Judgment of the Court of Justice, Brasserie du pêcheur and Factortame, Joined Cases C-46/93 and C-48/93 (5 March 1996)

Caption: In its judgment of 5 March 1996, in Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame, the Court of Justice concludes that, where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals.

Source: CVRIA. Case-law: Numerical access to the case-law. [ON-LINE]. [Luxembourg]: Court of Justice of the European Communities, [30.05.2006]. C-46/93 and C-48/93. Available on http://curia.eu.int/en/content/juris/index.htm.

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Judgment of the Court of 5 March 1996
Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others

References for a preliminary ruling: Bundesgerichtshof - Germany and High Court of Justice, Queen's Bench Division, Divisional Court - United Kingdom

Principle of Member State liability for damage caused to individuals by breaches of Community law attributable to the State - Breaches attributable to the national legislature - Conditions for State liability - Extent of reparation

Joined cases C-46/93 and C-48/93

Summary

1. Community law — Rights conferred on individuals — Infringement by a Member State — Obligation to make good damage caused to individuals — Directly applicable nature of the provision infringed — No effect

2. Community law — Breach by Member States — Consequences — No express, specific provisions in the Treaty — Definition by the Court of Justice — Method

(EEC Treaty, Art. 164)

3. Community law — Rights conferred on individuals — Infringement by a Member State — Obligation to make good damage caused to individuals — Infringement attributable to the national legislature — No effect

4. Community law — Rights conferred on individuals — Infringement by a Member State — Infringement attributable to the national legislature having a wide discretion to make legislative choices — Obligation to make good damage caused to individuals — Conditions — Manner of reparation — Application of national law — Limits

(EEC Treaty, Arts 5 and 215, second para.)

5. Community law — Rights conferred on individuals — Infringement by a Member State — Obligation to make good damage caused to individuals — Determination of the damage for which reparation may be granted — Application of national law — Limits

6. Community law — Rights conferred on individuals — Infringement by a Member State — Obligation to make good damage caused to individuals — Conditions — Reparation limited to damage sustained after delivery of a judgment finding the relevant infringement — Not permissible

1. The application of the principle that Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible cannot be discarded where the breach relates to a provision of directly applicable Community law.

The right of individuals to rely on directly effective provisions before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of Community law. That right, whose purpose is to ensure that provisions of Community law prevail over national provisions, cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State.

2. Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is 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 is 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.

3. The principle that Member States are obliged to make good loss or damage caused to individuals by breaches of Community law for which they can be held responsible is applicable where the national legislature was responsible for the breaches.

That principle, which is inherent in the system of the Treaty, holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach, and, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied, the obligation to make good damage enshrined in that principle cannot depend on domestic rules as to the division of powers between constitutional authorities.

4. In order to define the conditions under which a Member State may incur liability for damage caused to individuals by a breach of Community law, account should first be taken of the principles inherent in the Community legal order which form the basis for State liability, namely, the full effectiveness of Community rules and the effective protection of the rights which they confer and the obligation to cooperate imposed on Member States by Article 5 of the Treaty. Reference should also be made to the rules which have been defined on non-contractual liability on the part of the Community, in so far as, under the second paragraph of Article 215 of the Treaty, they were constructed on the basis of the general principles common to the laws of the Member States and it is not appropriate, 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, since the protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.

Accordingly, where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals.

Subject to that reservation, the State must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

In particular, pursuant to the national legislation which it applies, the national court cannot make reparation of loss or damage conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law.

The decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State concerned manifestly and gravely disregarded the limits on its discretion. The factors which the competent court may take into consideration include 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 and 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 or retention of national measures or practices contrary to Community law. On any view, a breach of Community law will be sufficiently serious if it has 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 is clear that the conduct in question constituted an infringement.

5. Reparation from Member States for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must 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 may be awarded pursuant to similar claims or actions founded on domestic law.

6. The obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question.

Since the right to reparation under Community law exists where the requisite conditions are satisfied, to allow the obligation of the Member State concerned to make reparation to be confined to loss or damage sustained after delivery of a judgment of the Court finding the infringement in question would amount to calling in question the right to reparation conferred by the Community legal order. In addition, to make the reparation of loss or damage conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to the Member State concerned 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. Rights arising for individuals out of Community provisions having direct effect in the domestic legal systems of the Member States cannot depend on the Commission' s assessment of the expediency of taking action against a Member State pursuant to Article 169 of the Treaty or on the delivery by the Court of any judgment finding an infringement.

