OPINION OF ADVOCATE GENERAL LÉGER

delivered on 20 June 1995 *

Summary

* Original language: French.

Facts and procedure

1. Does the existence of a harmonizing directive allow a Member State to rely on Article 36 of the EC Treaty in order to justify measures restricting exports? Does a Member State which refuses to grant an export licence, in circumstances contrary to Article 34 of the EC Treaty, incur liability? What are the conditions governing such an action for compensation?

2. These are the main questions which have been submitted by the High Court in a case having the following factual and legal background.

3. Council Directive 74/577/EEC of 18 November 1974 on stunning animals before slaughter, [1] which is based on Articles 43 and 100 of the EEC Treaty, is intended to remove the disparities between Member States' legislation in the field of animal protection and provides that: 'For the slaughter of animals belonging to the following species: bovine animals, swine, sheep, goats and solipeds, Member States shall ensure that suitable measures are taken to induce death as rapidly as possible after stunning, in accordance with appropriate procedures.' [2] The directive does not harmonize the procedures for monitoring compliance with its provisions.

4. The Kingdom of Spain was required to comply with Directive 74/577 from 1 January 1986, the date of its accession to the Community.

5. The directive was transposed in Spain by way of the Royal Decree of 18 December 1987, [3] which reproduces, *inter alia*, the provisions of Article 1 of the directive. The Decree does not provide for any penalties in the event of failure to comply with its provisions.

6. Since it took the view that live animals exported to Spain were suffering, in that State's slaughterhouses, treatment contrary to the directive, the United Kingdom Ministry of Agriculture, Fisheries and Food systematically refused to issue licences for exports of live animals for slaughter to Spain from April 1990 to 1 January 1993.

7. It was for this reason that an application made on 7 October 1992 by Hedley Lomas (Ireland) Ltd ('Hedley Lomas') for a licence to export live sheep to a Spanish slaughterhouse was turned down.

1 — OJ 1974 L 316, p. 10.
2 — Article 1.
3 — *Boletin Oficial del Estado* No 312 of 30 December 1987.

8. Since it takes the view that the slaughterhouse in question, which had been approved since 1986, complied with the Community directives and that the United Kingdom authorities had no evidence to the contrary, Hedley Lomas has applied to the High Court for judicial review of the implied decision of refusal. It also seeks damages.

9. While it does not deny that the refusal to grant a licence amounted to a quantitative restriction on exports, the United Kingdom Ministry relies on Article 36 of the Treaty.

10. The High Court has referred the following questions to the Court for a preliminary ruling:

'(1) Does the existence of a harmonizing directive (Directive 74/577/EEC), which does not contain any sanctions or procedures for non-compliance, prevent a Member State (Member State A) from relying on Article 36 of the EEC Treaty to justify measures restrictive of exports in circumstances where an interest specified in that article is threatened by the failure of another Member State (Member State B), as a matter of fact, to secure the results required by the directive?

If the answer to Question 1 is in the negative,

(2) In the circumstances described in Question 1, does Article 36 entitle Member State A to prohibit the export of live sheep to Member State B for slaughter

(i) generally; or

(ii) in a case where the stated destination of the sheep is a slaughterhouse in Member State B in respect of which Member State A does not have evidence that the provisions of the directive are not complied with?

If the answer to Question 1 is in the affirmative, or if the answer to Question 2 is in the negative, and in the circumstances of this case,

(3) Is Member State A liable as a matter of Community law to compensate a trader in damages for any loss caused to the trader by the failure to grant an export

licence in breach of Article 34 and, if so, under what conditions does such liability arise and how is such compensation to be calculated?'

Question 1

11. Two issues will be addressed in turn. First: can a Member State rely on Article 36 of the Treaty where a harmonizing directive is silent about procedures for *monitoring* the measures which it introduces? (I). Second: with regard to a harmonizing directive protecting an interest covered by Article 36 of the Treaty (protection of the health and life of animals), can a Member State rely on Article 36 in order to restrict exports to a Member State which fails to comply within its territory with the requirements of the directive? (II).

I — *Can a Member State rely on Article 36 of the Treaty where a harmonizing directive is silent on the matter of procedures for monitoring the measures which it introduces?*

12. It is common ground that the refusal by the United Kingdom authorities to issue export licences is a measure having an effect equivalent to a quantitative restriction on exports.

13. Is the United Kingdom entitled to rely on Article 36 of the Treaty to justify such a measure even though a harmonizing directive based on Article 100 of the Treaty regulates the matter?

14. Once a harmonizing directive has been adopted, Member States can no longer impose requirements other than those provided for by the directive, on condition that the harmonization introduced is *complete*.

15. If harmonization is only partial or if the directive confers on Member States national powers to apply it or introduce measures of control, Articles 36 and 100 of the Treaty can apply at the same time.

16. Thus, as the Court ruled in its judgment in *Van Bennekom*: [4]

'It is only when Community directives, in pursuance of Article 100 of the Treaty, make

4 — Case 227/82 *Van Bennekom* [1983] ECR 3883.

provision for the *full harmonization* of all the measures needed to ensure the protection of human and animal life and institute Community procedures to monitor compliance therewith that recourse to Article 36 ceases to be justified. It is, however, not in dispute that such is not the case with the directives dealing with pharmaceutical products. It is therefore necessary to consider whether measures which restrict the marketing of vitamins may be justified by Article 36 of the Treaty.' [5]

17. It follows that in so far as there has not been full harmonization in the area of protection of animals regarding their export to other Member States, it is for Member States to adopt the necessary measures of control within the context of Article 36 of the Treaty.

18. That is precisely the case with regard to Directive 74/577 here before the Court.

19. Under Article 1, '... Member States *shall ensure* that ... measures are taken ...'. Article 2 provides that: 'The competent authority in accordance with national legislation *shall ensure* that stunning is performed by means of equipment approved ...'. Finally, Article 5 provides that: 'The Member States shall ... bring into force the laws, regulations and administrative provisions necessary to comply with this Directive ...'.

20. The directive does not therefore set out Community procedures to monitor compliance with it. It does not establish an appropriate framework within which such controls might be carried out, unlike, for example, Directive 73/173/EEC [6] dealt with in the judgment in *Ratti*, [7] or Directive 74/63/EEC [8] addressed by the Court in its judgment in *Tedeschi* v *Denkavit*. [9]

21. Member States were thus required, under the directive, to adopt the measures necessary to ensure compliance within their territory with the obligation to stun animals before slaughter, to carry out controls in the slaughterhouses covered by the directive, and to take all appropriate measures, such as making slaughterhouses subject to an approval procedure.

5 — Paragraph 35, emphasis added. See also paragraph 35 of the judgment in Case 5/77 *Tedeschi* v *Denkavit* [1977] ECR 1555, paragraph 13 of the judgment in Case 73/84 *Denkavit Futtermittel* v *Land Nordrhein-Westfalen* [1985] ECR 1013, paragraph 19 of the judgment in Case C-39/90 *Denkavit Futtermittel* v *Land Baden-Württemberg* [1991] ECR I-3069, and paragraph 25 of the judgment in Case C-17/93 *Van der Veldt* [1994] ECR I-3537. See also paragraph 35 of the judgment in Case C-323/93 *Société Civile Agricole du Centre d'Insémination de la Crespelle* v *Coopérative d'Élevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECR I-5077.

6 — Council Directive 73/173/EEC of 4 June 1973 on the approximation of Member States' laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous preparations (solvents) (OJ 1973 L 189, p. 7).

7 — Judgment in Case 148/78 *Pubblico Ministero* v *Ratti* [1979] ECR 1629.

8 — Council Directive 74/63/EEC of 17 December 1973 on the fixing of maximum permitted levels for undesirable substances and products in feeding-stuffs (OJ 1974 L 38, p. 31).

9 — Cited above in footnote 5.

II — *Can a Member State rely on Article 36 of the Treaty in order to restrict exports to a Member State which fails to comply within its territory with the requirements of the directive?*

22. Is a Member State entitled to rely on Article 36 in order to adopt measures for protecting animals against possible breaches of the Treaty *within the territory of other Member States*? Can Article 36 be the subject of *extraterritorial* application?

23. It is clear that in this case the United Kingdom is relying on Article 36 — and thus inhibiting the free movement of the animals in question — not in order to protect those animals against maltreatment in its own territory, to improve their protection there or to take account of a situation particular to its national territory. The United Kingdom is here taking into account *the Community interest* and is drawing the consequences of an alleged breach of the directive's provisions by another Member State. Is the United Kingdom entitled to rely on Article 36?

24. It should first of all be noted that *it has not been established* that the Kingdom of Spain is in breach of its obligations under the directive. In any event, no such breach has been demonstrated by the United Kingdom. The issue of a breach was discussed both by the applicant in the main proceedings [10] and by the Commission, [11] which, moreover, did not consider it appropriate to institute Treaty-infringement proceedings against the Kingdom of Spain.

25. This ought, in my opinion, to be sufficient for the Court to hold that the United Kingdom is not entitled to rely on Article 36 in such circumstances.

26. Second, the fundamental principles of Community law preclude such an application of Article 36 of the Treaty.

27. Nothing is more alien to Community law than the idea of a measure of retaliation or *reciprocity* proper to classical public international law. A Member State paralyses the free movement of goods on the ground that the higher interest of the protection of animals has allegedly been violated in another Member State. In other words, the first Member State reacts to an alleged breach of the Treaty (animals are allegedly not protected in Spain) by a separate breach of the Treaty (sheep originating in the United Kingdom are no longer exported to Spain). '... [E]xcept where otherwise expressly provided, the basic concept of the Treaty requires that the Member States shall not take the law into their own hands.' [12]

10 — Point 29 of its observations, *in fine*.

11 — Point 7.6 of its observations.

12 — Judgment in Joined Cases 90/63 and 91/63 *Commission* v *Luxembourg and Belgium* [1964] ECR 625, at 631.

Community law does not allow reliance to be placed on the principle of reciprocity for ensuring compliance with Treaty obligations. A Member State cannot take unilateral action against defaults by other Member States. The Treaty of Rome created an original legal order *in which the procedures necessary for establishing and penalizing a breach of its provisions are strictly regulated.* It is through proceedings for a declaration that a Member State has failed to fulfil its obligations under the Treaty, whether instituted by another Member State or by the Commission, that an infringement of Community law can be established. The case-law of the Court has been consistent on this point:

'... a Member State cannot, in any circumstances, plead the principle of reciprocity and rely on a possible infringement of the Treaty by another Member State in order to justify its own default. ...' [13]

28. Let me quote the even clearer formula used by the Court in its judgment in Case 232/78 *Commission* v *France*: [14]

'A Member State cannot under any circumstances unilaterally adopt, on its own authority, corrective measures or measures to protect trade designed to prevent any failure on the part of another Member State to comply with the rules laid down by the Treaty.'

29. The Court has also held that

'... any delays there may have been on the part of other Member States in performing obligations imposed by a directive may not be invoked by a Member State in order to justify its own, even temporary, failure to perform its obligations.' [15]

30. The onus was thus on the United Kingdom either to bring an action under Article 170 of the EC Treaty or to submit a complaint to the Commission in order for that institution, as guardian of the Treaties, to try to have the breach brought to an end and, if necessary, consider whether to institute infringement proceedings. The United Kingdom would then have been able, in infringement proceedings brought against Spain, to obtain authorization under Article 186 of the EC Treaty to suspend temporarily the issue of licences for the export of live animals to Spain. [16]

13 — Judgment in Case 325/82 *Commission* v *Germany* [1984] ECR 777, paragraph 11.

14 — Judgment in Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 9.

15 — Judgment in Case 52/75 *Commission* v *Italy* [1976] ECR 277, paragraph 11. See also the judgment in Case C-38/89 *Blanguernon* [1990] ECR I-83.

16 — It would appear that proceedings under Article 170 of the EC Treaty for failure to fulfil Treaty obligations are the only means available to a Member State to get round a refusal by the Commission to institute proceedings under Article 169 of the EC Treaty; the Commission's discretionary power in this matter and the objection of parallel proceedings do not allow a Member State to bring proceedings against the Commission for failure to act.

31. Third, a Member State can rely on Article 36 only in order to ensure protection of an interest safeguarded by that article *within its own national territory.*

32. Advocate General Trabucchi emphasized this point as follows in his Opinion in *Dassonville*: [17] '... States can derogate in the said manner [under Article 36] only for the purpose of the protection of their own interests and not for the protection of the interests of other States ... Article 36 allows every State the right to protect exclusively its own national interests. Consequently, for the purpose of protecting industrial and commercial property, each State can restrict the freedom of movement of goods only with reference to the protection of individual rights and economic interests falling under its own sphere of interest.'

