OPINION OF ADVOCATE GENERAL TESAURO
delivered on 28 November 1995 *

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1. State liability for infringements of Community law and the resultant obligation to make reparation to individuals, which is the subject of *inter alia* the well-known judgment in *Francovich*, [1] continues to arouse great interest. That judgment, however, has not cleared up every aspect; many question marks remain, some relating to important issues.

The questions from the Bundesgerichtshof (Federal Court of Justice, Case C-46/93) and the High Court of Justice (Case C-48/93), which raise the issue once again of infringements of the Treaty already found in preceding judgments of this Court, consequently afford an opportunity, if not of resolving all the remaining difficulties associated with this complex subject, at least of providing further clarification, in particular about the existence of State liability in cases other than failure to implement a directive and about the *Community* preconditions for an individual's right to reparation.

As a result, the Court will have to consider a number of important institutional aspects, in particular the relationship between Community law and the national legal systems. Consequently, this is an area in which the correct operation of the Community legal system as a whole has to be assessed.

I Facts, national legislation, questions referred for a preliminary ruling

2. Whilst referring to the Report for the Hearing for a detailed account of the rele-

1 — Judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECR I-5357.

vant legislation and the facts which have given rise to these proceedings, I shall confine myself to those aspects which are most relevant for present purposes.

(a) *Case C-46/93* (Brasserie du Pêcheur)

3. Brasserie du Pêcheur SA, a French brewery the seat of which is at Schiltigheim (Alsace), claims that it was forced to discontinue exports of beer to Germany in late 1981 because the beer produced by it did not comply with the 'purity' requirements laid down in Paragraphs 9 and 10 of the Biersteuergesetz [2] (Law on Beer Duty, hereinafter 'the BiStG'). More specifically, as emerged at the hearing, the persistent checks carried out by the German authorities at retailers' premises and the resultant claims that the beer in question did not satisfy the requirements laid down caused the brewery's German sole importer to refuse to renew the distribution contract.

Following the judgment of 12 March 1987 [3] in which the Court held that the prohibition against the marketing of beers imported from other Member States which did not comply with the BiStG was incompatible with Article 30 of the Treaty, Brasserie du Pêcheur brought an action against the Federal Republic of Germany for compensation for the loss suffered by it as a result of that import restriction between 1981 and 1987, in the sum of DM 1 800 000, which is presumably a fraction of the loss actually incurred. That action was dismissed by the lower courts. Brasserie du Pêcheur is pursuing the same claim in its appeal on a point of law before the Bundesgerichtshof.

4. Given that the infringement in question must be regarded as an omission on the part of the legislature, since it had not amended the BiStG to accord with Community law, the Bundesgerichtshof points out that compensation for damage is governed in Germany by Paragraph 839 of the Bürgerliches Gesetzbuch (German Civil Code) in conjunction with Article 34 of the Grundgesetz (Basic Law). According to the first paragraph of the latter provision, 'If a person infringes, in the exercise of a public office entrusted to him, the obligations incumbent upon him as against a third party, liability therefor shall attach in principle to the State or to the body in whose service he is engaged'. The first subparagraph of Paragraph 839 of the Bürgerliches Gesetzbuch provides, in contrast, that if an official wilfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom. In the event that he acted negligently, he will be answerable for the damage only if the injured party has no other possibility of obtaining compensation.

2 — Law of 14 March 1952 (BGBl I, p. 148) as amended by the Law of 14 December 1976 (BGBl I, p. 3341). Needless to say, Paragraph 10 restricts the use of the description 'beer' to beer produced in accordance with the purity requirements compulsorily laid down by Paragraph 9 of the Law.

3 — Case 178/84 *Commission* v *Germany* [1987] ECR 1227.

Apart from the exercise of a public office and a breach of official duty, therefore, the applicability of the rules in question depends on the further requirement that the official duty breached should be 'referrable to the third party' (*Drittbezogenheit*), which means that the State is responsible only for breaches of official duties the exercise of which is expressly directed at a third party and therefore has the aim of protecting a right of the third party. However, it is precisely that requirement which is normally absent in the case of a legislative wrong, including the illegality in point in this case. [4] As the national court has pointed out, in fact, in the BiStG the legislature imposed burdens concerning the community which do not relate in particular to any individual or class of individual capable of being regarded as third parties for the purposes of the provisions adverted to. [5]

Secondly, the national court observes that neither in this case can there be State liability on account of an unlawful act of the public authority which is capable of being equated with expropriation, a principle developed by the case-law of the Bundesgerichtshof (Federal Court of Justice). [6] The national court considers this to be inevitable in that the principle in question, according to that case-law, does not permit compensation to be granted for loss or damage arising out of laws infringing the Grundgesetz, which is equatable to compensation for loss or damage resulting from infringement of a Community obligation. Moreover and in any event, in this case there was no interference with the appellant's legal interest which may be protected under the law of property.

5. The Bundesgerichtshof, taking the view that German law affords no basis for upholding the appellant's damages claim, has therefore made a reference for a preliminary ruling to the Court in order to establish whether the principle of State liability for loss or damage caused to individuals by infringements of Community law attributable to it, as may be inferred from the judgment in *Francovich*, is applicable to the case pending before it. More specifically, it has asked the Court:

'1. Does the principle of Community law according to which Member States are obliged to pay compensation for damage suffered by an individual as a result of breaches of Community law attributable to those States also apply where such a breach consists of a failure to adapt a national parliamentary statute to the higher-ranking rules of Community law (this case concerning a failure to adapt Paragraphs 9 and 10 of the German Bier-

4 — A legislative wrong (*legislatives Unrecht*) is governed by the same rules as liability of the public authorities (*Amtshaftung*). It is precisely because of this that the amenability to compensation of damage arising out of a legislative wrong — still a very controversial subject in Germany — is unquestionably allowed where individual-case laws (*Einzelfallgesetze*) are involved or a legislative measure such as a land development plan (*Bebauungsplan*).

5 — The picture which emerges does not differ much from that which is allegedly peculiar to the Italian system — the distinction between *diritti soggettivi* (individual rights) and *interessi legittimi* (protected interests).

6 — See BGHZ (Reports of Decisions of the Bundesgerichtshof in Civil Matters), 90, p. 17, in particular at p. 29 et seq.

steuergesetz to Article 30 of the EEC Treaty)?

2. May the national legal system provide that any entitlement to compensation is to be subject to the same limitations as those applying where a national statute breaches higher-ranking national law, for example where an ordinary Federal law breaches the Grundgesetz of the Federal Republic of Germany?

3. May the national legal system provide that entitlement to compensation is to be conditional on fault (intent or negligence) on the part of the organs of the State responsible for the failure to adapt the legislation?

4. If Question 1 is to be answered in the affirmative and Question 2 in the negative:

(a) May liability to pay compensation under the national legal system be limited to the reparation of damage done to specific individual legal interests, for example property, or does it require full compensation for all financial losses, including lost profits?

(b) Does the obligation to pay compensation also require reparation of the damage already incurred before it was held in the judgment of the European Court of Justice of 12 March 1987 in Case 178/84 *Commission* v *Germany* [1987] ECR 1227 that Paragraph 10 of the German Biersteuergesetz infringed higher-ranking Community law?'

(b) *Case C-48/93* (Factortame III)

6. The action for damages arising out of the application of the Merchant Shipping Act 1988 brought by the 97 applicants in the main proceedings is the sequel to the well-known *Factortame* affair, of which I shall merely set out the gist.

The law in question provided for a new register for all British fishing vessels and hence also for vessels already registered on the former register. In particular, the new registration system, which became compulsory on 1 April 1989, imposed stricter conditions relating to the national-

ity, residence anddomicile of the natural and legal persons who were the true owners of the vessels. If those requirements were not met, fishing vessels were ineligible to be entered on the new register and consequently were not allowed to fish under the British flag.

The new registration system was challenged in the Divisional Court, which by order of 10 March 1989 suspended the application of the new registration system by interim injunction, which was subsequently overturned by the Court of Appeal. [7] Concurrently, the Divisional Court requested the Court of Justice to give a preliminary ruling on the questions of Community law raised by the applicants, which it did by judgment of 25 July 1991. [8] In that judgment, the Court held that it was contrary to Community law and, in particular, to Article 52 of the EEC Treaty, for a Member State to impose conditions as to the nationality, residence and domicile of owners of fishing vessels such as those laid down by the new registration system in the United Kingdom.

In the meantime, the Commission brought an action against the United Kingdom under Article 169 on the ground of the alleged incompatibility with Community law of the British statute, but only as regards the nationality aspect. The Commission also applied for interim measures requiring the United Kingdom to suspend the application of the statute, which the Court granted by order of 10 October 1989. [9] Following that order, the United Kingdom partially amended the Merchant Shipping Act with effect from 2 November 1989. Subsequently, by judgment of 4 October 1991, [10] the Court of Justice held that, by imposing the conditions as to the nationality of the vessel owners, the United Kingdom had failed to fulfil its obligations under Articles 7, 52 and 221 of the EEC Treaty.

As long ago as 2 October 1991, the Divisional Court made an order giving effect to the judgment of the Court of Justice in Case C-221/89 *Factortame II* in respect of the registration of the fishing vessels of 79 of the applicants, in which it directed that the applicants should give detailed particulars of their claims for damages against the Secretary of State for Transport. Then, by order of 18 November 1992, it gave leave to a number of companies and various other persons to be joined as parties to the proceedings and/or to claim damages and further gave Rawlings (Trawling) Limited, the 37th claimant, leave to amend its statement of claim to include a claim for exemplary damages for unconstitutional behaviour.

7 — In order to give the full picture, it is recalled that following the claimants' appeal to the House of Lords, that court made a reference to the Court of Justice, by judgment of 18 May 1989, for a preliminary ruling on two questions concerning the existence and scope of the jurisdiction of a national court to grant interim relief where rights conferred by Community law were at issue. In its judgment in Case C-213/89 *The Queen* v *Secretary of State for Transport*, ex parte *Factortame and Others* (*Factortame I*) [1990] ECR I-2433, the Court of Justice ruled that 'Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule'. On 11 October 1990, the House of Lords affirmed the interlocutory injunction granted by the Divisional Court pending the determination of the substantive case.

8 — Case C-221/89 *Factortame II* [1991] ECR I-3905.

9 — Case 246/89 R *Commission* v *United Kingdom* [1989] ECR 3125.

10 — Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585.

The applicants seek damages under various heads, including, in particular, expenses and losses of profits and income incurred from the entry into force of the new legislation (1 April 1989) until the time at which they were able to resume fishing. [11]

7. In English law, State liability in damages is a creature of case-law. In particular, the same wrongs (individual torts) leading to civil liability have been used in so far as they lend themselves to cover conduct of the public authorities.

First, damages may be awarded where loss or damage is due to a negligent breach committed in the exercise of administrative or legislative activity (tort of negligence). [12] Since, however, there must be a 'duty of care' on the part of the public authority and the relevant case-law holds that there can be no such duty in the case of pure economic loss, [13] which makes it impossible for damages to be awarded for that type of harm, it would be hard for an infringement of Community law to give rise to liability. The concept and scope of the duty of care are presently being developed in the case-law of the courts of the United Kingdom. [14]

Secondly, liability on the part of the public authorities may be claimed in the event of a breach of statutory duty. In such case, however, the actual chances of obtaining damages are considerably reduced in so far as the prevalent view is that the possibility of obtaining administrative remedies designed to ensure that the law is complied with precludes bringing an action for damages. [15] Admittedly, the existence of liability in damages for infringements of Community law was affirmed in that very context, but only in the case of 'ordinary civil actions'. [16]

11 — Although the national court refers solely to 2 November 1989, the date on which the relevant law was partially repealed, it is pointed out that that repeal related, in accordance with the Court's order in Case 246/86 R *Commission* v *United Kingdom*, only to those provisions which were discriminatory on grounds of nationality. This means, as the applicants point out in their written observations in these proceedings, that the statute in question ceased to have harmful effects as regards the other conditions held to be discriminatory (residence, domicile) which were the subject of the proceedings in Case C-221/89 *Factortame II* only on 11 October 1990, when the House of Lords, following the Court's judgment in *Factortame I*, affirmed the interlocutory injunction requested. In this connection, see footnote 7.

12 — See, for example, *Rowling* v *Takaro Properties* [1988] A. C. 473.

13 — The duty of care is confined to typical sets of circumstances, the upshot being that liability does not attach to every harmful negligent act. However, there are decisions to be found in the less recent case-law in which the duty of care has been identified with the neighbourhood principle, which is essentially equivalent to *neminem laedere*, since liability may be incurred under that principle for harm done to anyone where it was reasonably foreseeable that the victim might be harmed (see, for example, *Donoghue* v *Stevenson* [1932] A. C. 562).

14 — See, for example, *Lonbro* v *Tebbit* [1992] 4 All ER 280.

15 — See, for example, *Thornton* v *Kirklees MBC* [1979] Q. B. 626.

16 — See *Garden Cottage Foods* v *Milk Marketing Board* [1984] 1 A. C. 130 HL., in which the House of Lords essentially accepted, albeit in an *obiter dictum* (the proceedings were concerned with an application for interim measures), the existence of liability in damages to a person who had suffered loss as a result of conduct in breach of Articles 85 and 86 of the Treaty by a private citizen or also by a public authority, but in the event that it acted as a private citizen.

In contrast, where the breach falls solely within the ambit of public law, liability may be claimed only for misfeasance in public office. This is the only tort which does not cover relations between private persons but specifically the public authorities. However, the requirement for intentional unlawful conduct makes the possibility of obtaining damages a remote one, even where the loss or damage arises out of infringements of Community law. Thus, as the Divisional Court points out in the order for reference, in *Bourgoin* [17] the Court of Appeal held that the State was not required as a matter of English or Community law to compensate the victims of acts which had been found to be contrary to Community law, unless the Minister acted in the knowledge that the act in question was unlawful and with the intention of injuring the claimants. Following the judgment in *Francovich*, however, the House of Lords itself has questioned whether *Bourgoin* was correctly decided. [18]

8. The Divisional Court considers that if English case-law were to be applied, the claimants would have no remedy in damages. Since, in addition, it is uncertain whether the principle of State liability for loss or damage caused to individuals by infringements of Community law attributable to the State, as may be inferred from *Francovich*, applies also to the facts of the case pending before it, it has requested the Court to give a preliminary ruling. Its questions are as follows:

'1. In all the circumstances of this case, where:

(a) a Member State's legislation laid down conditions relating to the nationality, domicile and residence of the owners and managers of fishing vessels, and of the shareholders and directors in vessel-owning and managing companies, and

(b) such conditions were held by the Court of Justice in Cases C-221/89 and C-246/89 to infringe Articles 5, 7, 52 and 221 of the EEC Treaty,

are those persons who were owners or managers of such vessels, or directors and/or shareholders in vessel-owning and managing companies, entitled as a matter of Community law to compensation

17 — *Bourgoin* v *Minister of Agriculture, Fisheries and Food* [1986] 1 Q. B. 716 A. C.

18 — *Kirklees Metropolitan Borough Council* v *Wickes Building Supplies* [1992] 3 W. L. R. 170, in particular at 188.

by that Member State for losses which they have suffered as a result of all or any of the above infringements of the EEC Treaty?

2. If Question 1 is answered in the affirmative, what considerations, if any, does Community law require the national court to apply in determining claims for damages and interest relating to:

(a) expenses and/or loss of profit and/or loss of income during the period subsequent to the entry into force of the said conditions, during which the vessels were forced to lay up, to make alternative arrangements for fishing and/or to seek registration elsewhere;

(b) losses consequent on sales at an undervalue of the vessels, or of shares therein, or of shares in vessel-owning companies;

(c) losses consequent on the need to provide bonds, fines and legal expenses for alleged offences connected with the exclusion of vessels from the national register;

(d) losses consequent on the inability of such persons to own and operate further vessels;

(e) loss of management fees;

(f) expenses incurred in an attempt to mitigate the above losses;

(g) exemplary damages as claimed?'

Terms of the problem and structure of the Opinion

9. The question of State liability for infringements of Community law, which is of considerable importance in terms of both the principles involved and the potential consequences for the Member States were such liability to be affirmed broadly and generally, is complex and by no means free of snares, as witness moreover the substantial debate which has taken place in recent years in academic writings.

In these proceedings, the Court has to establish whether, on what terms and with regard to which classes of injury, there exists an obligation for the State to compensate individuals who have suffered loss or damage as a result of the application of national laws conflicting with Community law. [19]

10. In the first place, it will accordingly be necessary to establish whether liability in damages should be confined to the case, which has already been assessed in *Francovich*, of failure to implement a directive whose provisions, albeit satisfying a number of conditions relating to their special nature, may not be relied on directly by individuals in order to obtain the benefit provided for them by the directive, or whether it should be extended to circumstances, such as those of the cases now before the Court, in which the loss or damage suffered by the individuals arises out of the application of a national law conflicting with Community provisions which may be relied on by individuals directly in the national courts. In order to do so, I consider it useful to set out the terms in which the obligation for Member States to make reparation for infringements of Community law has been affirmed to date, in order, partly by this means, to trace the basis of liability in Community law. In addition, I consider it worthwhile dwelling on the alleged non-liability of the State for acts or omissions of the legislature, which has also been raised (albeit somewhat cautiously) in these proceedings in order to deny, on an abstract level and in principle, the existence of State liability in the circumstances at issue.

