The EU, the Member States and Damages Liability

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1 Introduction

It is instructive to return to fundamentals when thinking about EU damages liability and state liability in damages for breach of EU law. The evolution of the case law is especially interesting given that the Court was working from something akin to a tabula rasa in both instances. Article 215 EEC gave the ECJ a broad discretion to fashion Community non-contractual liability in accord with the general principles common to the laws of the Member States, and the text has remained unchanged in substantive terms. The scope for crafting the contours of state liability in damages was even greater, given that the Treaty was silent on this issue, the corollary being that it fell to the Court to articulate the rationale for such liability and then specify the conditions thereof. The development of the case law in both areas served, therefore, as a laboratory for the judicial explication of what the principles of delictual responsibility should be in an emergent legal order. This chapter examines the jurisprudence and draws out the key features that have shaped the twin bodies of legal doctrine.

The discussion begins with EU damages liability. It points to the symbiotic connection between reasoning and result in the case law. The remainder of the section elaborates the key features that have fashioned this body of law, which are the disaggregation of annulment and damages; the disaggregation of discretionary and non-discretionary acts; the normative choice that finds expression in the definition of superior rule of law for protection of the individual; the normative choice inherent in the meaning given to flagrant violation of Community law;

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and the disaggregation and normative choice in dealing with damages flowing from unlawful and lawful action.

The focus then shifts to state liability in damages. The discussion begins by reiterating the symbiotic connection between reasoning and result in this body of law. The central precepts that have framed this body of law are then examined. These are the linkage between state liability in damages and EU damages liability; the disaggregation between damages and direct effect; the unitary conception of the state that underpins the ascription of state liability; the increased sophistication as to the conditions for state liability; and the malleable divide between interpretation and application that has shaped the division of responsibility between the CJEU and national courts in applying the legal criteria in this area.

2. EU Damages Liability: Reasoning and Result

(a) Reasoning and Result: The Symbiotic Connection

It is axiomatic that there is an integral relationship between legal reasoning and result in the creation and development of legal norms. The legal reasoning perforce shapes the resultant legal rule, although it may also be consistent with more than one formulation thereof. The legal reasoning may also be constrained in various respects. The constraints may emanate, inter alia, from existing legal norms, from legal tradition as it plays out in that legal system, from practical considerations, or from an admixture of all such considerations. What is noteworthy is the relative freedom accorded to the ECJ in the fashioning of damages liability of the EU institutions. This was evident in the formulation now embodied in Article 340(2) TFEU, which has not altered substantively since the inception of the EEC.

> In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

The EEC, now EU, is simply instructed to develop the law of non-contractual liability taking account of the general principles common to the law of the Member States. It is instructive, in the light of this Treaty discretion, to identify the principal lines of reasoning that shaped the law in this area.

(b) Annulment and Damages: Disaggregation

Annulment and damages are the twin legal mechanisms through which public bodies are held to account. The former serves to nullify acts that are ultra vires or unlawful. The latter renders the public body liable in damages for losses suffered by the injured party. There is no a priori relation between them. There is nothing that dictates whether they operate as independent grounds of challenge, or whether they are linked. The choice resides with the particular legal system. Insofar as it opts for linkage this normally takes the form of requiring annulment as a condition precedent for damages liability.

This was the initial stance of the ECJ, which held in *Plaumann*[1] that annulment of the relevant norm was a necessary condition precedent to using Article 340(2) TFEU. If this requirement had been retained then Article 340(2) would have been of little use, given the difficulty that non-privileged applicants faced in proving *locus standi* for annulment.[2] This condition has, however, generally been discarded, and the action for damages is regarded as independent and autonomous. The fact that the contested provision has not been annulled will not therefore normally bar a damages action.[3] This general rule is, however, subject to

[1] Case 25/62 *Plaumann v Commission* [1963] ECR 95.

[2] P Craig and G de Búrca, *EU Law, Text, Cases and Materials* (Oxford University Press, 7th edn, 2020) Ch 16.

[3] Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975; Cases 9 and 11/71 *Compagnie d'Approvisionnement de Transport et de Crédit SA et Grands Moulins de Paris SA v Commission* [1972] ECR 391; Case T-178/98 *Fresh Marine Company SA v Commission* [2000] ECR II-3331, [45]-[49]; Case T-99/98

exceptions. Thus, a damages action will be inadmissible if it is aimed at securing withdrawal of a measure that has become definitive where the damages action would in effect nullify the legal effects of that measure. This would be the case where the applicant sought payment in a damages action of an amount precisely equal to a duty paid by it pursuant to a measure that had become definitive.[4] Subject to this caveat, a damages action can be pursued even if the relevant measure has not been annulled. It will, nonetheless, be necessary for the claimant show some illegality, since this is, as will be seen below, a necessary, albeit not sufficient, condition for a damages action.

(b) Discretionary and Non-Discretionary Acts: Disaggregation

A second central feature of the EU courts' reasoning is the disaggregation between discretionary and non-discretionary acts. This was not pre-ordained. It represents a normative choice of the circumstances in which, and the conditions on which, damages liability should be incurred. It would be perfectly possible in theory for the same test to be applied to cases where the illegality resided in misapplication of a discretionary power and a non-discretionary

Hameico Stuttgart GmbH v Council and Commission [2003] ECR II-2195, [37]-[38]; Case 234/02 P *European Ombudsman v Frank Lamberts* [2004] ECR I-2803; Case T-47/02 *Danzer and Danzer v Council* [2006] ECR II-1779, [27]; Case T-193/04 *Hans-Martin Tillack v Commission* [2006] ECR II-3995, [97]-[98].

[4] Case 543/79 *Birke v Commission* [1981] ECR 2669, [28]; Cases C–199 and 200/94 *Pesqueria Vasco-Montanesa SA (Pevasa) and Compania Internacional de Pesca y Derivados SA (Inpesca) v Commission* [1995] ECR I–3709, [27]-[28]; Case T–93/95 *Laga v Commission* [1998] ECR II-195; Case C–310/97 P *Commission v AssiDomän Kraft Products AB* [1999] ECR I–5363, [59]; Case T-178/98 *Fresh Marine* (n 3) [50]; Cases T-44, 119, 126/01 *Eduardo Vieira SA, Vieira Argentina SA and Pescanova SA v Commission* [2003] ECR II-1209, [214]-[216]; P Mead, 'The Relationship between an Action for Damages and an Action for Annulment: The Return of *Plaumann*', in T Heukels and A McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International, 1997) Ch 13.

power. The normative impulse underlying the ascription of such liability would be that the public body committed the legal wrong in both instances, with the corollary being that it should bear the monetary risk if things go wrong, rather than this being imposed on the private party. This is indeed the normative thinking that underpins liability rules in some civil law legal systems, such as the French, where the staring point is that illegality leads prima facie to damages liability, albeit subject to some exceptions.

However, notwithstanding the considerable numerical dominance of civil law regimes within the Community legal order, and notwithstanding also the relative ascendancy of the French legal order in the early years of the Community, the ECJ signalled in *Schöppenstedt* that damages liability in cases where there was meaningful discretion would require not merely illegality, but a sufficiently serious breach of a rule of law for the protection of the individual.[5]

> In the present case the non-contractual liability of the Community presupposes at the very least the unlawful nature of the act alleged to be the cause of the damage. Where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Article 215, second paragraph, of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred. For that reason the Court, in the present case, must first consider whether such a violation has occurred.

