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Phantom Menace or New Hope: Member State Public Tort Liability After the Double-Bladed Light Saber Duel Between the European Court of Justice and the German Bundesgerichtshof in Brasserie du Pecheur

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Phantom Menace or New Hope: Member State Public Tort Liability After the Double-Bladed Light Saber Duel Between the European Court of Justice and the German *Bundesgerichtshof* in *Brasserie du Pêcheur*

*“Wie das Bier Sommer wie Winter auf dem Land sol
geschenkt und prauen werden.”†*

*Markus G. Puder**

ABSTRACT

This Article examines the interactions between European Community and national law, in the context of Member State public tort liability. Specifically, the Article analyzes Brasserie du Pêcheur v. Federal Republic of Germany, a case that pitted German beer purity legislation against requirements of Community law. In that case, the European Court of Justice (ECJ) ruled that acts or omissions of the national legislator may, under certain conditions, give rise to Member State public tort liability, which is adjudicated in the national court systems. The German Federal Court of Justice dismissed the case after finding that the conditions of state liability were not met under either German or Community law.

The Article discusses in detail the nature and characteristics of the Member State liability principle conceived by the ECJ; despite the silence of treaty law on this

† “How in Summer as in Winter the Beer in the Land Shall be Drawn and Brewed.”

* First Legal State Examination, 1987, Ludwig-Maximilians University of Munich, Germany; Second Legal State Examination, 1990, Upper Court of Appeals of Munich; Master of Laws, 1991, Georgetown University Law Center; Ph.D. in Law, 1997, Ludwig-Maximilians University. Member, New York Bar and U.S. Supreme Court Bar. Dr. Puder is an attorney and researcher with the Environmental Assessment Division of Argonne National Laboratory, Washington, D.C. Office, and an adjunct professor of law at the Georgetown University Law Center, where he teaches European Union law.

issue, the ECJ has long supported the notion that a Member State may incur tort liability for breaching community law. As a result of ECJ jurisprudence, supranational judge-made law may deeply permeate domestic legal orders. However, the German court's dismissal of the damages claim in Brasserie du Pêcheur demonstrates that Member State liability is not open-ended. Rather, a balance may be achieved between European Community (EC) compliance interests and Member State domestic institutional prerogatives.

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I. INTRODUCTION**

On October 24, 1996, the highest civil court in Germany, the Federal Court of Justice (*Bundesgerichtshof* (BGH)), rejected a claim for damages levied by *Brasserie du Pêcheur* against the Federal Republic of Germany.¹ The decision drew the final curtain on a drama of serial litigation² pitting German legislation

** The views as well as the translations of foreign legal sources and terms offered in this article are strictly those of the author as a private individual.

1. See BGHZ 134, 30, (40); [1997] 1 C.M.L.R. 971.

2. See Peter Oliver, *Cases C-46/93 and C-48/93, Brasserie du Pêcheur v. Germany, and The Queen v. Secretary of State for Transport ex parte Factortame*

against requirements of European Community (Community) law.³ The German laws had confined the use of the designation “beer” (*Bier*) to products brewed from certain raw materials and prohibited the use of additives, basically codifying the ancient Purity Requirement for Beer (*Reinheitsgebot für Bier*)—the hallmark of German beer brewing tradition—which stipulates malted barley, hops, yeast, and water as the only permitted ingredients for brewing beer.⁴ Under European Court of Justice

Ltd, [1996] E.C.R. I-1029, 34 COMMON MKT. L. REV. 635, 635 (1997) (speaking of “two of the longest-running judicial soap operas in the Community’s history”).

3. The European Community, the European Atomic Energy Community, and the European Coal and Steel Community form the supranational first pillar of the European Union. The mainly intergovernmental Common Foreign and Security Policy and the Police and Judicial Cooperation in Criminal Matters are organized in the second and third pillars. This Greek temple structure of the European Union was conceived by the TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 340/02) 145 (as amended by the TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340/01) 1 (1997) [hereinafter TREATY OF AMSTERDAM]). European Community law, as referenced in this article, is governed by the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, O.J. (C 340/03) 173 (as amended by the TREATY OF AMSTERDAM) [hereinafter EC TREATY]. For an excellent overview of the treaty architecture and pertinent terminology, see DAVID A.O. EDWARD & ROBERT C. LANE, EUROPEAN COMMUNITY LAW 1-2 (1995).

4. The German Purity Requirement for Beer ranks among the oldest food-and-drug laws in the world. See <http://ourworld.compuserve.co/m/homepages/Karl_Prommersberger/Bayern02.htm> (explaining that (1) as early as 1165, the City of Augsburg punished drawing bad beer; (2) in 1487, Duke Albrecht enacted an ordinance fixing the beer price at one cent for the liter of winter beer and two cents for the liter of summer beer; (3) in addition, brewers were required to perform a brewing oath (*preu-aid*) before the *Rentmeister* of Upper Bavaria; and (4) decreed by Duke George the Rich of Bayers-Landshut in 1493 and extended to the whole of Bavaria in 1516 by Archduke Wilhelm IV, the original German Purity Requirement for Beer entitled “How in Summer as in Winter the Beer in the Land Shall Be Drawn and Brewed” (*Wie das Bier Summer wie Winter auf dem Land sol geschenkt und prauen werden*) emerged). See also CARLO DEVITO, THE EVERYTHING BEER BOOK 5, 11 (1998) (noting that (1) the first recorded description of beer in words or artifacts date suggests beer brewing may date back between 6000 and 9000 years ago somewhere between the Tigris and Euphrates rivers, and (2) the Bavarian Duke was probably interested in protecting consumers’ rights but even more so in improving the national standard so that beer could be reliably exported and taxed). For the full text in middle German, see <http://ourworld.compuserve.com/homepages/Karl_Prommersberger/Bayern02.htm>:

Item wir ordnen, setzen und wollen mit Rathe unnser Lanndtschaft das füran allenthalben in dem Fürstenthumb Bayrn auff dem Lande auch in unsern Stettn wie Märckthen da desáhalb hievor kain sonndere ordnung gilt von Michaelis bis auff Georij ain mass oder kopffpiers über einen pfennig müncher werung un von Sant Jorgentag biß auff Michaelis die mass über zwen pfennig derselben werung und derenden der kopff ist über drey haller bey nachgefertter Pene nicht gegeben noch außgeschenckht sol werden. Wo auch ainer nit Merrzn sonder annder pier prauen oder sonst haben würde sol

(ECJ) case law, beers that do not conform to the German beer recipe legislation may still be sold under the designation of beer in Germany.⁵ They may contain other raw ingredients and additives, but must be unequivocally labeled.⁶

erd och das kains weg häher dann die maß umb ainen pfennig schenken und verkauffen. Wir wollen auch sonderlichen dass füran allenthalben in unsern stetten märckthen un auf dem lannde zu kainem pier merer stückh dan allain gersten, hopfen un wasser genommen un geprauchet solle werdn. Welcher aber dise unsere Ordnung wissendlich überfaren unnd nie hallten wurde den sol von seiner gerichtsobrigkait dasselbig vas pier zustraff unnachlässlich so oft es geschiehet genommen werden. [J]edoch wo ain brüwirt von ainem ainem pierprewen in unsern stettm märckten oder aufm lande jezuzetn ainen Emer piers zwen oder drey kauffen und wider unnter den gemaynen pawrfuolck ausschenken würde dem selben allain aber sonstnyemandes soldyemaßs oder der kopfpiers umb ainen haller häher dann oben gesetzt ist zugeben un ausschencken erlaube unnd unuerpotn.

For an English translation, see Karl J. Eden, *History of German Brewing*, 16 (4) ZYMURGY (Special 1993), available at <<http://brewery.org/library/ReinHeit.html>>:

We hereby proclaim and decree, by Authority of our Province, that henceforth in the Duchy of Bavaria, in the country as well as in the cities and marketplaces, the following rules apply to the sale of beer:

From Michaelmas to Georgi, the price for one Mass [Bavarian Liter 1,069] or one Kopf [bowl-shaped container for fluids, not quite one Mass], is not to exceed one Pfennig Munich value, and

From Georgi to Michaelmas, the Mass shall not be sold for more than two Pfennig of the same value, the Kopf not more than three Heller [Heller usually one-half Pfennig].

If this not be adhered to, the punishment stated below shall be administered.

Should any person brew, or otherwise have, other beer than March beer, it is not to be sold any higher than one Pfennig per Mass.

Furthermore, we wish to emphasize that in future in all cities, markets and in the country, the only ingredients used for the brewing of beer must be Barley, Hops and Water. Whosoever knowingly disregards or transgresses upon this ordinance, shall be punished by the Court authorities' confiscating such barrels of beer, without fail.

Should, however, an innkeeper in the country, city or markets buy two or three pails of beer (containing 60 Mass) and sell it again to the common peasantry, he alone shall be permitted to charge one Heller more for the Mass of the Kopf, than mentioned above. Furthermore, should there arise a scarcity and subsequent price increase of the barley (also considering that the times of harvest differ, due to location), WE, the Bavarian Duchy, shall have the right to order curtailments for the good of all concerned.

5. See Case 178/84, *Commission v. Federal Republic of Germany*, 1987 E.C.R. 1227, [1988] 1 C.M.L.R. 780.

6. But see <http://ourworld.compuserve.com/homepages/Karl_Prommersberger/Bayern02.htm> (explaining that (1) such beers, however, have not been accepted by the German consumer, and (2) on the contrary, large foreign breweries have

In contrast, the matter of damages to parties allegedly injured as a result of the Purity Requirement for Beer was not raised until *Brasserie du Pêcheur* (hereinafter *Brasserie*), which involved proceedings before the German civil courts and the ECJ. The ECJ's preliminary ruling, which the BGH had requested, held that Member State public tort liability may be triggered by domestic legislation violative of Community law.⁷ Nevertheless, the BGH, finding that the conditions of state liability were not met under German or Community law, dismissed the case.⁸

This Article employs the beer litigation as a case study to analyze the interactions and fault lines between Community and national law, as exhibited in the context of Member State public tort liability. Part I juxtaposes the ECJ's and the BGH's *Brasserie* decisions. Part II analyzes the content, characteristics, and nature of the state liability doctrine conceived by the ECJ. Part III assesses the effects of the ECJ's jurisprudence on the national legal orders. Finally, Part IV provides findings and conclusions.

II. THE *BRASSERIE* DECISIONS OF THE ECJ AND THE BGH

A. *Factual Background*⁹

The plaintiff, the French beer brewery of *Brasserie du Pêcheur* based at Schiltigheim (Alsace), alleged that, until 1981, it exported significant amounts of beer into the Federal Republic of Germany.¹⁰ *Brasserie* claimed that it was forced to discontinue exports of beer into Germany in late 1981 because the German authorities objected to the beer asserting that it did not comply with the German Purity Requirement for Beer laid down in the

acceded to the wishes of German consumers who continue to prefer beers brewed in accordance with the German Purity Requirement for Beer).

7. See *Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, [1996] 1 C.M.L.R. 889, 987.

8. See *Brasserie du Pêcheur SA v. Germany*, [1997] 1 C.M.L.R. 971.

9. For comprehensive depictions of the facts, see *Brasserie du Pêcheur SA*, 1996 E.C.R. I-1029, [1996] 1 C.M.L.R. 889 (presenting the facts of the case as provided in (1) the report for the hearing, (2) the Opinion of Advocate General Tesouro, and (3) the judgment of the ECJ); *Brasserie du Pêcheur SA*, [1997] 1 C.M.L.R. 971 (containing the description of the facts by the BGH); Dirk Ehlers, *Die Weiterentwicklung des Staatshaftungsrechts durch das europäische Gemeinschaftsrecht*, 1996 JURISTEN ZEITUNG 776 (giving a concise summary of the facts).

10. See Ehlers, *supra* note 9, at 776 (1996) (noting that in the mid-seventies *Brasserie*'s exports into Germany reached a level of over 100,000 hl, however declined in the subsequent years until coming to a total halt in 1982).

German Law on Beer Duty (*Biersteuergesetz* (BStG)).¹¹ Fines were assessed against staff of the plaintiff's German contract partner, which undertook the importation and distribution of the beer in Germany, as well as buyers acting for food market chains, in which the beer was sold.¹² In its letter of November 4, 1981 addressed to the plaintiff, the distributor declared that the frequency of administrative proceedings pressed against it as the importer made it advisable to desist from all importation of the plaintiff's beer into Germany forthwith until the resolution of the issues raised by the Purity Requirement for Beer.¹³

The Commission of the European Communities took the view that the provisions of the German Law on Beer Duty contradicted the Treaty Establishing the European Community (EC Treaty) and initiated infringement proceedings against the Federal Republic of Germany. The Commission's complaint was directed at the prohibition on marketing under the designation *Bier* (beer) of beer lawfully manufactured in other Member States according to different recipe rules (designation prohibition), as well as the importation ban on beer containing additives (ban on additives).¹⁴ By judgment of March 12, 1987, the ECJ held that both prohibitions imposed by Germany were incompatible with the EC Treaty.¹⁵

Brasserie consequently brought an action against the Federal Republic of Germany for reparation of the loss incurred from 1981 until 1987 as a result of the import restrictions, including a partial claim for DM 1.8 million (\$1.1 million).¹⁶ The District Court (*Landgericht*) and Upper District Court (*Oberlandesgericht*)¹⁷ rejected the complaint and the plaintiff appealed to the BGH.¹⁸ After receiving the ECJ's preliminary ruling on the conditions under which a Member State may incur liability for damage caused to individuals by breaches of Community law attributable to that State, the BGH denied the claim for damages levied by the plaintiff.¹⁹

11. See §§ 9-10 of *Biersteuergesetz* (hereinafter BStG) v. 14.3.1952 (BGBl. I S.149), v. 14.12.1976 (BGBl. I S.3341, 3357).

12. See *Brasserie du Pêcheur SA*, [1997] 1 C.M.L.R. 971.

13. See *id.*

14. See *id.*

15. See Case 178/84, *Commission v. Federal Republic of Germany*, 1987 E.C.R. 1227, [1988] 1 C.M.L.R. 780.

16. See *Brasserie du Pêcheur SA v. Germany*, [1997] 1 C.M.L.R. 971.

17. See 7 *EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* 574 (1996).

18. For an overview of the German court system, see Patricia Dugdale, *The West German Court System*, 83 *LAW SOCIETY'S GAZETTE* 2665 (1986).

19. See *Brasserie du Pêcheur SA*, [1997] 1 C.M.L.R. 971.

B. *The Preliminary Ruling of the ECJ*²⁰

On March 5, 1996, the ECJ handed down its preliminary ruling resolving the five questions submitted to it by the BGH. The ECJ's answers addressed (1) the emergence of Member State liability for acts and omissions of the national legislature violative of Community law,²¹ (2) the conditions under Community law triggering a guarantee of a right to reparation of loss or damage caused to individuals by breaches of Community law attributable to a Member State,²² (3) the permissibility of making reparation conditional upon the existence of fault,²³ (4) the criteria for determining the amount of the reparation,²⁴ and (5) the period covered by the reparation.²⁵

1. State Liability for Acts and Omissions of the National Legislature Violative of Community Law

The ECJ ruled that acts or omissions of the national legislature contrary to Community law qualify as potential triggers of state liability, which requires Member States to

20. Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, [1996] 1 C.M.L.R. 889.

21. *See id.* at I-1036-37:

Does the principle of Community law according to which Member States are obliged to pay compensation for damage suffered by an individual as a result of breaches of Community law attributable to those States also apply where such a breach consists of a failure to adapt a national parliamentary statute to the higher-ranking rules of Community law (this case concerning a failure to adapt [Sections] 9 and 10 of the [BStG] to Article [28] of the [EC] Treaty)?

22. *See id.* at I-1037 ("May the national legal system provide that any entitlement to compensation is to be subject to the same limitations as those applying where a national statute breaches higher-ranking national law, for example where an ordinary Federal law breaches the Grundgesetz of the Federal Republic of Germany?").

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

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

25. *See id.* ("Does the obligation to pay compensation also require reparation of the damage already incurred before it was held in the judgment of the European Court of Justice of 12 March 1987 in *Case 178/84, Commission v. Germany*, [1987] E.C.R. 1227 that [Section] 10 of the [BStG] infringed higher-ranking Community law?").

compensate individuals for damages suffered as a result of breaches of Community law.²⁶ The ECJ reasoned that the principle, which was inherent in the system of the EC Treaty, alleged breaches committed by the domestic legislature.²⁷ According to the ECJ, in light of the fundamental requirement of the Community legal system that Community law be uniformly applied,²⁸ the rise of Member State liability “cannot depend on domestic rules [governing] the division of powers between constitutional authorities.”²⁹ The Court stated that this approach was consistent with international law³⁰ and, in the Community legal system, “all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by [Community] law directly governing the situation of individuals.”³¹

The ECJ rejected two alleged limitations to the emergence of Member State liability. According to the Court, state liability was not dependent upon the absence of a directly effective provision of Community law³² or upon the existence of formal legislation granting individuals access to reparations from the government.³³ The ECJ explained that the right of individuals to rely on directly effective provisions before national courts was only a minimum guarantee, not in itself sufficient to ensure full and complete

26. See *id.* at I-1145.

27. See *id.*

28. See *id.* (referring in particular to *Joined Cases C-143/88 & C-92/89, Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe & Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, 1991 E.C.R. I-415, [1993] 3 C.M.L.R. 1).

29. *Id.*

30. See *id.* (referring to Advocate General Tesouro's Opinion stating that international law, for purposes of breaches of international commitments, views a state as a single entity irrespective of whether the damage was attributable to the legislature, the judiciary, or the executive).

31. *Id.*

32. See *id.* at I-1142 (recalling the contentions of the German, Irish, and Netherlands Governments that (1) Member States were required to make good loss or damage caused to individuals only where the provisions breached were not directly effective, (2) in *Franovich*, the ECJ simply sought to fill a lacuna in the system for safeguarding rights of individuals, and (3) in so far as national law afforded individuals a cause of action enabling them to assert their rights before their national courts under directly effective provisions of Community law, it was unnecessary, where such provisions were breached, also to grant them a right to reparation founded directly on Community law).

33. See *id.* at I-1143 (providing the position of the German Government that (1) a general right to reparation for individuals could be created only by legislation, and (2) the recognition of such a right by judicial decision would be incompatible with the institutional balance established by the Treaty as well as the allocation of powers between the Community institutions and the Member States).

compliance with Community law.³⁴ The Court emphasized that direct effect could “not, in every [instance], secure for individuals the benefit of the rights conferred on them by [Community] law”³⁵ and the operation of direct effect was not designed to remedy damages which individuals may incur as a result of a breach of Community law attributable to a Member State.³⁶ The Court argued that the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a Member State’s breach of Community law.³⁷ The ECJ found that in cases of infringement of directly effective Community law, “the right to reparation [was] the necessary corollary of the direct effect” of Community law when the breached provision caused the damage sustained by the injured parties.³⁸ According to the Court, such a situation had arisen in the case at bar.³⁹

Addressing the second alleged limitation, the ECJ held that its jurisdiction to interpret questions of Community law included adjudging “the existence and extent of state liability for damage ensuing as a result of a breach of obligations incumbent on the State by virtue of Community law.”⁴⁰ The Court reasoned that its primary task and power of interpretation was rooted in primary Community law directing the ECJ to ensure that “in the interpretation and application of [the treaties] the law is observed.”⁴¹ This, the Court continued, included ruling on a question pursuant to generally accepted methods of interpretation, in particular by reference to the fundamental principles of Community law and, where necessary, to general principles common to laws of the Member States.⁴² According to

34. See *id.* at I-1142 (referring in particular to *Case 168/85, Commission v. Italian Republic*, 1986 E.C.R. 2945, para. 11; *Case C-120/88, Commission v. Italian Republic*, 1991 E.C.R. I-621, para. 10; and *Case C-119/89, Commission v. Kingdom of Spain*, 1991 E.C.R. I-641, para. 9).

