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#### 4. *Francovich* liability before national courts: 25 years on, has anything changed?

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### 1 INTRODUCTION: CAN THE KING REALLY DO WRONG?<sup>1</sup>

For a long time, the day-to-day application of European Union (EU) law relied largely on national judicial procedures and did not require the creation of special EU remedies.<sup>2</sup> In its famous *Francovich* ruling, decided 25 years ago, the European Court of Justice (ECJ)<sup>3</sup> departed from this principle of national procedural autonomy and ruled that the remedy of state liability for violation of EU law was ‘inherent’ in the Treaty.<sup>4</sup>

Over the years, the ECJ brought together the EU and ~~the~~ state liability regimes, adopting the same set of requirements for actions in damages for breaches of EU law, irrespective of whether they originate in EU institutions or national authorities.<sup>5</sup> In *Brasserie/Factortame*, the ECJ specified the three conditions under which liability for violation of EU

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<sup>1</sup> See Gerrit Betlem, ‘The king can do wrong. State liability for breach of European community law in the post-*Francovich* era’ [1996] 4 *Web Journal of Current Legal Issues*. I dedicate this contribution to his memory.

<sup>2</sup> Case 33/76 *Rewe Zentralfinanz eG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989; Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043.

<sup>3</sup> Referring to the higher tier of the Court of Justice of the European Union (CJEU).

<sup>4</sup> Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci v Italian Republic* [1991] ECR I-5357, para 35.

<sup>5</sup> Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport ex p Factortame Ltd* [1996] ECR I-1029 (para 42) and case C-352/98 P *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission* [2000] ECR I-5291. For a critical analysis, see Takis Tridimas, ‘Liability for breach of Community law: growing up and mellowing down?’ (2001) 38 *CML Rev* 301.

law would be established: there must be a ‘sufficiently serious breach’ (1) of a ‘rule of law intending to confer rights to individuals’ (2) and a ‘direct causal link’ between the breach and the damage (3).<sup>6</sup>

What lawyers call ‘*Francovich* liability’ lies, together with the doctrines of direct and indirect effect and the obligation of member states to provide effective judicial remedies,<sup>7</sup> at the heart of the judge-made framework for the decentralized private enforcement of EU law.<sup>8</sup> It coexists and supplements the treaty-based centralized public mechanism activated by the European Commission in the context of infringement actions.<sup>9</sup> It is thus meant to serve compliance with EU law, but also the protection of individuals’ rights.

*Francovich* liability is a hybrid liability regime. The main conditions for engaging state liability for violations of EU law are set at EU level, but they remain relatively loosely defined. Moreover, many elements are left to the national level to determine, provided that these national requirements do not make it practically impossible or excessively difficult to exercise EU rights (‘effectiveness’) and that they are similar to those applicable in similar situations under domestic law (‘equivalence’).<sup>10</sup> This mixed set-up should facilitate the doctrine’s integration into domestic legal orders and contribute to the development of a European *ius commune* (common law) on public authorities’ liability across the EU. When national courts do not ‘play along’ though, it risks compromising the uniform and effective application of EU law and the ability of individuals, organizations and companies to obtain compensation when they suffer a damage as a result of public authorities’ breach of European law.

The introduction and development of the doctrine of state liability for violation of EU law was no small feat; at the time, many countries in Europe imposed restrictive conditions on tort actions against executive or administrative measures, or limited vicarious liability for acts of civil

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<sup>6</sup> *Brasserie/Factortame*, n 5 *supra*, para 51.

<sup>7</sup> Now codified in Art 19(1) of the Treaty on the European Union (TEU).

<sup>8</sup> See Dorota Leczykiewicz, ‘Effectiveness of EU law before national courts – direct effect, effective judicial protection and state liability’ in Damian Chalmers and Anthony Arnall (eds), *Oxford Handbook on European Union Law* (OUP, Oxford 2015) 212.

<sup>9</sup> Art 258–60 of the Treaty on the Functioning of the European Union (TFEU).

<sup>10</sup> Case 158/80 *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel* [1981] ECR 1805; C-432/05 *Unibet* ECLI:EU:C:2007:163; Art 47 of the EU Charter of Fundamental Rights and Art 19(1) TEU.

servants. Furthermore, few recognized that the state could be at all liable for legislative or judicial wrongs. *Francovich* liability interfered with deeply rooted legal traditions and core conceptions on the separation of powers, parliamentary sovereignty, and judicial independence, authority and hierarchies. In addition, budgetary and resource allocation concerns, as well as particular conceptions of justice, militate in favour of limiting the circumstances in which the state should compensate private parties from the public purse.<sup>11</sup> Resistance was therefore expected.<sup>12</sup>

A quarter of a century has passed since *Francovich* was decided, but we still know little about its reception in domestic courts. While studies exist related to specific countries or policy areas, there have been few systematic and comparative assessments of its application at national level.<sup>13</sup> In this chapter, I investigate, from a comparative perspective, the application of *Francovich* liability by national courts, with a view to evaluate its real contribution to improving compliance with EU law and the protection of individual rights – its main objectives – and in the development of public authorities' liability in Europe. Given linguistic limitations, as well as time, space and resource constraints, I adopt a pragmatic methodological approach. Following up on my previous comparative work,<sup>14</sup> I analyse relevant cases reported, over the past decade, in comparative reports,<sup>15</sup> public databases,<sup>16</sup> and scholarly literature. My modest goal is to identify patterns and trends, rather than to provide a definite and conclusive assessment.

The analysis reveals that the doctrine has gained wide acceptance in national courts on paper, but that its practical impact remains limited. *Francovich* liability offers some form of compensation to the few individuals who engage it successfully, but does not seem to act as a deterrent against violations of EU law. It nonetheless contributes to the

<sup>11</sup> Cees Van Dam, *European Tort Law* (2nd edn, OUP, Oxford 2013) 531.

<sup>12</sup> Jonas Tallberg, 'Supranational influence in EU enforcement: the Court of Justice and the principle of state liability' (2000) 7 *Journal of European Public Policy* (JEPP) 104, 116.

<sup>13</sup> For a similar observation, see Gareth Davies, 'Activism relocated. The self-restraint of the European Court of Justice in its national context' (2012) 19:1 *JEPP* 76–91.

<sup>14</sup> Marie-Pierre F. Granger, 'National applications of *Francovich* and the construction of a European administrative jus commune' (2007) 32 *EL Rev* 157.

<sup>15</sup> 'Reflets: Quick information on legal developments of European Union interest,' accessed 15 May 2017 at [http://curia.europa.eu/jcms/jcms/Jo2\\_7063/](http://curia.europa.eu/jcms/jcms/Jo2_7063/).

<sup>16</sup> Databases Jurifast, accessed 15 May 2017 at <http://www.aca-europe.eu/index.php/en/jurifast-en>, and Dec.Nat, at <http://www.aca-europe.eu/index.php/en/dec-nat-en>.

transformation of national regimes of public authorities' liability, towards a greater acknowledgement of states' duty to compensate private actors for material and moral harm resulting from serious violations of individual rights by public organs, including when these are parliaments and courts.

After a brief review of existing scholarship, I examine how the *Francovich* doctrine is applied at domestic level, analysing the various conditions and elements of the state liability regime for violation of EU law.

## 2 THE STATE OF THE ART: FRANCOVICH AND COMPLIANCE WITH EU LAW, PROTECTION OF INDIVIDUALS' RIGHTS AND A EUROPEAN COMMON LAW OF PUBLIC AUTHORITY LIABILITY

When it was decided, *Francovich* was presented as a breakthrough.<sup>17</sup> It did have detractors though: some resented it as an unnecessary disruption in national constitutional and legal traditions, since it could never be applied in a practical and fair manner.<sup>18</sup> Recent assessments have come to divergent, and more humble, conclusions on the capacity of the doctrine to fulfil its dual objective of improving state compliance with EU law and protecting individuals' rights. For some, the difficulty lies in the stringent nature of the conditions for establishing the existence of a sufficiently serious breach, in particular for legislative or judicial wrongs.<sup>19</sup> For others, the problem resides in the margin of appreciation left to national courts, which enables them to minimize its practical impact.<sup>20</sup> In his review of the ECJ case law on state liability for violations of EU law,

<sup>17</sup> Tallberg *supra* n 12, 122; Albertina Albors-Llorens, 'The principle of state liability in EC law and the supreme courts of the member states' (2007) 66:2 CLJ 270.

<sup>18</sup> Carol Harlow, '*Francovich* and the problem of the disobedient state' (1996) 2:3 *European Law Journal* 199; J. David Campbell, Jr, 'Unenforceable impracticality: exploring *Köbler's* constitutional, jurisprudential and practical miscues' 38 *Syracuse Journal of International Law and Commerce* 1 (2010–11).

<sup>19</sup> Tridimas, n 5 *supra*.

<sup>20</sup> Tobias Lock, 'Is private enforcement of EU law through State liability a myth? An assessment 20 years after *Francovich*' (2012) 49:5 CML Rev 1675; Michael Haba, *The Case of State Liability: 20 Years After Francovich* (Springer, Wiesbaden 2014).

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Haba suggests that it is of little help to individuals harmed by unlawful public action and is only good for improving state compliance with EU law.<sup>21</sup>

Comparative analyses of the application of *Francovich* by national courts are few.<sup>22</sup> Lock, in a study of the application of *Francovich* by English and German courts, finds that they applied the *Brasserie/ Factortame* criteria in a restrictive manner and effectively avoided engaging state liability for violations of EU law. However, in contrast to Haba, he concludes that *Francovich* is ‘unsuitable’ as a compliance device, suggesting that its only benefit is for the protection of (a few) individuals.<sup>23</sup> In this, he joins the chorus of those who hold sceptical views about the potential of the private and decentralized enforcement of EU law through national courts.<sup>24</sup> In a previous comparative assessment, I painted a mixed picture. While national courts seemed to have generally accepted that the state could be held liable under *Francovich* and awarded damages, notably in cases of administrative or executive violations of clear EU law obligations, they appeared more reluctant to accept the principle of state liability for legislative and judicial breaches, in particular in countries without pre-established traditions; even where courts came to terms with it in principle, they would generally look for a fault and refrain from imposing liability for legislative and judicial mistakes in the application or interpretation of EU law. The study also identified national attempts at ‘blending’ *Francovich* in domestic tort regimes.<sup>25</sup> As for national studies, they show that the EU case law on state liability has, at the very least, influenced the development of national regimes for public authorities’ liability.<sup>26</sup>

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<sup>21</sup> Haba, n 20 *supra*.