33. The reasons for so restricting the application of Article 36 are these:

(1) The principle, referred to by the Court at paragraph 20 of its judgment in *Richardt*, [18] that Article 36 is to be interpreted strictly:

> 'The Court has stated on several occasions (see the judgment in *Campus Oil*, cited above, paragraph 37, concerning restrictions on imports) that Article 36, as an exception to a fundamental principle of the Treaty, must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure. Measures adopted on the basis of Article 36 can therefore be justified only if they are such as to serve the interest which that article protects *and if they do not restrict intra-Community trade more than is absolutely necessary.*' [19]

(2) The principle of mutual confidence, which governs relations between Member States when they give effect to a Community directive in their national law, prohibits any one of them from adopting unilaterally a measure, based on Article 36, for protecting animals within the territory of another Member State. [20]

(3) Only the Member State within whose territory the protective measure must be

17 — Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, at 860. See also his Opinion in Joined Cases 3/76, 4/76 and 6/76 *Kramer and Others* [1976] ECR 1279, at 1328.

18 — Judgment in Case C-367/89 *Richardt and Les Accessoires Scientifiques* [1991] ECR I-4621, emphasis added.

19 — See also the judgment in Case 46/76 *Bauhuis* v *Netherlands* [1977] ECR 5, paragraph 12.

20 — See, to this effect, the Opinion of Advocate General Van Gerven in Case C-169/89 *Van den Burg* [1990] ECR I-2143, at point 7.

adopted is in a position to ensure that the measure is strictly necessary and to check that it is being complied with.

(4) The Court's case-law cited in support of extraterritorial application of Article 36 lends no support to the view that Article 36 may be relied on by a Member State in order to ensure protection, in another Member State, of an interest covered by that article.

34. When the Grand Duchy of Luxembourg had recourse to Article 36 to justify a measure restricting transit of goods classified as strategic material (special authorization sanctioned by confiscation of the material), it was seeking to ensure protection of public security *within its own territory*, even though the goods, which came from France and were destined for the Soviet Union, were merely passing in transit through its territory. [21]

35. In its judgment in *Bauhuis*, [22] the Court held that health inspections carried out in exporting countries on live animals destined for export were compatible with Article 36 of the Treaty in so far as those inspections *replaced* those carried out by the importing State on the crossing of the frontier. [23] The inspections carried out in the interest of the importing State were simply shifted to the State of exportation.

36. Likewise, the Court has held that plant-health inspections of exports, provided for by an international agreement for promoting free importation of plants into the country of destination through the introduction of a system of inspections carried out in the State of dispatch, which are mutually recognized and organized on identical bases, do not amount to unilateral measures in restraint of trade. On the contrary, such inspections make it possible to remove obstacles to the free movement of goods which may result from import inspections covered by Article 36 of the Treaty. [24]

37. Nor is any justification for an extraterritorial application of Article 36 of the Treaty to be found in the judgment in *Van den Burg*. [25] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [26] does not allow Member States to adopt stricter measures than those for which it provides, except with regard to species occurring within their territory. The Court held that a prohibition on importation and marketing based on Article 36 cannot be justified with regard to a species of bird which

21 — See judgment in *Richardt and Les Accessoires Scientifiques*, cited above.

22 — Cited above in footnote 19.

23 — Paragraph 46 of the judgment.

24 — Judgment in Case 89/76 *Commission* v *Netherlands* [1977] ECR 1355.

25 — Cited above in footnote 20.

26 — OJ 1979 L 103, p. 1.

does not occur in the territory of the legislating Member State but is found in another Member State, where it may lawfully be hunted under the terms of the directive and under the legislation of that other Member State, and which is neither migratory nor endangered within the meaning of the directive.

38. Finally, the United Kingdom relies, unconvincingly, on the judgment in *Campus Oil*, [27] which deals with a case in which Article 36 of the Treaty is relied on by a Member State even though existing Community rules provide for the measures necessary to guarantee protection of the interests specified in that article. The Court accepted that, even if there were existing Community rules, a Member State was entitled to rely on Article 36 in order to adopt appropriate additional measures *at national level* where public security and minimum supply of petroleum products to that State were in issue.

39. In the present case, as has already been seen, harmonization is incomplete and monitoring of the proper application of the directive must be effected by way of a procedure adopted at national level.

40. Only in the alternative, therefore, shall I discuss Question 2, which requests the Court to examine the proportionality of the refusal to issue export licences in the light of Article 36.

27 — Case 72/83 *Campus Oil and Others* v *Minister for Industry and Energy and Others* [1984] ECR 2727.

Question 2

41. Measures adopted pursuant to Article 36 of the Treaty are '... only justified provided that [they] are in reasonable proportion to the aim pursued and that the protection of health cannot be achieved as effectively by measures which restrict intra-Community trade to a lesser extent.' [28]

42. To take the words used by the Court in its judgments in *Campus Oil* [29] and *Mirepoix*, [30] national measures adopted on the basis of Article 36 of the Treaty are justified only *if they take into account the requirements of the free movement of goods* as laid down by the Treaty and, in particular, by the last sentence of Article 36.

43. Could the objective of protecting animals which were to be exported to Spain have been as effectively achieved by less restrictive measures?

44. In refusing to issue any export licences at all, the United Kingdom imposed a blanket ban on exports of live sheep to Spanish

28 — Paragraph 14 of the judgment in Case 73/84 *Denkavit Futtermittel* v *Land Nordrhein-Westfalen*, cited above in footnote 5. See also the judgments in Case 35/76 *Simmenthal* [1976] ECR 1871, *Bauhuis* and *Denkavit Futtermittel* v *Land Baden-Württemberg*, cited above in footnotes 19 and 5, and that in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203.

29 — Cited above, paragraph 44.

30 — Judgment in Case 54/85 *Ministère Public* v *Mirepoix* [1986] ECR 1067, paragraph 13.

slaughterhouses and thereby adopted the measure most restrictive of trade. Such a prohibition is generally regarded as being disproportionate. [31]

45. According to the Court's consistent case-law, [32] the onus is on the party relying on Article 36 of the Treaty to demonstrate that there is a threat to the health of animals. The United Kingdom has not demonstrated that Directive 74/577 was being breached throughout Spain, thereby justifying a blanket ban on exports to that country, or even that it was being breached occasionally by a specific, precisely identified slaughterhouse.

46. I see this as proof that Article 36 cannot be relied on by a Member State to protect interests situated within the territory of another Member State. How can it, within territory over which it has no sovereignty (and in which it consequently lacks investigative powers), gather the evidence to show that Article 36 must be applied?

47. I wish finally to point out, as the applicant company in the national proceedings has aptly noted, [33] that if the United Kingdom had had proof that the directive was being infringed in some slaughterhouses, it could have imposed on the exporter measures more conducive to the free movement of goods, such as production of a certificate of conformity for the slaughterhouse of destination.

48. I accordingly conclude that Article 36 does not entitle Member State A to prohibit the export of live sheep to Member State B for slaughter, either generally, or where it has not shown that the slaughterhouse of destination in Member State B is not complying with the provisions of the directive.

Question 3

49. Can a trader bring an action against his State for compensation for the damage which he incurs by reason of the refusal — incompatible with Community law — to grant an export licence? If so, what are the conditions under which such State liability arises?

50. To put it another way, is there, in Community law, a general principle that a State can be liable for the actions of its administrative authorities which are contrary to Community law?

31 — Judgments in Case 261/85 *Commission* v *United Kingdom* [1988] ECR 547, paragraph 15; in Case 407/85 *Drei Glocken and Kritzinger* [1988] ECR 4233, paragraph 14; and in Case C-304/88 *Commission* v *Belgium* [1990] ECR I-2801, paragraph 14.

32 — Judgments in Case 174/82 *Sandoz* [1983] ECR 2445, paragraph 22, and in Case 227/82 *Van Bennekom*, cited above, paragraph 40.

33 — Point 29 of its observations.

51. The question submitted here is a key question in Community law. It means determining the ambit of and drawing all the consequences from the general principle that a State is liable for loss and damage caused to individuals as a result of breaches of Community law, which the Court laid down at paragraph 35 of its judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italy* [34] ('the *Francovich* judgment') and which the Court there applied only in the very specific case of a failure to transpose a directive the provisions of which were not directly effective.

52. The stir created by that judgment — no other decision of the Court has ever generated so much comment — is a measure of the magnitude of the step forward which the Court is now being asked to take. The question is all the more delicate because it was submitted to the negotiators of the Maastricht Treaty without receiving any answer. [35] Despite the Community legislature's silence, a Member State which infringes Community law ought to incur liability in the same way as the Community may incur liability for loss and damage caused by its institutions or agents in the exercise of their functions.

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

35 — See H. Teske, 'Die Sanktion von Vertragsverstößen im Gemeinschaftsrecht', *Europarecht*, 3-1992, p. 265, at p. 285; the observations of the German Government, point 4, and the observations of the Netherlands Government, point 12 (the observations cited in the context of the third question are those submitted in Joined Cases C-46/93 *Brasserie du Pêcheur* v *Germany* and C-48/93 *Factortame and Others*, both at present pending before the Court, to which the parties to the main proceedings have referred).

53. This exceptional issue calls for detailed discussion which I shall present as follows:

I — Effective judicial protection of individuals relying on Community law must entail recognition of a right to compensation

II — The *Francovich* judgment is not only a remedy for imperfect direct effect

III — The basis of State liability for breach of Community law

IV — The requirements of Community law relating to an action for damages against the State for breach of Community law do not vary according to the State organ liable for the damage

V — The diversity prevailing under Article 215 of the Treaty

VI — The Article 215 scheme cannot be transposed to State liability for breach of Community law: the example of the *Bourgoin* case

VII — Defining minimum requirements for enforcing State liability for breach of Community law

A — The cause of the damage: breach of Community law

B — Is a judgment declaring a Member State to be in breach of its Community obligations a precondition for bringing an action for damages against it for breach of Community law?

C — The damage

D — The causal link

E — Objection of parallel proceedings

VIII — Conclusion

I — *Effective judicial protection of individuals relying on Community law must entail recognition of a right to compensation*

54. It is well known that the Court has not only laid down the principles of direct effect and primacy of Community law but is also vigilant to ensure that their application is effective. Monitoring compliance with and the proper application of Community law is therefore not only the task of the Commission, with its power to bring infringement proceedings: it is also in the hands of the individual. This was expressed in the famous passage in the Court's judgment in *Van Gend en Loos*: [36] 'The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.' [37] The legal protection conferred on individuals by the direct effect of provisions of Community law is ensured by the national courts, pursuant to the principle of cooperation laid down in Article 5 of the Treaty. [38] As the Court put it in its judgment in *Simmenthal*: [39]

'Direct applicability in such circumstances means that rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force.

... [direct applicability] also concerns any national court whose task it is as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law.' [40]

55. How can effective judicial protection be guaranteed for an individual relying on Community law when the Member States enjoy 'procedural autonomy' and, in the absence of any harmonization of procedural rules, retain the power to designate the competent courts and determine the procedural rules governing actions for safeguarding the rights which individuals derive from the

36 — Case 26/62 *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1.

37 — Page 13.

38 — Judgment in Case 33/76 *Rewe* v *Landwirtschaftskammer Saarland* [1976] ECR 1989, point 5, and judgment in Case 45/76 *Comet* v *Produktschap voor Siergewassen* [1976] ECR 2043, paragraph 12.

39 — Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629. See also paragraph 5 of the judgment in Case 811/79 *Amministrazione delle Finanze dello Stato* v *Ariete* [1980] ECR 2545.

40 — Paragraphs 14 and 16.

direct effect of Community law? [41] How can respect for procedural autonomy be reconciled with the uniform application of Community rules having direct effect?

As early as 1981, in its judgment in *Rewe-Handelsgesellschaft Nord*, [44] the Court referred to a 'system of legal protection' making it possible to ensure the effectiveness of Community law.

