. As the pending case affected EU law interpretation, the Divisional Court decided to stay proceedings and referred questions for the European Court of Justice for preliminary ruling. Those questions in substance had an intention to clarify whether a Member State may determine particular telecommunications services that falls outside of the scope of Article 8. of the Directive while transposing it into national law. Moreover, the Divisional Court wanted to ascertain, if the following: „other entities are free to offer the same services in the same geographical area and under substantially the same conditions" must be considered as only matter of law or also as a matter of fact. Lastly, the national court inquired, whether the UK is expected to grant compensation for BT under EU law for any loss as a result of such transposition of that Article, which allowed the Member States to determine means of telecommunications services deemed to be exemptions.[137]

Considerations

The company claimed, that Article 8 of the Directive was transposed incorrectly as the government left behind the criteria laid down in it depriving BT of the eligibility

services which it considers to be covered by this exclusion, for information, int he Official Journal of the European Communities. In so doing, the Commission shall respect any sensitive commercial aspects the contracting entities may point out when forwarding this information."
Part B of Schedule 2:
2, „All public telecommunications services, other than the following services when they are provided whithin the geographical area for which the provider is licensed as a public telecommunications operator: basic voice telephony services, basic data transmission services, the provision of private leased circuits and maritime services."

[136] The Queen and H.M. Treasury v British Telecommunications Plc, 1996, [ECJ] page 1-8.

[137] Case C-392/93, 1996, [ECJ] page 8-9.

provided by the Directive itself to make its own decisions. Furthermore, BT argued that it suffered loss in connection with incorrect implementation measures, in particular the additional expense imposed on the company by national law and sought for compensation as well. In addition to this, BT claimed, that national provisions did not allow it to enter into profitable transactions pushing the company towards commercial disadvantage by subjecting it to the obligations to publish its procurement plans and contracts in the Official Journal.[138]

On the side of the UK government, the argument was in essence, that the Directive does not exclude any Member State from determining the sorts of telecommunications services which constitutes exemption from the scope of Article 8. This concept was supported with the idea, that in contrary to business entities, Member States should specify the content of that provision particularly in a roughly disputed situation. In addition to this, such an interpretation would permit a more effective control over assessment of competition.[139]

ECJ opinion and assessment

First of all, the European Court of Justice reflected on other provisions of the Directive in question, which provides, that business entities acting on telecommunications market should notify the Commission by request of any services which are regarded as excluded from the scope of the Articles. It follows from this obligation imposed upon companies, that it is for the contracting undertakings to determine, whether a particular service is precluded. Furthermore, the Directive intended to provide adequate and effective legal protection for suppliers and contractors e.g. right to claim damages and interim measure in connection with such an action, which constitutes violation of EU law. Based on these findings, the ECJ rejected arguments of UK government. As regards topic of same services and same conditions, pursuant to ECJ findings, other contracting entities are authorised to operate in the

[138] Case C-392/93, 1996, [ECJ] page 7-8.
[139] Case C-392/93, 1996, [ECJ] page 10-11.

telecommunications market without legal obstruction and in a position which enables them to provide services under the same conditions as contracting entities. Therefore the requirement is matter of law and fact at the same time regarding in particular characteristics of services, existence of alternative services, price factors etc.[140]

In the field of compensation and assessment of State liability, the current case brought innovation again. The European Court of Justice strongly relied on the findings presented in Brasserie and Factortame joined cases. A said to be general principle was confirmed, pursuant to which State liability for loss and damage caused to individuals by breaching EU law on condition that the State can be held responsible is inherent in the system of the Treaty. Moreover, if a Member State affected by breach acts in a field in which it has a wide discretion about making legislative decisions, can be held liable. Based on Schöppenstedt formula, the particular provision of EU law infringed must be intended to confer rights on individuals, that breach must be sufficiently serious and there should be a casual link between the breach of the obligation and damage suffered by individuals.[141] According to previous case-law, a breach should be deemed to be serious if an institution or a Member State manifestly and gravely disregarded the limits of the exercise of its powers.[142] The significance of this judgement is, that the European Court of Justice extended the scope of Member State liability by giving a ruling pursuant to which conditions of State liability laid down in Brasserie and Factortame joined cases including justifications must be applied to such situation, when a Member State enjoys a wide margin of discretion and incorrectly transposes a directive by breaching sufficiently seriously EU law.[143] Another interesting feature of the ruling is, that concept of 'good faith' was introduced as a subjective element to the assessment conditions making considerable modifications on liability. The ECJ held, that the UK interpreted and implemented the provisions of the Directive in an incorrect way, however incorrect implementation in this particular case did not constitute sufficiently serious breach. The European Court of Justice drew attention to the fact, that provisions of Article 8 of the Treaty in question was imprecisely worded and as a result of this, the UK acted by transposing it into national law in good faith. Furthermore, that kind of

[140] Case C-392/93, 1996, [ECJ] page 10-14.
[141] Case C-392/93, 1996, [ECJ] page 14-15.
[142] Case C-392/93, 1996, [ECJ] page 15.
[143] Takis Tridimas, Jack Beatson, 1998. page 26-27.