In Joined Cases C-46/93 and C-48/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesgerichtshof (Case C-46/93) and by the High Court of Justice, Queen' s Bench Division, Divisional Court (Case C-48/93) for a preliminary ruling in the proceedings pending before those courts between

Brasserie du Pêcheur SA

and

Federal Republic of Germany

and between

The Queen

and

Secretary of State for Transport

ex parte : Factortame Ltd and Others

on the interpretation of the principle of the liability of the State for damage caused to individuals by breaches of Community law attributable to the State,

THE COURT,

composed of: G.C. Rodríguez Iglesias (Rapporteur), President, C.N. Kakouris, D.A.O. Edward and G. Hirsch (Presidents of Chambers), G.F. Mancini, F.A. Schockweiler, J.C. Moitinho de Almeida, C. Gulmann and J.L. Murray, Judges,

Advocate General : G. Tesauro,

Registrars: H. von Holstein, Deputy Registrar, and H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of :

– Brasserie du Pêcheur SA, by Hermann Buettner, Rechtsanwalt, Karlsruhe,

– claimants 1 to 36 and 38 to 84 in Case C-48/93, by David Vaughan QC, Gerald Barling QC and David Anderson, Barrister, instructed by Stephen Swabey, Solicitor,

– claimants 85 to 97 in Case C-48/93, by Nicholas Green, Barrister, instructed by Nicholas Horton, Solicitor,

– the 37th claimant in Case C-48/93, by Nicholas Forwood QC and Peter Duffy, Barrister, instructed by Holman Fenwick & Willan, Solicitors,

– the Government of the Federal Republic of Germany, by Ernst Roeder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent, and Joachim Sedemund, Rechtsanwalt, Cologne,

– the United Kingdom, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and Stephen Richards, Christopher Vajda and Rhodri Thompson, Barristers,

– the Danish Government, by J. Moelde, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

– the Spanish Government, by Alberto José Navarro González, Director-General for Community Legal and Institutional Affairs, and Rosario Silva de Lapuerta and Gloria Calvo Díaz, Abogados del Estado, of the State Legal Service, acting as Agents,

– the French Government, by Jean-Pierre Puissochet, Director of Legal Affairs in the Ministry of Foreign Affairs, and Catherine de Salins, Deputy Director of the Foreign Affairs Directorate in that Ministry, acting as Agents,

– Ireland, represented by M.A. Buckley, Chief State Solicitor, acting as Agent,

– the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

– the Commission of the European Communities, by Christian Timmermans, Assistant Director-General of its Legal Service, Joern Pipkorn, Legal Adviser, and Christopher Docksey, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Brasserie du Pêcheur SA, represented by H. Buettner and P. Soler-Couteaux, of the Strasbourg Bar; claimants 1 to 36 and 38 to 84 in Case C-48/93, represented by D. Vaughan, G. Barling, D. Anderson and S. Swabey; claimants 85 to 97 in Case C-48/93, represented by N. Green; the 37th claimant in Case C-48/93, represented by N. Forwood and P. Duffy; the German Government, represented by J. Sedemund; the United Kingdom, represented by Sir Nicholas Lyell QC, Attorney General, S. Richards, C. Vajda and J.E. Collins; the Danish Government, represented by P. Biering, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the Greek Government, represented by F. Georgakopoulos, Assistant Legal Adviser to the State Legal Council, acting as Agent; the Spanish Government, represented by R. Silva de Lapuerta and G. Calvo Díaz; the French Government, represented by C. de Salins; the Netherlands Government, represented by J.W. de Zwaan, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by C. Timmermans, J. Pipkorn and C. Docksey, at the hearing on 25 October 1994,

after hearing the Opinion of the Advocate General at the sitting on 28 November 1995,

gives the following

Judgment

1 By orders of 28 January 1993 and 18 November 1992, received at the Court on 17 February 1993 and 18 February 1993, respectively, the Bundesgerichtshof (Federal Court of Justice) (Case C-46/93) and the High Court of Justice, Queen' s Bench Division, Divisional Court (Case C-48/93) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty questions concerning the conditions under which a Member State may incur liability for damage caused to individuals by breaches of Community law attributable to that State.

