

The Concept, Nature And Conditions Of State Liability Under EC Law : *Per Se* Rules?

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I. Establishment of a judicial liability system by the European Court of Justice (the "Court")

The possibility of holding Member States liable to pay damages to individuals who suffer loss due to infringements of Community law attributable to the state had not been anticipated from the outset. The EEC Treaty did not contain any provisions to that effect¹; however, as the Community legal order firmly established itself as part of the national legal orders and above them², the need arose to reconsider the position of the state with regard to carrying out the duties imposed upon it by the Community³.

It could be perceived that the enforcement actions against the Member States stipulated under Articles 169 and 170 did not suffice to ensure the full effectiveness of Community Law. The tension between the Community at the decision making level and the Member States at the implementation level is a common feature of the Community legal system.

The issue came up in the 1991 Intergovernmental Conferences. The Commission contributed with an opinion in which it envisaged methods to ensure compliance with Community law⁴. One of the proposals regarding financial sanctions to be imposed by the Court in an action for failure to comply with a previous judgment of the Court has been taken up and Article 171 has been amended enabling the Court to impose a lump sum or penalty payment on the Member State not complying with its judgment⁵.

The final proposal pertained to the recognition of the financial liability of a Member State towards persons suffering harm from the failure of the state to

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1 The EEC Treaty only envisages the non-contractual liability of the Community under the provision of Article 215.

2 Principle of direct effect and supremacy as recognised in case 26/62, van Gend en Loos [1963] European Court Reports ("ECR") 1.

3 F. Snyder, "The Effectiveness of EC Law" in T. Daintith (ed.), *Implementing EC Law in the UK: Structures for Indirect Rule* (Chancery Law Publishing, 1995, 1st edn.) 54-55.

4 Commission Opinion of 21 October 1990 on the proposal for amendment of the Treaty establishing the EEC with a view to political union, EC Bull. Supp. 2/91.

5 For a critique of the amendment of Art. 171, see P. Curtin, "The Constitutional Structure of the Union; A Europe of Bits and Pieces (1993) 30 Common Market Law Review, 17.

meet its Community law obligations. This is a type of sanction taken up by the Court in *Francovich*⁶, a case referred to it under the preliminary ruling procedure; the right of the individual to bring a damages action against the state before the national court has been recognised as a national remedy⁷ for the first time in this decision. It may be presumed that the short-cut, precise and effective solution must have appealed to the Court whose main concern is to ensure the full effectiveness of Community law. It also seems to be the more rational solution to impose the duty to grant damages on national courts than to extend the jurisdiction of the Court. It should be borne in mind however that, at the time being, there are no Treaty articles on state liability and that the system and its justification have been developed by the case law of the Court.

II. The justification of the concept of state liability

The Court has derived justifications for the establishment of a judicial liability system from three different levels in *du Pêcheur*⁸ following an initial declaration in *Francovich* where it is stated that the principle of state liability is inherent the Treaty⁹.

These will be briefly analysed in turns:

a) *The justification derived from the international law principle of pacta sunt servanda:*

In *du Pêcheur*, the obligations of the Member States arising out of the Treaty is compared to the international commitments which sovereign states undertake under the international legal order and as in the requirement of the principle of *pacta sunt servanda*; it is stated that all state authorities are bound in performing their tasks to comply with the rules laid down by Community Law¹⁰. The Court also contends that a state whose liability for breach of an international commitment is at issue will be viewed as a single entity. This unitary conception of the organs of the state assists the Court in attributing the damage to the state as a single entity where the national legislature is responsible for the infringement in question.

b) *The justifications derived from Community law:*

The Court establishes the existence of state liability as a matter of principle

6 Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357.

7 See *supra* No. 25.

8 Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Germany and R v. Secretary of State for Transport, ex p Factortame Ltd and others* ECR [1996] 3 I-1029.

9 No. 6 above, par. 35.

10 No. 8 above, par. 34.

outright in *Francovich* and states that this principle is inherent in the system of the Treaty.

The *ratio legis* lying behind this principle is to ensure the full effectiveness of Community law, the realisation of which the Court contends to have been undertaken by the Member States under the provision of Article 5 of the Treaty¹¹.

Article 5 provides that;

"Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty."

The emphasis the Court places on Article 5 may be perceived starting from its early case law. The obligation to conform to the Community legal order has been defined as "... the duty of solidarity" and the failure of the Member State as "...striking at the fundamental base of the Community legal order"¹².

