

# The Implementation of Decisions of the ECJ and of the EFTA Court in Member States’ Domestic Legal Orders

CARL BAUDENBACHER<sup>†</sup>

## SUMMARY

I.	INTRODUCTION.....	384
II.	EFFECT OF EUROPEAN LAW IN THE MEMBER STATES’ LEGAL ORDERS .....	384
	A. <i>The “Transformation of Europe”</i> : EC Law Direct Effect and Primacy .....	384
	B. <i>The “Surest Legally Enforceable Mechanism for Promoting Member State Compliance”</i> : EC Law State Liability.....	385
	C. <i>Facets of a Constitutional Order in the EEA Agreement</i> .....	386
III.	IMPLEMENTATION OF PRELIMINARY RULINGS.....	388
	A. <i>Right and Duty to Refer</i> .....	388
	B. <i>Noncompliance with the Duty to Refer by EC States’ Courts of Last Resort in Particular</i> .....	390
	C. <i>Effect of ECJ Rulings</i> .....	396
	1. General.....	396
	2. Referring EC States’ Courts Deviating from Preliminary Rulings .....	398
	3. EC State Courts Deviating from Existing ECJ Case Law .....	399
	D. <i>State Liability Cases in Particular</i> .....	401
	1. General.....	401
	2. Restriction of Damages by the National Legal Framework .....	401
	3. What is the Role of the ECJ in Applying the Conditions to the Facts? .....	402
	4. Cases in Which Plaintiffs Left the National Courts Empty Handed .....	407
	5. Conclusions.....	410
	E. <i>The Consequences of Noncompliance with the Duty to Refer</i> .....	410
	F. <i>The Legal Situation in the EEA/EFTA</i> .....	411
	1. General.....	411
	2. Which Cases are Referred Under the Preliminary Reference Procedure?.....	412
	3. Compliance with EFTA Court Rulings .....	412
	4. State Liability in Particular .....	413
IV.	IMPLEMENTATION OF INFRINGEMENT RULINGS.....	414
	A. <i>EC</i> .....	414
	B. <i>EEA/EFTA</i> .....	415
V.	CONCLUSIONS .....	416

---

<sup>†</sup> President of the EFTA Court.

## I. INTRODUCTION

According to classical public international law, the effect international law produces in municipal law depends on whether a given country's constitution adheres to monism or to dualism. Hence, it is for the single domestic legal order to decide on such effect. This article will first describe how that issue is dealt with in the law of the European Community (EC) and of the European Economic Area (EEA). It will then turn to the question of how and to what extent preliminary rulings of the Court of Justice of the European Communities (the ECJ) are being implemented in the domestic legal orders of the Member States, in particular by national courts. The respective problem will also be discussed with regard to preliminary rulings of the Court of Justice of the European Free Trade Association (the EFTA Court). The last part will deal with the implementation of judgments rendered by the ECJ and the EFTA Court in which an infringement of EC or EEA law by a Member State has been found. Finally, some conclusions will be drawn. Many of the judgments of national courts of EC Member States discussed in this article have been reported in the Commission's Annual Surveys on the Application of Community Law by National Courts of the Member States, which are based on the data gathered by the ECJ's Research and Documentation Department. Some 1,200 judgments relating to Community law have come to the department's attention in recent years.

## II. EFFECT OF EUROPEAN LAW IN THE MEMBER STATES' LEGAL ORDERS

### A. *The "Transformation of Europe":<sup>1</sup> EC Law Direct Effect and Primacy*

The ECJ held as early as 1963 that the Community constitutes a unique "new legal order" instead of just another agreement under traditional public international law and that the rules of primary law are eligible for producing direct effect provided that they are clear (which later became "sufficiently precise") and unconditional. The Court rejected the arguments of several governments that the Treaty is addressed to the Member States and not to individuals and that infringements of the Treaty provisions are to be exclusively remedied by former Articles 169 and 170 EEC (now Articles 226 and 227 EC). Instead, it held that direct effect amounts to granting individual rights that the national courts must protect.<sup>2</sup> Direct effect was later extended *mutatis mutandis* to acts of secondary law.<sup>3</sup> Of those, the issue of the effect of nontransposed or misimplemented directives is most famous; the discussion, which cannot be taken up here, has still not come to an end.<sup>4</sup> For the time being, it appears to be safe to assume that provisions of directives may have direct effect provided that they are "unconditional and sufficiently precise" and that they concern

---

1. See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2403 (1991) (reviewing the "constitutionalization" of the European Community, the development of the EC's doctrine of direct effect, and the use of judicial review at both the Community and Member State level).

2. Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Admin.*, 1963 E.C.R. 1, 13, [1963] 2 C.M.L.R. 105 (1963).

3. See, e.g., Case 34/73, *F.Ili Variola SpA v. Amministrazione Italiana delle Finanze*, 1973 E.C.R. 981, 990 (concerning regulations); Case 41/74, *Duyn v. Home Office*, 1974 E.C.R. 1337, 1349, [1975] 1 C.M.L.R. 1 (1975) (concerning directives).

4. See, e.g., *Joined Cases C-397 & C-403/01, Pfeiffer v. Deutsches Rotes Kreuz* (E.C.J. Oct. 5, 2004), at <http://europa.eu.int>.

the vertical relationship between a Member State and an individual or an economic operator.<sup>5</sup>

In its second landmark decision, *Costa v. ENEL* in 1964, the Court found that Community law takes primacy over national law. It considered that the “executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty . . . and giving rise to . . . discrimination.”<sup>6</sup> The ECJ later clarified that Community law has the same status in relation to national constitutions.<sup>7</sup> Further, the ECJ held that the courts of the Member States are obliged to interpret national law enacted before or after the adoption of a directive in conformity with the latter.<sup>8</sup> Through this case law, the ECJ has established a monist system in EC law. Monism does not thereby follow from a decision of a Member State’s law, but from Community law itself. EC law is no longer a part of international law: it is supranational in nature.

*B. The “Surest Legally Enforceable Mechanism for Promoting Member State Compliance”:<sup>9</sup> EC Law State Liability*

In 1991, the ECJ recognized state liability of Member States as a principle of EC law in its judgment in the *Francovich* case.<sup>10</sup> This principle was clarified five years later in the judgment in the joined cases *Brasserie du Pêcheur/Factortame*.<sup>11</sup> The ECJ emphasized that there were no provisions of the Treaty expressly governing the consequences of breaches of EC law. For this reason, reference had to be made to the general principles of the legal systems of the Member States. Furthermore, Article 288 EC, the provision dealing with the noncontractual liability of the EC, was held to express a general principle familiar to the legal systems of the Member States.

In *Francovich*, the ECJ acknowledged that the principle of state liability for legislative wrongdoing is inherent in EC law. Italy had failed to implement the Insolvency Directive on time. The ECJ found that Member States were obliged to make good such loss that occurred due to the nonimplementation of the directive and consequently, the nonexistence of a compensation fund. The respective provision of the directive was not able to produce direct effect. In the *Brasserie du Pêcheur* case, the ECJ principally held that the state liability doctrine applies also to violations of primary law and that a Member State may also be liable if the infringed provision has direct effect.<sup>12</sup> Accordingly, a state is liable if three conditions are fulfilled: First, the infringed provision must entail the grant of rights to individuals. The content of those rights must be capable of being identified on the

5. Case C-91/92, *Dori v. Recreb Srl*, 1994 E.C.R. I-3325, I-3354–58, [1995] 1 C.M.L.R. 665 (1995); Case 152/84, *Marshall v. Southampton & S.W. Hampshire Area Health Auth. (Teaching)*, 1986 E.C.R. 723, 748–50, [1986] 1 C.M.L.R. 688 (1986).

6. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 594, [1964] 3 C.M.L.R. 425 (1964).

7. See Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1134, [1972] 11 C.M.L.R. 255 (1972).

8. Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentación SA*, 1990 E.C.R. I-4135, I-4159, [1992] 1 C.M.L.R. 305 (1992).