35. *Id.*

36. See *id.* at I-1142-43 (reasoning that (1) provisions of a non-transposed directive may be insufficiently precise and unconditional, and therefore preclude individuals from relying on direct effect before their national courts, and (2) state liability actions for reparation against the defaulting Member State for breach of the third paragraph of Article 249 of the EC Treaty serve “to redress the injurious consequences of a Member State’s failure to transpose a directive as far as beneficiaries of that directive are concerned”).

37. See *id.* at I-1142.

38. *Id.* at I-1143.

39. See *id.* (finding that Article 28 of the EC Treaty has direct effect and that breach of such a provision may give rise to reparation).

40. *Id.* (stating that in the case at issue those questions of interpretation had been referred to the Court by national courts pursuant to Article 234 of the EC Treaty).

41. *Id.* at I-1144 (invoking Article 220 of the EC Treaty).

42. See *id.* (referring to Article 288 of the EC Treaty).

the ECJ, in both legal systems the essentials of the legal rules governing state liability were shaped by the courts.⁴³

2. Conditions of Member State Liability

The ECJ emphasized that the rise of state liability, albeit varying with the nature of each case, was based on the core fundamentals of the Community legal order.⁴⁴ These principles, the Court continued, included the protection of individual rights, the full effectiveness and uniform application of Community law, and the duty of sincere cooperation between the Community and the Member States.⁴⁵

The Court fashioned its analysis along its established jurisprudence with respect to the rules of non-contractual liability of the Community under the EC Treaty.⁴⁶ The ECJ found that its case law was basically driven by the margin of discretion available to the legislator.⁴⁷ The Court recalled that under its "strict standard," when Community institutions act in legislative contexts characterized by the need to exercise wide discretion and make economic choices, the Community cannot incur liability unless the institutions concerned have manifestly and gravely disregarded the limits on the exercise of their powers.⁴⁸ The ECJ then addressed the Member State level and distinguished between acts or omissions of the national legislature in a field governed by Community law as opposed to

43. See *id.* (stating that non-contractual liability of the Community under Article 288(2) of the EC Treaty and the referenced laws common to the legal orders of the Member States both reflect the generally recognized obligation of public authorities to make good damage caused by unlawful acts or omissions in the performance of their duties).

44. See *Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, I-1146, [1996] 1 C.M.L.R. 889, 987.

45. See *id.* (referring to the need for effective protection of the rights conferred by Community rules and the solidarity bond enshrined in Article 10 of the EC Treaty).

46. See *id.* at I-1146-47.

47. See *id.* at I-1147 (identifying "the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question" as salient factors for deciding whether liability was incurred).

48. See *id.* at I-1147-48 (referring to *Joined Cases 83/76, 94/76, 4/77, 15/77 & 40/77, Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG v. Council & Commission*, 1978 E.C.R. 1209, paras. 5-6, [1978] 3 C.M.L.R. 566, in support of the general rationale for this approach that "even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests").

legislative activity or inactivity in an area of law characterized by wide Member State discretion.⁴⁹ The Court stated that requirements of Community law may narrow a national legislature's margin of discretion.⁵⁰ In contrast, the ECJ continued, when a Member State legislated in a field involving broad discretion, liability standards were comparable to those applicable to Community institutions.⁵¹ The Court found that, in absence of Community harmonization of foodstuffs laws, the German legislature, when enacting rules on the quality of beer marketed in Germany, enjoyed wide discretion and basically faced policy choices similar to those made by the Community institutions when adopting legislative measures pursuant to Community policies.⁵²

The ECJ deduced that individuals suffering loss or injury as a result of a breach of Community law by a Member State, which is attributable to the national legislature acting in a field involving wide discretion for making legislative choices, are entitled to reparation when the following requirements are met: (1) the rule of Community law breached is intended to confer rights upon individuals, (2) the breach is sufficiently serious, and (3) the breach and the damage sustained by the individuals have a direct causal link.⁵³

The Court then tested the three conditions in the case at bar.⁵⁴ The ECJ found that the first condition was satisfied because the breached provision of the EC Treaty was designed to accord rights to individuals.⁵⁵ Addressing the second condition, the Court defined a "sufficiently serious" breach as a manifest and grave

49. See *id.* at I-1148.

50. See *id.* (explaining that the case of Article 249 of the EC Treaty, which "places the Member State under an obligation to take, within a given period, all the measures needed in order to achieve the result required by a directive," illustrated the reduced margin of discretion on behalf of a national legislature and the ensuing rise of state liability if the Member State failed to transpose the directive).

51. See *id.*

52. See *id.*

53. See *id.* at I-1149. The Court also stated that (1) "those conditions satisfy the requirements of the full effectiveness of the rules of Community law and of the effective protection of the rights which those rules confer," and (2) "those conditions correspond in substance to those defined by the Court in relation to Article [288] in its case-law on liability of the Community for damage caused to individuals by unlawful legislative measures adopted by its institutions." *Id.*

54. See *id.* at I-1150-55.

55. See *id.* at I-1150 (referring to *Case 74/76, Iannelli & Volpi S.p.A. v. Ditta Paolo Meroni*, 1977 E.C.R. 557, para. 13, [1977] 2 C.M.L.R. 688, in the context of the position that "[w]hilst Article [28] [of the EC Treaty] imposes a prohibition on Member States, it nevertheless gives rise to rights for individuals which the national courts must protect").

disregard by a Member State for the limits of its discretion. It listed various factors for making this determination, including (1) the clarity and precision of the rule breached, (2) the extent of discretion left by that rule to the authorities, (3) the degree of intent involved, (4) the excusability of the act or omission, (5) the degree of contribution by Community institutions, and (6) the adoption or retention of national measures or practices contrary to Community law.⁵⁶ The ECJ added that a persistent non-compliance with an ECJ judgment establishing the infringement at issue would constitute such a breach.⁵⁷ The Court then distinguished between the designation prohibition and the ban on additives imposed by the BStG.⁵⁸ The ECJ found that the German legislature was not excused when imposing the designation prohibition in light of the clear early case law establishing the manifest incompatibility of such rules with the EC Treaty.⁵⁹ In contrast, according to the Court, such jurisprudence did not exist for the banning of additives until the ECJ's judgment involving the German Purity Requirement for Beer.⁶⁰ The Court concluded its analysis of the three conditions by deferring to the national courts for the determination of direct causation between the breach committed by the Member State and the damage incurred by the injured party.⁶¹

With regard to the modalities of the claim, the ECJ held that injured parties had to proceed against the State within the framework of national law.⁶² The Court emphasized that the conditions for reparation of loss and damage laid down by national law could not be less favorable than those relating to similar domestic claims and could not be organized so as to make obtaining reparation practically impossible or excessively

56. *See id.*

57. *See id.* (explaining that a "breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement," and that another example of an infringement constituting a sufficiently serious breach lies in the failure to adopt immediately the measures needed to comply with an Order of the President of the Court in proceedings for interim measures).

58. *See id.* at I-1151.

59. *See id.* (referencing in particular *Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, [1979] 3 C.M.L.R. 49 ("Cassis de Dijon") and *Case 193/80, Commission v. Italy*, 1981 E.C.R. 3019 ("vinegar"), both involving breaches of Article 28 of the EC Treaty).

60. *See id.* (referring to its judgment of 12 March 1987 in *Case 178/84, Commission v. Federal Republic of Germany*, 1987 E.C.R. 1227, [1988] 1 C.M.L.R. 780, which held the prohibition of additives incompatible with Article 28 of the EC Treaty).

61. *See id.* at I-1152.

62. *See id.* at I-1153.

difficult.⁶³ The ECJ found that the restrictions imposed by German law, which requires that the legislative act or omission in breach of higher ranking national provisions be referable to a third party (*Drittbezogenheit*),⁶⁴ did not appear to disfavor Member State liability claims vis-à-vis similar domestic claims, but would in practice make it impossible or extremely difficult to secure effective reparation for loss or damage resulting from a breach of Community law.⁶⁵ In general, the Court explained, the tasks of the national legislature related to the public at large, as opposed to identifiable persons or classes of persons.⁶⁶ The Court concluded that in national state liability proceedings for damages involving a breach of Community law by the national legislature, such a restriction had to be set aside.⁶⁷

3. Permissibility of Making Reparation Conditional upon the Existence of Fault

The ECJ held that a national court could not, under the legislation that it applied, make reparation for loss or damage conditional upon a requirement of fault exhibited by the Member State organ responsible for the infringement of Community law, which went beyond the seriousness criterion.⁶⁸ The Court conceded that a variety of objective and subjective factors possibly connected to the concept of fault could be factored into the determination of whether the Member State, through its legislature, had committed a sufficiently serious breach of Community law. According to the ECJ, however, national courts

63. See *id.* (citing *Joined Cases C-6/90 & C-9/90, Francovich v. Italian Republic*, 1991 E.C.R. I-5357, [1993] 2 C.M.L.R. 66, and *Case 199/82, Amministrazione delle Finanze dello Stato v. SpA San Giorgio*, 1983 E.C.R. 3595, [1985] 2 C.M.L.R. 658).

64. See § 839 Nr. 1(1) BGB; GRUNDGESETZ [Constitution] [GG] art. 34 (F.R.G.). The translation of § 839 Nr. 1(1) BGB reads as follows: "If a public official intentionally or negligently breaches an official duty incumbent on him or her toward a third party, then he or she has to compensate the third party for the damage resulting therefrom." *Id.*

65. See *Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, I-1154, [1996] 1 C.M.L.R. 889, 992.

66. See *id.*

67. See *id.*

68. See *Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, I-1155-56, [1996] 1 C.M.L.R. 889, 993-94 (referring to its analysis of the conditions for Member State liability and noting that, according to the case file, "the concept of fault does not have the same content in the various legal systems").

were disallowed from altering and frustrating the standard by requiring an element of fault, including intent or negligence.⁶⁹

4. Amount of the Reparation

The ECJ ruled that reparation awards in Member State liability cases had to be commensurate with the loss or damage sustained by the injured parties.⁷⁰ The Court noted the absence of relevant Community provisions and emphasized that criteria established by the domestic legal systems of the Member States were subject to limitations, which the Court had established for the modalities of pursuing Member State liability claims.⁷¹ According to the ECJ, Community law barred national proceedings under national law from imposing conditions that, when compared to domestic government liability actions, were less favorable and excessively burdensome.⁷² The Court added several considerations for a national court determining the extent of the award in a Member State liability action for damages, including the degree of contribution by the claimants⁷³ and the potential types and heads of damages.⁷⁴

5. Period Covered by Reparation

The ECJ held that the onset of Member State liability was not contingent on a prior judgment of the Court finding that a Member State had infringed Community law.⁷⁵ The Court reasoned that the finding of state liability was governed by the conditions that it had developed earlier.⁷⁶ It added that imposing

69. *See id.*

70. *See id.* at I-1156 (reaffirming the need to ensure the effective protection of the rights of the claimants).

71. *See id.* at I-1157.

72. *See id.*

73. *See id.* (citing *Joined Cases C-104/89 & C-37/90, Mulder v. Council & Commission*, 1992 E.C.R. I-3061, in support of the proposition that, in accordance with a general principle common to the legal systems of the Member States, the injured parties had to show reasonable diligence in avoiding or limiting the extent of the loss or damage, or otherwise risk having to bear the damage themselves).

74. *See id.* at I-1157-58 (stating that Community law disallowed (1) a total exclusion of loss of profit as a head of damage, especially in the context of economic or commercial litigation, by requiring an injury to property rights as opposed to the mere marketing opportunities, and (2) a foreclosure of otherwise domestically available specific damages, including exemplary damages).

75. *See* *Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, I-1160, [1996] 1 C.M.L.R. 889, 996.

76. *See id.* at I-1159 (stating that, while being of "determinative" value, a prior judgment of the ECJ was "not essential" for meeting the condition of a sufficiently serious breach of Community law).

an additional requirement would undermine the right to reparation established by the Community legal system⁷⁷ and frustrate the principle of the effectiveness of Community law.⁷⁸

The ECJ concluded its analysis by addressing a proposal from the German government to limit the temporal effects of the present judgment.⁷⁹ The Court declined the request, reasoning that procedural and substantive conditions of national law—within the standards governing the pursuit of state liability claims developed by the ECJ—were able to address concerns relating to the principle of legal certainty.⁸⁰

C. *The Judgment of the BGH*

The BGH held the appeal admissible but dismissed it as unfounded. The Court identified the rise of government liability for legislative injustice (*legislatives Unrecht*) as the sole subject of review in the case at bar, as Germany allegedly failed to adjust its Law on Beer Duty to the higher ranking norms of Community law.⁸¹ The BGH clarified that liability issues were not posed in connection with the singular administrative measures taken by the German authorities on the basis of provisions breaching Community law.⁸² According to the plaintiff's own submissions, the BGH continued, the proceedings, especially those involving fines, were not initiated against the plaintiff itself, but rather against its contract partners in Germany.⁸³ The BGH analyzed German national law and Community law as the potential

77. See *id.* at I-1159-60 (reasoning that any right to reparation would be precluded as long as the presumed infringement had not been the subject of judgment of the Court in an action brought by the Commission against the Member State under Article 226 of the EC Treaty).

78. See *id.* (citing *Joined Cases 314/81, 315/81, 316/81 & 83/82, Procureur de la République v. Waterkeyn*, 1982 E.C.R. 4337, para. 16, as authority for the proposition that direct effect of Community provisions giving individuals subjective rights enforceable before their national courts could not "depend on the Commission's assessment of the expediency of taking action against a Member State pursuant to Article [226] of the Treaty or on the delivery by the Court of any judgment finding an infringement").

79. See *id.* at I-1160 (recalling that the German Government, in light of the potential financial implications, requested the ECJ "to limit any damage to be made good by the Federal Republic of Germany to loss or damage sustained after delivery of judgment in this case, in so far as the victims did not bring legal proceedings or make an equivalent claim before").

80. See *id.*

81. See *Brasserie du Pêcheur SA v. Germany*, [1997] 1 C.M.L.R. 971, 976.

82. See *id.*

83. See *id.* (observing that the complaint contained the reference that the plaintiff proper was never the addressee of any unfavorable administrative enforcement act).

sources for the government liability claim advanced by the plaintiff.⁸⁴

1. Claim Based on Domestic German Law

The BGH held that German state liability law did not offer any cause of action for the plaintiff's action.⁸⁵ According to the BGH, neither liability for a breach in public office (*Amtshaftung*) nor liability for an expropriation-like intrusion (*Haftung für einen enteignungsgleichen Eingriff*) controlled the case at bar.⁸⁶

a. Liability for a Breach in Public Office

The BGH rejected the claim because the omission by the German legislature to adjust the Beer Duty Law to requirements under primary Community law did not breach any official duty toward the foreign brewery allegedly affected by the restriction of imports.⁸⁷ The BGH explained that official duties were directed at the public at large, as opposed to specific persons or groups of persons, and served the general interest of maintaining an orderly public life.⁸⁸ Legislative functions, the BGH added, were exercised in that general interest through statutes and regulations containing general and abstract rules.⁸⁹ According to the BGH, only specific-measure statutes (*Massnahmengesetze*) or single-case statutes (*Einzelfallgesetze*) altered the position of individuals or particular classes of persons, thus meeting the criterion of third persons.⁹⁰ The Court, however, found that such exceptional circumstances were not satisfied in the present case.⁹¹

b. Liability for an Expropriation-Like Intrusion

The BGH also denied the claim of liability for an expropriation-like intrusion.⁹² The BGH reasoned that the compensation for disadvantages, which arose (directly or indirectly) by reason of a formal parliamentary act contrary to Community law, did not remain within the boundaries of a

84. See *id.* at 976-77.

85. See *id.* at 976.

86. See *id.* at 976-77.

87. See *id.* at 976.

88. See *id.*

89. See *id.*

90. See *id.*

91. See *id.*

92. See *id.* at 976-77.

liability category developed and shaped by case law.⁹³ The BGH stated that this matter should be reserved to the legislature.⁹⁴ In addition, the BGH explained, the requirements of an expropriation-like intrusion were not satisfied because the facts of the case did not support a breach of a vested property right of the plaintiff.⁹⁵ According to the BGH, the German legal system did not recognize a mere opportunity to sell products on the German market as a protected asset.⁹⁶ The BGH concluded that the circumstances of the case did not meet the threshold of even touching the core of the plaintiff's property rights.⁹⁷

2. Claim Based on Community Law

The BGH also dismissed the plaintiff's claim based on Community law.⁹⁸ The BGH emphasized that, because the principle of Member State liability for breaches of Community law flowed directly from the Community legal system and only the consequences of the damage had to be remedied within the framework of national law,⁹⁹ a re-examination of German domestic government liability for legislative injustice was not warranted.¹⁰⁰

Applying the facts advanced by the plaintiff, in light of the ECJ's preceding preliminary ruling,¹⁰¹ the BGH decided that a claim for damages failed for want of a sufficiently serious breach that directly caused the alleged damage.¹⁰² The BGH held that the designation prohibition, which had been adjudged by the ECJ as a sufficiently serious breach of Community law, had not been enforced by German authorities against the plaintiff, as the food inspections and penalty proceedings were conducted in the

93. *See id.* at 976.

94. *See id.* at 977.

95. *See id.*

96. *See id.*

97. *See id.*

98. *See* Brasserie du Pêcheur SA v. Germany, [1997] 1 C.M.L.R. 971, 977.

99. *See id.* at 978 (reasoning that the ECJ had "transferred" the system which it had developed specifically under Article 288(2) of the EC Treaty).

100. *See id.* (stating that it was not necessary, in particular, to decide whether the conditions for state liability for a legislative injustice may have to be changed under an interpretation "in conformity with European law" in such a way that the criterion of third-party directedness would have to be questioned for the sphere of application of the German domestic legal order).

101. *See id.* at 978-79 (summarizing the pertinent passages from the ECJ's preliminary ruling, which develop the three conditions for Member State liability in areas where, in the absence of EC harmonization, the national legislator enjoys a wider margin of discretion).