Article 5 is defined by some authors as the "fidelity clause"¹³ which is akin to the *pacta sunt servanda* principle. The definition encompasses "the duty of Community loyalty or the principle of sincere co-operation"¹⁴.

The interpretation of this Article considered together with the active role the Court plays under the provision of Article 164, raises a number of policy issues extending beyond the mere legal definition of the principle of *effect utile*. The identification of the social, political and economic context around which the legal framework of the effectiveness of Community law is drawn, is essential in order to be able to specify and determine the conditions under which the Member States should be held liable for breaches of Community law, precisely and justly¹⁵; however, such an assessment would surpass the purpose of this essay in which it is aimed to analyse the structure of the judicial liability system established by the Court in order to ensure the effectiveness of Community law.

c) *The justification derived from the national legal systems of Member States*

The Court contends in *du Pêcheur* that state liability is "familiar to the legal systems of the Member States" and proceeds to note that the courts played

11 No. 6 above, par. 36.

12 Case 39/72, *Commission v. Italy* [1973] ECR 101.

13 Temple Lang, "Community Constitutional Law: Article 5 of the Treaty" (1990) 27 *Community Market Law Review* 645.

14 Snyder, *op. cit.* N. 3, 66.

15 *Ibid.* 50-87.

an important role in developing the essential legal rules on state liability in many national legal systems¹⁶. In order to display the similarity between the national and Community legal systems, the Court refers to the principle of the non-contractual liability of the Community expressly laid down in Article 215 of the Treaty.

At this point, the Court in fact, admits that state liability is not stipulated in the Treaty, but developed by the case law of the Court. Referring to Article 215 in this context weakens the argument that state liability is inherent in the system of the Treaty. One returns to the question of the position and the role of the Court as a Community institution and the nature of the liability of the state¹⁷.

The German government challenges the power of the Court to create a general right to reparation for individuals by judicial decision and submits that the institutional balance of the Community is thus impaired.

The Court merely responds by stating that the power allocated to it under the provision of Article 177 which provides that it has jurisdiction to give preliminary rulings concerning, *inter alia*, the interpretation of the Treaty, justifies the creation and determination of the extent of such reparation¹⁸.

Objections from Member States as to the extent of the jurisdiction of the Court are likely to persist even though it appears that the Court does not take any heed of them.

III. The individual suffering loss v the state before the national courts

The establishment of the principle of state liability is another indication of the desire of the Court to promote integration further and to "inject" Community law into the national legal systems¹⁹. It imposes Community law at national level²⁰ by making use of the preliminary ruling procedure under the provision of Article 177 while remaining outside the arena of the dispute. It may be perceived that the approach of the Court is to encourage national courts to rule in accordance with its judgments to protect the rights of individuals and thereby to ensure the effectiveness of Community law.

16 No. 8 above, par. 29-30.

17 For a detailed analysis of the role and methodology of the Court, see P.P. Craig and G. de Burca, *EC Law: Text, Cases and Materials* (Oxford University Press, 1995), 79-88.

18 No. 8 above, par. 24-25.

19 For an analysis of the evolving relationship between the Court and national courts, see *op. cit.*, No. 17, 445.

20 See T. Hartley, "The effects in national law of judgements of the European Court" [1980], 5 *European Law Review* 366.

a) *The individual*

The ruling in the *Francovich* case set aside²¹ the principle laid down previously by the Court which provided that the rights conferred on individuals by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules²².

The effective protection of the rights of the individual under Community law against the state lies at the heart of the judicial liability system established by the Court. It is expressly set down in *Francovich* that "the subjects of that legal system (the legal system created by the EEC Treaty) are not only the Member States, but also their nationals"²³. Later, in *du Pêcheur*, the Court refers to the rules laid down by Community law *directly governing the situation of individuals* in order to draw the framework of the duty of compliance with Community law and the scope of liability of the state²⁴.

The Court provides the individual with a strong national remedy irrespective of whether such a remedy is originally available in national law or not²⁵. It may be perceived that the relationship between the right of the individual to claim damages from the state due to the breach of Community obligations and the realisation of the full effectiveness of Community law is symbiotic.

b) *The state*

One of the consequences, in Community law, of the division of powers within the state is that it raises contentious issues with regard to the duty of fulfillment of Community obligations by the organs of the state; the scope of liability of state due to breaches of Community law committed by its organs other than the executive organ is controversial in the light of the principles of supremacy and subsidiarity²⁶.