<sup>22</sup> Eg for a recent contribution, the use of state liability in the UK to ensure the effective implementation of directives, see James Marson and Katy Ferris, ‘The transposition and efficacy of EU rights: indirect effect and a coming-of-age of state liability?’ (2015) 36:4 Bus LR 158. On the influence of EU state liability in the UK, see also Paula Giliker, *The Europeanisation of English Tort Law* (Bloomsbury, London 2014), van Dam, n 11 *supra*.

<sup>23</sup> Lock, n 20 *supra*.

<sup>24</sup> Rheinhard Slepcevic, ‘The judicial enforcement of EU law through national courts: possibilities and limits’ (2009) 16 JEPP 378.

<sup>25</sup> Granger, n 14 *supra*.

<sup>26</sup> Eg Nina Póltorak, ‘State liability for violation of European law – a Polish perspective’ (2012) 13 *ERA Forum* 185; Michael Potacs and Claudia Mayer, ‘Changes in Austrian state liability under the influence of European Law’ (2013) 19:1 *European Public Law* 51; Carmen Plaza, ‘Member states liability for legislative injustice’ (2010) 3:2 *Review of European Administrative Law* 27

Ten years later, has the doctrine gained more ground at domestic level and has it redefined public tort law in Europe? These questions are addressed in the following sections.

### 3 STATE LIABILITY FOR VIOLATIONS OF EU LAW COMMITTED BY ALL ORGANS OF THE STATE

The ECJ has held that the state should be liable for damage resulting from violations of EU law committed by all public servants and organs, including regulators, legislators and courts.<sup>27</sup> After some resistance and hesitations, most national courts have now accepted this principle. In practice, however, most claims concerning regulatory or supervisory failure, as well as legislative and judicial wrongdoing are rejected, as national courts apply both substantive and procedural conditions restrictively.

#### 3.1. Liability for Acts of Civil Servants

According to the ECJ case law, the state is liable for the acts of its civil servants (*A.G.M Cos.MET*).<sup>28</sup> National systems should thus remove the fault requirement for liability for damage caused by public employees in claims brought under EU law. In 2001, the Polish Constitutional Court had already set aside the fault condition for liability based on a civil servant's conduct, as being contrary to the constitution;<sup>29</sup> and just before accession, the Polish legislator amended the Civil Code to allow for state liability without the need to establish a fault by a civil servant.<sup>30</sup>

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(Spain); Tamara Hervey and Philip Rostant, 'After *Francovich*: state liability and British employment law' (1996) 25:4 ILJ 259.

<sup>27</sup> *Brasserie/Factortame* (n 5); C-424/97 *Haim* [2000] ECR I-5123; C-470/03 *A.G.M Cos.MET* [2007] I-2749; C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239; C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177.

<sup>28</sup> C-470/03 *A.G.M Cos.MET* [2007] I-2749.

<sup>29</sup> *Trybunał Konstytucyjny* 4 December 2001, SK 18/00, reported in *Reflets* No 2/2002, 24.

<sup>30</sup> OJ No 162, point 1692, reported in *Reflets* No 2/2005, 22.

### 3.2 Liability for Acts of Public Bodies, Administrations and Executives

When *Francovich* was decided, most member states already had established tort regimes for wrongful acts committed by public bodies, national administrations and executives, although immunities existed. National courts thus easily accepted the principle of state liability for breach of EU law by executives or administrations. It remains difficult, however, to hold public authorities liable for certain types of public activities, notably in the case of regulatory or supervisory failure. What is more, national courts still look for some ‘fault’ or ‘negligence’ to hold the state liable for executive or administrative action.

State liability for wrongful acts committed by public bodies does not pose particular difficulties and its application has, at times, contributed to the protection of EU citizens’ rights.<sup>31</sup> For example, a Greek administrative court held the state liable for a violation of EU law by a public hospital. The hospital, relying on a civil servant statute, which read that female civil servants could take parental leave, had refused to grant such a leave to a male employee. The court interpreted the statute in light of constitutional requirements and relevant EU Directives to recognize the father’s subjective right to paid parental leave and award him compensation.<sup>32</sup>

In some of the new member states, it was not possible to hold the state liable for regulatory acts. Czech law, for instance, did not recognize state liability for general legal measures (referred to as ‘normative acts’). To get around the prohibition, applicants tried to ‘frame’ those legal acts as ‘service faults’. In a case concerning a ministerial decision which, in breach of EU law, excluded establishments in which midwives worked from the public insurance system, a midwife sought compensation from the state. The Czech Supreme Court first rejected her claim, ruling that the adoption of a ‘normative act’ could not qualify as a service fault and thus trigger liability. The Constitutional Court confirmed this conclusion, but ruled that, under EU law, a member state can be held liable for a ‘normative act’. It clarified that two distinct regimes coexisted, the national regime and the EU regime, which have different legal bases and requirements. It thus concluded that the Supreme Court had violated the applicant’s right to a fair trial and sent the case back, calling on that court

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<sup>31</sup> See also cases discussed in Granger, n 14 *supra*, 162–3.

<sup>32</sup> *Trimeles Dioikitiko Protodikeio Peiraia*, 6 October 2010, No 4768/2010, accessed 12 May 2017 at <http://www.dsnet.gr/1024x768.htm> (*Reflets* No 1/2012, 20).

to interpret Czech law in the light of the *Francovich* doctrine.<sup>33</sup> In Poland, the legislator adopted, in times for accession (2004), a new law which explicitly established state liability for the illegal adoption or non-adoption of a ‘normative act’.<sup>34</sup>

Otherwise, national courts appear generally ready to hold the state liable for the failure by administrative authorities to properly implement and apply EU legislation. For instance, Czech courts ruled that, in the absence of suitable domestic remedies, the ECJ case law on state liability applied to administrative failure to correctly implement an EU regulation.<sup>35</sup> Similarly, the French Conseil d’Etat (Council of State) held the state liable for damage resulting from a decree which had not properly transposed and applied an EU Directive.<sup>36</sup>

Yet, despite the ECJ instructions, some national courts continue to impose a demanding fault condition and exonerate the state from liability in cases which do not amount to gross misconduct. The Italian **Consiglio di Stato** (Council of State), for example, considered that the ECJ *Strabag* decision,<sup>37</sup> which held that national rules subjecting the award of damages to the existence of a fault were incompatible with EU law, was limited in scope to the specific context of public procurement. It ruled that in other areas, courts should apply the *Brasserie/Factortame* ‘manifest and serious breach’ condition, which ~~requires~~ a fault. The case concerned a regulatory act which fixed minimum prices for cigarettes in breach of EU law (as confirmed in a prior ECJ infringement decision). The court stated that the illegal nature of the act was only one of the elements to look at and that courts should also check the clarity of EU law, the complex nature of the facts, the genuine nature of the conduct of the administration and the degree of discretion which it enjoyed. In any case, even when the authority’s actions were found to be culpable, the administration could still escape liability if the error was excusable or if there was no alternative.<sup>38</sup>

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<sup>33</sup> *Ústavní soud*, 9 February 2011, No IV.US 1521/10 (*Reflets* No 2/2011, 24–6).

<sup>34</sup> *Supra* n 30.

<sup>35</sup> *Nejvyšší soud*, 20 August 2012, No 28 cdo 2927/2010, available at [www.nsoud.cz](http://www.nsoud.cz) (*Reflets* No 3/2012, 19–20).

<sup>36</sup> Conseil d’Etat 24 July 2009, *Ministre de l’agriculture/Société Bruyagri*, No 296140.

<sup>37</sup> *C-314/09 Stadt Graz v Strabag AG & Others* [2010] ECR I-8769.

<sup>38</sup> *Consiglio di Stato*, 31 January 2012, No 482, accessed 12 May 2017 at [www.lexitalia.it](http://www.lexitalia.it) (reported in *Reflets* No 1/2012, 23–5).

In particular, national courts appear keen to apply strictly the sufficiently serious breach (~~or fault~~) condition, where executive measures or supervisory activities are at stake. For instance, the UK Court of Appeal rejected a claim for damages in a case concerning the wrongful transposition of the Reception Conditions Directive (2003/9/EC). Two asylum seekers, who had submitted successive applications for asylum, relied on Article 11 of that Directive to request a work permit. Their request had been rejected, because the ministerial Act, which transposed the ~~directive~~, specified that it applied only to the first application for asylum. The UK Supreme Court had found that the ministerial reading of the scope of the Directive was wrong. The Court of Appeal nonetheless considered that the erroneous interpretation by the Ministry did not constitute a sufficiently serious breach. It looked at the history of the adoption of the Directive and transposition measures, as well as the background of the 2010 Supreme Court decision, to conclude that the solution adopted had not been obvious prior to a recent ECJ ruling on the matter.<sup>39</sup>

~~Fault~~ is particularly hard to establish where national administrative authorities have wide discretion, notably in the context of regulatory or supervisory activities.<sup>40</sup> In the environmental field though, French courts have been willing to award compensation for regulatory and supervisory failure. In the *Marées vertes* saga, a French court ruled that the failure of the relevant authorities to check that agricultural holdings complied with national and EU norms resulted in serious water pollution, which should be compensated.<sup>41</sup>

The principle of state liability for the activities of public bodies, as well as administrative and executive organs, is generally accepted in principle, but the fault condition applied by national courts can make it particularly difficult for claimants to obtain compensation where public organs have some discretion and ~~made~~ mistakes. These findings are, overall, not incompatible with the gist of the ECJ case law.