102. *See id.* at 979.

context of the ban on additives.¹⁰³ Hence, the requirement of a direct causal connection between the infringement of Community law and damage to the injured party was not satisfied.¹⁰⁴

The BGH also denied the claim pertaining to the ban on additives as not constituting a sufficiently serious breach of Community law.¹⁰⁵ The BGH argued that the ECJ's judgment of March 12, 1987 provided no indication that the national legislature had manifestly and gravely overstepped the boundaries of its discretion.¹⁰⁶

Finally, the BGH decided that Germany was also not liable for further damages alleged by the plaintiff for the time subsequent to the ECJ judgment of March 12, 1987.¹⁰⁷ The BGH reasoned that the defendant had notified and instructed the authorities to adhere to that decision immediately after its publication.¹⁰⁸ The plaintiff's loss of earnings during the transitional time, while it built a new distribution organization in Germany, was not attributable to the defendant in legal liability terms.¹⁰⁹ According to the BGH, these disadvantages did not result from a failure of the defendant to implement the ECJ's judgment.¹¹⁰

III. NATURE AND CHARACTERISTICS OF THE MEMBER STATE LIABILITY PRINCIPLE CONCEIVED BY THE ECJ

A. *Emergence of Member State Liability Through Case Law*

The EC Treaty does not contain any explicit and specific legal provisions governing claims for damages advanced by individuals against Member States for breaches of Community law.¹¹¹ Early

103. *See id.* at 980.

104. *See id.* at 980-81 (explaining that (1) this result followed from an evaluative re-attribution of the liability consequences to the liability trigger, which, under German law, is expressed by the doctrine of adequate causation, and (2) it did not have to address the need for a narrower approach focusing on the protective purpose of the breached norm).

105. *See id.* at 981.

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.* at 981-82.

110. *See id.* at 982 (arguing that the lost earnings were the late consequences of the defendant's previous conduct, which did not constitute a sufficiently serious breach of Community law).

111. *See* Monika Böhm, *Voraussetzungen einer Staatshaftung bei Verstößen gegen primäres Gemeinschaftsrecht*, 1997 JURISTEN ZEITUNG 53-54 (1997). *See also* Dennis F. Waelbroeck, *Treaty Violations and Liability of Member States: The Effect*

ECJ case law, however, suggests that despite the silence of treaty law, the Court has long been leaning in favor of the notion that a Member State may incur liability.¹¹² Nevertheless, the Court never squarely confronted the question until many years later in *Francovich*.¹¹³ Since then, the ECJ has handed down several

of the *Francovich Case Law*, in *THE ACTION FOR DAMAGES IN COMMUNITY LAW* 311, 315 (Ton Heukels & Alison McDonnell eds., 1997) (observing that (1) for many years Article 88 of the Treaty Establishing the European Coal and Steel Community provided the only mechanism for sanctions but was never applied because of its heaviness and partial ineffectiveness, and (2) the penalty scheme of Article 228 of the EC Treaty added by the Treaty on European Union to Articles 226 and 227 of the EC Treaty may involve significant delays); J. Duthail de la Rochère, *Member State Liability for Infringement of European Community Law*, 11 TUL. EUR. & CIV. L.F. 1, 2 (emphasizing that "the Article [226] procedure does not provide the individuals with the insurance [sic] that Member States will effectively respect Community law."). For an illustration of the pre-Maastricht, rudimentary nature of this system, see Commission Notice Concerning the Judgment of the Court of Justice of 21 September 1989 in Case 68/88, 1990 O.J. (C 147/03) 3 (providing that the Commission could only recommend to the States that, while keeping the choice of sanctions, they shall ensure that the breaches of Community law shall be punished in an effective proportionate and deterrent way). For a description of the post-Maastricht sharpened enforcement procedure under Article 228 of the EC Treaty, see PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW—TEXT, CASES AND MATERIALS* 376-77 (2d ed. 1998) (noting that by early 1998 the ECJ had not ruled on any enforcement proceeding). See also Memorandum on Applying Article 171 of the EC Treaty, 1996 O.J. (C 242/07) 6 (containing a memorandum from the Commission on the criteria to be applied in the future to implement the enforcement provision); 1997 O.J. (C 63/02) 2 (providing the method of calculation for penalties).

112. See, e.g., Case 6/60, *Humblet v. Belgian State*, 1960 E.C.R. 559, 569 (opining that the defendant Member State may be obliged "to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued"); Case 60/75, *Russo v. AIMA*, 1976 E.C.R. 45, 56 (stating that "[i]f such damage has been caused through an infringement of Community law the State is liable to the injured party of the consequences in the context of the provisions of national law on the liability of the State"). See also Oliver, *supra* note 2, at 638 (characterizing the language in these decisions as "rather fleeting pronouncements on that issue"). But see Case 158/80, *Rewe v. Hauptzollamt Kiel*, 1981 E.C.R. 1805, 1838 (holding that Community law "was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law").

113. Joined Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357, [1993] 2 C.M.L.R. 66. This cornerstone decision, which involved the complete non-implementation of a Community directive, has generated a vast amount of commentary and literature. See, e.g., CHRISTOPH HENRICHS, *HAFTUNG DER EG-MITGLIEDSTAATEN FÜR VERLETZUNG VON GEMEINSCHAFTSRECHT* (1995); CARSTEN ALBERS, *DIE HAFTUNG DER BUNDESREPUBLIK DEUTSCHLAND FÜR DIE NICHTUMSETZUNG VON EG-RICHTLINIEN* 72 (1995); Carmen Plaza Martin, *Furthering the Effectiveness of EC Directives and the Judicial Protection of Individual Rights Thereunder*, 43 INT'L & COMP. L.Q. 26; Rolf Uecker, *Francovich and Beyond: A German Perspective*, 1994 EUR. BUS. L. REV. 286; Mark Brealey, *The Liability of the State in Damages for Breach of Community Law*, 1992 EUROP. BUS. L. REV. 39; Peter Duffy, *Damages Against the State: A New Remedy for Failure to Implement Community Obligations* 17 EUR. L. REV. 133 (1992).

seminal decisions, including *Brasserie*,¹¹⁴ *British Telecom*,¹¹⁵ *Hedley Lomas*,¹¹⁶ and *Dillenkofer*,¹¹⁷ that have expanded and refined the Court's state liability jurisprudence.¹¹⁸

Critics of the Court have argued that, by developing the principle of Member State liability, the ECJ continues to arrogate legislative powers to itself.¹¹⁹ Focusing on methodology, these commentators have alleged that the gap in the EC Treaties with regard to Member State liability is not plan-adverse and therefore can only be filled by treaty amendment, not by judicial legislation from the bench.¹²⁰ Moreover, the terse, minimalist jurisprudential reasoning offered by the ECJ in support of its holdings has been faulted.¹²¹ Finally, some have branded the Court's judicial activism as a violation of the delicate balance among Community institutions and as a disregard for the allocation of powers between the Member States and the Community.¹²² The

114. Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, [1996] 1 C.M.L.R. 889.

115. Case C-392/93, *The Queen v. H. M. Treasury, ex parte British Telecommunications plc*, 1996 E.C.R. I-1631, [1996] 2 C.M.L.R. 217.

116. Case C-5/94, *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. I-2553, [1996] 2 C.M.L.R. 391.

117. Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 & C-190/94, *Dillenkofer v. Germany*, 1996 E.C.R. I-4845, [1996] 3 C.M.L.R. 469.

118. For case notes discussing this quartet of decisions, see Peter Oliver, *Case C-329/93, The Queen v. Her Majesty's Treasury, ex parte British Telecommunications*, [1996] ECR I-1631, 34 COMMON MKT. L. REV. 658 (1997); Peter Oliver, *Case C-5/94, The Queen v. Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas (Ireland)*, [1996] ECR I-2553, 34 COMMON MKT. L. REV. 666 (1997); Peter Oliver, *Case C-178/94, Dillenkofer v. Germany, Judgment of 8 October 1996*, 34 COMMON MKT. L. REV. 675 (1997).

119. For a review of the generic criticisms levied against the alleged judicial activism of the ECJ, especially in German and English circles, see, for example, L. NEVILLE BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* (4th ed. 1994); G. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 175 (1994); Ehlers, *supra* note 9, at 777 (summarizing the concerns pertaining to ECJ lawmaking in the area of state liability); Rudolph Streinz, *Anmerkungen zu dem EuGH-Urteil in der Rechtssache Brasserie du Pêcheur und Factortame*, 7 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 201, 202 (1996) (explaining that, in light of the Federal Constitutional Court's Maastricht Decision, one could argue that the ECJ does not have the general power to introduce an indemnification scheme).

120. See Ehlers, *supra* note 9, at 777 (recapitulating the position of the German Government).

121. See Böhm, *supra* note 111, at 54 n.18 (providing several references in the German legal literature). *But see* Streinz, *supra* note 119, at 202 (observing that in light of the Court's past usages the judgement is relatively detailed).

122. See Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, I-1082, [1996] 1 C.M.L.R. 889, 935 (describing allegations of the German Government). See also Ehlers, *supra* note 9, at 777 (explaining that (1) this argumentation transplants the German essentiality theory

introduction of state liability into the treaty system, it has been argued, amounts to an unauthorized qualitative leap in the integration program, triggering significant financial consequences and strengthening the position of the market citizens.

As previously described, the ECJ gave these concerns "short shrift,"¹²³ explaining that its methodological approach stayed within the confines of treaty interpretation using the appropriate interpretational tools allowed by primary Community law. Supporters of this line of reasoning have characterized the Court's state liability decisions as essential contributions to the viability of Community law.¹²⁴ Some have explained that the significance of the courts for the rise of state liability stems from the reluctance of the government to enable liability claims against itself.¹²⁵ Others have justified the ECJ's approach by adding that the *Brasserie* reference proceeding involved redress for breaches of Community fundamental freedoms.¹²⁶ The deflective content of freedom rights, according to these commentators, enshrines claims to desist from action (*Unterlassungsansprüche*) and claims to eliminate undue consequences (*Folgenbeseitigungsansprüche*). If, in the wake of unlawful intrusions of freedom rights, the elimination of undue consequences was no longer possible, the very nature of these rights mandated the rise and availability of compensation.¹²⁷ Since the EC Treaty did not speak to state liability triggers and consequences, it fell to the ECJ to ensure the proper functioning of Community law through judge-made law, which was binding on Germany.¹²⁸ Finally, the argument has

(*Wesentlichkeitstheorie*) into the Community legal system, (2) this doctrine explains the principle of reservation to statutory law (*Gesetzesvorbehalt*) through a delineation of the legislative and executive branches of government, and (3) these domestic law principles are used for purposes of delimiting the legislature and judiciary in the Community legal order).

123. Oliver, *supra* note 2, at 642.

124. See, Böhm, *supra* note 111, at 54 (providing numerous literature references).

125. See *id.* at 55 (referring to the example of German law where the liability figures of intrusion equivalent to a taking and expropriation-like have been developed by the judiciary).

126. See Ehlers, *supra* note 9, at 777 (explaining that the fundamental freedoms contain equality and freedom rights).

127. *Id.*

128. See *id.* (recalling that the German Federal Constitutional Court has stated that subsequent essential changes of the integration programs and powers established in the EC Treaty were no longer covered by the applicable German ratification law, yet explaining that this was not the case here because Community law demanded the rise of state liability for its sphere of application, whereas the tasks and objectives of the Community were left untouched and the powers of the Community were not expanded). For a description of the Federal Constitutional Court, see BERND GUGGENBERGER & THOMAS WÜRTENBERGER, HÜTER DER VERFASSUNG ODER LENKER DER POLITIK? DAS BUNDESVERFASSUNGSGERICHT IM

been advanced that the Member States impliedly ratified the ECJ's state liability case law by default in failing to make the pertinent revisions to the EC Treaty at Maastricht or Amsterdam.¹²⁹

B. Roots and Foundations of Member State Liability

The question of whether the principle of state liability is anchored in Community law or national law has been discussed for many years.¹³⁰ According to the ECJ, Member State liability is directly rooted in Community law.¹³¹ Nevertheless, the Court

WIDERSTREIT (1998); DIETER C. UMBACH & THOMAS CLEMENS, BUNDESVERFASSUNGSGERICHTSGESETZ: MITARBEITERKOMMENTAR UND HANDBUCH (1992).

129. See Böhm, *supra* note 111, at 55, n.23 (explaining that protocol declarations correcting the judgments could have sufficed since *Franovich* and *Brasserie* were handed down before the Maastricht and Amsterdam Intergovernmental Conferences, respectively).

130. See Ehlers, *supra* note 9, at 777 (noting that this issue, which arose in the wake of *Franovich*, may be relevant under the German Court Constitution Act (*Gerichtsverfassungsgesetz*) for the applicability of the jurisdiction of civil courts, as opposed to administrative courts, in expropriation and public tort liability cases).

131. *Id.* (referring to the ECJ's *Brasserie* judgment). For the proposition that general principles of international law associated with state responsibility provide authority for the existence of state liability, see *Chorzow Factory (F.R.G. v. Pol.)*, 1927 P.C.I.J., ser. A, No. 9, at 21 (July 26) (stating that "[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."). The concept of an indemnification scheme seated in supranational law is not novel. According to Article 13 of the European Convention on Human Rights (ECHR), everybody whose rights or freedoms under the Convention are breached by persons acting in an official capacity is entitled to an effective remedy before a national authority. See European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force Sept. 3, 1953, 213 U.N.T.S. 222. See also Stephan Kopp, *Staatshaftung für gesetzgeberisches Unterlassen—Die Rechtsprechung des EuGH nach Franovich*, 1997 NEUE JURISTISCHE WOCHENSCHRIFT 645, 645-46 (explaining that (1) Article 13 of the ECHR gives rise to an adequate indemnity or effective relief, without imposing a punitive sanction against the member country in violation, (2) a Swedish mother prevailed against the Kingdom of Sweden and won a liability award of 200,000 Crowns because she had unlawfully been stripped off the custody over her child, and (3) the national governments are closing statutory gaps to ensure sufficient indemnification opportunities, as evidenced by an Italian law granting indemnity for judicial procedures that last up to 30 or 40 years); COUNCIL OF EUROPE, RECOMMENDATION NO. R (84) 15 OF THE COMMITTEE OF MINISTERS RELATING TO PUBLIC LIABILITY (adopted Sept. 18, 1984). Within the federal system of the United States, causes of action for liability in damages have also been recognized. See P. P. Craig, *Once More Unto the Breach: The Community, the State and Damages Liability*, 113 LAW Q. REV. 67, 86 n.94 (explaining that (1) damages liability for those who act pursuant to the state law, which violates the Constitution, is governed by 42 U.S.C. § 1983, which, according to *Mitchum v.*

has simultaneously recognized that state liability may proceed on the basis of national law under less restrictive requirements than those demanded by Community law.¹³² This jurisprudence of setting minimum standards has been described as case law of "directive-like character."¹³³ If municipal law recognized state liability, the claim for damages would derive from that legal system, albeit subject to the requirement that the interpretation of domestic law conform to Community law standards.¹³⁴ In contrast, if national law did not allow for government liability, direct application would be accorded to the ECJ's jurisprudence.¹³⁵

The Court's philosophical rationale and solemn tone of analysis describing the foundations of Member State liability are strikingly reminiscent of its first-generation case law.¹³⁶ The doctrines of supremacy, direct effect, and state liability all flow from the general system, spirit, and fundamentals of the EC Treaties. More specifically, these features arise from the nature of Community law as a novel legal order *sui generis* enveloping both the Member States and individuals,¹³⁷ the principles of "full

Foster, 407 U.S. 225, 242 (1972), "interpose[s] the federal courts between the States and the people, as the guardians of the people's federal rights—to protect the people from unconstitutional action under the color of state law whether that action be executive, legislative, or judicial," and (2) liability in damages against federal officers who infringe the Constitution stems from the principle that protection for constitutional rights demanded, under certain circumstances, a monetary remedy).

132. See Ehlers, *supra* note 9, at 777 (invoking *Brasserie* once more).

133. *Id.* (using the term *richtlinienähnlicher Charakter*).

134. See *id.* (noting that Article 5(3) of the EC Treaty precludes an exhaustive regulation of state liability by Community law, since Community measures may not exceed what is necessary to attain the treaty goals, and concluding that Germany may incur liability according to German state liability laws, including Art. 34 GG in conjunction with § 839 BGB, which would have to be interpreted in conformity with Community law).

135. See *id.* at 777-78 (stating that the ECJ's case law establishes the liability requirements in a sufficiently clear and precise manner as well as guarantees the enforcement of subjective rights).

136. See Case 26/62, *NV Algemene Transport -en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1, [1963] 2 C.M.L.R. 105 (establishing the doctrine of direct effect, which enables individuals to invoke Community law before their national courts); Case 6/64, *Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, 1964 E.C.R. 585, [1964] 3 C.M.L.R. 425 (fostering the supremacy principle, which establishes the primacy of Community law over conflicting national law).

137. See Joined Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357, I-5413, [1993] 2 C.M.L.R. 66, 113 (supporting the rise of Member State liability with the following considerations, including that (1) "the [EC] Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply," (2) "[t]he subjects of that legal system are not only the Member States but also their nationals," and (3) the rights conferred upon individuals by Community law "arise

effectiveness"¹³⁸ and "equivalence"¹³⁹ postulated by the Community legal system, and the duty of sincere cooperation

not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions"). See also Case 26/62, *NV Algemene Transport -en Expeditie Onderneming van Gend & Loos*, 1963 E.C.R. at 12-13, [1963] 2 C.M.L.R. at 129 (basing direct effect of Community law on the following lines of reasoning, including that (1) "[t]he objective of the [EC] Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states;" (2) "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals;" (3) "[i]ndependently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage;" (4) "[t]hese rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community," and (5) "[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision"); *Costa*, 1964 E.C.R. at 593-94, [1964] 3 C.M.L.R. at 455-57 (providing the following reasons for supremacy of Community law, including (1) "[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply;" (2)

[b]y creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves;

and (3)

the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

138. The *effet utile* doctrine holds that it falls to the national courts to ensure the full effectiveness of Community law within their jurisdiction and make an effective remedy available for the enforcement of Community law conferring rights upon individuals. See JOSEPHINE STEINER, *ENFORCING EC LAW* 43-44 (1995) (explaining that the effectiveness principle protects individuals and deters parties from breaching Community law). See also *Francovich*, 1991 E.C.R. I-5357, [1993] 2 C.M.L.R. 66 (reasoning that (1) "[t]he full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible;" and (2)

imposed upon the Member States and the EC.¹⁴⁰ The introduction of state liability reflects the ECJ's commitment to integration through the reinforcement of subjective rights of the vigilant individual.¹⁴¹

[t]he possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law;

Case C-213/89, *The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1990 E.C.R. I-2433, I-2457-58, [1990] 3 C.M.L.R. 1 (reasoning that the effet utile principle derives from the principle of cooperation under Article 10 of the EC Treaty); Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629, 643, [1978] 3 C.M.L.R. 263, 282-83 (explaining that national judges may be under a duty to set aside national legislative provisions which may prevent Community rules from unfolding full force and effect); Case 222/86, *Union nationale des entraîneurs et Cadres techniques professionnels du football (Unectef) v. Heylens*, 1987 E.C.R. 4097, 4117, [1989] 1 C.M.L.R. 901, 913 (emphasizing that "the existence of a remedy of a judicial nature against any decision of a national authority . . . is essential in order to secure for the individual effective protection for his [sic] right"); Case 22/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651, 1682, [1986] 3 C.M.L.R. 240, 262 (1986) (observing that the "requirement of judicial control . . . reflects a general principle of law which underlies the constitutional traditions common to the Member States [and which] is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950").