The Court took the opportunity in *du Pêcheur* to clarify that all state authorities, regardless of the division of powers between constitutional

21 The author does not purport to state that the principle of national procedural autonomy is declared as wholly inapplicable, but rather that it has become subject to the principle of full effectiveness after *Francovich*; it is decided in *du Pêcheur* that national legal rules will still apply regarding the extent of reparation in the absence of Community rules.

22 Case 33/76, *Rewe-Zentralfinanz EG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

23 No. 6 above, par. 30.

24 No. 8 above, par. 34.

25 For an assessment that the Court has invented a Community law remedy by providing for state liability in *Francovich*, see M. Ross, *Beyond Francovich*, (1993) 56 *Modern Law Review* 55.

26 For a discussion of broadening the concept of state in the context of giving effect to directives, see *op. cit.* n. 17, 184-189.

authorities, were viewed as a single entity for the purposes of holding the state responsible for breaches of Community law²⁷.

Factortame I was brought before the Court by an English court and it involved a case where the national legislature was responsible for the infringement in question²⁸. Certain articles of the Merchant Shipping Act, adopted in 1988 were held to be in breach of the principle of non-discrimination and freedom of establishment under Community law. Preceding this decision, the Court ordered that interim measures 'be taken ordering the suspension of the application of the provisions of these articles²⁹; however, in English law, an interim injunction may not be granted against the Crown (e.g. against the proviso of an Act of Parliament). The Court rejected the argument that the English courts had no power to grant interim relief in such a case and ordered that any provision of a national legal system which might impair the effectiveness of Community law should be set aside³⁰. A similar problem arose with regard to the claims for damages when the plaintiff companies sought compensation for losses incurred during the period in which the legislation was in force. The English national courts were confronted with the problem of national provisions inhibiting them from awarding damages again. The damages issues referred to the Court for preliminary rulings were replied in the same manner as in *Factortame I*.

The Court does not distinguish between the breaches of the different organs of the state. Their obligation to ensure the full effectiveness of Community law is uniformly defined and national rules are held to be subject to the requirements of this principle. The liability of the state may arise even from the breach of Community law by the national courts if the conditions are fulfilled.

c) *The national courts ensuring the full effectiveness of Community law*

In *du Pêcheur*, the Court rejects the arguments of the German, Irish and the Netherlands governments that the direct effect of Community law is an adequate protection for the individual and that state liability may only arise when the provisions breached are not directly effective³¹.

It states that the principle of direct effect is only a minimum guarantee which is not sufficient to ensure full effectiveness of Community law. The

27 No. 8 above, par. 33.

28 Case C-221/89, *R v. Secretary of State for Transport, ex parte Factortame Ltd.* [1991] ECR I-3095.

29 Case C-213/89, *R v. Secretary of State for Transport, ex parte Factortame Ltd.* [1991] ECR I-2433.

30 *Ibid.*, par. 21.

31 No. 8 above, par. 18.

principle of direct effect enables the individual to assert before national courts that prevailing Community law provisions should be applied instead of national provisions whereas the purpose of the principle of effectiveness is "to redress the injurious consequences of the breach of the state" and thus to ensure that Community law is given full effect in the Community³².

The Court then concludes that the individual is, *a priori* entitled to claim damages when a state organ infringes a right conferred by a directly effective Community provision, since direct effect has remained inadequate to ensure full effectiveness³³.

It may be perceived from the cases cited above that Article 177 is an important tool which the Court makes use of extensively to develop important principles of Community law³⁴. It aims to establish the Community legal order firmly in all Member States through its rulings promoting co-operation with national courts³⁵. The development of the principle of interpretation of national law by national courts in the light of directives and the obligation imposed on national courts to set aside national provisions impeding full effectiveness of Community law indicate that the Court desires the national courts to reason in accordance with the principles of Community law in cases where there is a Community dimension.

Interesting situations may arise when damages claims are made before the national courts which arise from the breach of Community law obligations by another national court³⁶, taking into consideration that the duty to enforce Community law has been conferred on national courts. In any case, it may be stated that the importance of the role of the national courts in the enforcement of Community law is likely to increase as their consciousness to perceive themselves as Community courts develops.