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<sup>39</sup> *R (Negassi) v Secretary of State for the Home Department* [2013] England and Wales Court of Appeal (EWCA) Civ 151; [2013] 2 *Common Market Law Report* (CMLR) 45 (reported in *Reflets* No 3/2013, 51–2).

<sup>40</sup> See the French banking supervision cases, discussed in Granger (n 14) *supra* 177.

<sup>41</sup> Tribunal administratif (Rennes) 2 May 2001, Société Suez Lyonnaise des Eaux, No 97182; Tribunal administratif (Rennes) 25 October 2007, Assoc. ‘Halte aux marées vertes’ et al. No 0400630, 0400631, 0400636, 0400637, 0400640; Cour administrative d’appel (Nantes) 23 December 2014, No 13NT01737.

### 3.3 Liability for Legislative Acts and Omissions

National courts were, at first, suspicious towards the concept of state liability for legislative wrongs, in particular where it clashed with established conceptions of the separation of powers and legislative immunities.<sup>42</sup> As noted earlier, in some countries, the path was opened by the legislator itself. In Poland, at the time of accession, new legislation made it possible to launch a tort action against the state in relation to law-making activities.<sup>43</sup> Furthermore, alongside EU law, the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR), as well as the ~~growth~~ growth of constitutionalism, have gradually worn down judicial resistance to holding national parliaments accountable for their misconduct, including through compensation.

#### 3.3.1 The influence of the ECHR

National courts appear increasingly ready to accept liability claims for legislative acts or omissions which conflict with the ECHR. This evolution adds weight to EU law's demand for state liability for legislative violation of EU law.

In 2006, the Belgian *Cour de cassation* (Court of Cassation) ruled that state liability could be engaged where the legislator failed to adopt adequate and sufficient legislation. In this case, the Parliament had not passed appropriate legislation to enable courts to process cases speedily and effectively, a failure which resulted in excessively lengthy procedures, in breach of Article 6 ECHR. The court dismissed the government's objections based on separation of powers; it considered that by assessing whether the harmful behaviour of the legislator constituted a fault, the judiciary did not tread on legislative competence but complied with its own duty to protect civil rights.<sup>44</sup>

The French **Conseil d'Etat** followed suit in 2007, in the *Gardedieu* ruling, when it introduced a new regime for state liability for acts of the legislator. The case concerned an individual who had been obliged to pay contributions to a pension fund, in breach of the law. The legislator however passed a law which ex post facto 'legalized' these contributions,

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<sup>42</sup> Granger, n 14 *supra*, 163–8.

<sup>43</sup> *Supra* n 30.

<sup>44</sup> *Cour de Cassation* 28 September 2006, C.02.0570.F/19 (reported in *Refléts* No 1/2007, 10)

despite such ‘validation laws’ being contrary to Article 6 ECHR.<sup>45</sup> The French ~~Supreme Administrative Court~~ ruled that state liability could be engaged for the adoption of legislative acts contrary to an international agreement.<sup>46</sup>

Likewise, in Sweden, the Supreme Court, under the influence of the ECHR, recognized the liability of the legislator for breach of international law. The case concerned Swedish owners who had been prevented from making claims related to their properties in the former German Democratic Republic (GDR) because of a legislative decision.<sup>47</sup> They brought an action for compensation based both on national law and Article 13 ECHR. The first instance court declined jurisdiction since, under national law, the Swedish state was immune from litigation in the ordinary courts for legislative acts. The Supreme Court overruled it, and held that a claim for compensation against the Parliament should be admissible before the ordinary courts.<sup>48</sup>

### 3.3.2 Liability for the non-transposition or late legislative transposition of EU Directives

National courts have awarded damages for harm caused by non-transposition. Since both EU law and national law normally oblige national legislators to transpose EU legislation, the courts have not struggled with identifying faulty or negligent behaviour in such cases.

Delayed transposition, in contrast, does not always suffice to engage state liability for legislative activities, in particular when the terms of a Directive are unclear or its transposition practically cumbersome. Furthermore, courts appear to be at pains to ‘fit’ *Francovich* liability for late transposition within the domestic system of remedies, and often continue to assess state liability for violation of EU law using existing dichotomic legislative liability frameworks (for example, fault versus no fault).

In 2008, the Italian *Corte di Cassazione* (Court of Cassation) confirmed its 2003 decision, in which it had accepted that the state could be held liable in tort for harm caused by delayed transposition. The case concerned doctors who had claimed remuneration for specialization courses, as provided under an EU Directive, which had not been

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<sup>45</sup> ECHR (Grand Chamber) 28 October 1999, *Zielinski, Pradal, Gonzales and others v France* ECHR 1999-VII.

<sup>46</sup> Conseil d’Etat 8 February 2007, *Gardedieu*, No 279522.

<sup>47</sup> The legislative act had endorsed a bilateral agreement between Sweden and the ex-GDR.

<sup>48</sup> *Högsta domstolen*, 17 December 2009, *Nytt juridiskt arkiv* 2009 s 873 (No T-2430-09).

transposed on time.<sup>49</sup> The first instance and appeal courts had rejected their claim. The Cassation Court confirmed that the transposition delay constituted a violation of binding EU Treaty requirements. It considered that the obligation to transpose, contained in Article 11 of the Constitution, prevailed over the principle of legislative immunity in tort.<sup>50</sup> At the time, it was suggested that state liability for late transposition should be examined under Article 2403 of the Civil Code (fault-based liability). However, in a later decision, it ruled that this provision was contrary to EU law, and thus unsuitable, because it required the existence of a fault. Since the activity was illegal only on the basis of EU law, it instead considered that it should be treated as ‘liability for the violation of an *ex lege* obligation of the state’ (no-fault liability) under Article 1176 of the Civil Code.<sup>51</sup>

In France too, administrative courts have been hesitating between fault and no-fault based regimes to address liability for late legislative transposition. In the *Marées vertes* saga concerning water pollution resulting from the late transposition of EU environmental legislation, French courts found the state liable for ‘fault’.<sup>52</sup> In another case, the French ~~Supreme Administrative Court~~ examined a claim under fault-based liability, before suggesting compensation based on a no-fault regime. The case concerned a disabled lawyer who had sought compensation because she had not been able to fully exercise her profession due to the absence of equipment for disabled access in court buildings. EU Directive 2000/78/EC, which required reasonable accommodation, should have been transposed by 2003, but France made use of a special derogation regime until 2006. By a 2005 law, the French legislator further extended the transposition delay until 2015. The Conseil d’Etat found that the state did not commit any fault, since making public buildings accessible for the disabled required significant building work, disruptions and costs, together with cumbersome regulatory requirements for the protection of historical buildings. It concluded the new statutory transposition delay was not incompatible with the reasonable accommodation objective of the Directive, but suggested that the state should offer compensation

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<sup>49</sup> *Corte di Cassazione*, Sesione III, 1 Paril 2003 (No 915) *Repubblica Italiana v della Minola* [2003] I, 1193, discussed in Granger, n 14 *supra*, 164.

<sup>50</sup> *Corte di Cassazione*, 12 February 2008, N. 3283 *Rosati/Post del Consiglio dei Ministri* (reported in *Reflets* No 3/2008, 24–5)

<sup>51</sup> *Corte di Cassazione* (Civ.) 9 November 2011, No 23275, accessed 12 May 2017 at [www.dejure.it](http://www.dejure.it) (reported in *Reflets* No1 /2012, 25).

<sup>52</sup> *Supra* n 41.

under the traditional no-fault regime based on the principle of equality before public burdens for ~~the moral damage and costs incurred~~.<sup>53</sup>

National courts are willing to award damages for late legislative transposition, but often rely on no-fault regimes and thus avoid finding the legislator in the wrong.

### 3.3.3 Incorrect legislative transposition

Cases of incorrect transposition and application are delicate and often fail for lack of a sufficiently serious breach. National courts often set the bar high. A recent successful Bulgarian decision nonetheless suggests that the obstacle is not 'insurmountable'.<sup>54</sup>

In 2014, the Spanish *Tribunal Supremo* rejected a claim for compensation for incorrect transposition, because of a lack of a sufficiently serious breach. The case concerned an action brought by a temporary employee in a public administration, who had been denied seniority premiums by a series of administrative and judicial decisions, adopted under national acts transposing the EU Fixed Term Contract Framework Agreement (Directive 1999/70/EC). In 2010, following a ruling by the ECJ, it became clear that persons in his situation were entitled to such premiums. The employee thus brought a request before the Spanish Supreme Court, seeking compensation for the incorrect transposition of the EU Directive. The court found that Spain had not properly transposed the Directive. However, since the Directive left a wide margin of appreciation to member states concerning its scope of application, the relevant ECJ case had been decided after the actions brought by the claimant, and finally, the law had been modified in order to comply with the ECJ ruling, the judges concluded that there was no persistent violation and that the breach was not serious enough to trigger compensation.<sup>55</sup>

In contrast, a Bulgarian regional court awarded damages for loss resulting from a violation of EU law by the legislator (together with a national agency and the Supreme Court). The applicant had asked for the

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<sup>53</sup> Conseil d'Etat, 22 October 2010, *Mme Bleitrach*, No 301572; in application of an old doctrine established in the 1930s (Conseil d'Etat, 14 January 1938, *La Fleurette*, Rec. 25).

<sup>54</sup> See Björn Beutler, 'State liability for breaches of Community law by national courts: is the requirement of a manifest infringement of the applicable law an insurmountable obstacle?' (2009) 46 CML Rev 773.

