

Liability for Breach of Community Law – a Survey of the ECJ Cases Post *Factortame*

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Introduction

1. My talk aims to paint the post-*Factortame* picture with a relatively broad brush. It is intended to provide an overview of some of the key cases that have driven the development of the principle of state liability. In doing so, I hope it will create a suitable backdrop for the fine detail to be added by this afternoon's distinguished speakers.

Francovich²

2. No discussion of *Factortame* can begin without a reference to *Francovich* – the 1991 case in which the principle of state liability was established. The Court held that the principle of state liability for harm caused to individuals by breaches of Community law for which the state is responsible, was inherent in the Treaty system. Where, as here, a Member State failed to implement a Directive³, the full effectiveness of that measure required a right to compensation, provided three conditions were fulfilled:
 - (i) first, that the result prescribed by the directive should entail the grant of rights to individuals;
 - (ii) second, that it should be possible to identify the contents of those rights on the basis of the provisions of the directive; and
 - (iii) third, that a causal link existed between the breach of the state's obligation and the harm suffered by the injured parties.

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² Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

³ Here, Directive 80/987 on the protection of employees in the event of employer insolvency.

Factortame⁴

3. Five years later, *Factortame* picked up where *Francovich* left off – developing the conditions for, and the scope of, the principle.
4. *Factortame* and the case with which it was joined, *Brasserie du Pêcheur*, each concerned a breach of Community law attributable to the national legislature. In laying down the conditions applicable to such cases, the Court was therefore guided by the principles it had already developed – in particular in *Bayerische*⁵ – in relation to the non-contractual liability of the Community Institutions.⁶ Those principles took account of the wide discretion afforded to the Community institutions in their legislative capacities.
5. The alignment of the principles of Community and state liability is a theme which I will return to later. But the significance of this analogous approach in *Factortame* was that it resulted in what appeared to be a rather stricter set of conditions for state liability than had been applied in *Francovich*. This reflected the need – where legislatures were acting with a wide degree of discretion – to ensure that they were not hindered by the prospect of damages claims wherever the Community interest required legislative measures that may adversely affect individual interests. To this extent the Court addressed the major concern of the Member States.
6. The *Factortame* conditions are of course now well known :
 - (i) first, the rule of law infringed must be intended to confer rights on individuals;
 - (ii) second, the breach must be sufficiently serious – the test being whether the Member State has manifestly and gravely disregarded the limits on its discretion; and
 - (iii) thirdly, there must be a direct causal link between the breach and the damage sustained.
7. Where a national court found that these conditions were satisfied, it should award damages in accordance with, and to the extent provided by, domestic rules on liability. The proviso was that such rules themselves accorded with the twin Community principles of equivalence and effectiveness.
8. The strict conditions for state liability were counter-balanced by a broad wide scope. First, as was clear from *Francovich*, liability was not confined to breaches of directly effective provisions. Secondly, where the conditions were satisfied, a Member State was liable, regardless of which state body was responsible for the breach of Community Law. And thirdly, liability was not conditional on the establishment of fault, though intention could be taken into account for the purposes of the second condition. Further, one may question the application of those conditions to the provisions of the registration conditions in the Merchant Shipping Act.

R v HM Treasury, ex p British Telecommunications⁷

9. The BT decision arrived three weeks after *Factortame*. The case concerned the Directive regulating the procurement procedures of entities operating in *inter alia* the telecommunications sector.⁸ The UK had implemented this Directive via the Utilities Supply and Works Contracts Regulations 1992. However, in doing so, it had purported to determine which services were to be excluded from the scope of the Regime. This was contrary to the scheme of the Directive, under which the power to make that determination was vested in the contracting entities themselves – in this case BT.

⁴ Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

⁵ Joined Cases 83/76 and others, *Bayerische v Council* [1978] ECR 1209.

⁶ Under what is now Article 288 of the EC Treaty. Note: all subsequent references are to the new numbering.

⁷ C-392/93, *R v HM Treasury, ex p British Telecommunications* [1996] ECR I-1631.