interpretation was shared by other Member States as well not manifestly contrary to the wording of the Directive, and there was no guidance in case law available that would lead the UK towards correct interpretation. In addition to this, the Commision did not raise objections about such interpretation.[144] Based on the abovementioned, the UK did not bear responsibility for implementing the Directive incorrectly due to lack of sufficiently serious breach of EU law.[145]

6. The Queen and Ministry of Agriculture, Fisheries and Food versus Hedley Lomas Ltd.

Facts of the case

The Ministry of Agriculture, Fisheries and Food for England and Wales (hereinafter referred to as Ministry) refused to issue export licences of live animals to Spain for slaughter as it considered, that the treatment in spanish slaughterhouses did not meet the conditions laid down in Council Directive 74/577/EEC on stunning of animals before slaughter.[146] The Directive was implemented[147] by Spain in 1987., especially reproducing provisions of Article 1 and 2.[148] While the Directive intended to remove diaparities among Member States in the field of protection of animals, it did not

[144] Takis Tridimas, Jack Beatson. 1998. page 25-26., and Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 15-16., and Case C-392/93, 1996, [ECJ] page 15-16.
[145] Case C-392/93, 1996, [ECJ] page 15-17.
[146] The Queen and Ministry of Agriculture, Fisheries and Food v Hedley Lomas Ltd., 1996, [ECJ] page 3-4.
[147] Case C-5/94, 1996, [ECJ] page 4.
[148] Council Directive 74/577/EEC on stunning of animals before slaughter
Article 1: „For the slaughter of animals belonging to the following species: bovine animals, swine, sheep, goats and solipeds, Member States shall ensure that suitable measures are taken to induce death as rapidly as possible after stunning, in accordance with appropriate procedures."
Article 2: „For the purposes of this Directive, stunning means a process effected by a mechanically operated instrument, electricity or gas anaesthesia without adverse effects on the condition of the meat or the offal, which when applied to an animal puts it into a state of insensibility which lasts until it is slaughtered, thus sparing it in any event all needless suffering."

provide rules for monitoring compliance with its provisions. Despite the fact of implementation, the Ministry was supported with horrifying information by spanish organisations dealing with animal protection about cruel treatment in spanish slaughterhouses. Based on english and spanish complaints, the Commission investigated the case but did not reveal any practise of non-compliance, thus refused to act. At the same time, the Commission informed the UK that general ban introduced by them was contrary to EU law. In 1993. the UK and Spain solved the dispute and as a result of this, the ban was ceased.[149]

On 7th October 1992. Hedley Lomas applied for export licence for live sheep with a view to send it to a spanish slaughterhouse. The Ministry denied issuing the licece, however there was no evidence against that particular spanish slaughterhouse. After the refusal, Hedley Lomas brought proceedings before High Court of Justice and sought for declaration of incompatibility with EU law concerning the refusal and for compensation. The High Court of Justice decided to stay proceedings and referred questions for preliminary ruling to the European Court of Justice. The questions in substance affected the assessment of the conduct of the UK and State liability including conditions.[150]

Considerations

Hedley Lomas claimed, that the refusal of the Ministry to issue export licence was contrary to Article 34[151] of the Treaty and in that way the conduct constituted quantitative restriction for which the UK must bear responsibility.[152]

Although the Ministry did not dispute the fact that its deny constituted quantitative restriction on exports, they held that the omission was justified by

[149] Case C-5/94, 1996, [ECJ] page 4-5.
[150] Case C-5/94, 1996, [ECJ] page 5-7.
[151] Article 34 TEU (Maastricht version): „Quantitative restrictions on exports and all measures having equivalent effect, shall be prohibited between Member States."
[152] Case C-5/94, 1996, [ECJ] page 4-6.

provisions of Article 36[153] of the Treaty. They argued, that pursuant to general information, some spanish slaughter houses did not comply with the implemented Directive and in this way the animals exported to Spain would undergo on a suffering treatment prohibited by provisions of the Directive. Based on the observations, the Ministry acted in the name of protection of animals provided by Article 36 of the Treaty.[154]

ECJ opinion and assessment

The European Court of Justice held, that the refusal by the UK to grant export licences constituted a quantitative restriction on exports prohibited by Article 34 of the Treaty. Moreover, the justification of the UK was unacceptable, because the Directive in question provided harmonization of national laws in order to achieve a specific objective, namely the protection of animals. Furthermore, the fact, that the Directive did not lay down any monitoring procedure or penalties in the event of a breach including rules that must be disregarded, therefore Member States are obliged to rely on trust in each other to carry out investigations on their territories concerned. In addition to this, the ECJ pointed out referring to previous case law, that a Member State is not allowed to adopt or introduce protective or corrective measures unilaterally in order to obstruct any breach of EU law by another Member State.[155]

In relation to State liability, the European Court of Justice strongly relied on findings presented by the occasion of Francovich and Brasserie cases. Firstly, the principle was consistently repeated, that liability of a Member State for loss or damage caused to individuals as a result of breach of EU law for which that State can be held

[153] Article 36 TEU (Maastricht version: „The provisions…shall not preclude prohibitions or restrictions on imports, export sor goods in transit justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrinination or a disguised restriction on trade between Member States."
[154] Case C-5/94, 1996, [ECJ] page 4-6.
[155] Case C-5/94, 1996, [ECJ] page 7-9.