139. The equivalency or assimilation principle requires that the remedy must be equivalent to a comparable internal right of action. See Oliver, *supra* note 2, at 637; Nicholas Emiliou, *State Liability under Community Law: Shedding More Light on the Francovich Principle?*, 21 EUR. L. REV. 399, 407 (1996).

140. See *Francovich*, 1991 E.C.R. at I-5414, [1993] 2 C.M.L.R. at 114 (referring to the solidarity bond of Article 10 of the EC Treaty which, according to the Court, imposes on the Member States the obligation to nullify the unlawful consequences of a breach of Community law). See also Norbert Reich, *Der Schutz subjektiver Gemeinschaftsrechte durch Staatshaftung*, 7 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 709 (1996) (characterizing Article 10 of the EC Treaty as a lever to constitutionalize Community law in the context of protecting subjective rights interests); Oliver, *supra* note 2, at 638 (identifying Article 10 of the EC Treaty, the concept of direct effect, and human rights as the three distinct bases of law underlying the principle of state liability).

141. See Reich, *supra* note 140, at 710 (explaining that the ECJ adopted Jellinek's concept of subjective public-law rights (*subjektive öffentliche Rechte*)), Dutheil de la Rochère, *supra* note 111, at 8 (speaking of a "formidable new weapon" of "private punishment").

C. Contours of Member State Liability

1. Alignment with Non-Contractual Liability of the Community

The ECJ generally aligns the system of Member State liability for breaches of Community law with the standards governing non-contractual liability incurred by the Community under Article 288(2) of the EC Treaty.¹⁴² The Court's rationale consists in achieving a high degree of coherence within the Community legal system.¹⁴³ The linkage allows the ECJ to use a regulatory model created by the contracting parties themselves.¹⁴⁴ Community liability, which originates from the common core of fundamental principles prevailing in the legal orders of the Member States,¹⁴⁵ bounces back into the Community legal system and provides the framework for state liability claims against Member States for breaches of Community law.¹⁴⁶ This approach of cross-fertilization and constant replenishment may ultimately gravitate toward a *jus commune* state liability regime.¹⁴⁷ The ECJ caveat that certain circumstances may

142. See, e.g., Böhm, *supra* note 111, at 55 n.26 (observing that in its Francovich decision, the ECJ did not mention Article 288(2) of the EC Treaty, despite the respective proposition by Advocate General Mischo); Streinz, *supra* note 119, at 202 (observing that the ECJ does not use Article 288(2) of the EC Treaty in analogy but rather as an appropriate reference framework).

143. See, e.g., Böhm, *supra* note 111, at 55 (invoking the image of a full loop); Dutheil de la Rochère, *supra* note 111, at 14 (using also the term "congruity").

144. See, e.g., Böhm, *supra* note 111, at 55; Dutheil de la Rochère, *supra* note 111, at 14.

145. See Ton Heukels & Alison McDonnell, *The Action for Damages in a Community Law Perspective: Introduction*, in *THE ACTION FOR DAMAGES IN COMMUNITY LAW*, *supra* note 111, at 1, 3 (explaining that "[t]his general reference to the Member States' legal systems has proved to be a rich source of inspiration and legitimacy for the [ECJ] in tracing and developing precise criteria governing . . . non-contractual liability").

146. See Böhm, *supra* note 111, at 55.

147. See, e.g., Roberto Caranta, *Judicial Protection Against Member States: A New Jus Commune Takes Shape*, 32 *COMMON MKT. L. REV.* 703 (1995); Walter van Gerven, *Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?*, 32 *COMMON MKT. L. REV.* 679 (1995); Walter 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*, 1 *MAASTRICHT J. EUR. & COMP. L.* 6 (1994);. *But see* Jürgen Schwarze, *Tendencies Towards a Common Administrative Law in Europe*, 16 *EUR. L. REV.* 3 (1991) (opining that, paradoxically, the Court has had to build this common model itself, since there were no principles common to the laws of the Member States in this area); Streinz, *supra* note 119, at 202 (observing a recent

warrant a deviation from the model,¹⁴⁸ however, does not specify any indicators that would suggest decoupling the question of Member State liability from Community non-contractual liability.¹⁴⁹

Several commentators in the legal literature have welcomed the alignment between the two liability systems.¹⁵⁰ Others have rejected the linkage, arguing that the foundations of Member State liability and Community non-contractual liability are different.¹⁵¹ Moreover, the rules pertaining to scenarios of Community non-contractual liability have been characterized as woefully inadequate.¹⁵² Theoretical options for a government

tendency of the ECJ to advance "coherence arguments" (*Kohärenzargumente*) and "communitarize" national law serving to execute Community law).

148. See Oliver, *supra* note 2, at 649 (explaining that the ECJ seeks to avoid any double standards, since nobody can predict all future case scenarios).

149. See *id.* at 649 n.36 (asking whether, in light of recent case law, national courts may be required to make available interim relief granting provisional damages in Member State liability actions). For a decision handed down by the ECJ, on appeal of a Court of First Instance judgment, see *Case C-393/96 P(R), Antonissen v. Council & Commission*, 1997 E.C.R. I-441, I-454-55, [1997] 1 C.M.L.R. 783, 792 (stating that the Court of First Instance has jurisdiction to grant provisional damages by way of interim measure in proceedings brought pursuant to Article 288(2) of the EC Treaty, in exceptional cases where the *prima facie* case is especially strong and the urgency particularly evident). See generally Mark Hoskins, *The Relationship Between an Action for Damages and the Award of Interim Measures*, in *THE ACTION FOR DAMAGES IN COMMUNITY LAW*, *supra* note 111, at 259.

150. See, e.g., Streinz, *supra* note 119, at 202; Böhm, *supra* note 111, at 57-58.

151. See, e.g., *Case C-5/94, The Queen v. Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. I-2553, 2588, [1996] 2 C.M.L.R. 391, 429 (providing Advocate General Leger's assessment that the "Member States are subject to a hierarchy of legal norms which does not exist in the Community"); Waelbroeck, *supra* note 111, at 311 (explaining that the liability triggers of both systems do not closely dovetail); Emiliou, *supra* note 139, at 408 (observing that the

Community institutions, and in particular the Community legislature, will often act in a field which is characterized by the exercise of wide discretion whereas the national legislature, when acting o[r] failing to act in a sphere of activity which comes within the ambit of Community law, rarely possesses discretionary powers as wide as those of the Community legislator;

Walter van Gerven, *Bridging the Unbridgeable: Community and National Tort Laws After Francovich and Brasserie*, 45 INT'L. & COMP. L.Q. 507 (1996) (describing a discrepancy in determining the quantum of damages under both liability regimes); *Case C-5/94, The Queen v. Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. I-2553, I-2581, [1996] 2 C.M.L.R. 391, 423 (1996) (presenting Advocate General Leger's use of the term "illogicality").

152. See *Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. at I-2588 [1996] 2 C.M.L.R. at 430 (containing Advocate General Leger's statement that it would be somewhat paradoxical to align state

liability scheme include adopting a test of strict liability based on a finding of illegality,¹⁵³ shaping a fault criterion,¹⁵⁴ requiring proof of a serious breach of the relevant Community norm,¹⁵⁵ and imposing liability only under exceptional circumstances or not at all.¹⁵⁶ The following passages will discuss the criteria established by the ECJ.

2. Criteria

Article 288(2) of the EC Treaty prescribes the comparative legal method for deciding non-contractual liability cases.¹⁵⁷ Over the years the ECJ has used this unique feature of Community law,¹⁵⁸ whereas high courts in other jurisdictions have exhibited

liability for breach of Community law with the rules pertaining to Article 288(2) of the EC Treaty, which are judged to be unsatisfactory, unduly stringent and affording insufficient protection to effective judicial relief, at least with regard to the condition concerning breach of Community law). For an example of case law considered as deficient, see *Case C-282/90, Industrie- en Handelsonderneming Vreugdenhil BV v. Commission*, 1992 E.C.R. I-1937, I-1968, [1994] 2 C.M.L.R. 803, 827 (rejecting the claim for damages in a scenario where a Community regulation, which had to be enacted by the Council, was adopted by the Commission, because, according to the ECJ, "the aim of [the system of the division of powers between the various Community institutions] is to ensure that the balance between institutions provided for in the Treaty is maintained, and not to protect individuals"). See also Francette Fines, *A General Analytical Perspective on Community Liability*, in *THE ACTION FOR DAMAGES IN COMMUNITY LAW*, *supra* note 111, at 11, 23 (observing a trend of "real worsening of the treatment of individuals"); STEINER, *supra* note 138, at 153 (describing the dichotomy between the high substantive thresholds and the relatively unproblematic standing requirements in proceedings under Article 288(2) of the EC Treaty). *But see* Oliver, *supra* note 2, at 650 (wondering whether the *Brasserie* ruling "might herald a more liberal approach to Article [288(2) of the EC Treaty], as the Court may be under pressure from litigants to place . . . [its] case law [pertaining to the Community's non-contractual liability] on the same footing as that on state liability").

153. See Craig, *supra* note 131, at 79.

154. See *id.* at 75-76 (explaining that (1) in different legal systems fault has been distinct meanings, (2) civil law systems tend to equate fault with illegality, (3) the common law differentiates fault from illegality, and (4) fault may also connote subjective elements, including intent or some form of consciousness).

155. See *id.* at 79.

156. See *id.*

157. See Gil Carlos Rodriguez Iglesias, *Gedanken zum Entstehen einer Europäischen Rechtsordnung*, 1999 NEUE JURISTISCHE WOCHENSCHRIFT 1, 6 (emphasizing that the framers of the EC Treaty refer to "the principles common to the laws of the Member States," as opposed to "the law," giving the ECJ a wide degree of latitude for performing this task).

158. See *id.* at 8 (explaining that (1) the ECJ has its own legal research department, (2) the Court's deliberations often include a comparative legal research component, and (3) the ECJ's judgments rarely reflect this exercise, but noting that the various legal systems differ more in procedure than in actual substance). For an example of the use of comparative legal analysis pertaining to

a general reluctance to explore this type of analytical tool.¹⁵⁹ A comparative glance through the tort laws¹⁶⁰ of the Member States canvassing their common core yields three basic elements of a general tort: (1) an unlawful act or omission imputable to the tortfeasor, (2) actual damage sustained by the injured party, and (3) a causal link between the conduct and the damage.¹⁶¹ Nevertheless, the Court routinely cautions that the specific requirements for the rise of state liability depend on the type of violation of Community law leading to the damage.¹⁶² Therefore, the evolution of the conditions governing Member State liability does not seem surprising.

The *Francovich* decision, which involves a Member State's complete failure to transpose a Community directive within the required implementation period, established three requirements.¹⁶³ First, the results prescribed by the directive must entail the grant of rights to individuals.¹⁶⁴ Moreover, it must be possible to identify the contents of these rights on the basis of the provisions of the directive.¹⁶⁵ Finally, a causal link must exist between the breach of the Member State's obligation and the loss and damage suffered by the injured parties.¹⁶⁶ *Francovich* offers the "unusual feature"¹⁶⁷ that the judicial genesis of Member State liability is preceded by the Court's aborted direct effect analysis with respect to the provisions of the directive in the first part of

the revocation of an administrative act, which has conferred subjective rights upon the addressee, see *Joined Cases 7/56 & 3 to 7/57, Algeria v. Common Assembly of the European Coal & Steel Community*, 1957 E.C.R. 39.

159. See generally *Printz v. United States*, 521 U.S. 898 (1997) (involving a federal law that forced the police of the states to perform checks on potential weapons buyers). The dissenting opinion of Justice Breyer affirmed the requisite federal power making reference to the "federal systems" of Switzerland, Germany, and the European Union. See *id.* at 976. However, the majority opinion, which was written by Justice Scalia, rejected this comparative law approach as "inappropriate" for interpreting the U.S. Constitution. See *id.* at 921 n.11.

160. Case C-392/93, *The Queen v. H. M. Treasury, ex parte British Telecommunications plc*, 1996 E.C.R. I-1631, [1996] 2 C.M.L.R. 217 (including Advocate General Tesouro's derivation of the rise of state liability from the rule of law (*Rechtsstaat*)).

161. See David Edward & William Robinson, *Is There a Place for Private Law Principles in Community Law?*, in *THE ACTION FOR DAMAGES IN COMMUNITY LAW*, *supra* note 111, at 339, 343 (invoking, in support of the proposition that private law ideas are increasingly invading Community law, the common law of negligence and the triad under Aquilian liability of (1) *damnum*, (2) *iniuria*, and (3) *datum*).

162. See, e.g., *Joined Cases C-6/90 & 9/90, Francovich v. Italian Republic*, 1991 E.C.R. I-5357, I-5415, [1993] 2 C.M.L.R. 66, 114.

163. See *id.*

164. See *id.*

165. See *id.*

166. See *id.*

167. Oliver, *supra* note 2, at 639.

the judgment.¹⁶⁸ By preserving the first two steps in the direct effect analysis¹⁶⁹ and replacing the failed element with a requirement of causation, the Court arrives at Member State liability.¹⁷⁰ This transition appears to have been facilitated by “equity” considerations and the nature of the right at issue. Insolvency protection claims are “secondary” in character, because they are designed to compensate for the employers’ incapacity to meet their “primary” obligation of paying due salaries to their employees.¹⁷¹ This may seem to approximate claims for damages and their “compensatory” rationale. Independent of the specific features underlying the case,¹⁷² *Francovich* suggests that Member State liability is triggered in cases where direct effect of a directive is foreclosed because the rights are not conferred vis-à-vis the State. In lieu of recognizing horizontal direct effect of directives, the Court opts for the rise of a liability claim against the State.¹⁷³

168. See Joined Cases C-6/90 & 9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357, I-5408 [1993] 2 C.M.L.R. 66, 109 (recalling its case law postulating direct effect of directives and, in accordance with the nature of the right at issue, the Court performing the standard direct effect test for each constituent element of the insolvency protection claim, including (1) the identity of the persons entitled, (2) the content of the guarantee, and (3) the identity of the person liable).

169. See *id.* at I-5411 (finding that the identity of the persons entitled and the contents of the guarantee are provided in a sufficiently clear, precise, and unconditional manner).

170. See *id.* at I-5411-13 (reasoning that the provisions of the directive do not identify the person liable to provide the guarantee and the State can not be considered liable on the sole ground that it had failed to transpose the Community directive within the prescribed period).

171. See *id.* at I-5405 (characterizing the directive as being designed to guarantee employees a minimum level of protection in the event of their employer’s insolvency).

172. For the proposition that direct effect may emerge under different guises, see, for example, *Case 148/78, Pubblico Ministero v. Tullio Ratti*, 1979 E.C.R. 1629 (presenting the defendant’s use of direct effect as a criminal defense); *Case 152/84, M. H. Marshall v. Southampton & South-West Hampshire Area Health Authority (Teaching) (Marshall I)*, 1986 E.C.R. 723 (featuring direct effect of gender equality rights).

173. See Böhm, *supra* note 111, at 58 n.73. See also Waelbroeck, *supra* note 111, at 317 (observing that (1) the ECJ’s state liability jurisprudence will further the force of directives, in particular by compensating for their lack of horizontal direct effect, (2) pursuant to horizontal direct effect a public sector employee can claim rights under non-implemented directives against a state, whereas a private sector employee cannot proceed against a private employer, and (3) the rise of state liability enables the private sector employee to sue the state for damages); Reich, *supra* note 140, at 710 (explaining that (1) in contrast to primary Community law and the regulation which may produce direct effect *ex lege*, the directive merely enjoys “limping direct effects,” (2) state liability fills the gaps in the direct effect doctrine when it comes to directives that have not been transposed *in toto*, in time, or quite correctly, and (3) the Member State then acts

Brasserie and successive decisions further develop the somewhat cryptic *Francovich* set of requirements.¹⁷⁴ In addition to clarifying that direct effect and state liability are legal *aliuds*,¹⁷⁵ the ECJ fashions the set of conditions for state liability more explicitly like a tort claim without considering its approach to be chiseled in stone.¹⁷⁶ As discussed earlier, the Court prescribes a trio of elements.¹⁷⁷ The ECJ continues to require that the rule of Community law breached must be intended to confer rights upon individuals.¹⁷⁸ Moreover, the breach must be sufficiently serious.¹⁷⁹ Finally, the breach and the damage sustained by the individuals must have a direct causal link.¹⁸⁰ While the first and

as a "residual debtor" flowing from guarantee obligations under Articles 10 and 249 of the EC Treaty).

174. Emiliou, *supra* note 139, at 400 (observing that *Francovich* left open a number of particularly significant issues, including the relationship between state liability and direct effect, the relevance of the concept of fault, the connection between Member State and Community liability, and the harmonization effect of the judgment on the national legal orders of the Member States).

175. See Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, I-1142, [1996] 1 C.M.L.R. 889, 985 (qualifying direct effect as a minimum guarantee). The availability of Member State liability is not contingent on the existence of direct effect nor does it require its foreclosure but serves an independent means of redress for wrongful government conduct. Thus, an action for Member State liability may be brought independent or instead of a complaint based on direct effect. See also Case C-271/91, *M. H. Marshall v. Southampton and South West Hampshire Area Health Authority (Marshall II)*, 1993 E.C.R. I-4367 (holding that a national measure imposing a ceiling on the compensation pursuant to the directive was unlawful because the maximum sum in question was not adequate to ensure real equality of opportunity in all cases). *But see id.* at I-4391 (presenting Advocate General van Gerven's opinion that such a ceiling was lawful if it was fixed at a sufficiently high level to ensure its "effective, uniform, and deterrent nature"). In certain instances it may actually be advisable to also advance a claim for damages based on Member State liability. See, e.g., Emiliou, *supra* note 139, at 406 (referring to scenarios of uncertainties pertaining to the scope of "state" in light of the limitation that, according to the ECJ, a provision of an EC directive only produces vertical direct effect).

176. See Gerrit Betlem, *The King Can Do Wrong: State Liability for Breach of European Community Law in the Post-Francovich Era*, 4 WEB J. CURRENT LEGAL ISSUES (Sept. 30, 1996) <<http://webjcli.ncl.ac.uk/1996/issue4/betlem4.html>> (describing the *Brasserie* liability regime comparable to the "conceptual" Dutch and French approaches, in contrast to the situation-based German and English liability systems). For a primer of Dutch law, see INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS (Jeroen Chorus et al. eds., 2d. rev. ed. 1993). For a comparative law perspective, see KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., Clarendon Press 3d. rev. ed. 1998).