IV. Sources of state liability

It is stated in Francovich that "although state liability is thus required by Community law, the conditions under which that liability gives rise to a right to compensation depend on the nature of the breach of Community law giving rise to the harm. "There are different types of breaches of Community law by a

32 *Ibid.*, par. 20.

33 *Ibid.*, par. 22.

34 See *supra* No. 19.

35 For a discussion of the tension between the Court and the national courts, see Boch & Lane, *EC Law in National Courts, a Continuing Contradiction*, [1991], *Leiden Journal of International Law* 171.

36 It is possible that the national court may have breached the duty imposed upon it by the Court to award damages to the individual suffering harm from breach of Community law by a state organ and this breach, in itself, may incur state liability.

Member State comprising the sources of state liability to which different conditions for liability apply³⁷.

a) *Breaches pertaining to the failure to give effectiveness to a Community directive*

A Member State is obliged to take all measures necessary to achieve the result prescribed by a directive. The Member State may fail to fulfill this obligation in two ways:

(i) Non-implementation of a directive:

Directives are required to be transposed into national law before the expiry of the period stipulated in the directive³⁸. Failure to do so entails state liability. In *Franovich*, the Court defined this situation as a case where the exercise of the Community right is subject to prior action on the part of the state and concluded that the possibility of compensation would be particularly indispensable in this case³⁹.

Later on in *Rivero*⁴⁰, the Court confirms that Community Law requires the Member State to make good damage caused to individuals if the state has failed to transpose a directive before the date for implementing the directive has expired.

(ii) Misimplementation of a directive:

Incorrective transposition of a directive into national law may be regarded as the second source of liability under the type of breaches pertaining to the failure to give effectiveness to a directive. In a recent case⁴¹ referred to the Court where British Telecommunications plc alleged that the United Kingdom government had misinterpreted and incorrectly transposed into national law, the Council Directive regulating procurement procedures of entities operating, *inter alia*, in the telecommunication sector and claimed damages, the Court held that state liability in this case was not *per se* and that it had to be determined whether the breach was sufficiently serious prior to the assessment of other conditions the existence of which would create state liability.

It should be noted at this stage that state liability is not incumbent upon the nature of the provision of the directive; the provision may or may not have

37 No. 6 above, par. 38.

38 See Case 148/78, *Pubblico Ministero v. Tullio Ratti*, [1979] ECR 1629 where the Court establishes that it is within the discretion of the Member State to adopt a directive before the end of the prescribed period.

39 No. 6 above, par. 34.

40 Case C-192/94 *El Cortè Ingles SA ve Cristina Blazquez Rivero* ECR [1996] 3 I-1281.

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

direct effect⁴². The criterion is the possibility to identify the content of the rights conferred on individuals on the basis of the provisions of the directive.

Secondly, it may be perceived that the Court has a firm stance with regard to the non-implementation of a directive and assumes the liability of the state without requiring the assessment of whether the breach is sufficiently serious or not⁴³.

b) *Breaches pertaining to the failure to give effectiveness to other Community legislation*

The other types of community legislation whose provisions are binding on Member States are regulations which have general application and decisions which are binding upon those to whom they are addressed.

Regulations and decisions have direct effect and the national authorities are obliged to ensure the full effectiveness of these provisions. The individual may invoke the provisions of these rules before the national court which is also under the same obligation. Failure of the organs of the state to give full effect to Community legislation may incur the liability of the state. Since the Court has not stipulated that a sufficiently serious breach of Community law may be assumed in this case, "the decisive test in order to determine whether the limits on the discretion of the organ of the state in the application of the Community legislation have been manifestly and gravely disregarded or not" will be needed to be carried out⁴⁴.

c) *Breaches pertaining to the failure to give effectiveness to the judgments of the Court*

The Court determined four sources of liability with regard to the failure to comply with the jurisprudence of the Court in *du Pêcheur*⁴⁵. These are:

(i) Failure to comply immediately with the order of the Court during the proceedings of a case.

In *Factortame III*⁴⁶, the Court contends that if the allegation that the United Kingdom has failed to comply with the order of the President of the Court in Case 246/89 R. may be proved, the state may be held liable if it may also be proved that the loss incurred has thus been needlessly increased. The state liability is not *per se* in this case, but incumbent upon the proof of existence of two conditions, i.e., failure to adopt immediate measures for

42 See *supra* No. 32.

43 No. 6 above, par. 40.

44 No. 8 above, par. 55-56.

45 *Ibid.*, par. 55-56.