responsible is inherent in the system of the Treaty. Secondly, the conditions governing that liability depend on the nature of the breach of EU law, which gave rise to the loss or damage suffered by individuals. Thirdly, if the State acted in a field concerning which it had a wide discretion to make legislative choices a right to compensation can be confirmed if the infringed law intended to confer rights upon individuals, the breach was sufficiently serious and causal link between breach of obligation and sustained damage could be detected. The ECJ held in this particular case, that Schöppenstedt formula must play role in the assessment of State liability. In addition to this, while prohibition of quantitative restrictions and measures that have equivalent effect impose an obligation on the side of Member States, it also creates rights for individuals that must be protected by national courts.[156] The most relevant finding of the ECJ, which contributed to the enrichment of the case law involved was, that if a Member State did not enjoy right of discretion in making legislative choices or it considerably reduced burdens of discretional rights at the time of violating EU law, that breach must be considered as sufficiently serious in itself without assessing any other condition.[157] In this case the Court also left the opportunity for national courts to determine whether there was a causal link between breach of obligation and damage suffered. As regards granting compensation, it must be beared in mind, that the State concerned have to make reparation on the basis of its domestic law, however those conditions for compensation for loss and damage cannot be less favourable, than those relating to similar domestic claims. Moreover, national provisions cannot give rise to such a practise, that would make it impossible or excessively difficult to obtain that reparation.[158]

[156] Case C-5/94, 1996, [ECJ] page 9-10., Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 16., and Takis Tridimas, Jack Beatson, 1998. page 24-25.
[157] Takis Tridimas, Jack Beatson, 1998. page 25., and Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám) 2003. page 16.
[158] Case C-5/94, 1996, [ECJ] page 11., and Kecskés (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 16.

7. Dillenkofer and Others versus Federal Republic of Germany

Facts of the case

On 24th June 1994, Federal Republic of Germany adopted national law into German Civil Code (BGB) implementing details of Council Directive 90/314/EEC[159] on package travel, package holidays and package tours. The purpose of the Directive was the approximation of national laws, regulations and administrative actions of Member States concerning package travel, package holidays and package tours sold or offered for sale within the territory of the EU. The national provisions entered into force on 1st July 1994. and applied to travel contracts that were concluded after that date and on condition that the travel began after 31st October 1994. Dillenkofer and others were purchasers of package travel. In 1993. two operators, from whom the purchasers bought their packages went bankrupt and as a result of this, they did not left for their destination or returned from their holiday location on their own expense. The plaintiffs were unsuccesful in obtaining reimbursement from the companies and due to this fact they brought actions against the Federal Republic of Germany seeking for compensation founded on provisions of the Directive. The national court Landgericht Bonn decided to stay proceedings and referred numerous questions to the European Court of Justice for preliminary ruling.[160] Those questions in essence affected conditions under which a Member State may incur liability, content of rights granted by the Directive, failure of implementation in time, extent of protection provided and measure of breaching EU

[159] Council Directive 90/314/EEC on package travel, package holidays and package tours
Article 7: „The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency."
Article 9
1, „Member States shall bring into force the measures necessary to comply with this Directive before 31. December 1992. They shall forthwith inform the Commission thereof."

[160] Erich Dillenkofer and Christian Erdmann and Hans-Jürgen Schulte and Anke Heuer and Werner, Ursula and Torsten Knor v Federal Republic of Germany Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94., 1996, [ECJ] page 1-8.

law.[161] As discussion of all of the questions and rulings given on them would go far beyond the aim of my Master Thesis, I only evaluate and present the most relevant ones.

Considerations

The plaintiffs argued, that if provisions of the Directive in question had been transposed into german law within the prescribed period, it would have been provided protection for them against insolvency of the operators from whom they had purchased their package travels. Dillenkofer and the Others in substance relied on the findings of the European Court of Justice laid down in Francovich case. They claimed, that the provisions of the Directive, especially Article 7 and 9 were precisely worded and intended to confer rights upon them. Moreover, pursuant to the plaintiffs, there is a detected causal link between infringement of EU law by Federal Republic of Germany and damage suffered by them.[162]

The German government refused claims arose from the cases on the grounds, that conditions presented in Francovich judgement would only applicable if breach of EU law by a Member State considered to be sufficiently serious and on condition that a State could be held responsible for that conduct. Moreover, the German government reflected on the idea pursuant to which circumstances that caused extension of transposition period should be assessed and evaluated. In conclusion, the German government pointed out, that time period for implementation prescribed by the Directive was too short and they would have to face with considerable difficulties arising for the economic sector concerned.[163]

[161] Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94., 1996, [ECJ] page 8-10.
[162] Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94., 1996, [ECJ]. page 7-8 and 15.
[163] Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94., 1996, [ECJ] page 8, 12 and 19.