Secondly, it will have to be established whether the conditions of liability are those specific to each national legal system — albeit subject to the well-known limits identified in several of the Court's decided cases — or whether, by contrast, it is Community law itself which determines at least the *substantive conditions* which are sufficient in order for the State in breach of its obligations to be required to make reparation for the resulting loss or damage. If the second branch of this alternative prevails, it should obviously be clarified whether any infringement whatsoever which injures an individual is enough or whether something more is needed, as most of the Member States have argued in these proceedings. Then again, can that something more be taken to be the need for fault or are other conditions necessary, for example the very ones which the Court has identified in regard to non-contractual liability on the part of the Community institutions (case-law on Article 215)? In addition, from the point of view of the causal link, it will have to be assessed, for example, whether it is important that the nature of the Community provision infringed was such as to enable the individual to protect his own rights directly so as to eliminate the substantive illegality; furthermore, the time at which the obligation to make reparation arises will have to be assessed in any event. Lastly, there will be a need to dwell on the *procedural requirements* governing the right to reparation and on the criteria for quantifying the damage.

19 — For a different case in which the State is claimed to be liable for damage caused by conduct of the administrative authorities contrary to Community law, see pending Case C-5/94 *Lomas*; Advocate General Léger's Opinion of 20 June 1995 in that case also considers some aspects relevant to these proceedings.

11. These, therefore, are the aspects which I shall be considering and the questions which I shall be seeking to answer. Accordingly, the analysis set out below will be subdivided into three parts. The first part will deal with the principle of State liability under Community law with a view to identifying its basis and scope, *inter alia* with respect to unlawful acts or omissions on the part of the legislature, and to assessing in particular whether an action for damages is a residual remedy only, in the sense that such an action may be brought only where the individual has no other means of asserting the rights conferred on him by Community law, or whether its ambit is wider.

As for the conditions of liability, I shall say forthwith that the minimum substantive — unlike the procedural — conditions must be common and hence Community conditions. To my mind, this is the only way of avoiding a situation in which the actual possibility of obtaining reparation for a given infringement is not secured equally in the several Member States and in which discrimination consequently arises as between individuals, which a Community based on the rule of law should not tolerate. Accordingly, the second part of my Opinion will deal with the conditions enabling individuals to obtain reparation, that is to say, the Community preconditions for liability, and the limits imposed by Community law on the procedural conditions. In my view, the latter conditions continue — in common with the criteria for determining the quantum of the damages — to be governed by national law.

Lastly, I shall consider the two cases before the Court and reply to the questions which gave rise to these proceedings.

I — *The principle of State liability in Community law: basis and scope*

12. The idea of State liability for loss or damage caused by legislative activity does not seem at all surprising. The basic principle of most of the *civil* rules on non-contractual liability is *neminem laedere*, as variously interpreted and limited, under which everyone is bound to make good loss or damage arising as a result of his conduct in breach of a legal duty. [20] It is undeniable that reference is made to that principle by the various rules, mostly created by the courts, governing liability on the part of the public authorities, even though that liability has special features peculiar to itself in view of the activities carried out by those authorities, in particular in the case of legislative activity. Liability of the *public authorities* is also closely, if not indeed necessarily, connected to wrongful damage by the fact of its having to have been caused by the unlawful conduct; in a manner of speaking, this is the other side of the coin.

20 — Albeit that principle does not have the same general scope in all the legal systems — suffice it to cite the British system, in which there is a limit in terms of the (restricted) scope of the duty of care, — it none the less remains that, inasmuch as it refers to the idea of wrongful damage, it may be regarded as the starting point for any discussion of liability.

Admittedly, in the case of the public authorities, precisely because of the nature of the activity which they perform and of the consequences which would ensue were there held to be liability and an obligation to compensate generally, the tendency has invariably been to limit the scope of liability in various ways. The extent of that limitation, which may be encapsulated, by way of initial approximation, in the well-known formula according to which the liability in question is 'neither general, nor absolute', [21] is consequently related to the need to balance the opposing, competing interests at stake: on the one hand, the injured party's interest in obtaining at least financial restitution for the loss or damage he sustained as the result of an activity — in particular legislative activity — of the State; on the other, the State's interest in not having to answer invariably and in any event for loss or damage caused by the activities of its organs in performing the institutional tasks entrusted to them.

Manifestly, over time significant changes have taken place with regard to the limitation of the scope of responsibility, varying according to the legal system considered. In particular, the emergence of the *State governed by the rule of law* has resulted in an increasing shift of emphasis, at least in the more advanced legal systems, from the conduct of the perpetrator of the damage to the rights of the injured party, as in the case of liability generally. From this point of view, State liability and the resulting obligation to make reparation have ended up by becoming a means of penalizing unlawful and/or, in any event, harmful conduct and thereby of achieving effective protection for individuals' rights.

13. This reasoning prompts an initial, straightforward observation with regard to the principle of State liability for infringements of Community law. The fact that the Member States, even though subject to conditions limiting the scope of liability in different ways, may be called upon to answer for loss or damage caused by legislative activity of the public authorities suggests in itself that it is unreasonable that they should invariably and in any event not be liable for infringements of Community law which have an effect on the financial situation of individuals affected by those infringements.

Consequently, in so far as at least the principle of State liability is part of the tradition of all the legal systems, [22] it must be able to be applied also where the unlawful conduct consists of an infringement of a Community provision.

14. Furthermore, it should be observed straight away that, whilst it is essentially for the State, and hence its institutions, to ensure that Community law is duly implemented and, in particular, to guarantee individuals that the rights conferred on them are effective, it is also unquestionable that, where rights claimed by individuals pursuant to

21 — Judgment of the French Tribunal des Conflits of 8 February 1873 in *Blanco*, D. 1873, II, 20.

22 — For an essential understanding of the relevant rules in the various Member States, see Schockweiler — Wivenes— Godart: 'Le régime de la responsabilité extra-contractuelle du fait d'actes juridiques dans la Communauté européenne', in *Revue trimestrielle de droit européen*, 1990, p. 27 et seq., in particular at p. 54.

Community provisions are concerned, it falls to the Court to review the degree of adequacy of the protection afforded by the national legal systems. That review has on several occasions extended even so far as to require the Member State concerned to adopt a judicial remedy not available under its legal system. [23]

It would therefore be at odds with the relevant case-law and with the characteristics of the legal system as a whole, in particular the division of tasks between the Community and the Member States, for Community law to disinterest itself completely of compensation for loss or damage, by leaving it, without any review, to each national system.

(a) The obligation on Member States to make reparation for failures to fulfil obligations as affirmed in the Court's case-law: the Francovich judgment and its precursors

15. The judgment in *Francovich*, which is bound to be the starting point for any discussion of State liability in damages for infringements of Community law, still constitutes the Court's most precise response in this area. The case turned on the non-implementation of the directive on the protection of employees in the event of the insolvency of the employer, which required Member States to set up machinery affording a minimum guarantee in respect of unpaid wage claims. Italian magistrates asked the Court whether, faced with the failure of a Member State to implement that directive, individuals were entitled to rely directly on the Community measure before the national courts in order to obtain its benefits and, in any event, claim damages from the Member State where the directive lacked direct effect. Consequently, the Court was asked, not only about the direct effect of a number of provisions of a directive, but also about compensation for loss or damage resulting from its non-implementation. [24]

Although it found that the relevant provisions of the directive were unconditional and sufficiently precise as regards the determination of the persons entitled to the guarantee and the content of the guarantee itself, the Court held that those provisions could not

23 — See sections 43 to 47 below.

24 — I would recall that, as long ago as Case 380/87 *Enichem Base and Others* v *Comune di Cinisello Balsamo* [1989] ECR 2491, an Italian court asked the Court whether 'the administration [is] required under Community law to pay compensation where an unlawful administrative measure taken by it [unlawfully] infringes a right under Community law (*diritto soggettivo comunitario*) which upon its incorporation in the Italian legal system, while retaining its Community character, takes the form of a protected interest (*interesse legittimo*)' (Report for the hearing, loc. cit., at 2494 et seq.). Neither the Advocate General nor the Court answered that question, since it was absorbed into the answers given to other questions. I note, however, that in their observations both the United Kingdom and Italy argued that any right to compensation should be based solely on the substantive and procedural possibilities afforded by national law.

be relied upon directly before the national court in order to seek the benefit provided for them by the directive. In particular, those provisions did not identify the person liable to provide the guarantee, and the State could not be considered liable on the sole ground that it had failed to take transposition measures within the prescribed period.

16. Turning to whether it was possible for an individual to claim and obtain compensation for any loss or damage sustained, the Court first called to mind the fundamental characteristics of the Community system and, in particular, the tasks conferred on the national courts. It drew the lapidary but incontestable conclusion that 'the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty' (paragraph 35).

More specifically, the Court inferred that principle from two fundamental elements of the Community legal order. First, it pointed out that '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' (paragraph 33). The Court also stressed that the possibility of obtaining redress from the Member State is 'particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law' (paragraph 34).

Secondly, as it had already done in the judgment in *Humblet*, [25] it derived and inferred that obligation to make reparation from Article 5 of the EC Treaty, 'under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law', which include precisely 'the obligation to nullify the unlawful consequences of a breach of Community law' (paragraph 36).

17. What was contemplated, therefore, was the means made available in order to reinforce the effectiveness of Community provisions through the effectiveness of the judicial supervision of the legal interests created by those provisions and likewise in order not to leave Member States' failures to fulfil obligations without — *inter alia*, tangible — consequences.

25 — Case 6/60 *Humblet* v *Belgium* [1960] ECR 559, in particular at 569. In that case, the reference was to Article 86 of the ECSC Treaty, which corresponds to Article 5 of the EC Treaty.

Consequently, it is precisely in the light of those objectives that the position of the individual has been used and given its proper importance. The State's financial liability *vis-à-vis* individuals for loss or damage caused by legislative inaction has been created by the Court in the final analysis as an instrument for securing protection for individuals and thereby also the proper implementation of Community law. From this point of view, it has remote roots, both in terms of specific precedents for the liability and obligation to compensate of the Member States [26] and in the more general setting of the effective protection of rights asserted by individuals under Community provisions. [27]

18. It should not be overlooked that statements relating to the obligation to provide compensation for breaches of Community law of various kinds are to be found in the Court's case-law, if only incidentally, since the early 1960s. I would refer in the first place to the judgment in *Humblet*, which I have already mentioned, where the Court held in particular that if it 'rules in a judgment that a legislative or administrative procedure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged, by virtue of Article 86 of the ECSC Treaty, to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued'. [28]

19. In addition, it is on the very assumption that the Member State's failure to fulfil obligations may give rise to a right on the part of an individual to compensation that the Court has, on several occasions, rejected an objection of inadmissibility, despite the fact that the Member State against which infringement proceedings have been brought has fulfilled the relevant obligation in the period between the reasoned opinion and delivery of judgment by the Court. [29]

26 — Suggestions to that effect were also to be found in academic writings: Pescatore, 'Responsabilité des États membres en cas de manquement aux règles communautaires', in *Foro Padano*, 1972, p. 10 et seq.; Kovar, 'Voies de droit ouvertes aux individus devant les instances nationales en cas de violation des normes et décisions du droit communautaire', in *Les recours des individus devant les instances nationales en cas de violation du droit européen*, Brussels, 1978, p. 245 et seq., in particular at p. 272 et seq.; Barav, 'Damages in the domestic courts for breaches of Community law by national public authorities', in *Non-contractual Liability of the European Communities*, Europa Instituut, University of Leiden, 1988, p. 149 et seq.

27 — For this aspect, see sections 27 to 32 below.

28 — *Humblet* v *Belgium*, cited in footnote 25. That case was concerned more specifically with securing the annulment of a measure by the Belgian State and the restitution of sums unduly levied; but the general wording used by the Court — 'make reparation for any unlawful consequences' — can sufficiently clearly cover also cases of compensation for any loss or damage sustained.

29 — There is a very clear dictum to this effect that 'a judgment by the Court under Articles 169 and 171 of the Treaty may be of substantive interest as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member States, the Community or private parties' (judgment in Case 39/72 *Commission* v *Italy* [1973] ECR 101, paragraph 11). The statement that the interest in continuing the proceedings even after the breach at issue has been remedied may consist in 'establishing a basis for the liability which a Member State may incur, in particular, towards individuals as a result of the breach of its obligations' is to the same effect (judgment in Case 309/84 *Commission* v *Italy* [1986] ECR 599, paragraph 18). That dictum appears quite frequently: Case 103/84 *Commission* v *Italy* [1986] ECR 1759, paragraph 9; Case 154/85 *Commission* v *Italy* [1987] ECR 2717, paragraph 6; Case C-287/87 *Commission* v *Greece* [1990] ECR I-125 (summary publication only). The Court has further held that the interest in pursuing the action 'may consist [in particular] in establishing the basis for a liability which a Member State may incur, by reason of its failure to fulfil its obligations, towards those to whom rights accrue as a result of that failure': see the judgments in Case 240/86 *Commission* v *Greece* [1988] ECR 1835, paragraph 14, Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 31, and Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, paragraph 41. It is clear that the conferral on individuals of a right to compensation for damage sustained owing to an infringement of the Treaty cannot be inferred from dicta of this type, but only the possibility that, within the limits laid down by national law, the individual may assert his right to compensation in relation to such an infringement.

20. The affirmation of the obligation on Member States to compensate individuals is even more direct and explicit in *Russo* v *AIMA*, [30] where the Court held that 'If such damage has been caused through an infringement of Community law the State is liable to the injured party for the consequences in the context of the provisions of national law on the liability of the State'.

21. It is unquestionably clear from the above dicta, therefore, that a Member State may indeed be called upon to compensate for the damage sustained by individuals consisting in or resulting from an infringement of Community provisions.

However, the case-law makes it clear that liability has to be made out by the national court 'in the context of the provisions of national law on the liability of the State'. [31] Consequently, it is to the legislation of each Member State that reference is made in principle in order to determine whether the State is obliged to compensate for damage caused by failure to comply with a Community provision. [32]

22. That case-law seems to have been overtaken from this particular point of view by the judgment in *Francovich*, in which the obligation on Member States in breach of their obligations to make reparation is rooted in Community law, even as regards the preconditions for the obligation to make reparation.

Essentially, in *Francovich* the Court did not confine itself to leaving it to national law to draw *all* the legal inferences from the infringement of provisions of Community law, but held that Community law itself imposed on the State an obligation to make reparation *vis-à-vis* individuals by defining, at least as regards the case of liability at issue in *that* case, the 'Community' conditions determining liability.

30 — Judgment in Case 60/75 *Russo* v *AIMA* [1976] ECR 45, paragraph 9.

31 — Judgment in *Russo* v *AIMA*, cited in the preceding footnote, paragraph 9.

32 — This stance was further emphasized in the judgment in *Granaria*, where the Court held that 'the question of compensation by a national agency for damage caused to private individuals by the agencies and servants of Member States, either by reason of an infringement of Community law or by an act or omission contrary to national law, in the application of Community law does not fall within the second paragraph of Article 215 of the Treaty and must be determined by the national courts in accordance with the national law of the Member State concerned' (judgment in Case 101/78 *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623, paragraph 14).

(b) The 'Community' principle of liability: merely a means of closing a lacuna in the protection of rights or a principle of broader scope?

23. What must now be considered is precisely whether the approach which can be discerned from the pre-*Francovich* case-law (still) has any basis or whether an obligation based on Community law of the Member States to make reparation may and must exist even in cases other than that of failure to implement a directive.

In particular, it has to be determined whether Community law requires a guarantee in terms of compensation even where provisions having direct effect are infringed or whether the fact that in that event an individual may rely directly on the provision in question and therefore ensure that the right claimed is guaranteed by that means rules out that possibility.

24. The German, Netherlands and Irish Governments have argued to that effect in these proceedings. They reason that the Community legislature did not intend to establish a general system of Member State liability for infringements of Community law. This, they maintain, is borne out in particular by the fact that the Member States did not incorporate any provision on this matter in the Maastricht Treaty. The German Government has further argued that it would not be compatible with the system of division of powers between the Community institutions and the Member States as laid down by the Treaty or with the principle of institutional balance for the case-law to flesh out Community law above and beyond cases in which this is justified by a lacuna in the legislation.

In the final analysis, those governments consider that the right to reparation plays merely a residual protective role, in the sense that it comes to the fore only in regard to provisions which could not otherwise be relied on before the national courts. Essentially, the Court used the *Francovich* judgment in order to bridge a lacuna in the system for the protection of rights by imposing a sanction on the Member State in breach in the shape of an obligation to make reparation. Conversely, where an individual is already able to take action directly in order to enforce the provisions of Community law, as in the cases which gave rise to these proceedings, there is no need for the Community system to require damages to be awarded and there is no basis for imposing this. Individuals may be held to have a right to reparation only if and in so far as this is permitted by national law.