2 The questions were raised in two sets of proceedings between, on the one hand, Brasserie du Pêcheur SA and the Federal Republic of Germany and, on the other, Factortame Ltd and others (hereinafter "Factortame") and the United Kingdom of Great Britain and Northern Ireland.

Case C-46/93

3 Before the national court, Brasserie du Pêcheur, a French company based at Schiltigheim (Alsace), claims

that it was forced to discontinue exports of beer to Germany in late 1981 because the competent German authorities considered that the beer it produced did not comply with the Reinheitsgebot (purity requirement) laid down in Paragraphs 9 and 10 of the Biersteuergesetz of 14 March 1952 (Law on Beer Duty, BGBl. I, p. 149), in the version dated 14 December 1976 (BGBl. I, p. 3341, hereinafter "the BStG").

4 The Commission took the view that those provisions were contrary to Article 30 of the EEC Treaty and brought infringement proceedings against the Federal Republic of Germany on two grounds, namely the prohibition on marketing under the designation "Bier" (beer) beers lawfully manufactured by different methods in other Member States and the prohibition on importing beers containing additives. By judgment of 12 March 1987 in Case 178/84 Commission v Germany [1987] ECR 1227, the Court held that the prohibition on marketing beers imported from other Member States which did not comply with the provisions in question was incompatible with Article 30 of the Treaty.

5 Brasserie du Pêcheur consequently brought an action against the Federal Republic of Germany for reparation of the loss suffered by it as a result of that import restriction between 1981 and 1987, seeking damages in the sum of DM 1 800 000, representing a fraction of the loss actually incurred.

6 The Bundesgerichtshof refers to Paragraph 839 of the Buergerliches Gesetzbuch (German Civil Code, "the BGB") and Article 34 of the Grundgesetz (Basic Law, "the GG"). According to the first sentence of Paragraph 839 of the BGB, "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." Article 34 of the GG provides that "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."

7 If those provisions are read together, it appears that, in order for the State to be liable, the third party must be capable of being regarded as beneficiary of the obligation breached, which means that the State is liable for breach only of obligations conceived in favour of a third party. However, as the Bundesgerichtshof points out, in the case of the BStG the task assumed by the national legislature concerns only the public at large and is not directed towards any particular person or class of persons who could be regarded as "third parties" within the meaning of the provisions mentioned above.

8 In this context, the Bundesgerichtshof has referred 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 German Biersteuergesetz to Article 30 of the EEC Treaty)?

2. May the national legal system provide that any entitlement to compensation is to be subject to the same limitations as those applying where a national statute breaches higher-ranking national law, for example where an ordinary Federal law breaches the Grundgesetz of the Federal Republic of Germany?

3. May the national legal system provide that entitlement to compensation is to be conditional on fault (intent or negligence) on the part of the organs of the State responsible for the failure to adapt the legislation?

4. If Question 1 is to be answered in the affirmative and Question 2 in the negative:

(a) May liability to pay compensation under the national legal system be limited to the reparation of damage done to specific individual legal interests, for example property, or does it require full compensation for all financial losses, including lost profits?

(b) Does the obligation to pay compensation also require reparation of the damage already incurred before it was held in the judgment of the European Court of Justice of 12 March 1987 in Case 178/84 Commission v Germany [1987] ECR 1227 that Paragraph 10 of the German Biersteuergesetz infringed higher-ranking Community law?"

Case C-48/93

9 On 16 December 1988 Factortame and others, being individuals and companies incorporated under the laws of the United Kingdom, together with the directors and shareholders of those companies, brought an action before the High Court of Justice, Queen' s Bench Division, Divisional Court (hereinafter "the Divisional Court"), in which they challenged the compatibility of Part II of the Merchant Shipping Act 1988 with Community law, in particular Article 52 of the EEC Treaty. That act entered into force on 1 December 1988, subject to a transitional period expiring on 31 March 1989. It provided for the introduction of a new register for British fishing boats and made registration of such vessels, including those already registered in the former register, subject to certain conditions relating to the nationality, residence and domicile of the owners. Fishing boats ineligible for registration in the new register were deprived of the right to fish.