<sup>55</sup> *Tribunal Supremo de España*, 21 February 2014, No 820/2014 (request No 724/2012), accessed 12 May 2017 at [www.poderjudicial.es](http://www.poderjudicial.es) (reported in *Reflets* No 2/2014, 22).

annulment of a deposit requested by the national privatization agency applying national legislation, on grounds that it was incompatible with EU free movement of capital rules. His claims were turned down by the **Appeal and Supreme Courts**. He then brought a tort action before the regional court, which held the state liable for legislative failure to comply with EU rules, and awarded damages to the applicant.<sup>56</sup>

The principle of state liability for legislative breach of EU law is thus gaining broader acceptance, but its practical reach remains limited where legislators enjoy a margin of discretion and did not obviously intend to go against EU law rules.

### 3.4 Liability for Judicial Violation of EU Law

The ECJ, in light of the specificities of the judicial function, **have** introduced a more demanding condition to trigger state liability for violation of EU law by national courts: there needs to be a ‘manifest violation’ of EU law (*Köbler*).<sup>57</sup> State liability for violation of EU law should, however, not be inaccessible (*Traghetti*).<sup>58</sup>

Prior to the ECJ rulings, in many countries, most acts of the judiciary were immune from liability. Where liability for judicial acts or omissions was accepted, it was limited to administrative aspects of courts’ activities, or to extreme situations of denial of justice or gross judicial misconduct.<sup>59</sup> Moreover, its application posed a number of practical difficulties, such as working out implications ~~on~~ *res judicata*, identifying the required procedural steps and determining the competent court. We would thus expect resistance.

Somewhat unexpectedly, principled objections were relatively easily set aside by national courts to accommodate the *Köbler* doctrine. However, the practical impact of *Köbler* has remained marginal. National courts have shown little inclination to award damages for harm resulting from the content of judicial decisions or failure to comply with an obligation to make a preliminary reference to the ECJ. They have read in the ECJ findings of non-liability in *Köbler* and *Traghetti* an encouragement to restrict the award of compensation to extreme cases of judicial misconduct.

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<sup>56</sup> *Okrajen sad Yambol*, 26 October 2015, accessed 12 May 2017 at <http://www.os-yambol.org/ser/final/2015/11/0063d814/407b0415.htm> (reported in *Reflets* No 1/2016, 14–15).

<sup>57</sup> *Köbler*, *supra* n 27.

<sup>58</sup> *Traghetti*, *supra* n 27.

<sup>59</sup> Granger, n 14 *supra*, 166–8.

### 3.4.1 Acceptance of liability for excessive length of proceedings

Similar to 3.3.1 above, the ECHR has opened roads for the acceptance of state liability for judicial activities, notably for excessive delays. In 2004, the Polish parliament introduced a reform, which enabled claimants to claim up to €2500 and obtain injunctions for accelerated proceedings from a hierarchically superior court, where a lower court has not heard their case within a reasonable time period (in addition to the damages available under regular tort liability rules).<sup>60</sup>

In 2002, in *Maguiera*,<sup>61</sup> the French **Conseil d'Etat** admitted that state liability could be engaged for violation of international law by a national court. It removed the condition of *faute lourde* (gross negligence), which was until then applicable to damage caused by the 'activities' of judicial organs, but kept it for matters touching the 'heart of judicial activity' (such as the content of judicial decision).<sup>62</sup>

The Austrian Constitutional Court also ruled that, in order to respect obligations under the ECHR and the EU Charter, compensation based on fault could not be excluded in case of illegal and faulty delay.<sup>63</sup>

### 3.4.2 Liability for the content of judicial decisions

While many courts eventually recognized the possibility of holding the state liable for judicial decisions by final instance courts which are, in substance, contrary to EU law, few claims have, in practice, succeeded.

Among those that maintain principled objections, the Austrian Constitutional Court considered that a law which excluded state liability (*Amtshaftung*) for damage caused by decisions of the asylum court, which cannot be appealed, was compatible with constitutional norms.<sup>64</sup> Whether it would hold also for claims arising under EU law is not clear though. In contrast, in 2004, when the Polish legislator reformed public liability tort law, it specifically included that state liability could be

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<sup>60</sup> Law of 17 June 2004, OJ No 179, point 1843 (reported in *Reflets* No 2/2005, 22).

<sup>61</sup> Conseil d'Etat (Ass) 28 June 2002, *Maguiera*, No 239575.

<sup>62</sup> Before *Maguiera*, state liability for judicial activities could only be engaged in the case of *faute lourde* and the content of final judicial decisions was immune to liability claims (Conseil d'Etat 29 December 1978 *Darmont*, No 96004).

<sup>63</sup> *Verfassungsgerichtshof* 9 October 2012, (reported in *Reflets* No 1/2013, 35).

<sup>64</sup> *Ibid.*

engaged for the illegal adoption of a judicial decision which has become *res judicata*.<sup>65</sup>

Courts in France, the United Kingdom, and Bulgaria, among others, have declared their willingness to accept the *Köbler* doctrine. In 2008, in *Gestas*, the French **Conseil d'Etat** ruled that, in principle, state liability could be engaged when the content of a judicial decision constituted a manifest violation of EU law which intended to confer rights to individuals. The claimant had claimed damages for the excessive length of proceedings, as well as a *faute lourde* by the administrative courts. The **Conseil d'Etat**, applying its earlier *Maguiera* case-law, accepted the first ground; as for the second, it did not examine whether there had been a *faute lourde*, but instead reviewed the content of the decision under the *Köbler* doctrine. On the facts however, the **Conseil d'Etat** found that relevant norms of EU law were not applicable, and thus denied compensation.<sup>66</sup>

In the United Kingdom, as in France, the courts have endorsed the principle, but rejected the claim on the facts. Mr Cooper, a trustee of the Council for the Protection of Rural England, had sought judicial review of a decision by local authorities granting authorization for a large development project, without verifying whether an environmental impact assessment (EIA) was needed. The claimant argued that it was necessary under the EU Environmental Impact Assessment Directive, but it was not required under national law. His request had been rejected by the Appeal Court, because the time-limits for bringing the action had passed and the applicant could not rely on the direct effect of the Directive, without sending a preliminary reference to the ECJ.<sup>67</sup> A 2006 ECJ ruling eventually established that an EIA should have been carried out in such a situation. Cooper consequently sued for damages. The High Court, which first heard the claim, readily acknowledged that the state could be liable under *Köbler*, but, on the facts of the case, found that the threshold for liability (that is, manifest violation) was not met.<sup>68</sup> The decision was

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<sup>65</sup> Law of 17 June 2004, OJ No 179, point 1843 (reported in *Reflats* No 2/2005 22).

<sup>66</sup> Conseil d'Etat 18 June 2008, *Gestas*, No 2958.08.

<sup>67</sup> See *R v London Borough of Hammersmith and Fulham ex p CPRE London Branch* [2000] *Environmental Law Review* 549 and (unreported) 12 June 2000; [2000] Court of Appeal Transcript No 1136.

<sup>68</sup> High Court, *Cooper v Attorney General* [2008] England and Wales High Court (EWHC) 2178 (QB), [2008] 3 CMLR 45.

confirmed by the Appeal Court, which again did not consider it necessary to send a reference to the ECJ for a preliminary ruling.<sup>69</sup>

In 2014, the Sofia City Court heard a claim for state liability for violation of EU law by the judiciary. The applicants claimed damage from losses resulting from a decision of the Supreme Administrative Court, which had denied them a value added tax (VAT) deduction. The City Court declared the claim admissible, by reference to Article 4(3) TFEU and the ECJ case law on state liability. However, it found that the Supreme Court's interpretation of the Directive had been correct and therefore no liability ensued.<sup>70</sup>

In contrast, and quite remarkably, a Finnish first instance court awarded compensation for loss resulting from a Supreme Court decision which had denied leave to appeal against an administrative court judgment concerning the unlawful VAT payment on a vehicle import. The decision was confirmed by the Appeal Court and the Supreme Court, which ruled that the violation of Article 110 TFEU on discriminatory taxation by the Supreme Court had been sufficiently serious to trigger liability.<sup>71</sup>

### 3.4.3 Liability for non-referral by last instance courts

National courts have overall refrained from engaging state liability for damage resulting from a breach of the duty to refer questions for preliminary rulings to the ECJ by last instance courts.<sup>72</sup> The Sofia City Court found that the matter was *acte clair*, which meant that the Supreme Court was under no duty to refer and therefore was not liable for damage resulting from the refusal to request a preliminary ruling.<sup>73</sup> Similarly, referring to *Köbler*, the Austrian Constitutional Court considered that a non-referral by the Administrative Court to the ECJ did not, per se, constitute a manifest violation. The contested point had not been decisively decided by the ECJ, but the answer could be easily deduced from prior ECJ decisions. Consequently, it was, here again, *acte clair* and the

<sup>69</sup> Court of Appeal (Civil Division), 12 May 2010, *Cooper v Attorney General* [2010] EWCA Civ 464, [2010] 3 CMLR 28. The UK Supreme Court declined leave to appeal.

<sup>70</sup> *Sofiyski gradski sad*, 3 January 2014, *Pretsiz 2 EOOD/Bulgarian state* (judicial power), (reported in *Reflets* No 1/2014, 16–18).

<sup>71</sup> *Korkein hallinto-oikeus*, decision of 7 June 2013, KHO:2013:105, accessed 12 May 2017 at [www.kho.fi/fi/](http://www.kho.fi/fi/) (reported in *Reflets* No 3/2013, 25–6).

<sup>72</sup> Eg German *Bundesgerichtshof*, *Re Accountant Aptitude Tests* (Case III ZR 294/03) [2006] 2 CMLR 55.

<sup>73</sup> *Supra* n 70.