While this test will most commonly apply where the discretion is contained in EU legislation, it is not thus confined, as made clear in *Bergaderm*.[6] The applicant sought damages for losses suffered by the passage of a Directive, which prohibited the use of certain substances in cosmetics. It claimed that the Directive should be regarded as an administrative act, since it only concerned the applicant, and therefore it should suffice to show illegality *per se*, rather than having to prove a sufficiently serious breach. The ECJ rejected the argument, stating that 'the general or individual nature of a measure taken by an institution is not a decisive criterion

[5] Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt* (n 3) [11].

[6] Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm SA and Goupil v Commission* [2000] ECR I-5291.

for identifying the limits of the discretion enjoyed by the institution in question'.[7] This is correct in principle. Many administrative measures involve discretionary choices that are just as difficult as those made in the context of legislative action,[8] and the line between the two may be difficult to draw.

The nature of the disaggregation between discretionary and non-discretionary acts was, however, modified post-*Bergaderm*. Prior to that case the traditional approach was that where the contested measure did not entail any meaningful discretionary choice it would normally suffice to show illegality, causation, and damage.[9] The post-*Bergaderm* formulation is subtly different. In all cases the claimant must prove that the rule of law was intended to confer rights on individuals, a sufficiently serious breach and a causal link between the breach and the resultant harm. The difference between discretionary and non-discretionary acts nonetheless persists, since in the latter instance the mere infringement of EU law may suffice to establish the sufficiently serious breach.[10]

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[7] Ibid [46]. See also, Case C-390/95 P *Antillean Rice Mills NV v Commission* [1999] ECR I-769, [56]-[62]; Case C-472/00 P *Commission v Fresh Marine A/S* [2003] ECR I-7541, [27]; Case C-312/00 P *Commission v Camar Srl and Tico Srl* [2002] ECR I-11355, [55]; Case C-440/07 P *Commission v Schneider Electric SA* [2009] ECR I-6413, [160]-161]; Case T-16/04 *Arcelor SA v European Parliament and Council* [2010] ECR II-211, [141]-[143.

[8] See, e.g., in the UK context, *X (Minors) v Bedfordshire CC* [1995] 2 AC 633.

[9] See, e.g., Cases 44–51/77 *Union Malt v Commission* [1978] ECR 57; Case 26/81 *Oleifici Mediterranei v EEC* [1982] ECR 3057, [16]; Case C–146/91 *KYDEP v Council and Commission* [1994] ECR I–4199; Cases C–258 and 259/90 *Pesquerias de Bermeo SA and Naviera Laida SA v Commission* [1992] ECR I–2901; Case T-336/94 *Efisol v Commission* [1996] ECR II-1343, [30]; Case T-178/98 *Fresh Marine* (n 3) [54]; Cases T-79/96, 260/97, 117/98 *Camar Srl and Tico Srl v Commission* [2000] ECR II-2193, [204]-[205]; Case T-333/03 *Masdar (UK) Ltd v Commission* [2006] ECR II-4377, [59]-[62].

[10] See, e.g., Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm* (n 6) [42]-[44]; Case C-472/00 P *Fresh Marine A/S* (n 7) [26]-[27]; Case C-312/00 P *Camar* (n 7) [54]-[55]; Case T-283/02 *EnBW Kernkraft GmbH v*

The rationale for this shift, whereby discretionary and non-discretionary acts are differentiated in a different manner than hitherto is not clear. The rationale for circumscribing liability for discretionary acts does, however, strike a familiar chord with common law regimes on damages liability of public authorities, and this is so notwithstanding the dominance of civil law regimes within the EU legal order. The ECJ's reasoning in *Schöppenstedt/Bergaderm* is expressive of the fact that the legislature/administration may often have broad discretion that requires the making of difficult choices, which entails balancing different variables. This discretionary power is still subject to legality controls, and the decision will be annulled if it violates such procedural and substantive precepts. The mere finding of such illegality should not, however, suffice for damages liability, given that the implications for the public purse could be very serious. Such liability should be dependent on showing a sufficiently serious breach. It was not fortuitous that many seminal rulings on what is now Article 340(2) occurred in the context of the Common Agricultural Policy. There were many legislative initiatives enacted in this area, which were made pursuant to the enabling Treaty provisions, Articles 39-40 TFEU. These Articles required the EU legislature to balance a number of different objectives, which could conflict inter se, and these choices would often have to be made within tight temporal limits. It was unsurprising that the Court should be reluctant to impose damages liability merely on a finding of illegality per se.

> 1. The objectives of the common agricultural policy shall be:
> (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
> (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing
> the individual earnings of persons engaged in agriculture;
> (c) to stabilise markets;
> (d) to assure the availability of supplies;
> (e) to ensure that supplies reach consumers at reasonable prices.

Commission [2005] ECR II-913, [87]; Case T-139/01 *Comafrica SpA and Dole Fresh Fruit Europe & Co Ltd v Commission* [2005] ECR II-409, [142]; Case C-440/07 P *Schneider* (n 7) [160].

> 2. In working out the common agricultural policy and the special methods for its application, account shall be taken of:
> (a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions;
> (b) the need to effect the appropriate adjustments by degrees;
> (c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.

(c) Superior Rule of Law: Normative Choice

The ECJ made clear from the outset that a necessary condition for liability was the existence of a superior rule of law for the protection of the individual. The Court did not provide further and better particulars of the rules that would qualify for this status. It was left to incremental case law to amplify and exemplify the rules that would suffice in this respect. The ensuing case law embodied normative choices as to the rules that would count for the purposes of damages liability. In negative terms, it became clear that Rules of the World Trade Organization (WTO) could not generally be relied on in this context.[11] In positive terms, the case law reveals that 'superior' is sometimes equated with 'important', and sometimes with a more formalistic conception of one rule being hierarchically superior to another.

Thus, many Treaty provisions fall within this category. A commonly cited ground is the ban on discrimination in Article 40(2) TFEU, in the context of the Common Agricultural Policy (CAP). This is not surprising, given that many damages actions are brought pursuant to regulations made under the CAP. A claimant may also argue that a regulation is in breach of a hierarchically superior regulation,[12] or that it infringes certain general principles of law such as

[11] Case C-149/96 *Portugal v Council* [1999] ECR I-8395; Case T-18/99 *Cordis Obst und Gemuse Grosshandel GmbH v Commission* [2001] ECR II-913; Case C-377/02 *Leon Van Parys NV v BIRB* [2005] ECR I-1465; Case T-383/00 *Beamglow Ltd v European Parliament, Council and Commission* [2005] ECR II-5459; Cases C-120-121/06 P *FIAMM v Council and Commission* [2008] ECR I-6513, [111]-[112].