56. Only recently the Court pointed out that it was a matter for national law to define the procedural rules appropriate for guaranteeing the rights of the defence '... subject to compliance with Community law and in particular its fundamental principles'. [42] From the principle of cooperation laid down in Article 5 of the EC Treaty the Court has developed a minimum standard of judicial protection for individuals relying on Community law in a body of case-law which has grown more and more extensive with the passage of time and in which Grévisse and Bonichot see 'les prémisses d'une véritable éthique juridictionnelle communautaire'. [43]

57. On the question of recovery of undue payments, the Court, while recognizing the Member States' competence in procedural matters, has laid down its own requirements by imposing the *principle of equivalence* (or non-discrimination) [45] (national procedural rules must not place an individual relying on Community law in a more difficult position than when he relies on national law) and the *principle of effectiveness* [46] (domestic procedural rules must not render impossible in practice the exercise of rights which individuals enjoy under Community law), principles which the Court insists must be complied with whenever an issue of Community law arises before a national court. It follows from this second principle that '... in the case of rights which individuals derive from provisions of Community law, judicial protection must in any event come up to an appropriate level and the monitoring of that level is a matter for the Court.' [47]

41 — Judgments in *Rewe* and *Comet*, cited above in footnote 38, at point 5 and paragraph 13 respectively. Within certain very specific areas, procedural law has been harmonized. I would mention here Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1), Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1), Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures in the award of public supply and public works contracts (OJ 1989 L 395, p. 33) — which provides in particular that persons adversely affected by a breach have the right to bring an action for damages —, Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ 1990 L 158, p. 56) and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

42 — Judgment in Case C-60/92 *Otto* v *Postbank* [1993] ECR I-5683, paragraph 14.

43 — 'Les incidences du droit communautaire sur l'organisation et l'exercise de la fonction juridictionnelle dans les États membres', *Mélanges Boulouis*, 1991, p. 297.

44 — Case 158/80 *Rewe-Handelsgesellschaft Nord and Rewe-Markt Steffen* v *Hauptzollamt Kiel* [1981] ECR 1805, paragraph 44.

45 — Paragraph 12 of the judgment in Case 130/79 *Express Dairy Foods* v *Intervention Board for Agricultural Produce* [1980] ECR 1887. See also the judgments in *Rewe*, cited above, paragraph 44, and those in Case 14/83 *Von Colson and Kamann* [1984] ECR 1891 and Case 79/83 *Harz* [1984] ECR 1921. This principle is also referred to as the 'requirement of comparability': A. P. Tash, 'Remedies for European Community Law Claims in Member State Courts: Toward a European Standard', *Columbia Journal of Transnational Law*, 1993, Volume 1, 31, p. 377, at p. 387.

46 — See, *inter alia*, the judgment in Case 265/78 *Ferwerda* v *Produktschap voor Vee en Vlees* [1980] ECR 617, paragraph 10.

47 — G. Tesauro, 'La sanction des infractions au droit communautaire', *Reports for the XVth FIDE Conference*, Lisbon 1992, General Report, p. 423, at p. 455.

58. Grévisse and Bonichot have stated that '... ensuring the "effectiveness of the direct effect" of Community law implies that national courts are in a position to guarantee individuals effective respect for the rights which they derive from Community law. This leads the Court of Justice, as cases come before it, to reveal the gaps in, or inadequacies of, national rules for ensuring the protection of individuals.' [48] Many are the opportunities which the Court has thus been given to confirm or lay down principles without which there can be no effective judicial protection for an individual relying on Community law.

59. The list of these is now long and diverse.

60. Community law applies immediately, without any need to await the outcome of domestic actions, even on constitutional issues. [49] An individual relying on Community law must have an effective judicial remedy. The Court has identified in the 'right to obtain a judicial determination' [50] a general principle of law which underlies the constitutional traditions common to the Member States and which is laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. [51]

61. The Court has likewise held that national courts must have the power to ensure the necessary interim protection for rights which an individual derives from Community law, even if those courts do not have that power under their domestic law:

'... the full effectiveness of Community law would be ... impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law'. [52]

62. In its judgment in *Zuckerfabrik Süderdithmarschen*, [53] the Court held that Article 189 of the EEC Treaty did not preclude a national court from suspending enforcement of an administrative measure adopted pursuant to a Community regulation the validity of which was being contested before the Court of Justice. Thus, the judicial protection of individuals relying on Community

48 — Op. cit., p. 301.

49 — Judgments in *Simmenthal*, cited above, and in Case C-348/89 *Menacarte* [1991] ECR I-3277.

50 — See point 3 of the Opinion of Advocate General Darmon in Case 222/84 *Johnston* [1986] ECR 1651.

51 — Paragraph 18 of the judgment in *Johnston*.

52 — Paragraph 21 of the judgment in Case C-213/89 *Factortame and Others* [1990] ECR I-2433. Note also the comment of A. P. Tash, op. cit., p. 397: '... the *Factortame* cases go far further than *Von Colson* because the Court actually specified the new remedies that the national courts must provide.'

53 — Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415.

law goes as far as allowing a national court to suspend temporarily the application of Community law. [54] That judgment '... places the protection of the individual in the foreground, even in front of the question of priority'. [55] Furthermore, I detect in that case a reference to the principle of a right of action for damages in favour of individuals relying on Community law. Suspension of implementation of a national measure will be possible only if, amongst other conditions, the applicant is threatened with serious and *irreparable* damage. [56] Is this not already a demonstration that he has in fact an action for damages? I might stress that the possibility of ordering interim measures does not take away the need for an action for compensation: 'There will often be cases — for example, regulations which come into force with little warning and immediate effect — in which even the most alert of litigants in the most cooperative of courts will be unable to secure interim relief before a degree of loss has been suffered.' [57]

63. Following the same line of reasoning, the Court has held that Community law precludes the competent authorities of a Member State from relying, in proceedings brought in its national courts against those authorities by an individual relying on a directive which the Member State in question has not yet properly transposed into its domestic legal system, on national procedural rules laying down time-limits for the bringing of actions. [58]

64. To this arsenal of rights which the Court has recently affirmed, one could add the principle that clear, precise and unconditional provisions contained in directives which have not been transposed have direct vertical effect: [59] all the authorities of the Member States, including the judicial authorities, are obliged to take all measures necessary to achieve the result envisaged by directives and in particular to interpret their national law in the light of the wording and purpose of the directives, [60] whether or not the period prescribed for their implementation has expired [61] and whether or not their provisions are directly effective. [62]

65. With regard to an employer's civil liability for breach of the prohibition of discrimination between men and women on grounds of sex, the Court seeks to ensure that a victim will have 'real and effective judicial protection'. Thus, the Court has held that Directive 76/207 [63] 'does not make liability on the part of the person guilty of discrimination conditional in any way on proof of fault or on the absence of any ground dis-

54 — See H. G. Schermers, *Common Market Law Review* 1992, Volume 29, p. 133, at p. 136.

55 — Ibid., p. 137.

56 — Paragraph 33 of the judgment.

57 — Point 6.6 of the observations of applicants nos 1 to 36 and 38 to 97 in Case C-48/93, cited above in footnote 35.

58 — Judgment in Case C-208/90 *Emmott* [1991] ECR I-4269.

59 — Judgment in Case 8/81 *Becker* [1982] ECR 53; judgment in Case 152/84 *Marshall* [1986] ECR 723.

60 — Judgments in *Von Colson and Kamann*, cited above in footnote 45, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 12, Case 157/86 *Murphy* [1988] ECR 673, and C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8.

61 — Judgment in *Kolpinghuis Nijmegen*, cited in the previous footnote, paragraph 15.

62 — On this issue, see point 15 of the Opinion of Advocate General Darmon in Case C-177/88 *Dekker* [1990] ECR I-3941.

63 — Cited above in footnote 41.

charging such liability.' [64] From this the Court has concluded that '... any breach of the prohibition of discrimination must, in itself, be sufficient to make the employer liable ...'. [65]

66. Finally, in its judgment in *Marshall II* [66] — to which I shall return — the Court laid down the minimum criteria for preventing the right to compensation recognized by a Community directive from being made subject to restrictions such as would render the principle of the obligation to pay compensation completely ineffective.

67. It is within that trend in the case-law, marking out 'real and effective' [67] judicial protection, that the right of an individual relying on Community law to bring an action for damages against a State which has acted in breach of that law must be set.

68. Just as it requires national legislation which is contrary to Community law to be disapplied, so too the principle of the primacy of Community law requires that an individual should be able to obtain compensation for the damage caused by the application of such legislation in the past.

69. An action for damages against the State for breach of Community law constitutes the indispensable adjunct to the principle laid down in the *Simmenthal* judgment, cited above, that domestic legislation that is contrary to Community law is inapplicable. To make good the consequences of the application of that legislation in the past is to annul the effects of that application and, ultimately, to render that legislation inapplicable in the past, or to draw the consequences of such inapplicability for the past.

70. Just as individuals are protected by the fact that the courts or the administration may disapply legislation, so they must also be protected by reparation of the damage which they have incurred through application of legislation which ought to have remained a dead letter.

71. The Court accepted some time ago that '... a judgment by the Court under Articles 169 and 171 of the Treaty may be of substantive interest as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member States, the Community or *private parties*', [68] making proceedings to establish default admissible even if the defendant Member State has, between the time of the reasoned opinion and the institution of the

64 — Paragraph 22 of the judgment in *Dekker*, cited above in footnote 62.

65 — Ibid., paragraph 25.

66 — Case C-271/91 *Marshall* [1993] ECR I-4367.

67 — Ibid., paragraph 24.

68 — Judgment in Case 39/72 *Commission* v *Italy* [1973] ECR 101, point 11, emphasis added. See also the judgments in Case 309/84 *Commission* v *Italy* [1986] ECR 599, paragraph 18, Case 103/84 *Commission* v *Italy* [1986] ECR 1759, Case 154/85 *Commission* v *Italy* [1987] ECR 2717, Case 240/86 *Commission* v *Greece* [1988] ECR 1835, Case C-287/87 *Commission* v *Greece* [1990] ECR I-125, Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, and in Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 31.

proceedings, taken the measures necessary to remedy the default. [69]

72. In its judgment in *Russo*, [70] the Court confirmed, without specifying the basis of this obligation, that, where damage has been caused to an agricultural producer by a breach of Community law, the State responsible 'is liable to the injured party [for] the consequences in the context of the provisions of national law on the liability of the State.' [71] The measure infringed in that case was Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals, [72] *which was directly applicable.*

73. As early as its judgment in *Humblet*, [73] the Court derived from Article 86 of the ECSC Treaty, which is analogous to Article 5 of the EC Treaty, the obligation '... to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued.'

74. It was precisely upon these two bases — Article 5 of the Treaty [74] and the obligation imposed on national courts to ensure, by virtue of the direct effect and primacy of Community law, that Community law rules took full effect, in accordance with the principles enunciated in the judgments in *Simmenthal*, cited above, and *Factortame I* [75] — that the Court, in its judgment in *Francovich*, laid down the principle of State liability for damage caused to individuals by breaches of Community law. This 'right ... to obtain reparation' is 'founded directly on Community law'. [76] Those words are not to be taken as indicating an automatic right to compensation whatever the significance of the breach of Community law but rather as recognition of a right to bring an action for damages. [77]

II — *The Francovich judgment is not only a remedy for imperfect direct effect*

75. The Court has held many times that 'the right of [individuals] to rely on the directly applicable provisions of [the Treaty] before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty.' [78] The *Francovich* judgment illustrates this point.

69 — It will be noted that by referring to the Community the Court appears to accept that the Community may be able to bring proceedings in liability against a State which has infringed the Treaty.

70 — Case 60/75 *Russo* v *AIMA* [1976] ECR 45.

71 — Point 9. See also the judgment in Case 179/84 *Bozzetti* [1985] ECR 2301, paragraph 17: '... it is for the legal system of each Member State to determine which court has jurisdiction to hear disputes involving individual rights derived from Community law, but at the same time the Member States are responsible for ensuring that those rights are effectively protected in each case.'

72 — OJ, English Special Edition 1967, p. 33.

73 — Case 6/60 *Humblet* v *Belgium* [1960] ECR 559, at 569.

74 — Paragraph 36 of the *Francovich* judgment.

75 — Cited above in footnote 52, paragraph 32.

76 — Paragraph 41 of the *Francovich* judgment.

77 — On this point, see A. Barav, 'Omnipotent courts', in *Mélanges Schermers*, 1994, Volume 2, p. 265, at p. 288.

78 — Judgment in Case C-120/88 *Commission* v *Italy* [1991] ECR I-621, paragraph 10. See also the judgments in Case 168/85 *Commission* v *Italy* [1986] ECR 2945, paragraph 11, Case C-119/89 *Commission* v *Spain* [1991] ECR I-641, paragraph 9, and Case C-159/89 *Commission* v *Greece* [1991] ECR I-691, paragraph 10. See also point 44 of the Opinion of Advocate General Van Gerven in Case C-128/92 *Banks* [1994] ECR I-1209.

76. That judgment enables an individual to bring an action for damages against the State where, by reason of the insufficiently precise and unconditional nature of the provisions of a directive, *he cannot rely on it directly before his national courts*. The fact that the directive has not been transposed and that its provisions are not directly effective prevents the individual from obtaining judicial recognition of a right *which the directive gives him*.

