REPORT FOR THE HEARING
in joined Cases C-46/93 and C-48/93 *

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* Languages of the cases: English and German.

I. Background to the disputes

A. *Case C-46/93*

1. *Facts and procedure*

1. Brasserie du Pêcheur SA, the appellant in the main proceedings in Case C-46/93, is a French brewery based at Schiltigheim (Alsace). Until 1981, it exported beer to the Federal Republic of Germany. At the end of 1981 it was forced to discontinue those exports, since the German authorities objected that the beer it produced did not comply with the German Reinheitsgebot (purity requirement) (Biersteuergesetz — Law on Beer Duty —, codification of 14 March 1952, BGBl. I, p. 149, in the version dated 14 December 1976, BGBl. I, p. 3341, p. 3357, hereinafter 'the BStG'), in particular Paragraphs 9 and 10 thereof.

2. The Commission, regarding the aforesaid paragraphs of the BStG as contrary to Article 30 of the EEC Treaty, brought an action against the Federal Republic of Germany for failure to comply with its obligations under the Treaty, with regard both to the prohibition against the marketing, under the designation of 'Bier' (beer), of beers lawfully manufactured in other Member States according to different rules and to the prohibition against the importation of beers containing additives.

3. In the judgment in Case 178/84 *Commission* v *Germany* [1987] ECR 1227, the Court held that the prohibition against the marketing of beers imported from other Member States which did not comply with Paragraphs 9 and 10 of the BStG was incompatible with Article 30.

4. Brasserie du Pêcheur consequently 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, representing a fraction of the loss actually suffered. That action was dismissed by the lower courts. Brasserie du Pêcheur is pursuing the same claims in its appeal before the Bundesgerichtshof (Federal Court of Justice).

2. *National law*

5. The first sentence of Paragraph 839(1) of the Bürgerliches Gesetzbuch (German Civil Code, hereinafter 'the BGB') provides:

'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.'

Article 34 of the Grundgesetz (Basic Law, hereinafter 'the GG') provides:

'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. Where such infringement is wilful or results from gross negligence, a right of recourse is reserved against the person committing the same. A right of appeal to the ordinary courts shall not be excluded for the purposes of proceedings for compensation or an action by way of recourse.'

In the Federal Republic of Germany, State liability may be incurred under the combined provisions of the BGB and the GG mentioned above. In the present case, however, the legislature, in enacting the BStG, merely took upon itself tasks which concern the public at large, and which do not relate to any particular person or class of persons who might be regarded as 'third parties' within the meaning of those provisions.

6. Furthermore, State liability may also be incurred by reason of unlawful interference, akin to expropriation, on the part of the public authority. This involves a principle developed by the case-law of the Bundesgerichtshof (BGHZ 90, p. 17, p. 29 et seq.). According to that case-law, however, that principle is not such as to enable an order to be made for the payment of compensation for loss resulting from a statute which is contrary to the constitution (BGHZ 100, p. 136, pp. 145 and 146).

7. Consequently, the national court does not consider that German law affords any basis for the payment of compensation for the loss suffered by the claimant.

3. *Questions referred for a preliminary ruling*

8. The Bundesgerichtshof, doubtful as to the interpretation of the principle of State liability for damage caused to individuals by infringements of Community law attributable to the State, as derived from the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357 (hereinafter 'the *Francovich* judgment'), decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'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 Biersteuergesetz 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*

1. *Facts and procedure*

9. On 16 December 1988 a number of individuals and companies incorporated under the laws of the United Kingdom, together with the directors and shareholders of those companies, brought an action before the High Court of Justice, Queen's Bench Division, Divisional Court (hereinafter 'the Divisional Court'), in which they challenged the compatibility of Part II of the Merchant Shipping Act 1988 with Articles 7, 52, 58 and 221 of the EEC Treaty. The new system of registration of British fishing vessels imposed certain conditions relating to the nationality, residence and domicile of the owners of the vessels. Fishing boats ineligible for registration in the new register were deprived of the right to fish. The new system entered into force on 1 December 1988, but registration in the new register was not required until, at the latest, the end of a transitional period expiring on 31 March 1989.

10. By order of 10 March 1989, the Divisional Court suspended the application of the new registration system and stayed the proceedings pending a preliminary ruling by the Court of Justice on the questions of Community law raised by the claimants. In the judgment in Case C-221/89 *Factortame II* [1991] ECR I-3905, the Court of Justice 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 the owners of fishing vessels such as those laid down by the new registration system in the United Kingdom.

11. The grant of an interlocutory injunction by the Divisional Court was set aside by the Court of Appeal. Following the claimants' appeal to the House of Lords, that court referred to the Court of Justice, by judgment of 18 May 1989, for a preliminary ruling two questions concerning the extent of the jurisdiction of a national court to grant interim relief where rights conferred by Community law are in issue. In the judgment in Case C-213/89 *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.

12. In the meantime, the Commission brought an action on 4 August 1989 against the United Kingdom under Article 169 of the EEC Treaty in relation to the conditions imposed by the new system of registration in the United Kingdom as to the nationality of the owners of fishing vessels, on the ground that those conditions were contrary to Articles 7, 52 and 221 of the EEC Treaty. By separate document, the Commission also applied, pursuant to Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure of the Court of Justice, for interim measures requiring the United Kingdom to suspend the application of the nationality requirements at issue in relation to nationals of other Member States and in respect of fishing vessels which until 31 March 1989 were pursuing a fishing activity under the British flag. By order of 10 October 1989 in Case 246/89 R *Commission* v *United Kingdom* [1989] ECR 3125, the President of the Court granted that application. Pursuant to that order, the new registration system was amended by regulation with effect from 2 November 1989. By judgment of 4 October 1991 in Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, 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 the obligations incumbent upon it under Articles 7, 52 and 221 of the EEC Treaty.

13. Meanwhile, on 2 October 1991, the Divisional Court made an order giving effect to the judgment of the Court of Justice in *Factortame II*, in respect of the registration of the fishing vessels of 79 of the claimants. At the same time, it directed the claimants to give detailed particulars of their claims for damages against the Secretary of State for Transport. 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. By that order of 18 November 1992, it also gave Rawlings (Trawling) Limited, the 37th claimant in Case C-48/93 (hereinafter 'Rawlings'), leave to amend its claim for compensation to include a claim for exemplary damages for unconstitutional behaviour by the public authorities.

14. The compensation sought by the claimants is based on various heads of damage including, in particular, expenses and losses incurred from the entry into force of the new legislation on 1 April 1989 until its repeal on 2 November.

2. *National law*

15. There is no legislation in the United Kingdom by virtue of which the State may incur liability. However, the possibility of such liability has been developed by case-law.