[12] Case 74/74 *Comptoir National Technique Agricole (CNTA) SA v Commission* [1975] ECR 533.

proportionality, legal certainty, or legitimate expectations.[13] However, it is clear that the Court draws distinctions within the category of general principles of law. The duty to give reasons does not seem to qualify in this respect,[14] nor does the principle of sound administration, except where it constitutes the expression of specific rights, such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of Fundamental Rights.[15]

(d) Flagrant Violation/Serious Breach: Normative Choice

It is clear, as we have seen from *Schöppenstedt*, that the individual must prove not only that there has been breach of a superior rule of law for the protection of the individual, but also that the breach was flagrant. It has been the most significant control device used by the courts. The meaning accorded to this term embodies a normative choice as to the more particular conditions that should suffice for the imposition of EU damages liability. The meaning has not remained constant over time. To the contrary, the case law reveals the way in which its content has altered over time, and the competing values that have informed this choice.

The older case law revealed two senses of the term 'flagrant violation', which was the formulation used in *Schöppenstedt*. The ECJ denied recovery where the loss was not deemed

[13] Ibid.

[14] Case 106/81 *Julius Kind KG v EEC* [1982] ECR 2885; Case C–119/88 *Aerpo* (n **Error! Bookmark not defined.**) [19]; Cases T–466, 469, 473, 474, 477/93 *O'Dwyer v Council* [1996] ECR II-207, [72]; Cases T-64 and 65/01 *Afrikanische Frucht-Compagnie GmbH v Council and Commission* [2004] ECR II-521, [128].

[15] Case T-193/04 *Tillack* (n 3) [116]-[117].

to be sufficiently serious, as exemplified by *Bayerische HNL*.[16] The concept of flagrant violation also referred to the seriousness of the breach, as exemplified by *Amylum*,[17] where recovery was denied because the institutional error did not verge on the arbitrary.[18] These conditions were cumulative. An applicant had to show both that the 'effect' of the breach was serious, in terms of the quantum of loss suffered, and also that the 'manner' of the breach was arbitrary. If EU damages liability had continued to be predicated on proof of these twin conditions then few claimants would have succeeded. It was rare for the EU to promulgate a regulation that was wholly unrelated to the general ends it was entitled to advance in, for example, the agricultural sphere. The mistakes more often occurred in the carrying out of legitimate policies in an erroneous manner.

The more recent case law dates from *Bergaderm*.[19] The ECJ had held in *Brasserie du Pêcheur/Factortame*[20] that the test for state liability should not be different in principle from that used to determine the EU's liability under Article 340(2). The broader significance of the case for the relationship between EU damages liability and state liability in damages will be discussed below. Suffice it to say for the present, that this cross-fertilization between the test for the EU's damages liability and that of the Member States was carried further in *Bergaderm*, where the ECJ completed the circle by explicitly drawing on the factors mentioned in *Brasserie du Pêcheur/Factortame* to determine the meaning of flagrant violation for the purposes of

[16] Cases 83, 94/76, 4, 15, 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co KG v Council and Commission* [1978] ECR 1209.

[17] Cases 116 and 124/77 *Amylum NV and Tunnel Refineries Ltd v Council and Commission* [1979] ECR 3497.

[18] Ibid [19].

[19] Case C-352/98 *Laboratoires Pharmaceutiques Bergaderm* (n 6).

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

liability under Article 340(2). It was not fortuitous that the language shifted from that of 'flagrant violation' to 'serious breach'. The linguistic shift betokened substantive rethinking of the conditions that must be satisfied to render the EU liable in damages.

Thus in *Bergaderm*, the ECJ held that the rules for liability under Article 340(2) take account, as do those in relation to state liability in damages, of 'the complexity of situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question'.[21] It affirmed that the test for damages liability was in general the same irrespective of whether the Union or the Member State inflicted the loss: the rule of law infringed must be intended to confer rights on individuals; there must be a sufficiently serious breach; and there had to be a direct causal link between the breach and the damage.[22] The possibility of a large number of applicants claiming damages as a result of the same illegality will not preclude an Article 340(2) action, [23] and arbitrariness is no longer required for liability.[24]

The seriousness of the breach for the purposes of Article 340(2) will, therefore, be dependent upon factors articulated in the case law on state liability, such as the relative clarity of the rule which has been breached; the measure of discretion left to the relevant authorities; whether the error of law was excusable or not; and whether the breach was intentional or voluntary. Where the Member State or the EU institution has only considerably reduced, or even no discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach. The decisive issue for the purposes of damages liability is not

[21] Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm* (n 6) [40].

[22] Ibid [41]-[42].

[23] Cases C–104/89 and 37/90 *Mulder v Council and Commission* [1992] ECR I–3061.

[24] Case C–220/91 P *Stahlwerke Peine-Salzgitter AG v Commission* [1993] ECR I–2393; Case C–282/90 *Industrie-en Handelsonderneming Vreugdenhil BV v Commission* [1992] ECR I–1937, [17]–[19].

the individual or general nature of the act adopted, but the discretion available to the institution when it was adopted. This approach has been followed in later cases.[25]

There may well be differing views concerning the current test. Its rationale is, as we have seen above, that EU institutions often have to make difficult discretionary choices. A test for liability based on illegality per se would render the decision-makers susceptible to a potentially wide liability, and would run the risk that the Court might 'second-guess' decisions of the Council and Commission as to how the variables concerning the discretion should be balanced in any particular instance. Such a strict test for damages liability might also deter the courts from finding illegality. However, the interpretation of 'flagrant violation' in the early case law was too restrictive, more especially the need to show something akin to arbitrary action. The approach in *Brasserie du Pêcheur/Factortame*, which was adopted in *Bergaderm*, is to be preferred. Where loss has been caused by sufficiently serious illegal action the applicant should not, however, have to prove that the loss was particularly serious. The applicant should have to show that the illegality caused the loss, but there should be no requirement over and above this.[26]

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[25] Case C-472/00 P *Fresh Marine A/S* (n 7); Case C-312/00 P *Camar* (n 3); Case C-198/03 P *Commission v CEVA Santé Animale SA and Pfizer Enterprises Sàrl* [2005] ECR I-6357; Case T-16/04 *Arcelor SA v European Parliament and Council* [2010] ECR II-211, [141]-[143]; Case C-282/05 P *Holcim (Deutschland) AG v Commission* [2007] ECR I-2941; Case T-304/01 *Julia Abad Pérez v Council and Commission* [2006] ECR II-4857; Case T-364/03 *Medici Grimm KG v Council* [2006] ECR II-79; Cases T-3/00 and 337/04 *Athanasios Pitsiorlas v Council and ECB* [2007] ECR II-4779; Case T-94/98 *Alfonsius Alferink v Commission* [2008] ECR II-1125; Case T-212/03 *My Travel Group plc v Commission* [2008] ECR II-1967; Case T-79/13 *Accorinti v European Central Bank*, EU:T:2015:756, [64]-[67]; Cases C-8-10/15 *Ledra Advertising Ltd v Commission and European Central Bank*, EU:C:2016:701, [63]-[64].

[26] Case T-57/00 *Banan-Kompaniet AB and Skandinaviska Bananimporten AB v Council and Commission* [2003] ECR II-607, [70].

