OPINION OF ADVOCATE GENERAL LÉGER delivered on 11 October 2005 [1]

1. Does Community law preclude a Member State on the one hand, from excluding State liability for damage caused to individuals by a breach of Community law attributable to a supreme court, where the breach in question is in relation to the interpretation of provisions of law or the assessment of facts and of evidence and, on the other hand, from limiting such liability — apart from that situation — to cases of intentional fault or serious misconduct?

2. That is, in essence, the question referred by the Tribunale di Genova (Italy) in the context of a dispute between a maritime transport company (currently in liquidation) and the Italian State following the granting by that State of direct subsidies to a competing company.

3. The question calls on the Court to clarify the scope of the principle of the liability of a Member State for damage caused to individuals by a breach of Community law attributable to a supreme court, as defined by the Court in Case C-224/01 *Köbler*. [2]

I — Legal framework

A — *Community legislation*

4. The relevant Community provisions at the time of the events that gave rise to the dispute in the main proceedings are the rules of the EC Treaty governing State aid and abuse of a dominant position.

5. State aid is in principle prohibited. Article 92(1) of the EC Treaty (now Article 87(1) EC) provides: '[s]ave as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to

1 — Original language: French.

2 — [2003] ECR I-10239.

distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

6. The Treaty provides for several exceptions to that prohibition in principle. Only some of these will be of interest in the context of the dispute in the main proceedings.

7. The first is provided for in Article 92(3)(a) and (c) of the Treaty in respect of regional aid. [3] That type of aid may be considered to be compatible with the common market.

8. Article 77 of the EC Treaty (now Article 73 EC) provides for another class of exception, specific to the field of transport, for aid which meets the needs of coordination of transport or represents reimbursement for the discharge of certain obligations inherent in the concept of a public service. Such aid is compatible with the Treaty.

9. Article 90(2) of the EC Treaty (now Article 86(2) EC) contains a further exception for undertakings entrusted with the operation of services of general economic interest. Such undertakings are to be 'subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'. This exception applies only on condition that 'the development of trade [is] not ... affected to such an extent as would be contrary to the interests of the Community'.

10. In principle the Commission of the European Communities alone is competent to rule on the compatibility of aid, to the exclusion of national courts. [4] To that effect, the checking carried out by the Commission follows different rules depending on whether the aid concerned is existing or new aid. Whilst existing aid is subject to continuous checks after it has been granted in order to ascertain whether it is still compatible with the common market, new aid is subject to a check before it is granted, while it is still at the planning stage.

3 — More specifically, Article 92(3)(a) of the Treaty refers to 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment', and Article 92(3)(c) of the Treaty refers to 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

4 — I am not taking into account the changes in the respective roles of the Commission and the national courts resulting from Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ 1998 L 142, p. 1), since that regulation came into force after the events in the dispute in the main proceedings.

11. In order to enable the Commission to carry out such prior checking Article 93(3) of the EC Treaty (now Article 88(3) EC) imposes on Member States an obligation to notify the Commission of planned new aid. Besides the obligation to notify, that article also requires a Member State not to put its proposed new aid measures into effect until the Commission has given a final decision accepting their compatibility with the common market. Those two obligations are cumulative. New aid must therefore be regarded as unlawful if it has been granted without being notified to the Commission or if it has been duly notified but has been granted before the Commission has given a decision regarding its compatibility within the relevant time limit. [5]

12. Those provisions of Article 93(3) of the Treaty have direct effect and confer rights on individuals which national courts are bound to protect. [6]

13. Abuse of a dominant position is subject to a general and systematic prohibition. The first paragraph of Article 86 of the EC Treaty (now the first paragraph of Article 82 EC) provides that '[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States'. Those provisions also have direct effect. [7]

14. The Treaty rules on State aid and abuse of a dominant position are applicable in the transport sector, including maritime transport. [8]

B — *National legislation*

15. In Italy, State liability for errors committed in the exercise of judicial functions is governed by Law No 117 on compensation

5 — This outline of the procedural rules of the Treaty relating to State aid is not affected by Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), which came into force after the events in the dispute in the main proceedings and to a great extent merely reproduces the Court's existing case-law on the subject.

6 — See, in particular, Case 6/64 *Costa* [1964] ECR 1141; Case 77/72 *Capolongo* [1973] ECR 611, paragraph 6; Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 8; Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* [1991] ECR I-5505, *'Saumon'*, paragraph 11; and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 39.

7 — See in particular, Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraph 32.

8 — As regards the rules relating to State aid, see in particular Case 156/77 *Commission* v *Belgium* [1978] ECR 1881, paragraphs 10 and 11. Regarding Article 86 EC on the abuse of a dominant position, see in particular Joined Cases 209/84 to 213/84 *Asjes and Others* [1986] ECR 1425, paragraphs 39, 42 and 45.

for damage caused in the exercise of judicial functions and the civil liability of judges (Legge No 117, [sul] risarcimento dei danni cagionati nell'esercizio delle funzioni giudiziarie e responsabilità civile dei magistrati), of 13 April 1988. [9]

16. The contested national legislation was adopted by the legislature following a referendum held in November 1987, as a result of which the legislative provisions previously governing this matter were repealed. [10]

17. Article 2(1) of the contested national legislation establishes the principle that '[a]ny person who has sustained unjustifiable damage as a result of judicial conduct, acts or measures on the part of a judge [11] who is guilty of intentional fault or serious misconduct in the exercise of his functions, or as a result of denial of justice, may bring proceedings against the State for compensation for pecuniary damage he has suffered or non-pecuniary damage caused to him by being deprived of his personal liberty'.

