

## **Resumé**

### **Member state liability for breach of EU law**

Under The Treaty on the functioning of The European union (TFEU), Member States have the primary responsibility for the application of EU law. The Commission has the authority and responsibility to ensure respect for EU law. At the end of 2008, the rules of the Treaty were supplemented by some 8200 regulations and just under 1 900 directives in force throughout the 27 Member States.

The European Court of Justice (ECJ) has developed a general principle of state responsibility for non-compliance with EU law. State liability derives from the fact that EU Member States are responsible for the implementation and enforcement of EU law. Enforcement of state liability for violations of rights granted to individuals by EU law is carried out through the national courts of the Member States.

Many EU rights, particularly those in the many directives are enforced through the doctrine of direct effect of directives: the state is liable, even where responsibility for the non-implementation of the EU directive lies with other organs of the State. The impact of directives remains limited, however, by the insistence of the ECJ on the exclusively vertical responsibility of the state (vertical direct effect) which prevents enforcement of directives against private individuals (horizontal direct effect) even where EU law imposes responsibilities on these persons.

### **Infringements of EU law**

Each Member State is responsible for the implementation of EU law (adoption of implementing measures before a specified deadline, conformity and correct application) within its own legal system. Under the Treaties (Article 258 TFEU; Article 141 of the Euratom Treaty), the Commission of the European Communities is responsible for ensuring that EU law is correctly applied. Consequently, where a Member State fails to comply with EU law, the Commission has powers of its own (action for non-compliance) to try to bring the infringement to an end and, where necessary, may refer the case to the European Court of Justice.

Member States have a general obligation to cooperate under Article 4 The European Union Treaty (EUT), which states:

“Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the

institutions of the Community. They shall facilitate the achievement of the Community's tasks".

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

For example, the refusal or failure of a Member State to respond to a Commission request for information needed to develop policy in determinate area could constitute an infringement of the Article 4 obligation. Similarly, the failure of a Member State to ensure that its national law penalizes citizens breaking EU law in the same way as those who break similar national laws may constitute an infringement by the Member State of its Article 4 obligation.

The infringement process plays an essential role in guaranteeing the correct application of the law. The latest figures show around 68% of complaints being closed before the first formal step in an infringement proceeding; around 84% of infringement procedures based on a complaint are closed before the reasoned opinion stage and around 94% before a ruling from the European Court of Justice.

In the case of directives, a Member State's failure to implement the directive by the date specified is a clear case of violation. Further, since Member States are given the 'choice of form and methods' of achieving the result required by a directive (Article 288 TFEU), the infringement may take the form of inadequate implementation of the directive.

Administrative enforcement against Member States violating EU law is through the mechanism of Article 258 TFEU. This grants the Commission the powers to investigate and bring before the European Court of Justice any EU Member State that it considers 'has failed to fulfill an obligation under this Treaty'.

The introduction by the Treaty of Maastricht of an amendment to Article 228 EC (260 TFEU), providing for financial penalties to be imposed on Member States failing to comply with previous judgements of the Court condemning violations, is intended to reinforce the consequences of Member States violating their EU obligations. Member States failing to comply with EU law face a state liability, and a compensation can be claimed by individuals in a legal action before a national court.

Member States may define the procedures governing claims for violations of EU law, such as prescribing the time limits within which claims must be made. However, such rules must comply with EU principles of equivalence and effectiveness: the procedures must be equivalent to those available for similar claims for damages under national law, and the procedures must be effective to secure that EU law is respected.

The 'useful effect' (from the French *l'effet utile*) rationale for direct effect requires a remedy where private individuals fail to respect provisions of EU law. To circumvent the limitations of the doctrine of horizontal direct effect, the ECJ developed a general principle of state responsibility for compliance with EU law. This doctrine was created by a case in the field of employment rights: *Andrea Francovich and Others v. Italian Republic*<sup>1</sup>, and the resulting principle of state liability is called the *Francovich* principle.

The elements of liability, which comprise the *Francovich* principle, that emerged from the decision of the ECJ include:

- (i) a breach of EU law;
- (ii) attributable to the Member State;
- (iii), which causes damage to an individual, and
- (iv) there is a direct causal link between the breach and the damage sustained by the individuals.

If these elements are established, compensation may be claimed in a legal action before a national court.

The principle of state liability was said to be also explicit in Article 4 EUT. It relies on a general principle of the EU legal order: that national courts must protect the rights conferred by EU law on individuals, including enforcement of these rights where the state is responsible.

The breach of EU law in the *Francovich* case itself was a violation of the EU directive by reason of the national legislator failing to act to implement it. However, total failure to implement a directive is only one type of violation of EU law. Implementation of a directive by a Member State may be partial or incorrect or inadequate. There are numerous decisions of the European Court upholding complaints against Member States for faulty implementation of a directive.

The elements of state liability was completed and generalized by *Brasserie du pêcheur and Factortame* case.