10 In answer to questions referred by the Divisional Court, the Court held by judgment of 25 July 1991 in Case C-221/89 Factortame II [1991] ECR I-3905 that conditions relating to the nationality, residence and domicile of vessel owners and operators as laid down by the registration system introduced by the United Kingdom were contrary to Community law, but that it was not contrary to Community law to stipulate as a condition for registration that the vessels in question must be managed and their operations directed and controlled from within the United Kingdom.

11 On 4 August 1989 the Commission brought infringement proceedings against the United Kingdom. In parallel, it applied for interim measures ordering the suspension of the abovementioned nationality conditions on the ground that they were contrary to Articles 7, 52 and 221 of the EEC Treaty. By order of 10 October 1989 in Case 246/89 R Commission v United Kingdom [1989] ECR 3125, the President of the Court granted that application. Pursuant to that order, the United Kingdom adopted provisions amending the new registration system with effect from 2 November 1989. By judgment of 4 October 1991 in Case C-246/89 Commission v United Kingdom [1991] ECR I-4585, the Court confirmed that the registration conditions challenged in the infringement proceedings were contrary to Community law.

12 Meanwhile, on 2 October 1991, the Divisional Court made an order designed to give effect to this Court' s judgment of 25 July 1991 in Factortame II and, at the same time, directed the claimants to give detailed particulars of their claims for damages. Subsequently, the claimants provided the national court with a detailed statement of their various heads of claim, covering expenses and losses incurred between 1 April 1989, when the legislation at issue entered into force, and 2 November 1989, when it was repealed.

13 Lastly, by order of 18 November 1992, the Divisional Court gave Rawlings (Trawling) Ltd, the 37th claimant in Case C-48/93, leave to amend its claim to include a claim for exemplary damages for unconstitutional behaviour on the part of the public authorities.

14 In that context, the Divisional Court referred the following questions to the Court for a preliminary ruling:

"1. In all the circumstances of this case, where:

(a) a Member State' s legislation laid down conditions relating to the nationality, domicile and residence of the owners and managers of fishing vessels, and of the shareholders and directors in vessel-owning and managing companies, and

(b) such conditions were held by the Court of Justice in Cases C-221/89 and C-246/89 to infringe Articles 5, 7, 52 and 221 of the EEC Treaty,

are those persons who were owners or managers of such vessels, or directors and/or shareholders in vessel-owning and managing companies, entitled as a matter of Community law to compensation by that Member State for losses which they have suffered as a result of all or any of the above infringements of the EEC Treaty?

2. If Question 1 is answered in the affirmative, what considerations, if any, does Community law require the national court to apply in determining claims for damages and interest relating to:

(a) expenses and/or loss of profit and/or loss of income during the period subsequent to the entry into force of the said conditions, during which the vessels were forced to lay up, to make alternative arrangements for fishing and/or to seek registration elsewhere;

(b) losses consequent on sales at an undervalue of the vessels, or of shares therein, or of shares in vessel-owning companies;

(c) losses consequent on the need to provide bonds, fines and legal expenses for alleged offences connected with the exclusion of vessels from the national register;

(d) losses consequent on the inability of such persons to own and operate further vessels;

(e) loss of management fees;

(f) expenses incurred in an attempt to mitigate the above losses;

(g) exemplary damages as claimed?"

15 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

State liability for acts and omissions of the national legislature contrary to Community law (first question in both Case C-46/93 and Case C-48/93)

16 By their first questions, each of the two national courts essentially seeks to establish whether the principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the infringement in question.

17 In Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 37, the Court held that it is a principle of Community law that Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

18 The German, Irish and Netherlands Governments contend that Member States are required to make good loss or damage caused to individuals only where the provisions breached are not directly effective: in Francovich and Others the Court simply sought to fill a lacuna in the system for safeguarding rights of individuals. In so far as national law affords individuals a right of action enabling them to assert their rights under directly effective provisions of Community law, it is unnecessary, where such provisions are breached, also to grant them a right to reparation founded directly on Community law.

19 That argument cannot be accepted.

20 The Court has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty (see, in particular, Case 168/85 Commission v Italy [1986] ECR 2945, paragraph 11, Case C-120/88 Commission v Italy [1991] ECR I-621, paragraph 10, and C-119/89

Commission v Spain [1991] ECR I-641, paragraph 9). The purpose of that right is to ensure that provisions of Community law prevail over national provisions. It cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State. As appears from paragraph 33 of the judgment in Francovich and Others, the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law.