18. By way of derogation from that principle, Article 2(2) provides that 'in the exercise of judicial functions the interpretation of provisions of law or the assessment of facts and evidence shall not give rise to liability'. Such exclusion of State liability was provided for, it would appear, in order to preserve the independence of judges, which is a principle having constitutional value. [12]

19. Article 2(3) lists a number of cases of 'serious misconduct' for the purposes of Article 2(1) of the contested legislation, and reads as follows: 'The following constitute serious misconduct:

(a) a serious breach of the law resulting from inexcusable negligence;

(b) the assertion, due to inexcusable negligence, of a fact the existence of which is indisputably refuted by the case file;

(c) the denial, due to inexcusable negligence, of a fact the existence of which is indisputably established by documents in the case file;

9 — GURI No 88 of 15 April 1988, p. 3, 'the contested national legislation'

10 — The provisions concerned were contained in Articles 55, 56 and 74 of the Code of Civil Procedure. Thereunder the State could incur liability only for intentional fault, fraud or peculation committed in the exercise of judicial functions.

11 — Under Article 1 of the contested legislation, the latter applies 'to all members of the ordinary, administrative, financial, military and special judiciary exercising a judicial function of any type, and to other persons participating in the exercise of a judicial function'.

12 — See decision of the Corte costituzionale of 19 June 1989, No 18, paragraph 10 (*Giustizia civile*, 1989, I, p. 769).

(d) the adoption of a decision concerning personal liberty in a case other than those provided for by law or without due reason.

20. Article 3(1) defines 'denial of justice', which is also referred to in Article 2(1) of the contested national legislation, as 'any refusal, omission or delay by a judge in regard to the taking of measures for which he is responsible where, after expiry of the statutory time-limit for taking the measure in question, a party has submitted a request for such a measure and, without valid reason, no measure has been taken within thirty days following the date on which the application was lodged with the court registry ...'.

21. Any action raising the question of the State's liability with regard to judicial activity must be brought against the President of the Italian Council of Ministers. [13] A claim for damages in such an action gives rise to a preliminary examination by the court having jurisdiction, which gives a ruling on its admissibility. Article 5(3) of the contested national legislation provides that such a claim is to be declared inadmissible if it does not meet the conditions and criteria laid down in Articles 2, 3 and 4 of that legislation or if it appears manifestly unfounded. A decision of inadmissibility may be the subject of an appeal and of a further appeal in cassation. [14]

II — Facts and procedure in the main action

22. In 1981 the shipping company Traghetti del Mediterraneo ('TDM'), which had entered into an arrangement with its creditors, brought proceedings against a competitor, Tirrenia di Navigazione ('Tirrenia'), before the Tribunale di Napoli seeking compensation for the damage that that company had allegedly caused it between 1976 and 1980 through its policy of low fares (below the cost price) on the maritime cabotage market between mainland Italy and the islands of Sardinia and Sicily, made possible by public subsidies.

23. In support of its action, TDM submitted that the conduct in question constituted unfair competition under Article 2598(3) of the Italian Civil Code, and abuse of a dominant position, prohibited by Article 86(1) of the Treaty. The applicant also claimed infringement of Article 85 of the EC Treaty (now Article 81 EC) and of Articles 90 and 92 of the Treaty.

13 — See Article 4(1) of the contested national legislation.

14 — See Article 5(4) of the contested national legislation.

24. The claim for compensation was dismissed by a decision of the Tribunale di Napoli of 22 April 1993. That decision, against which the applicant lodged an appeal, was upheld by the Corte d'appello di Napoli by a judgment of 7 January 1997, on the grounds, in particular, that the subsidies at issue were granted for purposes of regional development and that in any event they did not affect activities on the various sea links competing with those operated by the defendant, so that those subsidies were not being granted in breach of the Treaty.

25. In making that ruling, the appeal court did not see fit, contrary to what was being sought by TDM, to refer a question to the Court for a preliminary ruling regarding the interpretation of the rules of the Treaty concerning State aid in order to ascertain whether those rules precluded the granting of the subsidies in question.

26. As TDM was then put into liquidation, the administrator (whom I shall also refer to as 'TDM') appealed against that judgment. In the context of that appeal, the claimant again asked that a reference for a preliminary ruling be made.

27. By a judgment of 8 October 1999, the Corte suprema di cassazione dismissed that appeal without making a reference for a preliminary ruling. Although the Court of Justice is not asked to examine the content of that decision in order to provide guidance for the referring court in assessing the merits of the action for damages in question, which falls within the exclusive jurisdiction of that court, I think it might be helpful to give an account of the decision in question since it lies at the heart of the dispute in the main proceedings.

28. As regards the alleged infringement of the rules of the Treaty relating to State aid, the Corte suprema di cassazione held that Articles 90 and 92 of that Treaty allow, in certain cases such as the present, an exception to the prohibition in principle on State aid in order to promote the economic development of underprivileged regions or to meet demands for goods and services which cannot be fully satisfied by the operation of free competition.

29. It held in that regard that during the time the subsidies in question were being awarded, bulk transport between mainland Italy and its main islands could not be operated by sea owing to the costs involved, so that it was necessary to entrust that activity to a public concessionary applying a set schedule of charges. In its view, the distortion of competition which resulted from this does not affect the compatibility of the aid in question with the Treaty since, in particular, TDM has been unable to show that Tirrenia derived benefit from that aid in order to obtain profit in connection with activities other than those for which the aid was granted.

30. As regards the plea alleging infringement of Articles 85 and 86 of the Treaty, the Corte suprema di cassazione held that it was unfounded, on the grounds that the activity of maritime cabotage had not yet been liberalised at the time of the events in question and the restricted nature and limited geographical extent of that activity did not allow for clear identification of the relevant market for the purposes of Article 86 of the Treaty.

31. As regards TDM's request that a reference for a preliminary ruling be made, the Corte suprema di cassazione also considered such a course unnecessary since the solution reached by the Corte d'appello di Napoli, in the judgment challenged by the appeal in cassation, was in accordance with the case-law of the Court of Justice, in particular in Case 13/83 *European Parliament* v *Council*, [15] in the field of transport.

32. After the Corte suprema di cassazione delivered that judgment, TDM instituted an action against the Italian Republic before the Tribunale di Genova (brought against the President of the Italian Council of Ministers), seeking reparation for the damage caused to it by that judgment.