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

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<sup>1</sup> Joined Cases C-6/90 and C-9/90, [1991] ECR I-5357.

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.

Violations of EU law by different organs of the state will engage liability; the state is responsible for acts of public law bodies or others to which the state has delegated the performance of its responsibilities. For example, the Court has held that failure to transpose a directive into national law within the prescribed time limit amounts of itself to a sufficiently serious breach, giving rise to state liability (*Dillenkoffer and others v. Federal Republic of Germany*<sup>2</sup>).

The principle of state responsibility has potentially far-reaching implications for the enforcement of EU law. If an individual has a definable interest protected by the directive, failure by the state to act to protect that interest may lead to state liability where the individual suffers damage, provided causation can be demonstrated.

### **Judicial enforcement of EC law**

A judicial system whereby individuals seeking remedies before national tribunals and courts could rely upon EU law is necessary for the enforcement of EU law. The model for judicial enforcement of EU law could have followed one of at least two tracks.

Enforcement of EU law could have been left entirely to the national judicial system of each Member State, using the national system of remedies, procedures and sanctions to enforce EU law.

Alternatively, the attempt might be made to create an entirely original form of judicial system. This would mean developing a new and uniform EU law on remedies, procedures and sanctions, to which the national judicial systems of all Member States must conform. This solution would require the EU institutions to prescribe a system of harmonised rules on enforcement covering remedies for infringements of EU law, procedures and sanctions. The legislative organs of the EU have refused to do so; there is lacking a consensus among Member States that this is either necessary or desirable.

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<sup>2</sup> Cases C-178-9/94, 188-190/94 [1996].

EU law has not provided for specific remedies to be available in national courts in case of infringements of EU law. The European Court of Justice (ECJ) has no opportunity to develop such remedies since it cannot itself adjudicate on complaints by individuals that rights under EU law have been violated. Instead, minimum standards for remedies to be provided by national courts have been developed through the requests by national courts for preliminary rulings under Article 267 TFEU.

Different national legal systems provide a variety of remedies for infringements of laws. While the ECJ has recognised the necessity for enforcement of EU law in national courts. The ECJ has attempted to maintain equilibrium between the autonomy of national systems to enforce EU law and the imperative of effective and uniform enforcement of EU law across all Member States. Referring to the third paragraph of Article 249 EC (288 TFEU), the Court held: ‘Although that provision leaves Member States to choose the ways and means of ensuring that the directive is implemented, that freedom does not affect the obligation imposed on all the Member States to which the directive is addressed, to adopt, in their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective that it pursues’ (*Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83). The ECJ has moved in the direction of scrutinising national systems of judicial protection of EU rights by laying down some general principles regarding the adequacy of national laws on remedies. These include the principle of equivalence of EU law remedies to national remedies, and the requirement that remedies for infringements of EU law be effective. National autonomy as regards enforcement of EU law is subject to these principles.

The State must make good the consequences of the loss or damage caused by the breach of EU 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 EU law.

The failure of the legislative organs of the EU to develop an EU judicial system has to some extent been compensated for by the efforts of the European Court of Justice (ECJ). The ECJ has developed a role for the national judicial systems in securing enforcement of EU law. Article 4 EUT sets out Member State obligations regarding compliance with EU law.

National judiciaries are also organs of the Member States, and, as such, incur responsibility for ensuring fulfillment of the Article 4 obligation. A link was created between the European Court of Justice and national judiciaries, using the Article 267 TFEU preliminary reference procedure. This was used to develop uniform rules for the enforcement of EU law through an EU judicial system. National courts were recast as part of a supra-national judicial hierarchy, with the European Court at its apex.

Article 267 TFEU was the instrument enabling the ECJ to develop an EU judicial system. Article 267 provides that, on questions of EU law, any ‘court or tribunal may if it considers that a decision on the question is necessary to enable it to give judgment, require the Court of Justice to give a ruling thereon’. This intervention in national judicial systems allowed any courts, including lower courts, to make direct references to the ECJ. The ECJ was given a specific position within national judicial systems by the last paragraph of Article 267 TFEU: ‘Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.’

These provisions were the constitutional basis allowing for the integration of the ECJ into Member State judicial systems and the eventual recasting of these national systems as part of a supranational EU judicial system for the enforcement of EU law.

### **National procedural autonomy – *res judicata* principle**

Legal certainty is one of a number of general principles recognized by EU law. Finality of an administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies, contributes to such legal certainty and it follows that EU law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way.

The question of the possibility to reopen final decision of national administrative body, if the decision is in breach of EU law, was laid down by *Kühne & Heitz* case (C-453/00).

The Court held that the principle of cooperation arising from Article 10 EC (4 EUT) imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where

- (i) under national law, it has the power to reopen that decision;
- (ii) the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;

(iii) that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of EU law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and

(iv) the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.