177. See *Brasserie du Pêcheur SA*, 1996 E.C.R. I-1029, I-1149, [1996] 1 C.M.L.R. 889, 989 (1996).

178. See *id.*

179. See *id.*

180. See *id.*

third conditions¹⁸¹ are virtually identical to the *Francovich* test, the modified second element of the *Brasserie* liability test establishes a bright line for imputing breaches of Community law to the Member State on the basis of the degree of unlawfulness involved.¹⁸² Determining whether a sufficiently serious breach of Community law has occurred will most likely constitute the central issue posed in state liability cases. The Court proposes the following roadmap. Infringements of Community law in scenarios not involving discretion shall automatically be considered serious, thus triggering liability without further analysis.¹⁸³ Situations characterized by an ample margin of discretion, however, shall be evaluated by applying a more extensive rule of reason.¹⁸⁴ According to the ECJ, a sufficiently serious breach arises if the bounds of discretion are manifestly

181. See, e.g., Böhmer, *supra* note 111, at 58 (observing that the first requirement of the breached norm conferring rights upon individuals will always be considered to be satisfied in the case directly effective provisions of Community law); Oliver, *supra* note 2, at 651 (reconfirming that the first condition "is automatically met . . . whenever the rule is enshrined in a directly applicable provision of Community law"). See also Ehlers, *supra* note 9, at 778 (proposing to re-phrase the first condition that the breached Community norm must embody a subjective right or intend to confer rights in a sufficiently concrete manner). But see Oliver, *supra* note 2, at 651 (noting that the Court, in deviation from its jurisprudence pertaining to Community non-contractual liability, has abandoned the requirement that the rule breached must be "for the protection of the individual" by substituting it with the less onerous criterion that the rule in question must "confer rights on individuals"). For ECJ case law involving Article 288 of the EC Treaty and highlighting the strict threshold modeled after the German protective-norm theory (*Schutznormtheorie*), which stipulates that the norm allegedly violated is designed to protect the interests of the applicant, see, for example, *Cases C-104/89 and C-37/90, Mulder v. Council and Commission*, 1992 E.C.R. I-3061; *Case 5/71 Aktien-Zuckerfabrik Schöppenstedt v. Council*, 1971 E.C.R. 975. For a discussion of the causation requirement, see Reich, *supra* note 140, at 714 (explaining that (1) the ECJ requires direct causal connection and takes the defense of overtaking causation under strict scrutiny, (2) the causation prong serves to exclude merely indirect consequences of the infringement from the state liability principle, and (3) a comparison between the hypothetical conditions under a Community law-conform scenario (*Sollzustand*) and the actual situation in light of the infringement (*Istzustand*) is sufficient to prevent the causation requirement from becoming a factual liability obstacle).

182. See Dutheil de la Rochère, *supra* note 111, at 14 (calling this criterion the "harmonized" condition).

183. See Emiliou, *supra* note 139, at 408 (speaking of a mere breach, or breach *simpliciter*, including the clear-cut violation of a precise "*obligation de résultat*"). See also Ehlers, *supra* note 9, at 778 (stating that the transposition of unambiguous directives does not involve any appreciable discretion).

184. See *Case C-392/93, The Queen v. H. M. Treasury, ex parte British Telecommunications plc*, 1996 E.C.R. I-1631, [1996] 2 C.M.L.R. 217 (illustrating that discretion emerges in instances of imprecise Community law requirements). See also Ehlers, *supra* note 9, at 778 (explaining that such a situation may also arise in the case of a directive).

and gravely disregarded.¹⁸⁵ In light of the open, normative nature of these criteria, the ECJ suggests the use of factors to distill obvious and severe infringements of Community law by a Member State.¹⁸⁶

The ECJ's overall set of conditions may appear rigid and mechanistic. The Court, however, injects an element of elasticity into its system by distinguishing cases according to the type and margin of discretion featured in a particular scenario. The determination and evaluation of circumstances involving discretion may require the exercise of judgment, especially in light of the factors offered by the ECJ to facilitate the analysis.

The ECJ's tailored approach, which may stem from an overall hesitation to open Pandora's liability box too widely,¹⁸⁷ has been described as "relatively unrefined"¹⁸⁸ and "unnecessarily complex."¹⁸⁹ With regard to the liability standard, the majority of commentators have advocated lowering the bar toward strict

185. See Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, I-1148, [1996] 1 C.M.L.R. 889, 988.

186. See Ehlers, *supra* note 9, at 778 (opining that the ECJ's guidance assists in determining the evidence of the breach, whereas its severity is not further pursued). The ECJ's factor approach has led several commentators to emphasize that the ECJ's guidance for Member State liability actions and the Court's historic considerations in non-contractual liability cases brought against the Community do not jibe. See, e.g., Oliver, *supra* note 2, at 651 (recalling that under Article 288(2) of the EC Treaty the ECJ requires the flagrant violation of a "superior rule of law" when the Community legislative action involves a wide margin of discretion. "[T]he word 'superior' creates the impression that some rules of law are not sufficiently important for their breach to give rise to liability in damages"); *Brasserie du Pêcheur SA*, 1996 E.C.R. at I-1107, [1996] 1 C.M.L.R. at 959 (providing Advocate General Tesouro's observation that the term superior is "tautologous" because it would be logically impossible to infringe a rule of law which is not superior); Ehlers, *supra* note 9, at (observing that Community non-contractual liability may be triggered in instances where (1) the number of commercial operators is clearly delimited, (2) the damage sustained exceeds the normal bounds of risk inherent in the sector-specific activity, and (3) violations of primary Community law, especially fundamental rights, occur).

187. See Betlem, *supra* note 176 (explaining that the Court could not be expected to accept a new state liability regime without initial restrictions); Streinz, *supra* note 119, at 203 (reasoning that (1) the seriousness criterion may be problematic, (2) it opens the door for a non-fault defense if Community law is unclear, and (3) the restrictive design of the requirements constituted the reason for the ECJ's rejection of Germany's general request to limit the temporal effects of the present judgment).

188. Oliver, *supra* note 2, at 653 (rephrasing the Court's differentiation previously described as a distinction "between (i) legislative measures involving choices of economic policy and a wide margin of discretion and (ii) other measures").

189. Betlem, *supra* note 176 (observing that "[l]ess appealing about the newly established *Brasserie* regime is its incongruity between the fundamental principles of and the actual prerequisites for liability").

liability.¹⁹⁰ Others have espoused setting a high liability threshold.¹⁹¹ Intermediate approaches have proposed replacing the ECJ's test with a sliding scale of imputability ranging from intentional conduct to non-fault risk-bearing.¹⁹² Alternatively, categories varying according to the seriousness of each infringement have been suggested.¹⁹³ Less conceptual approaches have developed thematic groupings, either capturing qualitatively potential liability triggers¹⁹⁴ or, in the alternative, extrapolating the central headnotes from liability decisions

190. See Craig, *supra* note 131, at 79-81 (identifying two strands to this approach as (1) the design of the standard for non-contractual liability incurred by the Community has itself been subject to criticism, and (2) the rationale for the high threshold underlying non-contractual Community liability does not apply where the defendant is a Member State, as opposed to the Community). *But see id.* at 80-84 (presenting the counter arguments that (1) a strict liability approach would be inappropriate because

[t]he fact that a court might interpret complex discretionary provisions differently from the primary decision-maker, and thereby conclude that the decision is vitiated by illegality on the grounds of irrelevancy, impropriety of purpose or the like, should not be sufficient without more to render the public purse liable for what might be considerable sums of money

and (2) the exercise of all species of discretion, including the often not clearly distinguishable implemenational and interpretative discretion alike, should not be suffocated at the level of Community institutions nor in the case of domestic agencies, which share in having to evaluate broad and complex scenarios).

191. See *id.* at 84-85 (stating that (1) few voices supported a more limited liability for Member States than the Community itself, (2) the ECJ's test was the "best . . . the Member States could have hoped for," (3) a lower bar would preclude recovery in most instances, and (4) the state liability is designed to provide an incentive for Member States to comply with Community law).

192. See *id.* at 86 (expressing confusion about the use of discretion in a double function of potentially triggering the elaborate determination of a manifest and grave breach, while simultaneously serving as a factor within that analysis).

193. See van Gerven, *supra* note 151, at 521 (explaining that breaches of duty *simpliciter* or *obligation de résultat*, breaches consisting of the misinterpretation of sufficiently precise and reasonably clear Community rules, as well as breaches consisting in the misinterpretation of open-ended notions and general principles which lend themselves to considerable scope for interpretation, are—absent bona fide misunderstanding in interpretational settings—in themselves sufficient to establish liability, whereas breaches of ambiguous or misleading Community rules and breaches committed in the exercise of broad discretionary powers, require manifest and grave disregard before liability engages).

194. See Hans D. Jarras, *Haftung für die Verletzung von EU-Recht durch nationale Organe und Amtsträger*, 1994 NEUE JURISTISCHE WOCHENSCHRIFT 881, 884 (providing as examples of Member State liability triggers (1) breaching directly effective Community law, including provisions of a directive, (2) not or deficiently applying Community regulations, (3) applying national implementation law in contravention of a Community directive, and (4) interpreting national law in non-conformity with Community law).

already handed down by the ECJ.¹⁹⁵ Academic commentaries in the wake of *Brasserie* have not been confined to the conditions of Member State liability. The following passages discuss selected issues, which, while not within the actual scope of that decision, may further occupy the courts in the future.

3. Issues for Further Discussion

a. Other Forms of State Action as Potential Liability Triggers

The ECJ's approach of attributing the conduct of all State organs and agencies to the Member State is scarcely novel.¹⁹⁶ In *Brasserie*, the Court includes breaches of Community law by the legislature¹⁹⁷ and counters the concern that the specter of liability litigation may deter legislative operations into paralysis by differentiating according to the margin of discretion accorded

195. See Emiliou, *supra* note 139, at 405 (citing (1) *British Telecom* for covering a timely, yet bona fide incorrect partial implementation of a directive, (2) *Lomas* for involving an individual decision by the national administration in breach of a directly effective Treaty provision, and (3) *Factortame III* and *Brasserie* for addressing a legislative act and a legislative omission that previous ECJ rulings held incompatible with directly effective Treaty provisions); Betlem, *supra* note 176 (classifying *Francovich* and *Dillenkofer* under "Type A" or strict liability, and *British Telecom*, *Brasserie*, *Factortame III*, and *Hedley Lomas* under a "Type B" or "MSB" (manifest and serious breach) liability standard).

196. See Emiliou, *supra* note 139, at 407 (confirming that "[t]his approach is in line with the Court's case law under Article [226] [of the] EC [Treaty] according to which a Member State is responsible for a failure to fulfil [sic] an obligation under the Treaty irrespective of which State agency is responsible for it, 'even in the case of a constitutionally independent institution.'"); Craig, *supra* note 131, at 68-69 (explaining that the Court used a "unitary conception of the state" based on hierarchical, international law, and "contractarian" rationales). See also Andrew Geddes, *Claims for Damages Against the State*, 146 NEW L.J. 451, 452 (1996) (explaining that public authorities within the meaning of "state" may include all local authorities and State-controlled bodies); see Betlem, *supra* note 176 (noting that this may include municipalities and public undertakings).

197. For arguments to include "legislative injustice" as potential liability triggers, see, for example, Jarras, *supra* note 194, at 884 (arguing that the liability sanction is especially important in cases of breaches of Community law by national legislatures, since it is more difficult to control the application and implementation of Community law than monitoring the transposition of directives); Dutheil de la Rochère, *supra* note 111, at 10 (arguing that "[t]he election by universal suffrage does not confer to the parliament any special right to escape from its obligation to comply with EC law"); Streinz, *supra* note 119, at 605 (dispensing with the requirement of a previous ECJ declaration that the Member State has breached Community law). See also Waelbroeck, *supra* note 111, at 321 (explaining that the traditional view that regards the legislative authority as sovereign based on separation-of-power considerations may not hold true for the modern, multi-layer government).

to the legislature.¹⁹⁸ The ruling, however, does not address “administrative injustice” (*Verwaltungsunrecht*),¹⁹⁹ because the Court was bound by the BGH’s reference.²⁰⁰ In *Hedley Lomas*²⁰¹ and *Brinkmann*,²⁰² which involve determinations by executive authorities, the ECJ confirmed the three basic elements of its state liability test.

In addition to the issue of ascertaining the meaning of “administrative” or “executive,”²⁰³ the legal literature discusses factors that may be uniquely tied to this type of injustice scenario. Some academic circles postulate that state liability should only be considered if national authorities are under a duty, as opposed to a merely optional competence, to set aside national law that potentially infringes Community law.²⁰⁴ Those who would impose a duty on administrative authorities to disregard national law that breaches primary Community law argue that the ECJ has consistently held that Community law

198. See Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, I-1147-48, [1996] 1 C.M.L.R. 889, 988-89. See also Böhm, *supra* note 111, at 58 (supporting the ECJ’s rationale). But see Jarras, *supra* note 194, at 885 (identifying the significant risks for the Member States).

199. Ehlers, *supra* note 9, at 778.

200. See Böhm, *supra* note 111, at 60. See also Streinz, *supra* note 119, at 202 (observing that the ECJ would not have had to address legislative injustice if one assumes an obligation of national authorities to ignore domestic law in conflict with Community law, even absent a legislative change).

201. *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. I-2553, I-2613 [1996] 2 C.M.L.R. 391, 448 (holding that in a case of ministerial action the United Kingdom “was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion”). See also Craig, *supra* note 131, at 75 (reading this passage to mean “that because the E.C.J. found there was *neither* a legislative choice, *nor* any real discretion, therefore an infringement of Community law could *per se* be sufficient to establish the existence of a serious breach for the purposes of damages liability”).

202. Case C-319/96, *Brinkmann Tabakfabriken GmbH v. Skatteministeriet*, 1998 E.C.R. I-5255, I-5272, [1998] 3 C.M.L.R. 673, 691 (holding that the interpretation of the directive at bar given by Danish authorities was “not manifestly contrary” to Community law because it constituted one of a “number of perfectly tenable interpretations”).

203. See Craig, *supra* note 131, at 70-71 (observing that (1) the meaning of “the executive” is contentious, (2) this issue will arise in relation to privatized utilities which continue to retain a certain degree of monopoly status, agencies contracted by the government to perform statutory powers and duties, and “other bodies which exist at the fringes of the executive *strictu sensu*,” (3) a body may be considered part of the executive if it has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the state, and (4) the ECJ enunciated these “tripartite conditions” in *Foster*).

204. See Böhm, *supra* note 111, at 55.

enjoys supremacy over national law.²⁰⁵ These commentators invoke Member State obligations under the solidarity bond and the principle of uniform application of Community law.²⁰⁶ They further note the ECJ's ruling that administrative authorities must disregard national law that does not conform to Community law.²⁰⁷ Nevertheless, commentators opposing the rise of this duty observe that this principle is not applied to domestic laws within the national legal orders of the Member States.²⁰⁸ They emphasize that, under the EC Treaty, the national authorities do not have recourse to the reference proceeding for a preliminary ruling before the ECJ.²⁰⁹ Moreover, according to these commentators, the ECJ's jurisprudence is confined to imposing this duty on national agencies in scenarios involving direct effect of a Community directive.²¹⁰ This rationale, they caution, cannot be expanded to breaches of the EC Treaty, because this would contradict long-standing ECJ case law pertaining to potential conflicts between secondary and primary Community law.²¹¹ The opponents of a duty to set aside national law conclude that the administrative authorities are restricted to expressing their legal

205. See *id.* at 56 (explaining that (1) the German Federal Constitutional Court has interpreted this primacy as one of application, as opposed to validity, and (2) the supremacy of Community law may bar conflicting German norms from being applied, while not rendering them null and void, as well as relieve German courts from their obligations under Art. 100(1) GG).

206. See *id.* at 60 (referring to Articles 10(2) and 249 of the EC Treaty, in particular).

207. See, e.g., Case 103/88, *Fratelli Costanzo SpA v. Comune di Milano*, 1989 E.C.R. 1839, 1871 (establishing a duty of administrative authorities not to apply national law that breaches Community directives); HANS D. JARRAS, *GRUNDFRAGEN DER INNERSTAATLICHEN BEDEUTUNG DES EG-RECHTS* 102 (1994) (stating that such a duty to set aside should be limited to national implementation measures of grave legal deficiencies, and noting a contradiction within the ECJ's case law that does not allow national authorities to set aside secondary Community law allegedly breaching primary Community law).

208. See Böhm, *supra* note 111, at 55-6 (explaining that (1) according to the prevailing opinion in the legal literature, German administrative agencies do not have a duty nor a competence to set aside domestic law, (2) post-constitutional formal statutes cannot be set aside by national authorities because they are within the ambit of the control monopoly of the Federal Constitutional Court, which protects the sovereignty of the parliamentary legislator, (3) decrees (*Rechtsverordnungen*) and by-laws (*Satzungen*), which are substatutory measures, cannot be disregarded by the authorities because of considerations involving jurisdictional delineations and legal certainty, and (4) flagrant constitutional infringements may result in a stay of the administrative process).

209. See *id.* at 56 (explaining that Article 234(2) & (3) of the EC Treaty confer upon the ECJ jurisdiction in reference proceedings initiated by "courts and tribunals" only).

210. See *id.*

211. See *id.* (explaining that in these cases the ECJ asserts its control monopoly of holding secondary Community law invalid, which, by reasons of separation of powers, is not granted to national agencies and courts).

reservations, thereby enabling potentially concerned parties to seek judicial review.²¹² They add that the development of the high abstraction level of the EC Treaty occurs in the “energy field” between the Member States and the Community.²¹³ Finally, the meticulously designed proceedings governing the control of an alleged breach of Community law would be thwarted if, in the absence of an ECJ decision, authorities were required or even allowed to disregard national law that potentially infringes primary Community law.²¹⁴ An alternative proposal does not make this distinction between a duty and a competence to set aside national law, but, along the lines suggested in *Hedley Lomas*, advocates the adoption of the ECJ’s narrowly tailored conditions governing legislative injustice.²¹⁵ According to this approach, however, certain scenarios may automatically trigger state liability and not even require assessing the seriousness of the breach.²¹⁶

The proposition of litigants pursuing claims for compensation based on “judicial injustice” that stems from an alleged misconstruction of Community law has not yet been tested. The ECJ has indicated that state liability may exist for infringements attributable to the judiciary.²¹⁷ In proceedings against Member States for failures to fulfill obligations under Community law, the

212. See *id.* (pleading for a uniform treatment of both sets of cases, although the supremacy of Community law over national law differs from the hierarchical primacy of primary over secondary Community law).

213. See *id.* (stating that the implementation-oriented administrative bodies cannot trump the Community institutions nor the national legislatures).

214. See *id.* (explaining that (1) the process involves many imponderables and complexities, (2) the Commission annually screens thousands of national regulations against requirements of Community law and engages in a “continuous dialogue” with Member States, (3) in less than five percent of these cases the Commission initiates the procedure under Article 226 of the EC Treaty, and (4) with the exception of evident infringements, a duty to set aside can only be construed after the ECJ has handed down a judgment finding a national law in breach of Community law).

215. See Ehlers, *supra* note 9, at 778-79 (reasoning that the Court’s overall intent of preserving the legislature’s freedom of decision-making would otherwise be frustrated if Member States were to be held liable when executing national statutory law through administrative measures that infringe Community law).

216. See *id.* at 779 (referring to (1) deficient applications of national law conforming to Community law and (2) other violations of Community law by administrative measures that are not based on national law, as exemplified under German state liability law in cases involving administrative warnings that do not have a statutory basis and do not conform to German law).

