CASE STUDY – ANALYSING JURISPRUDENCE

Learning Objective

understanding the development of state liability in the EU
- learning how to read judgments (understanding their structure and extracting the problems discussed in court)
- understanding the role of opinions of the General Advocats
- learning how to analyze and criticize rulings
- put individual judgments in a broader context and detect lines of reasoning of a Court

Chronological analysis of the development of the position of the court

1. Francovich – invention of state liability

a) Facts of the case

Mr. Francovich, an Italian citizen, lost his job. When trying to receive his salary for the last months, he failed due to the bankruptcy of his employer.
In order to avoid this, the directive 80/987 *on the approximation of the laws of the member States relating to the protection of Employees in the event of the insolvency of their employer* had been adopted. The directive obliged Member States to set up guarantee institutions for the claims of the employees. It had to be implemented into national law by 23 October 1983 at the latest. Italy failed to implement the directive in this period.
Mr. Francovich then sued the Italian Republic for his salary. If they had implemented the directive, he could have received his salary from the guarantee institution Italy was obliged to set up.

b) Content/important statements of the decision

- declares the existence of State liability for breaches of EU law resulting from the principle of effectiveness and the principle of equivalence
- creates conditions:
  - rule of law infringed must be intended to confer rights on individuals
  - content of conferred rights
  - direct causal link between the breach of the obligation and the alleged damages

c) Open Questions

- Is the principle of State liability limited to the failure of Member States to implement directives? What's the scope of liability? see Brasserie du Pêcheur
- Does it apply to incorrect implementation of directives? see British Telecommunications

- What are the implications for Member States? Obligation to adapt their liability system, and to what extent?
- Is the ECJ allowed to create such a liability through judicial decision? see Brasserie du Pêcheur

2. Brasserie du Pêcheur and Factortame – necessity of a serious breach by any domestic act or omission

a) Facts of the Case:

Brasserie du Pêcheur:

A French brewery (Brasserie du Pêcheur) claimed damages for not having been able to export beer to Germany, as a consequence of the German "Reinheitsgebot" which was judged as incompatible with the Treaties.

Factortame:

Spanish fishers sued the UK for compensation of losses due to the Merchant Shipping Act. This Act required ships to have a majority of British owners if they wanted to be registered in the UK. This being contrary to EU law, they acted for damages.

b) Content:

- all domestic acts and omissions in breach with union law relevant; liability not limited to the failure of implementing directives
- liability is not limited to cases where the provisions breached are not directly effective: "*The Court has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure full and complete implementation of the treaty*"[1]
- question of liability is a question of treaty interpretation => therefore, the ECJ was acting within its jurisdiction by acknowledging the existence of state liability (para 27 ff.)
- added a new criterion => sufficiently serious breach: has the institution concerned manifestly and gravely exceeded the limits of its discretion? (para 55) => this decision qualified and clarified conditions of state liability (alignment with conditions that Art. 340 AEUV sets up)
- question of culpability: is liability dependent upon fault of the Member State? no, serious breach is considered sufficient

c) Development in following judgements: clarification upon the criterion "serious breach"

- Lindöpark (C-150/99), Opinion of Advocate General Jacobs, para 59:

[1] ECJ, Brasserie du Pêcheur, joined cases C-46/93 and C-48/93, para 20.

„Another instance is the situation where the breach is particularly obvious. In French, the Court has always used - originally with regard to liability incurred by the Community - the term 'violation suffisamment caractérisée'. This is now normally translated into English as 'sufficiently serious breach'. However, the underlying meaning of 'caractérisé', which gives rise to its inherent implication of seriousness, includes the notion that the breach (or other conduct) has been clearly established in accordance with its legal definition, in other words, that it is a ***definite, clear-cut breach****. This may help to explain why the term was previously translated (41) as 'sufficiently flagrant violation' and may throw additional light on the choice of factors which the Court has indicated should be taken into consideration when deciding whether a breach is 'sufficiently serious'.*