21 This will be so where an individual who is a victim of the non-transposition of a directive and is precluded from relying on certain of its provisions directly before the national court because they are insufficiently precise and unconditional, brings an action for damages against the defaulting Member State for breach of the third paragraph of Article 189 of the Treaty. In such circumstances, which obtained in the case of Francovich and Others, the purpose of reparation is to redress the injurious consequences of a Member State's failure to transpose a directive as far as beneficiaries of that directive are concerned.

22 It is all the more so in the event of infringement of a right directly conferred by a Community provision upon which individuals are entitled to rely before the national courts. In that event, the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.

23 In this case, it is undisputed that the Community provisions at issue, namely Article 30 of the Treaty in Case C-46/93 and Article 52 in Case C-48/93, have direct effect in the sense that they confer on individuals rights upon which they are entitled to rely directly before the national courts. Breach of such provisions may give rise to reparation.

24 The German Government further submits that a general right to reparation for individuals could be created only by legislation and that for such a right to be recognized by judicial decision would be incompatible with the allocation of powers as between the Community institutions and the Member States and with the institutional balance established by the Treaty.

25 It must, however, be stressed that the existence and extent of State liability for damage ensuing as a result of a breach of obligations incumbent on the State by virtue of Community law are questions of Treaty interpretation which fall within the jurisdiction of the Court.

26 In this case, as in Francovich and Others, those questions of interpretation have been referred to the Court by national courts pursuant to Article 177 of the Treaty.

27 Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is 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 is 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.

28 Indeed, it is to the general principles common to the laws of the Member States that the second paragraph of Article 215 of the Treaty refers as the basis of the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties.

29 The principle of the non-contractual liability of the Community expressly laid down in Article 215 of the Treaty is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused. That provision also reflects the obligation on public authorities to make good damage caused in the performance of their duties.

30 In any event, in many national legal systems the essentials of the legal rules governing State liability have been developed by the courts.

31 In view of the foregoing considerations, the Court held in Francovich and Others, at paragraph 35, that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty.

32 It follows that that principle holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach.

33 In addition, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied (see, in particular, Joined Cases C-143/88 and C-92/89 Zuckerfabrik Suederdithmarschen and Zuckerfabrik Soest [1991] ECR I-415, paragraph 26), the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities.

34 As the Advocate General points out in paragraph 38 of his Opinion, in international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity, irrespective of whether the breach which gave rise to the damage is 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, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.

35 The fact that, according to national rules, the breach complained of is attributable to the legislature cannot affect the requirements inherent in the protection of the rights of individuals who rely on Community law and, in this instance, the right to obtain redress in the national courts for damage caused by that breach.

36 Consequently, the reply to the national courts must be that the principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the breach in question.

Conditions under which the State may incur liability for acts and omissions of the national legislature contrary to Community law (second question in Case C-46/93 and first question in Case C-48/93)

37 By these questions, the national courts ask the Court to specify the conditions under which a right to reparation of loss or damage caused to individuals by breaches of Community law attributable to a Member State is, in the particular circumstances, guaranteed by Community law.

38 Although Community law imposes State liability, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage (Francovich and Others, paragraph 38).
39 In order to determine those conditions, account should first be taken of the principles inherent in the Community legal order which form the basis for State liability, namely, first, the full effectiveness of Community rules and the effective protection of the rights which they confer and, second, the obligation to cooperate imposed on Member States by Article 5 of the Treaty (Francovich and Others, paragraphs 31 to 36).

40 In addition, as the Commission and the several governments which submitted observations have emphasized, it is pertinent to refer to the Court' s case-law on non-contractual liability on the part of the Community.

41 First, the second paragraph of Article 215 of the Treaty refers, as regards the non-contractual liability of the Community, to the general principles common to the laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of Community law.

42 Second, the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the

liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.

43 The system of rules which the Court has worked out with regard to Article 215 of the Treaty, particularly in relation to liability for legislative measures, takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question.

44 Thus, in developing its case-law on the non-contractual liability of the Community, in particular as regards legislative measures involving choices of economic policy, the Court has had regard to the wide discretion available to the institutions in implementing Community policies.

45 The strict approach taken towards the liability of the Community in the exercise of its legislative activities is due to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterized by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 HNL and Others v Council and Commission [1978] ECR 1209, paragraphs 5 and 6).