ECJ opinion and assessment

The ECJ held consistently during investigation of conditions of State liability, that the principle of that liability for loss and damage caused to individuals as a result of breach of EU law for which a State can be held responsible is inherent in the system of the Treaty established the EU. Moreover, founded on considerations laid down in Francovich case, conditions of State liability are dependable on the nature of the breach of EU law that gave rise to loss and damage. According to Schöppenstedt formula, individuals suffered damage have right to compensation if the law infringed intended to confer rights on them, the breach is deemed to be sufficienly serious and there is a causal link between breach of obligation and loss suffered by those individuals. The European Court of Justice pointed out, that likewise in Francovich case, if a State fails to transpose a directive within the prescribed period, there must be a right to compensation where the content of rights conferred upon individuals by that directive are identifiable on the basis of the provisions.[164] The significance of the case is the following argumentation provided by the ECJ due to which based on conditions of Francovich judgement, if a Member States failed to implement provisions of a directive within prescribed period it constitutes in itself a sufficiently serious breach of EU law. In such case, no other criteria[165] must be taken into considerarion in assessment of State liability, in particular the reasons why implementation period was exceeded. Likewise, in such situation, State liability cannot depend either on prior finding provided by the ECJ that confirms the infringement of EU law by a Member State attributable to it and nature of fault, namely intention or negligence of that State would not count. With these findings, the European Court of Justice rather pushed concept of State liability towards objective liability.[166] In addition to this, in this judgement, the European Court of

[164] Takis Tridimas, Jack Beatson, 1998. page 17-18., and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94., 1996, [ECJ] page 12-13., and Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 16-17.
[165] subjective criteria laid down in Brithish Telecommunications case
[166] Takis Tridimas, Jack Beatson, 1998. page 18, and Kecskés 2003. page 17., and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94., 1996, [ECJ] page 13-14.

Justice clearly distinguished situations of non-transposition of a directive and incorrect implementation of a directive.[167]

By the way, pursuant to the view of the European Court of Justice, provisions of Article 7 of the Directive in question were sufficiently precise and content was determinable. The purpose of Article 7. was to protect consumers, who have the right for reimbursement or repatriation in the event of insolvency of the organiser, from whom individuals purchased package travel. In addition to this, if the German government had faced with difficulties in transposing the provisions of the Directive, they should have taken appropriate initiatives within the EU with a view to make the competent EU institution grant the necessary extension of the implementation period.[168]

8. Denkavit International and Others versus Bundesamt fürFinanzen

Facts of the case

A Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States[169] was

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[167] Kecskés, (Polgári Jogi Kodifikáció, V. évfolyam 4. szám), 2003. page 17.
[168] Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94., 1996, [ECJ] page 16 and 19-20.
[169] Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States
Article 3 (1) a,: „For the purposes of applying this Directive…the status of parent company shall be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 25% in the capital of a company of another Member State fulfilling the same conditions,"
Article 3 (2): „By way of derogation from paragraph 1, Member States shall have the option of:
-replacing by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights,
-not applying this Directive to companies of that Member State which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies or to those of

adopted and transposed into german law within the deadline of 1st January 1992. Law on Income Tax, which incorporated the provisions of the Directive provided, that Parent company in connection with the reduction of withholding tax to rate of 5% shall mean a company, which at the moment when liability to investment income tax arises can show, that it has held directly at least 25% of the share capital of the subsidiary for continuous period of at least 12 months.[170]

Denkavit International BV incorporated under the law of the Netherlands (hereinafter referred to as Denkavit) had a direct holding of 20% in the capital of a company Denkavit Futtermittel GmbH operated in Federal Republic of Germany since 1973. In 1992. summer, as a result of share purchase, holding of Denkavit in its subsidiary increased to 99,4%. On 6th October 1992. Denkavit asked the competent german tax authority to reduce withholding tax due to national law, which encompassed the modifications required by the Directive. Moreover, Denkavit undertook to maintain the amount of 25% of the shares owned in its subsidiary for at least two years continuous period from the date of aquisition.[171]

VITIC Amsterdam BV, a dutch undertaking (hereinafter referred to as VITIC) had a direct holding of 19% in the capital of the a german company Wesumat GmbH since 1987. In 1992. winter, after further acquisition of shares, its holding rate was increased to 95%. Although dividend was paid to shareholders concerning parent company, it only happened after the deduction of investment income tax computed using a normal rate. On 29th June 1992. VITIC sought for reallocation of tax already paid as it exceeded the beneficial 5% rate prescribed in national law.[172]

their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years."

Article 5 (1): „Profits which a subsidiary distributed to its parent company shall, at least where the latter holds a minimum of 25% of the capital of the subsidiary be exempt from withholding tax."

Article 5 (3): „Notwithstanding Paragraph 1, the Federal Republic of Germany may, for as long as it charges corporation tax on distributed profits at a rate at least 11 points lower than the rate applicable to retained profits, and at the latest until mid-1996, impose a compensatory withholding tax of 5% on profits distributed by its subsidiary companies."

[170] Denkavit International and others v Bundesamt für Finanzen Joined Cases C-283/94, C-291/94 and C-292/94, 1996, [ECJ] page 1-5.

[171] Joined Cases C-283/94, C-291/94 and C-292/94, 1996, [ECJ] page 5.

[172] Joined Cases C-283/94, C-291/94 and C-292/94, 1996, [ECJ] page 6.

