State responsibility—Breach of treaty obligations—Breach of European Community law for which Member State responsible—Principle of State liability for damage caused to individuals — Whether inherent in treaty system — Whether applicable even where provision of European Community law breached is directly effective and can be relied upon by individuals before national courts—Whether applicable where breach attributable to national legislature — Whether State regarded as single entity in respect of liability for breaches of international commitments irrespective of organ responsible

Treaties — Interpretation — EC Treaty — Role of Court of Justice of European Community under Article 164 of Treaty —Interpretation by reference to fundamental principles of Community legal system and general principles common to legal systems of Member States—Principle of State liability for breaches of Community law — Whether inherent in treaty system—Reference to Article 215 of Treaty concerning non-contractual liability of Community institutions — Whether evidence of general principle that public authorities should make good damage caused in performance of their duties

State responsibility—Breach of treaty obligations—Breach of Community law for which Member State responsible—Conditions for State liability — Whether governed by Community law or national law — Whether conditions in principle the same whether Member State or Community institution incurring liability—Requirement that breach of Community law be sufficiently serious—Test of whether Member State or Community institution has manifestly and gravely disregarded the limits of its discretion—Whether any requirement to prove fault — Scope of applicability of national rules on liability—Requirement that conditions should be no less favourable than those applicable to similar domestic claims

Damages—Grounds for awarding damages—Breaches of Community law for which Member State responsible—Loss suffered by individuals—Scope of right to reparation under Community law — Community rules governing claims brought before national courts against Member States—Requirement that reparation must be commensurate with loss or damage sustained—Requirement that loss of profits

must be claimable—Requirement that exemplary or other special damages must be available if such damages could be awarded under domestic law — Requirement that reparation should also cover loss sustained prior to court judgment finding infringement of Community law

International organizations — European Community — Liability of Member States for breaches of treaty obligations causing loss to individuals—Breach attributable to national legislature—Whether claims can be brought by individuals before national courts—Conditions for liability—Scope of right to reparation—The law of the European Community

BRASSERIE DU PÊCHEUR SA *v.* FEDERAL REPUBLIC OF GERMANY

REGINA *v.* SECRETARY OF STATE FOR TRANSPORT, *ex parte* FACTORTAME LTD AND OTHERS

(Joined Cases C-46/93 and C-48/93)

Court of Justice of the European Communities. 5 *March* 1996

(Rodríguez Iglesias, *President and Rapporteur*; Kakouris, Edward and Hirsch, *Presidents of Chambers*; Mancini, Schockweiler, Moitinho de Almeida, Gulmann and Murray, *Judges*; Tesauro, *Advocate-General*)

SUMMARY: *The facts:*—In Case C-46/93 Brasserie du Pêcheur SA, a French company, had claimed that it had been forced to discontinue beer exports to Germany in 1981 because the competent German authorities considered that the beer it produced did not comply with purity requirements contained in the Law on Beer Duty 1976. In proceedings brought by the Commission of the European Community ("EC") against Germany for failure to fulfil treaty obligations, the prohibition on marketing beers which did not comply with purity requirements was held to be contrary to Article 30 of the EC Treaty in a judgment of the Court of Justice of 12 March 1987.[1] Brasserie du Pêcheur then brought an action before the German courts against the Federal Republic for reparation of the loss suffered by it between 1981 and 1987 as a result of the import restriction.

In Case C-48/93 Factortame Ltd, a British company, had challenged the compatibility of Part II of the Merchant Shipping Act 1988 with Community law, in particular Article 52 of the EC Treaty, in proceedings brought before the Divisional Court of the High Court of Justice in the United Kingdom. The Merchant Shipping Act provided for the introduction of a new register for British fishing vessels and made their registration subject to certain conditions relating to the nationality, residence and domicile of vessel owners. Vessels ineligible for registration were deprived of their right to fish. The

[1] Case 178/84, *Commission* v. *Germany* [1987] ECR 1227.

conditions in question were held to be contrary to Community law by a judgment of the Court of Justice of 25 July 1991.[2] At the same time, the Court held that it was not contrary to Community law to stipulate, as a condition for registration, that vessels must be managed and their operations directed and controlled from within the United Kingdom. In separate proceedings, the EC Commission also brought proceedings under Article 169 of the EC Treaty against the United Kingdom concerning the new system of registration, and the Court of Justice, in a judgment of 4 October 1991,[3] held that the United Kingdom had failed to fulfil its obligations under Article 52 of the Treaty. In further proceedings before the Divisional Court of the High Court of Justice, Factortame sought damages from the Secretary of State for Transport for losses incurred due to its inability to obtain registration and operate its fishing vessels between April 1989 and November 1992, when the new United Kingdom legislation had been amended to make it compatible with Community law.