77. An action for damages against the State thus appears to be a remedy for *imperfect direct effect*. In holding that an individual has a right to compensation, the Court is in effect conferring direct effect on the provisions at issue in so far as the individual may rely on their non-transposition in order to obtain compensation. [79] The party entitled has no action for performance *vis-à-vis* the person against whom the right created by the directive could be asserted because that person is indeterminate. As the victim of loss, the party entitled has an action in damages against the State which is founded on the failure to transpose. So, an action in damages makes up for the absence of transposition and the absence of direct effect. As pointed out by Wivenes, [80] 'by making the failure by the State to adopt national measures transposing the directive into the act causing the harm suffered by the person on whom the Community legal order intended to confer rights, the Court substitutes the State, as the party obliged to perform "equivalent implementation", for the individual who, had the directive been transposed into national law, would have been the person obliged to perform "implementation in kind"'.

78. So, making the State liable specifically where there is a failure to transpose a directive is not only an *effective sanction* or a means of exerting pressure or of providing an inducement to transpose: it allows the person for whom the directive intended the right concerned indirectly to take immediate benefit from that right despite the failure to transpose. The effective assertion of rights given to individuals by a directive is no longer totally dependent on transposition.

79. Without transposition, an individual has no other means of asserting his rights under a directive than to plead that his national law be interpreted in a manner consistent with it — in so far as this is possible — [81] whereas, in the Member States in which it has been transposed, the directive, by virtue of the national transposing measure, constitutes a directly effective measure which can be relied on directly by individuals. In its judgment in *Faccini Dori*, [82] the Court pointed out that the possibility of bringing an action in damages provided by the *Francovich* judgment applied precisely where 'the result prescribed by the directive cannot be achieved by way

79 — On this point, see W. Van Gerven, 'Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe', *Maastricht Journal*, 1, 1994, p. 6, at p. 21.

80 — Luxembourg Report for the XVth FIDE Conference, Lisbon 1992, 'La sanction des infractions au droit communautaire', p. 277, at p. 296.

81 — See the judgments in *Marleasing* and *Dekker*, cited above in footnotes 60 and 62.

82 — Judgment in Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325.

of interpretation'. [83] The effect of substituting an action in damages — making up for the directive's lack of direct effect or the impossibility of relying on it through interpretation — is particularly clear where, as in the *Francovich* case, the right recognized by the directive relates to a sum of money. Reparation of the loss and damage may tally exactly with the rights arising upon proper transposition of the directive.

80. This analysis demonstrates how 'the principles of direct and indirect effects were simply expedients designed to secure the enforcement of Community law precisely because States had failed to fulfil their obligations' [84] and how the *Francovich* judgment falls into that line of authorities ensuring effective application of directives so that, where these create rights for individuals, they can identify and rely on those rights.

81. In its judgment in *Emmott*, [85] the Court had held that a Member State may not, by relying on national limitation periods, thwart the full effect of a directive which it has not transposed in good time.

82. It is therefore clear that the *Francovich* judgment fills a lacuna in the protection afforded to individuals who wish to rely on a directive which has not been transposed.

83. Yet must we deduce from this that the principle of liability applies only to breaches of provisions which are not directly applicable, this then being the only way of achieving the result aimed at by the directive which a Member State refuses to transpose, thereby serving as an adjunct to the Court's case-law on the direct applicability of provisions of Community law, as the Federal Republic of Germany, [86] Ireland [87] and the Kingdom of the Netherlands [88] argue in their written observations? Is there no 'need' for a right to reparation in relation to directly applicable provisions, as the German Government argues?

84. Where the Community provision has direct effect, would the individual already have judicial protection, or remedies, such that an action for damages would be unnecessary? If the provisions of the directive had been directly effective, is it not true that Mr Francovich would have had an action for performance as a party entitled to enforce an obligation against the Italian State, thereby making any action for damages needless?

83 — Paragraph 27.

84 — J. Steiner, 'From direct effects to *Francovich*: shifting means of enforcement of Community law', (18) ELR, 1993, p. 3, at p. 10.

85 — Cited above in footnote 58.

86 — Points 2 and 3. 'Consequently, compensation is of only subsidiary importance in relation to claims for protective measures and specific performance'.

87 — Point 7.

88 — Point 8.

85. As I have already pointed out, direct effect is only a minimum guarantee which does not necessarily ensure complete protection for an individual relying on Community law. [89]

86. If the principle of State liability applies in respect of a right having no direct effect conferred by a directive, it applies *a fortiori* in respect of a subjective right conferred by provisions which do have direct effect. [90] This is so true that, well before judgment was delivered in *Francovich*, national courts had found against their own Member States for breaches of directly effective provisions of Community law. Consider the case of the French State found guilty of a *faute de service* by allowing abnormal delays in the completion of customs inspections carried out in conditions contrary to Article 30 of the Treaty. [91]

87. Furthermore, it is widely accepted that an individual or undertaking may bring an action for damages against another individual or undertaking for breach of a rule of Community law having direct horizontal effect. In the judgment of the House of Lords in *Garden Cottage Food Limited* v *Milk Marketing Board*, [92] it was held that a breach of Article 86 of the EEC Treaty could be treated in English law as breach of a statutory duty and give rise to compensation. Likewise, proof of the existence of a restrictive arrangement contrary to Article 85 may be sufficient to make those responsible for it liable in tort. [93]

88. An individual who brings an action for damages against a State on the ground that there has been a breach of a directly effective provision of Community law can, by definition, show that rights were granted for his benefit and that their content is identifiable. He thereby satisfies the first two conditions for establishing liability, as set out in the *Francovich* judgment. [94] An action for damages is a corollary of direct effect itself.

89. Indeed, in its judgment in *Foster*, [95] the Court had already held that an individual could claim damages from a Member State for its breach of a directly effective provision of a directive.

90. Next, it is significant that, as ground for the obligation of a State which acts in breach

89 — See point 75 above.

90 — See point 43 of the Opinion of Advocate General Van Gerven in Case C-128/92 *Banks*, cited above in footnote 78.

91 — Judgment of 15 April 1986 of the Tribunal Administratif de Dijon, *Société Vinicole Berard, Recueil Lebon*, p. 311.

92 — House of Lords [1983] 2 *All England Reports* 770, 3, *CMLR*, 1983, 43. See also C. Pecnard and E. Ruiz, 'Les sanctions civiles du droit communautaire de la concurrence par le juge national: les exemples anglais et français', *RDAI* No 5, 1993, p. 637.

93 — See the judgment of the Cour d'Appel de Paris of 19 May 1993 in *Labinal* v *Mors and Westland Aerospace, Journal du Droit International*, 1993, p. 957.

94 — Paragraph 40.

95 — Case C-188/89 *Foster and Others* v *British Gas* [1990] ECR I-3313, paragraph 22.

of Community law to make reparation, the Court has cited judgments which apply the principle that national courts must ensure the effective protection of *directly applicable* rights which individuals derive from Community law (with the exception of the judgment in *Factortame I*, cited above). [96]

91. In its judgment in *Zuckerfabrik Süderdithmarschen*, cited above, the Court held that a national decision based on a Community regulation, the validity of which was contested before the Court, ought to be capable of being suspended temporarily where its immediate enforcement would cause *irreparable damage* or damage reparable only with difficulty.

92. Furthermore, it has been shown [97] that, on the basis of the direct effect of Article 93(3) of the EEC Treaty, the Court requires national courts to make good damage suffered by competitors of a recipient of aid granted prematurely, if necessary by declaring the State liable.

93. Finally, the full range of remedies available to an individual relying on Community law includes an action for damages against the Community institutions under Article 215 of the EC Treaty. I cannot see why such an action for damages could be denied to an individual seeking to rely on Community law just because the damage was caused by a Member State. Barav has made this point with regard to the Community: 'A system of judicial remedies would be incomplete if it did not include an action for compensation for the harm occasioned by administrative action'. [98] In a Community founded on the principle of indirect administration by the Member States, in which the spheres of competence of the Member States and the Community are so closely interlocked that it is sometimes difficult to determine who should be held accountable for damage, [99] can the Member States be exonerated from all liability? The reply to this question is even clearer when one looks at the cases in which the Community and a Member State have *jointly caused* the damage and in which the Court considered it possible for an action for damages to be brought before national courts against the Member State concerned. [100]

94. 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

96 — See D. Curtin, 'State liability under Community law: a new remedy for private parties', (1992) *ILJ*, Volume 21, p. 74, at p. 78.

97 — W. Van Gerven, op. cit. footnote 79, p. 23.

98 — '"Injustice normative" et fondement de la responsabilité extracontractuelle de la Communauté économique européenne', *CDE*, 1977, No 1, p. 439.

99 — See J. G. Huglo, 'Cour de justice, responsabilité extracontractuelle', *Jurisclasseur Europe*, Volume 370, paragraphs 82 to 90.

100 — Judgment in Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245.

nited to the situation in *Francovich*. It is a tal component of the judicial protection of ıdividuals relying on Community law, from ıe moment when the provision or decision ›ccasioning the damage is capable of giving rise to rights on the part of individuals. [101] 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.

III — *The basis of State liability for breach of Community law*

95. Does State liability for breach of Community law have the same legal basis as State liability for legislative action? The latter form of liability was largely the inspiration behind Article 215 of the Treaty, which is based on those national legal systems most protective of persons injured by wrongful action in this area. After having looked at State liability for legislative action in the Member States, I shall demonstrate that State liability for legislative action and State liability for breach of Community law have different legal foundations.

(a) *The systems applicable in the Member States are heterogenous and no common general principles can be derived from them*

(b) *The basis of State liability for legislative action in domestic law bears no relation to State liability for breach of Community law*

96. (a) It is beyond argument that the State should not incur liability for legislative action except in quite exceptional circumstances. The freedom of the legislature must not be trammelled by the prospect of actions for damages. Nor should it be limited solely because catering for the public interest adversely affects private interests. [102] The 'power to express the sovereignty of the people' [103] justifies the legislature's immunity in relation to the general rules of liability. [104]

101 — Paragraph 40 of the judgment in *Francovich*. When the issue of the liability of a State for breach of Community law had been submitted to the Court in the *Enichem Base* case, it had not been necessary for the Court to reply to that question since the Community-law measures there at issue had not conferred any right on individuals (judgment in Case 380/87 *Enichem Base and Others* v *Comune di Cinisello Balsamo* [1989] ECR 2491).

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

103 — Ibid., point 2 of the Opinion of Advocate General Capotorti.

104 — See also the quotation from Professor E. Laferrière cited by French Government Commissioner Laroque in his submissions in the cases of *Société Rothmans International France* and *Société Arizona Tobacco Products* (AJDA 1992, p. 210): 'Legislation is a sovereign act and a fundamental feature of sovereignty is that it binds all without anyone being entitled to compensation. The legislature alone may determine, in light of the nature and seriousness of the damage and the needs and resources of the State, if it should grant such compensation. The courts cannot grant such compensation in its place'.

97. As the Court held in its judgment in *HNL*, [105] the principles which, in the legal systems of the Member States, govern the liability of public authorities for damage caused to individuals by legislative measures 'vary considerably from one Member State to another'. [106]

98. In a number of Member States the State cannot be liable for its legislative action. This is the case in Italy, the Federal Republic of Germany, [107] Belgium [108] and, apparently, in Ireland [109] and Luxembourg. [110] This is also the rule applied by the courts in the United Kingdom, [111] at least where Community law is not in issue.

99. In contrast, the principle of State liability for legislative action is accepted in other Member States, although strict conditions must always be fulfilled before it can be enforced. This is the case in Spain, [112] France, [113] Greece, [114] Denmark, [115] Portugal [116] and the Netherlands. [117]

100. From this I conclude that, as far as State liability for legislative action is concerned, there are no general principles which are *truly common* to the Member States. The principles established by the Court in relation to Article 215 of the Treaty have, in fact, been those laid down by the systems of domestic law most protective of individuals suffering damage through legislative action.

101. (b) State liability for breach of Community law and State liability in domestic law for legislative action do not have the same basis.

105 — Cited above in footnote 102.

106 — Paragraph 5.

107 — See the judgment of 12 March 1987 of the Bundesgerichtshof, *Juristen Zeitung*, 1987, p. 1024. See also BGHZ 100, p. 136, and BGHZ 102, p. 350. Under the *Schutznormtheorie*, the liability of the State presupposes the breach of a duty of service towards specific persons or groups of persons. Such a duty is not imposed on the legislature serving the public interest.

