# *THE PRINCIPLE OF LIABILITY FOR BREACH OF COMMUNITY LAW*

**Ionuț Tudor, PhD Researcher, "Al. Ioan Cuza" University of Iași**

*Abstract: Although the European Court of Justice has taken an important step in stating a general principle of liability for breaching of Community law, its jurisprudence hasn't configured a kernel of liability. The Francovich case is exemplary because it allows individuals to sue any Member State. In this case, ECJ developed three requirements for liability. I intent to follow the path taken by the Court, to detail the requirements for liability, explain the relevance of this form of liability for the direct effect and indicate the connection with the principle of the effectiveness of Community law. The jurisprudence of the Court developed by acknowledging the Community liability of private persons, as stated in Courage v. Crehan. However, the emergence of this principle has not had such an important impact in practice, an issue which remains to be supplemented in the future by way of jurisprudence or statutory means.*

*Keywords: European Court of Justice, liability of Member States, requirements of liability, EU law, direct effect.*

**Introduction:**

The idea of Member States liability is located at a crossroad between the imperative of an autonomous legal order of the European Union and the necessity to protect individual rights. Due to disparities between legal orders, The European Court of Justice (from now on, ECJ) has taken up the task of translating the idea of "Unity in diversity" into a practical aspect that will create the framework for an united Europe, with a common shared perspective. But the legal traditions cut deeply across this unifying perspective. There are Member States that questioned the idea of the supremacy of ECJ on national courts (the *Kompetenz-Kompetenz* doctrine), others considered that their internal system of law imposes far superior rights to individuals (England). This disparity is, as Damien Chalmers puts it, like two tectonic plates: "On the one hand, there is the logic of competing legal orders. This pushes for the primacy of EU law but acknowledges the autonomy of local legal orders, the sensitivities involved, and the difficulties of imposing uniform and centralised solutions. On the other, there is the logic of
individual rights which pushes for the full protection of individual entitlements"[1].

Although the Court didn't manifest too many reserves in imposing the autonomy of European Union law and its supremacy over national legal systems, it was very precautionary in imposing sanctions to the Member States when it came to their liability for legislative acts. The Court stated that the Member States are liable for loss or damage caused to individuals as a result of a breach of Community law. The *Francovich*, *Brasserie du Pêcheur* and *Factortame* cases underline this form of liability. But, establishing a principle of liability hasn't had a major impact on national legal systems, because the Court imposed a rigid criteria for establishing liability: the Member States will be held accountable only when there is "a serious breach of a superior rule of law which intends to confer rights on individuals"[2].

[1] Damien Chalmers, Gareth Davies, Giorgio Monti, *European Union Law*, Cambridge University Press, Cambridge, 2010, p. 312.
[2] Cees van Dam, *European tort law*, Oxford University Press, Oxford, 2009, p. 16.

Thus, it seems that the Court manifests circumspection in establishing a coercive principle of liability, although manifestly has imposed a general principle. We want to trace the source if this inconsistency, but keeping in mind that a general rule of liability has emerged, conferring to individuals supplementary rights against the Member States.

## I. Historical and contextual background:

As stated in Article 288 (ex Article 249) of Lisbon Treaty, a Directive "shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to national authorities the choice of form and method". Thus, the purpose of a Directive is not to *unify* the laws of the Member States, but to *harmonize* them. As a general rule, it is considered that for a Directive to be effective into national legislations it has to be transposed by the competent authority. However, the issue is not without controversy. There are opinions, especially of those connected to the *common law*, according to whom Directives are directly dependent on the implementing measures of the Member States[3]. On the other hand, other scholars argue that Member States have only a competence to implement Directives. Further, until the moment when they are transposed into national law, one cannot say that those Directives do not exist from a legal point of view[4]. This seems to sustain the idea that, although a Directive is not yet implemented, it retains the features of a legal entity. The idea was fully developed by the ECJ in Case 26/62 *Van Gend en Loos*, in which the claimant contested the extra charges imposed by Netherlands authorities on imports from Germany, considering them as an infringement of Article 12 (now Article 30). The ECJ took the opportunity to address the issue of direct application of Community law, meaning the prerogative of individuals to invoke in front of national courts individual rights which these courts must protect. Considering the objectives of the EEC Treaty to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, this means that the Treaty is more than an international agreement. It is "a new legal order of international law for the benefit of which the states have limited their sovereign rights…", albeit within limited fields, and subjects of which comprise not only Member States but also their nationals. Independently 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"[5]. The criteria were stated by the ECJ: for a provision of EU law to produce direct effect it must be sufficiently clear and precise and unconditional in that it is capable of judicial application without any need for adoption of