Voormeer BV incorporated in the Netherlands (hereinafter referred to as Voormeer) also bought shares and obtained 96,13% of the capital of a german company Framode GmbH. After that, the undertaking paid dividends after deduction of investment income tax calculated on normal rate. On 15th October 1992. Voormeer sought for reimbursement of the tax paid as it exceeded prescribed reduced rate of 5% as well.[173] After the rejection of the german tax authorities relating to all of the applications of the companies, they appealed against the decisions. In case of Denkavit, the Finance Court located in Cologne modified the verdict and authorised the reduced withholding tax rate on condition that the company would maintain required holding proportion until 30th September 1995. As far as the other two cases were concerned, the Finance Court held, that the requests for reduced withholding tax rate and reimbursements could not be awarded based on national law, however it raised reasonable doubts about if the national law was in line with provisions of the Directive. Based on this ground, the Finance Court decided to stay proceedings and referred questions for preliminary ruling to the ECJ. The questions in essence affected the validity of time period during which the required shareholding rate must be maintained prescribed by national provisions and the problematic of making a formal promise to maintain it. Moreover, the national court wanted to be assured, whether in the event when the national provisions were incompatible with the Directive the tax benefits would be awarded for companies seeking for it. Finally, the national court got to know, if an incorrect transposition would give rise for compensation in the relation of loss of interest suffered as a result of refusal and postponement of the distribution of a profits of the subsidiary until completion of the minimum holding period.[174]

[173] Joined Cases C-283/94, C-291/94 and C-292/94, 1996, [ECJ] page 7.
[174] Joined Cases C-283/94, C-291/94 and C-292/94, 1996, [ECJ] page 7-9.

Considerations

Denkavit argued, that it was a legitimate interest to secure that the refusal of german tax authorities was declared to be illegal. Morover, as a result of that refusal, its subsidiary decided not to distribute profit and due to this involuntary decision the company suffered considerable loss of interest. After having pronounced the illegality of such decision from tax authorities, Denkavit intended to seek for compensation.[175]

The german government held, that since the provisions of the Directive did not provide any rule which stated, that wheter a required time period must be expired by the time of request for tax reimbursement and thus the Federal Republic of Germany had a right of discreciton to rule on that matter. Furthermore, that introduced minimum time period of the required proportion of holding must be expired justified on the grounds to obstruct abuse or fraud also provided by the Directive. In addition to this, claim for compensation was considered to be inadmissible as Denkavit did not seek for it during national proceedings.[176]

ECJ opinion and assessment

Based on the interpretation of provisions in question and recitals of the Directive together, the European Court of Justice took the view, that the minimum period in relation to holding the prescribed amount of shares was not required to have expired at the time when the tax advantage was granted. It follows from the Directive as a whole, that the aim was to encourage cross-border holdings and facilitate tax arrangements governing cross-border cooperation by eliminating any disadvantage concerning cooperation between companies of different Member States. It also means, that the Member States were not entitled to unilaterally introduce restrictive measures such as

[175] Joined Cases C-283/94, C-291/94 and C-292/94, 1996, [ECJ] page 6.
[176] Joined Cases C-283/94, C-291/94 and C-292/94, 1996, [ECJ] page 10-15.

regarding expiration of required period in this case. However, the ECJ reflected on the fact, that the Directive also stated prevention of abuse and fraud relating to tax advantages. In order to deal with it, Member States were free to determine detailed rules to ensure that minimum prescribed period should have been observed. In conclusion, pursuant to the Directive, Member States were not obliged to grant tax exemption immediately if a parent company undertook to maintain the minimum holding period. In addition to this, parent companies could only rely directly on rights ensured by the Directive about tax advantages, if minimum holding period have been observed by Member States.[177]

On the topic of State liability, the Court pointed out first of all, that conduct and endavour of Denkavit in order to seek for declaration of illegality concerning refusal was legitimate. Secondly, the principle of State liability is inherent in the system of the Treaty and right to reparation if Schöppenstedt criterias are fulfilled laid down in Francovich, Brasserie and Dillenkofer cases were again stated. Furthermore, referring to previous case law, a breach of EU law must be deemed to be sufficiently serious, if a Member State during excercising of its rule making powers manifestly and gravely disregards limits of those powers. In that regard, clarity and precision of the rule breached have to be taken into consideration.[178]All in all, the ECJ found, that the incorrect transposition of the Directive by the Federal Republic of Germany did not amount to a serious breach. In support, the Court noted, that the incorrect interpretation from german side excercisig the right of derogation were shared by almost all of the other Member States. In addition to this, it was also taken into consideration, that the Member States conducted discussions with the Council and such interpretation was not challanged. Furthermore, the incorrect interpretation by the Member States implied prevention of abuse and fraud laid down in the Directive and previous case law did not provide Member States with any indication on how the provision in question had to be interpreted. Finally, the European Court of Justice pointed out, that discussions in proceedings before the Commission do not entail consequences on the interpretation of EU law, however they may be relevant in regard to excusable error on the side of a State concerning action for damages. Based on the abovementioned, the Court found, that in

[177] Joined Cases C-283/94, C-291/94 and C-292/94, 1996, [ECJ] page 9-15.
[178] Joined Cases C-283/94, C-291/94 and C-292/94, 1996, [ECJ] page 16-18.

this particular case, the Member State bear no liability for consequences of faulty interpretation regarded as an excusable error.[179] As we can see, Denkavit judgement is another useful source in the assessment of State liability. Subjective elements firsly laid down in British Telecommunications case were further extended and played a decisive role in this case.