16. First, the State may incur liability for misfeasance in public office. However, in *Bourgoin* v *Minister of Agriculture, Fisheries and Food* [1986] Q. B. 716, 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 by the Court of Justice to be contrary to Community law, unless the Minister were shown to have acted in the knowledge that the act in question was invalid and with the intention or knowledge that it would injure the claimants. More recently, in *Kirklees Metropolitan Borough Council* v *Wickes Building Supplies Limited* [1992] 3 WLR 170, 188, C to D, the House of Lords stated *obiter* that:

'... since the decision of the European Court of Justice in *Francovich* v *Republic of Italy* ... there must now be doubt whether the *Bourgoin* case was correctly decided'.

17. An action for damages is unlikely to lie for purely financial loss occasioned by the negligent exercise of administrative, let alone legislative, powers, though that possibility has been left open by the courts: see in particular *Rowling* v *Takaro Properties Ltd* [1988] AC 473. An action for such compensation is conditional on the existence of a duty of care on the part of the public authorities. The concept and scope of that duty of care are presently being developed in the case-law of the courts of the United Kingdom (*Lonhro* v *Tebbit* [1992] 4 All ER 280).

18. The national court considers that if English law as expressed in the *Bourgoin* decision were to be applied in the present case, the complainants would have no remedy in damages.

3. *Questions referred for a preliminary ruling*

19. The national court, doubtful as to the interpretation of the principle of State liability for damage caused to individuals by infringements of Community law attributable to the State, as derived from the *Francovich* judgment, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'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 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?'

II. Procedure before the Court of Justice

20. The orders for reference were received at the Court Registry on 17 February 1993 in Case C-46/93 and on 18 February 1993 in Case C-48/93.

21. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on behalf of:

— Brasserie du Pêcheur SA, by H. Büttner, Rechtsanwalt, Karlsruhe,

— complainants 1 to 36 and 38 to 84 in Case C-48/93, by D. Vaughan QC, G. Barling QC and D. Anderson, Barrister, instructed by S. Swabey, Solicitor,

— complainants 85 to 97 in Case C-48/93, by N. Green, Barrister, instructed by N. Horton, Solicitor,

— the 37th complainant in Case C-48/93, by N. Forwood QC and P. Duffy, Barrister, instructed by Holman Fenwick & Willan, Solicitors,

— the Government of the Federal Republic of Germany, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent, and J. Sedemund, Rechtsanwalt, Cologne,

— the United Kingdom, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, and by S. Richards, C. Vajda and R. Thompson, Barristers,

— the Danish Government, by J. Mølde, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Spanish Government, by A. J. Navarro González, Director-General for Community Legal and Institutional Affairs, and R. Silva de Lapuerta and G. Calvo Díaz, Abogados del Estado, of the State Legal Service, acting as Agents,

— the French Government, by J.-P. Puissochet, Director of Legal Affairs in the Ministry of Foreign Affairs, and C. de Salins, Deputy Director of the Foreign Affairs Directorate in that Ministry, acting as Agents,

— Ireland, by M. A. Buckley, Chief State Solicitor, acting as Agent,

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by C. Timmermans, Assistant Director-General of its Legal Service, J. Pipkorn, Legal Adviser, and C. Docksey, of its Legal Service, acting as Agents.

22. By order of 22 March 1993, the President of the Court decided that the two cases should be joined for the purposes of the written procedure, the oral procedure and the judgment.

23. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

III. Written observations submitted to the Court

A. *Summary of the arguments and proposed answers*

24. *Brasserie du Pêcheur* considers that no distinction is to be made according to the nature of the State institution to which the infringement is attributable and that, consequently, the activities of the legislature may give rise to compensation. The conditions governing the right to reparation may be those laid down by national law in the case of an infringement of a national provision, subject to the proviso that any rule of national law which imposes conditions which are more restrictive as regards claims based on Community law, or which make it impossible or excessively difficult to obtain reparation, must be disapplied (*Francovich*, paragraphs 42 and 43). It follows that a rule having the effect of wholly excluding the legislature's obligation to pay compensation must be incompatible with Community law. The obligation to pay compensation may be dependent on the existence of fault, but the burden of proving fault cannot be imposed on the victim and, in any event, in Case C-46/93, the mere fact of the application of legislation incompatible with Community law objectively constitutes fault. Compensation for the damage must extend, at the very least, to the fundamental loss caused by the breach of Community law, which, in Case C-46/93, lies essentially, if not exclusively, in loss of profit. The appellant's rights derive from the breach of a provision having direct effect, and thus arose at the time when the breach was committed.

25. *Brasserie du Pêcheur* submits that the answers to the questions referred in Case C-46/93 should be as follows:

'1. Community law obliges Member States to make good the damage caused to individuals by breaches of Community law attributable to those States, including breaches caused by a national parliamentary statute which is inconsistent with the rules of Community law.

2. The legislature may decide that the claim for compensation should be subject to the same restrictions as result from a national law when there is a breach of a higher-ranking rule of national law, but only to the extent that such a restriction does not have the effect of making it impossible or extremely difficult to exercise the right to reparation of damage caused by a breach of Community law. It is the task of the national courts to disapply a rule of national law which would have the consequence that the right to reparation could not be asserted or could only be asserted with great difficulty.

3. Even if Community law does not preclude the conditions for an obligation to provide compensation being defined by national law and in particular being dependent on proof of fault, that condition must be regarded as fulfilled if the breach of Community law has been found by a judgment of the Court of Justice of the European Communities. Accordingly, the victim of such a breach of Community law cannot be required to provide proof of the exact nature of the fault for that breach.

4. (a) The obligation to protect rights which claimants derive from a breach of Article 30 of the Treaty means that the compensation for the damage resulting from that breach relates to all material elements of the damage, including loss of profit.

(b) The obligation to pay compensation covers the damage suffered from the date when the liability to pay compensation arose, that is, from the time when the Member State breached its obligations under Community law, regardless of when such a breach of Community law was found by the Court of Justice.'