[3] See, John Tillotson, Nigel Foster, *European Union Law*, Cavendish Publishing Limited, London, 2003, p. 69. The main thrust of the authors' arguments consist in comparing the acts of the Community to delegated legislation. Their authority is derived "from the fact that they are brought to force by institutions invested with the necessary power, *where specific Articles of the Treaty so provide:* for example, Article 40 (formerly 49) which authorises the Council and the Parliament jointly to issue Directives or make Regulations in order to bring about freedom of movement for workers; or Article 95 (formerly 100) which grants the Council and the Parliament power to adopt measures for the harmonisation of the laws of the Member States in the course of the establishment and functioning of the Internal Market. In that they derive their authority from the Treaty (which is an act of the Member States) and so rank below it, Community acts can be compared to delegated legislation. Whereas neither the Community Courts nor national courts have the power to test the validity of the Treaty (which can be regarded as the constitutional document), the validity of Community acts can be challenged either directly before the Court of Justice or the CFI, or indirectly in a national court on the basis of the Court's preliminary rulings jurisdiction under Article 234(1)(b) (formerly 177(1)(b))". The British authors seem to consider EU law similar to international treaties and superimpose their manner of incorporation on European law.

[4] Alina Kaczorowska, *European Union Law*, Routledge, Abigdon, 2011, p. 300.

[5] Case 26/62 (*Van Gend en Loos v Nederlanse Administratie de Belastingen*), ECR 1963, 1, 12.

further implementing measures, either at national or EU level. Subsequently, the ECJ considered that provisions also have "horizontal direct effect", which means that individuals may bring an action against another individual for infringing a rule of Community law[6]. However, provisions of a Directive do not have direct horizontal effect[7]. This ruling was confirmed in the *Dori* case from 1994, when the Court considered that "…in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court"[8]. This decision was put under hard scrutiny. Although a number of Advocates-General have pleaded in favour of full direct horizontal effect and despite academic criticism, the Court insisted on the formal requirement that directives should have vertical direct effect only.[9]

An alternative to direct horizontal effect of Directive provisions is the indirect horizontal effect, or purposive interpretation (or teleological), sustained by the ECJ in *Von Colson*[10]. The idea underlying this ruling is that any national court is obliged to interpret domestic law in the light of the text and objectives of EU law, which in this particular case was a Directive. This possibility was prefigured by *Mazzalai*[11], but its definitive fulfilment came ten years after *Von Colson*, in *Pfeiffer*, when the ECJ held that the "…requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty"[12]. By this case, concerning emergency workers claiming that German legislation imposing a weekly working time exceeding 48 hours was in breach of EC Directives, the ECJ "invested" the national courts with the prerogative to interpret the entire national law in the light of the purpose of the Directive in order to achieve the outcome consistent with the EU law. Somehow, it seems that the ECJ wanted to escape the vicious circle of explaining over and over again the relation between Directives and national law, "delegating" to national courts an active role in interpreting Directives.

However, the guarantees imposed by direct or indirect effect of EU law are not enough. Of course, the main impediments of enforcing EU law were ascribable to the Member States themselves, by various reasons. That's why, it came natural for the ECJ to develop the principle of liability of Member States for breach of EU law.

## II. The emergence of a principle of liability for breach of EU law

The *Francovich* case is paramount for the development of Member States liability for breach of EU law. It arose to bridge the gap inherent in the Directives themselves, for there are situations when these don't offer remedies to individuals, although the protection of rights is granted. "One is where there is no national measure to interpret, and the other is where the national legislation contradicts the Directive"[13]. The ECJ progressively developed this principle of liability through a series of cases.