46 That said, the national legislature ° like the Community institutions ° does not systematically have a wide discretion when it acts in a field governed by Community law. Community law may impose upon it obligations to achieve a particular result or obligations to act or refrain from acting which reduce its margin of discretion, sometimes to a considerable degree. This is so, for instance, where, as in the circumstances to which the judgment in Francovich and Others relates, Article 189 of the Treaty places the Member State under an obligation to take, within a given period, all the measures needed in order to achieve the result required by a directive. In such a case, the fact that it is for the national legislature to take the necessary measures has no bearing on the Member State' s liability for failing to transpose the directive.

47 In contrast, where a Member State acts in a field where it has a wide discretion, comparable to that of the Community institutions in implementing Community policies, the conditions under which it may incur liability must, in principle, be the same as those under which the Community institutions incur liability in a comparable situation.

48 In the case which gave rise to the reference in Case C-46/93, the German legislature had legislated in the field of foodstuffs, specifically beer. In the absence of Community harmonization, the national legislature had a wide discretion in that sphere in laying down rules on the quality of beer put on the market.

49 As regards the facts of Case C-48/93, the United Kingdom legislature also had a wide discretion. The legislation at issue was concerned, first, with the registration of vessels, a field which, in view of the state of development of Community law, falls within the jurisdiction of the Member States and, secondly, with regulating fishing, a sector in which implementation of the common fisheries policy leaves a margin of discretion to the Member States.

50 Consequently, in each case the German and United Kingdom legislatures were faced with situations involving choices comparable to those made by the Community institutions when they adopt legislative measures pursuant to a Community policy.

51 In such circumstances, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

52 Firstly, those conditions satisfy the requirements of the full effectiveness of the rules of Community law and of the effective protection of the rights which those rules confer.

53 Secondly, those conditions correspond in substance to those defined by the Court in relation to Article 215 in its case-law on liability of the Community for damage caused to individuals by unlawful legislative measures adopted by its institutions.

54 The first condition is manifestly satisfied in the case of Article 30 of the Treaty, the relevant provision in Case C-46/93, and in the case of Article 52, the relevant provision in Case C-48/93. Whilst Article 30 imposes a prohibition on Member States, it nevertheless gives rise to rights for individuals which the national courts must protect (Case 74/76 Iannelli & Volpi v Meroni [1977] ECR 557, paragraph 13). Likewise, the essence of Article 52 is to confer rights on individuals (Case 2/74 Reyners [1974] ECR 631, paragraph 25).

55 As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.

56 The factors which the competent court may take into consideration include 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 and 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 or retention of national measures or practices contrary to Community law.

57 On any view, a breach of Community law will clearly be sufficiently serious if it has 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 is clear that the conduct in question constituted an infringement.

58 While, in the present cases, the Court cannot substitute its assessment for that of the national courts, which have sole jurisdiction to find the facts in the main proceedings and decide how to characterize the breaches of Community law at issue, it will be helpful to indicate a number of circumstances which the national courts might take into account.

59 In Case C-46/93 a distinction should be drawn between the question of the German legislature’s having maintained in force provisions of the Biersteuergesetz concerning the purity of beer prohibiting the marketing under the designation "Bier" of beers imported from other Member States which were lawfully produced in conformity with different rules, and the question of the retention of the provisions of that same law prohibiting the import of beers containing additives. As regards the provisions of the German legislation relating to the designation of the product marketed, it would be difficult to regard the breach of Article 30 by that legislation as an excusable error, since the incompatibility of such rules with Article 30 was manifest in the light of earlier decisions of the Court, in particular Case 120/78 Rewe-Zentral [1979] ECR 649 ("Cassis de Dijon") and Case 193/80 Commission v Italy [1981] ECR 3019 ("vinegar"). In contrast, having regard to the relevant case-law, the criteria available to the national legislature to determine whether the prohibition of the use of additives was contrary to Community law were significantly less conclusive until the Court' s judgment of 12 March 1987 in Commission v Germany, cited above, in which the Court held that prohibition to be incompatible with Article 30.

60 A number of observations may likewise be made about the national legislation at issue in Case C-48/93.

61 The decision of the United Kingdom legislature to introduce in the Merchant Shipping Act 1988 provisions relating to the conditions for the registration of fishing vessels has to be assessed differently in the case of the provisions making registration subject to a nationality condition, which constitute direct

discrimination manifestly contrary to Community law, and in the case of the provisions laying down residence and domicile conditions for vessel owners and operators.