9. George A. Bermann, *Member State Liability in the Member State’s Own Court: An American Law Comparison*, in *UNE COMMUNAUTE DÉ DROIT: A FESTSCHRIFT FOR PRESIDENT GIL CARLOS RODRÍGUEZ IGLESIAS* 305, 305 (2003).

10. Joined Cases C-6 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, I-5413–14, [1993] 2 C.M.L.R. 66 (1993).

11. Joined Cases C-46 & C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany*, 1996 E.C.R. I-1029, I-1141–46, [1996] 1 C.M.L.R. 889 (1996).

12. See *id.* at I-1142–43.

basis of the infringed provision. Second, the ECJ requires a sufficiently serious breach of EC law. The nature of the breach depends in particular on the degree of discretion open to the acting institution or the clarity or ambiguity of the law. Third, the existence of a causal link between the breach of the state's obligation and the harm suffered by the injured party must be present. Compensation may also be due under the principles developed by the ECJ for administrative wrongdoing. In the recent *Köbler* case, the ECJ has even recognized the principle of Member State liability for judicial wrongdoing, i.e., infringements by courts adjudicating at the last instance.<sup>13</sup> According to the Court, a state that incurs liability for breaches of an international commitment is to be viewed as a single entity, including that state's judiciary. The ECJ furthermore stressed the essential role played by the latter in the protection of individual rights and in warranting the effectiveness of Community rules. However, the Court, having regard to the "specific nature of the judicial function and to the legitimate requirements of legal certainty," stressed that the second condition for state liability, the existence of a "sufficiently serious breach," is to be understood as a "manifest infringement" of Community law, including the Court's own case law.<sup>14</sup> The ECJ also made clear that an infringement will only be manifest in exceptional circumstances.

### C. *Facets of a Constitutional Order in the EEA Agreement*

The Agreement on the European Economic Area, or the EEA Agreement, which was concluded in 1992 and entered into force in 1994, extends the internal market established within the European Union to the EFTA states of Iceland, Liechtenstein, and Norway.<sup>15</sup> EEA law is essentially identical in substance to EC law. Specific homogeneity provisions are intended to ensure a homogeneous interpretation of the law throughout the EEA.<sup>16</sup> From early on, the question has been discussed as to whether it follows from the homogeneity goal informing the EEA Agreement that the principles of direct effect, primacy, and state liability also form part of EEA law. The EEA Agreement contains regulations that at first sight seem to speak in favor of a dualist approach. Article 7 EEA states that acts corresponding to an EEC regulation are not directly applicable but shall be made part of the internal legal order of the EFTA states.<sup>17</sup> Furthermore, Protocol 35 stipulates that the aim of achieving a homogeneous European Economic Area, based on common rules, does not require the Contracting Parties to transfer legislative powers to any institution of the EEA.<sup>18</sup> On the other hand, the EEA Agreement emphasizes on a number of occasions that the protection of individual rights is of paramount importance and that the Contracting Parties are under a duty to loyally cooperate within the framework of the EEA Agreement.<sup>19</sup> The EFTA Court went for what may be called quasi-direct effect, quasi-primacy, and full state liability. It held in its very first case, *Restamark*, on December 14,

---

13. Case C-224/01, *Köbler v. Austria*, paras. 34–36, (E.C.J. Sept. 30, 2003), at <http://europa.eu.int>. The ECJ previously held in *Brasserie du Pêcheur* that the principle of state liability "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." *Brasserie du Pêcheur*, 1996 E.C.R. at I-1145.

14. Case C-224/01, *Köbler v. Austria*, para. 54, (E.C.J. Sept. 30, 2003), at <http://europa.eu.int>.

15. Agreement on the European Economic Area, May 2, 1992, 1994 O.J. (L 1) 3 [hereinafter EEA Agreement], available at <http://secretariat.efta.int/Web/EuropeanEconomicArea/EEAAgreement/EEAAgreement/EEA%20Agreement.pdf> (last visited Mar. 27, 2005).