The Federal Supreme Court (*BGH*) (Case C-46/93) and the Divisional Court of the High Court of Justice (Case C-48/93) decided to stay the proceedings in the cases before them and to make references to the Court of Justice of the European Communities for preliminary rulings under Article 177 of the EC Treaty. Both national courts considered that, if their respective national laws were applied in their present state, there would be no remedy, basically because the damage caused was the result of acts and omissions of the national legislature rather than the administration. The relevant German legislation imposed a condition for State liability that the act or omission in question should be referable to an individual situation whilst the British legislation required proof of misfeasance in public office.

The Court of Justice decided to join the two sets of proceedings because of the similarity of the questions which they raised. By their questions, the national courts essentially sought a ruling on

(i) whether the principle of Community law (established in the Court of Justice's judgment of 19 November 1991 in the *Francovich* case)[4] that Member States were obliged to make good loss and damage caused to individuals by breaches of Community law for which they could be held responsible was applicable where the national legislature was responsible for the infringement in question;

(ii) under what conditions a right to reparation of loss or damage caused to individuals by breaches of Community law attributable to a Member State was, in the particular circumstances, guaranteed by Community law; and

(iii) according to what criteria the extent of the reparation payable by the Member State responsible for the breach should be determined.

Opinion of the Advocate-General:—Advocate-General Tesauro pointed out that the Court now had to establish whether the principle of State liability in

[2] Case C-221/89, *Regina* v. *Secretary of State for Transport ex parte Factortame Ltd*, 93 *ILR* 642 at 731. For an earlier related judgment of the Court of Justice concerning the extent of the duty of national courts to grant interim relief where rights conferred by Community law were in issue, see Case C-213/89, *Regina* v. *Secretary of State for Transport ex parte Factortame Ltd*, of 19 June 1990, 93 *ILR* 642 at 665.

[3] Case C-246/89, *Commission* v. *United Kingdom* [1991] ECR I-4585.

[4] Case C-6190, *Francovich* v. *Italian Republic*, 19 November 1991, 93 *ILR* 146.

damages for infringements of Community law established in *Francovich* should be confined to cases of failure to implement a directive whose provisions could not be relied on directly by individuals or should be extended to cases, such as those now before the Court, in which the loss or damage suffered arose out of the application of a national law conflicting with Community provisions which could be relied on directly in the national courts. The German, Irish and Netherlands Governments contended that Member States should be required to make good loss or damage caused only where the provisions breached were not directly effective and could not therefore be invoked by individuals to protect their rights. Those Governments argued essentially that the Community law principle of State liability was merely a means of closing a *lacuna* in the protection of rights and not a principle of broader scope. But the Advocate-General could not accept this view. He argued that every individual right had a substantive content and a financial content which could generally be quantified. The substantive reinstatement of a right which had been impaired was the optimum means of protection for an individual. But at times this was not enough to ensure effective judicial protection. The principle of the State's financial liability to make good damage caused by its infringement of provisions of Community law applied as a remedy which was both alternative and additional to substantive protection. Consequently a claim to establish State financial liability should be available whether or not the provision infringed had direct effect (pp. 48-60).

In their respective reference orders, the national courts indicated that their national law did not allow them to award damages because the infringements of Community law at issue were attributable to the legislature which had failed to amend a national law to align it with Community provisions (Case C-46/93, *Brasserie du Pêcheur*) or had passed a national law inconsistent with Community law (Case C-48/93, *Factortame*). The Advocate-General argued that there was no reason why the *Francovich* principle should not apply equally irrespective of whether the acts or omissions of the State causing loss or damage were the responsibility of the legislature or the executive. Under international law, a State whose liability for breach of an international treaty commitment was in issue was viewed as a single entity. It made no difference whether the infringement which gave rise to the damage was attributable to the legislature, the judiciary or the executive. Moreover, the same approach could be seen in the Court's own case-law on Article 169 of the EC Treaty. The Community legal order had a contractual basis founded on the conclusion of traditional international instruments which conferred rights on individuals not only where they were expressly granted but also as a result of the obligations imposed by the Treaty on the Member States. It followed that State liability for legislative acts or omissions in breach of obligations which the States had themselves contractually entered into was perfectly consistent with, and indeed inherent in, the fundamental characteristics of the Community legal order. Whilst it was true that this approach meant that Community law required a remedy to be created in the judicial systems of the Member States which was not at present available, the Advocate-General pointed out that this was not a new problem and there were clear precedents in the rulings of the Court in *Simmenthal*[5] and *Factortame I*.[6] The Member

[5] 93 *ILR* 45.
[6] 93 *ILR* 642 at 665.