⁸ Council Directive (EEC) 90/351 regulating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

10. So whereas *Francovich* had concerned a failure to transpose a Directive at all within the prescribed period, here the Directive had been transposed on time, but incorrectly.
11. The Court held that whether this gave rise to financial liability on the part of the state nonetheless depended on the three conditions laid down in *Factortame*. It was thus established that these conditions applied not only where a national legislature acted in a field where there was little, if any, Community legislation but also where it misinterpreted a Directive whilst transposing it into domestic law. While the approach was understandable as a matter of policy, it is hard to see it as a case where the Member State had a wide margin of discretion in implementing this particular provision. So a mere infringement of Community law did not in this situation engage the liability of the UK.
12. In this case the “sufficiently serious” condition was decisive. In determining whether that condition was satisfied, the factors to be considered included the clarity and precision of the provision breached. Since the Directive was imprecisely worded, the UK’s interpretation was not manifestly contrary to its wording or aims. The breach of Community law was therefore not sufficiently serious to require the UK to compensate BT.

R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas⁹

13. The “sufficiently serious” condition was developed further in *Hedley Lomas*. The Ministry of Agriculture, Fisheries and Food had refused to issue a licence for the export of live sheep to Spain. This was part of a general ban based on a concern that the treatment of animals in Spanish slaughterhouses was contrary to a Community Directive.¹⁰ The Court held that this constituted a quantitative restriction on exports, contrary to Article 29 of the Treaty. Further, the UK could not rely on Article 30 to justify the refusal, since those objectives were already protected by the Directive in question.
14. The Court held that the *Factortame* conditions applied. This was significant since they had been developed in circumstances where the Member State had a wide legislative discretion. Here, however, “the Member State...was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion”.¹¹ In such circumstances one might have expected the conditions for liability to be somewhat less strict than in *Factortame* – as they had been in *Francovich*. But the Court met this concern – and in doing so confirmed the versatility of the conditions – by suggesting that, in these circumstances, the mere infringement of Community law may be sufficient to satisfy the “sufficiently serious” condition. This was not a discretion case.

Dillenkofer v Germany¹²

15. In *Dillenkofer* the respondent Member State sought to rely on the stricter *Factortame* conditions in order to avoid liability, even though the facts were akin to *Francovich*.
16. Germany had failed to implement the Package Holidays Directive¹³ before the prescribed deadline, leaving a number of Claimants unable to obtain reimbursement following the insolvency of the tour operators from whom they had purchased holidays. Although Germany had clearly infringed Community law, it argued that failure to transpose a Directive could not give rise to liability unless it constituted a manifest and grave breach.
17. The Court’s response was to reconcile the *Francovich* and *Factortame* conditions. It held that the requirement that there be a “sufficiently serious” breach (the second *Factortame* condition), although not expressly mentioned in *Francovich*, was evident from its facts. Where a Member

⁹ C-5/94, *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas* [1996] ECR I-2553.

¹⁰ Council Directive 74/577/EEC on stunning of animals before slaughter.

¹¹ *supra*, n.9, §28.

¹² Joined Cases C-178/94 and others, *Dillenkofer v Germany* [1996] ECR I-4845.

¹³ Council Directive 90/314 on package travel, package holidays and package tours.

State failed to take any measure to transpose a Directive within the prescribed period that Member State manifestly and gravely disregarded the limits on its discretion. As such this constituted a *per se* serious breach of Community law and gave rise to a right of reparation, provided the Directive conferred on individuals rights whose content was identifiable, and a causal link existed between the breach and the loss and damage suffered. The Court had little difficulty in finding that the first of these was satisfied. Further, that condition did not necessarily mean that the rule concerned must be directly effective. As to the causal link, it had made clear in *Factortame* that it was for the national courts to determine whether such a link was established.¹⁴

18. The Court emphasised, as it had in previous cases, that the conditions under which a right to reparation arose depended on the nature of the breach. But in the same breath it indicated that the *Factortame* conditions applied in every case. Crucially, it made clear that the strictest of those conditions – that a breach be “sufficiently serious” – applied regardless of the degree of discretion enjoyed by the Member State.

Klaus Konle v Austria¹⁵

19. *Konle* concerned the compatibility of two Austrian laws that required administrative authorisation to be obtained prior to the acquisition of land in the Tyrol region. The first 1993 version of the law obliged non-Austrian purchasers to show that the acquired property would not be used as a second residence – the purpose being to maintain a permanent population in a region with limited space. The 1996 version of the law abolished the overtly discriminatory features of its predecessor. But in requiring *all* purchasers to obtain prior authorisation, rather than make a simple declaration, it imposed restrictions that were not essential to the achievement of effective land supervision. As such it constituted a restriction on the free movement of capital contrary to Article 56 of the Treaty.