9. Traghetti del Mediterraneo SpA versus Repubblica Italiana

Facts of the case

Traghetti del Mediterraneo SpA (hereinafter referred to as TDM) and Tirrenia di Navigazione (hereinafter referred to as Tirrenia) were companies operating in the field of maritime transport and in the 1970s, they ran regular ferry services between mainland Italy and islands of Sardinia and Sicily. In 1981. TDM sued Tirreni before Naples District Court and sought for compensation. TDM argued, that for a period of years, it suffered damage as a result of low-fare policy of Tirrenia. Moreover, with its operation, Tirrenia breached provisions of Italian Civil Code relating to unfair competition and also infringed Article 85-86-90 and 92[180] of the EEC Treaty by abusing with dominant

[179] Takis Tridimas, Jack Beatson, 1998. page 26-27., and Joined Cases C-283/94, C-291/94 and C-292/94, 1996, [ECJ] page 18-19.
[180] Article 85 of EEC Treaty:
„1, The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions, (b) limit or control production, markets, technical development, or investment, (c) share markets or sources of supply, (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them in a competitive disadvantage, (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage have no connection with the subject of such contracts."

position introducing fares well below costs in the market attributed to the fact, that it obtained public subsidies.[181]

Both of the courts of first instance and appeal dismissed action of TDM. The national courts took the view, that subsidies granted by authorities of State were legal as they reflected public interest and Tirrenia was not held responsible for unfair competition. TDM considered, that the judgements contained errors of law and were based on incorrect interpretation of the Treaty concerning State aid and submitted an appeal to the Italian Supreme Court of Cassation asking it to refer questions for preliminary ruling to the European Court of Justice. The request was rejected as the Supreme Court held, that previous judgement complied with EU law and especially with case law of the ECJ. In the justification, the Supreme Court took the view, that provisions of the Treaty allow exception to prohibition of State aid to promote economic development of underprivileged regions or to meet demands for goods or services which cannot be carried out by free competition. The Supreme Court also rejected objections of TDM raised against failure to refer questions to the ECJ. Since TDM did not accept argumentation of Supreme Court laid down in its judgement issued in 19th April 2000., it brought proceedings against the Italian State before the Genoa District Court and sought for compensation for damage suffered as a result of incorrect interpretation of the Treaty committed by the Supreme Court. In addition to this, TDM argued, that the Supreme Court bereached its obligation to refer questions for preliminary ruling to the European Court of Justice. The Genoa District Court finally decided to stay proceedings and turned to the ECJ. The national court was curious to know in essence whether a Member State bears liability for damages caused to individuals on the basis, that national courts made errors about the application of EU

Article 86 of EEC Treaty:
1, „In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact or maintain in force any measure contrary to the rules contained in this Treaty…"
2, „Undertakings entrusted with the operation of services of general economic interest or having a character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not affected to such an extent as would be contrary to the interests of the Community."

[181] Traghetti del Mediterraneo SpA v Italian Reppublica Italiana Case C-173/03, 2006, [ECJ] page 1-6.

law and the court of last instance disregarded the obligation to refer the case for preliminary ruling to the ECJ.[182]

Considerations

TDM claimed, that if the national court previously had contacted the European Court of Justice pursuant to its obligations, the result of the appeal would have been different. In addition to this, TDM held, that Law NO 117/88[183] was incompatible with EU law in a way, that provisions made it excessively difficult or rather impossible to get reparation from a State in the even when judicial decisions caused damage for individuals. Furthermore, as far as TDM was concerned, these national provisions were not in line with case law on State liability either.[184]

The Italian Republic refused the action for damages in the light of provisions of Law NO 117/88. They argued, that interpretation of law carried out by judicial institutions cannot give rise to State liability at any time and conditions of preliminary rulings were not fulfilled. Furthermore, the government reflected on the fact, that decision of the Supreme Court became decisive and had full effect, that is it could not be challanged any more.[185]

[182] Case C-173/03, 2006, [ECJ] page 6-11.

[183] Law NO 117/88-„applicable to all members of the ordinary, administrative, financial, military and special judiciary exercising a judicial function of any type, and to other persons participating in the exercise of a judicial function"

Article 2 (1): „Any person who has sustained unjustifiable damage as a result of judicial conduct, acts or measures on the part of a judge who is guilty of intentionaly fault or serious misconduct int he exercise of his functions, or as a result of denial of justice, may bring proceedings against the State for compensation for pecuniary damage he has suffered or non-pecuniary damage caused to him by being deprived of his personal liberty."

Article 2 (2): „In the exercise of judicial functions the interpretation of provisions of law or the assessment of facts and evidence shall not give rise to liability."

[184] Case C-173/03, 2006, [ECJ] page 9.

[185] Case C-173/03, 2006, [ECJ] page 9.