- Hedley Lomas (C-5/94), para 28:
"when it committed the infringement, the Member State in question was not called upon to make legislative choices and had only ***considerably reduced, or even no, discretion****, the* ***mere infringement of Community law may be sufficient*** *to establish the existence of a sufficiently serious breach"*
=> moving scale: sometimes, mere infringement sufficient

- British Telecommunications (C-392/93), para 40:
„Those same conditions must be applicable to the situation, taken as its hypothesis by the national court, in which a Member State ***incorrectly transposes*** *a Community directive into national law. A* ***restrictive approach*** *to State liability is justified in such a situation, for the reasons already given by the Court to justify the strict approach to non-contractual liability of Community institutions or Member States when exercising legislative functions in areas covered by Community law where the institution or State has a* ***wide discretion*** *— in particular, the concern to ensure that the* ***exercise of legislative functions is not hindered*** *by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests"*
=> answers question of incorrect implementing; sanctioning refringements where Member States have wide discretion would be contrary to the principle of legal certainty

- Dillenkofer and others v Federal Republic of Germany (joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94), para 25:
"On the one hand, a breach of Community law is sufficiently serious if a Community institution or a Member State, in the exercise of its rule-making powers, manifestly and gravely disregards the limits on those powers (…) On the other hand, if, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach"

d) Open questions:

- If all domestic acts are subjected to state liability, what acts can be qualified as those? see Haim
- If judicial failures can lead to state liability, does this affect the independence of judges? see Köbler

3. Haim v Kassenzahnärztliche Vereinigung Nordrhein (and others) (C-424-97) - clarification of the extent of state liability: for whose breaches can a Member State be made responsible of?

a) Facts

Mr. Haim, a dental practitioner of Italian nationality, had obtained his degree in Turkey. This diploma was recognized by the Belgian authorities. When he started working in Germany, he enrolled on the register of dental practitioners in order to be eligible for appointments under a social security system. The KVN refused to enroll him for lack of completing a preparatory program of two years. The ECJ considered this within breach of EU law. Mr. Haim then sued Germany for compensation for the loss of earnings he could have had if he had been allowed to treat patients under a social security system.

b) Content

- liability of a public-law body that's legally distinct from the Member State (para 31); otherwise, Member States could make it in practice impossible to obtain reparation by "outsourcing" to legally distinct bodies
- this liability can stand next to the liability of the Member State itself (para 32)

c) Development in following judgements

- AGM-COS MET Srl v Suomen Valtio and Tarmo Lehtinen (C-470/03): liability of an individual next to a Member State (attribution of statements made by an official to its Member State)

critically Costa, Peers: "the prospect of individual officials being held liable for actions carried out in their official capacity is a worrying one (…) Union law does not require such liability, although it does not preclude it (…) it seems state liability is more about compensating individuals than enforcing EU law"[2]

4. Köbler (C-224/01) - liability for judicial failures?

a) facts

The Austrian Administrative Supreme Court refused to grant Mr Köbler a raise. This raise was a loyalty bonus for length of service; time spent in similar positions in other Member States

[2] Costa/Peers in Steiner & Woods EU Law, 14. edition 2020, p. 213.

were not taken into account. The ECJ stated that this ruling of the Austrian Court was in breach with EU law. Mr Köbler invoked state liability.

b) content

State liability also applies for loss or damages caused by a decision of a national court adjucating at last instance which infringes a rule of EU law and is governed by the same conditions. In the case Brasserie du Pêcheur, the ECJ already stated that all domestic acts and omissions in breach with union law are relevant. This was confirmed by Köbler with regard to acts of the judiciary.
For critics see below (III. ad 4.).

c) following judgments: Traghetti, Europäische Kommission ./. Italien 2011 (C-173/03)

National law cannot limit liability solely to cases of intentional fault and serious misconduct on the part of the court; otherwise, state liability would be deprived of all practical effect when the infringement was committed by a court.