26. The *claimants in Case C-48/93 other than Rawlings (hereinafter 'Factortame and others')* [1] consider that non-compliance with a substantive provision of Community law (Articles 30 and 52 of the EEC Treaty) is more serious, and more deserving of compensation, than a breach of a procedural obligation (the case of *Francovich* involved Article 189 of the EEC Treaty). In their view, there is no reason why damages should not be awarded for the act of a national legislature. The criteria for compensation established by the case-law relating to the liability of the Community under Article 215 of the Treaty, and in particular the requirement, in relation to legislative measures involving choices of economic policy, that a sufficiently flagrant breach be proven, are irrelevant in the present context, since the United Kingdom adopted legislation aimed at an identifiable group of Community nationals and there was no question of any choice of economic policy. More particularly, the liability of a State should not be dependent on its knowledge of the unlawfulness of the act; the breach of a provision of the Treaty must be enough to found such liability. In any event, the Merchant Shipping Act 1988 satisfies the applicable criteria regarding liability on the part of the Community legislature. Factortame and others further state that, as regards their particular situation, the fact that they were granted interim relief is no bar to their being awarded damages, since those two forms of relief are not alternatives. That con-

1 — Those applicants include all those companies and individuals, as well as persons claiming to be shareholders or directors of such companies, to whom leave was granted by the Divisional Court to bring proceedings and claim damages, apart from Rawlings. Rawlings, the 37th applicant, to whom leave was granted to include a claim for exemplary damages, was separately represented in the main proceedings and submitted separate observations to the Court.

clusion is inevitable, particularly since the interim relief was granted over a year after the vessels were excluded from the register. In any event, some applicants were not the beneficiaries of the interim measures. Factortame and others assert that the Court should lay down certain guidelines as to the specific heads of claim for compensation, in the light of the principle laid down in the *Francovich* judgment that the applicable national rules must be no less favourable than those relating to similar claims under national law and must not be such as to render the recovery of damages impossible or excessively difficult (paragraph 43 of the *Francovich* judgment).

27. *Factortame and others* submit that the answers to the questions referred in Case C-48/93 should be as follows:

'Question 1: Yes

Question 2: The claims for damages and interest as specified in Question 2, in particular paragraphs (a) to (f), are all recoverable as a matter of Community law.'

28. *Rawlings* considers that the ultimate test of a right is whether effective measures exist for its protection and enforcement — *Ubi jus, ibi remedium* —; a right without an effective remedy is in reality no right at all. In its view, the Court is bound to confirm that any infringement by a Member State of a directly applicable provision of Community law gives rise to a right to compensation. The criteria established by the Court's case-law in the context of Articles 178 and 215 of the EEC Treaty are inapplicable in the present case, but, in any event, the conditions of liability laid down by that case-law, together with any other condition which may be deemed appropriate, are nonetheless fulfilled by reason of the manifest and grave nature of the facts on which Rawlings' claim is based. As regards the specific heads of claim, the principles laid down in paragraphs 42 and 43 of the *Francovich* judgment should be complied with. As regards, more particularly, its claim for exemplary damages, Rawlings considers that to deny the possibility of exemplary damages for breaches of Community law while retaining it for certain breaches of English law would go contrary to the requirement that rights under Community law must not be treated less favourably than similar claims under national law.

29. *Rawlings* submits that the questions referred in Case C-48/93 should be answered as follows:

'1. When legislation of a Member State, in breach of Articles 5, 7, 52 and 221 of the

EEC Treaty, lays down in relation to the owners and managers of fishing vessels and the shareholders and directors in vessel-owning and managing companies conditions which unlawfully discriminate, directly or indirectly, between citizens of Member States according to their nationality, the Member State concerned is in principle liable to provide effective compensation for losses suffered as a result of the unlawful discrimination.

2. In the absence of any applicable Community legislation, the competent national courts must adjudicate upon claims for such compensation in accordance with the foregoing principle, but otherwise according to substantive and procedural conditions laid down by the national law for similar claims under the internal legal order of the State. Such conditions may not, however, be so framed as to make it virtually impossible, or excessively difficult, to obtain effective compensation for losses which have actually been sustained as a result of the unlawful measures.

3. Where the law of a Member State provides for the possibility of an additional award of damages in respect of oppressive, arbitrary or unconstitutional conduct by public authorities, national courts must ensure similar protection where the conduct in question is contrary to a fundamental principle of Community law. For this purpose,

(i) the rule prohibiting discrimination on grounds of nationality, as expressed *inter alia* in Articles 7, 52 and 221 of the EEC Treaty, constitutes one of the fundamental principles upon which the Community is based and which is designed for the protection of the individual. Disregard of that essential principle should always be regarded as seriously as similar fundamental provisions in a national constitution or its equivalent;

and

(ii) failure by a Member State to take prompt and effective steps to implement an order of the Court of Justice is a serious infringement of the fundamental principle of respect for the rule of law which is one of the essential foundations of the Community.'

30. The *Danish Government* considers that the *Francovich* judgment lays down a general principle of Community law requiring Member States to make good the loss and damage caused to individuals by breaches of Community law. The procedural and substantive conditions governing an action for compensation are a matter of national civil law, provided that the compensation must not be rendered illusory. However, it would not be reasonable if Member States could incur more extensive liability than that

incurredby the Community institutions, as defined by the Court in its case-law relating to Article 215 of the EEC Treaty. That case-law establishes the requirement of the existence of fault, in the sense that liability is not incurred unless there is a 'sufficiently serious' infringement of a superior rule of law protecting the individual and the institution concerned has 'manifestly and gravely' disregarded the limits on the exercise of its powers.

31. The *Danish Government* does not submit any proposed answers to the questions referred to the Court, confining itself to giving its views on the fundamental issues.

32. The *German Government* considers that it was not the intention of the Community legislature to establish any general liability on the part of Member States for infringements of Community law. It points out that during the negotiations concerning the Maastricht Treaty the Member States did not adopt any rules in that regard. The new version of Article 171 of the EC Treaty merely provides for the imposition of penalties on Member States which do not comply with the Court's judgments. The German Government further states that an extension of Community law by judge-made law going beyond the bounds of the legitimate closure of lacunae would be incompatible with the division of competence between the Community institutions and the Member States laid down by the Treaty, and with the principle of the maintenance of institutional balance. The institutions having legislative competence, in particular the Council and the Parliament, cannot be excluded from the establishment of a general right to compensation, which requires democratic legitimation. Furthermore, such a principle requires an alteration of the Treaty entailing financial implications which also necessitate the consent of the national parliaments.

In the German Government's view, the *Francovich* judgment is only concerned with the imposition of penalties in respect of provisions which are not directly applicable, the Court having sought in that judgment to close a lacuna in the system for the safeguarding of rights. Inasmuch as a right of action is accorded for the purposes of asserting rules of Community law, there is no need for the grant of a right to compensation. Consequently, the views expressed by the German Government in relation to the questions referred for a preliminary ruling are put forward only as alternative observations. As regards the conditions governing entitlement to compensation, reference should be made to the criteria laid down in the *Francovich* judgment and to other procedural and substantive conditions deriving both from Community law (case-law relating to Article 215 of the Treaty) and from national law, subject to the restrictions laid down by the Court in paragraph 43 of the *Francovich* judgment. More particularly, the requirement of fault, in the sense that the State must be shown to have acted intentionally or negligently, constitutes a fundamental and intrinsically legitimate condition of the right to compensation. In any event, there cannot exist any obligation to make good loss and damage arising prior to delivery of the judgment of the Court in *Commission* v *Germany*, cited above, according to which a Member State is obliged to remedy an infringement of the Treaty only *ex nunc*.