217. See generally Case 103/88, *Fratelli Costanzo SpA v. Comune di Milano*, 1989 E.C.R. 1839. See also Craig, *supra* note 131, at 71-72 (observing that (1) this feature “provides an important check upon national courts” and (2) the specter may be raised when national courts opt to follow national law, as opposed to supreme Community law, or choose to give an unduly restrictive interpretation of Community law).

Commission has generally exercised restraint vis-à-vis the domestic also judicial branches.²¹⁸ The trend in national legal systems also reflects high-threshold requirements.²¹⁹

Finally, Community law is generally considered as “state blind” because the Community’s institutional balance equation envelops the Member States independently from their political subdivisions, including states and regions.²²⁰ For example, regions are not considered Member States for purposes of privileged standing under the Community judicial review system.²²¹ Member States cannot plead their internal allocations of powers to free themselves of their Community law obligations.²²² Recently, the ECJ modified that reservation in the area of Member State liability for breaches Community law and held that, in Member States with a federal structure, the reparation for damages need not necessarily be provided by the federal state to fulfill that Member State’s Community law obligations, as long as the basic tenets of effectiveness and equivalency are met.²²³

b. National Measures Executing Potentially Unlawful Community Legislation

The trio of *Brasserie* conditions may be interpreted to cover a Member State’s good faith execution of an act of the Council or Commission, which is subsequently held unlawful.²²⁴ Some argue that the Member State does not commit an imputable breach of law under these circumstances because the legislative

218. See Duteil de la Rochère, *supra* note 111, at 11 (reasoning that “the Commission has been anxious to preserve the independence of the judiciary”).

219. See *id.* (explaining that French law, for example requires a serious mistake in order to involve liability of the judiciary (*faute lourde*)).

220. In response to concerns about a loss of prerogatives raised by the regions, through their Member States, the Framers of the Maastricht Treaty created a new advisory body, the Committee of Regions, that is governed by Articles 263 through 265 of the EC Treaty.

221. See Joined Cases 62 and 72/87, *Exécutif régional wallon & SA Glaverbel v. Commission*, 1988 E.C.R. 1573, 1582.

222. See, e.g., Case 52/75, *Commission v. Italian Republic*, 1976 E.C.R. 277 (concerning the legislative organs), Case 103/88, *Fratelli Castanzo SpA v. Comune di Milano*, 1989 E.C.R. 1839 (involving the obligation of localities and other territorial authorities to apply the provisions of directives).

223. See Case C-319/96, *Klaus Konle v. Republik Österreich*, 1998 E.C.R. I-5255 (involving a national liability law, which stipulates that in case of infringements attributable to a part of the Member State, the injured party may claim only liability against the subunit, as opposed to the Member State as a whole).

224. See Oliver, *supra* note 2, at 654.

measure is in force at the time of implementation.²²⁵ Others advise that the injured parties must bring these types of actions before the national courts and against the national authorities, rather than petitioning the ECJ to take jurisdiction under the rules governing the non-contractual liability of the Community.²²⁶ These commentators reason that indemnification vehicles may constitute proper avenues allowing a bona fide Member State to recover from the Community.²²⁷ Some of these mechanisms may already exist for certain areas of the law.²²⁸ Alternatively, a Member State may consider lodging a request for payment of the sum with the Commission and, if the petition is not fruitful, bring an action for failure to act against the Commission.²²⁹ Ascertaining potential liability of the Community, however, may prove difficult.²³⁰ According to the ECJ, a national court cannot find that the Community has incurred non-contractual liability under the EC Treaty.²³¹ Conversely, litigation involving a defective Community act against national authorities to circumvent the ECJ's prior dismissal of an action for damages brought on identical grounds against the Community may constitute an abuse of process.²³²

225. See Case 101/78, *Granaria BV v. Hoofdprodukschap voor Akkerbouwprodukten*, 1979 E.C.R. 623, 644, [1979] 3 C.M.L.R. 124, 138 (providing Advocate General Capotorti's opinion that "the Member State has not committed a wrongful act by implementing a regulation in force, even if it is defective because it is at variance with higher rules of Community law"). See also Oliver, *supra* note 2, at 654 (hinting at considerations of legal certainty).

226. Oliver, *supra* note 2, at 654.

227. See *id.*

228. See *id.* at 654 & nn.58-59 (citing Council Regulation 729/70 on the Financing of the Common Agricultural Policy, 1970 O.J. SPEC. ED. 218; Council Decision 94/728 on the Community's Own Resources 1994 O.J. (L 293) 9 (Euratom)).

229. See *id.* at 654 n.59 (referencing Article 232 of the EC Treaty, which establishes a pre-litigation and a judicial stage).

230. For a detailed analysis of several crucial issues, see Peter Oliver, *Joint Liability of the Community and the Member States, in THE ACTION FOR DAMAGES IN COMMUNITY LAW*, *supra* note 111, at 285.

231. See Case 101/78, *Granaria BV v. Hoofdprodukschap voor Akkerbouwprodukten*, 1979 E.C.R. 623, 644, [1979] 3 C.M.L.R. 124, 134 (deciding that "a question relating to the application of the second paragraph of Article [288 of the EC Treaty] cannot be determined in proceedings under Article [234] of the [EC] Treaty").

232. See Oliver, *supra* note 2, at 655 (finding that such action against the national authorities before the national courts "if successful . . . would have [ultimately] resulted in the applicants being compensated by the Community after all"). For an illustration of the ECJ's posture in a case featuring a Community regulation pertaining to production aid for tomato concentrate, see *Joined Cases 106 to 120/87, Asteris AE v. Hellenic Republic*, 1988 E.C.R. 5515, 5539 (holding that Article 288 of the EC Treaty "precludes a national authority which merely implemented the Community legislative measure and was not responsible for its

c. Subsidiarity to Other Remedies

The *Brasserie* decision does not address the relationship between the action for damages and other legal remedies that may be in the quiver of the injured party.²³³ Those seeking to treat the action for damages as subsidiary to other remedies argue that a fledgling subsidiarity requirement may be embedded in *Brasserie* when the Court imposes on the injured parties a duty of applying reasonable care to mitigate their loss.²³⁴ A mitigating measure may include seeking to have the contested underlying measure quashed in due time.²³⁵ The principal policy rationale advanced in support of subsidiarity involves shifting the injured parties into a mode of damage prevention and containment as well as providing the authorities with the opportunity to abort their unlawful conduct more speedily.²³⁶

unlawfulness from being held liable on the same grounds"). The regulation had previously been the subject of review in an actions for damages and annulment before the ECJ. See Case 194 to 206/83, *Asteris AE v. Commission*, 1985 E.C.R. 2815 (dismissing the action for non-contractual liability because the unlawfulness of the regulation did not rise to the level of constituting a flagrant violation of a superior rule of law since it resulted from a merely technical error); Case 192/83, *Hellenic Republic v. Commission*, 1985 E.C.R. 2791 (annulling a Community regulation pertaining to production aid for tomato concentrates).

233. See generally Oliver, *supra* note 2, at 652 (stating that while "the Court held that the plaintiff owed a duty to take care to mitigate his [sic] loss, it did not examine this particular issue"); Ehlers, *supra* note 9, at 779 (speaking of primary legal review (*Primärrechtsschutz*)).

234. See Oliver, *supra* note 2, at 652 (observing that the approach, "which has much to commend it," "has yet to be endorsed by the Court"); see also Case C-2/94, *Denkavit International BV v. Kamer van Koophandel en Fabriken voor Midden-Gelderland*, 1996 E.C.R. I-2827, I-2852 (presenting (1) Advocate General's Jacobs' characterization of State liability in damages "as a remedy [of exceptional character] which goes beyond ordinary administrative remedies," and (2) the Commission's point of view that the State liability action might be regarded as ancillary to other remedies).

235. See Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, I-1119, [1996] 1 C.M.L.R. 889, 974 (containing Advocate General Tesaurò's statement that "the Member States cannot be reasonably debarred" from making the right to damages contingent on having brought an action for annulment where available). See also Ehlers, *supra* note 9, at 783 (advocating that the individual constitutional complaint against anti-constitutional laws be opened to encompass German statutes infringing Community law).

236. See Oliver, *supra* note 2, at 652 (referring to a regulatory model provided by Article 839(3) BGB, "which precludes the recovery of damages for the acts of public authorities where the plaintiff has 'deliberately or negligently failed to avert loss by seeking another remedy'"). Article 839(3) BGB reads, "Die Ersatzpflicht tritt nicht ein, wenn der Verletzte vorsätzlich oder fahrlässig unterlassen hat, den Schaden durch Gebrauch eines Rechtsmittels abzuwenden." *Id.* at 653 n.53.

This may be especially relevant in cases of "legislative injustice," which can involve considerable claims.²³⁷

The ECJ seems to derive the injured party's duty of mitigation from the principle of good faith common to the laws of the Member States.²³⁸ The Court apparently envisions addressing the subsidiarity question as a matter of liability consequences by assigning a degree of comparative fault to the plaintiffs that do not avail themselves of primary legal remedies.²³⁹ Nevertheless, the potential subsidiarity of the action for damages is not limitless; the ECJ notes that the injured party is not required to make unreasonable efforts for completely exhausting all other remedies.²⁴⁰

d. Quantum of Damages

Primary Community law does not provide any indication of the calculation, amount, and types of compensable damages. As previously discussed, the ECJ provides the adjudicating national courts with a three-pronged guideline pertaining to the amount of damages. The Court, however, does not further define the phrase "commensurate with the loss or damage sustained" when

237. Ehlers, *supra* note 9, at 779 (explaining that a primacy of other remedies may specifically limit the amount of damages).

238. *But see id.* (invoking the regulatory intent of Community law, which entails the protection of fundamental freedoms through deflective rather than compensatory legal remedies, and validating this line of reasoning against German state liability law, which does not recognize (any more) a choice among remedies according to the motto "defend yourself or cash in" (*wehre dich oder liquidiere*)).

239. *See id.* (expressing, however, the preference of including a subsidiarity requirement among the liability triggers, as opposed to addressing it as a corrective in the subsequent stage of liability consequences). *See also* Oliver, *supra* note 2, at 653 (observing that "as Advocate General Tesauero pointed out, the Court has arguably followed the same approach with respect to non-contractual liability under Article [288 of the EC Treaty]"). For ECJ case law analyzing subsidiarity issues already in the admissibility stage of actions for damages levied against the Community, see, for example, *Case 5/71, Aktien-Zuckerfabrik Schöppenstedt v. Council*, 1971 E.C.R. 975 (holding that the plaintiff's legal interest is independent of an action for annulment against the contested measure allegedly triggering the damages); *Case 175/84, Krohn & Co. Import-Export (GmbH & Co. KG) v. Commission*, 1986 E.C.R. 753, [1986] 1 C.M.L.R. 745 (holding the action admissible without the prior exhaustion of national remedies).

240. *See Brasserie du Pêcheur*, 1996 E.C.R. I-1029, I-1157 [1996] 1 C.M.L.R. 889, 994. *See also* Reich, *supra* note 140, at 715 (providing the example that if a national court, in the case of an incorrect transposition of a directive, cannot correct the defect through a Community law-conform interpretation, then the Member State has to fill the gap). *But see* Ehlers, *supra* note 9, at 779 (noting that the uncertain outcome, high cost, or long duration of a complex case do not reach the threshold of unreasonableness, which, although affirmed prematurely in numerous German court cases, should be treated as a criterion of exceptional character).

addressing the extent of the reparation.²⁴¹ A glimpse at the German language version of the decision²⁴² reveals the term *angemessen*, whereas the French translation uses *adéquat*. The potential subtleties involved with the different language versions of the judgment may suggest less than full restitutory compensation.²⁴³ Moreover, the Court does not offer a method of calculation for the damages.²⁴⁴ Finally, the ECJ's guidance appears particularly cautious not to micro-manage the margin of evaluation enjoyed by the national courts with respect to this criterion.²⁴⁵

241. See *Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, I-1156-57, [1996] 1 C.M.L.R. 889, 971 (advising that (1) the framework for Member State liability must not be unfavorable vis-à-vis corresponding domestic claims, (2) the compensation for damages must be commensurate with the loss suffered, and (3) the pursuit of the Member State liability claim must not be rendered practically impossible or excessively difficult). See also Ehlers, *supra* note 9, at 779 (further discussing the guidance elements identified by the ECJ).

242. See *Brasserie du Pêcheur*, 1996 E.C.R. I-1029, I-1131 (identifying German and English as the "languages of the case"). Article 29 of the Rules of Procedure of the Court of Justice of the European Communities and Article 35 of the Rules of Procedure of the Court of First Instance of the European Communities govern the language of the case. See RULES OF PROCEDURE OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES art. 29, reprinted in KOEN LENAERTS & DIRK ARTS, PROCEDURAL LAW OF THE EUROPEAN UNION app. 2 at 445-46 (Robert Bray ed., 1999); RULES OF PROCEDURE OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES art. 35, reprinted in LENAERTS & ARTS, *supra*, at app. 3 at 484-85.

243. See *Case C-271/91, Marshall v. Southampton and South West Hampshire Area Health Authority (Marshall II)*, 1993 E.C.R. I-4367, I-4390, [1993] 3 C.M.L.R. 293 (presenting Advocate General van Gerven's explanation that the "compensation must be adequate in relation to the damage sustained but does not have to be equal thereto"). But see Oliver, *supra* note 2, at 656 (noting that "[t]he Court appeared to reject this suggestion").

244. For the damage calculation method under German law, see DIETER MEDICUS, BÜRGERLICHES RECHT 604 (17th ed. 1996) (explaining that the German Civil Code provides two options, that are both aimed at "total restitution" (*Totalrestitution*): (1) "natural restitution" (*Naturalrestitution*) reflecting the injured party's "integrity interest" (*Integritätsinteresse*), and (2) "pecuniary compensation" (*Geldersatz*) equivalent to "value interest" (*Wertinteresse*). See also Oliver, *supra* note 2, at 656 (observing that "[i]n this connexion, the Court's statement that loss of profit may not be 'totally excluded' leaves open the question whether it may be partially excluded").

245. See Oliver, *supra* note 2, at 656 (emphasizing that "[i]t is striking that the Court regarded compensation for the specific heads of damage referred to in the second [*Factortame*] question of the High Court as a matter for the English courts alone").

e. Plaintiffs, Defendants, and Fora

The ECJ has consistently held that judicially confirmed failures of Member States to fulfill their EC Treaty obligations constitute an important factor for establishing the basis for potential responsibilities of the defaulting Member State.²⁴⁶ *Brasserie* does not appear to include any indication that the ECJ envisions enabling other Member States or the Commission, in their own right or on behalf of an individual, to sue a Member State before its national courts for an alleged breach of Community law. The Community legal system is designed to achieve a full spectrum of legal remedies by assigning roles to different players in the Community and national arenas. Under the EC Treaty, the Commission and the Member States are empowered to prosecute Member States before the ECJ for alleged failures to fulfill EC Treaty obligations.²⁴⁷ The enforcement of ECJ judgments resulting from these actions was significantly strengthened by the framers of the Maastricht Treaty, who introduced a scheme of lump sums or penalty payments for deficient Member State compliance.²⁴⁸ The new sanctions are designed to establish respect for ECJ judgments, whereas state liability claims aim at compensation for individual damages.²⁴⁹ The degree to which the individual becomes the vigilant guardian of Community law²⁵⁰ obviates the need for "adoptive actions" that would unnecessarily separate claimant and damage as well as blur the lines between the types of actions provided by the EC Treaty. The individual in turn has no standing before the ECJ and must sue the Member State in the national courts.²⁵¹ The ECJ may then become indirectly involved through a reference proceeding for a preliminary ruling.²⁵²

246. See, e.g., Case 240/86, *Commission v. Hellenic Republic*, 1988 E.C.R. 1835, [1989] 3 C.M.L.R. 578; Case 39/72, *Commission v. Italian Republic*, 1973 E.C.R. 101, [1973] 12 C.M.L.R. 773.

247. See EC TREATY arts. 226-27.

248. *Id.* art. 228(2).

249. Böhm, *supra* note 111, at 55 n.23.

250. See RALPH H. FOLSOM, *EUROPEAN UNION LAW IN A NUTSHELL* 82 (1999) (suggesting that Americans may analogize this role to that of "private attorney generals," a law technique adopted in a number of U.S. statutes).

251. See Günter Krohn, *Government Liability in Germany for Infringement of Community Law*, in *EUROPEAN AMBITIONS OF THE NATIONAL JUDICIARY* 119 (Rosa H.M. Jansen et al. eds., 1997) (providing an *argumentum e contrario* based on Articles 235, 288(2) of the EC Treaty).

252. See EC TREATY art. 234. See also Tana Burns Newell, Book Note, 3 COLUM. J. EUR. L. 523, 525 (1997-98) (reviewing JOSEPHINE STEINER, *ENFORCING EC LAW* (1995) (explaining that (1) the ECJ refuses acceptance of certain referrals, especially when they involve questions that are not sufficiently clear, (2) the Court

Nevertheless, this conversation between judges, which the framers of the EC Treaty designed as the "procedural linchpin" linking the legal orders of the Community and the Member States,²⁵³ has become a powerful tool for the ECJ to shape Member State liability, including, to a certain extent,²⁵⁴ the non-harmonized prongs of the principle.²⁵⁵

According to several commentators, the ECJ's Member State liability jurisprudence may set a significant precedent with respect to the delicate issue of the liability of private parties for violations of Community law.²⁵⁶ Those violations may involve the rules governing antitrust, social policy, public procurement, and state aid.²⁵⁷ This view has been bolstered by encouraging signals from the Commission.²⁵⁸

has never rejected a referral for being inappropriate, (3) the appeal of a national court's decision to refer or not to refer will be governed by domestic remedy rules, (4) an order of reference cannot be appealed to the ECJ, and (5) therefore, a uniform standard of review in the Community does not exist and the degree of protection of individuals' rights may differ by Member State).

253. See FOLSOM, *supra* note 251, at 90 (explaining that in light of the functional division of powers between courts, the ECJ, which is not considered a super-revision instance but a court with delimited jurisdiction, provides the abstract facades of Community law and the national courts determine and apply the facts of the case). For critical arguments levied against the design and use of the reference proceeding, see Waelbroeck, *supra* note 111, at 323-24 (arguing that (1) the abstract preliminary ruling leaves the Member State with little room to argue, and (2) the procedure should be revised to allow for "a better opportunity for contradictory debate").

254. See Case C-319/96, *Brinkmann Tabakfabriken GmbH v. Skatteministeriet*, 1998 E.C.R. I-5255, I-5270 [1998] 3 C.M.L.R. 673, 690 (explaining that "[w]hile it is, in principle, for the national courts [to adjudicate the facts of the actual case] . . . in this instance the Court has all the information necessary in order to [ad]judge . . . the facts . . ."); Case C-261/95, *Palmisani v. Istituto Nazionale della Previdenza Sociale (INPS)*, 1997 E.C.R. I-4025 (stating, while "certain aspects of the case provide a basis for the following remarks by the Court," in one "regard the Court does not have all the information necessary").