16. See, e.g., Case C-452/01, *Ospelt v. Austria*, para. 29, (E.C.J. Sept. 23, 2003), at <http://europa.eu.int>.

17. EEA Agreement, *supra* note 15, art. 7(a).

18. Protocol 35 to the European Economic Area Agreement, available at [http://secretariat.efta.int/Web/EuropeanEconomicArea/EEAAgreement/protocols/changed\\_protocols/protocol35.pdf](http://secretariat.efta.int/Web/EuropeanEconomicArea/EEAAgreement/protocols/changed_protocols/protocol35.pdf) (last visited Mar. 27, 2005).

19. EEA Agreement, *supra* note 15, art. 3.

1994, that individuals and economic operators must be “entitled to invoke and to claim at the national level any rights that could be derived from provisions of the EEA Agreement, as being or having been made part of the respective national legal order, if they are unconditional and sufficiently precise.”<sup>20</sup> In its 2002 *Einarsson* judgment, the Court found that such provisions take precedence over conflicting provisions of national law.<sup>21</sup> Effect and primacy of implemented rules follow from EEA law. Moreover, in the 2002 *Karlsson* case, the EFTA Court held in dicta that national courts have to consider any relevant element of EEA law, whether implemented or not, when interpreting national law.<sup>22</sup> Again, this obligation follows from EEA law.<sup>23</sup> Overall, it is fair to say that even if EC-style direct effect and primacy are as such lacking in EEA law, homogeneity has not been impaired in this field. The EEA Agreement has been implemented in the domestic legal orders of the EFTA states. EEA secondary law is being implemented in an ongoing process. There has, to this writer’s knowledge, never been a case in which a national court refused to set aside a conflicting rule of domestic law, at least not in a vertical context.<sup>24</sup>

In its 1998 *Sveinbjörnsdóttir* ruling, the EFTA Court found that the principle of state liability for breaches of EEA law must be assumed to be part of that law.<sup>25</sup> Iceland had mis-implemented the Insolvency Directive (i.e., the “*Francovich*” Directive).<sup>26</sup> The EFTA Court confirmed its stance in its *Karlsson* judgment of May 30, 2002, and made it clear that the conditions of state liability in EEA law are as strict as in EC law.<sup>27</sup> Iceland had not abolished its state alcohol import monopoly until December 1, 1995, and thereby infringed its obligations under the EEA Agreement, namely under Article 16 EEA—the provision mirroring Article 31 EC.

In *Rechberger*, the ECJ was, inter alia, asked by the Landesgericht Linz, the regional court of Linz, Austria, whether the principle of state liability applied in Austria after January 1, 1994, in view of the fact that Austria had become part of the EEA on that date.<sup>28</sup> Austria had not implemented the Package Tour Directive in good time and travelers had suffered damage. The Court declared itself not competent to rule on a question of interpretation related to the application by Austria of the EEA Agreement during the period preceding its accession to the Community.<sup>29</sup> The Court went on, however, by stating that “in view of the objective of uniform interpretation and application which informs the EEA Agreement, it should be pointed out that the principles governing the liability of an EFTA state for infringement of a directive referred to in the EEA Agreement were the subject of the EFTA Court’s judgment of December 10, 1998, in *Sveinbjörnsdóttir*.”<sup>30</sup> On the same day, the ECJ rendered a second judgment dealing with the same legal issue in *Andersson*.<sup>31</sup> In 1994, when Sweden was an EFTA state party to the EEA, it had misimplemented the Insolvency Directive. Two workers had suffered

20. Case E-1/94, *Kustannus v. Restamark*, 1994–95 REP. EFTA CT. 17, 32.

21. Case E-1/01, *Einarsson v. Iceland*, 2002 REP. EFTA CT. 3, 13.

22. Case E-4/01, *Karlsson v. Iceland*, 2002 REP. EFTA CT. 240, 249.

23. *See id.*

24. In its *Finanger* judgment, the Norwegian Supreme Court declared itself unable to set aside a clear provision of Norwegian law that conflicted with the EEA Motor Vehicle Insurance Directives. The court emphasized that the judgment was given in a horizontal context. Case 55/1999, Rt. 2000, at 1811 (S. Ct., Nov. 16, 2000) (Nor.), translated in EUROPEAN COURTS PROCEDURE 3.042 (2002).