33. In support of that action, it claims that the judgment in question is based on an incorrect interpretation of the Treaty rules relating to competition and State aid, and on the erroneous assumption that there is settled case-law of the Court of Justice on the subject. It follows that in that judgment the Corte suprema di cassazione has both infringed substantive Community law and failed to fulfil the obligation to make a reference for a preliminary ruling which is incumbent on supreme courts under the third paragraph of Article 177 of the EC Treaty (now the third paragraph of Article 234 EC).

34. On that point, TDM contends that, if a reference had been made for a preliminary ruling, the Court would in all likelihood have given an interpretation of the relevant Treaty rules which would have led the Corte suprema di cassazione to take a decision that was favourable to its claims. It cites as evidence of this in particular that, following a procedure to investigate the subsidies awarded to Tirrenia after the relevant period as regards the dispute in the main action (which was initiated by the Commission during the proceedings culminating in the judgment at issue), the Commission issued a decision which pointed to the Community dimension of maritime cabotage and the difficulties in assessing the compatibility of those subsidies with the rules of the Treaty on State aid. [16] In the view of TDM, the assessment criteria adopted by the Commis-

15 — [1985] ECR 1513.

16 — This was Commission Decision 2001/851/EC of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company by Italy (OJ 2001 L 318, p. 9). I would point out that in that decision the Commission declared that aid awarded to that undertaking between 1 January 1990 and 31 December 2000 as compensation for providing a public service was compatible with the common market and authorised, subject to compliance with certain conditions, aid to be paid between 1 January 2001 and 31 December 2004. That aid, classified as new aid, was considered to fall within the derogation provided for in Article 86(2) EC, except from that provided in Article 87(2) and (3) EC.

sion in that decision, which are to be taken into account when examining the compatibility of the subsidies in question, undermine the analysis of the Corte suprema di cassazione in the judgment in question.

35. The President of the Italian Council of Ministers challenges the claim for compensation lodged by TDM, in particular on the ground that Article 2(2) of the contested legislation precludes State liability in a case such as the present since the judicial activity in question relates to the interpretation of provisions of law.

36. In reply to that argument, TDM contends that the legislation in question makes it excessively difficult, indeed virtually impossible, for individuals to be compensated for damage caused by the State as a result of judicial activity. That situation is contrary to the principles laid down by the Court in *Francovich and Others*, [17] and *Brasserie du Pêcheur and Factortame*. [18]

III — The reference for a preliminary ruling

37. In view of the arguments put forward by the parties and its own doubts regarding the possibility of extending the principle of State liability for a breach of Community law to encompass judicial activity as well, the Tribunale di Genova decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is a [Member] State liable on the basis of non-contractual liability to individual citizens for errors by its own courts in the application of Community law or the failure to apply it correctly and in particular the failure by a court of last instance to discharge the obligation to make a reference to the Court of Justice under the third paragraph of Article 234?

2. Where a Member State is deemed liable for errors by its own courts in the application of Community law and in particular for failure by a court of last instance to make a reference to the Court of Justice under the third paragraph of Article 234 EC, is affirmation of that liability negated in a manner incompatible with the principles of Community law by national legislation

17 — Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357.

18 — Joined Cases C-46/93 and C-48/93 [1996] ECR I-1029.

on State liability for judicial errors which:

— precludes liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial functions,

— limits State liability solely to cases of intentional fault and serious misconduct on the part of the court?'

38. Following delivery, after the decision had been taken to make a reference, of the judgment in *Köbler*, which the Court of Justice sent to the Tribunale di Genova, the latter decided, after hearing the parties to the dispute in the main proceedings, to withdraw the first question, since an affirmative answer had been given to it in that judgment, but to retain the second question. Accordingly, there now remains only one question, which to ascertain whether 'affirmation of that liability is negated in a manner incompatible with the principles of Community law by national legislation on State liability for judicial errors which precludes liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial activity, and limits State liability solely to cases of intentional fault and serious misconduct on the part of the court'.

IV — The meaning and scope of the question

39. As it is worded, the remaining question is broad in scope since it covers all judicial activity, that is to say, both that of supreme courts and that of ordinary courts. It should be pointed out that the action to establish State liability in the main proceedings is challenging only a decision of a supreme court, against which there is no possibility of appeal, and not those of the ordinary courts which have already been delivered to the same effect in the same case. [19] The question should therefore be reworded to that effect in order to limit the scope of the Court's answer to what is strictly necessary for judgment to be given in the main proceedings.

40. Moreover, in order to clarify still further the scope of the question, it is necessary to give some indication as to the meaning of the contested national legislation whose alleged incompatibility with Community law is the reason for the reference for a preliminary ruling.

19 — As I pointed out in my Opinion in *Köbler*, point 38), although where there is no possibility of an appeal against a decision of a supreme court, an action for damages alone serves — in the final analysis — to ensure that the right infringed is restored and, finally, to ensure that the effective judicial protection of the rights which individuals derive from Community law is of an appropriate level, the same does not apply as regards decisions delivered by ordinary courts since a domestic appeal may be brought against them.

41. According to the Tribunale di Genova, were that legislation to be applicable in the present case, the claim made by TDM would clearly have to be considered inadmissible (as the defendant contends) since that claim is based on an alleged error of interpretation of provisions of law by a court; it is pointed out that both the absence of a reference for a preliminary ruling and the application of Community rules to the situation in question are the result of such an interpretation exercise. [20]

42. That assertion rests on the premise that, under the contested national legislation, the interpretative activity of the court, 'whether or not it may be endorsed from a substantive point of view, must be considered to be lawful per se' so that, by its very nature, it cannot give rise to State liability. [21]

43. At the hearing, the Italian Government argued for an interpretation of the contested national legislation which is considerably different from that adopted by the referring court. In its view, the exclusion of State liability provided for in Article 2(2) of that legislation in relation to the interpretation of provisions of law does not apply in a situation where that interpretation exercise has led to a serious breach of the law resulting from inexcusable negligence within the meaning of paragraph (3)(a) of that article. Article 2(3)(a) provides for a derogation from the rule of exclusion of liability contained in Article 2(2), which in turn is a derogation from the principle of liability set out in paragraph 1 of that article.