108 — 'Hitherto in Belgium the liability of the State by reason of its legislative function has mainly been a matter of theoretical analysis and academic speculation'. However, since the establishment of the Cour d'Arbitrage, 'there now exists in statute-law a sufficient basis for establishing, through judicial interpretation, a specific system of liability incurred in law-making' (M. Leroy, 'La responsabilité des pouvoirs publics', Actes du colloque interuniversitaire organisé les 14 et 15 mars 1991 par la faculté de droit de l'université catholique de Louvain et la faculté de droit de l'université libre de Bruxelles, p. 300, at p. 334. See also the judgment of 9 February 1990 of the Tribunal de Première Instance, Brussels, in *Michel and Others* v *Office National des Pensions de l'État* (R. G. 54 636, unpublished)).

109 — Schockweiler, Wivenes and Godard, 'Le régime de la responsabilité extracontractuelle du fait d'actes juridiques dans la Communauté européenne', *RTDE*, January-March 1980, p. 27, at p. 41.

110 — Judgment of the Cour d'Appel of 1 April 1987 in *Poos* v *Grand-Duché*, Pasicrisie Luxembourgeoise, No L/1987, p. 68, which states that 'the idea that the legislative act is the emanation *par excellence* of the sovereign power of the State and consequently incapable of giving rise to the award of damages and that a permissible feature of sovereignty, absolute in its essence, is to be arbitrary and irresponsible, does not in any way appear to have been seriously questioned in judicial practice' (p. 69).

111 — For the question of State liability to be raised, misfeasance in public office must be proved, which is inconceivable in the case of the legislature.

112 — See Articles 9(3) and 106(2) of the Constitution of 27 December 1976, Law No 30 of 16 December 1992 on the legal rules governing public authorities and administrative procedure (Article 139(1)), and the judgments of the Supreme Court of 15 July 1987, 25 September 1987 and 19 November 1987.

113 — Since the judgment of the Conseil d'État of 14 January 1938 in *Société anonyme des produits laitiers 'La Fleurette'*, *Recueil Lebon*, p. 25, D. 1938.3.41.

114 — Article 105 of the Law introducing the Civil Code.

115 — Observations of the Danish Government, point 3.

116 — Article 21(1) of the Constitution of 2 April 1976 (Article 22 since the amendment of 30 September 1982).

117 — See the judgment of the Hoge Raad of 11 October 1992 in *Van Hilten*, NJ/AB 1992, 62, and the decision of the Arrondissementsrechtbank, The Hague, of 18 July 1984 in *Roussel Laboratoria and Others* v *Netherlands* (Minidoc No QP/01013-P1).

102. The first type of liability is necessarily founded on illegality: breach of a higher-ranking rule of law and therefore of the principle of primacy.

103. Under that principle, directly effective provisions of Community law '... not only by their entry into force render automatically inapplicable any conflicting provision of current national law but ... also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions'. [118]

104. Respect for primacy requires not only that legislation contrary to Community law should be disapplied. It requires also that damage resulting from its application in the past should be made good.

105. Article 5 imposes an obligation on all Member States to take all appropriate measures to ensure fulfilment of their obligations under the Treaty: '... those obligations include that of expunging the unlawful consequences of a breach of Community law either directly or, failing that, by ensuring effective reparation of the damage which has resulted from it.' [119]

106. Refuge can no longer be taken behind the supremacy or unchallengeability of legislation: it may give rise to an action for damages if it is not in conformity with Community law with which each Member State, upon joining the Community, undertakes to comply — and to ensure that it is complied with. By ratifying the original Treaties, the Member States limited their freedom of action in the field of Community law. This explains why the bringing of an action for damages against the State for the legislature's failure to act is perfectly permissible where the State's liability is based on a breach of Community law, as *Francovich* shows, whereas this is hardly conceivable in domestic law. [120]

107. As Lord Bridge explained in the judgment delivered after the Court had given its judgment in *Factortame II*, [121] by ratifying the Treaty of Rome (or, in the United Kingdom's case, by adopting the 1972 European Communities Act), the Member States accepted that the legislative sovereignty of

118 — Judgment in *Simmenthal*, cited above, paragraph 17.

119 — Cour Administrative d'Appel de Paris, 1 July 1992, *Dangeville*, AJDA, p. 768.

120 — See, for example, the judgment of the French Conseil d'État of 29 November 1968 in *Tallagrand*, *Recueil Lebon*, p. 607.

121 — Judgment in Case C-221/89 *Factortame and Others* [1991] ECR I-3905.

their Parliaments was limited by the principle of the primacy of Community law. [122]

108. So, State liability is not based here on the exceptional nature of the damage suffered by the aggrieved person (as is the case in some national legal systems) but on *failure to respect the primacy* of Community law over conflicting national provisions.

109. The principle of primacy must be observed by all the organs, authorities and courts of the Member States.

110. I cannot therefore see why in such circumstances the right to reparation should be subject to restrictions imposed by national law when the national Parliament exercises its powers in a manner independent of Community law.

111. After all, the liability of the State under domestic law for its legislative action and the State legislature's liability for breaches of Community law have radically different foundations and it is not certain that Member States are entitled to make the right to reparation, in the event of breach of Community law by the State, subject to the general restrictions imposed by domestic law on the State's activity. Even though they are not without common features, there is, in my view, a certain illogicality in bringing State liability for breach of Community law *into line* with the liability provided for in Article 215 of the Treaty, which is itself based on the restrictive liability of the State for its legislative action, provided for under domestic law.

IV — *The requirements of Community law relating to an action for damages against the State for breach of Community law do not vary according to the State organ liable for the damage*

112. The *Francovich* judgment lays down the principle that individuals have a right of action in damages against the State taken as a whole, without specifying the person or body causing the damage. It is not a specific organ of the State but rather the Member State *qua* State which must provide compensation.

122 — 'If the supremacy within the European Community of Community law over the national law of Member States was not always inherent in the EEC Treaty ... it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it is a duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy' (*The Weekly Law Reports*, 2 November 1990, pp. 857 and 858).

113. One cannot help drawing a comparison with the Court's case-law on Article 169 of the EC Treaty. A failure to fulfil obligations is serious whichever State agency is responsible for it, '... even in the case of a constitutionally independent institution.' [123]

114. The State as a whole incurs liability for a breach of Community law, irrespective of whether the damage is attributable to the legislature or to administrative action — or even to a court judgment incompatible with the Treaty. [124] This is the price for the uniform application of Community law, '... a fundamental requirement of the Community legal order': [125] the existence of an action for damages cannot depend on internal rules allocating powers between the legislature, the executive and the courts.

115. Consequently, the liability of the State acting in its legislative capacity cannot be *excluded a priori*. Nor is it possible, when a breach of Community law is at issue, to make the State *qua* legislator subject to more restrictive or more severe liability rules than the State *qua* executor and which would not comply with the requirements of Community law. If a Member State only had to let an act be passed by the national Parliament in order to avoid an action in damages, laying down a Community standard for governing such actions would be futile. [126]

116. Since, where a breach of Community law has occurred, the obligation of a Member State to pay damages is a question of Community law, the arising of that obligation and the requirements of Community law relating to the action to obtain the damages cannot be made subject to questions concerning the allocation of powers between legislative, regulatory, administrative and judicial organs, *which by definition are governed by domestic law*.

117. The most recent decisions of the French administrative courts demonstrate very clearly that, where there has been a breach of Community law, the State alone is liable, independently of the organ of that State to which the damage is attributable.

118. Initially, the administrative courts found indirect means by which to avoid

123 — Paragraph 15 of the judgment in Case 77/69 *Commission* v *Belgium* [1970] ECR 237. See also paragraph 14 of the judgment in Case 52/75 *Commission* v *Italy* [1976] ECR 277.

124 — State liability incurred by reason of judgments of national courts contrary to Community law is certain to pose many difficult constitutional questions. See E. Szyszczak, 'European Community Law: New Remedies, New Directions?', (1992) *MLR*, No 55, p. 690, at p. 696.

125 — Paragraph 26 of the judgment in *Zuckerfabrik Süderdithmarschen*, cited above.

126 — As early as 1960, the Court held in its judgment in *Humblet*, cited above, that '... if the Court rules in a judgment that a *legislative* or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged, by virtue of Article 86 of the ECSC Treaty, to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued' (citation from p. 569, emphasis added).

imposing liability on the State, *qua legislator*, for breaches of Community law.

119. In its judgment of 28 February 1992 in *Société Rothmans International France and Société Arizona Tobacco Products*, [127] the French Conseil d'État avoided finding a principle that the State could be liable in its legislative capacity for failure to transpose a directive. It derived State liability from a fault committed by the administrative authorities in the application of domestic legislation found to be contrary to Community law.

120. The Minister of Economic Affairs and Finances had adopted regulatory decisions fixing tobacco products by using discretionary powers conferred on him by the Law of 24 May 1976 on the Monopoly in Manufactured Tobacco Products, when he should have acted outside the ambit of that Law which was contrary to the directive in question.

121. In other words, it was the act of the administration, and not the Law itself, which was held to be the cause of the damage, thus enabling the Conseil d'État to hold the State liable for the acts of its administrative authorities which must, in the exercise of their regulatory power, respect the primacy of Community law. Legislation incompatible with Community law must be set aside not only by the national court but also by the administrative authorities.

122. Rather than considering the liability of the legislature — and the restrictive conditions for its enforcement —, the Conseil d'État approached the question of liability by holding the State liable in its administrative capacity for a fault giving rise to reparation where, having a degree of discretionary power, it takes decisions or adopts measures incompatible with Community law.

123. Later, in a judgment given on 1 July 1992 in *Société Dangeville*, [128] the Cour Administrative d'Appel de Paris found *the State* as a whole liable, without identifying the State organ to which the breach of Community law could be attributed. [129]

124. The mere fact that Article 256 of the French General Tax Code, in its version prior to 1 January 1979, was incompatible

127 — See footnote 104 above.

128 — *Droit fiscal*, 1992, No 1665, p. 1420.

129 — On this point, see the observation of Government Commissioner Bernault in his submissions in *Dangeville*: 'The attitude of the State *qua* legislator, by its failure to act, the attitude of the State *qua* administrator, which refused to apply the directive ... the attitude, finally, of the State as tax collector, which dismissed reliance on the directive as ineffective, appear to me to constitute a single act constituted by non-transposition of the directive ...', *Droit fiscal*, 1992, No 1665, p. 1420, at p. 1431.

with the Sixth Directive and insurance transactions were consequently not exempted from VAT, as they ought to have been, was sufficient to render the State liable.

125. The Cour Administrative d'Appel de Paris did not base its findings on the illegality of the taxation notice or on the illegality of the decision of the director of the tax authorities. It did not identify the administrative act that was unlawful in Community law, interposed between the incompatible legislation and the damage complained of. This would have allowed it to find liability for wrongful administrative action. Instead, the Paris court held that there was liability on the part of the State as such and that the question of its liability could be raised because of the State's *failure to act*, that is to say, its failure to transpose the directive properly. One sees here how much State liability for breach of Community law differs from State liability under domestic law for legislative action: the legislature's failure to act may raise the question of State liability in the first case, but not in the second. [130]

126. From this I draw the conclusion that any distinction between State liability for breach of Community law attributable to legislative action and State liability for breach of Community law attributable to administrative action or action by some other State body would be *alien* to Community law. The requirements of Community law are identical in any event: it sees only one liable party (the State), just as, in proceedings for failure to fulfil Treaty obligations, it sees only one defendant (the State).

127. However, a distinction between liability incurred by the State for acts of general scope conflicting with Community law and liability incurred by the State for individual acts conflicting with Community law would be relevant since a distinction of this kind is made in Community law. In this opinion, I shall consider only the first of these situations.

V — *The diversity prevailing under Article 215 of the Treaty*

128. The requirements of Community law with regard to State liability for breach of Community law cannot be determined without defining how such liability relates to the scheme of Article 215 of the Treaty.

129. The entire area of non-contractual liability of the Community is marked by *diversity*: the application of Article 215 of the Treaty is subject to extremely disparate conditions. In its judgment in *Richez-Parise*, [131] the Court accepted that the mere supply of

130 — Judgment of the Conseil d'État of 11 January 1838 in *Duchâtelet, Recueil Lebon*, p. 7.

131 — Judgment in Joined Cases 19/69, 20/69, 25/69 and 30/69 *Richez-Parise and Others* v *Commission* [1970] ECR 325, paragraph 38.

incorrect information constituted an administrative fault of such kind as to render the Community liable. In the field of public contracts, breach of the duty to obtain the information necessary to ensure economical management of Community resources makes the Community liable under Article 215 of the Treaty. [132] Mere breach of the duty of confidentiality and failure to inform a person of the risks he runs may give rise to application of the article [133] without it being necessary to furnish evidence of breach of a superior rule of law. In contrast, in its judgment in *Amylum*, [134] the Court made application of Article 215 of the Treaty subject to proof that the breach of the Community law measure was verging on the arbitrary. The Court held that Community liability for legislative action could arise '... only exceptionally in cases in which the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers', [135] when that legislative action is characterized by the exercise of a wide discretion.