33. The *German Government* submits that the questions referred for a preliminary ruling in Case C-46/93 should be answered as follows:

'1. Where a national parliamentary statute such as Paragraphs 9 and 10 of the German Biersteuergesetz is not adapted to a directly effective rule of Community law such as Article 30 of the EEC Treaty, there is no obligation under Community law for a Member State to repair the damage suffered by an individual as a result of that failure.'

and, in the alternative:

'2. The national legal system may provide that, as regards not only the establishment of liability and its consequences but also the procedure to be followed, the right to compensation under Community law is to be subject to the same limitations as those applying where a national law infringes higher-ranking national law, in so far as those conditions are not so framed as to make it virtually impossible or excessively difficult to obtain compensation.

3. The national legal system may provide that entitlement to compensation under Community law is to be conditional on fault on the part of the Member State, provided that this condition is not framed in such a way as to make it impossible or excessively difficult to obtain compensation.

4. (a) Liability under Community law to provide compensation may be limited in scope by the national legal system, provided that such liability constitutes an effective sanction for ensuring the enforcement of Community law.

(b) The right to compensation under Community law does not generally require damage which had already arisen before the Court of Justice of the European Communities found that Community law had been infringed to be made good.

(or, at all events, if Questions 1 and 4(b) are answered in the affirmative)

The liability of the Federal Republic of Germany for breach of Article 30 of the EEC Treaty by Paragraphs 9 and 10 of the Biersteuergesetz extends only to damage arising after the delivery of this judgment, unless

the injured parties previously commenced an action or sought analogous remedies.'

34. The *German Government* considers that the answer to the first question referred by the Divisional Court to the Court of Justice should be the same as that given to the first question referred by the Bundesgerichtshof. As regards the Divisional Court's second question, the German Government considers that the amount of the damages to be awarded falls to be determined in accordance with the rules of domestic law, provided that they are not so framed as to make it virtually impossible or excessively difficult to obtain compensation.

35. The *Greek Government*, which has not lodged any written pleading before the Court but which has presented oral submissions, considers that, in order to have any effect, the principle of reparation, which is based directly on Community law (paragraph 41 of the *Francovich* judgment), must ensure the removal of all consequences, of whatever kind, flowing from the infringement of Community law, and must fully protect the rights of individuals. The Greek Government takes the view that the conditions governing reparation must not differ fundamentally from those laid down in the *Francovich* judgment. The procedural rules of the Member States, which must not make the exercise of Community law impossible or excessively difficult, cannot relate to the conditions giving rise to the reparation obligation, but must be restricted to specific issues, such as the extent of the damage or the sharing of liability. The reparation criteria established by case-law where the Community incurs liability under Article 215 of the EC Treaty, and in particular the requirement as to proof of a manifest and sufficiently serious breach of a superior rule of law, are not relevant to the liability of Member States, inasmuch as it is not easy to establish whether there has been a breach of Community law. The Greek Government further states that, in order for liability to arise, it is enough that there should be an objective breach of a provision of Community law. In its view, compensation should be payable both for financial losses and for loss of profits. Lastly, the Greek Government considers that no temporal limitation should be applied to the right to compensation until a judgment has been delivered by the Court.

36. The *Spanish Government* considers that the principle of the liability in damages of Member States, including their legislatures, has been acknowledged by the Court of Justice. The criteria for compensation have been referred by the Court to the national legal systems. In that regard, the very great normative diversity amongst the Member States is such that there is a need for Community harmonization, since it is not enough simply to apply the principle of national treatment. The scope of such liability has to be examined on a case-by-case basis and, in any event, it is necessary to take account of the nature and scope of the prejudicial act, the damage caused and the existence of a causal link between that act and the damage suffered.

37. The *Spanish Government* requests the Court to reply to the questions referred to it for a preliminary ruling in the terms set out in the observations submitted by it.

38. The *French Government* considers that the acts or omissions of the legislature should not be exempted from a general obligation to pay compensation, but that, nevertheless, it is necessary to take into account the difficulties which prompted the Member State in question to disregard Community law. If the criteria for compensation required under national law are such as to render the Community principle of compensation wholly ineffective, those criteria are not compatible with Community law. The Court could develop criteria analogous to those which it has laid down pursuant to Article 178 of the EEC Treaty, but it should confine itself to the concept of a 'breach of Community law', without requiring national courts to classify such a breach as one involving 'fault'. As regards specific heads of compensation, the French Government observes that the Court has allowed claims for loss of profits. Lastly, no obligation to pay compensation can arise unless there has been a serious breach. Consequently, that question falls to be assessed on a case-by-case basis by the national court.

39. The *French Government* submits that the questions referred for a preliminary ruling in Case C-46/93 should be answered as follows:

'1. The principle developed by the Court, to the effect that Member States are obliged to repair damage caused to individuals by breaches of Community law which are attributable to them, may also apply where the breach arises from the non-adaptation of a formal parliamentary statute to the provisions of Community law.

2. A national legal system may not make a right to compensation subject to the same restrictions as those applicable where a statute infringes national provisions of a constitutional nature if, by subjecting the right to those requirements, it deprives of all effect the principle of the obligation to make reparation.

3. Where, as in the two cases referred to it, a breach of Community law does not involve the non-implementation of a directive, national courts may make the right to compensation subject to the condition that there must be a serious breach of Community law, that the damage should go beyond the bounds of the risks inherent in the business activities of traders in the sector concerned and, where appropriate, that it should be of a special nature.

4. (a) The obligation to pay compensation may relate to all damage which is proved by the plaintiff to have resulted directly from the breach found to have been committed.

(b) The obligation to make reparation may extend to damage arising prior to a judgment of the Court in which it is held that the national legislation at issue constitutes a breach of an obligation laid down by Community law. However, the concept of a "serious breach" may lead a national court to consider that that criterion is not satisfied until the Court has delivered

its judgment establishing the breach or a judgment giving a clear interpretation of the Community provisions said to have been infringed, and to rule that the right to compensation for the damage should run from the date of that judgment.'

40. The *French Government* considers that the answers which it proposes that the Court should give to the first three questions referred by the Bundesgerichtshof will enable the first question referred by the Divisional Court to be answered. Its proposed answer to the Bundesgerichtshof's fourth question will enable the Divisional Court's second question to be answered.