### 1. The *Francovich* case in a nutshell

As a result of the bankruptcy of his employer, Francovich lost 6 million lira. Although he sued he employer, the judgment could not be enforced because his employer had become

[6] Case 43/75 (*Defrenne v Sabena*)., ECR 1976, 455, 476.
[7] Case 152/84 (*Marshall v Southhampton and South-West Hampshire AHA (Marshall (No.1)*), ECR 1986, 723, 749.
[8] Case C-91/92 (*Dori v Recreb Srl*), ECR 1994, I-3325.
[9] Cees van Dam, *op. cit.*, p. 28.
[10] Case 14/83 (*Von Colson and Kamann v Nordhein-Westfalen*), ECR 1984.
[11] Case 111/75 (*Mazzalai v Ferrovia del Renon Case*), ECR 657, para. 10.
[12] Case 397-403/01 (*Pfeiffer and others v Deutsches Rotes Kreuz*), ECR 2004, I-8835, para. 119.
[13] Damian Chalmers, *op. cit*, p. 301

insolvent. In a second stage, in 1991, he sued the Italian state for sums due, or for compensation in lieu, under Council Directive 80/987, which was not implemented in Italy although the prescribed time limit had already elapsed. The Directive concerned the protection of employees in the event of the insolvency of their employers required that the Member State set up a scheme under which employees of insolvent companies would receive at least some of their wages. It should have been implemented by October 1983, and in 1987 the Commission brought a successful enforcement action against the Italian government for its failure to transpose the Directive[14]. Even after the judgment, there was still no transposition. The issue arose in Francovich, and the Italian Court asked preliminary questions to the ECJ.

2. The meaning of Francovich

The Court considered that the Directive 80/987 did not have direct effect, which should be interpreted that Mr. Francovich did not have the right to invoke direct protection on the basis of that Directive. The conditions of direct effect- to be clear, precise and unconditional, were not applicable to Directives. However, the Court discussed the issue of whether a Member State could be liable for damage caused by the violation of a duty which is imposed upon it by EU law.

Because the Treaty has created a *sui generis* legal order, integrated into the legal systems of the Member States, and because the subjects of this legal order are not only States, but also their nationals, this means that EU law legal framework becomes embedded in the legal patrimony of each legal system. EU law imposes not only obligations to the nationals, but also rights. Thus, these rights emerging from the EU law, with the condition to be clearly defined, arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes both on individuals and on the Member States and the EU institutions.

The national courts must have an active role in the protections conferred by EU law, because these courts are directly involved in the process of guaranteeing the full effectiveness of EU provisions. There must be no impediment from a Member State regarding the protection of rights in the form of inability to obtain redress. The possibility of obtaining redress from the State is important, because the full effectiveness of EU law is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by EU law.

That's why, the ECJ stated clearly that "It is a general principle inherent in the scheme of the Treaty that a Member State is liable to make good damage to individuals caused by a breach of Community law for which it is responsible" (para. 37). The ECJ based this principle on the more general principle of the effectiveness of Community law and the corresponding need that the rules of Community law take full effect and that the rights which they confer on individuals must be protected (para. 32). Against this background the Court concluded that the principle of liability is inherent in the system of the Treaty[15].

At this point, the Court developed three requirements of liability:

1) The result required by the directive must include the conferring of rights for the benefit of individuals;

2) The content of those rights must be clearly identifiable by reference to the directive;

3) There must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

[14] Case 22/87 (Commission v Italy), ECR 143

[15] For an extended debate, see Damien Chalmers, *op. cit.*, pp. 301-303 and Cees van Dam, *op. cit.*, p. 205

These three conditions must be fulfilled cumulatively for a right to compensation, directly based in EU law. These conditions have been further clarified in subsequent cases.

Ironically, the case, although it coined a principle, ended rather badly for Signor Francovich. The Court considered that Francovich's claim did not come within the scope of application of the Directive because his employer was not one against whom a collective procedure on behalf of the creditors could be brought under Italian law.