255. For an example of this approach with respect to the third Member State liability condition of causation between breach and damage, see *Brinkmann Tabakfabriken GmbH*, 1998 E.C.R. I-5255 (finding no direct causal link in a case where the Member State authorities, in the absence of a formal implementation through ministerial decree, had otherwise given immediate effect to the relevant provisions of the directive at bar). For a case involving a domestic limitation period, see *Palmisani*, 1997 E.C.R. I-4025 (holding that a one-year time limit cannot be regarded as making it excessively difficult or virtually impossible to lodge a claim for reparation).

256. See, e.g., Helen Smith, *The Francovich Case: State Liability and the Individual's Right to Damage*, 13 EUR. COMPETITION L. REV. 129 (1992); Julian Maitland-Walker, *A Step Closer to a Definitive Ruling on a Right in Damages for Breach of the EC Competition Rules*, 13 EUR. COMPETITION L. REV. 3 (1992).

257. Waelbroeck, *supra* note 111, at 318-27 (wondering, however, about the design of the conditions for liability in damages).

258. See, e.g., Commission Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty, 1993 O.J.

Another area for discussion involves cross-Member State jurisdiction when a plaintiff sues an allegedly defaulting Member State for damages before the courts of another Member State. General rules of public international law appear to lean towards jurisdictional immunity in such contexts.²⁵⁹ The special nature of Community law, however, may override this restrictive approach.²⁶⁰

f. Codification of State Liability Under Community Law

The Treaty of Amsterdam does not include a provision governing Member State liability for breach of Community law. During the preceding Intergovernmental Conference,²⁶¹ the United Kingdom had proposed language that would have circumscribed the exposure of Member States to liability litigation.²⁶² Nevertheless, the Draft Article on Damages was not approved.²⁶³ Thus, in the absence of an intervention by the

(C 39/05) 6. See also van Gerven, *supra* note 151, at 530 (discussing *Case 128/92, H. J. Banks & Co. Ltd. v. British Coal Corporation*, 1994 E.C.R. I-1209).

259. See European Convention on State Immunity art. 15, reprinted in 11 I.L.M. 470, 474 (stating that a "Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the Court shall decline to entertain such proceedings even if the State does not appear").

260. See Waelbroeck, *supra* note 111, at 332-33 (explaining that (1) *Francovich* may have dismantled traditional notions of sovereignty, (2) a national court may not accept the defense of *ius imperii* where the other Member State has violated Community law obligations, and (3) Article 15 of the Basle Convention on State Immunity constitutes treaty law signed and ratified by some Member States in violation of their solidarity obligation towards the Community).

261. For general documentation covering the Maastricht II process, see *The 1996 Intergovernmental Conference—Retrospective Database*, (visited Feb. 15, 2000) <<http://europa.eu.int/en/agenda/igc-home/>>.

262. See Refelction Group's Report, *Part Two: An Annotated Agenda*, at No. 120 (visited Feb. 15, 2000) <<http://europa.eu.int/en/agenda/igc-home/eu-doc/reflect/final.html>> (providing the U.K.'s position that (1) some judgments of the ECJ are disproportional, and (2) the IGC "should examine possible limits to [M]ember States economic liability when a [M]ember State has genuinely attempted to comply with Community law and the application of national time limits in such cases"). See also *A Partnership of Nations: The British Approach to the European Union IGC 1996* (12 Mar., 1996) <<http://www.fco.uk.europe/igc/index.html>> (suggesting at No. 37 that "that a Member State should only be liable in damages in cases of serious and manifest breach of its obligations") (website no longer available, source on file with author). For modification proposals predating the IGC, see, for example, Suggestions of the Court of Justice on European Union, Bulletin of the EC, Supplement 9/75 (containing the ECJ's thoughts); Sieglerschmidt Report, 10. Jan. 1983 (Doc-1-1052/82) (providing the European Parliament's ideas).

263. Craig, *supra* note 131, at 77 (predicting that "[t]he possibility of a [t]reaty amendment . . . to limit the E.C.J.'s powers will be raised once again").

Community legislature,²⁶⁴ the further development of the principle of state liability remains a matter for the courts.²⁶⁵

IV. CONSEQUENCES OF THE MEMBER STATE LIABILITY PRINCIPLE FOR THE DOMESTIC LEGAL ORDERS

A. *Rendezvous of Supranational and Municipal Legal Systems in the Area of State Liability*

1. General Observations

According to the ECJ's monist approach,²⁶⁶ the principle of Member State liability is grounded in the supranational

264. See Nicholas Green & Ami Barav, *Damages in the National Courts for Breach of Community Law*, 6 Y.B. EUR. L. 55, 119 (1986) (stating that "[t]here is little doubt that some Community legislative work is highly desirable in order to bring into harmony the normative relationship between the Community and its Member States, on the one hand, and the internal procedural arrangements which must accompany them, on the other hand").

265. See Betlem, *supra* note 176 (observing that "a step by step development [of the liability regimes] is the prevalent pattern in the legal systems of the Member States, as the Court itself noted in . . . *Brasserie*").

266. Strict monism holds that international law and the national legal systems constitute one legal order. For the principal theoretical representatives, see, for example, HANS KELSEN, *REINE RECHTSLEHRE (PURE THEORY OF LAW)* (1960); ALFRED VERDROSS, *DIE EINHEIT DES RECHTLICHEN WELTBILDES AUF GRUNDLAGE DER VÖLKERRECHTSVERFASSUNG* (1923). See also ALBERT BLECKMANN, *EUROPARECHT* 288 (1990) (summarizing that strict monism professes the supremacy of public international law, which renders conflicting national law void). In contrast, strict dualism professes that public international law and national law do not exist in a hierarchical or preferential relation, but coexist in parallel legal spheres. For the main advocates of classical dualism, see, for example, HEINRICH TRIEPEL, *VÖLKERRECHT UND LANDESRECHT* (1899); DIONISIO ANZILOTTI, *IL DIRITTO INTERNAZIONALE NEI GUIDIZI INTERNI* (1905). See also BLECKMANN, *supra*, at 288-89 (explaining that (1) public international law and municipal law do not overlap but differ with regard to their sources, governing norms, and addressees; (2) international treaties, customary international law, and the general rules of international law constitute the body of public international law that governs the legal relations between subjects of international law, especially states and international organizations; (3) national law is basically comprised of the constitution, laws, regulations, and other rules governing the relations between state and individual, and individuals *inter se*; (4) public international law has to undergo either transformation or execution before being able to penetrate into the national legal order and bind internal bodies and individuals; and (5) transformation is the process of receiving international law into a norm of national law, whereas execution is the result of an order by national act to domestic authorities stipulating the application of international law). However, these "purist" views have been converging over the years. See, e.g., *id.* at 289 (finding

Community legal order.²⁶⁷ Community law governs the contours of the liability claim and confers upon individuals a directly applicable cause of action against the Member States before their municipal courts.²⁶⁸ While an individual who proceeds to enforce a Community right against a public authority before a national court must, in the absence of relevant Community rules, use national remedies and procedures,²⁶⁹ the basic tenets of Community law²⁷⁰ permeate the institutional and procedural autonomy of the Member States when it comes to shaping the restrictions and modalities of the liability claim within the national legal frameworks.²⁷¹

2. Impact on Domestic Liability Infrastructures

The effects from the penetration of Member State liability into the national legal orders may vary according to the pre-existing liability infrastructure in the different Member States.²⁷² Certain domestic orders may be able to absorb the Community law-based

that monist scholars continue to derive the sovereign powers of the states from public international law but concede the delegation of territorial and personal powers to the state through public international law, thus enabling national law to determine the position of public international law within the internal legal order of the state); *id.* at 289-90 (noting that the moderated version of dualism recognizes the operation of public international law vis-à-vis individuals, however, only after the national "sovereignty shell" (*Souveränitätsspanzer*) has been opened or lifted).

267. See Böhm, *supra* note 111, at 59.

268. See Kopp, *supra* note 131, at 646.

269. See, e.g., Joined Cases C-430/93 & C-431/93, *van Schijndel & van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, 1995 E.C.R. I-4705, I-4737-38 [1996] 1 C.M.L.R. 801, 826-28 (referring to the possibility or obligation for the national jurisdictions to automatically raise any arguments based on infringements of Community law); Joined Cases C-6/90 & 9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357, I-5416 [1993] 2 C.M.L.R. 66, 115 (holding that "it is a matter for the internal legal order of the Member States to determine the competent courts and lay down the procedural rules for legal proceedings"); Case 33/76, *Rewe-Zentralfinanz & Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 1976 E.C.R. 1989, 1997 (emphasizing that "it is the national courts which are entrusted with ensuring the legal protections which citizens derive from . . . Community law").

270. See EDWARD & LANE, *supra* note 3, at 57-58 (explaining that these basic Community law principles include "full effectiveness" and "equivalence").

271. See Oliver, *supra* note 2, at 638. *But see* Emiliou, *supra* note 139, at 406 (stating that this may be hard to reconcile with the principle of procedural autonomy of the Member States).

272. In general, certain civil law systems have tended to provide easy access to damages against public authorities, whereas thresholds seem higher in common law jurisdictions. In support of the proposition, see EDWARD & LANE, *supra* note 3, at 59 (providing examples of litigation in Belgium, France, and the United Kingdom).

claim into the state liability systems that are already in place.²⁷³ In that sense, national norms operate as a vehicle for Member State liability subject, however, to Community law prerequisites affecting the installation of liability restrictions,²⁷⁴ the subsidiarity of the action for damages,²⁷⁵ the concept of fault in the context of the liability trigger,²⁷⁶ and the extent of the damage award.²⁷⁷ In other legal orders, Member State liability cases may proceed through autonomous *sui generis* causes of action.²⁷⁸ In this sense, a new tort avenue arises. Finally, in the longer term, Member State liability jurisprudence may create a spillover impact and affect scenarios that do not directly involve a Community law component,²⁷⁹ ultimately giving rise to a greater level of convergence among the Member States.²⁸⁰ The BGH's *Brasserie* judgment offers an illustrative case study for Germany.

273. See Betlem, *supra* note 176 (summarizing for the Netherlands that "[i]f . . . the Dutch State breaches EC law, it will be liable under less strict conditions than the ones of *Brasserie*"); Craig, *supra* note 131, at 88-89 (explaining that under U.K. domestic law the action for breach of statutory duty may accommodate Member State liability). *But see* EDWARD & LANE, *supra* note 3, at 59 (observing in the case of the United Kingdom that (1) liability claims, absent full-fledged statutory remedies, proceed under the umbrella of the British transformation law, and (2) the courts have started to bypass the doctrine of legislative sovereignty of Parliament by granting a liability claim for violations of the general principle that "everybody has to act in good faith and do their best"); Kopp, *supra* note 131, at 646 (explaining that full-fledged legal protection requires the enactment of a statutory liability basis).

274. See Oliver, *supra* note 2, at 646.

275. See Böhm, *supra* note 111, at 59-60.

276. See *id.*

277. See *id.*

278. See Craig, *supra* note 131, at 87-88 (explaining that, in the United Kingdom, the new tort would embrace the ECJ's three elements); Kopp, *supra* note 131, at 646 (observing for France that, because French judges do not consider themselves tightly bound by the ECJ's Member State liability jurisprudence, a novel legal remedy of fault liability is necessary to regulate liability resulting from legislative injustice). *But see* Dutheil de la Rochère, *supra* note 111, at 17-18 (explaining that (1) the French public liability system does not rank among the most restrictive ones, (2) "the principle of objective liability due to acts of Parliament or due to delegated legislation based on the breach of the principle of equality" has been acknowledged for a long time, and (3) since *Francovich*, "French jurisdictions [have shown] a remarkable tendency to leave room for the infringement of [Community] law . . . as a ground for the liability of the [s]tate authorities").

279. See Craig, *supra* note 131, at 89-94 (discussing, *inter alia*, reform plans in the United Kingdom that involve (1) the creation of a new liability head based on *ultra vires*, (2) the adoption of a risk theory, and (3) greater usage of *ex gratia* payments of compensation). *But see* Kopp, *supra* note 131, at 646 (observing that prevailing Euro-scepticism has thus far prevented legislative action).

280. See generally van Gerven, *supra* note 151, at 507-08 (using "cable cases," which involve loss not directly consequential upon injury to property, to explain that (1) at first sight, English, French, German, and Dutch law seem

B. *Reflections upon the BGH's Dismissal of
Brasserie—A Case Study*

Harmonizing the basic concepts of existing domestic government liability remedies with the system and modalities of Member State liability under Community law remains a daunting task in Germany.²⁸¹ From a German perspective, Member State liability does at present constitute a distinct *sui generis* remedy.²⁸² In consequence, absent a major national reform of public tort liability,²⁸³ the German legal order provides two distinct liability avenues for legislative injustice.²⁸⁴ One track is offered for infringements of domestic law under pre-existing liability vehicles²⁸⁵ and the other for breaches of Community law under *Brasserie* principles.²⁸⁶

The BGH proceeded under the two-track model. The BGH first adjudicated the domestic causes of action under domestic legal rules without superimposing Community law requirements.²⁸⁷ Then, on a separate basis, the BGH tested a

widely divergent and unbridgeable, however less so at second glance, and (2) the basic bridges of Community law drive towards remedy harmonization).

281. See generally Kopp, *supra* note 131.

282. See *id.*

283. See Krohn, *supra* note 252, at 123 n.15 (explaining that *Brasserie* may represent a new incentive for the German legislature to reinvigorate its efforts of replacing the old liability model of "sliding public liability" with a modern law of direct state liability).

284. See *id.*

285. See Craig, *supra* note 131, at 87.

286. See Kopp, *supra* note 131, at 646.

287. See, e.g., Oliver, *supra* note 2, at 646 (explaining that the narrow restriction under German law barring liability claims that result from a Federal statute contrary to the Basic Law, unless the act or omission of the legislature is referable to an individual situation, cannot be applied by analogy to breaches of Community law and must be set aside, because such a rule makes the recovery of damages impossible or excessively difficult); van Gerven, *supra* note 151, at 536 (stating that the remedy under § 839 BGB has to be "enlarged by way of interpretation or disapplication"); Böhm, *supra* note 111, at 60 (reconfirming that the German liability restriction is no longer viable when applied to legislative and normative breaches of Community law). See also Gerrit Betlem & Birgit SchoiSwohl, *Francovich Follow-Up A Survey of Cases on State Liability for Breach of European Community Law*, <<http://www.asser.nl/er/fran/francovi.htm>> (noting that (1) human rights law may affect access limitations to the right of compensation because such restrictions may amount to a violation of the European Convention on Human Rights (ECHR), and (2) the Treaty of Amsterdam explicitly codified the ECJ's jurisdiction to review the compatibility of Community acts with the ECHR, at Articles 46(d) and 6(2) of the Treaty on European Union, as amended by the Treaty of Amsterdam). For an illustration of the potential reach of human rights law, see *Pressos Compania Naviera SA v. Belgium*, 332 Eur. Ct. H.R. (ser. A) (1996) (holding that a tort claim for compensation is an "asset" and constitutes a "possession" within the meaning of Article 1 of Protocol No.1 of the

Community law-based claim without transferring the access restrictions of the national law track.²⁸⁸ While the application of the new *sui generis* liability regime fell to the national courts in absence of a formal domestic basis,²⁸⁹ the BGH was not in a position to hold off until the German legislature regulated legislative injustice in violation of Community law through statutory law.²⁹⁰ Awaiting a statutory codification would have involved unacceptable delays in pending judicial proceedings and created a significant formal legal vacuum.²⁹¹ Moreover, the size of the claim did not threaten to drain public funds to an extent necessitating legislative action.²⁹²

The ECJ's *Brasserie* preliminary ruling had basically directed the BGH to determine the full predictability of the ECJ's case law predating the first beer ruling of March 12, 1987.²⁹³ As previously discussed, the ECJ held that the designation prohibition constituted a serious breach of Community law, whereas the ban on additives was not inexcusable.²⁹⁴ The BGH embraced these determinations but, using its margin of maneuver within the assessment of the causation requirement for

European Convention of Human Rights); Betlem & Schoißwohl, *supra* (explaining that Article 6(1) ECHR was not examined by the Human Rights Court because of an overlap with the complaint pertaining to Protocol No. 1).

288. See *Brasserie du Pêcheur SA v. Germany*, [1997] 1 C.M.L.R. 971, 977-80.

289. See Krohn, *supra* note 252, at 122 (generally criticizing that "the German court, whose fundamental commitment to formal law is a key element in the system of separation of powers, is essentially overtaxed despite its related power to supplement and continue written law").

290. See *id.* at 121 (referring to the German State Liability Act (*Staatshaftungsgesetz*) of 1981). Section 5(2)[1] of the State Liability Act stipulated that the rise and extent of liability for unlawful acts by the legislature should be subject to a specific legal provision. See *id.* at 121 n.7. But see BVerfGE 61, 149 (preempting the entry into force of this law).

291. See Krohn, *supra* note 252, at 122 (caveating that "an increase in consistency of the law cannot be expected with the passing of the new liability institute to the national courts") (emphasis omitted).

292. *Id.* at 123.

293. See Oliver, *supra* note 2, at 645. One commentator observed that

[w]hile expressing its wish to avoid encroaching on the exclusive jurisdiction of the national courts to 'find the facts and decide how to characterize the breaches of Community law at issue,' the Court nevertheless deemed it helpful to indicate a number of circumstances which the national courts might take into account . . . [and embarked] upon the faintly curious exercise of determining which of its own earlier rulings had been fully predictable.

Id.

294. See *Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029; [1996] 1 C.M.L.R. 889.

state liability, connected the damage alleged by the plaintiff with the ban on additives.²⁹⁵ This approach became the cornerstone for the full dismissal of the plaintiff's claim pertaining to the period between 1981 and 1987.²⁹⁶ The designation prohibition, while determined sufficiently serious, was not found causal for damages incurred by the plaintiff.²⁹⁷ The ban on additives, which was deemed the predominant or sole cause of the damages, was not considered a grave and manifest breach of Community law.²⁹⁸ These findings, however, have not been immune from criticism in both directions in the legal literature.

Some suggest that the BGH could have declined to categorize Germany's designation prohibition as a sufficiently serious breach of Community law, because the ECJ's first beer judgment did not flatly outlaw the pertinent statutory provision but only arrived at a violation of Community law after an extensive consideration of the proportionality principle, which would have suggested a labeling regime in lieu of a marketing prohibition.²⁹⁹ This approach seems to resurrect the elaborate considerations advanced by the German Federal Government at the time to save its designation prohibition.³⁰⁰ In contrast, those viewing the designation prohibition as an open and grave violation of Community law emphasize that Germany's designation prohibition did not pose a novel type of infringement, as the ECJ's case law predating the first beer judgment was clear and evident for similar scenarios.³⁰¹

Several commentators concede that the BGH enjoyed a wider latitude of evaluation when assessing the ban on additives.³⁰² Others doubt that Germany's ban on additives constituted a significantly less obvious breach of Community law, because the

295. See *Brasserie du Pêcheur SA v. Germany*, [1997] 1 C.M.L.R. 971, 980-82.

296. See Oliver, *supra* note 2, at 657 (explaining that, as a result of this construction, "no liability might arise—a question on which the Court of Justice expressed no view").