(e) Unlawful and Lawful Acts: Disaggregation and Normative Choice

The discussion thus far has been concerned with liability in damages for unlawful acts. Individuals may, however, suffer loss flowing from lawful EU acts.[27] The problem of loss being caused by lawful governmental action is endemic to all legal systems, each of which decides whether to award compensation and the conditions required for such recovery. Thus, French law recognizes a principle of *égalité devant les charges publiques*, and German law the concept of *Sonderöpfer*, allowing loss caused by lawful governmental action to be recovered, albeit in limited circumstances.[28]

The ECJ had to decide whether to allow such claims for compensation and the conditions that would have to be satisfied in this respect. It has not been easy for claimants to succeed, and most claims for lawfully caused loss have been rejected.[29] The criteria for recovery were elaborated most clearly in *Dorsch Consult*.[30] The EC, acting pursuant to a UN

[27] H Bronkhorst, 'The Valid Legislative Act as a Cause of Liability of the Communities', in Heukels and McDonnell (n 3) Ch 8.

[28] Ibid 155–159.

[29] See, e.g., Cases 9 and 11/71 *Compagnie d'Approvisionnement de Transport et de Crédit SA and Grands Moulins de Paris SA v Commission* [1972] ECR 391, [45]; Cases 54–60/76 *Compagnie Industrielle et Agricole du Comté de Loheac v Council and Commission* [1977] ECR 645, [19]; Case 59/83 *SA Biovilac NV v EEC* [1984] ECR 4057, 4080–4081; Case 265/85 *Van den Bergh & Jurgens BV v EEC* [1987] ECR 1155; Case 81/86 *De Boer Buizen v Council and Commission* [1987] ECR 3677.

[30] Case T-184/95 *Dorsch Consult Ingenieurgesellschaft mbH v Council* [1998] ECR II-667, upheld on appeal, Case C-237/98 P *Dorsch Consult Ingenieurgesellschaft mbH v Council* [2000] ECR I-4549. See also, Case T-170/00 *Forde-Reederie GmbH v Council and Commission* [2002] ECR II-515, [56]; Cases T-64-65/01 *Afrikanische Frucht-Compagnie GmbH and Internationale Fructimport Gesellschaft Weichert & Co v Council and Commission* [2004] ECR II-521, [150]-[156]; Case T-383/00 *Beamglow Ltd v European Parliament, Council*

Security Council resolution, passed a regulation banning trade with Iraq. The Iraqi government retaliated with a law that froze assets of companies doing business in Iraq, where those companies were based in countries that imposed the embargo. The applicant argued that it should be compensated for its loss, even if the EC had acted lawfully. The CFI emphasized that if liability for lawful acts were recognized by EC law, it was necessary for the applicant to prove damage and causation. Such liability could only be incurred if the damage affected a particular circle of economic operators in a disproportionate manner in comparison with others, unusual damage, and exceeded the economic risks inherent in operating in the sector concerned, special damage, where the legislative measure that gave rise to the alleged damage was not justified by a general economic interest. The CFI concluded that the applicant had not met these criteria.

The tentative and conditional nature of these criteria were stressed on appeal to the ECJ.[31] They were further emphasized in *FIAMM*,[32] where the ECJ was even more wary about admitting the existence of any such principle of liability in EU law. It reiterated that no such principle yet existed in EU law and that if it did it would be subject to the stringent conditions set out above. The ECJ noted, moreover, that there was no consensus in the laws of the Member States as to whether liability for lawful acts of a legislative nature existed.[33]

This wariness and circumspection as to the existence of liability for lawfully caused loss is unsurprising. There can be considerable difficulties in deciding whether and when to

and Commission [2005] ECR II-5459, [173]-[174]; Cases C-120-121/06 P *FIAMM v Council and Commission* [2008] ECR I-6513.

[31] Case C–237/98 P *Dorsch Consult* (n 30) [19].

[32] Cases C-120-121/06 P *FIAMM* (n 30) [164]-[176].

[33] Ibid [175]; Case T-79/13 *Accorinti* (n 25) [117]-[122].

grant such compensation.[34] Legislation will often benefit a section of the population at the expense of another. Liability for losses flowing from lawful legislation requires the drawing of a difficult line between cases where the disadvantage was the aim of the legislation, or a necessary effect thereof, and where legislation was passed that incidentally affects a particular firm in a serious manner, but where there is no legislative objection to compensating for the loss suffered. The difficulties of drawing this line are especially marked in the EU, where many lawful policies can have a distributive impact on sections of society.

(f) EU Damages Liability: Assessment

The ECJ took the bare wording of what is now Article 340(2) and fashioned a test for liability that it has refined over the ensuing years. The GC now plays an increasingly important role in its interpretation. The jurisprudence displays a chequered history. The *Schöppenstedt* test as applied in the early years rendered it extremely difficult for any applicant to succeed. The need to prove serious loss and a breach that verged on the arbitrary meant that the EU coffers rarely had to pay out where losses were caused by legislative measures entailing the balancing of economic variables. Applicants were more successful where there was no discretion, provided they could show illegality, causation and resulting damage, but even here many claims failed because the applicant could not prove the requisite causation or damage.

The jurisprudence has, however, become less restrictive since *Bergaderm*. The ECJ emphasized the parity between the tests for Union and state liability and applied the test for serious breach in *Brasserie du Pêcheur/Factortame* to EU liability. The ECJ in *Bergaderm* also made clear that the decisive criterion for application of this test was whether the institution

[34] P Craig, 'Compensation in Public Law' (1980) 96 LQR 413, 450.

exercised discretionary power, and not the form through which this was expressed. These are positive developments.

It remains to be seen whether the Union courts intend to modify their approach in relation to non-discretionary acts. The test for liability hitherto was illegality, causation and damage. The formulation in *Bergaderm* and subsequent cases is subtly different. The Court continues to distinguish between liability for discretionary and non-discretionary acts, but within the framework of the sufficiently serious breach test. Where there is no or considerably reduced discretion, the mere breach of EU law 'may' suffice to establish the sufficiently serious breach. It would be regrettable if this new formulation rendered it more difficult to recover for loss where there is illegality and no discretion.

2. State Liability in Damages: Reasoning and Result

(a) Reasoning and Result: The Symbiotic Connection

The discussion thus far has been concerned with the forces that have shaped damages liability pursuant to Article 340 TFEU, and the symbiotic connection between reasoning and result. The same interconnection is apparent in the jurisprudence on state liability in damages, which is the focus of this section. Indeed, the latitude afforded to the ECJ was even greater in this instance, since the EU Treaties have nothing equivalent to Article 340 TFEU in relation to state liability in damages.

The Court forged the foundations for such liability in *Francovich*.[35] The applicants sued the Italian State because of the government's failure to implement Directive 80/987 on the

[35] Cases C–6/90 and C–9/90 *Francovich and Bonifaci v Italy* [1991] ECR I–5357; D Curtin, 'State Liability under Private Law: A New Remedy for Private Parties' [1992] ILJ 74; R Caranta, 'Judicial Protection Against Member States: A New Jus Commune Takes Shape' (1995) 32 CMLRev 703; M Ross, 'Beyond *Francovich*' (1993) 56

protection of employees in the event of their employer's insolvency. Their employer had become insolvent, but they were unable to recover their wages because Italy had not implemented the Directive. They argued that the State was liable to pay them the sums owed.