## III. Reinforcement of the principle

### 1. Relevant case law

As stated before, the principle was refined through a series of cases. After *Francovich*, *Brasserie du Pêcheur* and *Factortame* are of the utmost importance because they link the liability of the State with the Treaty, namely Article 340 (ex Article 288).

Brasserie, a French brewer, brought proceedings in a German court against Germany for losses it had suffered as a result of a ban imposed by the German authorities on beer which did not comply with the purity standards imposed by the German law. The German authorities imposed a ban on importing the beer produced by *Brasserie du Pêcheur*. In case 178/84 (Commission v Germany) the ECJ had already ruled that such a ban was incompatible with Article 34 (ex Article 28).

In *Factortame*, a Spanish company was deprived of its right to fish within the UK's quota because the UK Government had enacted an act that made the registration of fishing vessels dependent on their owner's nationality.

In the light of these two cases, the ECJ refined the criteria of liability:

1) The rule of law infringed must be intended to confer rights on individuals;

2) The breach must be sufficiently serious and the State must have "seriously and gravely" disregarded its obligations;

3) There must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

The link between these cases and Article 340 of TFEU is provided by the ECJ in *Brasserie du Pêcheur*, when the Court considered that the protection of the right derived from EU law cannot vary depending on whether a national or European authority is responsible for the damage, unless there is a particular justification for a different regime.

### 2. Liability of individuals for breach of EU law

As a final step in establishing a coherent principle of liability, the ECJ ruled in *Courage v Crehan* that it is possible to held liable private persons, not only states[16].

Inntrepreneur Estates Limited (IEL), co-owned by Courage Limited and Grand Metropolitan plc, entered into two 20 years leases with Mr. Crehan. The trade tie was not negotiable and Mr. Crehan had to purchase a fixed minimum quantity of beers at prices stated in Courage's price list. Courage sued Mr. Crehan for around £15.000 for unpaid beer deliveries. The plaintiff argued that the claim was breaching Article 81 EC and that he was entitled to damages, contending that Courage sold its beers to other pub tenants at considerably lower prices. According to English law, a person is not entitled to claim damages following an illegal agreement. So, Crehan could have not claim damages according to English law. However, the ECJ did not took this issue into consideration, stating that even a party to a contract that was liable to restrictions or distortions of competition could rely before a national court. Because national courts have a duty to protect the rights conferred to individuals by EU law, they must accept a claim of damages for losses caused by the contract.

[16] Case C-453/99 (*Courage v Crehan*), ECR 2001

But, national courts have the possibility to refuse relief to a party that had an unlawful conduct creating distortions in competition. Probably, the ECJ did not want to superimpose a rule of liability from EU law on a rule from the national law, but only intended to ensure the effectiveness of EU law when the litigation concerns two individuals.

**3. Member States liability for judicial decisions**

Almost as a matter of necessity, after the above-mentioned cases, arose the problem of liability of Member States for decisions of their national courts which were in breach of Community law.

*Köbler* (2003) is about an Austrian university professor applied under national law for the special length-of-service increment for his type of profession. However, the increment was conditioned by a period of 15 years at an Austrian university and the duration at universities from other Member States was not taken into account. Köbler considered it an unjustified indirect discrimination breaching EU law. The Austrian court dismissed the claim on the ground that the increment was a loyalty bonus which justified derogation from the Community law provisions on freedom of movement for workers. The Austrian Court of First Instance referred to the ECJ for a preliminary ruling on the interpretation of Article 39 EC (freedom of movement for workers) and on the application of the Francovich case law on acts of the judiciary.

The ECJ considered that the principle for breach of EU law does not apply if the infringement stems from a decision of a national legislator or executive power, or from a decision of a national court adjudicating at last instance. Excepting the national judiciary from liability for breach of Community law would call in question the full effectiveness of EU rules. Several governments had intervened against the proposed application of state liability to the conduct of courts of last instance. These included arguments based on the principle of legal certainty, on *res judicata*, on the independence and authority of the judiciary, and on the evident problem of absence of a superior court to rule against the conduct of a court of last instance. However, the ECJ rejected them all. "The Court drew support for its conclusions from the fact that under the ECHR (European Court of Human Rights), state reparation can be obtained for infringements of the Convention stemming from a decision of a national court of last instance"[17].