41. The *Irish Government* considers, primarily, that the question of the payment of compensation by a Member State for an infringement of a directly effective provision of Community law is a matter for national law, on condition that the Community remedy is treated not less favourably than the comparable remedies under national law, and that the procedural and substantive conditions should not be such as to render it impossible or excessively difficult to obtain redress. The right to compensation has, basically, a secondary role to play in affording protection, particularly where there is an infringement of Community rules which are not directly effective, as in the case of the provisions of the directive at issue in the *Francovich* judgment. The Irish Government points out that the Member States did not adopt any rule regarding general liability in the course of the negotiations concerning the Maastricht Treaty. The amended wording of Article 171 of the EEC Treaty is limited to providing for the imposition of penalties on Member States which do not comply with judgments of the Court. The Irish Government submits alternative observations in the event that the Court rules that there exists under Community law an obligation to pay compensation for the breach of a directly effective provision. In those circumstances, there should be taken into account, as regards the criteria for the payment of compensation, the Court's case-law relating to Article 215 of the EEC Treaty, as well as national case-law.

42. The *Irish Government* submits that the questions referred for a preliminary ruling in the two cases should be answered as follows:

'(a) It is for national law to settle the question of liability for compensation on the part of a Member State for an infringement of a directly applicable rule of Community law for which that State is responsible, on condition that national law treats the Community remedy not less favourably than the comparable national remedy, and that the procedural and substantive conditions imposed by national law are notsuch as to render it

impossible, or excessively difficult, for the wronged claimant to obtain redress.'

and, in the alternative:

'(b) If and insofar as damages are recoverable in Community law against a Member State for infringements of that law, the conditions laid down by national law, both as to substance and as to form, for the recovery of damages (including the heads of damage, questions of interest, exemplary damages etc.), apply, subject to these conditions being no less favourable than those relating to similar claims under national law and to their not being so framed as to render the recovery of damages excessively difficult or impossible in practice.'

43. In the view of the *Netherlands Government*, it is not yet clear whether the principle of compensation, as developed by the Court in the *Francovich* judgment, can be simply transposed to a situation involving the enactment by the national legislature of legislation which is contrary to Community law. The right to compensation has, basically, a secondary role to play in affording protection, particularly where there is an infringement of provisions of Community law which do not have direct effect, as was the case with the provisions of the directive at issue in the *Francovich* judgment. Where directly applicable provisions are involved (Articles 30 and 52 of the EEC Treaty), individuals can in principle have recourse to domestic legal remedies enabling them to secure compliance therewith. The Netherlands Government points out that, when the Treaty on European Union was being drawn up, the Member States discussed the question of the effective application of Community law, and that the negotiations resulted in the amendment of Article 171 of the EEC Treaty. If the principle of the payment of compensation falls to be applied in the present case, the conditions set forth by the Court in its case-law regarding Article 215 of the EEC Treaty could usefully be taken as a frame of reference. However, it is open to the national court to base its decision on national law and to apply a stricter system of liability, within the limits laid down in paragraph 43 of the *Francovich* judgment.

44. The *Netherlands Government* restricts itself, in its observations, to the submission of a number of arguments, without proposing any specific answers to the questions referred to the Court.

45. The *United Kingdom* considers that where, in the case of acts of a legislature charged with the responsibility of weighing up competing interests, directly applicable provisions of the Treaty are found to have been infringed, the enactment of such legislative acts gives rise to liability under Community law only if the following conditions are

satisfied: (1) the provision of the Treaty which has been infringed is a superior rule of law for the protection of the individual; (2) there has been a sufficiently serious breach of that provision, in that the measures were adopted or maintained in force in manifest and grave disregard of the Member State's obligations under the Treaty; (3) there is a direct causal link between the breach of the State's obligations and the damage suffered by individuals upon whom rights were conferred by the provision of the Treaty in question.

46. The *United Kingdom* submits that the questions referred should be answered as follows:

— in Case C-48/93:

'1. Where a Member State enacts legislation involving the exercise of legislative discretion it does not, as a matter of Community law, incur liability in damages in respect of such legislation subsequently held to be incompatible with Community law unless there has been a sufficiently serious breach of a superior rule of law for the protection of the individual whereby the State concerned has gravely and manifestly disregarded its obligations under the Community Treaties. Where:

(i) a Member State's legislature enacted primary legislation 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 which came into effect on 1 December 1988 and

(ii) the Member State complied with the order of the President of the Court in Case 246/89 R *Commission* v *United Kingdom* [1989] ECR 3125 and the judgment of the Court in Case C-221/89 *The Queen* v *Secretary of State for Transport* ex parte *Factortame* [1991] ECR I-3905,

the Member State does not, as a matter of Community law, incur liability in damages.

2. Where a Member State is liable, as a matter of Community law, to compensate individuals who suffer loss as the result of legislation which is subsequently held to be incompatible with Community law the conditions as to both substance and form for the recovery of damages are, in the absence of Community rules, a matter for national law

subject to those conditions being no less favourable than the conditions relating to similar claims under national law and not being so framed as to render the recovery of damages excessively difficult or virtually impossible in practice.'

— in Case C-46/93:

'1. Community law requires that a Member State incurs liability in damages for failure to adopt legislation involving the exercise of a legislative discretion where there has been a sufficiently serious breach of a superior rule of law for the protection of the individual whereby the State concerned has gravely and manifestly disregarded its obligations under the Community Treaties.

2. Where a Member State is liable, as a matter of Community law, to compensate individuals who suffer loss as the result of that State's failure to adapt legislation which is subsequently held to be incompatible with Community law the conditions as to both substance and form for the recovery of damages are, in the absence of Community rules, a matter for national law subject to those conditions being no less favourable than the conditions relating to similar claims under national law and not being so framed as to render the recovery of damages excessively difficult or virtually impossible in practice.

3. The answer to this question is the same as the answer to Question 1 above.

4. The answer to this question is the same as the answer to Question 2 above.'

47. The *Commission* considers that it is generally contrary to Community law, at all events in the situations with which the main proceedings are concerned, for Member States, in the event of an infringement of Community law, to apply systematically and without limitation, and with a view to redressing the damage caused by the acts of the legislature, general restrictions imposed by national law. As regards the criteria governing entitlement to compensation, the Commission considers that it is necessary to take account of the rules of national law within the limits established in the *Francovich* judgment, and that it may be appropriate to rely on the Court's case-law in relation to Article 215 of the EEC Treaty. The detailed rules for the calculation of loss are derived from national law, but must not fall short of the minimum requirements laid down by the case-law relating to Article 215 of the EEC Treaty. The obligation to pay compensation exists from the time when the authorities should have known, and could have had no excuse for not knowing, that they were taking action in areas covered by Community law and that they were encroaching on rights conferred by that law.

48. The *Commission* submits that the questions referred should be answered as follows:

— in Case C-46/93:

'1. A Member State must compensate the damage to the individual which arises from the interference by the organs of the State with an individual right granted by Community law, including the case where this interference is the consequence of a failure to adapt formal legislation to Community law.