25. I do not consider that that view can be accepted. First, it is clear from the Court's case-law itself, which has contemplated on

several occasions financial liability on the part of the State for infringements of provisions with direct effect, that the possibility of substantive protection does not indeed preclude financial protection. [33] Whilst it is true that in those cases the Court merely held that it was for the Member State to make reparation, under the rules of national law, for the damage caused by it, it is also true that the questions raised by the national courts in those cases were not concerned with the specific subject of the right to compensation.

When the subject was specifically tackled in *Francovich*, the Court deliberately specified that the principle of liability is an inherent principle of Community law by a general affirmation of principle which holds good for any situation in which Community law is infringed and not merely where there has been a failure to implement a directive. [34] As far as failure to implement a directive is concerned, the Court merely stated that the right to redress is 'particularly indispensable', precisely because otherwise the individual would be deprived of any protection, contrary to the rights conferred on him by the directive. However, this affirmation does not preclude liability in damages for injury caused by breaches of other types, particularly since the Court itself went on to hold that the *conditions under which ... liability gives rise to a right to reparation depend on the nature of the breach* of Community law giving rise to the loss and damage (paragraph 38).

26. Neither does it seem to me that affirmation of the principle of State liability for breaches of Community provisions having direct effect conflicts in any way with the division of powers, as laid down by the Treaty, between Community institutions and Member States. I would merely observe in this connection that it is the infringement of Community law itself which creates an imbalance in the division of powers freely accepted and subscribed to by the States. Any requirement which may be imposed by Community law to make reparation for loss or damage caused by such an infringement constitutes merely a means of restoring the upset equilibrium.

The State's responsibility for legislative activity (on the part of the legislature proper or of the administrative authorities) constitutes also from that point of view a natural and necessary part of the Community legal system created by the Treaty and by the Member States themselves. I cannot but remind myself that it was the Member States which, completely freely, agreed the contractual rules underlying the system as a whole;

33 — I refer to the judgment in *Russo* v *AIMA*, which I have already mentioned, relating to a regulation on the common organization of the agricultural markets, and to the judgment in Case C-188/89 *Foster* [1990] ECR I-3313, paragraph 22, in which the Court held that Article 5(1) of Directive 76/207/EEC on equal treatment for men and women 'may be relied upon in a claim for damages against a body' responsible for providing a public service. See also, as regards an infringement of Article 30, the judgment in Case 103/84 *Commission* v *Italy*, cited in footnote 29, paragraph 9.

34 — See, in particular, paragraphs 33, 35 and 37 of the judgment.

and the Member States are still the decisive protagonists in the process for the formulation of Community measures. Consequently, to hold that liability exists for failure to fulfil obligations is tantamount simply to increasing the effectiveness of the system and does not involve any activity supplementing — let alone supplanting — the legislature.

27. This is all the more true when it is borne in mind that the State's financial liability *vis-à-vis* individuals for loss or damage caused by legislative action or inaction has been constructed by the Court, I repeat, as an instrument for ensuring protection of individuals and, thereby, also for the purposes of the proper implementation of Community law in all the Member States.

In sum, what is contemplated is the same as that contemplated by the — now consolidated — case-law which established direct effect, in the sense that provisions of the Treaty and secondary legislation may be relied upon by individuals directly before national courts, provided of course that they are sufficiently clear and precise and unconditional.

28. By identifying the direct effect of a Treaty provision addressed to the Member States and containing an obligation on them, for instance to remove certain barriers and not to reintroduce them, the individual's right to the elimination of those barriers which is derived therefrom is identified and made relevant, with the further consequence that that right becomes capable of being asserted before the national court with a view to its being duly protected. In this way, therefore, the right arising out of the State's obligation by which the individual would have benefited if the obligation had been implemented properly and precisely is identified and enhanced.

This applies, not only on the substantive, but also on the procedural, level. Suffice it to mention what the Court itself has held: 'all direct protection of the individual rights of individuals would be removed' if it were to be held that the guarantees against an infringement of Treaty provisions imposing obligations on the Member States were confined to those afforded under Article 169. [35] In the final analysis, the individual's legal position, which is directly dependent on the Treaty provision, is utilized, even in the absence of an incorrect application of that provision, in order to guarantee full, effective protection of the rights which compliance with the provision in question by the State should secure.

29. The same viewpoint appears — even more clearly — from the case-law which,

35 — Case 26/62 *Van Gend & Loos* [1963] ECR 1, in particular at 13.

from a given time, has imposed a sanction for the non-implementation or late implementation of a directive by attributing direct effect to it, obviously where defined preconditions were fulfilled. [36] This confirms the observation that, even in the case of directives, the Community system has found in the position of the individual an effective lever for securing their implementation where they have not been duly transposed into national law.

30. It is further significant that the Court has reaffirmed the State's obligation to make reparation in the same terms already laid down in *Francovich* in a case involving precisely the possibility of relying, in relations between private individuals, on the direct effect of provisions of a directive which was not implemented within the prescribed period. [37]

Holding that there is an obligation to make reparation where a directive cannot be relied on directly before the national court, either because of the absence of direct effect of all the provisions needed to secure the benefit of the right which it confers on the individual or because of the absence of 'horizontal' direct effect of precise and unconditional directives, therefore also constitutes a means of reinforcing the position of the individual by making it possible to offset, at least from the financial point of view, the imbalance created by the State's failure to fulfil its obligations.

31. In the final analysis, the individual's position directly created by a provision with direct effect binding on the State is used in order to guarantee full, effective protection

36 — So much so that direct effect has been from the outset, and continues to be, what is termed vertical, almost, as it were, in order to reinforce the idea that, rather than an intrinsic quality of the provision, it is a remedy for preventing the States from taking advantage of a failure to fulfil their obligations. It is also significant that the Court's assessment of directives has been progressively refined and broadened. For example, the class of public agencies against which directives can be relied on has widened (see the judgments in Case 103/88 *Fratelli Costanzo* v *Comune di Milano* [1989] ECR 1839 and Case C-188/89 *Foster*, cited in footnote 33); likewise stress has been placed on the need for courts and administrative authorities in the Member States to interpret national provisions in conformity with the wording and purpose of the directive (see the judgments in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891 and Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8). It is sufficient to observe that the criterion of interpretation in conformity with the wording and purpose of a directive relates to directives as such, irrespective of their possible direct effect and regardless of the entity against which the national provisions are asserted, so much so that, in the ultimate analysis, one is not so far removed from the practical effects which would be achieved by the horizontal effect, pure and simple, of precise and unconditional directives.

37 — Judgment in Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325, paragraph 27. After stating that interested parties can enforce an unimplemented directive by relying directly on its provisions having direct effect before a national court or, where that is not possible, by interpreting the relevant provisions of national law, as far as possible, in conformity with the directive, the Court observed that 'if the result prescribed by the directive cannot be achieved by way of interpretation, ... Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive'. See, to this effect, also the judgment in Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 23. In that case, even though a directive (the same as that at issue in *Francovich*) was involved which had already been transposed into national law, the problem arose on account of the failure to take into account in the relevant national provisions a particular category of workers, with respect to whom the directive had not been implemented.

to the rights conferred by that provision. In the same way, the individual's right to compensation is used to guarantee protection of the rights conferred by a provision which does not have direct effect in the sense that it cannot be invoked directly before the national court, yet also places an obligation on the State, in the case of a failure to fulfil an obligation on the part of the State.

Consequently, the concept remains the same: in order to implement a provision putting the State under an obligation, the individual's legal position is used, on the one hand, in terms of its *full, substantive content*, on the other, in terms of its *financial content*. Even the result is the same: on the one hand, the failure of the Member State concerned to fulfil its obligations is remedied; on the other, the individual is guaranteed effective protection of rights claimed under Community provisions. The upshot is that the effectiveness of the provision is reinforced and hence that of the system as a whole.

32. The foregoing remarks show sufficiently clearly that, far from being a moment of eccentricity in the case-law of the Court, *Francovich* was completely consistent with and a logical extension of a value which has been upheld on several occasions without question in Luxembourg: effectiveness of Community provisions and hence complete judicial protection. [38]

It is undeniable that this is a fundamental value of any legal system, whether Community or national. It is also undeniable that respecting that value may require guaranteeing individuals, where necessary, the right to compensation for loss or damage sustained by reason of the legislative action or inaction of the public authorities, irrespective of whether or not the individual has other means, in addition to a remedy in damages, of asserting an infringement of the legal position bestowed on him by Community law.

33. Furthermore, the — now uncontested — affirmation of the State's obligation to compensate the individual in cases of failure to implement a directive, hence in cases in which the infringement of the State's obligation (infringement of Articles 189 and 5 of the Treaty) can be linked only indirectly to a breach of a correlative right of the individual, implies — *a fortiori* — that the same protection should be available where provisions are

38 — In the sense that 'the decision in *Francovich* is undoubtedly consistent with, and a natural and logical extension of, the Court's case-law'; and that, after recognizing direct effect and the obligation upon the Member States to give full effect to Community provisions, 'it was but a small step to guarantee their full effect by holding States liable in damages for infringements of those rights for which they were responsible', see Steiner: 'From direct effects to *Francovich*: shifting means of enforcement of Community Law', in *European Law Review*, 1993, p. 3 et seq., in particular at p. 9. Notoriously, there is now a substantial body of literature on the judgment in *Francovich*. The most recent contributions include Zenner: 'Die Haftung der EG-Mitgliedstaaten für die Anwendung europarechtswidriger Rechtsnormen', Munich, 1995.

directly infringed which guarantee the individual a legal position appertaining to himself and can therefore be relied on directly before the national courts.

In this sense, the argument that it is not possible to 'go beyond' liability for failure to implement directives cannot be accepted, not only on the grounds set out above, but also because it ignores that it is the *Francovich* situation itself which represents possibly the furthest which the case-law of the Court can go (and not the nearest port of call). On close inspection, the *Francovich* judgment conferred a remedy (at least a financial one) where the remedy provided for was that laid down in Article 169, which does not afford direct protection for individuals. On the contrary, in cases of infringement of provisions having direct effect, the protection already exists and a remedy may be asserted directly by the individual, with the result that it is necessary only to accompany it by that something less, which is financial protection. Consequently, in this case not even that 'small' logical leap has to be made which, in contrast, has to be made in order to move from infringement of Article 189 to a breach of the right potentially conferred on the individual by the directive.

Nor should it be overlooked that, as far as provisions having direct effect are concerned, the Court has consistently held that they 'must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force' [39] and that 'this consequence also concerns any national court whose task it is as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law'. [40] Consequently, it is quite clear that a Community provision with direct effect confers a legal position appertaining to an individual on the individual as from its entry into force and for as long as it continues in force, irrespective of and even despite any pre-existing or subsequent national provision which may negate that legal position. It therefore follows that the national court is under a duty to provide full, effective judicial protection of the rights conferred on the individual by the relevant Community provision.

34. It is unquestionable that the infringement of a provision gives rise to an imbalance consisting in the reduction or annulment of the legal situation affected, in this case that of an individual; it is also unquestionable that every legal situation appertaining to an individual, every 'right', if you prefer, has a substantive content and a financial content, which can generally be quantified. Guaranteeing the effectiveness of judicial protection in the case of an infringement of a provision conferring a legal position on an individual means securing the reinstatement of the content of the right impaired by the

39 — See, *inter alia*, the judgments in Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629, paragraph 14, and Case 811/79 *Amministrazione delle Finanze dello Stato* v *Ariete* [1980] ECR 2545, paragraph 5.

40 — Judgment in *Simmenthal*, cited in the preceding footnote, paragraph 16.

infringement of the provision. If that which unlawfully adversely affects the individual's right is an act of a public authority — an administrative measure or a law — it is whoever brought it into being who must reinstate the individual's right or at least its financial content.

In the final analysis, reinstating its financial content is something less, a minimum remedy compared with full substantive reinstatement, which remains the optimum means of protection. Annulment of an unlawful measure or setting aside a law which is inconsistent with a superior parameter of legality is necessary in a State governed by the rule of law. At times, however, this is not enough and it may be necessary, in order to render the protection real and effective, to bring back into balance also the financial content of the right which has been impaired and hence to ensure that the damage is made good. Consequently, reinstating financial balance in respect of the right which has been infringed is not something different or something more, even less something novel. Neither does it constitute something *optional* which is sophisticated and remote in a legal system which seeks and needs to be effective.

To sum up, the principle of the State's financial liability must be applied as a remedy which is both alternative and additional to substantive protection; consequently, it must be applied in the event of infringements both of provisions without direct effect, in the sense of provisions which may not be directly relied on before the national courts, and of provisions which may be so relied on.

(c) The obligation of the State to compensate for acts or omissions of the legislature

35. It does not seem to me that that conclusion may be invalidated by the fact that occasionally or often infringements of Community law are attributable to the legislature.

I would point out in this connection that *Francovich*, with which not even any of the States which have submitted observations in these proceedings have taken issue, makes no distinction depending on whether the loss or damage ensues from an infringement attributable to omissions of the legislature or of the executive. Certainly, that is no reason for considering that a different conclusion should be reached as regards the circumstances under consideration here.

However, as the national courts have shown in their respective orders for reference, they are debarred from awarding damages by their national law, precisely because the infringements at issue of Community law are attributable to the legislature, either because it failed to amend a national law so as to bring it into conformity with Community

law (Case C-46/93 *Brasserie du Pêcheur*) or because it passed a national law inconsistent with Community law (Case C-48/93 *Factortame III*). Essentially, therefore, given that it is impossible to bring an action for damages in the event of action or inaction on the part of the legislature, in such cases national law leads to the negation of the very principle of liability.

36. Admittedly, in the past the idea that the State was not liable for acts or omissions of the legislature was a widespread one. Its rationale was that the sovereign could do no wrong or, according to a more modern, democratic version, parliamentary sovereignty. In other words, in so far as it was the highest expression of the sovereign power, the legislature fell in principle outside the general rules governing liability in view, *inter alia*, of its democratic legitimacy.

That view, which took root above all in legal systems in which the law was not reviewed in the light of some higher parameter, should take on a different complexion where there is a higher norm which can be used to verify and, in an appropriate case, deny the legality of the legislature's activity. Yet, also in those legal systems in which there is not only a clear, formal hierarchy as between constitutional rules and legislative rules, but also a mechanism of *ad hoc* supervision as to constant compliance with that hierarchy (Austria, Italy, Germany and Spain, for example), the question as to whether compensation can be awarded for loss or damage ensuing from an unconstitutional law is far from having been incontestably resolved. [41] The fact remains, however, that in such a case it cannot be ruled out that the State will be called upon to answer for the loss or damage caused by laws declared unconstitutional.

37. It is true that when the legislature is bound in carrying out its legislative tasks to comply with particular limits imposed by superior rules, there is no reason in general legal theory for denying that the State may be bound to compensate for the damage caused by laws which exceed those limits. In those circumstances, liability for acts or omissions of the legislature is not conceptually very remote or different from responsibility of the administrative authorities for legislative activity, which is upheld more or less everywhere today without difficulty.

41 — For instance, in Germany such a possibility is not ruled out *per se*, but only to the extent to which the official duty infringed is not referable to a particular third party, which, as I have already mentioned, is true in most cases involving an unlawful act or omission attributable to the legislature; for those very reasons, the possibility in question is unquestionably available in relation to individual-case laws (*Einzelfallgesetze*). However, the prevalent view among academic writers is that an individual should have the right to compensation at least in the event of breaches of fundamental rights (see, for instance, in this connection, Haverkate: 'Amtshaftung bei legislativem Unrecht und die Grundrechtsbildung des Gesetzgebers', in NJW, 1973, p. 441). In Italy, in which the question is still the subject of debate, such a possibility has been allowed, for example, in the specific case of presidential expropriating decrees issued pursuant to the agrarian reform which have been declared unconstitutional, where the agrarian reform agency was held liable in damages even though it was not guilty of any unlawful conduct; hence the conviction that in such case the compensation is more in the nature of restitution of undue payments, relating solely to the value of the asset lost (for some more general observations in this connection, see Zagrebelsky in 'Processo costituzionale' in *Enciclopedia del Diritto* XXXVI, 1987, p. 639).

And that is not all. It is well known that, in most legal systems, compensation is awarded in certain cases for the diminution of assets sustained by individuals on account of a perfectly lawful activity of the legislature, in that it was brought into being without any infringement of any *enabling* law: take, for instance, cases of nationalization and expropriation for purposes of public utility. If, therefore, it is conceded that the sacrifice *lawfully* imposed on the legal and financial situation of individuals for the sake of the public interest must be accompanied by fair compensation, it would be curious, to say the least, not to consider that if such loss or damage is produced by a legislative act which is *unlawful* because it conflicts with a superior rule (constitutional, Community or in any event prevailing over the act) there is no room for compensation.

38. It is scarcely necessary to point out that, in relationships governed by international law, State responsibility for acts or omissions of the legislature is universally and unquestionably acknowledged. [42] Of the many instances, it is worth recalling the principle laid down by the Permanent Court of International Justice to the effect that the obligation to make reparation is the direct consequence of a harmful act contrary to international law which is attributable to a State. More specifically, *'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.'* [43]

39. Certainly, I am aware that, in international law, the State's obligation to make reparation for damage arises even where in practice the compensation is aimed at restoring the financial position of individuals *vis-à-vis* one or more States and not, as is sought in the cases now before the Court, directly *vis-à-vis* individuals.