46 *Ibid.*, par. 64.

compliance and the causal link between the failure and the increase of loss; then, sufficiently serious breach may be assumed.

(ii) Persistence in the failure to comply with a ruling of the Court despite a judgment finding the infringement in question to be established.

This situation has been classified as a case where the sufficiently serious breach of the state is assumed to be established. No extra conditions need to be proved.

At this point, it should be remembered that the Treaty on European Union amended Article 171 of the EEC Treaty and enabled the Commission to bring a state before the Court failing to take the necessary measures to comply with the judgment of the Court within the time-limit laid down by the Commission. It is envisaged that a lump sum or penalty payment may be imposed by the Court if non-compliance by the state is established⁴⁷.

(iii) Acting contrary to the preliminary ruling of the Court.

This situation may arise in cases where the national court rules contrary to the express guidance provided to it by the Court⁴⁸ or when the national authority fails to comply with a judgment of the national court given in accordance with the preliminary ruling of the Court. One should assume that the liability of the state would not be strictly *per se* in this case;

The Court sets down as a condition that the preliminary ruling breached by the state should be on a matter from which it is clear that the conduct in question constitutes an infringement;

This condition doesn't involve the assessment of the action on the part of the state; it is met when the clarity of the ruling is established and then the breach of Community law is deemed to be sufficiently serious.

iv) *Acting contrary to the settled case law of the Court*

Considering the active role the Court plays in shaping and developing the principles of Community law when fulfilling its duty under Article 164, it may be assumed that the settled case law of the Court encompasses Community rules, the infringement of which would incur liability on the infringing Member State⁴⁹.

47 See *supra* No. 5.

48 At this point, it should be noted that the duty to comply with the judgment of the Court imposed on national courts should be considered in the light of the expansive meaning the Court attaches to "interpretation" under the provision of Article 177.

49 See I. Maher, *A Question of Conflict: The Higher English Courts and the Implementation of EC Law*, in *op. cit.* No. 3, 306-307.

In *Brasserie du Pêcheur* where the German government acted contrary to the previous case law of the Court on the free movement of goods, the Court contended that it would be difficult to regard the breach of Article 30 by the German national authorities relating to the designation of the product marketed as excusable, in the light of the earlier decisions of the Court⁵⁰.

Similarly in *Factortame II*, national provisions making registration of fishing vessels subject to a nationality condition were held to be manifestly contrary to Community law in the light of the express provision of the Treaty, which provides for equal treatment. This provision reflects a principle which is encompassed in the case law of the court⁵¹.

In such cases, it may be perceived that the Court tends to assume the existence of sufficiently serious breach of Community law by the state. As in the previously listed source of state liability, the only condition for the finding of sufficiently serious breach is the clarity of the settled case law which constitutes that the conduct of state infringes Community law.

V. *Per se* rules in state liability in the light of the conditions of state liability applying to different types of breaches of Community law by the state

In general, *per se* rules are adopted in situations where it appears from the case law of the courts that certain types of cases fall into the same category, obviating the need to be treated differently by the courts by going in detail into the particular facts of the cases. When the particular case at hand fits into one of these categories, the courts apply a uniform reasoning, presuming the existence of certain concepts without further enquiry⁵².

It is possible to deduce *per se* rules from the case law of the Court regarding state liability. The conditions stipulated for the establishment of state liability enable the different types of breaches to be distinguished, to some of which *per se* rules apply, some of which *per se* rules apply subject to uniform conditions and some of which require a detailed assesment of certain factors before state liability may be established.

a) In cases where the state fails to implement a directive entailing the grant of rights to individuals the content of which it is possible to identify, state liability shall arise if there is a causal link between the breach and the harm suffered⁵³. It is not questioned any further by the Court whether or not this

50 No. 8 above, par. 59.

51 No. 6 above, par. 40.

52 No. 6 above, par. 40.

53 No. 6 above, par. 40.

breach is sufficiently serious to establish state liability; it is assumed. The conditions for state liability are consistent with the nature of the duty which is clear and precise and there is no discretion left to the national authorities.