The ECJ held that although the Directive lacked sufficient precision to be directly effective, it was nevertheless intended to confer rights on individuals, and stated 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 compensation when their rights are infringed by a breach of Community law for which a Member State can be held responsible'.[36]

It followed that 'the principle of State liability for harm caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty'.[37] Further foundation for this obligation was located in what was Article 10 EC, requiring Member States to take all appropriate measures to ensure fulfilment of their Community obligations, including 'the obligation to nullify the unlawful consequences of a breach of Community law'.[38]

(b) State Liability and EU Liability: Linkage

There are central issues concerning the nature of a cause of action that can easily be forgotten, more especially so when they become part of the accepted pattern of thought. It is, nonetheless, important to be mindful of the choices that were open to the Court when developing the

MLR 55; P Craig, '*Francovich,* Remedies and the Scope of Damages Liability' (1993) 109 LQR 595; J Steiner, 'From Direct Effects to *Francovich*: Shifting Means of Enforcement of Community Law' (1993) 18 ELRev 3.

[36] Cases C–6/90 and C–9/90 *Francovich* (n 35) [33].

[37] Ibid [35].

[38] Ibid [36].

contours of state liability in damages, and the way in which they resolved them. None was more important, politically and normatively, than the relationship between state liability and EU liability in damages.

The Court faced a real choice in *Brasserie du Pêcheur/Factortame*[39] as to whether to distinguish the criteria for state liability and EU liability, or whether to apply the same general legal test in both instances. The answer was not pre-ordained. Advocate General Léger in *Lomas* suggested that the two species of liability should be treated as distinct,[40] whereas Advocate General Tesauro in *Brasserie du Pêcheur/Factortame* argued that they should be linked. He contended that the conditions of EU liability under what was Article 215 EC were too restrictive and should be liberalized. We shall return to this issue below. However, subject to this caveat, he favoured linkage between the criteria for state liability and that for EU liability.[41]

> 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 ─ 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.
>
> 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

[39] Cases C-46 & 48/93 *Brasserie du Pêcheur/Factortame* (n 20).

[40] Case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553, [111], AG Léger.

[41] Cases C-46 & 48/93 *Brasserie du Pêcheur/Factortame* (n 20) [67]-[68], AG Tesauro.

> 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.

The Court followed this approach in *Brasserie du Pêcheur/Factortame*.[42] It held that the conditions for state liability should cohere with the Article 340 TFEU case law,[43] since the protection individuals derived from EU law could not, in the absence of some particular justification, vary depending upon whether a national authority or an EU institution was responsible for the breach.[44]

The liability rules under Article 340(2) took account, said the Court, of the wide discretion possessed by the EU institutions in implementing EU policies. Member States did not always possess such discretion when acting under EU law, but when they did the conditions for damages liability must be the same as those applying to the EU.[45] In the present cases the national legislatures had, said the ECJ, a wide discretion in the relevant areas and were faced

[42] W van Gerven, 'Bridging the Unbridgeable: Community and National Tort Laws after *Francovich* and *Brasserie*' (1996) 45 ICLQ 507; C Harlow, 'The Problem of the Disobedient State' (1996) 2 ELJ 199; N Emiliou, 'State Liability under Community Law: Shedding More Light on the *Francovich* Principle' (1996) 21 ELRev 399; J Convery, 'State Liability in the UK after *Brasserie du Pêcheur*' (1997) 34 CMLRev 603; P Craig, 'Once More unto the Breach: The Community, the State and Damages Liability' (1997) 105 LQR 67; J Steiner, 'The Limits of State Liability for Breach of European Community Law' (1998) 4 EPL 69; T Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down?' (2001) 38 CMLRev 301; M Dougan, 'What is the Point of *Francovich*?', in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Hart, 2004) Ch 14; M Dougan 'The *Francovich* Right to Reparation: Reshaping the Contours of Community Remedial Competence' (2000) 6 EPL 103.

[43] Cases C-46 & 48/93 *Brasserie du Pêcheur/Factortame* (n 20) [42].

[44] Ibid [42].

[45] Ibid [47].

with choices comparable to those made by the Union institutions when the latter adopted legislative measures pursuant to an EU policy.[46]

The Court's approach, following that of the Advocate General, was correct both politically and normatively. In political terms, it would have invited criticism to subject the Member States to damages liability based on criteria that were markedly stricter than those that were applicable to the EU. In normative terms, there was no warrant for doing so. The key issue, as correctly identified by Advocate General Tesauro, was the nature of the EU rule that had been breached, and whether it entailed exercise of discretionary power that required the making of complex choices, not whether the wrong was done by the EU as opposed to the Member States.[47]

(c) Damages and Direct Effect: Disaggregation

A second issue concerning the contours of state liability that was central to the emerging cause of action was the relationship between direct effect and damages. The salient issue in the light of *Francovich* was whether damages liability only existed in relation to provisions of Community law that lacked direct effect. In *Francovich* the ECJ found that the relevant article of the directive was not sufficiently precise for direct effect, but held that the state could, nonetheless, be liable in damages. It was for this reason that some argued that damages liability only existed to close a lacuna in the general system of rights and remedies available to individuals. On this view, if a provision of Community law did have direct effect there would be no need for a damages remedy, since the individual could rely on the right flowing from the

[46] Ibid [48]-[50].

[47] Craig (n 42).

directly effective norm to safeguard his or her position. This was the view taken by the Member States in *Lomas* and in *Brasserie du Pêcheur/Factortame*. [48]

This view was, however, forcefully rejected by Advocate General Léger in *Lomas*. He acknowledged that a damages action could provide a useful remedy in instances where the Community provision lacked direct effect, and that it could furnish an incentive for a Member State to transpose a directive.[49] This did not, said AG Léger, mean that damages liability was inapplicable in relation to provisions of Community law that had direct effect. Direct effect was only a minimum guarantee, which did not necessarily ensure complete protection for an individual relying on Community law. Moreover, if the principle of state liability applied in respect of a right having no direct effect conferred by a directive, it should apply a fortiori in respect of a subjective right conferred by provisions that had direct effect. An individual who brought a damages action on the ground that there had been a breach of a directly effective provision of Community law could, by definition, show that rights were granted for his or her benefit and that their content was identifiable, and thereby satisfied the first two conditions for liability in *Francovich* judgment.[50] An action for damages was therefore a corollary of direct effect.[51]

> My conclusion from this is that an action for damages against a State is not only a remedy for imperfect direct effect. It is not limited to the situation in Francovich. It is a vital component of the judicial protection of individuals relying on Community law, from the moment when the provision or decision occasioning the damage is capable of giving rise to rights on the part of individuals. This is why the *Francovich* judgment made the principle of liability a general principle of Community law. The adverb 'particularly' in paragraph 34 of the judgment tells us that the Court does not exclude such liability in cases other than that of failure to transpose a directive. It is for the Court to mark out the boundaries of this principle of State liability for breach of Community law.

[48] See, e.g., Cases C-46 & 48/93 *Brasserie du Pêcheur/Factortame* (n 20) [18].

[49] Case C-5/94 *Lomas* (n 40) [75]-[84], AG Léger.

[50] Ibid [85]-[93].

[51] Ibid [94].