However, it does not seem possible to me to ignore the specific, peculiar features of the Community legal order. That system is based, as far as is relevant for present purposes, on a contractual foundation. The Treaty, in common also with other agreements establishing international organizations, contains a series of obligations on Member States with regard to the achievement of the aims set out therein, which have been freely subscribed to, and to the operation of an institutional structure whose powers are very largely, but not wholly, predefined. However, the peculiar, ultimate aim of the contractual basis in the case of the Community is integration and more specifi-

42 — In fact, international law contemplates only State liability viewed in the round, that is to say, as a whole: consequently, there is no difference depending on whether the infringement which gave rise to the damage is attributable to the legislature, the judiciary or the executive. Moreover, the same approach can be seen in the Court's case-law on Article 169: the infringement of a Community obligation is imputed to the State in any event, regardless of the entity which was actually responsible for fulfilling the obligation (see, for example, the judgments in Case 77/69 *Commission* v *Belgium* [1970] ECR 237, paragraph 15, Case 8/70 *Commission* v *Italy* [1970] ECR 961, paragraph 9, and Case 52/75 *Commission* v *Italy* [1976] ECR 277, paragraph 14).

43 — Judgment No 8 of 26 July 1927 *Case concerning the Factory at Chorzów*, CPGI, Series A, p. 21; my emphasis. The same principle was subsequently reaffirmed by the International Court of Justice in the Advisory Opinion of 30 March 1950 on the interpretation of peace treaties with Bulgaria, Hungary and Romania, CGI, 1950, p. 228.

cally 'lay [ing] the foundations of an ever closer union among the peoples of Europe', [44] *inter alia* through the achievement of the common market. It follows that traditional instruments, those of international law in fact, prepared in order to promote the due, precise fulfilment of obligations on the part of the Member States have resulted and continue to result to a very great extent in giving maximum, direct relevance to the legal position of individuals. The reason for this is that the obligations of the Member States and Community institutions are directed above all, in the system which the Community system has sought and sets out to be, to the creation of rights of individuals. This is the picture drawn by the authors of the Treaty and consolidated by the Community legislature.

40. In case-law, which is only too well known, the Court has simply taken note of that specific intention of the authors of the Treaty and subsequently of the legislature, observing that the EC Treaty set up its own legal order 'for the benefit of which the States have limited their sovereign rights, albeit within limited fields'. [45] The subjects of that legal order comprise not only the States but also individuals, upon whom Community law confers rights which become part of their legal heritage: these rights arise not only where they are expressly granted by the Treaty, but also by reason of the obligations which the Treaty imposes upon individuals, the Member States and the Community institutions.

41. It must therefore be acknowledged that, in relation to the — Community — rules governing the situation of individuals which are recognized as prevailing over domestic rules, a claim that there was a general absence of liability on the part of the national legislature would be without justification. Instead, the very idea of liability of the State *qua* legislator in relation to the obligations imposed by Community law, and hence entered into contractually by the States themselves or brought into being subsequently by procedures laid down for the purpose, is perfectly consistent with — and hence inherent in — the fundamental and typical characteristics of the Community legal order.

42. In the final analysis, even in the light of *Francovich*, but if only in view of the specific nature of the Community legal system considered as a whole, it is completely irrelevant whether the unlawful act or omission is attributable to the legislature or to the executive.

Next, in any event the problem of the liability of the State *qua* legislator is surpassed where the unlawful act or omission is connected with rules having direct effect. The Court's dictum to the effect that 'it would be contradictory to rule that an individual may rely upon the provisions of a directive which

44 — The reference is to the preamble to the EC Treaty.

45 — See, in particular, the judgments in Case 26/62 *Van Gend & Loos*, cited in footnote 35, and in Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them' [46] implies in fact that even the administrative authorities are under an obligation to guarantee protection of rights claimed by individuals under Community provisions with direct effect. It follows accordingly that in such a case it is quite possible to enforce the liability of administrative authorities for having adopted prejudicial measures pursuant to a law which is alleged to be incompatible with Community law or, in any event, for having applied such a law.

The French *Conseil d'État* (State Council), for example, seems to have taken that approach in inferring State liability from the breach (*faute* [47]) of the administrative authorities, at least where they exercised a discretion conferred on them by a domestic law contrary to Community law. [48] Admittedly, in cases of this type the origin of liability is invariably to be found in unlawful conduct attributable to the legislature, that is, in a law incompatible with Community law. However, it is obviously for national law to determine whether attributability to the administrative authorities is an 'indispensable' procedural and/or substantive expedient in order to get the legislature to answer or the correct mode of proceeding.

43. What is required by Community law for present purposes is that, in any event, the necessary instruments be made available in order for individuals to be able to seek, and possibly obtain, compensation for loss or damage sustained as a result of infringements of Community law. In this connection, moreover, it should be made very clear that the problem of determining a judicial remedy which is not already known to or permitted by the judicial systems of the Member States is not insuperable or a new problem: this is so on account of the specific factors under consideration in these proceedings, and also because the problem has already been dealt with by the Court in a number of historic, uncontested passages in its case-law.

This is testified to, in particular, by cases such as *Simmenthal* [49] and *Factortame I*, [50] in both of which the Court was asked whether a particular judicial remedy, which the national court held was not available under

46 — Judgment in Case 103/88 *Fratelli Costanzo* v *Comune di Milano*, cited in footnote 36, paragraph 31.

47 — It is scarcely necessary to point out that, in relation to legislative activity of the administrative authorities, the term *faute* is used by academic writers and by French administrative case-law (where the concept was evolved) to denote maladministration and hence, even though this may seem odd, does not require fault. Indeed, the rule often referred to is that 'toute décision illégale est en principe fautive'. In short, in the French system the difference between *responsabilité pour faute* and *responsabilité sans faute* does not correspond so much to that between fault-based liability and strict liability, but, albeit only fairly roughly, to the distinction between liability for unlawful acts and liability for lawful acts.

48 — Judgment of 28 February 1992 in *Arizona Tobacco Products*, in AJDA, 1992, p. 210. On the other hand, the Cour Administrative d'Appel, Paris, in holding that there was an obligation to pay compensation in respect of an unlawful situation created by the legislature, regard being had to Community law, referred generally to the responsibility of the State in the judgment of 1 July 1992 in *Société Dangeville*, in AJDA, 1992, p. 768, including a critical note by Prétot.

49 — Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629.

50 — Case C-213/89 *The Queen* v *Secretary of State for Transport*, ex parte *Factortame and Others* [1990] ECR I-2433.

the national judicial system, could or had to be conferred and implemented by virtue of Community law.

44. What was in question in *Simmenthal* was the Italian court's power itself forthwith to disapply a national provision conflicting with Community law without having first to obtain a prior ruling from the Constitutional Court that it was unconstitutional. By basing on Community law the national court's power/duty to disregard the provision conflicting with Community law, a power/duty unknown to the national system — indeed there was express, repeated case-law of the Constitutional Court to the contrary —, the Court introduced a derogation from the Member States' autonomy in relation to means for the judicial protection of rights conferred on individuals by Community law. Moreover, it is remarkable — also for the present proceedings — that in *Simmenthal* the Court considered intolerable, not the absence of protection, but even a mere delay in protection, thereby giving pre-eminence to that aspect over the advantages in terms of certainty and finality which the system based on the assessment of constitutionality as hitherto operated undoubtedly possessed.

In *Factortame I*, the question arose yet again, just as in *Simmenthal*, as to whether where the national court lacked a power under its national judicial system — namely the power to suspend by interim measure a law suspected but not yet found to be incompatible with Community law — such a power could be based on Community law. As in *Simmenthal*, the Court ruled that an obstacle to the effective judicial protection of a right claimed under Community provisions by an individual had to be removed by the national court and that hence any measure providing for that obstacle had to be set aside.

45. In the final analysis, the Member States' autonomy in relation to judicial remedies for the infringement of rights conferred by the Community system, albeit affirmed by the Court, [51] is subject to considerable derogations: in particular, whenever it is essential to derogate in order to ensure the proper implementation of Community law and correct, effective protection of the rights claimed by individuals under Community law.

Accordingly, for example, whereas in *Salgoil* the Court emphasized the obligation on the national courts to ensure direct and immedi-

51 — See the judgment in Case 158/80 *Rewe* v *Hauptzollamt Kiel* [1981] ECR 1805, paragraph 44, in which the Court held that the Treaty was not intended to create new remedies in the national courts other than those already laid down by national law or to reduce the choice of the courts as to the most effective means of protection. In actual fact, that ruling is much less absolute in scope than would appear at first sight.

ate protection of individuals' interests, but went on to specify that 'it is for the national legal system to determine which court or tribunal has jurisdiction to give this protection and, for this purpose, to decide how the individual position thus protected is to be classified', [52] that ambiguity disappears in *Bozzetti* v *Invernizzi*. In that judgment, the Court reaffirmed the obligation to ensure that individual's rights are effectively protected 'in each case' and that, within those precise limits only ('subject to that reservation') 'it is not for the Court to intervene in order to resolve any questions of jurisdiction which may arise, within the national judicial system, as regards the definition of certain legal situations based on Community law'. [53] The qualification *'subject to that reservation'* is manifestly the most relevant key to the interpretation of this passage inasmuch as it marks out the limits to the autonomy of the national systems, and it is no accident, to my mind, that the same qualification is set out in paragraph 42 of *Francovich*.

46. It should not be overlooked that the Community legislature, too, has introduced exceptions to the Member States' autonomy, for example in the field of public contracts governed by Community law, precisely as regards compensation for damage. I refer, obviously, to Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [54] and to the corresponding Directive 92/13/EEC of 25 February 1992 on remedies in relation to the so-called excluded sectors. [55]

Faced with a large variety of solutions in the Member States' legal systems, the Community legislature acted, not only with regard to aspects relating to substantive, hence real, protection, but also by providing for a system — which was certainly novel to a good many national systems — of damages to compensate for the injury caused by unlawfulness of contract award procedures in the event of the absence or insufficiency of real protection. [56]

47. In the final analysis, it can certainly be said that the Member States' autonomy with regard to judicial remedies for the infringement of rights conferred by Community

52 — Judgment in Case 13/68 *Salgoil* v *Italy* [1968] ECR 453, in particular at 462 and 463.

53 — Judgment in Case 179/84 *Bozzetti* v *Invernizzi* [1985] ECR 2301, paragraph 17.

54 — OJ 1989 L 395, p. 33.

55 — OJ 1992 L 76, p. 14.

56 — That provision introduced a significant innovation into many Member States' legal systems. For instance, in the Italian system, which, even though it was among those affording the greatest protection and, in any event, one of the few in which it was possible, following the annulment of the unlawful administrative measure, even to have the ensuing contractual situation set aside, provision for compensation for infringement of situations which had traditionally been classed as *interessi legittimi* (protected interests) and not as *diritti soggettivi* (individual rights) constitutes nothing less than a *cultural revolution* (see judgment No 2667 of the Corte di Cassazione of 5 March 1993, in *Il Foro It.*, 1993, I, 3062), albeit confined solely to relationships governed by Community law.

provisions is firmly tied to the result sought by Community law. [57]

Where Community provisions are infringed by Member States, the result which should be attained, as far as is relevant for present purposes, for the proper operation of the Community legal system as a whole is that of ensuring, assuming that specific preconditions are satisfied, that the same legal situation is restored, at least in terms of its financial implications, as would have obtained if the Member State had not failed to fulfil the obligation imposed upon it by Community law.

II — *Conditions for the State's obligation to pay compensation*

48. Consequently, liability attaches to any case in which Community law is infringed, including that in which the loss or damage results from infringements of Treaty provisions having direct effect, regardless of the organ of the State (including the legislature) to which the loss or damage is attributable. It now remains to consider the conditions in which liability exists and, in parallel, the individual's right to compensation.

In the absence of specific Community provisions governing the area, the problem lies in defining the conditions determining State liability and in actually being able to ascertain when they are present. In addition, careful consideration should be given to the practicality of the possible solutions.

49. Certainly, Community law could very well, as some States have proposed in these proceedings, confine itself to affirming that liability exists in principle and that there is an obligation to compensate, whilst leaving it to national law to determine the preconditions and lay down the detailed substantive and procedural rules.

Such a solution, as I mentioned at the beginning, would however have considerable drawbacks, the first among them being that it would not ensure the result sought by Community law through an affirmation of the principle of liability, that is to say, full, effective protection of the rights claimed by individuals under the Community provision which is assumed to have been infringed. That this is a real risk is shown by the very questions referred by the national courts,

57 — For a somewhat different approach, see Advocate General Jacobs' Opinion of 15 June 1995 in Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen*, [1995] ECR I-4705, I-4707.

which arose precisely because the applicable national law did not allow any compensation to be granted in the cases before them. Again, in any event, it is only too obvious that a mere reference to national law would be in danger of endorsing a discriminatory system, in so far as for a given infringement Community citizens would receive different protection, some none at all.

national law that the State is bound to make reparation for the consequences of the damage caused, the Court itself identified and defined the conditions 'sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law' (paragraph 41). The Member State to which the failure to implement a directive is attributable is therefore bound in every case to make reparation for the loss or damage sustained by the individual, provided that the conditions laid down by the Court are fulfilled.

50. In order for protection in damages to be assured in all the Member States in at least a homogeneous — if not exactly uniform — manner, it is vital that it should be Community law itself which lays down at least the minimum conditions determining the right to compensation, in particular the criteria by which those conditions are established, and the 'Community' limits imposed on the 'national' conditions relating to compensation, be they procedural or otherwise.

However, this must not be taken as meaning that the presence of those conditions is sufficient for the purposes of compensation with respect to any infringement of Community law whatsoever. As the Court itself explained, 'Although State liability is thus required by Community law, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage' (paragraph 38).

This, moreover, was the solution adopted by the Court in *Francovich*, albeit with some particular features connected with the case at issue. There is no ground for considering that that solution should apply only in the event of failure to implement a directive and not to the infringement of provisions with direct effect.

52. Consequently, the necessary requirements in order for Member States to be liable are likely to vary from case to case. However, as in *Francovich*, the requirements must be identified and defined by Community law itself.

51. In *Francovich*, I recall, while specifying that it is in the context of the rules of

In other words, it is true that, in the case of infringements of Treaty provisions having

direct effect, the conditions set out in *Francovich* may not be necessary and/or sufficient to give rise to a right to reparation. Nevertheless, in such cases too, it will be necessary to identify what conditions are sufficient in order to enable an individual to obtain reparation. It is scarcely necessary to point out that the *sufficient conditions*, as is clear from the *Francovich* judgment itself, relate to the *substantive* preconditions for liability.

53. A rapid appraisal of the rules in force in the national legal systems on liability on the part of public authorities shows that it is commonly accepted at least that the principle should be that the entity to which the event which gave rise to the loss or damage is attributable is answerable for that event, provided that there is causal link between the event and the loss or damage.

The substantive preconditions for liability are more or less the same everywhere: actual damage, a causal link between the damage and conduct on the part of the perpetrator of the damage, and the fact that the conduct was unlawful. In contrast, the differences — which in some cases are important in so far as they affect, for example, even the nature of the individual interests protected [58] — relate to the manner in which those preconditions are defined and the criteria for ascertaining whether they are met.

54. For present purposes, therefore, it is necessary, not so much to identify the general conditions for liability, which in point of fact are practically the same in the various legal systems, but to establish the criteria for determining whether they are met or, if you prefer, those criteria which will enable a common definition to be found of the conditions in question.

To that end, I consider that I should dwell initially on the conditions which the Court considers sufficient in cases of failure to implement a directive in order to give rise to a right on the part of individuals to compensation.

1. *The* Francovich *solution*

55. The obligation on the State to make reparation for legislative omissions was recognized by the Court in cases of failure to implement a directive within the prescribed period, subject to finding that the following three conditions were met: 'First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive.

58 — Suffice it to recall the particularities (but see footnote 5) of the Italian system as regards the lack of a remedy in damages for breaches of *interessi legittimi* (protected interests). For the 'tormented chapter of the protection in tort of *interessi legittimi*' in Italy, see Ponzanelli: 'L'Europa e la responsabilità civile', in *Il Foro It.*, 1992, IV, col. 150. The question raised by the national court in *Enichem Base*, cited in footnote 24, indeed related to the breach of an *interesse legittimo*.

Finally, there must be a causal link between the breach of the State's obligation and the damage suffered.' [59]

A first question needs to be asked: are those conditions necessary and sufficient also in a case where the loss or damage was caused by infringement of a Treaty provision having direct effect?

56. Leaving aside for the moment the question of the causal link, which is compulsory for tortious liability, I would observe initially that the first condition, to the effect that the result prescribed by the directive should entail the grant of rights to individuals, is concerned with identifying the legal position of the individuals whose infringement may give rise to compensation. Having regard to the relevant case-law, it must be considered that the Court intended by those words to refer generally to all individual legal positions protected by Community law; hence — by definition — this condition is always met in the case of provisions having direct effect.