States' autonomy in relation to judicial remedies for the infringement of rights conferred by Community law was subject to derogations wherever these were necessary to ensure the effective protection of individual rights and thereby the proper implementation of Community law (pp. 60-7).

The Advocate-General then turned to the necessary conditions for the Member States to be liable to pay compensation, pointing out that, as made clear in *Francovich*,[7] at least the minimum conditions must be identified and defined by Community law itself, although they might vary in their application from case to case. Three basic conditions were laid down by the Court in *Francovich*,[8] but this did not mean that these conditions were exhaustive so far as the requirements of Community law were concerned. In particular the Court had not specified the limits of State liability, especially the Community criteria for judging whether the conduct of the State was unlawful. In *Francovich* itself, there was no doubt that the omission on the part of the State was unlawful since the result sought by the directive at issue had not been attained and the case was therefore particularly straightforward. But it could never have been intended that every infringement of Community law affecting the financial interests of individuals should automatically entail a right to reparation. In determining the conditions governing the right to compensation for loss caused by State legislative activity in contravention of Community law, it was appropriate to refer to the Court's case-law under Article 215(2) of the EC Treaty concerning the non-contractual liability of the Community institutions. The Advocate-General considered that there was no reason to apply different criteria depending on whether the infringement of Community law in question was attributable to a State or a Community institution. Whenever a Member State acted in a field in which it enjoyed broad discretion, its liability for infringements of Community law should be subject to the same restrictive conditions as those applicable to Community institutions in comparable situations. Harmonization of the preconditions for liability was essential (pp. 67-76).

So far as the substantive Community criteria governing State liability were concerned, from the Court's case-law on non-contractual liability it was clear that Community liability could not arise unless a sufficiently serious breach of a superior rule of law for the protection of individuals had occurred. A finding of State liability was therefore essentially dependent, according to the Advocate-General, on two criteria: a manifest and serious breach was required together with fault as the element necessary to characterize the breach of the Community provision as serious. Wherever a Member State enjoyed a broad margin of discretion it would be necessary to establish that it had manifestly and gravely disregarded the limits on its discretion. The Advocate-General further argued, following both the prevalent approach of national legal systems and the Court itself in relation to the non-contractual liability of Community institutions, that the liability of Member States for infringements of Community law should be strict. By this he meant that, whilst it was necessary to assess State conduct on the basis of objective factors, including negligence where appropriate, in order to establish a breach of Community law, there was no requirement to prove the existence of fault as a subjective component of State conduct (pp. 76-85).

[7] 93 *ILR* 146 at 201, paragraphs 41-2.
[8] *Ibid.*, paragraphs 39-40.

It was then recalled by the Advocate-General that in *Francovich* the Court had stressed that Community law laid down those conditions sufficient to give rise to a right of reparation for individuals. Community law thus confined the Member States' autonomy in this context to laying down the other substantive and procedural conditions concerning the reparation of damage. This role of the Member States was limited by the requirement to secure real and effective protection for individuals. Accordingly, the conditions laid down by national law should be no less favourable than those relating to similar domestic claims and should not be so framed as to make it virtually impossible or excessively difficult to obtain reparation. Furthermore, the reparation payable by the Member State should not be merely symbolic but should correspond to the damage suffered. Finally, the obligation on Member States to pay compensation could not be made dependent upon the existence of a judgment of the Court finding the infringement in question and thereby limiting the time from which the obligation to make reparation started to after the delivery of such a judgment (pp. 86-95).

Held:—(1) It was a principle of Community law that Member States were obliged to make good loss and damage caused to individuals by breaches of Community law for which they could be held responsible. This principle applied even where the provision of Community law breached was directly effective. The right of individuals to rely on directly effective provisions of Community law before national courts was only a minimum guarantee and was not sufficient in itself to ensure the full and complete implementation of Community law. The purpose of that right was to ensure that provisions of Community law prevailed over national provisions. It could not, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid them sustaining damage as a result of a breach of Community law attributable to a Member State (pp. 108-10).