44. It is true that at first sight one might wonder as to the extent to which the cases of breach of the law referred to in Article 2(3)(a) of the contested national legislation are likely not to be linked to the activity of interpreting provisions of law, which is covered by Article 2(2) of that article, so that Article 2(3) would not introduce any derogation from the rule laid down in Article 2(2). Only if that were the case would the legislation both exclude State liability in certain areas of judicial activity (covered by Article 2(2)) and limit such liability in other areas of a court's activity (which are covered by Article 2(3)). If the areas of activity covered by each of those paragraphs were not separate at all but overlapped completely, the contested national legislation could only really be understood in terms of State liability being limited and not in terms such liability being excluded as well.

20 — See order for reference, in the English version, p. 6.

21 — Ibid., p. 6.

45. All the same, it is clear from settled case-law that, in accordance with the allocation of functions between the Court of Justice and the national courts which governs the preliminary ruling procedure, it is for the national court alone, and not the Court of Justice, to interpret national law. [22]

46. From the interpretation of Article 2(2) of the contested national legislation given by the referring court, I therefore assume that, under that article, State liability as a result of judicial activity is excluded where the conduct for which the court concerned is criticised is linked to the activity of interpreting provisions of law, even if that activity has led to commission of a serious breach of the law resulting from inexcusable negligence. In other words, I assume that Article 2(3)(a) of the contested national legislation applies in situations of breach of the law other than those referred to in Article 2(2).

47. I therefore consider that by its question the referring court seeks to ascertain, in substance, whether Community law precludes State liability for damage caused to individual citizens in the event of breach of Community law by a supreme court being, on the one hand, excluded where the breach in question relates to the interpretation of provisions of law or the assessment of facts and of evidence and, on the other hand, — apart from that case — limited to cases of intentional fault or serious misconduct.

V — Assessment

48. In order to answer the question I shall consider in turn the points raised by the referring court in that question: first, whether the cases of exclusion of State liability in respect of a supreme court are compatible with Community law and, second, whether the cases of limitation of State liability in respect of a supreme court are compatible with Community law.

A — *Exclusion of State liability where a breach of Community law attributable to a supreme court relates to the interpretation of provisions of law*

49. It should be remembered that in *Köbler*, cited above, the Court held that the principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which

22 — See in particular Case 296/84 *Sinatra* [1986] ECR 1047, paragraph 11, and Case C-341/94 *Allain* [1996] ECR I-4631, paragraph 11.

they are responsible is also applicable where the alleged infringement stems from a decision of a supreme court. That follows from the requirements inherent in the protection of the rights of individuals relying on Community law. [23]

50. That conclusion is not undermined by arguments based in particular on the independence of the judiciary or the principle of *res judicata*, which the Court expressly dismissed. [24] Although the specific nature of the judicial function and the legitimate requirements of legal certainty were taken into account by the Court and thus caused it to limit State liability to 'the exceptional case where the court [that is to say a supreme court] has manifestly infringed the applicable law', [25] the fact remains that it held that neither the principle of the independence of the judiciary, nor that of *res judicata*, can justify general exclusion of any State liability for an infringement of Community law attributable to such a court.

51. In my view, nor can such principles, even when they have constitutional value, justify exclusion of State liability in the specific case in which an infringement of Community law on the part of a supreme court relates to the interpretation of provisions of law. [26]

52. To accept the contrary view would be to render meaningless or deprive of any effect the principle of State liability for the acts or omissions of its supreme courts laid down by the Court in *Köbler*.

53. Interpretation of provisions of law occupies an essential place in judicial activity. This is so to an even greater extent in the case of supreme courts since they are traditionally responsible for unifying the interpretation of law at national level.

54. Moreover, it is precisely in view of that eminent role of supreme courts, against whose decisions there is no remedy under national law, that such courts are required under Article 234 EC to refer questions to the Court of Justice for a preliminary ruling on the interpretation of Community law in order to prevent the occurrence within the

23 — See *Köbler*, paragraph 36.

24 — Ibid., paragraphs 37 to 43.

25 — Ibid., paragraph 53.

26 — In that regard, I would point out, as I did in point 18 above, that it appears that the exclusion of State liability provided for in Article 2(2) of the contested legislation (which is applicable in this specific case) was introduced in order to preserve the independence of judges, which is a principle laid down in the constitution.

Community of divergences in judicial decisions in that area . [27]

55. In the performance of their traditional functions of unifying the interpretation of provisions of law, it is possible that such courts may commit a breach of the Community law applicable, giving rise to State liability provided the breach is manifest. [28] Such a breach resulting from the activity of interpreting provisions of law may arise in a number of situations; I shall give some examples of these, which may occur individually or together.

56. First, the breach in question may result from a national law being interpreted in a way that conflicts with the Community law applicable. According to settled case-law that is contrary to the duty of interpretation in conformity with Community law incumbent on all national courts, the importance of which was recently reiterated in Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others*, [29] a dispute between individuals concerning the application of provisions of national law which were adopted in order to transpose a directive conferring rights on individuals.

57. The situation considered by the Court in Case C-129/00 *Commission* v *Italy* [30] (delivered shortly after the judgment in *Köbler*,) can be approximated to this case of breach of Community law (which presupposes, of course, that the national legislation concerned is capable of being interpreted in conformity with Community law).

58. In that case the Commission complained that the Italian Republic had maintained in force national legislation which, as interpreted by the Italian courts, including the Corte suprema di cassazione, and as applied by the administration, made the repayment of taxes collected in breach of Community law virtually impossible or excessively difficult, in view of the rules of evidence applied to individuals in order to obtain such repayment.

59. That national legislation was not in itself contrary to Community law since, as the Court stated, it was neutral in relation both to the burden of proof that the charges had been passed on to the other persons and to

27 — The objective of the requirement to make a reference for a preliminary ruling was specified by the Court in Case 283/81 *Cilfit* [1982] ECR 3415, paragraph 7.