20. As to whether Austria was liable for this infringement, the Court said it was clear from the case law that it was in principle for the national courts to apply the *Factortame* criteria in accordance with the guidelines it had established. And in contrast to both previous cases and the Advocate General’s Opinion the Court declined to apply those criteria itself. In particular it made no comment on whether the conditions for a “sufficiently serious” breach were satisfied in this case. This may well have been because it was unclear whether Mr. Konle’s damage flowed from the 1993 law (which the ECJ upheld contrary to the view of the A.G.) or the 1996 law.

21. The Court further held – in line with its view in *Factortame* of the state as a single entity – that it was for the Member State to ensure that individuals obtained compensation, whichever public authority was responsible (a) for the breach; and (b) for making reparation in accordance with domestic law. In Member States with a federal structure, it need not necessarily be the federal state that provided compensation, so long as the principles of equivalence and effectiveness were fulfilled.

Rechberger v Austria¹⁶

22. *Rechberger*, like *Dillenkofer*, concerned Article 7 of the Package Holidays Directive.¹⁷ But in this case Austria had implemented the Directive incorrectly, as opposed to having not implemented it at all. In particular the domestic law only provided protection against insolvency for trips commencing *after* 1 May 1995. Full implementation of Article 7 required that such protection be provided from 1 January 1995, when Austria acceded to the EU. Since Member States had no

¹⁴ *supra*, n.4, 366. *cf* C-319/96, *Brinkmann v Skatteministeriet* [1998] ECR I-5255. Here the defining articles of the Tobacco Tax Directive (Directive 79/32) had not been properly transposed into Danish law. However, since the Danish VAT Board had in any case applied the definitions contained in the Directive – albeit incorrectly – there was no causal link between the breach of Community law and the alleged damage.

¹⁵ C-302/97, *Klaus Konle v Austria* [1999] ECR I-3099.

¹⁶ C-140/97, *Rechberger v Austria* [1999] ECR I-3499.

¹⁷ Council Directive 90/314 on package travel, package holidays and package tours.

right to limit the application of Article 7, this four month window was manifestly incompatible with the Directive. As such there was a sufficiently serious breach of Community law, even though the rest of the Directive had been implemented.

23. Although the relevant infringement was the incorrect implementation of the Directive, it had a different quality from the implementation error in *BT*. There was no room for any discretion or indeed any excusable error in not implementing Article 7 of the Directive. The Court therefore had little trouble finding that this was a sufficiently serious breach.

Haim v KVN¹⁸

24. In this case Mr Haim – an Italian national with a Turkish dentistry diploma which was recognised by the Belgian authorities – sought compensation for loss of earnings from a German association of dentists. The claim followed a previous ruling of the Court finding that the association had infringed the right to freedom of establishment¹⁹ by refusing to enrol Mr Haim on the register of dental practitioners, without taking into account his experience in both Germany and Belgium.
25. The first issue referred was whether an autonomous public body, which infringed Community law when applying national law, could be held liable as well as the Member State. Although this was a new question the Court said the answer was to be found in the existing case law. It was well established that where state liability arose, it was on the basis of domestic rules of liability that reparation should be made. But there was nothing in the case law to suggest that the Member State itself must make that reparation; or to preclude an autonomous public body from being liable – either instead of or as well as the Member State – provided always that the requirements of equivalence and effectiveness were met.
26. Secondly, the Court addressed the fact that the association official who took the decision had no discretion under national law to take Mr Haim's experience into account. Did this necessarily mean, following *Hedley Lomas*, that the breach occasioned by that decision was sufficiently serious? In answering this question the Court confirmed again the universality of the *Factortame* conditions. And it clarified that the relevant discretion to be taken into account, in determining the seriousness of a breach, was that conferred on Member States by Community law. The degree of discretion conferred by domestic law on the national body that committed the breach was irrelevant.
27. The Court did not decide whether, in this case, the Member State had a broad or narrow discretion; it left that to the national court. But it emphasised that the rule in *Hedley Lomas* was not absolute: where there was little or no discretion, a mere infringement may, but would not necessarily, constitute a sufficiently serious breach. Referring back to *Factortame* the Court listed the factors to be taken into account. They included: the clarity and precision of the rule infringed; whether the infringement was intentional; whether any error of law was excusable; and any position taken on the issue by a Community institution.