The second condition, which at first blush seems merely to specify the first, emphasizes the need for the right resulting from the directive to have a precise content, that is to say, its subject-matter must be capable of determination, with the result that this condition should again be regarded, in principle, as being satisfied by Treaty provisions with direct effect. [60] It is worth stressing at this juncture that in *Francovich*, as in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others*, on which I am also delivering an Opinion today, the content of the right conferred on the individuals coincides exactly and precisely with their pecuniary claims asserted by virtue of that same right under the relevant Community provisions and hence with the loss for which damages may be payable. [61] Of course, this does not mean that the condition in question has to be interpreted as meaning that whether damages may be awarded in respect of the damage sustained by the individual is dependent on whether the exact content of the pecuniary loss sustained by the individual is capable of being identified on the basis of the actual provision infringed. In contrast, it is enough for the infringement of the provision in question, which confers on the individual a right whose subject-matter can be precisely identified, to have affected the injured party's financial interests. If this were not so, in fact, only claims in cases in which the aim of the provision infringed was precisely to confer a 'pecuniary' right on the individual would sound in damages.

57. The above observations lead me to an initial conclusion: in so far as they relate to

59 — However, the three conditions in question, which the Court identified in *Francovich* (paragraph 40), are set out here verbatim in the form in which they were stressed and summarized by the Court in *Faccini Dori* v *Recreb*, cited in footnote 37, paragraph 27.

60 — For this aspect, see sections 75 and 76 below.

61 — In *Francovich*, I recall, this was the amount owing to the employees following the employer's insolvency; in *Dillenkofer and Others* it is sums paid by purchasers of package holidays for trips never made.

the legal position which an individual must occupy in order to be able to claim a right to reparation, the conditions laid down by the Court in *Francovich* are manifestly necessary and satisfied even in the case of Treaty provisions having direct effect. What has to be clarified here is whether those conditions are sufficient in every case.

To that end, it is worth examining the reasons which prompted the Court to confine itself to those conditions and not also to specify, for instance, the criteria for holding that the relevant infringement of Community law involves unlawful conduct such as to cause the State to incur liability. In *Francovich*, as I have already said, the Court referred expressly to only one of the classic preconditions for liability: the causal link. In contrast, it provided no further clarification about the unlawfulness of the conduct of the perpetrator of the loss or damage and the actual existence of the loss or damage, the national court not having been asked to carry out any review in that regard.

58. In my view, the choice made by the Court in *Francovich* was due, very simply, to the fact that in that case the existence of the aforementioned two preconditions was obvious at first sight. There could be no doubt as to whether the *omission* on the part of the State was unlawful: the result sought by the directive — in respect of which the State had no margin of discretion, at any rate not in relation to the time within which the directive had to be implemented — was not attained; neither was there any doubt as to whether loss or damage had actually occurred, since it essentially coincided with the amount to which the applicants would have been entitled had the directive been implemented within the prescribed period.

Accordingly, in those circumstances, since the Court had first found that the directive could not be relied on directly by individuals before the national courts, it merely indicated that, for the purposes of the obligation to make reparation of the Member State in breach of its obligations, it must be possible to identify a precise, exact right on the part of the individuals.

59. In sum, it is undeniable that, from the point of view of State liability and the obligation to make reparation, *Francovich* was virtually a textbook case. The fact that the Court did not feel the need to specify the limits of State liability, in particular in so far as it omitted expressly to indicate the *Community* criteria for judging whether the conduct of the State was unlawful, should be seen solely in the light of the particular features of the case before it. It is significant in this regard that different, even opposite, reactions are to be encountered in academic writings: according to some commentators,

the Court intended only to target serious infringements or infringements involving fault; [62] others, in contrast, take the view that it appears from *Francovich* that any infringement of Community law gives rise to liability and an obligation to make reparation. [63]

60. To interpret *Francovich* differently would mean that every infringement of Community law affecting the financial interests of an individual occupying a legal position claimed under the provision infringed entailed *per se* and automatically a right to reparation.

It does not seem to me that this was the result intended by the Court or by Community law. Moreover, it would not actually be reasonable, given that, as I have already mentioned, in all the legal traditions liability for legislative activity on the part of the public authorities is limited in various ways. What is more, the Court's own case-law on the non-contractual liability of the Community institutions on account of their legislative activities takes a different line.

In the final analysis, the fact that the criteria required by Community law in order for the State to incur liability are not clearly defined in *Francovich* is closely connected with the particularly straightforward nature of that case. The Court's very statement that the conditions under which State liability gives rise to a right to reparation depend 'on the nature of the breach of Community law giving rise to the damage' should therefore be construed as meaning not only that the general conditions for liability to be incurred vary according to the type of breach, but also that the particular characteristics of a specific type of breach, such as failure to implement a directive within the prescribed period, may be such as not to require detailed consideration as to whether one or more of the conditions in question are present.

2. *The case-law on the second paragraph of Article 215*

61. Although this is not the proper place in which to analyse and discuss this case-law, I consider it necessary at least to point to the need for calm, profound reflection thereon. In these proceedings, the Member States have constantly referred to the case-law in question and asked for the same criteria set

62 — It shows, among other things, that failure to implement a directive constitutes a conscious breach, consequently a deliberate one and for that very reason one involving fault, Temple Lang: 'New Legal Effects Resulting from the Failure of States to Fulfil Obligations under European Community Law: The Francovich Judgment', in *Fordham International Law Journal*, 1992-1993, p. 1 et seq.

63 — In the sense that strict liability is involved in which fault plays no part, see, for example, Caranta: 'Governmental Liability after Francovich', in *Cambridge Law Journal*, 1993, p. 272 et seq.; see also Tatham: 'Les recours contre les atteintes portées aux normes communautaires par les pouvoirs publics en Angleterre', in *Cahiers de droit européen*, 1993, p. 597 et seq.

forth in that case-law also to be applied in respect of liability for infringements of Community law attributable to them.

That point of view does not seem completely baseless, bearing in mind, first, that the second paragraph of Article 215 refers, for the purposes of the reparation of damage caused by Community institutions in the performance of their duties, to the general principles common to the laws of the Member States and, secondly, that consequently that case-law could and should constitute, regard being had to the absence of uniform rules in this field, a useful frame of reference for common rules on State liability.

62. The Court does not seem — or at least not at first sight and unlike that which Advocate General Mischo proposed in his Opinion in *Francovich* — to have intended to make State liability hinge on the same restrictive conditions required by the case-law in order for the Community to incur liability.

Nevertheless, I consider it worth preceding my consideration of each of the general conditions for liability by a few observations designed to assess whether, and to what extent, an infringement of Community law attributable to the State is comparable to an infringement on the part of the Community institutions, and whether, in the final analysis, the criteria set forth in the relevant case-law may or may not constitute a useful frame of reference, at least given similar situations.

63. To that end, I would call to mind as a preliminary point that the Court has consistently held that 'the liability of the Community on account of its legislative powers depends on the coincidence of a set of conditions as regards the unlawfulness of the act of the institution, the fact of damage and the existence of a direct link in the chain of causality between the act and the damage complained of'. [64] As can be seen, the substantive preconditions are the same — indeed could not be different — also in the case of liability on the part of the Community institutions.

However, the case-law has identified — in particular with regard to the unlawfulness of the conduct imputable to the institutions — conditions which are so restrictive as to make it extremely difficult actually to obtain damages against a Community institution. [65]

64. The limits laid down by the case-law in regard to actions brought under Article 215 of the Treaty are in fact based on the widespread view that, as a matter of princi-

64 — See, for example, the judgment in Case 50/86 *Grands Moulins de Paris* v *Council and Commission* [1987] ECR 4833, paragraph 7.

65 — Indeed, to date the number of awards of damages made against Community institutions comes to just eight.

ple, compensation may not be recovered for injury caused by the legislature. Moreover, the Court itself has explained its restrictive approach as follows: 'the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals'. [66]

The application of that approach, however, in a good few cases has made for perplexity.

65. The limits of Community liability are relied upon and applied not only in relation to legislative measures which presuppose the existence of a broad discretion on the part of the relevant institution, but also in relation to measures which fall within the ambit of implementing legislation (typically Commission implementing regulations). [67] Essentially, the Court has applied the restrictive criteria formulated in assessing the Community's liability on account of legislative measures of a general nature even where the damage arose out of an individual measure not in fact involving economic policy choices of such scope as to necessitate the fullest possible protection of the institutions' discretionary powers.

Unquestionably, it would be more correct to apply different rules on liability depending on whether the activity in question was more particularly legislative or in the nature of executive activity, given that, in principle, the discretion available to the Community institutions differs significantly in the two cases. [68] More generally, the requirement for virtually arbitrary conduct in order for non-contractual liability on the part of the Commission to arise is justified where the Community has a broad discretion — as in the field of agricultural policy —, but is not justified where, in contrast, the conditions for the exercise of the discretion conferred on the institution are clearly and precisely defined. [69] In the latter case, the infringement

66 — Judgment in Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *HNL* v *Council and Commission* [1978] ECR 1209, paragraph 5.

67 — See, for example, the judgment in Joined Cases 194/83 to 206/83 *Asteris* v *Commission* [1985] ECR 2815, paragraphs 21 and 22, in which the Court held that the Community had incurred no liability for the erroneous fixing by the Commission pursuant to a Council regulation of aid for tomato concentrates. See also the judgment in Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, in which the Community was held liable on account of an essentially individual Commission regulation implementing another Commission regulation which in turn implemented a Council regulation, and the rigid criteria used for legislative measures involving choices of economic policy were applied.

68 — See Advocate General Biancarelli's Opinion in Case T-120/89 *Stahlwerke Peine-Salzgitter* v *Commission* [1991] ECR II-279, at II-340, in which he stated that, as far as liability was concerned, what was important was '— essentially — the margin of appreciation available to the Commission when it adopts its decision and the more or less complex economic context in which the decision is adopted'.

69 — This issue was recently raised and discussed before the Court of First Instance in an anti-dumping case in which the applicant argued that the question of Community liability should be assessed differently depending on whether the infringement imputed to the institution was attributable to a breach of the rules inherent in the assessment of complex economic facts or, as in that case, to a breach of procedural rules binding on the institutions. The Court, however, disagreed, confining itself to the lapidary statement that anti-dumping measures constitute legislative action involving choices of economic policy (judgment of 18 September 1995 in Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraphs 44 to 52).

of the relevant provision should in any event be regarded as such as to cause the Community to incur liability. [70]

From that point of view, it does not seem to me either that it can be validly argued that to transpose to national actions in tort the conditions attaching to actions brought under Article 215 would potentially constitute a step back from the situation existing in some legal systems. From the point of view of the requirements of the protection of the rights conferred on individuals by the Community legal system, it is not acceptable for the judicial protection achievable at Community level to be based on more restrictive and, in the final analysis, less liberal conditions than those obtaining in at least some Member States. [73]

66. In sum, whilst, according to *Francovich*, loss or damage caused by a provision of national law incompatible with a Community provision must be held to be amenable to an action for damages, it is not easy to understand why damages should be recoverable for the loss or damage ensuing from a Community measure which is *incompatible with the same Community provision* only if the restrictive conditions laid down by the Court (until now) are satisfied. [71] Moreover, in a Community governed by the rule of law, which aims to pay increasing attention and to be increasingly sensitive to the protection of individuals, also from the point of view of compensation, at least equal attention should be paid — as a number of parties have argued — to cases in which the loss or damage suffered by the citizen arises out of an unlawful act or omission attributable to the Community institutions themselves. [72]

67. In the light of the foregoing, I consider that there is no reason for applying different criteria — naturally in like situations — depending on whether the infringement of Community law in question is attributable to a State or a Community institution. Conversely, different situations can and must lead to different conclusions as regards the criteria employed to find whether the preconditions for liability are satisfied, whether the alleged liability be on the part of the Member States or the Community institutions.

In particular, by way of a first approximation, I take the view that it is absolutely reasonable that State liability — let us be quite clear about this, irrespective of whether or not the provision 'breached' has direct effect

70 — To this effect, see also Advocate General Darmon's Opinion in Case C-55/90 *Cato* v *Commission* [1992] ECR I-2561.

71 — This was the issue raised, *inter alia*, in *Bourgoin* before the Court of Appeal, Civil Division, *Common Market Law Reports* [1986] QB 716, considered in Simon-Barav, 'La responsabilité de l'administration nationale en cas de violation du droit communautaire', in RMC, 1987, p. 165, in particular at p. 170 et seq.; Oliver, 'Enforcing Community Rights in the English Courts', in *Modern Law Review*, 1987, p. 881, in particular at p. 899 et seq.

72 — To this effect, see, for example, Cartabia: 'Omissioni del legislatore, diritti sociali e risarcimento dei danni', in *Giurisprudenza Costituzionale*, 1992, p. 505 et seq.

73 — See, in this connection, the proceedings of the 1992 FIDE Congress: FIDE, 'La sanction des infractions au droit communautaire', Volume II, Lisbon, 1992.

— should be subject to the same restrictive conditions applying to the Community institutions whenever they have a margin of discretion or the limits imposed on their action by Community provisions, perhaps in sectors falling (partly) within their sphere of competence, are not clear.

Conversely, Member States should be more readily held liable, as in the case of the Community institutions, wherever the infringement is not coupled with the exercise of a broad discretion.

68. In the final analysis, what should be attained is a system of differentiated liability depending on whether or not the Community institutions (and the national authorities) have a broad discretion. To my mind, this is the most correct and consistent manner of bringing about the essential harmonization of the preconditions for liability, in so far as it would be strange, to say the least, to hold Member States liable, on equivalent facts, for infringements of Community law on different (less strict) conditions than those which the Court applies to liability on the part of the Community institutions.

In a Community governed by the rule of law, in which it is the aim that the acts and conduct of all participants in the system should be amenable to judicial review without privileges for anyone, the requirement for effective protection of the rights claimed by individuals under Community law may not vary — given equal situations — depending on whether a Member State or the Community caused the loss or damage.

69. The appraisal set out below will therefore take into consideration, as the point of reference for determining the obligation on Member States to make reparation, *inter alia* the conditions identified by the Court in its case-law on Article 215. Of course, this will not involve a 'blind' transposition of those (restrictive) conditions to the sector under consideration here. I am not overlooking that, in applying Community law, the Member States generally have very limited discretion, with the result that the conditions in question relating to this situation are likely to cause liability more readily to be incurred. At the same time, I consider that it cannot be ruled out that any lack of precision of the obligation on the Member State may be such as to necessitate the application of those same restrictive criteria, even though it does not have a significant margin of discretion in the sector in question.

3. *The 'Community' criteria relating to the general conditions for liability*

70. Having said all this, I shall now turn to consider the individual substantive precondi-

tions for incurring liability, starting with the event which gave rise to the damage, that is to say in this case, infringement of Community provisions with direct effect.

(a) The event which gave rise to the damage: infringement of Community provisions

71. Defining the limits of liability is primarily and essentially linked with the definition of the unlawful conduct. It is undisputed that the harmful conduct — here the legislative measure — must conflict with the rules of the system. In order, however, for such unlawfulness to give rise to liability, and at the same time damages, the individual States employ differing concepts, [74] whose meaning does not always correspond exactly and whose practical application may therefore result in different solutions being applied in respect of the infringement of a given provision. This confirms, if confirmation was needed, that it is necessary — particularly as regards the event which gave rise to the damage — to establish the criteria which will enable a common definition to be achieved.

As regards legislative activity of the public authorities, a first attempt has been made by the Council of Europe in a recommendation, Principle I of which states as follows: 'Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in the case of transgression of an established legal rule.' [75] Consequently, mere unlawfulness of the measure is not sufficient under that recommendation in order for the State to incur liability: except where the provision alleged to have been breached is clear, the conduct attributed to the public authorities must also have been 'unreasonable'.

72. In the Court's case-law on non-contractual liability it has been consistently held that if the damage complained of results from a legislative measure involving choices of economic policy, the fact that the measure in question is invalid is not sufficient to cause the Community to incur liability. In the case of measures of this kind, [76] Community liability cannot arise unless *a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.* [77]

74 — To take just a few systems, suffice it to mention *illecito* in Italian law, the French *faute*, the German *Verschulden* and the English concepts of *breach of a duty of care* or *misfeasance in public office*.

75 — Recommendation R (84) 15 of 18 September 1984.

76 — But, as I have already said, under the case-law in question it is as if all Community legislative measures involved choices of economic policy.

77 — See, in particular, the judgments in *HNL* v *Council and Commission*, cited in footnote 66, paragraph 4, and in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 12.

Whilst it is true therefore that the prejudicial measure must at least be unlawful in order for non-contractual liability to be incurred, there is the immediate addition of two conditions on which liability for damage caused by measures involving a choice of economic policy depends: the provision infringed must be 'a superior rule of law for the protection of the individual' and the breach must be 'sufficiently serious' ('grave', 'suffisamment caractérisée', 'hinreichend qualifiziert').

73. Having said that, I would point out that all the States which submitted observations in these proceedings ruled out an exact match between the reasons for the invalidity of the measure and the preconditions for liability, arguing that not every breach of Community law is capable of causing the State to incur liability and, as a result, of giving rise to an obligation in damages in favour of individuals.