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Administrative Court had not committed a manifest violation, in particular since it stated its reasons for denying the need for a referral.<sup>74</sup>

More controversially, the Austrian Constitutional Court also rejected an action for state liability for damage resulting, this time, from its own failure to make a preliminary reference to the ECJ. The case concerned two asylum seekers, whose requests had been rejected in last instance by the Constitutional Court, without a hearing. The applicants, who had been expelled, brought a claim in damages (*Staatshaftung*) before the Constitutional Court. The constitutional judge made it clear that, in the context of such procedure, it would not review its own decision, but would only determine whether a qualified breach of Union law had been committed. Recalling the *Köbler* criteria, it considered that a mere violation of the obligation to refer would not trigger state liability, and thus rejected the claim.<sup>75</sup>

While increasingly accepted in practice, liability of the state for judicial wrongs has little practical impact, beyond situations of excessive delays in proceedings. A particular difficulty lies in that lower level courts, before which tort actions are often brought, are de facto called upon to assess the correct or wrong nature of decisions of higher courts, which sometimes belong to different orders of jurisdictions. The judicial 'misconduct' by the higher court could well be an 'act of resistance' against the case-law of the ECJ, and it is delicate for lower courts to step in to do the ECJ's 'dirty work'.<sup>76</sup> Moreover, quite often, the tort claim ends up before the same higher (supreme or constitutional) court which is allegedly guilty of misconduct. Again, it may be difficult for such a court to admit to having done wrong, outside of the context of formal case-law reversal. National courts have been at pains to emphasize that, in tort actions, they are not reviewing the validity of previous decisions, but are simply checking that the conditions for compensation are met. Still, a finding of 'manifest violation' would undermine the authority of *res judicata*. The application of *Köbler* thus poses serious challenges to judicial hierarchies and structures.

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<sup>74</sup> *Verfassungsgerichtshof* 13 October 2004, A5/04 (reported in *Reflats* No 2/2005).

<sup>75</sup> *Verfassungsgerichtshof* 19 June 2013 (order), A2/2013-6, A3/2013-4, accessed 12 May 2017 at [www.vfgh.gv.at](http://www.vfgh.gv.at), (*Reflats* No 3/2013, 17–18).

<sup>76</sup> Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (CUP, Cambridge 2014) 336.

### 3.5 Allocation of Responsibility between Different Organs of the State, and between Private Actors and the State

The ECJ case law only requires that the state should be liable. It is for national law to determine the specific allocation of the burden to compensate amongst the different state organs or levels, and between public and private actors, as long as compensation is provided when the EU conditions are fulfilled. The ECJ has accepted that local or regional authorities, or other autonomous authorities, could be held liable instead of the central or federal state.<sup>77</sup> It has also confirmed that an individual may be held liable, in addition to the state itself, for damage caused by measures which that individual (in this case a civil servant) has taken in breach of Community law.<sup>78</sup>

National law often places (part of) the responsibility to compensate on the civil servants, national or local administration, or public bodies which committed the harmful breach.<sup>79</sup> In Poland, following a 2004 amendment, the new Civil Code provisions state that the Treasury, a local authority or any other legal person exercising public power may be held liable for damage caused during the exercise of those powers. In case of delegation, the person delegating, as well as the person to whom power was delegated, are jointly responsible.<sup>80</sup>

The question whether states should be liable for damage caused by private actors is controversial. Where private bodies were involved in the implementation of EU measures, they have been held jointly responsible with the state.<sup>81</sup> In the (in)famous *Laval* case, the ECJ had found trade unions guilty of a breach of EU free movement rules and Directive 96/71/EC on the Posting of Workers<sup>82</sup> for industrial action against a Latvian company carrying out building work in Sweden, which led to the company's bankruptcy. In the domestic follow-up, the Swedish Labour Court was placed in the delicate position of deciding on the trade unions' liability in damages. Even though trade unions had acted under the framework created by the Swedish state, the Labour Court did not look

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<sup>77</sup> Case C-302/97 *Konle v Austria* [1999] ECR I-3099; C-424/97 *Haim* [2000] ECR I-5123.

<sup>78</sup> C-470/03 *A.G.M Cos.MET* [2007] I-2749.

<sup>79</sup> See cases reported in Granger, n 14 *supra*, 161–2.

<sup>80</sup> See n 29.

<sup>81</sup> *Dublin Bus v Motor Insurers Bureau of Ireland* (MIBI), 20 October 1999, Circuit Court, Macmahon J., cited in Granger, n 14 *supra*, 162.

<sup>82</sup> Case 341/05 *Laval un Partneri Ltd* [2007] ECR I-11767.

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into whether the state should be liable.<sup>83</sup> Instead, it examined the liability of the trade unions under EU law and the national statutory regime of liability of trade unions and employers organizations for breach of rules related to ‘mandatory social peace’ (good industrial relations). The relevant statute provided for the award of both economic and general (moral) damages. The Labour Court rejected the claim for economic loss, since the applicant could not prove the damage; it, however, found the trade unions liable to pay a total of 550 000 Swedish kronor (*circa* €65 000) in general damages (and legal costs).<sup>84</sup>

In this case, the decision to engage the trade unions’, and not the state’s, liability led to insufficient compensation for the company. Moreover, the trade unions were made financially liable for what ultimately was a state’s failure to adopt suitable measures.<sup>85</sup> The trade unions tried to bring a further special procedure in revision and formal violation, in front of the Swedish Supreme Court, contesting the extension of horizontal effect to liability actions, and challenging the legal basis for imposing liability on private entities for retroactive compensation. The Supreme Court, however, rejected their requests.<sup>86</sup> In a recent case, which did not concern EU law, but a violation of the ECHR by a trade union through a blockade which caused the bankruptcy of the employers, the Swedish Supreme Court confirmed that trade unions’ actions could not be attributed to the state.<sup>87</sup>

While the allocation of responsibility between state organs does not pose problems in principle, it may have an impact on the competent court, and the nature and amount of compensation. Moreover, as illustrated in the *Laval* case, there is a risk that courts shift compensation to private actors for what are ultimately public failures, which could undermine the possibility for individuals to obtain appropriate compensation.

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<sup>83</sup> Barendt van Leeuwen, ‘An illusion of protection and an assumption of responsibility: the possibility of Swedish state liability after *Laval*’ (2011–12) 14 *Cambridge Yearbook of European Legal Studies* 453, 464.

<sup>84</sup> *Arbetsdomstolen*, 12 December 2009, Dom No 89 /09 (Mal No A-268-04) (reported in *Reflats* No 1/2011, 40–42). Note that although its decision could not be appealed, the Labour Court did not make a reference for a preliminary ruling to the ECJ, despite the lack of EU guidance on liability matters.

<sup>85</sup> See van Leeuwen, n 83 *supra*.

<sup>86</sup> *Högsta domstolen*, 6 July 2010, No O 2181-10.

<sup>87</sup> *Högsta domstolen*, 17 December 2015, no T 3269-13, accessed 12 May 2017 at <http://www.hogstadomstolen.se/Domstolar/hogstadomstolen/Avgoranden/2015/2015-12-17%20i%20m%C3%A5%20T%203269-13%20Dom%20%282%29.pdf>.

#### 4 APPLICATION OF THE THREE BRASSERIE/FACTORTAME LIABILITY CONDITIONS

As noted already, national courts do not all appraise the *Brasserie/Factortame* conditions in the same manner. National legal traditions and contexts influence their interpretation. Yet, depending on their reading of these essential criteria, compensation may be within, or on the contrary, out of reach for private claimants.

##### 4.1 The Conferral of Rights: from Central to Redundant Condition

The condition of ‘conferral of rights’ works out differently depending on national tort traditions. It occupies a central position, and creates a real hurdle, in countries which follow a subjective approach and require the existence of a ‘protective norm’ (*Schutznorm*) or ‘protected interests’ (*Rechtsguter*), as in Germany or the Netherlands, or a protective duty, as in the United Kingdom. It is, however, largely irrelevant in states which follow an objective approach (for example, in France, Spain, or Italy).

A good illustration comes from cases in the environmental field. In a case concerning water pollution brought by environmental non-governmental organizations (NGOs), a French first instance administrative court found the state liable for damage caused by water pollution resulting from the late transposition of EU Directive 91/676/EEC, as well as regulatory and supervision failures. The court awarded damages, without examining whether the Directive conferred rights on individuals.<sup>88</sup> However, in a similar case, a Dutch appeal court considered that the same Directive did not impose an obligation to guarantee a particular water quality and did not intend to confer rights on individuals; therefore, according to the Dutch judge, the state was not liable to compensate for cleaning costs and other related harm.<sup>89</sup>

These different traditions also visibly played out in the banking supervision cases. Banking authorities in the United Kingdom, Germany and France had allegedly failed in their supervisory duties and, as a result, a number of financial institutions collapsed. In the United Kingdom and Germany, judges found that the state was not liable because the relevant EU directives were not intended to protect depositors or investors. In contrast, in France, the courts did not look into whether EU

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<sup>88</sup> TA Rennes (Marées vertes) (n 41).

<sup>89</sup> *Gerechthof Den Haag*, 27 October 2005, *M&R* 2006, 1, no 4.

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directives conferred a right or not (they rejected the claim for absence of ‘fault’ though).<sup>90</sup>

In the German *Peter Paul* case, which concerned these questions, the ECJ unhelpfully blurred the distinction between direct effect and the conferral of rights.<sup>91</sup> This confusion is, unsurprisingly, perpetrated at domestic level, at least in countries in which the condition of conferral of rights is carefully examined.<sup>92</sup> In *Cooper*, already discussed, the UK Appeal Court considered the first condition (conferral of right) fulfilled because the EU provisions were directly applicable.<sup>93</sup> In *Ogieriakhi*, the Irish High Court found that Article 16 of the EU Citizens Directive (2004/38/EC) conferred a right on individuals in an unconditional manner, suggesting that it had direct effect in mind.<sup>94</sup> Given that state liability was introduced partly to compensate for the lack of direct effect of some Directive provisions which would consequently prevent individuals from relying on them, this confusion is particularly problematic.