ECJ opinion and assessment

The European Court of justice strongly relied on its previous case law, especially on findings laid down in Köbler[186] judgement. Firstly, the ECJ took the view, that a principle must be applied in any case due to which Member States are required to make good damage caused to individuals resulting from violation of EU law for which that particular State could be held liable and if it was attributable to a national authority by act or omission. Moreover, the rights conferred upon individuals by EU law would be weakened if they were excluded from being able under particular conditions to get compensation when those rights were infringed by a national court of last instance. Similarly, total exclusion of State liability on the ground, that an infringement of EU law committed by national courts resulting from assessment and legal classification of facts would lead to weakening of procedural guarantees and remedy options open for individuals, and thus unacceptable. On the other hand, the ECJ took the view, that State liability in such case could not be unlimited. State liability on non-contractual basis could arise exceptionally, if a national court, which adjudicates at last instance has manifestly infringed the applicable law. In assessment, whether that breach was manifest, some subjective factors should be taken into consideration such as degree of clarity and precision of the rule infringed, nature of violation (intentional or involuntary) and whether the error of law was excusable or inexcusable. It must also taken into consideration, whether the national court breached its obligation to make reference for preliminary ruling to the ECJ. Certain acts should be regarded as manifest infringement, for example if the national court attributed to a substantive or procedural rule of EU law a manifestly incorrect meaning in the view of relevant case law on the subject matter or for instance if the national court interpreted national law in a way as a result of which in practice it leads to an infringement of EU law.[187]

On the topic of conditions of State liability, the ECJ in essence repeated findings laid down in cases Francovich, Brasserie and Dillenkofer. In this case, State liability was governed by the principle of individual right for compensation in the event when a

[186] Gerhard Köbler versus Republik Österreich Case C-224/01, 2003, [ECJ]]
[187] Case C-173/03, 2006, [ECJ] page 10-19.

Member State breaches EU law and thus those individuals suffer losses. The rules concerning assessment of sufficiently serious breach and conditions of Schöppenstedt formula must also be taken into consideration. Moreover, it is for the national courts to determine whether there was a causal link between breach of EU law carried out by the Member States and damages sustained by individuals. In conclusion, the European Court of Justice held, that it was incompatible with EU law, that national legislation excluded State liability for damage caused to individuals by infringement of EU law attributable to the court of last instance because of faulty interpretation or assessment of law or facts or evidence. Furthermore, EU law precludes national legislation which restricts liability only to cases of intentional fault and serious misconduct committed by the national court if that limitation would lead to exclusion of State liability in other cases where a manifest infringement of applicable law was carried out.[188]

VII. Conclusion

As it turned out from the cases discussed in my Master Thesis, that the concept of State liability has seen an impressive change and development over the decades. In the beginning, the dominant viewpoint was State Immunity shared by several States, which gradually and slowly started to transform into Functional Immunity in a way, that State liability have been acknowledged concerning some aspects. Of course there were common initiatives to regulate the issue, however none of these attempts brought considerable and effective breakthrough. Due to the fact, that the Treaties were narrow worded on the topic, it was for the European Court of Justice to fill in the gap by providing primarily preliminary rulings, which changed the whole legal thinking about liability of Member States. Findings of the ECJ laid down in judgements had stong effect on position of individuals as well, let alone concept of rule of law within the territory of the European Union or functioning of the common internal market. The first landmarks were in ECJ case law the Van Gend en Loos and Costa judgements, through which doctrines of direct effect and supranationality of EU law were introduced. The

[188] Case C-173/03, 2006, [ECJ] page 17-19.

findings presented by the European Court of Justice in these cases created a bridge between individuals (natural and legal persons) and Member States constituting grounds for subsequent claims, albeit not immediately and at once concerning State liability. Although in Schöppenstedt case, there was no Member State directly involved, Schöppenstedt formula produced by the ECJ was a milestone often used in the assessment of State liability. Apart from the critics of the judgement relating to insufficient level of protection provided for individuals, in those circumstances findings were able to push legal thinking towards Functional Immunity. The first judgement was presented in Francovich joined cases, which stated expressis verbis, that a Member State must bear responsibility for breaching EU law attributable to it and such conduct – under certain conditions- has to entail reparation in relation to individuals, who suffered damage and losses as a result of such breach. In Brasserie joined cases, the European Court of Justice confirmed findings laid down in Francovich case. Furthermore, the concept of State liability was improved by providing points of view on extent of such liability, conditions playing important role during assessment, features of compensation provided and consequences of breach and about rules granting reparation for individuals. In subsequent cases, theories and findings laid down in Francovich and Brasserie judgements were further developed and supplemented, however the basics stayed the same so far.

Dillenkofer judgement is considered to be the case, that brought the concept of objective liability of Sates pushing eventually the doctrine of State immunity to Functional Immunity. In that case, the ECJ held, that if a Member State fails to implement a Directive within the prescribed period, that State is liable for breach of EU law irrespective of the other conditions which generally play role in assessment of State liability. At this point, we would say that the development process is finally over and Member States bear objective liability, however it is not the case. In other judgements, especially in latter ones, the ECJ still paid attention to subjective elements in the assessment of State liability as we saw in British Telecommunications and Hedley Lomas cases. The abovementioned subjective conditions play role in such situation, when a Member State transposes a directive in an incorrect way. In this category, a distinction should be made between cases in which Member States enjoy disreciton in attaining objectives prescribed by directives using national legislation and other cases in which there is no discretion left on the Member States. If a Member State do not enjoy discretional rights or manifestly and seriously disregards such rights by national legislature constituting breach of EU law, that breach must be considered as sufficiently serious in itself without assessing any other condition. In the event, when a Member State has a wide margin of discretion and incorrectly transposes a directive, subjective elements are still drawn into the assessment of State liability. Several criteria should be taken into consideration in such case, for instance whether provisions of the directive in question are sufficiently precise and unconditional, concept of good faith introduced by the Court in British Telecommunications case, if the error in law is excusable or inexcusable. Furthermore, it must be born mind whether other Member States shared the incorrect interpretation attributed to provisions of a directive or if the Commission expressed opinion about such interpretation. In addition to this, attention should be paid whether ECJ case law as a guidance for interpretation is available or not.