This conclusion was echoed by Advocate General Tesauro in *Brasserie du Pêcheur/Factortame*, who held that 'in so far as they relate to 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.'[52] The ECJ followed the advice from the Advocates General and unequivocally rejected the argument that damages liability was only applicable to instances where the Community provision lacked direct effect. It held that the right of individuals to rely on directly effective provisions of Community law before national courts constituted only a minimum form of protection:[53] direct effect could not necessarily ensure that individuals would not suffer damage as a result of a breach of Community law which was attributable to a Member State. The right to reparation was seen as a corollary of direct effect.[54]

(d) Ascription of State Liability: Unitary Conception of the State

It is axiomatic that development of state liability for damages requires some conception of what is to constitute the state for these purposes. This had been left open in *Francovich*, but the issue was addressed in *Brasserie du Pêcheur/Factortame* where the ECJ adopted a unitary conception of the state: liability could be imposed irrespective of which organ of the state was responsible for the breach, the legislature, the executive or the judiciary.[55] The rationale for this was that all state authorities were bound, when performing their tasks, to comply with the rules laid down by Community law which governed the situation of individuals.[56] This

[52] Cases C-46 & 48/93 *Brasserie du Pêcheur/Factortame* (n 20) [57], AG Tesauro.

[53] Cases C-46 & 48/93 *Brasserie du Pêcheur/Factortame* (n 20) 20.

[54] Ibid [22].

[55] Ibid [32].

[56] Ibid [34].

conceptual approach to the meaning of the 'state' for the purposes of state liability in damages made eminent good sense.

From the Community's perspective there was nothing to be gained by attempting to discern the particular organ of the state that was responsible for the breach. This would enmesh the Court in endless wrangles as to the division of responsibility within a particular state for the action that caused the loss. The resolution of such issues would, in turn, have left the Court open to claims that it was intruding on terrain that was beyond its competence, by delineating the boundaries of responsibility within a state for the loss that was caused. It sufficed from the ECJ's perspective to affirm that the state was liable for acts of all organs, legislative, executive and judicial, while leaving the more particular consequences of liability as between these organs to be determined by the state itself. However, the affirmation that state liability could attach to all organs of the state generated interesting conceptual issues.

This was evident in relation to legislative liability in *Brasserie du Pêcheur/Factortame*, since in the former case the damage suffered by the applicants was caused by the failure of the German legislature to amend a law that was contrary to EC law, while in the latter case it was caused by the passage of a UK statute that was inconsistent with Community law. It was clear from the references in both cases that the national courts were prevented by their national law from awarding damages in such instances. The ECJ nonetheless held that the state could be liable in damages.[57] It was influenced in this respect by Advocate General Tesauro, who advanced a series of arguments as to why this national limit on legislative liability should not preclude state liability in damages for breach of Community law. He drew, inter alia, on international law, which also adopts a unitary conception of state liability, in the sense of not differentiating between instances where the infringement is the result of a legislative as

[57] Ibid [34]-[36].

opposed to an executive act.[58] He also advanced a contractarian rationale:[59] Member States acceded to the EC by an international agreement, which sought to foster integration; the supremacy of Community law and direct effect were part of this overall scheme; individuals were part of the Community legal order, with rights of their own; it followed, said Tesauro AG, that liability for legislative acts that were in breach of obligations which the states had themselves contractually agreed to was perfectly consistent with the Community legal order.[60]

There were also interesting conceptual issues concerning the meaning of the executive for the purposes of state liability. While Member States might more readily accept the principle of liability for executive as opposed to legislative acts, this still left for resolution the meaning of the executive. The issue is not problematic in relation to traditional governmental departments, or public agencies that are clearly part of governmental machinery. It can arise more acutely in relation to other bodies, such as privatised utilities, which continue to enjoy some form of special monopoly status, de jure or de facto, or institutions to which a government department chooses to contract out the performance of statutory powers or duties. However, the Court not only adopted a unitary conception of the state, but also reserved for Community law the ultimate determination as to whether a particular institution could be regarded as part of the state for the purposes of damages liability. Thus, it would not be open to a Member State to deny liability in damages by arguing that a particular institution was not regarded as part of the executive as a matter of national law. The ECJ had to tackle this problem in other contexts, most notably in relation to the distinction between vertical and horizontal direct effect of directives. It took a broad view of the state for these purposes. The salient issue is not whether the ECJ takes precisely the same definition of the executive for the purposes of state liability

[58] Ibid [38], AG Tesauro.

[59] Ibid [39], AG Tesauro.

[60] Ibid [41], AG Tesauro.

in damages. It is rather that the Court will make the ultimate decision on this issue, rather than leave the determination to the national law of a particular Member State. This is in part to ensure equality in the meaning of the 'executive' across the Member State, and in part to prevent a Member State from seeking to evade liability by playing fast and loose with a narrow definition of the executive.

The issues pertaining to liability for judicial organs of the state were different yet again. The ECJ made it clear that state liability can apply in principle even when the relevant breach of Community law is attributable to action by the judiciary.[61] This might have been a surprise, perhaps even as a shock, to those accustomed to judicial immunity from such liability. The rationale for the inclusion of the judiciary was not, however, hard to divine. In doctrinal terms, national courts are amongst those subject to the obligation in what is now Article 4(3) TEU, which requires that Member States shall take all appropriate measures to ensure the fulfilment of Treaty obligations. In pragmatic terms, the affirmation that national courts could lead to state liability in damages provided an important check on their actions: if they refused to apply Community law, or gave an unduly restrictive interpretation, then such action could literally have a price in terms of the possibility of a consequential suit in damages brought by an individual against the state. There was, nonetheless, the lingering feeling that when the ECJ was really faced with the issue it would pull back, re-evaluate its prior case law and find some justification for excluding judicial action from the remit of state liability. The issue finally arose in *Köbler*[62] and the ECJ did not pull back from the brink, notwithstanding interventions from national governments warning of the dire consequences of such liability. The Court reaffirmed that liability could attach for the acts of the judiciary, albeit making clear that liability would

[61] Ibid [34].

[62] Case C-224/01 *Köbler v Austria* [2003] ECR I-10239.

attach only in the exceptional case where the national court had manifestly infringed EU law.[63] It held, moreover, in *Traghetti del Mediterraneo*[64] that while national law could define the criteria relating to the type of infringement that would lead to state liability for breach of EU law attributable to a national court of last resort, such criteria could not impose requirements stricter than that of a manifest infringement of the applicable law, as set out in *Köbler*.

(e) Conditions for State Liability: Sharpening the Criteria

The ECJ in *Francovich* gave relatively little guidance as to the specific conditions for liability. It held that they could vary depending on the nature of the breach of Community law. In relation to non-implementation of a directive, the result prescribed by the directive should entail the grant of rights to individuals; it should be possible to identify the content of those rights from the directive; and there should be a causal link between the breach of the State's obligation and the harm suffered by the injured parties. It was then for national law to determine the detailed procedural rules for such legal proceedings, subject to the caveat that such rules should not be less favourable than those relating to similar internal claims and should not be so framed as to make it virtually impossible or excessively difficult to obtain compensation.