#### 4.2 The Existence of a Sufficiently Serious Breach: the Real Hurdle

Many national cases fail on the sufficiently serious breach condition. In my previous work, I found that this was the main hurdle to compensation for violation of EU law, as national courts often avoided awarding damages on the basis that the breach of EU law was not sufficiently serious.<sup>95</sup> As exposed earlier, national courts tend to apply restrictive readings of what constitutes a sufficiently serious breach of EU law, in particular in cases of incorrect transposition by national legislators. They have also been keen to endorse a narrow interpretation of the *Köbler* higher threshold (manifest breach) for judicial wrongs. Further cases confirm these findings, but some national courts have found that legislators have committed a sufficiently serious breach and granted damages.

The German Federal Court rejected the action for compensation for loss resulting from the non-transposition of a VAT Directive. Directive 77/388/EEC provided for VAT exemptions for gambling establishments. Under German legislation, however, only those hosted in casinos could

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<sup>90</sup> Granger, n 14 *supra*, 175–7.

<sup>91</sup> Case C-222/02 *Peter Paul* [2004] ECR I-9425.

<sup>92</sup> See cases reported in Granger, n 14 *supra*, 174–8.

<sup>93</sup> *Supra* n 69.

<sup>94</sup> High Court, 22 December 2014, *Ogieriakhi v Minister for Justice and Equality & ors (No 2)* [2014] IEHC 582 (reported in *Reflète* No 2/2105, 39–40).

<sup>95</sup> Granger, n 14 *supra*, 168–74.

benefit from it. Managers of gaming establishments brought a liability action for loss resulting from the illegal payment of VAT over a decade. The court found Germany in breach of EU law, but considered that the non-transposition of the Directive did not qualify as a sufficiently serious breach.<sup>96</sup>

In the *Ogieriakhi* case, the High Court of Ireland, examining a claim based on the EU Citizens Directive, referred to *Brasserie* and recalled that even if the national authorities had acted in good faith, the seriousness of the breach must be assessed in an 'objective' manner. The fact that the national court had made a request for a preliminary ruling was not, in its view, determinant of the seriousness of the breach.<sup>97</sup>

In a recent decision already discussed above, a Bulgarian regional court, remarkably, awarded damages for loss resulting from a legislative breach of EU law.<sup>98</sup> It found that Parliament had committed a sufficiently serious breach when it failed to adopt urgent measures to remove the contested legislative provision, which was incompatible with EU law, while the Commission, in an infringement action, had requested such measures, and even though the Parliament had eventually responded by removing the problematic paragraph.<sup>99</sup>

The *Cooper* case, already discussed, illustrates the difficulty of reaching the threshold for state liability for judicial breaches. In this case, the Appeal Court did accept that previous judgments had been wrong, but considered them as 'excusable errors', which could not trigger state liability. Its finding was based on the fact that the interpretation endorsed by the national courts had been in line with decisions in other member states in similar cases, and that the national legislation at stake had been notified to the Commission, which had not objected to it.<sup>100</sup>

The requirement of sufficiently serious breach, infused with sometimes demanding national notions of fault, therefore remains one of the more significant hurdles in liability claims, but not an insurmountable one.

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<sup>96</sup> *Bundesgerichtshof*, 26 April 2012, III ZR 215/11, 'Private Spielhallen', accessed 12 May 2017 at [www.bundesgerichtshof.de](http://www.bundesgerichtshof.de).

<sup>97</sup> *Supra* n 94.

<sup>98</sup> *Supra* n 56.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Supra* n 69.

### 4.3 The Establishment of a Direct Causal Link, the Duty to Mitigate Loss and the Autonomy of State Liability as a Remedy

The ECJ provides little guidance on causation matters. It is for national courts to determine whether there is a ‘direct causal link’ (using, for example, a ‘but-for’ test) between the violation of EU law and the damage suffered. They may enforce a duty to mitigate loss and rule on contributory negligence in line with national tort practices. In my previous work, I found that courts applied this condition liberally, and sought to prevent the state from benefiting from its own wrongdoing.<sup>101</sup> In recent cases, however, some national courts have stressed individuals’ duties to bring necessary judicial actions. The court’s approach to the burden of proof is instrumental in facilitating or obstructing liability claims.

#### 4.3.1 Establishing a direct causal link

When *Francoovich* claims have passed the other hurdles, they normally do not fail on the causal link condition, unless the claimants clearly could have avoided the damage.

In a case in which the claimant claimed losses caused by the failure of the state to adopt a special procedure for the parallel import of pharmaceutical products, in breach of an EU Directive, the **Conseil d’Etat** found that it was for the judge to determine whether the economic operator had been dissuaded or prevented from carrying out parallel imports because of the absence of that specific procedure. It nevertheless specified that the operator was not required to prove that it had made applications for authorization under the general procedure in order to establish a direct causal link between the fault committed and the damage. The court thus applied a liberal reading of the causal link requirement.<sup>102</sup> In *Ogierakhi*, referenced earlier, the Irish High Court found that there was a direct causal link between a breach of a provision of the EU Citizens Directive and the harmful dismissal of the applicant by her employer. It thus awarded compensation.<sup>103</sup>

#### 4.3.2 Duty to mitigate loss and contributory negligence

In line with established tort traditions and EU case law, national courts do enforce a duty to mitigate loss. In a case concerning damages

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<sup>101</sup> Granger n 14 *supra*, 178–80.

<sup>102</sup> *Supra* n 36.

<sup>103</sup> *Supra* n 94.

resulting from the wrongful application of an EU regulation by a national administration, the Czech Supreme Court clarified that the ECJ state liability case law applied, but that national courts should, when calculating the compensation, check whether the claimant had contributed to the damage.<sup>104</sup>

An organization representing Danish pork breeders and slaughterhouses brought a *Francovich* claim against Germany, for failure to comply with an EU Directive. The infringement, established by the ECJ, had prevented the sale of non-castrated male pork from Denmark in Germany for more than six years. On appeal, the German government sought to rely on Article 839.3 of the German Civil Code. This provision excluded liability where, intentionally or negligently, a victim omitted to mitigate the loss by bringing appropriate judicial actions. The Köln *Oberlandesgericht* nevertheless noted that the German government had consciously violated EU requirements; that neither the German courts nor a preliminary ruling could have remedied the situation and that the only possible remedy was a complaint to the Commission. It thus concluded that the claimant had not failed its duty to mitigate loss.<sup>105</sup>

A company brought a tort action against the Belgian state to recover taxes paid in breach of EU law. The applicant had brought the damage claim directly, without having first challenged the tax using the relevant administrative procedure. The Appeal Court found there was no causal link between the imposition of the unlawful tax and the damage, since it was the failure to challenge the tax in administrative proceedings which had caused the damage. The Cassation Court confirmed the decision, considering that it had not been impossible for the taxpayer to do so, even though the illegal nature of the tax had only become clear at the time the case was heard on appeal.<sup>106</sup>

In contrast, a French court found that although there had been a contract between a local authority and a utilities company which had suffered loss as a result of the late transposition of an EU environmental directive, and the company could have activated contractual liability, this did not exonerate the state from tort liability.<sup>107</sup>

Generally, national courts do not appear to impose an excessive duty to mitigate loss.

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<sup>104</sup> *Supra* n 35.

<sup>105</sup> *Oberlandesgerichts Köln*, 2 June 2015, 7 U 29/04.

<sup>106</sup> *Cour de Cassation* (Belgium), 23 June 2008, No C.05.0012.F/1.

<sup>107</sup> TA Rennes (Suez), n 41 *supra*.

### 4.3.3 Requirement of prior annulment proceedings and the autonomy of state liability as a remedy

For a long time, the ECJ case-law required state liability to be available, but did not specify whether it should be available as an autonomous remedy, or whether domestic law could impose that an action for annulment be brought prior to a liability claim. The analogy between the liability of EU institutions and that of the state for breach of EU law suggested that state liability should be an autonomous remedy.<sup>108</sup> In 2015, the ECJ ruled that national law could not require a prior annulment decision where it was, in practice, impossible.<sup>109</sup> Some national decisions had already addressed this point before the ECJ clarification came in. These cases did not concern EU law directly, but are worth considering, as the national decisions appeared motivated by a desire to bring national rules in line with EU liability law.

The Italian Supreme Administrative Court required that private persons first bring a successful action for annulment, prior to a state liability claim. This contrasted with the approach adopted by its civil counterpart, the Cassation Court, which admitted such claim without prior invalidation. In a 2011 case, the Italian Supreme Administrative Court reversed its position; it now recognizes the action for liability against public authorities as an autonomous remedy. It justified the reversal based, *inter alia*, on the need to bring national law in line with the ECJ case law on the liability of EU institutions. The Supreme Administrative Court still denied compensation to the company, which had been wrongly excluded from participating in public tenders by the decision of an administrative agency, because it found it could have prevented the damage by bringing, in time, an action for annulment against the decision.<sup>110</sup> The ruling thus suggests that although a prior action for annulment is not formally necessary, in practice, parties should bring such judicial review procedure whenever such action may be effective in preventing or limiting the damage, for otherwise they will be denied (full) compensation.

In Portugal, the work contract of a sports coach was terminated, as a consequence of a wrongful decision of the Supreme Court, not subject to appeal. He sought compensation, calling for a special review procedure, based on Article 22 of the Constitution providing for state liability and national legislation on tort liability. The Supreme Court rejected the

<sup>108</sup> Case 5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975.

<sup>109</sup> C-160/14 *Ferreira da Silva e Brito v Portugal* EU:C:2015:565; [2015] ECR I-565.