130. This diversity must be borne in mind when one comes to examine the liability of the Community in respect of legislative acts, which is only one of its aspects.

131. The liability of the Community for legislative acts involving choices of economic policy has been accepted since the judgment in *Zuckerfabrik Schöppenstedt*. [136]

132. Where damage occurs as a result of the application of a legislative act involving choices of economic policy, the invalidity of the act is not sufficient to engage the Community's liability. The Community can incur liability only if there has been a sufficiently serious breach of a superior rule of law for the protection of individuals. More specifically, where the Community enjoys a wide discretion, it will incur not incur liability '... unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers', [137] which means in effect that the institution in question is allowed 'a certain margin of error'. [138]

133. Academic literature [139] generally sees this as an application of the German '*Schutznormtheorie*' based in particular on Paragraph 34 of the German Basic Law. An

132 — Judgment in Case C-370/89 *SGEEM and Etroy* v *EIB* [1993] ECR I-2583.

133 — Judgment in Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraph 44.

134 — Judgment in Joined Cases 116/77 and 124/77 *Amylum and Tunnel Refineries* v *Council and Commission* [1979] ECR 3497, paragraph 19. However, see the judgment in Case C-220/91 P *Commission* v *Stahlwerke Peine-Salzgitter* [1993] ECR I-2393, paragraph 51.

135 — Paragraph 13 of the *Amylum* judgment.

136 — Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975.

137 — Judgment in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 12. See most recently the judgment of the Court of First Instance in Case T-472/93 *Campo Ebro Industrial and Others* v *Council* [1995] ECR II-421, paragraphs 41 to 43.

138 — Point 15 of the Opinion of Advocate General Van Gerven in *Mulder*, cited in the previous footnote.

139 — See W. Van Gerven, op. cit. footnote 79, p. 27.

individual who has suffered damage can obtain reparation only if he specifically belongs to the group which the superior rule of law infringed was designed to protect.

134. This case-law has been '... for the greater part developed in connection with Council regulations, which are in a way the expression of the Community's *legislative* activity.' [140] It is to be commended where the contested measure is adopted in an area of economic policy — such as the common agricultural policy — in which the Community institution which has adopted it has to follow complex market developments.

135. In my view, the conditions for imposing Community liability should not be as restrictive where the cause of the damage is a regulatory measure not involving any choice of economic policy or where the Commission has adopted an implementing regulation which is contrary to the provisions of the Council's basic regulation. As the *Sofrimport* case demonstrates, [141] the Court's case-law is extremely strict, even though, in that case, the Community was held to be liable.

136. According to Barav and Vandersanden, '... the criteria for identifying a wrong ought to be less stringent in the case of non-legislative measures or acts which, though regulatory, do not involve choices of economic policy'. [142] In his Opinion in Case C-282/90 *Vreugdenhil*, [143] Advocate General Darmon stated, to the same effect, that:

'... Such a requirement of "quasi-arbitrary" conduct is justified where, as in the field of economic policy, the Community institution enjoys broad discretion, but is not relevant where the conditions under which the institution may exercise its powers are clearly and precisely defined. In such cases, the Community would appear to incur liability by any infringement of the rule in issue.'

137. As one can see, Community liability for its legislative action comes up against strict conditions which do not take adequate account of the different forms which that action may take.

140 — Point 39 of the first Opinion delivered by Advocate General Darmon in Case C-55/90 *Cato* v *Commission* [1992] ECR I-2533.

141 — Judgment in Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477.

142 — *Contentieux communautaire*, 1977, p. 336.

143 — Case C-282/90 *Vreugdenhil* v *Commission* [1992] ECR I-1937, point 51 of the Opinion.

VI — *The Article 215 scheme cannot be transposed to State liability for breach of Community law: the example of the* Bourgoin *case*

138. Even though the *Francovich* judgment does not mention Article 215 of the Treaty, aligning State liability for breach of Community law with the Community's liability for legislative wrongs would appear, *prima facie*, to be an obvious step. How could a Member State which can act jointly with the Community or upon delegation from it be made subject to more stringent liability rules than those applied to the Community? How could breach of the same rule lead to two different sets of rules governing actions for damages? It was upon that consideration that Parker LJ based his entire reasoning [144] in the case of *Bourgoin* v *Ministry of Agriculture, Fisheries and Food*, [145] in which the main facts and legal issues were as follows.

139. French turkey exporters had brought an action for damages against the United Kingdom Ministry of Agriculture for introducing a system of poultry import licences and deciding to revoke general import licences which had previously been granted. The Court of Appeal unanimously held that an individual was entitled to bring an action for damages in private law for the State's breach of Community law if it had committed a misfeasance in public office. A majority of the appeal judges took the view that breach by a minister of a directly effective Treaty provision was a breach of public law which could lead only to judicial review and did not create any entitlement to damages. The executive decision was in effect regarded as being equivalent to delegated legislation. [146]

140. The requirement of effective judicial protection for individuals who rely on Community law applies to *rules of evidence*. According to the Court's judgment in *San Giorgio*, [147] if such rules have the effect of making it 'virtually impossible or excessively difficult' [148] to secure a right derived from Community law, they will be incompatible with that law. How, precisely, could the applicant company prove the existence of abuse of power [149] consisting '... either of the malicious intention to harm the applicant's interests or of the awareness of acting unlawfully at the time when the measures were adopted'? [150]

144 — See, in particular, [1986] 1 CMLR, p. 303, paragraph 101.

145 — [1986] 1 QB 716, [1986] 1 CMLR, p. 267, at p. 303.

146 — *Bourgoin*, 29 July 1985, [1986] 1 CMLR, p. 267, at p. 308, paragraph 115.

147 — Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595.

148 — Paragraph 14. See also paragraph 7 of the judgment in Case 104/86 *Commission* v *Italy* [1988] ECR 1799.

149 — 'Détournement de pouvoir'.

150 — D. Simon and A. Barav, 'La responsabilité de l'administration nationale en cas de violation du droit communautaire', *RMC* No 305, March 1987, p. 165, at 172.

141. Consequently, requirements such as those imposed by the United Kingdom courts strike me as being contrary to the principle of effectiveness as laid down in paragraph 43 of the *Francovich* judgment. They make it 'virtually impossible or excessively difficult to obtain reparation'.

142. The objection that it would be 'inconceivable' for the Court to declare such liability rules — based on Article 215 of the Treaty — to be contrary to the principle of effectiveness, when the Court itself applies them to the Community, [151] appears to me to be refutable.

143. In the first place, the two types of liability do not have the same foundation. Member States are subject to a hierarchy of legal norms which does not exist in the Community.

144. Second, and more fundamentally, in applying Article 215 of the Treaty, one must, in my view, look to the rules applying to State liability in domestic law. Such is the wording — and such is the spirit — of Article 215. On the other hand, Article 215 of the Treaty can influence the rules applicable in domestic law in the case of State liability for breach of Community law only if it has the effect of *improving* the protection of individuals relying on Community law. It is, after all, a question of establishing a minimum standard of *protection* for individuals. There is a lesson to be drawn here from the judgment in the *Zuckerfabrik Süderdithmarschen* case, which I cited above, in which the Court transposed the conditions governing application of Article 185 of the EEC Treaty to the suspension of implementation of a national measure adopted pursuant to Community legislation the validity of which was being contested before the Court. We know that this approach has, in some cases, made it more difficult to order suspension of implementation in domestic law. [152]

145. Third, it is somewhat paradoxical to want to align State liability for breach of Community law with Article 215 rules *which are judged to be unsatisfactory*, unduly stringent and affording insufficient protection for the right to effective judicial relief, [153] at least with regard to the condition concerning breach of Community law. On this point, I consider that those rules could be based on State liability for breach of Community law, and not the other way round. I shall explain why below. [154]

146. Finally, it is noteworthy that an action in damages for breach of a Community rule having direct effect brought against an

151 — A. Barav, op. cit. footnote 77, p. 297.

152 — See W. Dänzer-Vanotti, 'Der Gerichtshof der Europäischen Gemeinschaften beschränkt vorläufigen Rechtsschutz', *BB* 15, 30 May 1991, p. 1015.

153 — See for example, N. Green and A. Barav, 'National Damages in the National Courts for Breach of Community Law', (1986) *YEL* 6, p. 55, at p. 117.

154 — Point 172.

individual or undertaking is not subject to restrictive enforcement conditions, analogous to those of Article 215. In *Dekker*, [155] the employer's fault lay in the very breach of the Community law rule, that is to say, in the discriminatory act.

VII — *Defining minimum requirements for enforcing State liability for breach of Community law*

147. While the principle that an individual relying on Community law against his State has a right to reparation is based on Community law itself, the substantive and formal conditions governing the enforcement of that right are governed by national law. [156] The *Francovich* judgment clearly distinguishes State liability 'inherent in the system of the Treaty' [157] and liability 'required by Community law' [158] from the 'detailed procedural rules' [159] governing actions for reparation. [160]

148. In this regard, the *Francovich* judgment takes an important step forward: the requirement of a minimum standard of protection for individuals seeking to recover a fiscal charge that is contrary to Community law has not presented many difficulties. In this area, national rules do not vary greatly. This is not so where State liability is in issue. Here, the national rules do diverge greatly. While it is easy to see why the State in its legislative capacity should be held liable only under very strict conditions, it is surprising to find that the conditions for enforcing State liability for the action of the State's administrative authorities are extremely stringent in a number of Member States.

149. The autonomy of the States is *limited* — and has been since the judgment in *San Giorgio*, which was cited in *Francovich* — by the principles of non-discrimination and effectiveness. National laws must provide for remedies ensuring full protection of the rights which individuals derive from Community law. [161]

150. It is thus for the Court to define, as it has done with regard to recovery of undue payments or suspension of implementation, a minimum standard of protection for individuals who bring an action in damages against a State for breach of Community law. Since 1987, Barav and Simon have been urging the Court to lay down '... the requirements of

155 — Cited above in footnote 62.

156 — Paragraph 42 of the *Francovich* judgment.

157 — Paragraph 35.

158 — Paragraph 38.

159 — Paragraph 42.

160 — It should be noted that in 1980 the Court put national courts on guard against applying to domestic proceedings procedural rules relating to Article 215 of the Treaty (the limitation period laid down in Article 43 of the Statute of the Court of Justice) (judgment in Joined Cases 119 and 126/79 *Lippische Hauptgenossenschaft and Westfälische Central-Genossenschaft* v *BALM* [1980] ECR 1863, paragraph 9).

161 — Paragraph 42 of the *Francovich* judgment.

Community law regarding the protection of individuals in the matter of State liability'. [162]

151. What are the conditions governing non-contractual liability for breach of Community law? Besides considering the three usual conditions for an action in damages — cause, damage and causal link — I shall consider the question whether a judgment establishing a breach of Community obligations is a pre-condition for such liability and the question of the objection of parallel proceedings.

A — The cause of the damage: breach of Community law

152. In the *Francovich* judgment there is no mention of the word 'fault' or the word 'risk'. What is meant by the term 'breach of Community law' which it uses?

153. The judgment does not refer to Article 215 of the Treaty or to the stringent requirements for enforcing Community liability for its legislative action. Temple Lang has explained why: 'The failure of a State to implement a directive is a concrete, readily identifiable, formal violation of Community law for which no justification is permitted. There is therefore no reason to say that, if a State is liable at all for non-implementation of a directive, it should be liable only when the other requirements for the non-contractual liability of the Community are also fulfilled', [163] the failure to transpose being described as '... a simple failure to fulfil a precise non-discretionary commitment clearly imposed by Article 189 of the EEC Treaty.' [164]

154. Member States certainly do not have a choice between transposing or not transposing. In the case of *Francovich*, however, Member States had a '... broad discretion with regard to the organization, operation and financing of the guarantee institutions', [165] which is borne out by the Court's declining to find that the provisions of Directive 80/987/EEC [166] relating to the identity of the person liable to provide the guarantee had direct effect. [167]

155. The Member State having such a broad discretion (confirmed two years later in the

162 — Op. cit. footnote 150, p. 174.

163 — 'New Legal Effects Resulting from the Failure of States to Fulfil Obligations under European Community Law: the *Francovich* Judgment', *Fordham International Law Journal*, 1992-1993, No 16-1, p. 1, at p. 18.

164 — Ibid.

165 — Paragraph 17 of the judgment in Case C-334/92 *Wagner Miret* [1993] ECR I-6911.

166 — Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23).

167 — Paragraph 26 of the *Francovich* judgment.