The conditions for state liability were elaborated in greater detail and with more sophistication in *Brasserie du Pêcheur/Factortame*. It will be remembered that in *Brasserie du Pêcheur* a French company sued the German government for losses resulting from not being able to sell beer into Germany, this prohibition being contrary to EU law on free movement of

[63] Ibid [52]-[55]; G Anagnostaras, 'Erroneous Judgments and the Prospect of Damages' (2006) 31 ELRev 735; B Beutler, 'State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?' (2009) 46 CMLRev 77.

[64] Case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica italiana* [2006] ECR I-5177. See also, Case C-379/10 *Commission v Italy*, EU:C:2011:775; Case C-168/15 *Tomášová v Slovenská republika*, EU:C:2016:602.

goods. In *Factortame* the applicants sued the UK for losses suffered by being unable to fish in certain areas because of the Merchant Shipping Act 1988, which was contrary to EU law on freedom of establishment. The ECJ clarified the nature and extent of state liability,[65] and held that it was dependent on three conditions.[66]

First, the rule of law infringed must have been intended to confer rights on individuals. This was held to be satisfied in the instant cases since what are now Articles 34 and 49 TFEU were intended to confer rights on individuals.[67] Whether the Treaty article, regulation, directive or decision was intended to confer rights was determined by construction of the relevant provision.[68]

Secondly, the breach of this rule of law must have been sufficiently serious. The decisive test for deciding whether the breach was sufficiently serious, as regards both EU liability under Article 340(2) and state liability in damages, was whether the EU or the Member State had manifestly and gravely disregarded the limits of its discretion.[69] The following factors should be taken into account:[70] the clarity and precision of the rule breached; the measure of discretion left by the rule to the national or EU authorities; whether the breach and consequential damage were intentional or voluntary; whether any error of law was excusable or inexcusable; whether the position adopted by an EU institution contributed to the act or omission causing loss committed by the national authorities; and whether on the facts the

[65] Ibid [22].

[66] Ibid [51].

[67] Ibid [54].

[68] See, e.g., Case C-222/02 *Peter Paul, Sonnen-Lutte and Christel Morkens v Bundesrepublik Deutschland* [2004] ECR I-9425.

[69]Cases C-46 & 48/93 *Brasserie du Pêcheur/Factortame* (n 20) [55].

[70] Ibid [56].

national measures had been adopted or retained contrary to EU law. A breach of EU law would be sufficiently serious if the state persisted in its behaviour notwithstanding an ECJ judgment finding an infringement. It would be equally so where there was settled ECJ case law making it clear that the Member State action was in breach of EU law.[71] There was, moreover, no requirement to prove fault over and beyond the finding of a serious breach.[72]

Thirdly, there must be a direct causal link between the breach of the obligation imposed on the state and the damage sustained by the injured parties.[73] It was for national courts to determine whether the causal link had been established.[74] The damages should be commensurate with the loss or damage suffered.[75] In the absence of EU rules, it was for the Member States to establish the criteria for determining the extent of the reparation, subject to the criteria of equivalence and effectiveness.[76] The ECJ, nonetheless, gave legal guidance on specific issues concerning damages, such as mitigation;[77] the type of recoverable loss;[78] the availability of exemplary damages;[79] and the date from which the obligation to make reparation began to run.[80]

The judgment in *Brasserie du Pêcheur/Factortame* brought welcome clarification and sophistication to the criteria for state liability. This is more especially so in relation to the

[71] Cases C-46 & 48/93 *Brasserie du Pêcheur/Factortame* (n 20) [57].

[72] Ibid [78]-[79]; Case C-429/09 *Fuss v Stadt Halle* [2010] ECR I-12167, [65]-[70].

[73] F Smith and L Woods, 'Causation in *Francovich*: The Neglected Problem' (1997) 46 ICLQ 925.

[74] Cases C-46 & 48/93 *Brasserie du Pêcheur/Factortame* (n 20) [65].

[75] Ibid [82].

[76] Ibid [83].

[77] Ibid [85].

[78] Ibid [86]-[87].

[79] Ibid [89].

[80] Ibid [94].

second part of the test, the determination of serious breach. It is very much the 'engine room' of the law relating to state liability. The factors specified in determining the existence of a serious breach are the very considerations that we should be cognizant of in this regard.

The existence of discretion is central to this determination. Where there is meaningful discretion the existence of a serious breach will be determined by the preceding factors. Where there is no meaningful discretion an infringement of EU law may suffice to establish a serious breach for the purposes of damages liability.[81] It is, moreover, the discretion that is relevant, rather than the body that exercises it. Whether the contested measure is, in formal terms, legislative, executive, administrative or judicial is not determinative, as affirmed in *Bergaderm*.[82] This is surely right in principle. The very classification of legislative, administrative or executive action is beset with difficulty. It can be entirely fortuitous whether a state operates through one medium or another, and exercise of executive or administrative discretionary power can be just as complex as discretionary choice made by the legislature.

The possibility of interpretive doubt is equally significant in the Court's specification of factors that are relevant to determination of serious breach. It finds expression in the reference to the 'clarity and precision of the rule breached' and whether the 'error of law was excusable or inexcusable'. This captures the idea interpretive judgment. EU norms may be cast in general terms and it may therefore be debatable whether they apply to a particular situation.[83] There can also be interpretive difficulties when the contested norm is more detailed. The

[81] Case C-5/94 *Lomas* (n 40) [28]; Case C-127/95 *Norbrook Laboratories Ltd v Ministry of Agriculture Fisheries and Food* [1998] ECR I-1531, [109]; Case C-424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, [38].

[82] Case C-352/98 P *Bergaderm* (n 6) [40]-[46].

[83] Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* [2007] ECR I-2107, [121]; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, [215].

meaning of particular provisions of a regulation or a directive may be unclear, and open to a spectrum of reasonable interpretations. These interpretive difficulties can beset the EU authorities, as recognized in *Bergaderm* where the ECJ spoke of the Article 340 test reflecting 'difficulties in the application or interpretation of the texts.'[84] They can also beset the Member States, as exemplified by *British Telecom* and *Brinkmann*.[85] Interpretive judgment may involve the weighing of complex variables in order to decide which interpretation best effectuates the relevant provision. The exercise of legislative or executive discretionary power will, moreover, often be affected, explicitly or implicitly, by interpretive judgments as to the meaning of the variables that have to be balanced.

(f) Interpretation and Application: The Malleable Divide

A key difference between EU liability under Article 340 TFEU and state liability in damages is that while the former is adjudicated solely by the CJEU, the latter is bifurcated between the national court that makes the reference pursuant to Article 267 TFEU and the CJEU that hears the preliminary reference. This in turn brings into play the traditional division of function between the CJEU and national courts under Article 267 TFEU, which is that the former interprets EU law, and the latter applies that interpretation to the facts of the case.

The malleability of this divide was, nonetheless, apparent when the ECJ stated in *Brasserie du Pêcheur/Factortame* that it would be helpful for the national courts if it, the ECJ, indicated a number of circumstances which the national courts should consider.[86] This

[84] Case C-352/98 P *Bergaderm* (n 6) [40].

[85] Case C-392/93 *R. v HM Treasury, ex p. British Telecommunications plc* [1996] ECR I-1631; Case C-319/96 *Brinkmann Tabakfabriken GmbH v Skatteministeriet* [1998] ECR I-5255.