(2) Since the Treaty contained no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it was for the Court, in pursuance of the task conferred on it by Article 164 of the Treaty of ensuring that in the interpretation and application of the Treaty the law was observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States. Those general principles were referred to in Article 215 of the Treaty as the basis of the non-contractual liability of the Community for damage caused by its institutions or servants. They included the obligation on public authorities to make good damage caused in the performance of their duties. The protection of the rights which individuals derived from Community law could not vary depending on whether a national authority or a Community authority was responsible for the damage. Accordingly, the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which it could be held responsible was inherent in the system of the Treaty (pp. 111, 113-14).

(3) The principle of State liability held good for any case in which a Member State breached Community law, whatever the organ of the State whose act or omission was responsible for the breach. Furthermore, in view of

the fundamental requirement of the Community legal order that Community law be uniformly applied, the obligation to make good damage caused to individuals by breaches of Community law could not depend on domestic rules as to the division of powers between constitutional authorities. In international law, a State whose liability for breach of an international commitment was in issue would be viewed as a single entity, irrespective of whether the breach which gave rise to the damage was attributable to the legislature, the judiciary or the executive. This must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, were bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals. Consequently, the principle that Member States were obliged to make good damage caused to individuals by breaches of Community law attributable to the State was applicable where the national legislature was responsible for the breach in question (p. 112).

(4) In order to determine the conditions under which State liability gave rise to a right to reparation, account first had to be taken of the principles inherent in the Community legal order which formed the basis for that liability. These were firstly the full effectiveness of Community rules and the effective protection of the rights which they conferred and secondly the obligation to cooperate imposed on Member States by Article 5 of the Treaty. Reference was also to be made to the rules defined in the case-law of the Court of Justice on the non-contractual liability of the Community in so far as, pursuant to Article 215 of the Treaty, they were constructed on the basis of the general principles common to the laws of the Member States. It was inappropriate, in the absence of particular justification, to have different rules governing the liability of the Community and the liability of Member States in like circumstances (pp. 113-14).

(5) (a) Accordingly, where a Member State acted in a field where it had a wide discretion, comparable to that of the Community institutions in implementing Community policies, the conditions under which it could incur liability must, in principle, be the same as those under which the Community institutions incurred liability in a comparable situation. In such circumstances, Community law conferred a right to reparation where three conditions were met: the rule of law infringed had to be intended to confer rights on individuals; the breach had to be sufficiently serious; and there had to be a direct causal link between the breach of the obligation incumbent upon the Member State and the damage sustained by individuals (pp. 115-16).

(b) The decisive test for finding that a breach of Community law was sufficiently serious was whether the Member State or the Community institution concerned had manifestly and gravely disregarded the limits on its discretion. The factors which the competent court could take into consideration included the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption and retention of national measures or practices contrary to Community law. On any view, a breach of Community law would be sufficiently serious if it had persisted despite a judgment finding the

infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it was clear that the conduct in question constituted an infringement (p. 117).

(6) (a) The right to reparation thus flowed directly from Community law where the conditions referred to in the preceding paragraph were satisfied. Where such a right existed the State was required, in the absence of relevant Community provisions, to make reparation for the consequences of the loss and damage caused in accordance with the domestic rules on liability, provided that the conditions for reparation laid down by national law should not be less favourable than those relating to similar domestic claims and should not be such as in practice to make it impossible or excessively difficult to obtain reparation. Any condition imposed by national law on State liability requiring either proof of misfeasance in public office or that the act or omission was referable to an individual situation would in practice make it impossible or extremely difficult to obtain reparation where the act or omission was the responsibility of the legislature itself (pp. 120, 121).

(b) Certain objective and subjective factors connected with the concept of fault under a national legal system could well be relevant for the purpose of determining whether or not a given breach of Community law was serious (see paragraph (5)(b) above). But the obligation to make reparation for loss or damage caused to individuals could not depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling into question the right to reparation founded on the Community legal order (pp. 122-3).

(7) Reparation by Member States of loss or damage caused to individuals as a result of breaches of Community law should be commensurate with the loss or damage sustained. National legislation which generally limited the damage for which reparation could be granted to damage done to certain specifically protected individual interests, not including loss of profit by individuals, was incompatible with Community law. Moreover, it should be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages could be awarded pursuant to similar claims or actions founded on domestic law (p. 125).

(8) The obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State could not be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question, without calling into question the right to reparation conferred by the Community legal order. Furthermore, a requirement that there must have been a prior finding by the Court of an infringement of Community law would be contrary to the principle of the effectiveness of Community law since it would preclude any right to reparation so long as the presumed infringement had not been the subject of an action brought by the Commission under Article 169 of the Treaty and of a finding of an infringement by the Court. Such a requirement would also violate the rights of individuals arising from Community provisions having direct effect in the domestic legal systems of the Member States (p. 126).

