

Development of state liability in the EU

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Step 1: Francovich – invention of state liability for breaches of EU law



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.

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



Open questions

- Is the principle of State liability limited to the failure of Member States to implement directives? What's the scope of liability?
- Does it apply to incorrect implementation of directives?
- What are the implications for Member States?
- Is the ECJ allowed to create such a liability through judicial decision?

Question 1



Step 2: Brasserie du Pêcheur – necessity of a serious breach of EU law

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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.

Decision

- 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
- Question of liability is a question of treaty interpretation, therefore the ECJ was acting within its jurisdiction
- New criterion: sufficiently serious breach (has the institution concerned manifestly and gravely exceeded the limits of its discretion?)
- Liability is not dependent upon fault of the Member State

Following judgments: clarification of the „serious breach“

- Lindöpark: definite, clear-cut breach
- Hedley Lomas: when Member State had considerably reduced, or even no, discretion, the mere infringement is sufficient
- British Telecommunications: reaffirms Hedley Lomas, states the applicability on incorrect transposition of directives

Question 2



Open questions

- If all domestic acts are subjected to state liability, what acts can be qualified as those?
- If judicial failures can lead to state liability, does this affect the independence of judges or other important legal principles?



Step 3: Haim v Kassenzahnärztliche Vereinigung Nordrhein – clarification of the extent of state liability

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Facts of the case

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.

Decision

- liability of a public-law body that's legally distinct from the Member State (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



Development in following judgments

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



Question 3



Step 4: Köbler – liability for judicial failures?

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Facts of the case

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 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.

Decision

- State liability also applies when the infringement is caused by a judicial act
- State liability underlies the same conditions in that case



Development in following judgments

- Traghetti, Europäische Kommission ./.. Italien: national law cannot limit liability solely to cases of intentional fault and serious misconduct on the part of the court



Question 4



Further Reading

- Stephen Weatherill, Cases and Materials on EU Law, 11th edition 2014, p. 140 ff.
- Frank Emmert, European Union Law Cases, 1st edition 2000, p. 66 ff.
- Marios Costa, Steve Peers, Steiner & Woods EU Law, 14th edition 2020, p. 210 ff.
- Alina Kaczorowska, Law of the European Union, 2nd Edition 2002, p. 132 ff.