Stockholm Lindopark v Sweden²⁰

28. Six months later *Lindopark* provided an example of when the *Hedley Lomas* that rule would be satisfied. The case concerned the incorrect transposition by Sweden of the Sixth Directive on Tax.²¹ Article 13 of that Directive provided for exemptions from the general principle under Article 2, by which every supply of services effected for consideration by a taxable person was subject to VAT. But the exemption permitted in relation to the supply of sports facilities only extended to their supply by non-profit-making organisations. Article 13 therefore precluded a general exemption for the supply of sports facilities, such as existed under Swedish law.

¹⁸ C-424/97, *Haim v KVN* [2000] ECR I-5123.

¹⁹ Article 43 of the EC Treaty.

²⁰ C-150/99, *Sweden v Stockholm Lindopark AB* [2001] ECR I-493.

²¹ Sixth Directive 77/388 on the harmonisation of the laws of Member States relating to turnover taxes.

29. The Claimant – which ran a golf course – complained that the general exemption had precluded it from deducting VAT on the goods and services used for the running of the golf course. The question thus arose whether the implementation of a general exemption, contrary to Article 13, was sufficiently serious to render Sweden liable in damages. The Court held that it was. The wording of the Sixth Directive was so clear that Sweden had little or no choice in how to implement it. In those circumstances, following *Hedley Lomas*, the mere infringement did constitute a sufficiently serious breach.

Köbler v Austria²²

30. Finally in this line of cases is the recent decision in *Köbler*: the most important development in state liability since *Francovich* and *Factortame*.
31. Mr Köbler, a university professor, applied for a special length of service increment in relation to his pension under the Austrian 1956 Salary Law. He was refused, pursuant to paragraph 50a of that law, on the basis that his 15 years' service had not been completed exclusively at Austrian universities. Mr Köbler claimed that this constituted indirect discrimination contrary to the freedom of movement for workers guaranteed under Community law.²³ An original reference by the Supreme Administrative Court on that question was withdrawn following an inquiry from the European Court whether it wished to maintain the reference in the light of the European Court's decision in *Schöning*²⁴ (where it held that promotion on grounds of length of service with a public body without taking account of comparable employment in other Member States constituted indirect discrimination). That decision gave strong support to Mr Köbler's case. However, the Austrian Court then dismissed his claim, ruling that the special increment was a loyalty bonus, which objectively justified derogation from the Community provisions on freedom of movement.
32. The questions thus arose on a second reference (this time not withdrawn), first whether that decision was contrary to Community law, but more fundamentally whether the decision of a national supreme court could give rise to state liability. The latter issue arose because Austrian law expressly precluded state liability in respect of loss and damage caused by decisions of its supreme courts.
33. Before the Court a whole raft of reasons was proposed as to why a judicial decision by a court of last instance should *not* give rise to state liability: *res judicata*; legal certainty and judicial independence among others.
34. But the Court was unconvinced. It held that the principle of state liability must apply where the alleged infringement was attributable to the decision of a supreme court. This was consistent with the decisions in *Francovich* and *Factortame*; and with the principle of international law by which the state was viewed as a single entity. It was also a necessary corollary of the essential role played by the national courts in protecting the rights derived by individuals from Community laws. The effectiveness of those laws and the protection of those rights would be weakened if individuals were unable to obtain redress for damage caused by a supreme court decision that infringed Community law.
35. The Court noted that state liability for judicial decisions was accepted in one form or another by most Member States. And it also pointed to the case law of the European Court of Human Rights, which itself provided for compensation where the Convention was infringed by a court of last instance.
36. As to the objections, the Court held that this extension of state liability was not incompatible with the principle of *res judicata*: a claim for compensation need not involve the invalidation of the decision giving rise to the damage. The Court held that, in line with settled case law, the

²² C-244/01, *Köbler v Austria* [2003] 3 CMLR 28.

²³ Article 39 of the EC Treaty and Council Regulation (EEC) 1612/68 on freedom of movement for workers within the Community.

²⁴ C-15/96, *Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg* [1998] ECR I-47.

Member States would themselves have to designate which courts would determine issues of liability arising from supreme court decisions.