<sup>110</sup> *Consiglio di Stato* (Plen.) 23 March 2011, No 3, accessed 12 May 2017 [www.lexitalia.it](http://www.lexitalia.it) (reported *Reflets* No 2/2011, 17–18).

action, ruling that the judicial error must be proven in the procedural context in which the damage was caused and using available remedies; otherwise, a later action for damages would fail. It held that the prior annulment requirement was compatible with EU law (although the case did not concern EU law).<sup>111</sup> A few months later, however, the Portuguese Constitutional Court, drawing on *Köbler* and the principle of supremacy and effectiveness, considered that while the requirement to obtain a prior annulment decision applied and was justified under domestic civil law by concerns of legal certainty and *res judicata*, it should not apply to an action in liability against the state for violation of EU law by a last instance national court.<sup>112</sup>

National courts thus appear to slowly accept the autonomy of state liability as a remedy, at least for matters that fall under the scope of EU law.

## 5 PROCEDURAL REQUIREMENTS: GAPS AND CONFUSION

Often, national law does not explicitly provide for an appropriate procedural framework to file *Francovich* type claims, which may leave applicants at a bit of a loss. The determination of the applicable procedure is important to identify the competent court, substantive and procedural requirements (including time limits), and the type and amount of damages.

### 5.1 Applicable Procedures and Judicial Competence

In some states, the legislator has intervened to create new remedies or procedures. For example, in 2004, the Polish legislator amended the Polish Civil Code and explicitly provided for state liability for the illegal adoption or non-adoption of a normative act (including legislative measures), and judicial wrongs.<sup>113</sup> It also specified that liability for

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<sup>111</sup> *Supremo Tribunal de Justica*, 24 February 2015, accessed 12 May 2017 at <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/680e9e23adcf72ba80257df6005801d3?OpenDocument> (reported in *Reflets* No 2/2015, 51–2).

<sup>112</sup> *Tribunal Constitucional*, 9 July 2015, accessed 12 May 2017 at <http://www.tribunalconstitucional.pt/tc/acordaos/20150363.html> (reported in *Reflets* No 3/2015, 44–5).

<sup>113</sup> *Supra* n 30.

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judicial decisions should be established through a special review procedure or a procedure in declaration of the illegality of a judicial decision which has become *res judicata*; where such review or declaration of illegality procedures was not available, the matter could be brought before the Supreme Court.<sup>114</sup>

Often though, national law does not specify which procedural frameworks apply, or, where it does, these are not compatible with EU requirements. In such cases, national courts have had to adjust, or set aside, existing rules or even create new ones, to give effect to state liability claims for violation of EU law.

In 2012, the Czech Supreme Court ruled that, in the absence of suitable remedies at domestic level for loss resulting from the incorrect application of an EU regulation, ECJ case law applied directly. It also clarified that national rules on the liability of the state could be enforced in fields covered by EU law only to the extent that they were compatible with it.<sup>115</sup> The Finnish Supreme Court explicitly referred to access to justice and an effective remedy to rule that an action for state liability for violation of EU law should be accepted, even in the absence of suitable domestic frameworks.<sup>116</sup>

Bulgarian law, too, did not provide for specific procedures for damage caused by violation of EU law, which led to inconsistent decisions by national courts. In 2015, the Cassation Court of Bulgaria clarified which procedures should be applicable. The case concerned violations of EU law by the legislator, an administrative agency and the Supreme Court. The Appeal Court of Sofia had terminated the liability procedure because the applicant had failed to pay a substantial advance deposit. The Cassation Court reviewed the decision and considered that, in this case, rules of administrative procedure, and not civil law rules, should apply. This reduced the fee to be paid by the applicant to the equivalent of €13. The court supported its position by reference to Article 4(3) TEU and the ECJ state liability case law. In opting for an administrative as opposed to a civil law procedure, the Cassation Court significantly reduced the costs of bringing an action in damages against the state.<sup>117</sup>

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<sup>114</sup> *Ibid.*

<sup>115</sup> *Supra* n 35.

<sup>116</sup> *Korkein hallinto-oikeus* 28 November 2012, KHO:2012:104, accessed 12 May 2017 at [www.kho.fi](http://www.kho.fi) (reported in *Reflets* No 3/2013, 25–6).

<sup>117</sup> *Varhoven kasatsionen sad*, 8 May 2015, No 269 (reported in *Reflets* No 2/2015, 24–5).

The introduction of state liability for breach of EU law messes with the traditional allocation of competences between administrative and ordinary jurisdictions. Identifying which court should hear state liability claims has turned out to be particularly problematic, notably for legislative and judicial violations of EU law. In such cases, claims in compensation have often been ‘redirected’ from ordinary courts towards constitutional or supreme courts.<sup>118</sup>

In a case concerning property claims under the ECHR (and not EU law), the Swedish Supreme Court ruled that the fact that the claim was based under Article 13 ECHR and directed against a legislative act did not affect the allocation of competence between the ordinary and the Supreme Court, and could thus be heard before the ordinary courts.<sup>119</sup> A further problem was that the Supreme Court, which was competent to address a claim based on the excessive length of procedure (judicial wrong), could only grant compensation for corporal, material or pecuniary damage; it thus rejected claims for moral damage.<sup>120</sup> In a later case, however, it ruled that, in order to avoid unnecessarily lengthy procedures and comply with Articles 6 and 13 ECHR, it should be possible to claim compensation for moral damage before the Supreme Court, where these are combined with pecuniary damage.<sup>121</sup>

In Finland, at first, litigants introduced claims in damages against the state for violation of EU law before the administrative courts, based on the Law related to Civil Tort (412/1974); these were rejected for lack of competence. In a gender discrimination case, the Finnish Supreme Administrative Court eventually accepted such a claim as constituting ‘administrative litigation’, relying on the Law on Administrative Litigation (586/1996).<sup>122</sup>

In France, two companies sued the state in damages before ordinary courts for loss resulting from unlawful taxation contrary to EU law. The difficulty in this case resided in the fact that, normally, ordinary courts are those which are competent to hear actions in compensation against the state for wrongful taxation. However, in this case, the payment of the tax was a consequence of the non-transposition of the EU Directive by the legislator. The matter was therefore referred to a special tribunal (*Tribunal des conflicts*), which found that, in this case, the liability action

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<sup>118</sup> See cases reported in Granger, n 14 *supra*), 183.

<sup>119</sup> *Supra* n 48.

<sup>120</sup> *Högsta domstolen*, 17 December 2009, No O 2765-08.

<sup>121</sup> *Högsta domstolen*, 16 June 2010, No T-333-09.

<sup>122</sup> *Supra* n 116.

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concerned legislative activities, and thus was a matter for administrative (and not civil) courts.<sup>123</sup>

Determining the applicable procedural framework and competent courts has proved challenging at times, a situation which may well compromise the chances of individuals receiving compensation.

## 5.2 APPLYING TIME LIMITS

National time limits apply. National courts have overall been generous in applying them, in order to safeguard the (appearance of a) right to an effective remedy.

A German fireman sought compensation for the damage suffered as a result of a violation of the Working Time Directive, but he had not brought the case within the required timeframe. The German Federal Administrative Court ruled that an action for liability against the state for violation of EU law must comply with national prescriptions rules, as long as these respected the principle of effectiveness and equivalence.<sup>124</sup>

The German *Bundesgerichtshof* clarified the application of national time limits in action for damages against the state for violation of EU law. A police officer had resented having to retire earlier than other categories of civil servants. He argued that the earlier mandatory retirement provisions consisted in a discrimination that was prohibited under Directive 2000/78/EC. The German transposition law provided for a two-month time period to bring an action for compensation for discrimination. The policeman filed his claim after the expiry of this period. The Federal Court considered that this time period was not applicable to actions in damages against the state for violation of EU law, as such a short period was not justified by the need to guarantee social peace in the company and legal certainty for the employer (it eventually rejected the claim though, as it found the retirement regime compatible with EU law).<sup>125</sup>

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<sup>123</sup> *Tribunal des conflits*, 31 March 2008, C-3634 (CETATEXT 000025706992) and 08-03631 (CETATEXT000025706991).

<sup>124</sup> *Bundesverwaltungsgerichtshof*, 20 January 2014, 2 B 3/14 (DE:BVerwG:2014:200114B2B3.14.0), accessed 12 May 2017 at [www.bundesverwaltungsgericht.de](http://www.bundesverwaltungsgericht.de) (reported in *Reflats* No 2/14, 15–16).

<sup>125</sup> *Bundesgerichtshof*, 23 July 2015, III ZR 4/15, accessed 12 May 2017 at [http://www.bundesgerichtshof.de/DE/Home/home\\_node.html](http://www.bundesgerichtshof.de/DE/Home/home_node.html) (reported in *Reflats* No 3/2015, 17–18).

Continuous violations pose particular problems for the calculations of prescription time periods.<sup>126</sup> In the Danish pork case, the first instance court, applying German law (Article 852 BGB), had ruled that there was a prescription over part of the rights of the claimant. However, on appeal, the *Oberlandgerichtshof* considered that the violation by the German government was a ‘continuous act’ and that the rights of the claimant were not prescribed. Moreover, it ruled that it was not reasonable to expect the claimant to have brought a liability action earlier, since at the time (1993–99), various aspects of the state liability regime had not yet been defined.<sup>127</sup>

The application of rules on time limits do not appear to pose particular problems. But that does not mean that individuals will receive full compensation for all the harm they have suffered.

## 6 DAMAGES: HEADS AND QUANTUM

European Union law only imposes compensation for monetary losses or loss of profits. The availability of other types of damages (for example, nominal or punitive damages) is left to the national level. The procedure applicable, as well as the court hearing the claims, may restrict the types of damages which can be granted, as well as the nature and size of the compensation.