Wagner Miret judgment [168]), the Court did not find any serious fault or any grave and manifest breach of a superior rule of law.

156. Bound to transpose, a Member State is under an obligation to *achieve a certain result*: the mere fact of not achieving it is sufficient for the State to incur liability.

157. Thus, where the domestic legislature has no discretion and is bound by the provisions of a directive which it must transpose, proof of a grave and manifest breach of a superior rule of law cannot be required. Infringement of the principle of the primacy of Articles 189 and 5 of the Treaty may be sufficient by itself to render the State liable, provided that the infringement affects a right protecting individuals. [169] The *Dangeville* judgment of the Cour Administrative d'Appel de Paris, cited above, exemplifies application of this principle: '... it follows from the requirements of the Treaty establishing the EEC, and in particular Article 5 thereof, that the French State is required to take all such measures as are appropriate for ensuring performance of its obligations under that Treaty; ... those obligations include that of nullifying the unlawful consequences of a breach of Community law, either directly or, failing that, by ensuring effective reparation of all resulting damage; ... consequently, the fact that a taxpayer who contends that he has been taxed under legislation incompatible with the objectives of a Community directive has unsuccessfully requested the tax courts to set the charge aside, those courts having refused to accept that such incompatibility could be successfully relied on, cannot by itself preclude the person concerned from being entitled, on the basis of obligations deriving from the Treaty, ... to seek reparation for the loss and damage which he has suffered by reason of the failure to transpose the objectives of the directive into national law.'

158. Likewise, Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, [170] which creates rights for individuals, ought to be capable of giving rise to an action in damages against any State which has failed to transpose it.

159. It is true that the *Francovich* case involved a complete failure to transpose, the Italian State having previously relied on pre-existent domestic rules as an unsuccessful defence to the charge that it had not fulfilled its obligations under the Treaty. [171]

168 — Cited above in footnote 165.

169 — Thus, in his Opinion in *Francovich*, Advocate General Mischo stated that, where there has been a failure to transpose a directive, the situation is close to that of the administration responsible for implementing a law (point 47).

170 — OJ 1985 L 210, p. 29.

171 — Judgment in Case 22/87 *Commission* v *Italy* [1989] ECR 143.

160. A more qualified approach to the question of liability would be required where there has been a clumsy or slightly incorrect transposition of complex Community legislation or a *bona fide* misinterpretation of its requirements. Allowance must also be made for excusable failings: a Member State cannot be held responsible for clumsy or obscure drafting of Community texts, for which the Council or Commission bear sole responsibility and which the Member State simply implements. [172] Here, the position is not the same as that involving a failure to fulfil Treaty obligations, which can be 'excused' only in quite exceptional circumstances. Designed to ensure respect for the principle that Community law must be strictly complied with, proceedings to establish a breach of Treaty obligations are objective in nature. They are admissible even where the conduct complained of has not caused any harm or had any adverse effect on the functioning of the common market. [173] An action in damages, on the other hand, is subjective in nature since both the seriousness of the fault and the extent of the damage must be taken into account.

161. What are the requirements of Community law in a case not involving a failure to transpose a directive? State liability may result from inaction (where unlawful rules are maintained or measures necessary for the application of Community law are not adopted). It may also arise from active infringements, such as the adoption of rules at variance with Community law.

162. It is easy to identify what the term 'breach of Community law' *cannot cover*. Requiring proof of intentional fault or 'misfeasance in public office' would appear to be at variance with the principle of effectiveness. Conversely, the slightest fault or the most excusable negligence must not be sufficient to render the State liable in damages. Given the rapid and complex development of Community law, such a severe result would not be warranted. I would see that as an infringement of the principle of legal certainty.

163. Defining *what is covered* by the term 'breach of Community law' is more difficult.

164. A serious fault, defined as breach of a clear provision of Community law (or of a provision already interpreted by the Court) or a repeated breach — or a breach in which a Member State persists despite a judgment declaring that it has failed to fulfil its obligations — ought, without any doubt, to render the State liable. In my view, this type of fault covers a Member State's refusal to issue export licences for live animals on the ground that the slaughterhouse of intended destination does not comply with Community requirements, where (1) that State is unable to furnish proof of such a breach of Community law and relies on a *risk* of mistreatment; [174] and (2) the Commission had advised it several months previously that

172 — On this point, see paragraph 18 of the judgment in Joined Cases 106/87 to 120/87 *Asteris and Others* v *Greece* [1988] ECR 5515.

173 — Judgment in Case 95/77 *Commission* v *Netherlands* [1978] ECR 863, paragraph 13.

174 — Point 7 of the order for reference. It would appear that the British Meat and Livestock Commission had received assurances that the slaughterhouse in question was approved and was operating in accordance with the Community directive.

such retaliatory measures would be contrary to Community law. [175]

165. Similarly, I consider that where a Member State, in a field clearly within the scope of the Treaty, enacts a law expressly imposing a condition of nationality for establishment within its territory without being able to put forward any justification based on Community law, that State incurs liability which must be easily enforceable.

166. Community law would not preclude application of domestic rules or judge-made law allowing the State to be held liable on the ground of negligent action (*faute simple*), the important point being simply that the action in damages against the State for breach of Community law should be subject to the same conditions as a similar action in domestic law.

167. The French State has been held liable for the damage suffered by a person seeking work who was domiciled in Belgium and working in France, on account of the *faute* of the French administrative authorities in providing inaccurate information about the conditions governing his entitlement to unemployment benefit. [176] In that case, the State was held liable, although a question concerning the interpretation of the provision of Regulation (EEC) No 1408/71 [177] which had to be applied was *subsequently* submitted to the Court of Justice by a different court.

168. Assessing whether such a wrongful act or omission has been committed will also depend on the discretion and leeway which the State has in the area regulated.

169. This, in my view, is the main lesson to be drawn from the *Francovich* judgment: *the nature of the wrongful act or omission required in order for the State to incur liability depends on the nature of the Community obligation incumbent on it and on the nature of the breach committed.* [178] If the Member State commits a breach of Community law in an area in which it has no discretion, it must incur liability more readily than where it acts in an area in which it has a broad discretion.

170. A recent judgment of the French Cour de Cassation illustrates how State liability

175 — According to information provided during the hearing, the Commission made its position known to the United Kingdom as early as July 1992.

176 — Judgment of the French Conseil d'État of 20 January 1988, *Aubin, Recueil Lebon*, p. 20.

177 — Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and to members of their family moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

178 — See paragraph 38 of the *Francovich* judgment.

must vary according to the extent of the discretion enjoyed by the executive authority.

171. In a matter concerning the liability of the French State for maladministration by its justice department, the Cour de Cassation [179] found that the issue of a circular on 10 October 1980 by the Ministry of Justice requiring the Public Prosecutor's Office to institute criminal proceedings against companies which had been advertising imported alcoholic drinks contrary to Articles L 17 and L 18 of the Code on Retail Outlets for Alcoholic Drinks constituted a *faute lourde* sufficient to render the State liable since the Court of Justice had declared the French rules on the advertising of alcoholic drinks to be discriminatory and contrary to Article 30 of the Treaty. [180]

172. Thus, *so far as the condition of breach of Community law is concerned*, it is not State liability for breach of Community law which must be aligned with the liability provided for by Article 215 of the Treaty. Such alignment would make it virtually impossible to raise the issue of the State's liability, as the Court of Appeal's decision in *Bourgoin* v *Ministry of Agriculture, Fisheries and Food*, [181] itself based on the case-law of the Court of Justice on non-contractual liability, demonstrates. I am suggesting the opposite. As in the matter of State liability for breach of Community law, the conditions for enforcing liability against the Community for its legislative activity should, as far as the question of fault is concerned, *vary more according to the extent of the Community legislature's discretion*. Academic writers have long been advocating such a change in the conditions governing application of Article 215: 'It is not normal that the same liability rules should be applied to basic regulations of the Council and regulations adopted by the Commission pursuant to Council delegation. If the Council does not deserve to be placed in the situation of a democratically elected legislature, the same applies *a fortiori* to the Commission.' [182]

173. It is, moreover, a change which the Court has already initiated with regard to the Community's liability in the context of the ECSC Treaty:

'... in order to appraise the nature of the fault required to render the Community liable, whether on the basis of Article 34 or of Article 40, neither of which, as has been stated, gives any details in this connection, it is appropriate to refer to the areas and conditions in which the Community institution

179 — Judgment No 419 P of the Commercial Chamber of 21 February 1995, *United Distillers, John Walker and Tanqueray Gordon* v *Agent Judiciaire du Trésor Public and Ministère de Justice, Le Quotidien Juridique*, 1995, No 27, p. 6.

180 — Judgments in Case 168/78 *Commission* v *France* [1980] ECR 347 and Case 152/78 *Commission* v *France* [1980] ECR 2299.

181 — Cited above.

182 — R. Joliet: *Le contentieux des Communautés européennes*, 1981, p. 270.

acts. In that respect it is necessary to take into account in particular the complexity of the situations which the institution must regulate, the difficulties of applying the legislation and the discretion available to the institution under that legislation.' [183]

B — Is a judgment declaring a Member State to be in breach of its Community obligations a precondition for bringing an action for damages against it for breach of Community law?

174. An action, governed by national law, for reparation of damage suffered by reason of State action will be compatible with Community law *only if it guarantees effective protection of the interests of the individual relying on Community law.*

175. It follows that such an action must, first of all, satisfy the principles of non-discrimination and effectiveness which have been laid down by the Court in relation to proceedings for recovering undue payments or in relation to interim measures, and which were reiterated in the *Francovich* judgment. [184] An action in damages against the State must not be barred for the very reason that it is based on a breach of Community law.

176. The principle of effectiveness has a precise consequence here: *the Member State concerned may not make the raising of the issue of its liability subject to prior delivery of a judgment declaring it to be in breach of its Community obligations.* There are several reasons for this. Such a requirement would:

— make it difficult to bring an action in damages, since an individual has only very limited and uncertain access to the procedure for obtaining such a judgment and has no influence over its outcome;

— not take account of the broad authority of preliminary rulings given on questions of invalidity or interpretation [185] (a judgment given on 12 November 1985 by the Tribunal Administratif de Pau in the case of *Steinhauser* [186] ordered the French State to make good the damage caused by the application of national measures incompatible with Community law after a preliminary ruling on a question of interpretation had declared them to be so incompatible);

183 — Paragraph 24 of the judgment in Joined Cases C-363/88 and C-364/88 *Finsider and Others* v *Commission* [1992] ECR I-359.

184 — Paragraph 43.

185 — On the subject of decisions determining validity, see paragraph 13 of the judgment in Case 66/80 *International Chemical Corporation* v *Amministrazione delle Finanze dello Stato* [1981] ECR 1191.

186 — Unpublished, cited by D. Simon and A. Barav, op. cit. footnote 150, p. 172.

— prevent quick reparation of the damage, since reparation would be suspended until delivery of judgment in proceedings to establish the State's breach of its Community obligations and prevent reparation of damage which arose prior to that judgment;

— overlook the fact that there is nothing to prevent a national court from declaring a decision or measure *of domestic law* to be contrary to Community law (only the Court of Justice may assess the validity of *Community* measures);

— fail to take account of the judgment in *Waterkeyn*, [187] in which the Court held that '... Rights for the benefit of individuals flow from the actual provisions of Community law having direct effect in the Member States' internal legal order ...' [188] and not from any judgment declaring a Member State to be in breach of its Community obligations.

177. Finally, such a requirement would make an action for damages impossible in a situation like that in the main proceedings, without there being any need to examine the case further, since the incompatibility with Community law of the administrative measure in question will — on my argument — ensue from a judgment given on a reference for a preliminary ruling and not from a judgment declaring the Member State concerned to be in breach of its obligations. Some national courts which have already found their State liable for breach of Community law have first made a point of establishing the State's failure to fulfil its Community obligations which enables them to establish a breach of Community law. It is not clear whether they have made this a condition of State liability. In short, prior delivery of a judgment declaring a State to be in breach of its obligations is not a necessary condition for an action in damages against that State. It may be a *sufficient* condition. When domestic procedural rules come to be applied, the fact that such a judgment has been given may be of some importance: what I mainly have in mind here is the determination of the date from which limitation periods begin to run. Furthermore, delivery of such a judgment should make it easier to establish State liability. This is how I see the Court's case-law to the effect that Article 169 proceedings are still admissible even where the breach of obligations is remedied after the period set by the Commission in its reasoned opinion has expired. [189] After all, the State will have had the time to reconsider its position during the pre-litigation procedure. This is not so where the Court gives judgment pursuant to a reference for a preliminary ruling. [190]

C — The damage

178. Legislation, by definition, applies to a very large circle of addressees. There can be no objection, therefore, in Community law, to a Member State's requiring that, in order for the issue of its liability to be raised, the damage must be special, concern only a

187 — Joined Cases 314 to 316/81 and 83/82 *Procureur de la République* v *Waterkeyn and Others* [1982] ECR 4337.