28 — I shall consider below the meaning of that condition for State liability, which is set out in paragraphs 54 to 56 of *Köbler*.

29 — [2004] ECR I-8835, paragraphs 110 to 115.

30 — [2003] ECR I-14637.

the evidence which was admissible to prove it.[31] However, the national legislation was the subject of differing interpretations by the courts, some arriving at an application of that legislation that was compatible with Community law, others arriving at an application that was incompatible with it. As the tendency of judgments to fall into the latter category was significant and not isolated, the Court took that factor into account when deciding on the scope of the national legislation at issue. In that regard, it paid particular attention to the judgments of the Corte Suprema di Cassazione,[32] which interpreted the national legislation in a way that was inconsistent with Community law and manifestly disregarded the Court's case-law on the subject.[33]

60. In view of those differences in case-law and the practice followed by the administration in that matter, which show that the national legislation in question was not sufficiently clear to ensure its application in compliance with Community law so that the national legislature should have effected the necessary amendments or clarifications to it,[34] the Court held that the infringement proceedings were well founded.

61. Although the breach of Community law in question was attributable to all the national authorities (judicial, administrative and legislative) and not just to the Corte Supreme di Cassazione, and was considered in the specific context of infringement proceedings, that case provides an interesting example of infringement of Community law, by a supreme court, of a kind to give rise to liability on the part of the State owing to an incompatible interpretation (of national law in relation to the provisions of Community law) adopted in manifest disregard of the case-law of the Court of Justice on the subject.[35]

62. Taking this example further, one could also imagine a situation in which a supreme court applied national legislation which it regarded as complying with Community law, although, under the principle of the supremacy of Community law over national law, it should have disapplied it because of its absolute incompatibility with Community law (excluding any possibility of a consistent interpretation). The consequent infringement of Community law might relate to an exercise of interpretation of national law and/or Community law which involved, for example, interpreting national law in order to render its application compatible with Community law, although the latter would

31 — See *Commission* v *Italy*, paragraph 31.

32 — Ibid., paragraphs 34 and 35.

33 — See, in particular, Case C-343/96 *Dilexport* [1999] ECR I-579, paragraphs 52 and 54, specifically in relation to the national legislation concerned; Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 14; and Case 104/86 *Commission* v *Italy* [1988] ECR 1799, paragraphs 7 and 11, in relation to earlier national legislation, eventually repealed, which expressly provided for the same evidential requirements as those imposed by certain courts and the administration in the context of the interpretation and application of the subsequent national legislation concerned.

34 — See to that effect, Case 129/00 *Commission* v *Italy*, paragraph 33.

35 — I would point out that the Corte suprema di cassazione appears to have departed from that case-law after the Court delivered its judgment in this case. See to that effect judgment No 13054 *Soc. Sief and Others* v *Ministero dell'Economia e delle Finanze and Others* of 14 July 2004 (*Foro italiano* 2004, I, p. 2700).

doubtless be wrongly interpreted since, in the present example, it would be impossible to reconcile them.

63. To that example, as to that preceding, one might add a case in which the infringement of Community law was the result of a misinterpretation of a rule of Community law applicable, whether substantive or procedural.

64. To exclude State liability for a breach of the law solely on the ground that the breach in question relates to the interpretation of provisions of law would amount to excluding State liability in each of those three examples of infringement of Community law. Clearly, such exclusion of State liability, where the breach of Community law is attributable to a supreme court, seriously undermines the principle defined by the Court in *Köbler*.

65. To those various examples of infringement of Community law one should add the situation in which a supreme court disregards its obligation under the third paragraph of Article 234 EC to make a reference for a preliminary ruling on the interpretation of Community law.

66. Failure to comply with that obligation is likely to cause the court concerned to commit an error falling within one of those examples, either an error in the interpretation of the Community law applicable, or an error regarding the consequences to be drawn from that law in order to ensure a consistent interpretation of national law or to assess whether that law is compatible with Community law.

67. That effect which disregard of the obligation to make a reference for a preliminary ruling would have on the commission of an infringement of Community law was taken into account by the Court in its definition of the criteria for assessing whether a supreme court has manifestly disregarded the applicable law, in order to determine whether the first condition for the State to incur liability, relating to the existence of a sufficiently serious breach of Community law, is met.

68. In paragraph 55 of *Köbler*, the Court held that it was necessary to take into account, in particular, 'the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC'.

69. Thus, disregard of the obligation to make a reference for a preliminary ruling is one of the criteria to be taken into consideration in order to determine whether there has been a sufficiently serious breach of Community law by a supreme court, in addition to those which the Court defined in *Brasserie du Pêcheur and Factortame*, and in the case-law which followed, regarding State liability for the acts or omissions of the legislature or the administrative authorities. [36]

70. Although the Court has refrained from establishing a hierarchy amongst those different criteria, the relevance of some of which appears to me to be debatable, [37] I consider that the criterion concerning the obligation to make a reference for a preliminary ruling is of particular importance.

71. In order to determine whether the error of law at issue is excusable or inexcusable (which I consider to be the central criterion in relation to the others), [38] particular attention should be paid to the position taken by the supreme court concerned with regard to its obligation to make a reference for a preliminary ruling.

72. Thus, where the provision of law infringed is unclear and imprecise the error of law in question is not therefore excusable; precisely in such a case, the supreme court should have referred a question for a preliminary ruling since it could not consider that the decision to be taken on the point of law concerned left no scope for any reasonable doubt within the meaning of *Cilfit*, [39] especially if there was no case-law of the Court which might give it guidance on that point. [40]

73. Conversely, where the provision of law infringed is clear and precise, the error of law in question is even less excusable since, if by chance the supreme court had contemplated not applying it, for example in a situation where in its view that provision was in conflict with other provisions which it would be difficult to interpret or apply in conjunction with the infringed provision, that court should also have referred a question for a

36 — Concerning the development of that case-law, see points 131 to 137 of my Opinion in *Kobler*, cited above.