37. As to *when* a judicial decision would give rise to state liability, the Court confirmed that the *Factortame* conditions still applied. But it indicated that the “sufficiently serious” condition would be particularly difficult to satisfy in these circumstances. Regard should be had to the specific nature of the judicial function and the requirements of legal certainty. Accordingly, liability could only be incurred “*in the exceptional case where the court has manifestly infringed the applicable law*”. In determining whether that was the case, the factors to be taken into account were the same as those laid down in *Factortame* and *Haim*. An additional relevant factor would be whether the court had complied with its obligation to make a preliminary reference under Article 234. By contrast Advocate General Léger (the same A.G. as in *Hedley Lomas*) suggested, in the light of the Court’s case law, a simplification of the test: the decisive factor would be whether the error of law was excusable.
38. On the facts of the present case the Court found that the conditions for the special increment were incompatible with Article 39 and Regulation 1612/68, and could not be justified by a pressing public interest. Further, the Austrian court’s inference from the *Schöning* decision that the special increment could nonetheless be justified if it constituted a loyalty bonus, was incorrect. Since the court in *Schöning* had expressed no view on that question, the issue was unclear. As such the Austrian court was obliged under Article 234 to maintain its request for a reference. Since the Court had now found that the special increment was in fact an obstacle to free movement, even if it was a loyalty bonus, the Austrian court had by its judgment infringed Community law.
39. But the Court then applied its “sufficiently serious” condition in a very restrictive way. Whether a loyalty bonus could be justified was neither obvious nor had it previously been resolved. Further, the Austrian court’s withdrawal of its request for a reference was based simply on a misreading of *Schöning*. As such its infringement could not be regarded as manifest in nature and was not therefore sufficiently serious. The Advocate General took a different view. The Court’s restrictive approach is to be contrasted with the more liberal approach taken, for example, in *Factortame*.
40. Although *Köbler* may seem a startling decision, it is clearly a logical extension of the view first expressed in *Factortame*. There the Court held that the principle applied irrespective of which state institution had breached Community law. The state was to be viewed as a single entity. Thereafter state liability was applied to infringement by both legislative and administrative authorities. It was only a matter of time before the issue arose in relation to a last instance judicial decision. That said, the *Factortame* conditions were found not to be satisfied in *Köbler*.

Bergaderm v Commission²⁵

41. Finally, I promised to return to the parallel between the principles of state and Community liability. One of the objections raised in *Köbler* was on this very basis. If a decision of a national supreme court could give rise to liability, then why not a decision of the Court of Justice? Austria, for example, maintained that Article 288 of the Treaty could not be applied to an infringement by the Court, since it would then be required to adjudicate on damage which it itself had caused.
42. This thus raised the question as to the current state of the alignment between the two sets of rules, which I referred to earlier as having been introduced in *Factortame*. That is a much bigger issue than I can cover today; but let me mention briefly the position we appear to have reached.
43. Previously, even after *Factortame*, there were important differences between the conditions of liability in state and Community liability. Most notably, in Community liability, there was a key

²⁵ C-352/98, *Laboratoires pharmaceutiques Bergaderm v Commission* [2000] ECR I-5291.

distinction between administrative and legislative acts. That distinction rested on whether the effects of the act were of individual or general application. For liability to arise from legislative measures there had to be a *flagrant violation of a superior rule of law*.²⁶ Indeed in *Köbler* it was argued that a similar condition should apply for infringements by national supreme courts, if liability was to be so extended.

44. However, in *Bergaderm* – which concerned liability arising from the Commission’s adoption of a Directive – the Court appears to have abandoned the superior rule of law condition. Indeed it held that the general or individual nature of a measure was not a decisive criterion for identifying the limits of the institution’s discretion, thus suggesting that the distinction between administrative and legislative measures was no longer key.
45. Rather, the Court returned to the principle on which the *Factortame* conditions were based: that the conditions for state and Community liability must be the same. And accordingly it adopted the *Factortame* conditions in their precise form for the determination of Community liability. The key question was whether there was a manifest and grave disregard on the limits of the Institution’s discretion.
46. It is thus arguable that, whereas once the conditions for Community liability formed the basis for state liability, that relationship of influence has now been inverted. What is clear is that, by the Court’s case law, the principles of state and Community liability have become even more closely aligned.²⁷ That was confirmed by Advocate General Léger in *Köbler*, who said “we can now speak of an alignment between the two systems”.²⁸ However, he also said that the Community could not be rendered liable on account of a decision of the Court of Justice.²⁹ In that regard, the systems of state and Community liability need not necessarily develop in strict parallel.³⁰

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²⁶ Case 5/71 *Schöppenstedt v Council* [1971] ECR 975.

²⁷ The *Bergaderm* approach was confirmed by the Court in C-472/00, *Commission v Fresh Marine* [2003] 2 CMLR 39.

²⁸ Case C-224/01 *Köbler v Austria* [2004] All ER (EC) 23, 57.

²⁹ Para. 94

³⁰ *ibid.*, 51.