62 The latter conditions are prima facie incompatible with Article 52 of the Treaty in particular, but the United Kingdom sought to justify them in terms of the objectives of the common fisheries policy. In the judgment in Factortame II, cited above, the Court rejected that justification.

63 In order to determine whether the breach of Article 52 thus committed by the United Kingdom was sufficiently serious, the national court might take into account, inter alia, the legal disputes relating to particular features of the common fisheries policy, the attitude of the Commission, which made its position known to the United Kingdom in good time, and the assessments as to the state of certainty of Community law made by the national courts in the interim proceedings brought by individuals affected by the Merchant Shipping Act.

64 Lastly, consideration should be given to the assertion made by Rawlings (Trawling) Ltd, the 37th claimant in Case C-48/93, that the United Kingdom failed to adopt immediately the measures needed to comply with the Order of the President of the Court of 10 October 1989 in Commission v United Kingdom, cited above, and that this needlessly increased the loss it sustained. If this allegation ° which was certainly contested by the United Kingdom at the hearing ° should prove correct, it should be regarded by the national court as constituting in itself a manifest and, therefore, sufficiently serious breach of Community law.

65 As for the third condition, it is for the national courts to determine whether there is a direct causal link between the breach of the obligation borne by the State and the damage sustained by the injured parties.

66 The aforementioned three conditions are necessary and sufficient to found a right in individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law.

67 As appears from paragraphs 41, 42 and 43 of Francovich and Others, cited above, subject to the right to reparation which flows directly from Community law where the conditions referred to in the preceding paragraph are satisfied, the State must 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 of loss and damage laid down by national law must not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation (see also Case 199/82 Amministrazione delle Finanze dello Stato v San Giorgio [1983] ECR 3595).

68 In that regard, restrictions that exist in domestic legal systems as to the non-contractual liability of the State in the exercise of its legislative function may be such as to make it impossible in practice or excessively difficult for individuals to exercise their right to reparation, as guaranteed by Community law, of loss or damage resulting from the breach of Community law.

69 In Case C-46/93 the national court asks in particular whether national law may subject any right to compensation to the same restrictions as apply where a law is in breach of higher-ranking national provisions, for instance, where an ordinary Federal law infringes the Grundgesetz of the Federal Republic of Germany.

70 While the imposition of such restrictions may be consistent with the requirement that the conditions laid down should not be less favourable than those relating to similar domestic claims, it is still to be considered whether such restrictions are not such as in practice to make it impossible or excessively difficult to obtain reparation.

71 The condition imposed by German law where a law is in breach of higher-ranking national provisions, which makes reparation dependent upon the legislature' s act or omission being referable to an individual situation, would in practice make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law, since the tasks falling to the national legislature

relate, in principle, to the public at large and not to identifiable persons or classes of person.

72 Since such a condition stands in the way of the obligation on national courts to ensure the full effectiveness of Community law by guaranteeing effective protection for the rights of individuals, it must be set aside where an infringement of Community law is attributable to the national legislature.

73 Likewise, any condition that may be imposed by English law on State liability requiring proof of misfeasance in public office, such an abuse of power being inconceivable in the case of the legislature, is also such as in practice to make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law where the breach is attributable to the national legislature.

74 Accordingly, the reply to the questions from the national courts must be that, where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the State must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

The possibility of making reparation conditional upon the existence of fault (third question in Case C-46/93)

75 By its third question, the Bundesgerichtshof essentially seeks to establish whether, pursuant to the national legislation which it applies, the national court is entitled to make reparation conditional upon the existence of fault (whether intentional or negligent) on the part of the organ of the State to which the infringement is attributable.

76 As is clear from the case-file, the concept of fault does not have the same content in the various legal systems.

77 Next, it follows from the reply to the preceding question that, where a breach of Community law is attributable to a Member State acting in a field in which it has a wide discretion to make legislative choices, a finding of a right to reparation on the basis of Community law will be conditional, inter alia, upon the breach having been sufficiently serious.

78 So, certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of Community law is serious (see the factors mentioned in paragraphs 56 and 57 above).

79 The obligation to make reparation for loss or damage caused to individuals cannot, however, 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 in question the right to reparation founded on the Community legal order.