2. In the present state of Community law, it is the responsibility of the Member States to determine the precise material conditions governing such a right to compensation. The relevant national rules must not be less favourable than those applicable to similar legal rights protected by purely national laws. In addition, those rules must not render this legal protection virtually impossible or excessively difficult in that, in cases of interference with Community law rights, they apply restrictions which are valid in the national framework for legislative conduct.

3. Community law does not prohibit a national rule according to which the right to compensation is subjected to a requirement of fault, provided that the rules governing liability, taken as a whole, do not fall short of the minimum standard applied under the second paragraph of Article 215 of the EEC Treaty in the case of legal acts of the Community having general effect.

4. The effective legal protection required by Community law is excessively curtailed if the obligation to compensate is confined to the reparation of damage to certain individual assets such as property. This also applies to cases where national liability laws generally rule out compensation for loss of profit, even where such loss is adequately substantiated.

5. The effective legal protection required by Community law is also excessively curtailed if compensation is made dependent on the breach of law having been formally established in proceedings pursuant to Article 169 of the EEC Treaty.'

— in Case C-48/93:

'1. A Member State must compensate the damage to the individual which arises from the interference by the organs of the State with an individual right granted by Commu-

nity law, including the case where this interference is the consequence of the adoption of a legislative act.

2. In the present state of Community law, it is the responsibility of the Member States to determine the additional conditions governing such a right to compensation. The relevant national rules should however be applied without discrimination and must not render this legal protection virtually impossible or excessively difficult in that, in cases of interference with Community law rights, they apply restrictions which are valid in the national framework for legislative conduct.

3. Community law does not prohibit a national rule according to which the right to compensation is subjected to a requirement of fault, provided that the rules governing liability, taken as a whole, do not fall short of the minimum standard applied under Article 215(2) of the Treaty in the case of legal acts of the Community having general effect.

4. In the present state of Community law, it is the responsibility of the Member States to determine the rules governing claims to damages and interest. The relevant national rules should however be applied without discrimination and should not render this legal protection virtually impossible or excessively difficult. Where national law provides for the award of special or exemplary damages, the rules relating to such damages must be applied without discrimination in the case of interference with Community law rights.'

B. *Applicability of the principle of State liability to the measures enacted by the legislature (Question 1 in Case C-46/93 and in Case C-48/93)*

49. *All the parties* accept that the principle of State liability applies to the national legislature (the conditions in which such liability is accepted as being capable of arising are summarized in C and D below).

50. *Brasserie du Pêcheur* considers that any uncertainty has now been removed by the *Francovich* judgment, since the Court draws no distinction according to the function of the State institutions which are responsible for the breach of Community law. In that judgment, the breach was attributed to the Italian Republic, when it resulted from an error on the part of the Italian legislature. This point of view is all the more compelling in that any other solution would have the consequence of creating discrepancies in the protection of rights and would endanger the uniform application of law in the Community.

51. *Factortame and others* and *Rawlings* consider that there is often no difference for the individual concerned between whether the unlawfulness is contained in primary legislation, or in secondary legislation adopted pursuant to the powers granted to the executive, or in the simple exercise of those powers. An unlawful act is unlawful however it is adopted and whether or not it has widespread political support.

52. The *French Government* submits in that regard that the fact that a statute is adopted or is not amended, which does not in any way prejudge the nature of the breach of Community law, cannot in itself justify a general exoneration from any obligation to pay compensation.

53. The *Commission* considers that infringements such as those alleged against the Member States in the two cases referred to the Court do not in fact concern the exercise of national legislative sovereignty in the classical sense of the term but failure to observe the principle of the supremacy of Community law. Having regard to the obligation to observe that supremacy, which is incumbent on all the institutions of the Member States, entitlement to compensation should not be made subject to restrictions which have been developed in national law in order to safeguard legislative autonomy and which have no bearing on Community law. The legislature is subject to the objectives of Community law from a practical standpoint, that is to say, not from the point of view of its constitutional position but from that of the executive when adopting general measures to implement Community law.

C. *Conditions governing State liability (Question 2 in Case C-46/93 and Question 1 in Case C-48/93)*

54. The observations of the *German and Irish Governments* in relation to the conditions governing the application of the principle of State liability are submitted only in the alternative, since those governments consider that the principle of Community law established in the *Francovich* judgment is concerned merely with sanctions against provisions which are not directly applicable.

55. *Brasserie du Pêcheur*, the *Danish, German, Spanish, Netherlands and United Kingdom Governments* and the *Commission* observe that the Court did not intend, in the *Francovich* judgment, to establish a universal, complete and fixed system relating to the conditions governing entitlement to compensation. On the contrary, in the absence of Community harmonization, the Court referred to the procedural and substantive conditions laid down by the legal systems of the Member States. However, they go on to state that the Court sought to lay down two limitations. The first requirement imposed by Community law is that the criteria laid down by the national legislatures must not be less favourable than those relating to similar claims under national law. The second requirement imposed by Community law is that those criteria must not be so framed as

to make it virtually impossible or excessively difficult to achieve reparation (paragraphs 42 and 43 of the *Francovich* judgment).

56. *All the governments* and the *Commission* consider that the Court's case-law relating to Articles 178 and 215 of the EEC Treaty could be applied, wholly or in part, in determining the liability of Member States. In their view, in the case of legislative acts involving choices of economic policy in fields where a wide discretion exists, Member States, like the Community institutions, should only incur liability where the infringement of Community law amounts to a 'serious' breach, that is to say, 'manifest and grave'. The Danish, German, Netherlands and United Kingdom Governments further state that it would not be reasonable if Member States could incur more extensive liability than that incurred by the Community institutions in comparable situations.

Factortame and others and *Rawlings* consider, on the other hand, that the Court's case-law relating to Articles 178 and 215 of the EEC Treaty is not applicable for the purposes of defining State liability. They consider that, in any event, Part II of the Merchant Shipping Act 1988 easily satisfies the conditions as to Community legislation laid down by the case-law of the Court.

57. The *Danish, Spanish, French, Irish and Netherlands Governments* and the *Commission* consider that a breach of Community law is 'manifest' either where the Community-law provisions which have been disregarded are clear in themselves or where the Court has clarified them in a preliminary ruling or in Treaty infringement proceedings, but above all where the Court has previously found the national rule at issue to be incompatible with Community law. However, the mere existence of a judgment of the Court confirming such incompatibility is not enough in itself to give rise to liability on the part of the State; on the other hand, it is not necessary for the breach to have been the subject of Treaty infringement proceedings.