The text of the judgment of the Court of Justice of the European Communities commences at p. 102. The text of the opinion of Advocate-General Tesauro delivered on 28 November 1995 commences at p. 39. The following is the text of the report for the Hearing by President of the Court and *Rapporteur* Rodríguez Iglesias:

034]

REPORT FOR THE HEARING
in joined Cases C-46/93 and C-48/93 *

035] **I. Background to the disputes**

A. *Case C-46/93*

1. *Facts and procedure*

1. Brasserie du Pêcheur SA, the appellant in the main proceedings in Case C-46/93, is a French brewery based at Schiltigheim (Alsace). Until 1981, it exported beer to the Federal Republic of Germany. At the end of 1981 it was forced to discontinue those exports, since the German authorities objected that the beer it produced did not comply with the German Reinheitsgebot (purity requirement) (Biersteuergesetz — Law on Beer Duty —, codification of 14 March 1952, BGBl. I, p. 149, in the version dated 14 December 1976, BGBl. I, p. 3341, p. 3357, hereinafter 'the BStG'), in particular Paragraphs 9 and 10 thereof.

2. The Commission, regarding the aforesaid paragraphs of the BStG as contrary to Article 30 of the EEC Treaty, brought an action against the Federal Republic of Germany for failure to comply with its obligations under the Treaty, with regard both to the prohibition against the marketing, under the designation of 'Bier' (beer), of beers lawfully manufactured in other Member States according to different rules and to the prohibition against the importation of beers containing additives.

3. In the judgment in Case 178/84 *Commission* v *Germany* [1987] ECR 1227, the Court held that the prohibition against the marketing of beers imported from other Member States which did not comply with Paragraphs 9 and 10 of the BStG was incompatible with Article 30.

4. Brasserie du Pêcheur consequently brought an action against the Federal Republic of Germany for compensation for the loss suffered by it as a result of that import restriction between 1981 and 1987, in the sum of DM 1 800 000, representing a fraction of the loss actually suffered. That action was dismissed by the lower courts. Brasserie du Pêcheur is pursuing the same claims in its appeal before the Bundesgerichtshof (Federal Court of Justice).

2. *National law*

5. The first sentence of Paragraph 839(1) of the Bürgerliches Gesetzbuch (German Civil Code, hereinafter 'the BGB') provides:

'If an official wilfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom.'

* Languages of the cases: English and German.

Article 34 of the Grundgesetz (Basic Law, hereinafter 'the GG') provides:

'If a person infringes, in the exercise of a public office entrusted to him, the obligations incumbent upon him as against a third party, liability therefor shall attach in principle to the State or to the body in whose service he is engaged. Where such infringement is wilful or results from gross negligence, a right of recourse is reserved against the person committing the same. A right of appeal to the ordinary courts shall not be excluded for the purposes of proceedings for compensation or an action by way of recourse.'

In the Federal Republic of Germany, State liability may be incurred under the combined provisions of the BGB and the GG mentioned above. In the present case, however, the legislature, in enacting the BStG, merely took upon itself tasks which concern the public at large, and which do not relate to any particular person or class of persons who might be regarded as 'third parties' within the meaning of those provisions.

6. Furthermore, State liability may also be incurred by reason of unlawful interference, akin to expropriation, on the part of the public authority. This involves a principle developed by the case-law of the Bundesgerichtshof (BGHZ 90, p. 17, p. 29 et seq.). According to that case-law, however, that principle is not such as to enable an order to be made for the payment of compensation for loss resulting from a statute which is [103(contrary to the constitution (BGHZ 100, p. 136, pp. 145 and 146).

7. Consequently, the national court does not consider that German law affords any basis for the payment of compensation for the loss suffered by the claimant.

3. *Questions referred for a preliminary ruling*

8. The Bundesgerichtshof, doubtful as to the interpretation of the principle of State liability for damage caused to individuals by infringements of Community law attributable to the State, as derived from the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357 (hereinafter 'the *Francovich* [9] judgment'), decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the principle of Community law according to which Member States are obliged to pay compensation for damage suffered by an individual as a result of breaches of Community law attributable to those States also apply where such a breach consists of a failure to adapt a national parliamentary statute to the higher-ranking rules of Community law (this case concerning a failure to adapt Paragraphs 9 and 10 of the

[* 93 *ILR* 146.]