25. Case E-9/97, *Sveinbjörnsdóttir v. Iceland*, 1998 REP. EFTA CT. 95, 109–13.

26. Council Directive 80/987/EEC of 20 October 1980 on the Approximation of the Laws of the Member States Relating to the Protection of Employees in the Event of the Insolvency of Their Employer, 1982 O.J. (L 283) 23 [hereinafter Council Directive 80/987/EEC], amended by Council Directive 87/164, 1987 O.J. (L 66) 11.

27. *Karlsson*, 2002 REP. EFTA CT. at 249–50.

28. Case C-140/97, *Rechberger v. Austria*, 1999 E.C.R. I-3499.

29. *Id.* at I-3537.

30. *Id.* at I-3538.

31. Case C-321/97, *Andersson v. Sweden*, 1999 E.C.R. I-3551.

damage and sued the Swedish State. Again, the ECJ denied its competence to rule on the question of interpretation related to the application by a Member State of the EEA Agreement during the period preceding its accession to the Community, i.e., whether the Swedish State was liable to cover damage caused to individuals and economic operators by misimplementing a directive.<sup>32</sup> However, unlike in *Rechberger*, the ECJ did not quote the EFTA Court's *Sveinsbjörnsdóttir* ruling. One will notice that the composition of the Court was slightly different from the one in *Rechberger*.

### III. IMPLEMENTATION OF PRELIMINARY RULINGS

#### A. *Right and Duty to Refer*

According to Article 234 EC, the ECJ renders, upon request by a national court of an EC Member State, preliminary rulings concerning questions related to the interpretation of EC law and the validity of acts of the institutions which have been raised in national proceedings.<sup>33</sup> The aim of this procedure is to guarantee a uniform interpretation and application of EC law by the courts throughout the Community. The Article 234 EC procedure is a cooperation procedure providing for a sharing of tasks between the ECJ and the national court.<sup>34</sup> Whereas any national court has the *right* to refer if it considers an answer to a certain question necessary in order to deliver judgment, courts against whose decisions there are no judicial remedies under national law are under a *duty* to refer.

The obligation on national courts of last resort to refer questions of Community law to the ECJ has been softened by the *acte clair* doctrine, which the ECJ acknowledged in its famous *CILFIT* judgment.<sup>35</sup> According to that doctrine, a national court against whose decisions there is no remedy under national law may refrain from seeking a ruling by the ECJ if the question concerning the interpretation of Community law raised before it is not relevant for the outcome of the case, if the ECJ has in previous cases already dealt with the point of law in question, and—most importantly—if “the correct application of Community law [is] so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.”<sup>36</sup> The *acte clair* doctrine was formulated in 1982, most likely in view of the ECJ's increasing caseload. It was criticized at the time as implying circular reasoning. Advocate General Capotorti stated that:

[b]efore a provision can be applied to a specific case, it is always necessary, from a logical and practical point of view, to determine its meaning and scope, failing which it is impossible to establish whether it is applicable to the case in question or to infer from its terms all the implications for that case . . . the oft-repeated Latin maxim “*in claris not fit interpretatio*” should be abandoned since it is through the interpretation of a provision that it is possible to ascertain whether its meaning is clear or obscure.<sup>37</sup>

---

32. *Id.* at I-3590–92.

33. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10 1997, art. 234, O.J. (C 340) 3 (1997), available at [http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E\\_EN.pdf](http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf) (last visited Mar. 31, 2005).

34. *See, e.g.*, Case C-393/98, Valente v. Fazenda Pública, 2001 E.C.R. I-1327.

35. Case C-283/81, Srl CILFIT v. Ministry of Health, 1982 E.C.R. 3415.

36. *Id.* at 3430.

37. *Id.* at 3436.

These considerations are logically correct. But they have been made obsolete by reality, in particular by the ECJ's being notoriously overburdened.