Consequently, for the purposes of holding that there is an obligation in damages on the Member State in breach, the emphasis has been placed, on the one hand, on the same criteria formulated by the case-law on Article 215 — hence essentially on the concept of a manifest and serious breach — and, on the other, on fault as the element necessary to 'characterize' (as serious) the breach of the provision or, in any case, as an indispensable, inherent ingredient of liability.

— Manifest and serious nature of the breach

74. Whilst entering all the caveats and making all the distinctions required as regards Community liability, it must therefore be assessed whether, also for the purposes of liability on the part of the Member States, the breach in question must be manifest and serious and, of course, what is to be understood by the breach having to be manifest and serious.

As I have mentioned, in the relevant case-law that criterion is defined in the following terms: 'In the context of Community provisions in which one of the chief features is the exercise of a wide discretion indispensable for the implementation of the common agricultural policy, the Community can incur liability only in exceptional cases, namely where the institution concerned manifestly and gravely disregarded the limits on the exercise of its powers', [78] provided of course that the breach in question was of a superior rule of law for the protection of the individual.

75. The latter requirement seems, for present purposes, to be the least controversial. It is obvious that, in order for an individual to be

78 — *Grands Moulins de Paris* v *Council and Commission*, cited in footnote 64, paragraph 8. See, in addition, the judgment in Case C-63/89 *Assurances du Crédit* [1991] ECR I-1799, paragraph 12, and, most recently, the judgement of 14 September 1995 in Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, paragraph 32.

able to claim a right to compensation, the provision breached must be capable of conferring a legal position upon him as an individual. Moreover, this is the sense in which the first two conditions set out in *Francovich* must be read, conditions which, as I have already stated, are both necessary and satisfied in the case of provisions having direct effect.

In my view, when it comes to Treaty provisions with direct effect, which is what we are concerned with here, some additional specification is needed. In particular, it must be made clear that the fact that such provisions are occasionally or often designed to protect other — *ex hypothesi* general — interests as well cannot be regarded in itself as preventing them from being for the protection of individuals.

76. Next, as regards the requirement that the provision infringed should be a *superior* rule, it is scarcely necessary to point out that if a legislative measure is unlawful, this means — by definition — that it conflicts with a higher-ranking provision. Admittedly, that expression is used in the case-law on Article 215, not to penalize every breach of limits imposed by superior rules, albeit for the protection of individuals, but solely breaches of general principles of the legal system and hence, in the final analysis, to categorize the breach in question as serious.

In this connection, I shall say forthwith that I do not consider it appropriate to propose the same solution also for State liability for infringements of Community law. If it is true that the Member States' obligation in damages is imposed in order to guarantee individuals effective protection of rights claimed under Community provisions, it follows it would not be easy to identify reasons justifying limiting that obligation to the breach of a particular class of rule, albeit one fundamental to the Community system.

77. Indeed, if the standpoint of the injured party is taken, it is only too obvious that any infringement of a Community provision which confers a legal position on him as an individual must be capable of giving rise to compensation. Consequently, infringement of a provision of a regulation cannot result for the individual in consequences differing from those arising out of an infringement of a Treaty provision; it seems to me even less appropriate to draw distinctions between actual provisions of the Treaty by deciding, for example, that only breaches of some of them, that is to say, the fundamental provisions and not the others, are capable of causing the Member State in question to incur liability. [79]

79 — It would still be necessary to specify which provisions also warrant protection in damages on the ground of their scope and in order to secure their effectiveness: is the prohibition of discrimination on grounds of residence, which is indubitably fundamental for the purposes of ensuring effective freedom to supply services, as fundamental as or less fundamental than the prohibition of discrimination on grounds of nationality?

In the final analysis, I consider it sufficient, from the point of view of the aspect considered so far, that the provision infringed should confer on the individual a right whose content is capable of determination and precise. It is hardly necessary to add that the same should be true of liability on the part of the Community institutions.

78. This having been clarified, it now falls to me to specify the concept of manifest and serious breach as it arises in this context.

It seems to me that, in order to identify the limits of the possibilities for translating unlawfulness into liability, the discretion factor can and must be the decisive element, irrespective of the rank of the provision infringed (Treaty or secondary legislation, at any rate a provision which takes precedence over national law) and of the measure (legislative or executive) which infringes it. The greater or lesser degree of discretion available to the State coincides, moreover, — at least in most cases — with the greater or lesser degree of clarity and precision of the obligation to which it is subject. In fact, it is quite possible to conceive of obligations which are not at all clear — or better, which are imprecisely demarcated—, even in cases where the States' discretion is small or unimportant. The upshot is that in such cases the limits set to the action of the States are not clearly defined for *that very reason*, with the result that the situation is not very different substantively from that in which the States have a significant margin of discretion.

79. This means that, even in the case of provisions with direct effect, the State may be guilty of breaches which, not by reason only of their having direct effect, must be categorized as *manifest and serious*. I shall explain what I mean using an example based on two provisions having direct effect. The prohibition of discrimination on grounds of nationality (Article 6) identifies precisely and exactly the individual's right, which is — very simply and without any possible alternative — the right not to be discriminated against. The same cannot be said of the provision prohibiting quantitative restrictions and measures having equivalent effect (Article 30) in view of the variety of fact situations conceivable in that area. In that case, the individual's right — which in itself is only too clear — not to be obstructed in his activity by measures contrary to the provision in question may be limited by the provisions of Article 36 or also, in the case of measures applicable without distinction, by imperative requirements relied on by the State with a view to pursuing an objective deemed worthy of protection by Community law itself. The upshot is that the State measure in question, which is in principle incompatible with Community law, may well be taken outside the scope of Article 30 or fall within the exceptions provided for in Article 36. To this end — and it is scarcely necessary to stress this — it may be necessary to obtain a prior determination from the national court and/or from the Community Court.

Furthermore, it is worth pointing out that, for present purposes, it is not decisive in itself whether or not the States have a wide discretion in a given sector, but rather what is decisive is the breadth of the margin of

discretion available to them in regard to the individual provision which confers a right on individuals. [80] It is in precisely that way that the discretion ends up by corresponding to the greater or lesser precision of the obligation which it imposes on the States themselves.

So, in all those sectors and with regard to all those provisions which do not give Member States a significant margin of discretion, in the sense described above, there must be held to be liability and an obligation in damages simply on account of the infringement of a Community provision which confers on individuals a right which is precise and whose subject-matter is determinable; no other factors may be taken into account.

80. If the question is seen in those terms, it has to be acknowledged that there will be State liability in principle whenever the State is constrained under Community law to achieve a *precise* result. This is precisely the case, as already held by the Court in *Francovich*, where there is a failure to implement a directive within the prescribed period, provided, of course, that the other conditions set out by the Court are fulfilled. But this is also the case with all other provisions, including those of the Treaty, that are confined to imposing on the Member States precise, clearly identified obligations to refrain from some conduct (suffice it to mention the prohibition on the introduction of new customs duties laid down by Article 12 and, more generally, all the standstill clauses) which concurrently give rise to a right for individuals.

81. Where, in contrast, Member States have a more or less wide discretion or the Community obligations imposed on them are not clearly and precisely defined, the same solution will have to be adopted only where the limits set to their action have been manifestly and gravely disregarded. Obviously, this will be the case where the provision assumedly infringed is clear, perhaps in the way described in *CILFIT* [81] or because it has already been interpreted by the Court with regard to identical or, in any event, similar facts [82] no matter whether the interpretation was given in a preliminary ruling or in a judgment pursuant to Article 169.

As far as the last-mentioned aspect is concerned, it is scarcely necessary to show that, unlike some Member States have argued in

80 — I would observe, for example, reiterating what I have already mentioned, that, although Article 30 of the Treaty is certainly not associated with the exercise of a broad discretion on the part of the Member States, it must nevertheless be considered that the limits which it imposes on action by the Member States are not always clear and precise, as clearly emerges, moreover, from the way in which the case-law has evolved. By contrast, the discretion available to the Member States, for instance, under Article 129a of the Treaty (consumer protection), could not in any event be regarded as capable of resulting in the application of more restrictive conditions for liability if, for example, a national provision excluded citizens of other Member States from the benefit of the national provisions.

81 — Judgment in Case 283/81 *CILFIT* v *Ministry of Health* [1982] ECR 3415, paragraphs 16 and 17.

82 — See, for a remark to similar effect but regarding the obligation to make a reference pursuant to the third paragraph of Article 177 of the Treaty, the judgment in Joined Cases 28/62, 29/62 and 30/62 *Da Costa en Schaake* v *Nederlands Belastingsadministratie* [1963] ECR 31.

these proceedings, there is no reason for making an action for damages dependent upon the Court's having made a prior declaration that the State in question has failed to fulfil its obligations. In this connection, regard must be had to the Commission's discretion in deciding whether or not to initiate infringement proceedings, which would reduce, without any review, the ability of individuals to obtain compensation. Moreover, as the Court itself has held 'the rights accruing to individuals derive, not from that judgment [declaring that the Member State failed to fulfil its obligations], but from the actual provisions of Community law having direct effect in the internal legal order.' [83]

82. In contrast, where the Member States have a broad margin of discretion and/or the relevant law is doubtful and has not yet been considered by the Court, even in regard to similar facts, it is impossible for the approach to be different. Simply on an abstract level, it must in fact be considered that in such cases it will be very difficult to find that the limits set to the States' action have been manifestly and gravely disregarded, all the less where this is equated, as in the Article 215 case-law, with *virtually arbitrary* conduct. [84]

Consequently, in such cases the individual continues to have the possibility of relying on the substantive protection of the legal position which may be conferred upon him by the provision in question. Of course, in the event that the Member State does not remedy reasonably quickly the infringement which has been found in the meantime, the injured party may indeed bring an action for damages.

83. Having said that, it certainly cannot be ruled out that the interpretation of the Community rules in question, as made by the national authorities in their legislative activity (or lack of activity), may prove to be *manifestly wrong*, with the result that the Member State in breach of its obligations should be held liable in damages also in such cases.

I would next observe that, from the same perspective, as regards the timely, but incorrect, implementation of a provision of a directive, State liability will exist only where the application of the provision by the Member State in question is manifestly wrong. [85]

83 — Judgment in Joined Cases 314/81 to 316/81 and 83/82 *Procureur de la République* v *Waterkeyn* [1982] ECR 4337, paragraph 16.

84 — See, for a statement of that concept, the judgment in Joined Cases 116/77 and 124/77 *Amylum* v *Council and Commission* [1979] ECR 3497, paragraph 19, in which the Court held that, in that case, 'these were not errors of such gravity that it may be said that the conduct of the defendant institutions (...) was verging on the arbitrary and was thus of such a kind as to involve the Community in non-contractual liability'. To the same effect, see, most recently, the judgment in *Nölle* v *Council and Commission*, cited in footnote 69.

85 — For a more exact appraisal of this aspect, see the Opinion in Case C-392/93 *British Telecommunications plc* [1996] ECR I-1631, I-1634, also delivered today, in particular paragraphs 33, 34 and 35.

84. In the final analysis, I consider that, for our purposes, there can be considered to have been a *manifest and serious breach* where:

(a) obligations whose content is clear and precise in every respect have not been complied with;

(b) the Court's case-law has provided sufficient clarification, either by an interpretation given in a preliminary ruling or by means of a judgment pursuant to Article 169, of doubtful legal situations which are identical or, in any event, similar to that at issue;

(c) the national authorities' interpretation of the relevant Community provisions in their legislative activity (or inactivity) is manifestly wrong.

— Fault: an essential ingredient?

85. It remains now to assess whether fault is an essential ingredient in order to hold Member States liable. In this connection, it is appropriate first to clarify that by fault I mean a subjective factor, or, if you prefer, a mental or psychological factor, which characterizes — as being at fault or negligent or in any sense traditionally attributed to the expression fault — the conduct of the entity to which the infringement and, with it, liability is attributed. From this angle, fault is therefore a factor which *is added* to the infringement of the *enabling* provision as a subjective element, by categorizing the conduct which results in the breach, but not directly the breach as such or the legislative measure giving rise to the damage.

Seeking fault in the subjective sense — and, *a fortiori*, wrongful intent — as regards legislative activity raises some considerable difficulties even at the conceptual level, especially since fault as a condition of State liability has always been the subject of profound reflection and conflicting assessments. In particular, attention has been drawn to the difficulties of identifying conduct displaying fault on the part of the public authorities on the basis of the same criteria used for the purposes of civil law, especially since the mechanisms devised for explaining the actions of legal persons by attributing to them the same manner of acting as natural persons are said to prove completely useless or at least inadequate from this point of view. Indeed, even viewed in the abstract, it appears difficult to identify conduct involving fault in the rule-making activity of the legislator or even to conceive of its possibly being aware of the breach. In contrast, it cannot be presumed that the legislator pursues a general interest invariably and in any event.

86. Despite this, it must be acknowledged that most national legal systems still refer to fault as the basis for liability, [86] even where, essentially, it is equated precisely with the unlawfulness of the measure. I am thinking, in particular, of the French system, in which the ruling principle is that 'toute illégalité constitue par elle-même une faute' (any illegality constitutes fault *per se*) [87] and of the approach of the Italian Corte di Cassazione (Court of Cassation), according to which 'as far as unlawful measures are concerned, fault may be found in the infringement *per se* of the provisions which was brought about by the adoption and implementation of the measure'. [88]

In other words, fault, which is at least presumed every time an unlawful legislative act is brought into being, either in view of the unquestionably voluntary nature of measures adopted by the public authorities or on account of infringement of the principles of legality which those authorities are bound to observe, has ended up by losing every subjective connotation. [89]

87. To put it another way, the search for fault has shifted from the perspective of a person to that of the 'organization', with the result that even where it does not coincide simply with the unlawfulness of the measure, it is in any event connected with the content of the provision infringed, inasmuch as it attributes relevance to those rules of conduct with which the administration is bound to comply in performing its institutional tasks. In particular, importance attaches to the fact that the action of the administration is constrained by the limits of legality imposed on it.

Whilst, therefore, it is indeed true that liability is still fault-based in most national legal systems, it is also true that the existence of fault is determined, subject to some exceptions, [90] by objective

86 — One exception is certainly the Spanish system, in which liability for legislative measures is strict (see Articles 9(3) and 106(2) of the Constitution and Article 139(1) of the Law of 26 November 1992 on the legal system for the public administration and administrative procedure).

87 — See, for instance, Paillet: 'La faute du service public en droit administratif français', 1980, p. 176.

88 — Cassazione Civile, Sezioni Unite, judgment No 5361 of 22 October 1984 (in *Giustizia Civile*, 1985, p. 1419), in which it is also stated that 'It cannot be seen ... how the voluntary enforcement of an administrative measure which is unlawful for contravening the law and which affected an individual right may not embody *per se* the elements of fault, even, possibly, slight fault, especially when referred directly to a public structure, organized and competent to act, which is bound to carry out its activities in accordance with the law'. It is also worth citing judgment No 5883 of 24 May 1991 (in *Resp. Civ. Prev.*, 1992, p. 247 et seq.), in which the Corte di Cassazione held that proof of fault on the part of the public administration may consist 'either of breach of the rules of common prudence, resulting in negligent or imprudent regulatory activity, or of the infringement of laws and regulations with which the public administration itself is bound to comply, in so far as it has to observe the principles of legality, impartiality and proper procedure laid down by Article 97 of the Constitution'.

89 — This is also the case in Belgium, Luxembourg, Greece, Portugal and Denmark.

90 — In the English system, the administrative authorities' liability for legislative activity seems still to be based (and solidly based) on fault as the subjective element of the conduct in question. Thus, an error on the part of the Minister in interpreting the extent of the powers conferred on him may not in itself be regarded as constituting fault (see, for example, *Rowling* v *Takaro Properties* [1988] 2 W. L. R., 418 et seq.); likewise, fault, and with it liability, is precluded where the authority in question sought legal advice on the field in which it was called on to act (see *Dunlop* v *Woollahra Municipal Council* [1981] 2 W. L. R., 693). Given in addition that damages may not be awarded in the tort of negligence for pure economic loss, it follows that only, or almost only, the unlawful adoption of measures characterized by wrongful intent, namely the tort of misfeasance in public office, constitutes an unlawful act capable of giving rise to liability.

criteria. [91] In sum, inthe Member States themselves fault liability ends up being allowed in only by virtue of a series of devices; in any event, it is becoming increasingly objectified, that is to say, it is decreasingly or not at all coupled with a subjective component.

88. I consider that that solution, which is prevalent in the national legal systems and has been adopted by the Court itself in relation to non-contractual liability on the part of the Community institutions, [92] results in liability of Member States for infringements of Community law being strict, no-fault liability.

On the other hand, even if it were to be sought to base such liability on fault, it seems to me, at least as a first approximation, that it could not, for present purposes, not be linked to the provision allegedly infringed or simply identified with its content.

89. To my mind, it is obvious that if the *enabling* provision in question is one intended to achieve a particular result, there is no room for making the emergence of a situation of liability depend on the existence of a subjective connotation of the conduct of the State which may be described as fault in the sense defined earlier. The infringement — the unlawful act — crystallizes at the time at which the State failed to achieve the result sought by the provision. There will then be liability on the part of the State, that is to say, strict or no-fault liability or whatever term one wishes to employ.