As we can see, objective liability declarated in Dillenkofer judgement only belongs to a particular category of conducts, that amount to sufficiently serious breach of EU law, namely when a Member State fails to implement provisions of a directive within the prescribed period.

Based on the abovementioned, I believe, that although ECJ case law reached declaration of objective liability in a case of a particular category of violation of EU law, subjective features are still typical of State liability during assessment, and in this way, the dualism of objective and subjective elements govern the concept of State liability respectively.

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Summary

The subject of civil liability in relation of Member States has been always a popular topic among lawyers of the European Union, judges and academic commentators alike. Lack of preciseness and broad legislation gave rise to common initiatives to regulate State liability on EU level and an opportunity for the European Court of Justice to fill in the gap with case law. In my Master Thesis, I wanted to introduce the reader into the issue of State liability focusing on ECJ case law by providing significant cases, which contributed to the enrichment and development of the topic. These landmark cases gradually pushed the legal thinking from Absolute Immunity to Functional Immunity, that strongly affected position of individuals (natural and legal persons alike) opposed to a Members State and contributed to the maintainance of rule of law and proper functioning of the common market. From my Master Thesis, it turns out, that the issue of State liability has seen a great change and development over the decades. The presented cases can be divided into three major groups constituting breaches of EU law, in particular cases that arose from ommission of transposition of EU Directives into national law, incorrect transpositions of a Directive and simply disregarding EU law by national legislation. The first milestones were the Van Gend en Loos and Costa judgements, through which doctrines of direct effect and supranationality of EU law were introduced creating grounds for subsequent claims. Francovich judgement was the first based on findings laid down in Schöppenstedt case, which stated expressis verbis Member States' liability for breaching EU law. Brasserie joined cases brought improvement on conditions playing role during assessment of State liability, features of compensation provided, consequences of breach and rules granting reparation for individuals. In subsequent cases, theories and findings were further developed and supplemented, however the basics stayed the same so far. Although by Dillenkofer judgement, the Court reached the concept of objective liability, subjective elements still play an important role in the assessment of State liability, and in this way, the dualism of objective and subjective elements govern the concept of State liability.

Zusammenfassung

Die Zivilverantwortung des Staates war immer ein populäres Thema, auch zwischen Juristen der Europäischen Union, Richtern und Akademikern. Die ungenaue und breite Gesetzgebung mündete in gemeinsame Initiativen zur Regelung der Verantwortung des Staates und war auch der Grund für den Gerichtshof der Europäischen Union, die Lücken zu füllen. In meinem Master Thesis, möchte ich für den Leser das Thema der Verantwortung des Staates vorstellen. Hierbei legte ich den Fokus auf bedeutende Rechtsfälle des EuGH, umd das Thema anschaulich darzustellen. Diese beachtliche Rechtsfälle zeigen die Entwicklung des rechtlichen Denkens von absoluter Immunität zur funktionalen Immunität des Staates. Diese Änderung hat einen starken Effekt auf die Position der Privatpersonen (Menschen und Gesellschaften) gegenüber den Staaten und hat auch bei der Erhaltung der Funktionsweise des gemeinsamen Marktes geholfen. In meinem Master Thesis hat sich gezeigt, dass sich das Thema der Verantwortung des Staates während der Dekaden verändert hat. Man kann die Rechtsfälle des EU-Rechts in drei Hauptgruppen klassifizieren: Nichtumsetzung von EU Richtlinien, inkorrekt Umsetzung der EU Richtlinien und Missachtung des EU-Rechts mit nationalen Regeln. In den ersten bedeutungsvollen Urteilen Van Gend en Loos und Costa hat der Gerichtshof der Europäischen Union die Begriffe unmittelbare Wirkung und Supranationalität ins EU-Recht eingeführt. Diese waren die Grundlage für nachfolgende Forderungen. Francovich war das erste Urteil – beruhend auf der Rechtssache Schöppenstedt – das expressis verbis die Verantwortung des Staates wegen Übertretung von EU Recht deklariert hat. Die Rechtssache Brasserie brachte Entwicklungen über die Bedingungen, die für die Bewertung der Verantwortung des Staates wichtig sind: Merkmale der Entschädigung, Nachwirkungen und Regeln für die Entschädigung von Privatpersonen. Im Dillenkofer Urteil, hat der Gerichtshof das Konzept der objektiven Verantwortung herausgearbeitet, subjektiv Kriterien (siehe Rechtssache British Telecommunications und Hedley Lomas) sind wichtig geblieben, was bedeutet dass objektive und subjektive Kriterien zusammen das Thema der Verantwortung des Staates dominieren.