[86] Cases C-46 & 48/93 *Brasserie du Pêcheur* (n 20) [58]; Cases C-501-506, 540-541/12 *Specht v Land Berlin and Bundesrepublik Deutschland*, EU:C:2014:2005, [100]-[105]; Case C-383/13 *X*, EU:C:2014:2133, [44]-[47].

'guidance' effectively resolved crucial issues in the two cases. Thus, in *Brasserie du Pêcheur* the ECJ held that the breach of EU law could not be excusable, since prior case law made it clear that the German laws on beer purity were incompatible with Article 34 TFEU. In *Factortame* the ECJ stated that the nationality condition under the Merchant Shipping Act 1988 was directly discriminatory and manifestly contrary to EU law, and that the conditions concerning residence and domicile for vessel owners, were also prima facie contrary to Article 49 TFEU.

The reality is that while the CJEU continues to acknowledge that application of the *Brasserie du Pêcheur/Factortame* criteria is for the national court, it has, in many cases, effectively resolved the liability issue by deciding whether there has been a serious breach, and has also on occasion decided issues of causation rather than leaving them to national courts.[87] The ECJ has thereby retained control over development of the cause of action, stating that it will determine the seriousness of the breach for itself where it has all the necessary information to do so. This is exemplified by *British Telecom*,[88] where the Court held that the mistaken interpretation of an Article in a Directive did not constitute a serious breach, given that it was imprecisely worded and was reasonably capable of bearing the meaning given to it by the UK and other governments and there was no guidance from past rulings of the Court or the Commission.[89] The retention of the power to decide whether there has been a serious breach has also led the Court to conclude that there was such a breach. Thus, in *Dillenkofer*[90] Germany had failed to implement Directive 90/314 on package holidays. The ECJ ruled that *Francovich*

[87] Case C-319/96 *Brinkmann* (n 85); Case C-140/97 *Rechberger v Austria* [1999] ECR I-3499.

[88] Case C-392/93 *British Telecommunications plc* (n 85).

[89] Ibid [43]-[45]. See also, Cases C–283, 291, & 292/94 *Denkavit International v Bundesamt für Finanzen* [1996] ECR I–5063; Case C-319/96 *Brinkmann* (n 85) [30]-[32]; Case C-224/01 *Köbler* (n 62) [101]-[102].

[90] Cases C–178–179, 188–190/94 *Dillenkofer v Federal Republic of Germany* [1996] ECR I–4845.

established that non-transposition of a directive within the required time constituted per se a sufficiently serious breach.[91] The ECJ reached the same result in *Rechberger*,[92] even though in this instance the case concerned incorrect transposition of Directive 90/314.

There are, by way of contrast, cases where the ECJ chooses to leave resolution of the serious breach test to the national courts. It will tend to do so where there is no obvious answer as to whether there has been such a breach in the light of the factors laid down in *Brasserie du Pêcheur/Factortame.* Thus in *Evans*,[93] the applicant argued that the UK had defectively implemented Directive 84/5 concerning compulsory civil liability in respect of motor vehicles and more specifically the provisions concerning damage caused by unidentified vehicles. The ECJ held that it was for the national court to determine in the light of the *Brasserie du Pêcheur* criteria whether there had been defective implementation and if so whether this was sufficiently serious for the purposes of damages liability.

(g) State Liability: An Assessment

The ECJ has been at its most creative in this area, reasoning in a teleological manner when it created the principle in *Francovich* and when it defined it further in *Brasserie du Pêcheur/Factortame*. There are unsurprisingly differences of view as to the cogency of the

[91] Ibid [21]–[27].

[92] Case C-140/97 *Rechberger* (n 87) [51]-[53]. See also, Case C–5/94 *Hedley Lomas* (n 40); Case C-470/03 *A.G.M.-COS.MET Srl v Suomen valtio and Tarmo Lehtinen* [2007] ECR I-2749; Case C-452/06 *R, ex parte Synthon BV v Licensing Authority of the Department of Health* [2008] ECR I-7681.

[93] Case C-63/01 *Evans v Secretary of State for the Environment, Transport and the Regions and the Motor Insurers' Bureau* [2003] ECR I-14447, [84]-[88]; Case C-127/95 *Norbrook Laboratories Ltd v Ministry of Agriculture Fisheries and Food* [1998] ECR I-1531, [105]-[112]; Case 278/05 *Robins and Others v Secretary of State for Work and Pensions* [2007] ECR I-1053, [69]-[77].

reasoning in *Francovich* and the desirability of the result. The reasoning in *Francovich* was teleological and based on broad principles, but this is commonly so for novel case law. The principles that informed the judgment were foundational. The need for effective remedies to safeguard EU rights is reflective of the principle *ubi ius, ibi remedium*, which is found in many national legal systems. The duty incumbent on Member States to take all appropriate measures to ensure fulfilment of their Union obligations is especially salient in a polity such as the EU, but resonates with analogous obligations in federal or confederal systems.

The test for liability, distinguishing as it does between discretionary and non-discretionary acts, is soundly based. The ECJ has refined the test in subsequent case law on state liability. It has, moreover, proved adept at retaining control of the case when it wished to do so, in order that it could make the all-important judgment as to whether there had been a serious breach. There will be instances where commentators disagree with the way in which the test was applied in a particular case. That is inevitable.

Any assessment of *Francovich* and its progeny should also take account of the insistence on parity between Member State and EU liability. The ECJ properly resisted the calls of some when *Brasserie du Pêcheur/Factortame* was litigated that Member State liability should be more extensive than that of the Union. These calls were unwarranted in normative terms and unwise in terms of practical politics, for the reasons given above. The reality has been that the cause of action for state liability has developed in a symbiotic manner with that for Union liability. In *Brasserie du Pêcheur/Factortame* the ECJ made the important policy choice that the conditions for EU and state liability should be parallel, and therefore drew on the jurisprudence on EU liability when devising the criteria for state liability. In *Bergaderm* the converse occurred, with the ECJ importing the more sophisticated test for serious breach developed for state liability and applying it to the EU's liability under Article 340(2). There are, nonetheless, differences between the two causes of action, which stem primarily from the

fact that EU liability will be directly resolved by the Union courts under Article 340(2). The application of the principles of state liability will, by way of contrast, be left to national courts. It should, moreover, be recognized that there will inevitably be a degree of diversity, precisely because the CJEU has made it clear that the test for state liability is a minimum, and does not prevent a Member State from imposing on its state authorities more far-reaching rules of liability if it chooses to do so.[94]

4. Conclusion

In many national legal systems non-contractual liability is the result of developments that span hundreds of years. The doctrine is the result of a plethora of factors that include normative conceptions of responsibility and legislative input. It is relatively rare to be able to observe the development of an analogous body of law in an emergent legal order over a short time span, more especially where the judicial latitude to frame the doctrine is broad. It is then interesting and instructive in equal measure to stand back from the resulting body of law and discern the key features that have shaped the doctrine over time. The normative choices that frame the resulting law are, as this chapter has shown, especially significant.

[94] Cases C-46 & 48/93 *Brasserie du Pêcheur/Factortame* (n 20) [66]; Case C-224/01 *Köbler* (n 62) [57].