Conversely, if the *enabling* provision is a provision relating to conduct, in the sense that it essentially prescribes a duty of care, fault will be an essential component. If so, however, fault is no longer a subjective component characterizing the conduct of the State which brought about the infringement and with it the wrongful damage, but precisely the subject-matter of the infringement. Breach of a duty of care consists precisely in negligent conduct, hence conduct exhibiting fault, with the upshot that fault is the subject-matter of the unlawful act and no longer a subjective component of the conduct.

90. In the final analysis, in order for there to be liability on the part of a Member State which has breached Community obligations to which it is subject, I consider that there is no relevance in inquiring into the existence of fault as a subjective component of the unlawful conduct.

91 — Such a trend can be seen also in the Netherlands and Germany, where fault is equated to conduct in breach of the duties of normal care. In this context, German commentators themselves now refer to the 'Objektivierung des Verschuldens' (see Ossenbühl: 'Staatshaftungsrecht', 4th ed., Munich, 1991, p. 61).

92 — After some initial wavering, even in the Court's case-law fault is of importance only as a synonym of unlawful conduct.

I would therefore reiterate my conviction, as described earlier, that the conduct of the State in breach of Community law must be assessed in the light of objective factors for the purposes of the obligation to make reparation.

(b) Existence of the damage

91. The damage must be real, that is to say, certain and actual. Moreover, those are the requirements generally insisted upon by the national legal systems, and it will be for the national court to find whether they are satisfied in the actual case.

92. Nevertheless, I am minded to dwell, if only briefly, on a number of conditions relating to the nature of the damage which have been prayed in aid or, at any rate, raised during these proceedings, in particular by the French Government, as a criterion for limiting the area of Member State liability following infringements of Community law. I refer, in particular, to the seriousness of the damage, in the sense that the damage should be considerable, and to its special nature, in so far as it should affect a small number of persons.

In my view, those conditions should be regarded as irrelevant for present purposes, even though they have often been applied in the Court's case-law on non-contractual liability. [93]

93. Whilst it is true that under the law of some Member States there are cases in which the right to reparation depends, among other things, on the seriousness of the damage, on its abnormally serious nature and on the special nature of the damage in regard to the injured parties, it is also true and worth stressing that that approach is employed for compensation for damage caused by lawful acts. [94] Accordingly, the terms of the problem are not, and could not be, the same as those arising in this case.

It would indeed be excessive to require of individuals injured by unlawful acts that the damage sustained by them should be abnormal and special, with the result that they would be left to bear, not only consequences of a modest scale, but also those common to a class of individuals which was not of lim-

93 — See in particular, the judgments in *HNL* v *Council and Commission*, cited in footnote 66, paragraph 7, Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères* v *Council* [1979] ECR 3091, paragraph 11, and Case 59/83 *Biovilac* v *EEC* [1984] ECR 4057, paragraphs 27 to 30.

94 — See, for example, the judgment of the Conseil d'État of 14 January 1938 in *La Fleurette*, Recueil Lebon, 1938, p. 25 et seq. The German '*Sonderopfer*' (special sacrifice) theory in the field of expropriation, which always relates to financial loss arising out of lawful measures adopted in the public interest, should also be subsumed under this head.

ited size. I consider therefore that the idea of exempting liability for minor loss or damage in this case would be a bad one.

94. In this connection, I would first observe that the argument against accepting the criterion of the seriousness of the financial damage is that an unlawful measure involving a manifest and serious breach contrary to a provision of the system and with the rights of the individual guaranteed thereby, must give rise to compensation in order to restore the balance altered by the unlawful act or omission, irrespective of the scale of the damage. Moreover, if a common approach to liability for unlawful acts or omissions of the public authorities emerges from the laws of the Member States, that approach consists in not making compensation depend on the scale of the damage.

On top of this, State liability does not seem to be able to be confined to cases in which there are specifically determined persons, or groups of persons, and precluded where the legislative act concerns a broad class of persons. Whilst it is true that it could be justifiably argued that public-interest requirements militate in favour of ruling out compensation for damage affecting large classes of persons, *inter alia* in order to avoid heavy financial burdens, it is also true that that approach is based merely on reasons of expediency. It still leaves the question open, given that liability is dependent on a manifest and serious breach of a higher norm which creates rights of the individual, as to the reasons for which the person with the right to compensation should be given satisfaction on the basis of the number of other persons with the same right which has been breached. [95]

95. In short, it does not seem possible to me to ignore the fact that liability for unlawful measures and compensation for lawful measures are two radically different creatures. It is certainly not without significance that the condition regarding the seriousness and the special nature of the damage was laid down in the French case-law only for damage arising out of lawful legislative measures.

Moreover, when in the judgment in *Alivar* it depicted State liability for infringements of Community law as *responsabilité sans faute*, seeing that the national measures were justified by the public interest, the Conseil d'État itself took the abnormal and special nature of

95 — See Advocate General Capotorti's Opinion in Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *HNL* v *Council and Commission* [1978] ECR 1226 et seq., especially at 1234 et seq.

the damage as established; [96] so much so that this has been referred to as *responsabilité sans faute* adjusted by the fact that it is not necessary for the damage to be abnormal and special. [97]

96. In the final analysis, I consider it to be only too obvious that conditions relating to the nature of the damage, which may, moreover, even result in the negation of the actual right to compensation, have no basis and no *raison d'être* where the damage complained of is connected, not with lawful activities, but with unlawful ones. [98] Naturally, this conclusion should also apply to cases of non-contractual liability on the part of the Community. [99]

(c) The causal link

97. The third condition for liability expressly mentioned in *Francovich* relates to the causal link — an obligatory requirement for liability in tort — according to which the damage complained of must be the direct consequence of the harmful event imputed to its perpetrator, hence, in this case, the unlawful legislative measure.

Obviously, it will be for the national court to establish whether this condition is fulfilled. For present purposes, however, I am minded to make a few observations with regard to a break in the chain of causation from two points of view. First, it is worth examining whether it is possible to consider that under Community law the causal chain may be broken by contributory causes or by negligent conduct on the part of the injured party; secondly, this matter raises, albeit under various guises, the question of the ancillary nature of a damages claim in relation to other national judicial remedies.

96 — Judgment of 23 March 1984 in *Alivar*, AJDA, 1984, p. 396, including a note by Genevois. This case was concerned with a claim for damages for failure to grant an export licence for potatoes introduced by a general administrative measure, which the Court of Justice subsequently held to be contrary to the prohibition of quantitative restrictions on exports set out in Article 34 of the Treaty. The Conseil d'État held that all that there could be in that case was *responsabilité sans faute*, upholding the judgment at first instance, which accepted the damages claim without even inquiring whether the damage was abnormal or special, but found that there was liability on account of an unlawful act (*pour faute*). See, in addition, the Opinion of Commissaire du Gouvernement Laroque in the judgment of the Conseil d'État of 28 February 1992 in *Arizona Tobacco Products*, cited in footnote 48, in which it is considered that infringements of Community — and international — provisions give rise to a third system of liability which, unlike *responsabilité sans faute*, does not require the damage to be exceptional in order for a right to compensation to arise.

97 — See on this subject Simon, 'Le Conseil d'État et les directives communautaires: du gallicanisme à l'orthodoxie?', in *Revue trimestrielle de droit européen*, 1992, p. 265 et seq.

98 — This conclusion is also borne out by the Council of Europe's recommendation of 18 September 1984, to which I have already referred. Principle II(1) of that recommendation expressly covers reparation of damage caused by lawful acts by stating that 'reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act'. For a different view, see Advocate General Léger's Opinion, cited earlier, of 20 June 1995 in Case C-5/94 *Lomas*, judgment of 23 May 1996, ECR I-2553.

99 — Indeed, it would appear from the judgment in *Mulder and Others*, cited in footnote 77, that the Court has already revised, albeit impliedly, its case-law on this point.

— Conduct of the injured party

98. In this connection, it should first be recalled that the Court itself has held that there is 'a general principle common to the legal systems of the Member States to the effect that the injured party must show reasonable diligence in limiting the extent of his loss or risk having to bear the damage himself'. [100]

Consequently, the injured party is under a duty to act diligently, a duty which consists in taking steps so as to avoid the damage or, at any rate, to reduce its scale. [101]

99. Moreover, this is the purport of the Council of Europe's aforementioned recommendation of 18 September 1984, Principle III of which reads as follows: *'If the victim has, by his own fault or by his failure to use legal remedies, contributed to the damage, the reparation of the damage may be reduced accordingly or disallowed'.*

It appears from the wording of that principle that a break in the chain of causation may depend on conduct exhibiting fault on the part of the injured party and that such conduct, in turn, might also consist in his not having made use of the legal remedies available to him.

— Remedies in damages and administrative remedies: independent or ancillary?

100. If the damage could be avoided by the injured party by means of domestic judicial remedies (for example, by contesting the prejudicial measure incompatible with Community law by invoking *vis-à-vis* the public authorities a right conferred by a provision having direct effect embodied in a directive), it is permissible to ask whether failure to have recourse to such remedies does not break the necessary chain of causation between the breach and the damage.

In other words, the question arises as to whether or not failure to use in time remedies challenging the contested measure precludes the possibility of claiming that the State 'in breach of its obligations' is liable. In this sense, apart from being a condition for liability, the prior initiation of substantive remedies could well — equally properly — constitute a requirement for the admissibility of the action for damages.

100 — Judgment in *Mulder and Others*, cited in footnote 77, paragraph 33.

101 — For an application of that principle in the case-law on Article 215, see, *inter alia*, the judgment in Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer* v *Commission* [1967] ECR 245, in particular at 265 et seq.; see also the judgment in Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, paragraph 14.

101. That problem is resolved in different ways in the various Member States, on the basis of three discernible different approaches. The first consists in making the various possible actions completely autonomous and hence in leaving it to the interested party to choose the one which he deems most appropriate in order to protect his interests. [102] The second makes an action for damages dependent on bringing an action for annulment. [103] The third is more closely connected with the causal link, in so far as it allows the administration not to answer for such damage as the person concerned could have avoided by employing substantive remedies, in particular an action for annulment. [104]

As we know, after initially taking the view that the action for damages was ancillary, [105] subsequently the Court's case-law on non-contractual liability firmly adopted the stance that such actions were autonomous and could be brought irrespective of the availability to the applicant of other judicial remedies. In particular, the Court has held that 'the action for damages under Article 178 and the second paragraph of Article 215 of the Treaty was established as an autonomous form of action with a particular purpose to fulfil within the system of actions and the exercise of it is subject to conditions imposed in view of the specific objective thereof'. [106]

102. Those dicta show, in particular, that the autonomous nature of the action for damages satisfies needs by way of guarantee, which needs are connected with the various requirements relating to *locus standi* for bringing an action for annulment as opposed to an action for damages. Under the system of protection provided for in the Treaties, individuals may not challenge acts of a general nature and it is very difficult for them to obtain a ruling that the Community institutions have failed to act. The fact that the action for damages has been held to be autonomous therefore enables that to be obtained by means of damages which is not obtainable or, in any event, has not been able to be obtained by means of an action for annulment.

That this is the *rationale* of holding that the action for damages is autonomous is borne out by the fact that it is not available in those few cases in which private persons can actu-

102 — This is, for example, the solution adopted in the French system.

103 — This is the solution in force, for example, in the Italian and British systems.

104 — This intermediary solution is employed in the German system under the third subparagraph of Paragraph 839 of the Civil Code.

105 — I refer to the judgment in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95.

106 — Judgment in Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle Erling and Others* v *Council and Commission* [1981] ECR 3211, paragraph 4. In the same judgment, the Court held that that action (for damages) is 'different from an action for annulment in that it does not seek the cancellation of a specified measure but compensation for damage caused by the institutions in the exercise of their functions; the conditions for actions for damages are laid down with that objective in mind and accordingly are different from those for an action for annulment'.

ally rely on administrative remedies, [107] in particular in the context of Community staff cases. [108]

In the final analysis, the fact that actions for non-contractual liability are autonomous favours private individuals, to whom substantive judicial remedies are normally not available, but not also persons who can effectively invoke such remedies.

103. Essentially, the criterion underlying the case-law laying down the rules on actions for non-contractual liability has remained consistent, apart from the formulas adopted from time to time with regard to domestic remedies (preliminary reference on validity in connection with a challenge to the domestic implementing measure) or direct challenges (action for annulment or for failure to act). The aim is to prevent actions for damages from being utilized in order to pursue the same result which could — effectively, of course — have been attained by means of a different action. Hence, an action for damages cannot be the means of neutralizing the effects of a harmful measure where that objective could also be achieved through a normal action for annulment, whether direct or national via a reference for preliminary ruling on validity to the Court. This is subject to the sole reservation that the (in particular, national) judicial remedy must in any case be capable of securing effective protection.

104. This means, as far as it is relevant to these proceedings, that the Member States cannot reasonably be debarred from making actions for damages dependent on a previous action for annulment having been brought, if and in so far as the aforementioned condition is also prescribed for similar domestic claims.

Moreover, the idea that the action for damages is ancillary in the case of loss or damage caused by infringements of Community law seems — at least at first sight — to have already received the Court's seal of approval. In *Wagner Miret*, the action for damages was portrayed as the individual's last resort, that is to say, the route to take when it is impossible otherwise to attain a worthwhile result, not even through the interpretation of the national provisions in question by the national court in conformity with the relevant Community provisions. [109]

107 — See the judgment in Case 175/84 *Krohn* v *Commission* [1986] ECR 753, in which the Court held that an application is inadmissible 'where an application for compensation is brought for the payment of an amount precisely equal to the duty which the applicant was required to pay under an individual decision, so that the application seeks in fact the withdrawal of that individual decision' (paragraph 33).

108 — See, for instance, the judgments in Case 346/87 *Bossi* v *Commission* [1989] ECR 303 and in Case T-27/90 *Latham* v *Commission* [1991] ECR II-35.

109 — Judgment cited in footnote 37, paragraph 23.

4. The other conditions

105. As for the *other conditions* relating to compensation for damage, it should first be recalled that, in *Francovich*, after identifying and defining the conditions 'sufficient to give rise to a right on the part of individuals to obtain reparation', the Court went on to state that 'subject to that reservation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the damage caused' (paragraph 42).

The interpolation 'subject to that reservation' manifestly means that, in relation to the rules on the reparation which is due under Community law itself and arises on the conditions laid down by Community law, the relevant rules of national law *are applicable* only in so far as they are necessary in order to govern the *other conditions* relating to the reparation. It is therefore the detailed rules for effectuating the individual's right to reparation which are governed by national law, in particular the procedural conditions. [110]

106. As regards those conditions, the Court also held in *Francovich* that 'In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law' (paragraph 42).

In truth, this is no new formula in the Court's case-law, having in fact usually been associated with the Member States' autonomy in procedural matters, an autonomy which, even in that sector, is not however without limits.

107. In that connection, the Court in *Francovich* emphasized a principle which it had already repeatedly expressed in general terms, [111] namely that 'the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States concerning reparation of damage 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' (paragraph 43).

110 — Thus, for example, in Italy an *ad hoc* measure was adopted by Legislative Decree No 80 of 27 January 1992 (GURI, 13 February 1992, p. 246) in order to give effect to the *Francovich* judgment; that measure lays down the rules and the limits as regards reparation for failure to implement the directive on insolvency of employers. The rules provide in particular that the action for damages should be brought against the INPS (Istituto Nazionale di Previdenza Sociale), that the magistrate acting as an employment court is to have jurisdiction and that the limitation period for bringing the action is one year.

111 — See in particular the judgment in Case 33/76 *Rewe* v *Landwirtschaftskammer Saarland* [1976] ECR 1989 and, most recently, that in Case C-410/92 *Johnson* [1994] ECR I-5483, paragraph 21.

Consequently, also with regard to reparation of damage, Community law confines the Member States' freedom to laying down procedural and substantive rules on the *other conditions* relating thereto; here again, this is dependent on the requirement to secure individuals real, effective protection. [112]

At least two consequences flow from that principle: first, judicial protection, in the case of rights claimed by individuals under Community law, must in any event attain a degree of adequacy; secondly, checking that that level has been attained is a matter for the Court. [113] Whilst it is true, therefore, that it is for the Member States to ensure that Community law is implemented properly, also from the point of view of protection in damages, the Court thereby reserves the right to check the level of adequacy of the protection afforded by the national judicial systems.

108. More specifically, the limit to *national treatment*, in the sense that judicial protection must at least be equal to that available for similar legal positions created by national provisions, may at times turn out to be completely worthless. It is sufficient to mention the very cases under consideration in these proceedings, in which national law lays down *no* relevant provision, since the remedy sought is not available in the national legal systems in question. What is doubtless more relevant and determinative, on account of its potential, is the limit consisting in the fact that the national legal system must not be such as to make it *virtually impossible* to exercise the rights which the national courts are bound to protect by virtue of Community law.