The *Danish and United Kingdom Governments* and the *Commission* consider that it is very difficult to resolve the question of the attribution of liability to the State where national legislation conflicts with a provision of the EEC Treaty, since fresh questions of interpretation are constantly arising. If questions of interpretation are shrouded in uncertainty and a Member State exercises its discretion in a reasonable way, it would seem unreasonable for it to incur liability if it is later held that Community law precludes the national law or administrative practice in question. Unblameworthy legal mistakes should not lead to liability to make reparation.

58. The *German Government* considers, in Case C-46/93, that the position regarding the compatibility of Paragraphs 9 and 10 of the BStG with Article 30 of the EEC Treaty was

by no means clear. On the contrary, when delivering its judgment in Case 178/84, cited above, the Court took the opportunity in that case to redefine in fundamental terms the scope of Articles 30 and 36 of the EEC Treaty as they apply in food law and to lay down procedural rules in relation to the marketability of foodstuffs containing prohibited additives. There was thus no conscious and deliberate infringement by the Federal Republic of Germany of a clear and unequivocal rule of Community law. Since Article 30 of the EEC Treaty was directly applicable, the plaintiff could have asserted its rights before the national courts. Evidently, the reason why it did not do so is because, in the beginning, neither the Commission nor the plaintiff thought that Article 30 had clearly been infringed by the German legislation.

As regards the facts in Case C-46/93, the *Commission* considers that it is necessary to examine separately, on the one hand, the prohibition on describing as 'beer' any beer not brewed in accordance with the Reinheitsgebot and, on the other hand, the prohibition on the importation of beer containing additives. As regards the rule concerning the description of the beverage on the sale thereof, it appears that the German authorities should have known, in the light of the settled case-law on the point, that import barriers resulting from such a prohibition cannot be justified under Community law. As regards, on the other hand, the prohibition on the marketing of beers containing additives, it was not made entirely clear until the judgment in Case 178/84 was delivered that such a prohibition was not covered by the exemptions allowed under Article 36 of the EEC Treaty.

59. *Factortame and others* and *Rawlings* consider, in Case C-48/93, that the United Kingdom is liable whatever criteria are applied, for the following reasons: first, the contested provisions of the Merchant Shipping Act 1988 constitute a manifest breach of Articles 7, 52 and 221 of the EEC Treaty, having regard to the judgments of the Court in Cases C-221/89 and C-246/89; second, the proposed legislation was objected to by the complainants, by the Commission and by another Member State at an early stage, yet such objections were ignored by the United Kingdom, which enacted the legislation and refused to collaborate in any way with the Commission; lastly, the Act was deliberately drafted so as to preclude any exemption and without any amendment in relation to acquired rights, with the intention of reducing the possibility of anticipated legal action and of the grant of interim measures and, finally, with the purpose of causing damage to a specific group of Community nationals, many of whom had been lawfully established in the United Kingdom for many years.

The *Irish and United Kingdom Governments* consider, on the other hand, that the United Kingdom Parliament was faced with two competing interests under Community law: on the one hand, the British fishing communities, who relied on the principle of 'relative stability' underlying the common fisheries

policy, and, on the other, those who were not part of the British fishing communities, who sought to rely on the principle of non-discrimination on grounds of nationality in access to an economic activity. The Merchant Shipping Act 1988 sought to uphold the first of those principles. The history of the subsequent legal proceedings confirms how uncertain the legal position was. At the time when the 1988 Act was passed, the extent to which the power of a Member State to lay down rules for the registration of vessels fell within the scope of Community law had not yet been determined. A number of experienced English judges were unable to form a precise view as to whether Community law had been infringed. In Case C-221/89, five Member States intervened in favour of the United Kingdom and one Member State intervened in favour of the complainants and the Commission.

The *Commission* observes that it wrote to warn the United Kingdom that the proposed provisions for the registration of vessels were contrary to the prohibition of discrimination on grounds of nationality and that, in any event, it became clear, following the judgment in *Factortame I*, cited above, that discrimination with regard to residence was unacceptable.

60. *Rawlings* considers that, whatever conditions may be held to be appropriate to enable individuals to obtain reparation for damage caused by national legislation contrary to Community law, there can be no doubt that it satisfies those conditions. In its view, it is in a different position from the other applicants, since the only reason given by the United Kingdom authorities for their refusal to authorize its continued ownership and operation of a British fishing vessel was the fact that Mr Ramón Yllera, a shareholder and director of the company, was a Spanish national. The application to Rawlings of the Merchant Shipping Act 1988 involved direct and manifest discrimination on grounds of nationality.

D. *The condition as to 'fault' (Question 3 in Case C-46/93)*

61. *Brasserie du Pêcheur* observes that the reference by the Court in the *Francovich* judgment to the autonomy of national rules of procedure may result in national law making the reparation of damage dependent on proof of fault on the part of the administrative authorities. However, it goes on to state that, even where the national rules require the existence of fault on the part of the administrative authorities as a condition of the payment of compensation for the damage, such fault is objectively constituted by the fact of the application of legislation which is incompatible with Community law. That is the position, in particular, where the breach has been established by a judgment of the Court. An exception to the responsibility of the administrative authorities could arise only if they had no discretion in the matter

whatever. If that were the case, the legislature would then incur direct responsibility. Lastly, it considers that, in the present case, the infringement of Article 30 of the EEC Treaty arising from the prohibition of the marketing of the imported beer clearly constitutes, in any event, a sufficiently flagrant breach of a rule of Community law such as to impose on Germany an obligation to pay compensation for the damage.

62. The *Danish Government* considers that the principle that the Community cannot incur liability 'unless there is a sufficiently serious breach', as laid down by the Court in its case-law relating to Articles 178 and 215 of the EEC Treaty, amounts to a requirement as to the existence of fault (*culparegel*). It further states that the Court has confirmed that the fact that a regulation is held to be invalid does not *per se* suffice to render the Community liable.

63. The *German Government* considers that the requirement of fault, whether intentional or not, committed by State institutions constitutes a fundamentally admissible substantive condition for entitlement to compensation which a Member State may lay down in addition to the conditions laid down by Community law. The only restriction is that the requirement of fault must not make it virtually impossible or excessively difficult to obtain compensation. In its view, German law satisfies that condition.

64. The *Spanish Government* considers that, where acts of the legislature are concerned, fault does not appear to be a factor by which those acts can be defined, since a legislative act cannot be attributed to natural persons who are the agents of the legislature.

65. The *French Government* considers that, taking into account the strong reservations harboured hitherto by Member States about making the legislature liable for wrongful conduct, it is important that the Court, in formulating any criteria, should confine itself to the concept of a 'breach of Community law', without requiring national courts to classify such a breach as one involving 'fault'. However, it further states that the Court could develop from its case-law on non-contractual liability criteria which national courts could apply as conditions governing entitlement to compensation. In particular, the infringement should be serious, the damage should go beyond the bounds of the risks inherent in business activities in the sector concerned and the damage should constitute special damage, in the sense that it should affect only a limited number of injured parties.