In the United Kingdom, for many years it was not possible to claim compensation for financial losses incurred due to negligence where loss was not linked to personal injuries; eventually, however, the courts have accepted the possibility of awarding compensation for pure economic loss.<sup>128</sup>

The question of compensation for moral harm is very much determined under national tort traditions, and the influence of the ECHR.<sup>129</sup> In *Marées vertes*, the courts awarded compensation for moral damage caused by water pollution to recognized NGOs, whose mission was to protect nature and the environment.<sup>130</sup> They, however, denied compensation to local authorities for reputational harm resulting from the

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<sup>126</sup> Granger, n 14 *supra*, 185.

<sup>127</sup> *Supra* n 105.

<sup>128</sup> Granger, n 14 *supra*, 180.

<sup>129</sup> Eg *Corte di Cassazione* 21 June 2004, No. 1354, *Societa italiana Viaggi Columbus Srl v Repubblica Italiana (ministerio della Giustizia)* (reported in *Reflets* No 1/2005, 16).

<sup>130</sup> TA Rennes (*Marées vertes*), n 41 *supra*.

pollution.<sup>131</sup> French courts regularly use the notion of moral damage to award compensation under tort law for damage to the environment.<sup>132</sup> In the disabled lawyer case, already discussed, the **Conseil d'Etat** awarded moral damage based not on *Francovich* liability, but the French regime of liability of the state without fault.<sup>133</sup>

The Italian *Corte di Cassazione* qualified state liability for late transposition of a directive as a no-fault liability, with the result that it should result in 'compensation' rather than 'reparation'. Under such a framework, the judge must apply equity rules and ensure that the compensation guarantees equal treatment for all similar situations, and that her calculations are duly explained.<sup>134</sup>

In *Ogierakhi*, the Irish High Court provided compensation for the financial loss resulting from the applicant's dismissal from employment, but rejected compensation for disturbance and distress caused by the violation of the right to good reputation, since the common law does not admit compensation for violation of the right to good reputation following a dismissal.<sup>135</sup>

It is impossible, in a study like this, to assess the opportune, let alone the appropriate, nature of compensation afforded under the application of *Francovich* by national courts. However, there is evidence that national courts sometimes award substantial compensation. French administrative courts ordered the state to pay 751 440 FF (*circa* €140 000) for economic loss caused to the utilities company by the water pollution which resulted from the late transposition of an EU environmental Directive,<sup>136</sup> 1 symbolic euro as well as €2000 to NGOs for moral damage caused by the pollution,<sup>137</sup> and €7 million compensation to local authorities for cleaning costs and expenses related to interventions and preventive measures.<sup>138</sup> In *Ogierakhi*, the applicant was awarded €107 905 in damages for dismissal resulting from a violation of the EU Citizens

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<sup>131</sup> *Cour administrative d'appel* (Nantes) 23 December 2014, No 13NT01737.

<sup>132</sup> *Tribunal correctionnel* (Paris) 16 January 2008, *Total e.a.* (cited in *Reflès* 1/2008, 19).

<sup>133</sup> *Supra* n 53.

<sup>134</sup> *Corte di Cassazione* (Civ) 9 November 2011, No 23275.

<sup>135</sup> *Supra* n 94.

<sup>136</sup> TA Rennes (Suez), n 41 *supra*.

<sup>137</sup> TA Rennes (Marées vertes), n 41 *supra*.

<sup>138</sup> *Cour administrative d'appel* (Nantes) 23 December 2014, No 13NT01737.

Directive.<sup>139</sup> And in the Bulgarian case involving a violation of EU law by the Parliament, the Supreme Court and an agency, the regional court awarded the equivalent of €350 000 in damages.<sup>140</sup>

These suggest that *Francovich* is not only a dog that barks, but it can also, at times, bite.

## 7 THE SCOPE OF EU LAW AND BEYOND

Where EU state liability rules are more liberal than national public tort regimes, litigants and their lawyers will, logically, try to bring their case under the scope of EU law. National courts, over the past decades, have been wary of expanding the reach of *Francovich* beyond the confines of EU law;<sup>141</sup> this trend, if confirmed, casts doubt as to the transformative effect of *Francovich* on public tort law in Europe.

In *Gestas*, discussed above, the **Conseil d'Etat** found that the principle of legitimate expectations or legal certainty guaranteed under EU law, or the relevant EU Directive invoked by the claimant, were not applicable to the case at hand. The case thus lay outside the scope of EU law and its more liberal liability regime.<sup>142</sup> Hungarian courts have weeded out a number of *Francovich* claims, based on violation of the EU Charter's rights, for lack of connection with EU law. A claimant claimed compensation based on the ECJ doctrine for harm resulting from a violation of his right to good administration protected under the Charter. The Regional Appeal Court of Budapest found the Charter inapplicable, and the case to fall outside the scope of *Francovich* liability.<sup>143</sup> In another case, in which the applicant sought damages from the state for loss resulting from administrative and judicial decisions rejecting his application for a building permit, also based on violations of the EU Charter, the same court again found that the case had no connection with EU law and therefore should be decided under national tort rules.<sup>144</sup>

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<sup>139</sup> *Supra* n 94.

<sup>140</sup> *Supra* n 56.

<sup>141</sup> But see Granger, n 14 *supra*, 188–9.

<sup>142</sup> *Supra* n 66.

<sup>143</sup> *Fovarosi Itelotabla* 17 May 2011, No 5.Pf.22.054/2010/5, accessed 12 May 2017 at <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozat-tara>.

<sup>144</sup> Since there was no civil law relation between the applicant and the state, the state could not be held responsible; in such context, the action in liability had to be targeted against the public bodies responsible for issuing the license, *Fovarosi Itelotabla*, 27 January 2011, 5 Pf.21.342/2010/5.

More controversially, the Hungarian Supreme Civil Court (*Kúria*) held that the state was not liable for a wrongful decision of the Administrative Supreme Court.<sup>145</sup> The claimant had sought the annulment of tax decisions on VAT deductions before the administrative courts; however, at the time, he had not brought arguments based on the violation of EU law. His request was ultimately rejected by the Supreme Administrative Court. He then filed a tort claim before the civil courts, arguing that the administrative judges had made an erroneous interpretation of an EU Directive and had failed to obey their duty to refer a case for a preliminary ruling. He argued that the administrative court should have brought up the violation of EU law of its own motion and asked the civil courts to make a reference for a preliminary ruling to the ECJ on this point. They declined and rejected the liability claim, considering that the case was not connected to EU law. The case went to the Supreme Civil Court. The *Kúria*, curiously, considered that the administrative judges did not violate their duty to raise violation of EU law *ex officio*, since the litigation concerned the interpretation, and not the application, of EU law. It consequently found that the conditions for state liability were not fulfilled.<sup>146</sup>

The application of *Francovich*, therefore, seems to be confined to cases which are connected to EU law.

## 8 CONCLUSIONS

Twenty-five years on, *Francovich* liability has found its place (its niche?) within national liability regimes; the principle is well accepted, even in its most controversial aspects. Its practical scope, however, remains more limited, in particular where the harm results from legislative and judicial breaches, or supervision failure, as national courts apply the ECJ conditions or other national procedural or substantive rules in a restrictive manner.

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<sup>145</sup> *Kúria*, 11 December 2013, No Pfv.III.22.112/2012/13, accessed 12 May 2017 at [www.lb.hu/sites/default/files/hirlevel/hirlevel-1401.pdf](http://www.lb.hu/sites/default/files/hirlevel/hirlevel-1401.pdf) (reported in *Reflets* No 2/2014, 29–30).

<sup>146</sup> The applicants then introduced a request before the Constitutional Court, which ruled that the absence of reasoning on a refusal to make a reference for a preliminary ruling was contrary to the Hungarian constitution, and requested the legislator to adopt a law providing for an obligation for national courts to state their reasons when they refuse to send a request for a preliminary ruling to the ECJ (*Alkotmánybirozság*, 14 July 2015, No 26/2015 (VII.21), accessed 12 May 2017 at [www.alkotmanybirosag.hu](http://www.alkotmanybirosag.hu), reported in *Reflets* No3/2015, 33–4).

Many of the successful *Francovich* claims concern financial losses and were brought by businesses against harm resulting from violation of EU economic law. However, damages have also been awarded to individuals for economic, but also moral harm resulting from violations of rights protected under EU law (for example, non-discrimination, right to a fair trial and effective remedies, EU citizenship rights). In this sense, winning claims may contribute to the effective protection of individuals who are courageous enough to launch and see through a judicial procedure. Violation of EU environmental legislation has led to mixed results, which makes it hard to say whether *Francovich* liability improves compliance in this field.

Often, *Francovich* seems to operate in a parallel universe with a separate set of procedural and substantive conditions for damage claims based on EU law, and appears to leave largely untouched national liability regimes. The *Francovich* doctrine nevertheless has triggered adjustments of national rules of engagement of the liability of public authorities, which sometimes stretch beyond the scope of application of EU law. Conversely, in its national applications, *Francovich* is infused with domestic notions and framed by national procedural requirements, which at some point also make their way into the EU legal frameworks through the preliminary reference avenue. There is, also, a certain amount of cross-fertilization between courts. In *Cooper*, for example, the English judges referred to the *Gestas* decision by the **Conseil d'Etat**.<sup>147</sup>

European Union law and the ECHR system combine to open up the national public tort regimes to claims against the legislator and judiciary and contribute to harmonizing certain aspects of the national law on the liability of public authorities above certain minimum standards.

A significant share of the cases reviewed did not lead to compensation. It is, however, difficult to judge whether this pattern is representative of the way *Francovich* claims fare before national courts, and whether compensation was 'rightly' or 'wrongly' denied, under EU law. More systematic and thorough comparative investigations are needed, to provide a more accurate assessment of the real potential of state liability, and its importance in the system of enforcement of EU law and protection of individual rights.

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<sup>147</sup> [2010] EWCA Civ 464.