109. Lastly, and still with regard to the other conditions of the rules on reparation, there was a discussion in these proceedings in particular of the types of damage or loss for which compensation could be granted and of the quantum of damages. In this connection, given that those questions should in princi-

112 — On this point, see, for example, to cite just one of the authorities, Barav, 'Sanction de la non-transposition de la directive CEE relative à l'insolvabilité de l'employeur', in *La Semaine Juridique*, 1992, Nos 2-3, p. 12; see also Kovar, 'Voies de droits ouvertes aux individus devant les instances nationales en cas de violation de normes et décisions du droit communautaire', in *Les recours des individus devant les instances nationales en cas de violation du droit européen*, Brussels, 1978, p. 245 et seq.

113 — This emerges, for example, from the judgment in Case 199/82 *Amministrazione delle Finanze* v *San Giorgio* [1983] ECR 3595, paragraph 14, where the Court held that 'any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law'. In addition, the adequacy of judicial protection has been linked with providing a statement of reasons on which administrative measures are based, in the sense that the individual must be enabled to decide whether or not to initiate judicial proceedings to protect his rights; hence the need that the choice should be made in full knowledge of the facts (judgment in Case 222/86 *UNECTEF* v *Heylens* [1987] ECR 4097, paragraph 15). There is also the judgment in *Dekker*, in which the Court stated that, where the sanction chosen by the Member State for infringement of the principle of equal treatment laid down by a directive is contained within the rules governing an employer's civil liability, any breach of the prohibition of discrimination determines the employer's overall liability, 'without there being any possibility of invoking the grounds of exemption provided by national law' (Case C-177/88 *Dekker* [1990] ECR I-3941, paragraph 25). Then again, there is the judgment in *Emmott*, in which the Court held that time-limits for bringing proceedings laid down by the national system do not start to run until such time as the directive conferring the rights in question has been properly transposed (Case C-208/90 *Emmott* v *Minister for Social Welfare and Attorney General* [1991] ECR I-4269, paragraph 24). However, *Emmott* has been attenuated, from the point of view of relevance to these proceedings, by the judgment in *Johnson*, cited in footnote 111.

ple be left to the law of the Member States, I shall confine myself to some brief observations.

First, it is all too obvious that reparation of damage may not be merely symbolic, but must correspond to the damage suffered. This requirement, which is linked to the very *raison d'être* of the action for damages, consists precisely in ensuring that the financial situation of the injured party is restored. Moreover, the relevant national case-law, the Community case-law on Article 215 [114] and the case-law on international relations [115] support this view.

110. Useful indications in this connection may also be found in a number of judgments in which the Court has checked the level of adequacy of the protection afforded by the national legal systems in relation to rights claimed by individuals under Community law. Thus, for example, with regard to the freedom allowed to Member States as respects sanctions for infringements of the prohibition of sex discrimination, the Court stressed that the sanctions in question have to be 'such as to guarantee real and effective judicial protection. ... It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained'. [116]

Further, in *Marshall II*, the Court held that, where a Member State elects to impose a sanction for discrimination in the form of compensation, 'such compensation must be full and may not be limited a priori in terms of its amount'. [117]

111. Next, it is scarcely necessary to add that identifying the types of damage for which compensation may be granted is certainly not likely to involve major difficulties, not even from the point of view of the uniformity of the compensation payable in different Member States for given damage. Despite variations in terminology, all the national systems hold that compensation may be granted in respect of financial damage suffered by the injured party, which damage certainly covers consequential damage and loss of profits and earnings, together with interest thereon. As far, more specifically, as the actual quantification of the damage is concerned, it is only too obvious that this is bound to depend on the different economic and social situations peculiar to each Member State and that it will be up to

114 — See the judgment in *Mulder and Others*, cited in footnote 77, in which the Court expressly held that 'the amount of compensation payable by the Community should correspond to the damage which it caused' (paragraph 34).

115 — In this connection, it is worth calling to mind judgment No 17 of the Permanent Court of International Justice of 13 September 1928 also in the *Case concerning the Factory at Chorzów*, in which it was held that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed' (CPGI, Series A, p. 47).

116 — Judgment in *Von Colson and Kamann*, cited in footnote 36, paragraph 23.

117 — Judgment in Case C-271/91 *Marshall v Southampton and South West Hampshire Area Health Authority (Marshall II)* [1993] ECR I-4367, paragraph 34.

each State to deal with this in accordance with the criteria laid down in this regard in its own national law.

In the final analysis, what is important for Community law is that compensation must be real and effective and hence that the situation which would have obtained if the infringement had not taken place should be restored, at least in terms of its financial content.

5. The time from which the obligation to make reparation starts to run

112. As I have already said, the obligation on Member States to pay compensation cannot be made dependent upon the existence of a judgment of the Court finding that there has been a failure to fulfil the relevant obligation. Consequently, such a judgment, even if one has been given, has no major importance for the purposes of determining the time as from which the State is bound to make reparation for the damage caused by an infringement attributable to it.

Moreover, the conditions suggested in regard to the characteristics of a 'manifest and serious' breach make it clear that, if the provision infringed confers identifiable, precise rights on individuals, the obligation in damages on the Member State in breach is bound to arise at the time when the harmful event occurred. The same solution must be adopted where the provision infringed had already been clarified by the case-law at the time when the harmful event occurred. In other cases, where a doubtful legal situation is involved, it will not be until after the national court and/or the Community Court has clarified the matter that the State 'in breach' can be obliged to make reparation for the damage, naturally in so far as it does not repair the breach reasonably quickly and only in respect of damage arising after the courts have clarified the situation.

113. Lastly, these proposed solutions lead to the conclusion that there is no reason for limiting the right to reparation to injured parties who have already brought a judicial action or lodged an equivalent claim with the national courts.

I consider that the imperative reasons of legal certainty referred to by the German Government are already sufficiently protected by the fact that the right to compensation may be made subject to the condition — if it is already laid down for similar domestic claims — that the injured party should have taken every step available to him in order to avoid the damage or at least reduce its scale. Apart from this, only the limitation and prescription periods laid down by national law, as in the case of actions for damages based on national law, may determine the time within which indi-

viduals may rely on the right to reparation for the damage sustained.

III — *Replies to the national courts' questions*

114. Before making more specific observations on the cases presently before the Court, I think it is worth recalling the conclusions which I have reached so far:

— in order to secure real, effective protection of rights claimed by individuals under Community law, that law requires that reparation be guaranteed to individuals for the loss or damage sustained by them as a result of infringements of Community law attributable to the State;

— it is completely irrelevant that the infringement in question is attributable to the legislature, as a result of which the restrictive conditions imposed by the national legal system for cases of unlawful action or inaction on the part of the legislature are not applicable;

— in order for the right to reparation to arise it is sufficient that the provision assumedly infringed is precise in all respects and unambiguous, which will be the case, for example, where a Member State fails to fulfil a precise obligation to achieve a result or where it fails to take account of established case-law;

— the criteria relating to the quantification of the damage continue to be governed by national law, provided that they are not less favourable than those applying to similar domestic claims and are not such as to make it excessively difficult or virtually impossible to obtain full compensation for the loss or damage arising as a result of the infringement in question;

— the obligation to make reparation arises at the time when the event which gave rise to the damage occurred in the case of a manifest and serious breach as defined above; otherwise it will not arise until there has been a determination by the national court or the Community Court, in the latter case by means of a preliminary ruling or a judgment given pursuant to Article 169.

(a) Case C-46/93 (Brasserie du Pêcheur)

115. What is at issue here is an infringement of a Treaty provision having direct effect,

namely Article 30, which is attributable to the legislature in so far as it failed to amend the BiStG to accord with that provision. The appellant in the main proceedings is seeking compensation for damage sustained by it between 1981 and 1987, that is to say, from the time at which it was no longer able to export beer of its manufacture to Germany because, it alleges, that beer did not satisfy the requirements of the BiStG, until the date of the judgment in which the Court held, by judgment pursuant to Article 169, that that law was incompatible with Article 30.

Having regard to my observations so far, it is only too clear that, in order to decide the case pending before it, the national court has to establish whether the obligation conferred on the States by Article 30 — whose content, as I have already mentioned, can certainly not be regarded as precise and determinable in every respect — had already been clarified by the relevant case-law at the time when the damage occurred with respect to facts such as those of the case pending before it. In other words, it has to be ascertained whether it was clear already in late 1981 that a law such as the BiStG embodied an unjustified obstacle to activities of traders in the sector and was hence incompatible with Community law.

116. To that end, it should first be recalled that, ever since the well-known 'Cassis de Dijon' judgment, [118] hence since February 1979, it has been clear that Article 30 prohibits, not only discriminatory measures, but also measures which are applicable without distinction and unjustified by imperative requirements. On top of this, by judgment of 9 September 1981, [119] which therefore was delivered more or less at the same time as the appellant in the main proceedings was obliged to stop exporting beer to Germany, the Court found that national legislation restricting the designation 'vinegar' to wine vinegar was incompatible with Community law. Certainly, there is no ground for considering that a different view had to be taken with regard to the BiStG in so far as it restricted the description 'beer' to beer produced using the ingredients mandatorily prescribed by that law.

However, it also transpires from the order for reference that the beer produced by the appellant contained additives, whereas the German law in question laid down an absolute prohibition on marketing beer containing additives in Germany. Whilst it is true that by the judgment of 12 March 1987 in *Commission* v *Germany* the Court held that the legislation in question was unlawful also from that point of view in so far as it was not justified by the requirement of protecting human health, it is also true that that conclusion could not be regarded as automatic, having regard to the relevant case-

118 — Judgment of 20 February 1979 in Case 120/78 *Rewe-Zentral* v *Bundesmonopol für Branntwein* [1979] ECR 649.

119 — Case 193/80 *Commission* v *Italy* [1981] ECR 3019, paragraphs 24 to 28.

law. [120] If the damage complained of by the appellant is connected rather with this second aspect of the national legislation in question, a different solution cannot therefore be ruled out.

117. One final observation. I have already mentioned that a Member State is entitled — for the purposes of the right to reparation and provided that it lays down the same conditions for similar domestic claims — to require the injured party to show diligence and hence to set in train such mechanisms as may obviate or at least reduce the damage.

It appears from the documents in the case that it does not seem that the appellant has taken any such steps. Admittedly, as the appellant showed in these proceedings, it stopped exporting because of failure to renew the distribution contract with its (German) sole importer, which meant that it was substantively impossible for it to challenge any measure. Consequently, it is manifestly for the national court to ascertain whether the appellant was actually precluded from being able in any way to rely on Article 30 directly before the national courts.

(b) Case C-48/93 (Factortame III)

118. In contrast, in the *Factortame* case the national court has to ascertain whether the infringement which has been found of Articles 7, 52 and 221 of the Treaty and is attributable to the legislature for having passed a national law incompatible with those articles, may be regarded as a manifest and serious breach in the sense defined above.

In other words, it is a question of establishing whether the infringement of provisions conferring clear, precise rights on individuals, such as the right not to be discriminated against on grounds of nationality, is such, despite the discretion available to the Member States in adopting measures relating to the common fisheries policy, as to cause the State to incur liability. In this respect, I consider that a few observations will suffice.

120 — For example, in the judgment of 6 May 1986 in Case 304/84 *Ministère Public* v *Muller* [1986] ECR 1511, the Court held that it was for the Member States to 'consider, in the context of factual assessments which they must undertake in that regard, whether the marketing of foodstuffs containing additives may present a risk to public health and whether there is a real need for the additives in the particular foodstuffs. In applying those criteria they must take account of the results of international scientific research and in particular of the work of the Community's Scientific Committee for Food viewed *in the light of the eating habits prevailing in the importing Member State*' (paragraph 24, my emphasis). In that judgment, which was delivered a good five years after the harmful event complained of by the appellant in the main proceedings, the Court therefore held that Articles 30 and 36 did not preclude national legislation prohibiting the marketing of foodstuffs imported from other Member States, in which they were lawfully sold, which contained particular additives.

119. Whilst it is true, as the United Kingdom has shown, that the Member States have a certain margin of discretion in adopting measures relating to the common fisheries policy, it is also true that that discretion is normally exercised under the constant supervision of the Commission, to which the Member States are obliged to communicate measures adopted by them. In this case, as transpires from the documents in the case, the Commission informed the United Kingdom in good time that the nationality, residence and domicile conditions laid down by the Merchant Shipping Act 1988 for the registration of fishing vessels in the new shipping register had to be regarded as incompatible with Community law.

What is more, the Court's case-law on the right of establishment is consistent in holding that national measures involving discrimination on grounds of nationality are incompatible with national law; likewise, the Court has held incompatible with Community law the very residence condition imposed on fishing vessels' crews. [121] Lastly, in so far as the legislation in question related to the registration of fishing vessels, its purpose was not to lay down detailed rules on the exploitation of the national fishing quotas and hence could not even be regarded as being justified on that ground.

120. In the final analysis, I do not consider that there can be any doubts as to the manifest and serious nature of the breach in question and hence as to the right to compensation of individuals who suffered damage as a result of it.

Finally, I would observe that, as the Court is well aware, the applicants in the main proceedings have done everything possible in order to avert the damage which eventually occurred. They took steps to that end even before the national provisions subsequently declared incompatible with Community law entered into force, by seeking and obtaining an interlocutory injunction suspending the application of the provisions at issue, the injunction which was set aside by the Court of Appeal and subsequently confirmed by the House of Lords following this Court's judgment of 19 June 1990 in *Factortame I*.

121. As far as the national court's second question is concerned, it is scarcely necessary to recall in the light of my earlier observations that the determination of the types of loss or damage for which damages may be awarded and the quantification of the damages continue to be governed by national law, but must, in any event, be such as to make full reparation for the loss or damage suffered by the injured parties.

121 — Judgment in Case C-3/87 *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Agegate* [1989] ECR I-4459, paragraphs 22 to 26. Whilst, admittedly, that judgment was delivered after the Merchant Shipping Act entered into force, equally it antedated the judgment in *Factortame II*, following which the House of Lords upheld the interim measures requested by the applicants. Moreover, in that case what was involved was a condition imposed so that fishing vessels could count their catches against the national fishing quotas, whereas in the instant case that which is at issue is a measure simply preventing the registration of fishing boats and hence the actual exercise of freedom of establishment.

However, the applicants also claim exemplary damages, as provided for by national law for unconstitutional conduct on the part of the administrative authorities, and this warrants separate consideration. Suffice it to observe in this connection that, in accordance with the principle that the conditions imposed by national rules in order to protect legal situations created by Community law may not be less favourable than those applying to similar domestic claims, a Member State is bound to grant that type of damages to the individuals concerned where the preconditions laid down by the relevant national rules are satisfied; this is so, therefore, even where the head of damages in question is completely unknown to the legal systems of the other Member States.

Conclusion

122. In the light of the foregoing considerations, I therefore propose that the Court should reply as follows to the questions raised in the respective cases by the Bundesgerichtshof and the High Court of Justice, Queen's Bench Division, Divisional Court:

(a) In Case C-46/93 (*Brasserie du Pêcheur*):

'1. A Member State is bound to make reparation for the loss or damage occasioned to individuals as a result of infringements of Community law attributable to that State, even where the infringement consists in the fact that the legislature omitted to amend a national law so as to bring it into conformity with Community law, provided that the obligation imposed on the State from which the individual's right is derived is precise in every respect or has been clearly specified by the relevant case-law.

2. A Member State is not entitled to make the right to reparation for infringements of Community law subject to the same restrictions laid down for infringements of national constitutional provisions by the legislature where those restrictions have the effect of making the right to reparation virtually impossible.

3. The obligation on the part of the State to make reparation may not be made to depend on finding a subjective component (fault or intention) accompanying the infringement of the provision, if the breach was manifest and serious in the sense explained above.

4. (a) It is for the national legal system to determine the types of injury for which reparation may be awarded and the criteria for quantifying the loss or damage, provided that the requirements laid down to that end are not less favourable than those applying to similar domestic claims and are not such as to make it excessively difficult or virtually impossible for the individual to obtain full reparation for the loss or damage suffered; this would be the case where national law limited the scope of the obligation to legal interests, such as property, yet excluded any possibility of obtaining reparation for lost profits.

(b) The obligation on the Member State to make reparation for loss or damage occasioned to individuals arises at the time when the event which caused the damage occurred if the provision infringed is clear in the sense specified above or, where the legal situation is doubtful, at the time when it was clarified by Community case-law, either by a preliminary ruling or by a judgment pursuant to Article 169.'

(b) Case C-48/93 (*Factortame III*):

'1. A Member State is bound to make reparation for the loss or damage occasioned to individuals as a result of infringements of Community law attributable to that State, even where the infringement consists in the fact that the legislature passed a national law incompatible with Community law, provided that the obligation imposed on the State from which the individual's right is derived is, as in the case at issue, precise in every respect or has been clearly specified by the relevant case-law.

2. It is for the national legal system to determine the types of injury for which reparation may be awarded and the criteria for quantifying the loss or damage, provided that the requirements laid down to that end are not less favourable than those applying to similar domestic claims and are not such as to make it excessively difficult or virtually impossible for the individual to obtain full reparation for the loss or damage suffered. Where the national legal system also provides for the award of exemplary damages, the relevant rules must therefore be applied, without any discrimination, even where rights asserted by individuals under Community law were infringed.'