37 — In my view, this applies to the criterion of whether the infringement was intentional or involuntary and the criterion concerning the position taken by Community institutions (apart from the particular field of competition law and State aid where that criterion may be relevant). See in that connection paragraphs 154 to 156 of my Opinion in *Kobler*, cited above.

38 — See to that effect point 139 of my Opinion in *Kobler*, cited above.

39 — See paragraphs 16 to 20 of the judgment.

40 — In my opinion, that view is not undermined by the view taken in *Kobler*, (paragraphs 120 to 124) concerning infringement of certain rules of Community law which the Court considered to be unclear or imprecise. According to the Court, given the spirit of judicial cooperation that governs the preliminary reference procedure, withdrawal of a question referred for a preliminary ruling may appear less serious than the absence of any reference, so that the error of law in question (which would most probably have been avoided if that question had been retained) is more excusable than if there had been no reference at all. However, strictly from the standpoint of the law and legal theory, one may wonder about the relevance of such a distinction when, as in the present case, the supreme court concerned withdrew its question owing to an erroneous reading of a judgment transmitted to it by the Court after the latter had received that question, when careful reading of that judgment (which is unambiguous) would have made it possible to avoid such an erroneous reading (and doubtless an error in establishing the consequences for the outcome of the case). That being so, the Court's analysis, which seeks to underplay the importance of the criterion of disregard of the obligation to make a reference for a preliminary ruling, seems largely to be based on considerations relating to the particular circumstances of the case, so that it is permissible to think that it should not be extended much beyond those circumstances.

preliminary ruling; according to its own analysis, it was also not possible to consider that the decision it was contemplating giving in respect of the point of law before it left no room for reasonable doubt, especially in a situation where that supreme court might have wished to depart from case-law of the Court of Justice on the subject. [41]

74. In my view, those examples show the extent to which disregard by a supreme court of its obligation to make a reference for a preliminary ruling will affect the delicate assessment as to whether the error of law in question is or is not excusable, which is intended to determine whether the breach concerned is sufficiently serious to give rise to liability on the part of the State.

75. The way the Court, in paragraph 55 of *Köbler*, dealt with disregard of the obligation to make a reference for a preliminary ruling, the importance of which I have just stressed as regards the assessment as to whether the error of law in question is or is not excusable, in my view precludes State liability from being excluded where a breach of Community law attributable to a supreme court is combined with a failure to comply with the obligation to make a reference for a preliminary ruling.

76. This appears to be the significance of national legislation such as that at issue in the dispute in the main proceedings. A failure to comply with the obligation to make a reference for a preliminary ruling has several points in common with the activity of interpreting provisions of law. Not only, as I stated above, is such failure likely to lead to an infringement of Community law relating to the interpretation of those provisions, it may also itself stem from an erroneous interpretation of Community law or from an incorrect interpretation of the case-law of the Court on the subject. It follows that, under such national legislation, an infringement of Community law committed by a supreme court in disregard of its obligation to make a reference for a preliminary ruling could not give rise to State liability.

77. If one confines oneself to paragraph 55 of the judgment in *Köbler*, which aims to define the scope of the principle of State liability for an infringement of Community law attributable to a supreme court, one must conclude from it that that principle precludes the exclusion of State liability under national legislation (such as, it would

41 — As I stated in point 141 of my Opinion in *Köbler*, the judgments of the Court, in particular preliminary rulings, are necessarily binding on the national courts as to the interpretation of provisions of Community law, so if those courts wish to depart from the Court's case-law, the only avenue open to them is to refer a question for a preliminary ruling to the Court and submit to it further factors for consideration that might lead the Court to give a different answer to a question that has already been examined.

appear, that in question in the dispute in the main proceedings) where the infringement concerned is combined with a failure to comply with the obligation to make a reference for a preliminary ruling.

78. In my view, the same applies in the specific (doubtless rare) [42] situation in which an individual whose claims have not succeeded alleges that a supreme court has infringed Community law merely by failing to comply with the obligation to make a reference for a preliminary ruling.

79. As I stated in point 144 of my Opinion in *Köbler*, State liability cannot be precluded *prima facie* in the case of a supreme court's manifest disregard for its obligation to make a reference for a preliminary ruling even if, as I also stated (in points 149 and 150 of that Opinion), in such circumstances there is a risk, in putting in issue State liability, of encountering serious difficulties in adducing proof of a direct causal link between breach of the obligation to make a reference and the damage pleaded.

42 — One could imagine a case in which an individual would prefer to bring his action for damages against the State on the ground of an alleged failure to comply with the obligation to make a reference for a preliminary ruling, rather than on the ground of an alleged breach of a provision of Community law the interpretation of which should have given rise to such reference, since it might be easier to demonstrate the existence of a manifest breach of the obligation to make a reference for a preliminary ruling than a manifest breach of the substantive provision of law concerned.

80. In my opinion, all these considerations show the extent to which the principle of State liability for an infringement of Community law attributable to a supreme court, which was defined in the judgment in *Köbler*, would be undermined in a situation where such liability was excluded (under national legislation) where the infringement in question related to the interpretation of provisions of law.

81. I conclude from this that the principle of State liability for an infringement of Community law attributable to a supreme court precludes such liability being excluded, under national legislation, solely on the ground that the infringement in question relates to the interpretation of provisions of law.

B — *Exclusion of State liability where the infringement of Community law attributable to a supreme court relates to the assessment of facts and of evidence*

82. At first sight, one might wonder whether exclusion of State liability, where the judicial activity in question relates to the assessment of facts and of evidence, has any effect on the principle of State liability in the case of an infringement of Community law attributable to a supreme court.