b) In situations where the state persists in breaching Community law failing to comply with a judgment of the Court on that matter, sufficiently serious breach is assumed by the Court. The finding of sufficiently serious breach is listed as a condition, but is regarded as already established in this case and the existence of a *per se* rule may be accepted.

c) If the state persists in breaching Community law despite a preliminary ruling or settled case law of the court, sufficiently serious breach may be assumed subject to the finding of the condition that it is clear from the judgments of the court that the conduct in question constitutes an infringement. These two situations contain a *quasi-per se* rule the application of which is subject to the finding of the existence of a single condition regarding the nature of the rulings.

d) The failure of a state to adopt measures to comply with an order of the Court is regarded as constituting a sufficiently serious breach of Community law if it may be proved that the state failed to adopt the order immediately and that there is a causal link between the failure to comply and the increase in the loss sustained. The state liability in this situation may be regarded as containing a *quasi-per se* rule as well. Two conditions are required to be proven, burden of proof resting on the plaintiff.

e) The final category comprises cases where the state has a certain discretion in applying Community law to ensure its full effectiveness; the incorrective transposition of directives into national law and acting contrary to the provisions of regulations and/or directives may be cited as falling in this category. The establishment of sufficiently serious breach of Community law requires the analysis and assessment of certain factors pertaining to the facts of the case.

The Court does not assume sufficiently serious breach and lists exhaustively the factors to be considered in the assessment of the seriousness of the breach⁵⁴.

It may be perceived that the extent of discretion left to the state and the tendency to assess the seriousness of the breach based on the facts of the case rather than the application of *per se* rules to the case are directly correlated⁵⁵. A

⁵⁴ No. 8 above, par. 56.

⁵⁵ *Ibid.*, par. 46. The Court refers to the obligation imposed on the national legislature to implement a directive within a given period as an example of a case where the margin of discretion has been reduced to a minimal degree.

similar correlation exists with regard to the extent of clarity of the Community rules breached and the application of *per se* rules⁵⁶.

VI. Conclusion

The Court has established a judicial liability system enabling individuals to claim damages from Member States before national courts for causing harm by infringing provisions of Community law intended to confer rights on individuals.

This formula has been devised as a radical tool to ensure full effectiveness of Community law and the quasi-legislative creation of the Court has been justified by way of referring to the concept of commitments of states under international law and the development of state liability in national legal systems by national courts.

The justifications are supported by two provisions in the Treaty, namely Article 5, imposing the obligation to co-operate on Member States and Article 215 stipulating the non-contractual liability of the Community. It is derived from these rules that the breach of the obligation to enforce Community law fully and correctly should incur liability on the state in the same way it would on the Community under Article 215.

The Court regards the existence and extent of state liability referred to it by national courts pursuant to Article 177, as questions of Treaty interpretation which fall within the jurisdiction of the Court, making use of the preliminary ruling procedure to establish the principle of state liability and to develop it. The duty to award damages to individuals against the state is imposed on the national courts; they may determine the extent of reparation in conformity with domestic provisions, provided that the full effectiveness of Community law is not impaired.

State liability imposed as above gives rise to a right to reparation depending on the nature of the breach of Community law. It is possible to classify the different types of breaches of Community law as breaches pertaining to the failure to give effectiveness to Community directives, to other Community legislation and to the judgments of the Court⁵⁷. They comprise different sources of liability to which different conditions apply. It may be deduced from the case law of the Court that *per se* rules apply in varying

⁵⁶ *Supra* No. 50.

⁵⁷ The judgments of the Court do not clearly encompass a classification as above; however, this systematic outline is suggested to be able to categorise the various sources of state liability arising from breaches of Community law. It is hoped that this classification will be a useful reference as a general structural analysis.

degrees to certain sources of liability, the extent of discretion left to the state and the clarity of the breached Community provision being relative in that respect.

Finally, it may be perceived that the Court has already formed the skeleton of a judicial liability system for breaches of Community law by the Member States. It will be filling in the gaps by interpretation as cases pertaining to different categories analysed above are brought before national courts which might refer questions to the Court on contentious, unclear matters. Moreover, it is likely that the Court will provide guidance to the national courts to set the details of the criteria for determining the scope and content of reparation in the light of the principle of full effectiveness, in the absence of relevant Community provisions⁵⁸.

⁵⁸ In this article, the guidelines provided by the Court with regard to the determination of the extent of the reparation for loss or damage is deliberately left out of the discussion to be taken up in a separate study.