80 Accordingly, the reply to the question from the national court must be that, pursuant to the national legislation which it applies, reparation of loss or damage cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law.

The actual extent of the reparation (question 4(a) in Case C-46/93 and the second question in Case C-48/93)

81 By these questions, the national courts essentially ask the Court to identify the criteria for determination of the extent of the reparation due by the Member State responsible for the breach.

82 Reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights.

83 In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.

84 In particular, in order to determine the loss or damage for which reparation may be granted, the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.

85 Indeed, it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself (Joined Cases C-104/89 and C-37/90 Mulder and Others v Council and Commission [1992] ECR I-3061, paragraph 33).

86 The Bundesgerichtshof asks whether national legislation may generally limit the obligation to make reparation to damage done to certain, specifically protected individual interests, for example property, or whether it should also cover loss of profit by the claimants. It states that the opportunity to market products from other Member States is not regarded in German law as forming part of the protected assets of the undertaking.

87 Total exclusion of loss of profit as a head of damage for which reparation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.

88 As for the various heads of damage referred to in the Divisional Court' s second question, Community law imposes no specific criteria. It is for the national court to rule on those heads of damage in accordance with the domestic law which it applies, subject to the requirements set out in paragraph 83 above.

89 As regards in particular the award of exemplary damages, such damages are based under domestic law, as the Divisional Court explains, on the finding that the public authorities concerned acted oppressively, arbitrarily or unconstitutionally. In so far as such conduct may constitute or aggravate a breach of Community law, an award of exemplary damages pursuant to a claim or an action founded on Community law cannot be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law.

90 Accordingly, the reply to the national courts must be that reparation by Member States of loss or damage which they have caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must 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 may be awarded pursuant to similar claims or actions founded on domestic law.

Extent of the period covered by reparation (question 4(b) in Case C-46/93)

91 By this question, the Bundesgerichtshof asks whether the damage for which reparation may be awarded extends to harm sustained before a judgment is delivered by the Court finding that an infringement has been committed.

92 Following from the reply to the second question, the right to reparation under Community law exists where the conditions set out in paragraph 51 above are satisfied.

93 One of those conditions is that the breach of Community law must have been sufficiently serious. The fact that there is a prior judgment of the Court finding an infringement will certainly be determinative, but it is not essential in order for that condition to be satisfied (see paragraphs 55, 56 and 57 of this judgment).

94 Were the obligation of the Member State concerned to make reparation to be confined to loss or damage sustained after delivery of a judgment of the Court finding the infringement in question, that would amount to calling in question the right to reparation conferred by the Community legal order.

95 In addition, to make the reparation of loss or damage conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to a Member State 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. Rights arising for individuals out of Community provisions having direct effect in the domestic legal systems of the Member States cannot depend on the Commission’s assessment of the expediency of taking action against a Member State pursuant to Article 169 of the Treaty or on the delivery by the Court of any judgment finding an infringement (see, to this effect, Joined Cases 314/81, 315/81, 316/81 and 83/82 Waterkeyn and Others [1982] ECR 4337, paragraph 16).

96 Accordingly, the reply to the national court' s question must be that the obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question.

The request that the temporal effects of the judgment should be limited

97 The German Government requests the Court to limit any damage to be made good by the Federal Republic of Germany to loss or damage sustained after delivery of judgment in this case, in so far as the victims did not bring legal proceedings or make an equivalent claim before. It considers that such a temporal limitation of the effects of this judgment is necessary owing to the scale of its financial consequences for the Federal Republic of Germany.

98 It must be borne in mind that, were the national court to find that the conditions for liability of the Federal Republic of Germany are satisfied in this case, the State would have to make good the consequences of the damage caused within the framework of its domestic law on liability. Substantive and procedural conditions laid down by national law on reparation of damage are able to take account of the requirements of the principle of legal certainty.

99 However, those conditions may not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation (Francovich and Others, paragraph 43).

100 In view of the foregoing, there is no need for the Court to limit the temporal effects of this judgment.

Costs

101 The costs incurred by the Danish, German, Greek, Spanish, French, Irish and Netherlands Governments, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national courts, the decision on costs is a matter for those courts.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesgerichtshof, by order of 28 January 1993, and by the High Court of Justice, Queen' s Bench Division, Divisional Court, by order of 18 November 1992, hereby rules:

[...]