83. It is commonly accepted that supreme courts, unlike ordinary courts, examine points of law, and not points of fact and law. Thus they are not supposed in principle to assess either the truth of the alleged facts or the relevance, meaning or scope of the evidence adduced in order to establish them, since that exercise of assessment falls by its nature solely to courts hearing the merits of the case. It follows that, in principle, only an error of law and not an error of fact falls within the review exercised by supreme courts over the decisions of the ordinary courts. [43]

84. All the same, the assessment of facts and of evidence carried out by those courts does not fall totally outside the review of the supreme courts since, in particular, the latter ensure compliance with the rules of evidence (concerning the admissibility of evidence or the burden of proof) and have to verify the accuracy of the legal classification of facts, that is to say, to consider whether the facts of the case, as set out in the judgment under appeal, do indeed fall within the legal category to which the courts hearing the merits of the case have assigned them, thus determining which specific set of legal rules they are subject to. [44] Each of those operations forms part of the review for error of law, whether it concerns the proper establishment of the facts found by the court hearing the merits or the consequential legal effects which that court has inferred from them (which may moreover result from an erroneous interpretation of the concept as it relates to the legal category concerned).

85. Such review is not unknown in Community law.

86. First of all, although the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded remain broadly governed by the principle of the procedural autonomy of the Member States, subject to observance of the principles of equivalence and effectiveness, there are certain rules of Community law relating to evidence. Take, for example, the rules laid down in several directives relating

43 — See in that connection, in particular, for the French system, Boré, J., and Boré, L., *La cassation en matière civile*, Dalloz, Third edition, 2003, p. 223 and pp. 262 to 278; for a comparative law study of the French and German systems, Ferrand, F., *Cassation française et Révision allemande*, PUF, 1993, pp. 42 and 161; for the Italian system, Di Federico, G., *Manuale di ordinamento giudiziario*, CEDAM, 2004, pp. 83 to 85. For a comparable system, see Wathelet, M., and Van Raepenbusch, S., 'Le contrôle sur pourvoi de la Cour de justice des Communautés européennes, dix ans après la création du Tribunal de première instance', *Mélanges en l'honneur de M.. Schockweiler*, 1999, pp. 605 to 633.

44 — See in particular, for the French system, Boré, J., and Boré, L., op. cit., pp. 274 and 275, and pp. 279 to 294; for the French and German systems, Ferrand, F., op.cit., pp. 135 and 163; and for the Italian system, Ascarelli, T., 'Le fait et le droit devant la Cour de cassation italienne', *Le Fait et le droit, Études de logique juridique*, Bruylant, Brussels, 1961, p. 113 et seq., and Mazzarella, F., *Analisi del giudizio civile di cassazione*, CEDAM, Third edition, 2003, p. 86.

to the burden of proof in the matter of discrimination.[45] It is incumbent on supreme courts to ensure that courts hearing the merits of a case comply with those rules.

87. Moreover and more especially, there are many concepts of Community law which lend themselves to review of the legal classification of the facts. This applies most particularly in matters of State aid.

88. As I stated above (subject to the amendments resulting from Regulation No 994/98),[46] implementation of the system of review of State aid falls to both the Commission and national courts, which have been given separate and complementary tasks. Thus, whilst the Commission is responsible for examining whether aid is compatible with the common market, the national court is required to safeguard (until the Commission has given a final decision on the compatibility of that aid with the common market) the rights which individuals derive from the direct effect of the provisions of Article 93(3) of the Treaty.

89. Within that framework, it is for the national court to carry out several operations in connection with the legal classification of the facts. First of all, it must examine whether the contested measure constitutes State aid within the meaning of Article 92(1) of the Treaty, that is to say, whether it procures an advantage, through the use of public resources, for its beneficiary or beneficiaries.[47] It must then determine whether that State aid falls within the category of aid which is prohibited by Article 92(1) of the Treaty, that is to say, on the one hand, whether it will distort competition and, on the other hand, whether it is likely to affect trade between Member States. Once the national court has concluded that the contested measure is covered by the prohibition in principle provided for in that article, it remains for it to determine whether that measure should be reviewed under the procedure laid down in Article 93(3) of the

45 — See Article 8 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22) and Article 10 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), adopted in furtherance of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6).

46 — See points 10 to 12 of this Opinion and the relevant footnotes.

47 — This classification exercise may prove difficult for the national judge, in particular in the case of subsidies of State origin granted in order to offset the cost of public service obligations imposed on an undertaking, having regard to the scope which the Court conferred, in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraphs 83 to 94, on the criterion of the advantage afforded to the beneficiary of such a measure. That being so, I would point out that, in *SFEI and Others*, (paragraph 50) the Court stated that '[w]here the national court entertains doubts as to whether the measures at issue should be categorized as State aid, it may seek clarification from the Commission on that point', adding that '[i]n its notice on cooperation between national courts and the Commission in the State aid field ..., the Commission expressly encouraged national courts to make contact with it when they encounter difficulties in the application of Article 93(3) of the Treaty and explained what kind of information it was able to supply'. To the same effect, the Court added that '[m]oreover, in accordance with the second and third paragraphs of Article 177 of the Treaty, the national court may or must request the Court for a preliminary ruling on the interpretation of Article 92 of the Treaty' (paragraph 51).

Treaty. This leads it, if appropriate, to examine whether it is new aid (which is subject to that procedure) and not existing aid (which is not subject to that procedure).

90. It is only on completion of that series of classification operations that the national court can rule on the legality of the contested measure and draw from it all the appropriate inferences in a case of infringement of Article 93(3) of the Treaty. [48]

91. All these operations of legal classification of the facts, in an area such as that in the dispute in the main proceedings, fall within the scope of review by the supreme courts.

92. It is possible that, in the course of such a review for error of law, the supreme courts might themselves commit an error of law giving rise to State liability if, according to the criteria laid down in *Köbler*, it results in a manifest infringement of the relevant Community law.

93. I conclude from this that the principle of State liability for an infringement of Community law attributable to a supreme court precludes such liability being generally excluded under national legislation solely on the ground that the infringement in question relates to the assessment of facts and of evidence.

94. At this point it is appropriate to consider whether such a principle also precludes State liability being limited under national legislation (where it is not excluded) solely to cases of intentional fault or serious misconduct.