297. See *Brasserie du Pêcheur SA*, [1997] 1 C.M.L.R. at 980.

298. See *id.* at 981.

299. See Krohn, *supra* note 252, at 125 (concluding that these considerations are "sure to have consequences for the basis and size of the liability").

300. Case 178/84, *Commission v. Germany*, 1987 E.C.R. 1227, [1988] 1 C.M.L.R. 780 (presenting Germany's submissions).

301. Ehlers, *supra* note 9, at 780.

302. See Krohn, *supra* note 252, at 125 (stating that (1) the "antimony" with Article 30 of the EC Treaty is "significantly less imperative," and (2) "[i]n the case of an affirmed liability it may also become significant . . . that the ECJ derived the unlawfulness from an infringement of the principle of reasonableness," since Germany banned all additives, as opposed to individual substances that were posing appreciable health concerns).

very health considerations that were invoked as a justification for the preclusion of all beers containing any type of additive were reduced in weight when it became clear that they were applied to other beverages.³⁰³ Moreover, some argue that in light of the ECJ's logic of finding a sufficiently serious breach, especially in the wake of continuous defiance of a previous judgment,³⁰⁴ the continued ban on additives had to be deemed a persistent and sufficiently serious breach of Community law after March 12, 1987.³⁰⁵ On December 31, 1989, the Commission officially reported that Germany had not yet fully complied with the ECJ's beer ruling.³⁰⁶ Germany did not formally amend the wording of its deficient legislation until several years later. Nevertheless, the BGH found that German authorities had implemented the ECJ ruling with all due haste through circulars requesting the immediate application of the judgment—decisive facts, which, according to the BGH, the plaintiffs failed to dispute.³⁰⁷

The ECJ has left the assessment of the causation element to the national courts, albeit limited by the Community principles of effectiveness and equivalence. The BGH's move of causally connecting the damage with the ban on additives, which was not considered sufficiently serious, while denying causation between the sufficiently serious infringement posed by the designation prohibition, has been criticized for several reasons. Some commentators hold that the designation prohibition did provide a direct cause for the rise of the damage, because the ban on additives affected only beverages already denominated as beer and the distribution under a different designation would have equally or similarly affected sales.³⁰⁸ Accordingly, one causal event unleashed by a seriously sufficient breach of Community law triggering liability consequences could not be undone by creating a second insufficiently serious causal contribution.³⁰⁹ Other commentators in the legal literature delve deeper into the theoretical underpinnings of causation and extract approaches

303. See Ehlers, *supra* note 9, at 780 (not further exploring this question).

304. See Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd*, 1996 E.C.R. I-1029, I-1150, [1996] 1 C.M.L.R. 889, 990 (stating that "[o]n any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established").

305. See Oliver, *supra* note 2, at 657.

306. See 1990 O.J. (C 232) 43 (providing the seventh annual report on the application of Community law during 1989). See also 1989 O.J. (C 330) 43 (relating to 1988); 1991 O.J. (C 338) 62 (pertaining to 1990).

307. See Oliver, *supra* note 2, at 657.

308. Ehlers, *supra* note 9, at 780.

309. *Id.*

for limiting state liability.³¹⁰ In the context of German tort law, supplementing the prevailing theory of adequate causation³¹¹ with the doctrine of the protective purpose of the norm would generally limit compensation to losses that are within the protective ambit of the liability principle.³¹² In cases involving transgressions of the proportionality principle, one commentator has proposed barring a plaintiff from claiming compensation for financial losses that would have occurred in the event of a reasonable, and therefore lawful, act or omission.³¹³ Moreover, plaintiffs alleging the improper exercise of discretion would be required to prove that appropriate use would have avoided their loss.³¹⁴ Another suggestion restricting liability would require a direct link between the allegations of legislative injustice and financial loss.³¹⁵ Under this approach, intervening administrative action could interrupt the chain of causation. A final, more esoteric observation relates to the degree that losses are attributable to prevailing customer habits.³¹⁶

The BGH did not have to address the potential subsidiarity of the Member State liability action or the quantum of the damages. Several commentators contend that, even assuming all other Member State liability conditions were met, Brasserie's action would have ultimately failed for not seeking judicial redress in

310. See Krohn, *supra* note 252, at 125-26 (providing insights into German causation teachings).

311. See *id.* at 125 (explaining that adequate causation focuses on the course of events following dutiful actions and the corresponding hypothetical situation of the injured party).

312. See *id.* at 125-26 (emphasizing that (1) the German BGH has repeatedly qualified the reach of the protective purpose as the authoritative criterion for the outcome of liability cases, and (2) Community law will not be unduly impaired by the application of the "protective principle," especially in light of the ECJ's case law pertaining to Article 288(2) of the EC Treaty).

313. See *id.* at 126 (using the terms proportional and reasonable interchangeably).

314. See *id.* (assigning the onus of proof to the plaintiffs).

315. See *id.* at 132 (noting that the ECJ did not address this issue in its preliminary opinion).

316. See *id.* (suggesting that (1) German consumers may have been committed to beers brewed according to the Purity Requirement for Beer independent of existing legislation, (2) "[u]nder certain circumstances a comparison of sales volumes before and after the phase of forced limitation of sales can be revealing," (3) "[a]n alleviation of the burden of evidence may be applied for a transitional period after termination of the trade impediment," and (4) this type of limitation may not violate essentials of Community law, which recognizes the consideration of "politico-economic" factors in non-contractual liability cases); Streinz, *supra* note 119, at 204 (adding that (1) one could doubt the existence of a damage, and (2) German law does not provide for exemplary damages).

German courts before the alleged damage arose.³¹⁷ These primary legal remedies, which reflect the plaintiff's duty of mitigation, would have included the action for annulment³¹⁸ or the action for a declaration³¹⁹ before the appropriate administrative courts as well as the individual constitutional complaint before the Federal Constitutional Court.³²⁰ Under the

317. See, e.g., Ehlers, *supra* note 9, at 780-83 (providing an extensive analysis of the primacy of primary judicial redress, while open whether the statutes of limitations pursuant to § 852 BGB and Article 43 of the Statute of the ECJ would have barred the action); Krohn, *supra* note 252, at 127-29 (emphasizing that the duty of mitigation corresponds to the injured party's obligation of exhausting the "right of appeal" under German public liability law pursuant to § 839(3) BGB).

318. See Ehlers, *supra* note 9, at 780 (explaining that (1) the facts of the case do not quite reveal how the German authorities interceded against the products of Brasserie, (2) since the authorities apparently ordered fines against at least one employee of Brasserie's German distribution firm and several different buyers acting for food market chains, one would have had to attribute the inaction of the concerned parties to Brasserie for construing the admissibility of the annulment action, and (3) if the German authorities, in addition, declined to process Brasserie's products imported by the distributor at the German border or barred German firms from continuing to market Brasserie's products in Germany, Brasserie could have brought an admissible annulment action as a directly and individually concerned third party); Krohn, *supra* note 252, at 128 (commenting that Brasserie was affected by (1) the sales prohibition under § 10 of the BStG and (2) by virtue of trade limitations illegally impeding its commercial activities).

319. See Ehlers, *supra* note 9, at 780-81 (reasoning that, in any case, an action directed at a declaration that the provisions of the purity law for beer did not apply to products of Brasserie would have been successful because the action would have (1) involved a real *inter partes* controversy regarding the application of a norm, as opposed to an abstract, *erga omnes* control of an existing or future parliamentary statute, (2) clarified the applicability of the provisions of the purity law for beer to Brasserie's products, thus pertaining to the existence or non-existence of a legal relationship sufficiently concretized by particular circumstances, albeit hinging on the validity of a legal norm adjudged divergently by the parties to the proceeding, (3) reflected a legitimate interest of Brasserie, and (4) met the subsidiarity hurdle through resolving the legal situation for Brasserie); Krohn, *supra* note 252, at 129 (providing similar rationales).

320. See Ehlers, *supra* note 9, at 781-83 (concluding that a constitutional complaint would have been admissible and successful on the merits). The admissibility of an individual constitutional complaint against statutory law pursuant to GG art. 93 Nr. 4a in conjunction with BVerfGG 13 Nr. 8a, 90-93 requires (1) standing, (2) compliance with the principle of subsidiarity, and (3) observance of the statute of limitations. *Id.* (explaining that (1) the complainant, despite being a foreign legal person, was a proper applicant with the requisite interest due to being individually, presently, and directly concerned by the violation of its freedom to exercise its profession; (2) the heightened general significance of the judgment for a multitude of cases involving the adjustment of national law to Community law requirements trumped subsidiarity; and (3) the designation prohibition did not trigger the one-year time bar because it involved legislative omission, while the clock for the additives ban did not start running until January 1, 1978 when the pertinent provision of the foodstuffs and feedingstuffs law entered into force). An individual constitutional complaint is successful on the merits if the Constitutional Court concludes that the legislative

circumstances of the case, that line of reasoning continues, the plaintiff company could have been reasonably expected to prevent or limit its loss appropriately by seeking primary legal relief.³²¹ Commentators addressing the size of the compensation note that the domestic legal systems may have some margin of maneuver as long as they do not frustrate the Community law parameters of effectiveness and equivalence.³²² A complete exclusion of certain heads of damages, including lost profit, from qualifying as restitutable losses is therefore disallowed by Community law.³²³ Several potential limitations have been advanced in the literature. National law could require that the lost profit fall within the protective area of the infringed principle.³²⁴ Moreover, subjective standards governing the unlawfulness could be raised.³²⁵ Finally, the compensation could be restricted to lost profits in excess of normal earnings.³²⁶

In sum, a majority opinion in the legal literature appears to conclude that the dismissal of Brasserie's action was justified, albeit for different reasons. This may explain why Brasserie did not pursue an individual constitutional complaint before the Federal Constitutional Court alleging that the BGH judgment

action or omission posed a violation of basic rights under the German constitution. *Id.* (observing that (1) the designation regulation for beer and the import restriction imposed on impure beers impinged upon the Brasserie's freedom to exercise its profession, and (2) in light of Article 30 of the EC Treaty and its associated system of immanent limitations and justifications, the infringement was not justifiable pursuant to domestic constitutional aspects, and (3) the scope of the individual constitutional complaint against laws had to be expanded and encompass Community law adverse statutes).

321. See, e.g., Ehlers, *supra* note 9, at 783 (rejecting even a "dilatatory damage" since Brasserie did not act at all); Krohn, *supra* note 252, at 128 (explaining that (1) the plaintiff could have provided financial assistance enabling employees of its distributors to challenge the fines, and (2) the plaintiff was particularly challenged by the trade impediments erected against the distributors). *But see* Streinz, *supra* note 119, at 204 (doubting that Brasserie's failure to encourage legal action is imputable to the plaintiff).

322. See Krohn, *supra* note 252, at 131 (explaining that "[t]his gives the national court a certain latitude, the extent of which it cannot however be sure of, due to the lack of pertinent national standardization").

323. See *id.* See also A.G. Toth, *The Concepts of Damage and Causality as Elements of Non-Contractual Liability*, in *THE ACTION FOR DAMAGES IN COMMUNITY LAW*, *supra* note 111, at 179, 187 (using the term *lucrum cessans* for the compensation of lost profits and *damnum emergens* for the compensation of loss actually sustained).

324. See Krohn, *supra* note 252, at 131 (describing that (1) German public liability law, according to § 839 BGB in conjunction with GG art. 34, provides such "far-reaching compensation," and (2) in addition, the plaintiff may also benefit from the alleviated burden of proof pursuant to § 252 Nr. 2 BGB).

325. See *id.* (querying whether the liability formula of a sufficiently serious breach meets a potential threshold of fault).

326. See *id.* (offering the rationale to avoid inequitable hardship).

violated its basic rights. The BGH's decision seems to suggest the proposition that national courts, which continue to serve as the principal fora for the enforcement of Community rights,³²⁷ have used their latitude, within Community law parameters, to act as gatekeepers. Legal commentators have in this context noted the BGH's general historic posture of preserving the political prerogatives of the legislature and protecting the state from inundation with liability claims.³²⁸ Finally, despite the increasing role of Community law,³²⁹ overall domestic adjudication trends indicate that the specter of open floodgates in the area of Member State liability has not materialized.

V. FINDINGS AND CONCLUSIONS

The ECJ has played an instrumental role in propelling Community law into new dimensions of international law.³³⁰ A high degree of juridification characterizes the relationship between Community law and national law. As a result of the primacy of Community law, the domestic legal orders may be deeply permeated by supranational judge-made law. From the ECJ's perspective, the rise of Member State liability continues to increase the completeness of the judicial review system that binds together the Community and the Member States by increasing the powers and vigilance of individuals in the process of controlling the enforcement of Community law. The new feature complements the broad spectrum of Community law-inspired remedies, including restitution,³³¹ interim relief,³³² damages based on direct effect and indirect effect as well as *Francovich* principles,³³³ and informal complaint avenues.³³⁴ The

327. See STEINER, *supra* note 138, at 30.

328. See Ehlers, *supra* note 9, at 783.

329. See Waelbroeck, *supra* note 111, at 315 (emphasizing (1) the heightened degree to which Community law and national law are interwoven in light of the integration progress and (2) the increased legislative activity of Community institutions in the course of the single market program).

330. See Pierce Pescatore, *Droit Communautaire et Droit International Public*, CAHIERS DE DROIT EUROPÉEN (CDE) 501, 503 (1970) (exclaiming "*du moment que l'on abandonne l'idée d'une souveraineté internationale absolue et intangible . . . [on introduit] des méthodes d'action qui seraient inconcevables dans le droit internationale classique*"); see also Lord Denning MR in the English Court of Appeal's judgment of May 22, 1974 in *H. P. Bulmer Ltd. v. J. Bollinger SA.* [1974] 3 W.L.R. 202, 209 (C.A.), [1974] 2 All E.R. 1226, 1231 (observing that Community law is "like an incoming tide [flowing] into the estuaries and up the rivers").

331. See STEINER, *supra* note 138, at 46-47.

332. See *id.* at 47-50.

333. See *id.* at 14-22, 50-53, 172 (opining that claims under *Francovich* may ultimately "replace actions based on the principle of indirect effect and even those

ECJ's *Brasserie* judgment further develops the Member State liability principle in the post-*Franovich* era by expanding its scope to cases involving legislative injustice.³³⁵ The seminal decision, which illustrates that "the king can do wrong,"³³⁶ uses general criteria for shaping effective remedies, while allowing the necessary differentiations to follow from the nature of the breach at hand.³³⁷

Brasserie, which avoids automatic liability for bona fide acts or omissions of public authorities, has established the three-prong blueprint for the rise of Member State liability: (1) the rule of law infringed must be intended to confer rights on the individual, (2) the breach must be sufficiently serious, and (3) the breach of the obligation incumbent upon the state and the damage incurred by the injured parties must have a direct causal link.³³⁸ This set of conditions has become the mantra for the ECJ's Member State liability jurisprudence of the late 1990s.³³⁹ The hybrid standard, which is constituted and based in Community law but effectuated in the domestic legal orders, belongs to the *acquis communautaire*.³⁴⁰ In theory, the scope of the ensuing imposition of liability may be considered revolutionary, especially in those Member States that do not even recognize strict legislative liability. Nevertheless, Member State actions originate within the procedural and institutional

based on direct effects where the opponent's 'public' status is doubtful"); see also van Gerven, *supra* note 151, at 516 n.39 (explaining that the principle of Member State liability and the requirement of interpretation of national law in conformity with directives "render the refusal to acknowledge the horizontal direct effect of directives . . . of little interest").

334. See STEINER, *supra* note 332, at 161-69 (listing complaints to the Commission, European Parliament, and Member States, however, under the caveat that very few individuals pursue these avenues, and noting that complaints tend to be more effective if they issue from organizations operating in Brussels or Strasbourg).

335. See Ehlers, *supra* note 9, at 776 (emphasizing that government liability, prior to *Brasserie*, was not recognized for breaches of Community law by national legislatures); see also Streinz, *supra* note 119, at 202 (emphasizing that, in addition to the United Kingdom and Germany as the immediately involved Member States, Denmark, Spain, France, Ireland, and the Netherlands participated in the proceedings, thereby evidencing the significance that was attributed to the case).

336. Betlem, *supra* note 176.

337. See Streinz, *supra* note 119, at 202.

338. See Heukels & McDonnell, *supra* note 145, at 8 (observing that the legitimacy of Community law is strengthened as a result of the Member States' acceptance of the duty to compensate for their breaches of Community law).

339. See Oliver, *supra* note 2, at 658 (predicting "confidently . . . that the Court will draw on [the *Brasserie* principles] . . . for many years to come").

340. See Reich, *supra* note 140, at 716 (speaking of a third pillar in state liability law).

frameworks of the domestic legal systems. Since only questions pertaining to the legal interpretation of Community law may reach the ECJ through reference proceedings, the national courts adjudicating the facts of each case hold important prerogatives, even when considered in light of the ECJ's guidance and the Community principles of effectiveness and equivalence.³⁴¹

The BGH's dismissal of the claim for damages and the overall Member State liability trends in Germany and other Member States illustrate that the doctrine of state liability is not open-ended. National judges, who ultimately apply the facts of each liability case, may act as gatekeepers. While the BGH's approach of solving the case through causation acrobatics may be subject to criticism, the overall result appears defensible. Requiring a heightened threshold of qualified breaches of law and a prior exhaustion of primary legal remedies balances the Community's compliance and deterrence interests with the Member States' concern to protect the political prerogatives of their domestic legislatures. As the Community continues to propel toward a larger polity of citizens, Member States will continue to assert their space within the evolutionary energy field that envelops the Community and the Member States.³⁴² Meanwhile, beer drinkers from all over the world may continue to enjoy beers brewed according to the *Reinheitsgebot*.³⁴³

341. See Emiliou, *supra* note 139, at 409, 411 (explaining that (1) the ECJ's approach leaves the national courts with some difficult questions, and (2) the national judges seem anxious to receive more elaborate directions from the ECJ within the role given by the EC Treaty); see also Green & Barav, *supra* note 265, at 119 (emphasizing that "[t]he proliferation of Community law makes it particular important that, in the area of judicial protection of individuals vested with Community rights, there should be clear guidelines as to the extent and scope of the remedies to which individuals may be entitled and which the national courts are required to afford").

342. See Böhm, *supra* note 111, at 60 (explaining that the challenge constitutes an indispensable condition for the legitimation and acceptance of the relationship between the Community and the Member States).

343. For an overview of German beers, see for example, DeVito, *supra* note 4, at 15-26. *Alt* or *Altbier* (Düsseldorf, Münster, Dortmund) is well-hopped and brewed warm with top-fermenting yeasts but stored cold, *Bock* or *Doppelbock* (München) are strong lagers for consumption in winter and spring that are characterized by a high-malt content and a lengthy, cold maturation), *Dortmunder Export* or *Helles* (Nordrhein-Westfalen) is a less hoppy but more malty beer, *Kölschbier* (Köln) is a golden summer beer with an unfiltered and cloudy finish, *Märzen* (München), which is traditionally brewed in March, has a sweet and malty taste, and *Weissbier* or *Weizenbier* (Bayern) exhibit a huge wheat content.