66. The *Netherlands Government* considers that, since the present proceedings are concerned not with the attainment of a Community objective (such as the transposition of a directive) but with an obligation on the part of a Member State to abstain from adopting measures contrary to Community law in the

realization of national aims, it would seem appropriate to require that the infringement by the Member State must be actually culpable.

E. *The substantive scope of the obligation to make reparation (Question 4(a) in Case C-46/93 and Question 2 in Case C-48/93)*

67. In the view of the *Commission*, it would seem appropriate to refer to the Court's case-law on the award of compensation and to regard State liability as corresponding to the minimum standard of liability on the part of Community institutions required under Article 215 of the EEC Treaty. It appears from those decisions of the Court, relating to legislative action involving choices of economic policy where wide discretionary powers or complicated issues are involved, that the criteria governing liability concern, *inter alia*, factors entailing, in many national legal systems, the concept of fault.

68. *Brasserie du Pêcheur*, *Factortame and others* and the *Commission* further state that to require proof of fault on the part of the national authorities, in the sense of an intention to cause damage to the injured parties, cannot be consistent with Community law. The conditions governing the exercise of a right to compensation should not be such as to make it virtually impossible or excessively difficult to exercise that right (judgment in Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595). It would be almost impossible to prove an intention to cause damage or knowledge of the unlawfulness of an act without obtaining access to the government's documents showing its innermost secrets, which no doubt would be sought to be protected with great tenacity.

69. The *German, Spanish and United Kingdom Governments* and the *Commission* observe that it is apparent from the *Francovich* judgment that the criteria applicable to the determination of the scope of reparation are covered by national law. The Spanish Government further states that the jurisdiction to determine the extent of the harm and therefore of the compensation obtainable lies not with the Court of Justice but with the national courts of the Member States.

70. *Brasserie du Pêcheur*, *Factortame and others* and *Rawlings* consider, however, that it is apparent from paragraphs 42 and 43 of the *Francovich* judgment that the criteria governing compensation must be no less favourable than those relating to similar claims under national law and must not be so framed as to render the recovery of damages virtually impossible or excessively difficult. They further state that the national rules must be such as to ensure that rights to compensation are granted full and effective protection.

71. *Brasserie du Pêcheur* considers that the rights of a claimant are not fully safeguarded if compensation is not given for the fundamental element of the loss or damage arising from the breach of Community law, and that

that fundamental element must be defined according to the nature of the right which has been infringed.

72. *Factortame and others* further state that a measure of guidance is necessary in order to minimize what could otherwise be unacceptable divergences in the application of the damages remedy in different Member States, because this is not an area in which any Community harmonization may be expected in the foreseeable future. Guidance from the Court could also obviate a further reference for a preliminary ruling, with the delay which that would entail.

73. The *German Government* considers that there is nothing to preclude the restriction of liability to breaches of specific individual legal interests, in the sense of absolute rights akin to property rights. Community law does not require full reparation of all losses, since even a limited right can achieve the objective of the effective enforcement of Community law.

The *Commission*, on the other hand, considers that the reference to national legal systems is qualified by the need for compliance with the minimum requirements laid down by the Court's case-law in relation to Article 215 of the EEC Treaty, and that those requirements would not be met if the obligation to pay compensation were to be limited to making good the damage to certain individual assets protected by law, such as property.

74. *Brasserie du Pêcheur*, *Rawlings*, the *French Government* and the *Commission* consider that, as is apparent from the case-law of the Court, lost profits (*lucrum cessans*) must be taken into account in determining the criteria governing reparation. Brasserie du Pêcheur further states that it has been deprived of any opportunity of exporting its products and that the damage suffered by it is therefore based essentially, if not exclusively, on the principle of loss of profit. Rawlings adds that interest on lost profits should also be taken into account. The Commission considers that, even though lost profits should be taken into account, the losses suffered as a result of the breach should none the less be proved.

75. The *French Government* considers that the concept of repairable damage is not subject to limitation, and that the possibility of non-material damage should be recognized, provided that it results directly from the breach which is found to have been committed.

76. The *Irish and United Kingdom Governments* observe, in relation to Rawlings' claim for exemplary damages in Case C-48/93, that there is no principle of Community law according to which such compensation must be paid by Member States over and above compensation for loss actually suffered by

the plaintiff. That concept appears to exist only in the common law systems of England, Wales and Ireland and is not, therefore, a principle of ordinary law in the legal systems of the Member States.

Rawlings and the *Commission* consider, on the other hand, that to deny the possibility of exemplary damages for breaches of Community law whilst retaining it for certain breaches of English law would go contrary to the requirement that Community law rights must not be treated less favourably than similar claims under national law.

F. *The temporal scope of the obligation to pay compensation (Question 4(b) in Case C-46/93)*

77. *Brasserie du Pêcheur* considers that, in the present case, entitlement to compensation for damage results from the breach of a directly applicable provision of the Treaty and thus accrued at the time when the breach was committed. The judgment establishing the breach of Community law is merely declaratory.

78. The *French Government* and the *Commission* likewise consider that entitlement to compensation for the damage caused by such a breach is not conditional on the prior existence of a judgment of the Court establishing that breach. Instead, it seems necessary to consider at what point in time the authorities should have known, and could have had no excuse for not knowing, that they were acting in breach of Community law.

79. The *Spanish Government* considers in that regard that entitlement to compensation is conditional on, and is triggered by, a judgment establishing the breach or interpreting the provision of Community law at issue. The Spanish Government further states that the principle of legal certainty is such that extreme caution is required in the recognition of the retroactive effect of declarations of unlawfulness.

80. The *German Government*, for its part, considers that, having regard to the Court's case-law on the consequences of a judgment delivered in infringement proceedings, the effect of such a judgment is to oblige the Member State to remedy the infringement only *ex nunc* and is not such as to require it to remedy the consequences of that infringement in the past as well. In the alternative, if Questions 1 and 4(b) in Case C-46/93 are answered in the affirmative, it considers that the application of the ruling in *Francovich* to the present case would have immeasurable financial repercussions and that, for compelling reasons of legal certainty, restrictions must be placed on the possible recovery by parties concerned of compensation for damage caused prior to delivery of the judgment. It is necessary, therefore, to restrict that possibility to cases in which the injured parties

have previously commenced an action or sought analogous remedies.

81. In the view of the *Danish Government* and of the *Commission*, it is also necessary to consider whether the claimant passively accepted the damage for many years without complaining of the alleged infringement and thus did not seek to have a directly applicable provision of the Treaty enforced before the national courts (duty of diligence).

G. C. Rodríguez Iglesias
Judge-Rapporteur