C — *Limitation of State liability for an infringement of Community law attributable to a supreme court to cases of intentional fault or serious misconduct*

95. At paragraph 53 of the judgment in *Köbler*, the Court limited State liability for an infringement of Community law resulting

48 — For an outline of those inferences, see point 125 of my first Opinion in *Altmark Trans and Regierungspräsidium Magdeburg*. In that connection I would emphasise that the need for the national court to rule on the legality of the contested measure is not affected by a final decision of the Commission declaring that measure to be compatible with the common market. As the Court has consistently held, the Commission's final decision does not have the effect of regularising *ex post facto* the implementation of aid measures that have been taken in breach of Article 93(3) of the Treaty. See, in particular, *Saumon*, paragraphs 16 and 17; and Joined Cases C-261/01 and C-262/01 *Van Calster and Others* [2003] ECR I-12249, paragraphs 62 and 63 and Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, paragraph 31.

from a decision of a supreme court to 'the exceptional case where the [latter] has *manifestly* infringed the applicable law'. [49]

96. This wording is different from that used by the Court in *Brasserie du Pêcheur and Factortame*, where a Member State acts in an area in which it has a broad discretion. The Court held that in such cases the State can incur liability only where 'the Member State concerned *manifestly and gravely* disregarded the limits on its discretion'. [50]

97. One might wonder what the purpose of this change in wording was since, in *Köbler*, (paragraphs 55 and 56), the Court nevertheless repeated in full the list of criteria which it had laid down in *Brasserie du Pêcheur and Factortame* (paragraphs 56 and 57) for determining whether that condition relating to the nature of the infringement in question is met. As I stated above, the Court merely added to it the criterion of failure to comply with the obligation to make a reference for a preliminary ruling.

98. Does the omission of an express reference to whether or not the infringement in question is serious have any connection with the fact that, since the judgment in *Bergaderm and Goupil* v *Commission*, [51] the condition for liability stemming from the higher rank of the provision of law infringed, defined by the Court some years ago in respect of the Community's non-contractual liability, is no longer applied? Although that condition governing whether the Community may incur liability was not extended, in *Brasserie du Pêcheur and Factortame*, to the rules under which Member States may incur liability, although the Court repeated in that judgment the requirement relating to the seriousness of the infringement in question (which had also been laid down in the context of Community liability), the question arises whether the Court was not concerned, in *Köbler*, to avoid that requirement relating to the seriousness of the infringement being interpreted as being a requirement concerning the nature of the rule of law infringed, since the so-called 'higher-ranking' or fundamental nature of that rule might contribute to the infringement in question being regarded as serious. The question remains open.

99. This being so, whatever interpretation is to be given to that change in wording in the course of the development of the case-law, I would repeat that in order to assess whether the condition under which the State may incur liability stemming from the nature of the infringement of Community law by a supreme court is met, according to the Court it is necessary to take into consideration, in particular, 'the degree of clarity and precision

49 — Emphasis added.

50 — Paragraph 55, emphasis added.

51 — C-352/98 P [2000] ECR I-5291 (see paragraphs 13 and 39 to 47).

of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC'. [52] Let us remember that in the view of the Court, '[i]n any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter'. [53]

100. Although the concepts of intentional fault and serious misconduct may take on significantly different meanings within the legal systems of the various Member States, one may consider, in furtherance of the judgment in *Brasserie du Pêcheur and Factortame*, [54] that some of the factors that may attach to those concepts within a national legal system may be of interest, in the light of the series of criteria listed in paragraphs 55 and 56 of *Köbler*, in assessing whether a supreme court has manifestly infringed the applicable law.

101. Although a State may incur liability on the basis of national law under less restrictive conditions than those defined by the Court in *Köbler*, [55] imposition of a supplementary, and therefore more restrictive, condition would, however, be tantamount to calling in question the right to reparation founded on the Community legal order. [56]

102. Like the Commission, and without abandoning my reservations with regard to the relevance of the criterion of whether the breach in question was intentional, which was ultimately adopted by the Court in *Köbler*, (which I acknowledge), [57] I infer from all those developments in the case-law that State liability for infringement of Community law by a supreme court cannot be made subject to a condition based on a concept of intentional fault or serious misconduct that goes beyond manifest disregard of the applicable law (within the meaning of paragraphs 55 and 56 of *Köbler*). [58]

52 — See *Köbler*, paragraph 55.

53 — Ibid., paragraph 56.

54 — See *Brasserie du Pêcheur and Factortame*, paragraph 78, regarding the possibility of making liability on the part of a Member State conditional on the existence of fault. One cannot fail to compare that concept of fault with that of intentional (or deliberate) fault or serious misconduct (in the sense of an unintentional fault).

55 — See paragraph 57 of *Köbler*, in line with paragraph 66 of *Brasserie du Pêcheur and Factortame*.

56 — Idem.

57 — See the reservations which I expressed in point 156 of my Opinion in *Köbler*. Although I maintain those reservations, I do not go so far as to propose a departure from precedent on this point.

58 — See, for a similar reasoning, *Brasserie du Pêcheur and Factortame*, paragraph 79.

103. Therefore, the answer to the question referred for a preliminary ruling by the national court should be that, although the principle of State liability for infringement of Community law attributable to a supreme court precludes such liability, under national legislation, being generally excluded solely on the ground that the infringement in question relates to the interpretation of provisions of law or assessment of facts and evidence, that principle nevertheless does not preclude such liability being made subject to the existence of intentional fault or serious misconduct on the part of the supreme court concerned, provided that that condition does not go beyond manifest disregard of the applicable law.

VI — Conclusion

104. Having regard to all these considerations, I propose that the Court give the following answer to the question referred for a preliminary ruling by the Tribunale di Genova which it wished to maintain:

Although the principle of State liability for infringement of Community law attributable to a supreme court precludes such liability, under national legislation, being generally excluded solely on the ground that the infringement in question relates to the interpretation of provisions of law or assessment of facts and evidence, that principle nevertheless does not preclude such liability being made subject to the existence of intentional fault or serious misconduct on the part of the supreme court concerned, provided that that condition does not go beyond manifest disregard of the applicable law.