Questions for the students / for the discussion

ad 1.:
why is state liability so important for the development of the EU?
mechanism by which individuals can enforce their EU rights before their national courts => better enforcement of Union law

ad 2.:
why did Brasserie du Pêcheur add the necessity of a "serious breach"?
legislative function shouldn't be hindered by the prospect of actions for damages; when EU law leaves a wide marge of discretion, it cannot incur liability unless this marge of discretion is obviously breached (para 45)

ad 3.:
why is it important that infringements committed by a legally distinct body from a Member State can still be attributed to the latter?
prevent Member States from escaping state liability by "outsourcing" their tasks

ad 4.:
state liability for judicial failures – arguments for and against?

against:

- undermines the principle of res judicata (finality of judgments)[3]
- infringes the principle of legal certainty, which has to prevail over the right to redress
- independence and authority of the judiciary is threatened
- difficult to maintain impartiality since the highest court might be called upon to hear a case of state liability that is based on one of its own judgments[4]; that might lead to the ECJ being a court of appeal via Art. 267 AEUV[5], which goes against the wishes of the parties of the treaty (ECJ wasn't meant to be a court of appeal)
- comparison with Art. 340 AEUV: if the ECJ himself infringes EU law, it would have to rule over its own mistake, which goes against the principle of nemo iudex in sua causa[6]

for:
- independence of the judiciary cannot be invoked in EU law as being international law: a State cannot rely on the particular characteristics of its constitutional organization in order to escape liability[7]; state is seen as a single entity[8] (BUT: EU law is more than international law, being supranational; aims to fulfil rule of law itself)
- since the State and not the judge himself is liable, independence isn't very gravely touched[9]
- important to find a balance between procedural autonomy of the member states, and the principle of equivalence and effectiveness[10]
- res judicata remains untouched – it applies only when a threefold identity of subject-matter, legal basis and parties is given[11] => state liability as different subject-matter
- principle of effectiveness[12]
- primacy of EU law => national rule cannot defeat an action based on EU law[13]
- guaranteeing impartiality falls within the sphere of the Member States' procedural autonomy[14]
- protection of individual rights (no correction possible if last instance infringes EU law)[15]
- doesn't undermine authority of judges, rather enhances the quality of a legal system[16]
- ECHR also obliges Member States to install state liability for judicial failures (Art. 41 ECHR, see Dulaurans v France, 21 March 2000)[17]

[3] Opinion of Advocate General Léger (ECLI:EU:C:2003:207), para 18, 20.
[4] Opinion of Advocate General Léger (ECLI:EU:C:2003:207), para 21.
[5] Opinion of Advocate General Léger (ECLI:EU:C:2003:207), para 21.
[6] Opinion of Advocate General Léger (ECLI:EU:C:2003:207), para 18.
[7] Opinion of Advocate General Léger (ECLI:EU:C:2003:207), para 88.
[8] ECJ, Köbler, Rs. C-224/01, para 32.
[9] Opinion of Advocate General Léger (ECLI:EU:C:2003:207), para 90; ECJ, Köbler, Rs. C-224/01, para 42.
[10] Opinion of Advocate General Léger (ECLI:EU:C:2003:207), para 97.
[11] Opinion of Advocate General Léger (ECLI:EU:C:2003:207), para 101; ECJ, Köbler, Rs. C-224/01, para 39.
[12] Opinion of Advocate General Léger (ECLI:EU:C:2003:207), para 103.
[13] Opinion of Advocate General Léger (ECLI:EU:C:2003:207), para 106.
[14] Opinion of Advocate General Léger (ECLI:EU:C:2003:207), para 110.
[15] ECJ, Köbler, Rs. C-224/01, para 34.
[16] ECJ, Köbler, Rs. C-224/01, para 43.
[17] ECJ, Köbler, Rs. C-224/01, para 49.

Teachers Note

- before class:

Let the students read the following decisions.

- → Francovich, Rs. C-6/90 and C-9/90
- → joined cases Brasserie du Pêcheur and Factortame, Rs. C-46/93 and C-48/93
- → Haim
- → Köbler

The students should formulate in their own words the problems discussed in these judgments.

The questionnaire is composed of questions that request deeper understanding of the judgments. Therefore, the students can give it a try before class, but the questions should mainly be discussed deeply during the lesson.

- after class:

The students should repeat and fill out the questionnaire entirely.