188 — Paragraph 15.

189 — See the cases cited above in footnote 68.

190 — See note 60, W. Van Gerven, op. cit. footnote 79.

limited number of persons, and be abnormal — by, for example, exceeding the normal risks inherent in the activities of traders operating in the sector concerned.

179. In many national legal systems, the legislature's liability is subject to strict rules as to the nature of the damage. It must be abnormal and special. [191]

180. This strict approach is also taken in Community law on non-contractual liability.

181. For example, in its judgment in *Mulder* the Court held that '... in so far as it failed completely ... to take account of the specific situation of a clearly defined group of economic agents ... the Community legislature manifestly and gravely disregarded the limits of its discretionary power, thereby committing a sufficiently serious breach of a superior rule of law.' [192]

182. In its judgment in *Dumortier Frères*, [193] the Court allowed an action for compensation, holding that failure to comply with the principle of non-discrimination

'... affected a limited and clearly defined group of commercial operators'. [194]

183. The damage may consist in loss of profit or even in 'lost opportunity', but it must be certain. Damage based on '... facts of an essentially speculative nature' cannot be compensated. [195]

184. What amount of compensation can an aggrieved person claim?

185. It is clear from the Court's judgment in *Marshall II*, [196] cited above, that a Member State may not impose a limit on the amount of compensation payable to a person suffering sex discrimination where secondary Community law, as interpreted by the Court, provides for full compensation.

191 — Consider the concept of 'Sonderopfer' in German law (judgments of the Bundesgerichtshof of 10 June 1953, BGHZ 6, p. 270, and of 25 April 1960, BGHZ 32, p. 208) and the concept of 'abnormal and special' damage referred to in the judgment of the French Conseil d'État in *Société anonyme des produits laitiers 'La Fleurette'*, cited above in footnote 113.

192 — Cited above in footnote 137, paragraph 16.

193 — Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères and Others* v *Council* [1979] ECR 3091.

194 — Paragraph 11.

195 — Judgment in *Kampffmeyer and Others* v *Commission*, cited above in footnote 100, at p. 266.

196 — Paragraph 34.

186. In the case of State liability for breach of Community law, the damage suffered must be compensated *in full*. The *restitutio in integrum* principle will only allow the injured person to be placed in the position in which he would have been had it not been for the breach of Community law. In his Opinion in *Dumortier Frères*, [197] Advocate General Capotorti demonstrated that this principle was common to the legal systems of the Member States. The Court has affirmed the principle in the context of Article 215 of the Treaty: '... the amount of compensation payable by the Community should correspond to the damage which it caused.' [198]

D — The causal link

187. Determination of the existence of a causal link is a matter for the national court.

188. It poses a difficult problem on which the Court's case-law on Article 215 of the Treaty sheds some light. Is the plaintiff's negligence a ground for exonerating the Community from liability or for limiting its liability?

189. In his Opinion in *Compagnie Continentale France* v *Council*, [199] Advocate General Trabucchi considered the consequences of negligence on the victim's part: '... the possible negligence of the victim operates ... as a *contributory cause*, and may even be regarded as a factor *breaking the chain of causation* between the unlawful conduct and the damage.' [200]

190. After finding that

'[t] he applicant, as a prudent exporter, fully informed of the conditions of the market, was not unaware and in any event could not be unaware that such was the position [price movements on the world market leading to reduced compensatory amounts] at the time when the contracts were concluded, and of the consequences which would result therefrom as regards the compensatory amounts',

the Court held, in its judgment in that case, that:

'Accordingly, the damage alleged has not been caused by the conduct of the Council.' [201]

197 — Point 4 of the Opinion.

198 — Paragraph 34 of the judgment in *Mulder*, cited above in footnote 137.

199 — Case 169/73 *Compagnie Continentale France* v *Council* [1975] ECR 117.

200 — At page 151, emphasis added. See also point 38 of the Opinion of Advocate General Van Gerven in *Mulder*, cited above in footnote 137.

201 — Paragraphs 28 and 32.

So, the aggrieved person's action failed, not because he had contributed to the damage but because he had failed to take the steps needed to prevent or mitigate it.

191. The *Brasserie du Pêcheur* case, [202] now pending before the Court, fully demonstrates the importance of the question of the aggrieved person's breaking the causal link where State liability for a breach of Community law is concerned.

192. Here I have four observations:

— determination of the existence of a causal link is a matter for the national court;

— the Court did indeed identify, in its judgment in *Mulder*, [203] '... a general principle common to the legal systems of the Member States to the effect that the injured party must show reasonable diligence in limiting the extent of his loss or risk having to bear the damage himself.' [204] Very generally, the injured person's negligence or inaction is penalized by limitation: his right of action is *time-barred*. So long as he acts within the limitation period, his right must hold good. The bringing of an action for damages within the limitation period must be regarded as 'reasonable diligence';

— the injured person's own *fault* may partially or wholly exonerate the legislature from liability, but does the fact that the injured person has not brought an action for damages when his action is still not time-barred constitute a fault?;

— it is wrong, in my view, to argue that by his inaction the injured person contributed to the damage. This existed before his negligence and arose independently of his action (or inaction).

E — Objection of parallel proceedings

193. A crucial question, however, is whether Community law could preclude national law from requiring other legal remedies to be exhausted before an action for damages may be brought, which is what the judgment in *Wagner Miret*, cited above, would appear to suggest.

202 — Referred to in footnote 35 above.
203 — Cited above in footnote 137.
204 — Paragraph 33.

194. Where the aggrieved person has, by intention or through negligence, not put a stop to the damage by using existing legal remedies, may he still successfully maintain an action against the State? Is an action for damages subsidiary to proceedings for stopping the harmful effects of the act or measure?

195. This would appear to be the position under the ordinary liability rules applicable in the Federal Republic of Germany [205] and Denmark. [206]

196. Let us first look at the theory of the exhaustion of rights in the case of direct actions before the Court of Justice.

197. Compared with the other types of action which may be brought directly before the Court of Justice, an action for damages is a virtually *independent* form of action, with one exception, the scope of which must be clearly defined.

198. It is apparent from the Court's decision in *Krohn* [207] that an objection of parallel proceedings can only be exceptional. An action for damages will be inadmissible in the extremely specific circumstances where it '... is brought for the payment of an amount precisely equal to the duty which the applicant was required to pay under an individual decision, so that the application seeks in fact the withdrawal of that individual decision.' [208]

199. Once the contested measure is general and impersonal in nature, an objection of parallel proceedings can no longer be raised.

200. As to the link between proceedings brought before national courts and an action for damages brought before the Court of Justice, the action before this Court will be inadmissible only if the individual concerned could obtain full reparation before the national courts. [209]

205 — Paragraph 839(3) of the Bürgerliches Gesetzbuch, which provides that a victim may not bring an action for damages if he had a legal remedy for stopping or mitigating the damage and did not make use of it, such as a restraint action against the act causing the damage.

206 — Observations of the Danish Government, point 3.

207 — Case 175/84 *Krohn* v *Commission* [1986] ECR 753.

208 — Paragraph 33.

209 — See paragraph 11 of the judgment in Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969, point 14 of the Opinion of Advocate General Darmon in *Cato*, cited above in footnote 140, and paragraph 15 of the judgment in Case 20/88 *Roquette Frères* v *Commission* [1989] ECR 1553. See also paragraph 14 of the judgment in *Amylum*, cited above.

201. Whether a Member State, faced with an action for damages, may plead parallel proceedings is purely a question of domestic law which the Court of Justice may not answer. Community law does not preclude domestic law from requiring other means of legal redress to be exhausted before an action for damages may be brought except in so far as this principle makes it impossible or virtually impossible to bring an action for damages. Finally, in my view, there is no Community law principle which requires the objection of parallel proceedings to be *imposed* on the Member States. No legal basis is to be found in Community law for establishing a hierarchy among domestic legal remedies.

VIII — Conclusion

202. In its judgment in *Factortame II*, [210] the House of Lords described the adoption of the 1972 European Communities Act as 'the voluntary acceptance by Parliament of the limits imposed on its legislative sovereignty by the principle of the primacy of Community law.'

203. Since that judgment was delivered, United Kingdom courts have had to reconsider the conditions under which the State is to incur liability where it is alleged to have acted in breach of Community law.

204. In a judgment it delivered on 25 June 1992 in *Kirklees MBC* v *Wickes*, [211] a Sunday trading case, the House of Lords apparently did not exclude the possibility of liability on the part of the legislature: in view of the general terms in which paragraphs 33 to 37 of the *Francovich* judgment are couched, '... it is in my opinion right that in the present case your Lordships should proceed on the basis that if ... the court should hold that section 47 of the Shops Act 1950 is invalid as being in conflict with Article 30 of the Treaty, the United Kingdom may be obliged to make good damage caused to individuals by the breach of Article 30 for which it is responsible.' [212]

205. That eventuality ought necessarily to affect the liability of the State for breach of Community law in the present case.

206. If, following the Court of Appeal's judgment in *Bourgoin*, mentioned above, the national court were to consider that (1) a straightforward breach of Community law by national administrative authorities can only be the subject of a declaratory judgment in judicial review proceedings and (2)

210 — [1990] 3 WLR 818.

211 — [1992] 3 WLR 170.

212 — [1992] 3 WLR 189, A and B.

an action for damages is sustainable only if an abuse of power in the application of national law is proved, it would have to consider that position in the light of the following Community rules and principles:

(1) Article 34 of the Treaty is directly effective by virtue of the judgment in the *Apple and Pear Development Council* case; [213]

(2) effective judicial protection, as meant by Community law, is not guaranteed by a declaratory judgment delivered in judicial review proceedings; [214]

(3) it is for the national court to establish that proving fulfilment of such requirements is not beyond the injured person's capability. Only a broad interpretation of 'misfeasance in public office' would afford the injured person effective protection of his rights.

207. Furthermore, to limit the administration's liability to such situations would make such liability exceptional. The comparison with the rules governing recovery of undue payments — described by the *Francovich* judgment as an issue 'analogous' [215] to that of liability — or the rules on the suspension of implementation, whereby a finding that the measures adopted by the national authorities are *unlawful* is sufficient to bring the illegality to an end by reimbursement or by temporary suspension of the unlawful measure — without proof of intention being required — demonstrates, in my opinion, that an action for damages cannot be confined to such rare cases.

208. One final comment. I see no justification for limiting the effects of the Court's judgment in time. Having been put on notice by the Commission that its refusal to issue export licences was contrary to Community law, the United Kingdom could not have been unaware that a persistent refusal might leave it open to an action for damages. I would add that the Court never imposes such a limitation of its own motion.

209. The Court will be well aware of the importance of the step which it is being urged to take here: 'This sort of decentralized enforcement in the national courts, coupled with a European standard of remediation, has all the force of an invisible hand. It will support and advance the integration of Europe regardless of the uncertainties of European politics.' [216]

213 — Paragraph 37 of the judgment in Case 222/82 *Apple and Pear Development Council* v *Lewis and Others* [1983] ECR 4083.

214 — See, on this point, point 44 of the Opinion of Advocate General Van Gerven in *Banks*, cited above in footnote 78. See also the dissenting judgment of Oliver LJ in the *Bourgoin* case, cited above, particularly at paragraphs 55 and 65.

215 — Paragraph 43.

216 — A. P. Tash, op. cit. footnote 45, p. 401.

210. I accordingly propose that the Court rule as follows:

(1) (a) A Member State may rely on Article 36 of the EC Treaty where a directive introducing incomplete harmonization is silent on the matter of procedures for monitoring the measures which it introduces.

(b) A Member State may not rely on Article 36 of the Treaty in order to restrict exports of live animals to another Member State which is not complying on its territory with the requirements of Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter.

(2) Alternatively, Article 36 of the Treaty does not entitle Member State A to adopt a measure imposing a general and absolute ban on exporting live sheep to Member State B for slaughter where it has not been demonstrated that the slaughterhouse of destination in Member State B is not complying with the provisions of the directive.

(3) A Member State must make good the damage caused to a trader by its failure to grant an export licence in breach of Article 34 of the EC Treaty. The conditions for sustaining an action for damages are determined by national law, subject to compliance with the principles of non-discrimination and effectiveness. In particular, an action for damages must not be made subject to conditions of proof which render the action impossible. The amount of compensation is to be determined by the national court. It may not be lower than the loss of profit incurred by the applicant by reason of the refusal to grant it export licences.