In the arguments, the ECJ reiterated the requirements of liability: conferment of rights on individuals, sufficiently serious breach, and a direct causal link between breach and damage. The second condition interested the Court, stating that in case of a judicial decision Member State liability can appear only in the exceptional case where the court has manifestly infringed the applicable law. Relevant factors are: the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling[18].

Further, regarding the freedom of movement of workers, as stated in the Treaty, could not be undermined by the article in the Austrian national law conditioning the increment by a period of 15 years in an Austrian university. There was no pressing public interest reason. Yes, the initial Austrian court infringed EU law, but this breach was not sufficiently serious. Firstly, the EU law did not cover this point. Secondly, the Austrian court had withdrawn its

[17] Paul Craig, Grainne de Burca, *EU Law: Text, Cases, and Materials*, Oxford University Press, Oxford, 2007, p.333

[18] Cees van Dam, *op. cit.*, pp. 205-206

request for a preliminary ruling on the view that the answer had been given in *Schoning-Kougebetopoulou* but this was based in incorrect reading of the judgment.

It seems that in the opinion of the Court an incorrect interpretation of ECJ's case law could be an unintentional mistake that cannot be considered a manifest mistake, unless proven otherwise. Only a manifest mistake could be the source of a sufficiently serious breach, the second requirement of liability. We can interpret this twist as a supplementary imposition of rules. But, we don't have to wonder too much, it's the Court's *modus operandi*. Of course, it's not a problem of rationality, as if these ulterior criteria are not in order, but one does not have to rely on the Court's predictability. In the end, just as for Signor Francovich, Mr. Köbler lost the case. However, in *Traghetti del Mediterraneo*, the ECJ condemned Italian legislation which sought to restrict state liability for damage caused by a last instance court. In the end Mr. Köbler left a deep mark in EU case law, although he did not benefit from a probably well-deserved increment.

**Conclusions**

The case law that coined a functional mechanism of liability for breach of EU law took about a decade to develop. During this time the ECJ steered bravely through rough tides, from the suspicion that a principle like this is even possible (as in *Francovich*), to astonished interpreters regarding the lack of extension on liability of individuals for breach of EU law (as in *Crehan*). In present, the principle of state responsibility has potentially far-reaching implications for the enforcement of EU law. If an individual has a definable interest protected by a directive, failure by the state to act to protect that interest may lead to state liability where the individual suffers damage, provided causation can be demonstrated. E.g., the directives on health and safety at work, on equal treatment of women and men, and an increasing number of directives regulating individual and collective interests of workers, are a fertile field for exploration of the scope of state liability[19].

As one can easily see, the principle is not definitely determined and a person who wants to invoke it in court must be very cautious. Although the principle is appealing, and one may consider it a safe course of legal action, we see that there are many intricacies connected to it. However, its simple existence is of the utmost importance because it binds more closely national law to EU law. The application and effectiveness of EU would be less realized if such a principle missed from the panoply of general rules.

**Bibliography**

Chalmers, Damien, Davies Gareth and Monti Giorgio, *European Union Law*, Cambridge University Press, Cambridge, 2010

Craig, Paul, Grainne de Burca, *EU Law: Text, Cases, and Materials*, Oxford University Press, Oxford, 2007

Dam, Cees van, *European tort law*, Oxford University Press, Oxford, 2009

Fuerea, Augustin, *Manualul Uniunii Europene*. Editia a V-a, Ed. Univers Juridic, 2011

Kaczorowska, Alina, *European Union Law*, Routledge, Abigdon, 2011

Rusu, Ioana Eleonora and Gorning, Gilbert, *Dreptul Uniunii Europene*, Ed. C.H. Beck, București, 2009

Tillotson John, Foster, Nigel, *European Union Law*, Cavendish Publishing Limited, London, 2003

[19] http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/stateliability.htm

http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/stateliability.htm

**This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013**