Today, national supreme courts apply an even broader *acte clair* doctrine. German Supreme Court (the Bundesgerichtshof) Judge Joachim Bornkamm stated at this conference last year:

Today it is widely accepted that the functioning of the ECJ would be jeopardized if the courts of last resort would follow the ruling in *CILFIT* and would refer all cases in which the interpretation of the Treaty or of a European directive of regulation was at stake and the answer was not absolutely obvious. The functioning of the ECJ would even be made impossible if the lower courts would make use of their discretionary power to refer such cases to Luxembourg.<sup>38</sup>

To illustrate his point, Judge Bornkamm mentioned that out of more than 250 trademark cases decided by the Bundesgerichtshof in the last nine years, only nine were referred to the ECJ.<sup>39</sup> And this had occurred despite the fact that the Bundesgerichtshof does not have a reputation of avoiding references in this field.<sup>40</sup> One will notice in this context that preliminary-ruling proceedings last 25.5 months on average.<sup>41</sup> That means that in certain cases, the parties must wait more than three years. As compared to the original *CILFIT* doctrine, the tide has turned. Moreover, national (supreme) courts of EC Member States have acquired expertise over the years and are nowadays Community courts to a much greater extent than they used to be twenty years ago. The practice of the ECJ has stayed abreast of these changes in expecting from national courts that do refer under the Article 234 EC procedure a proposal on how they think the ECJ should answer their questions.

Even if one will allow national courts a discretion that goes beyond what has been said in *CILFIT*, there appears to be a difference in attitude between the courts of last resort of the six founding Member States—Belgium, France, Germany, Italy, Luxembourg, and the Netherlands—and the ones of the countries that have joined the Community since. There are relatively few requests by the courts of the United Kingdom, although the number has been increasing over the last years. It has been said that in a culture in which the judge makes the law, “passing the resolution of the dispute to another authority may be viewed as indecisiveness” and that English courts appear to subject requests to a cost-benefit analysis that takes into account the likelihood of getting it wrong in case of nonreference as well as the impact of a request on the length of proceedings.<sup>42</sup> An example of the latter is provided by the *Three Rivers District Council* case, in which the House of Lords examined provisions of the First Banking Directive and came to the conclusion that the likelihood of a wrong interpretation was so small that the disadvantages of a reference to the ECJ in terms of cost and delay were outweighed.<sup>43</sup> The courts of last resort of the Scandinavian EC countries—Denmark, Finland, and Sweden—seem to be reluctant to seize

---

38. Joachim Bornkamm, *The German Supreme Court: An Actor in the Global Conversation of High Courts*, 39 TEX. INT'L L.J. 415, 426 (2004) (footnote omitted).

39. *Id.*

40. *Id.*

41. COURT OF JUSTICE OF THE E.C., ANNUAL REPORT 222 (2003), <http://curia.eu.int/en/instit/presentationfr/rapport/stat/st03cr.pdf> (last visited Mar. 7, 2005).

42. Takis Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure*, 40 COMMON MKT. L. REV. 9, 38 (2003).

43. *Three Rivers Dist. Council v. Bank of England*, [2000] 2 W.L.R. 1220, 1258 (H.L. 2000).

upon the jurisdiction of the ECJ.<sup>44</sup> At the same time, it must be borne in mind that the Commission has brought far more lawsuits for noncompliance with Community law against Italy, France, the United Kingdom, and Germany than against Nordic countries.<sup>45</sup> The Spanish Supreme Court (the Tribunal Supremo) also does not have a reputation of being keen to refer. But Spain is the only Mediterranean EC Member State that, according to a recent study, does not have the reputation of frequently breaching Community law. A peculiar position is taken by the Austrian courts. In absolute figures, Austrian courts have, in the first ten years of their country's EC membership, referred the highest number of cases per capita to the ECJ of all the EC countries. But that does not in of itself guarantee that the "right" cases are sent to Luxembourg. The following examples are obviously selective. They are partly taken from the Commission's Annual Report Monitoring the Application of Community Law in the National Courts of the Member States and partly from academic literature. One case (the *Dyed Jeans* case from the German Bundesgerichtshof) appears to have not been dealt with in the literature, but in this writer's view, the Bundesgerichtshof has clearly infringed its obligation under Article 234(3) EC.

That a reference to the ECJ will cause considerable delay seems to cause general concern in interlocutory proceedings. In a case before the French Conseil d'Etat, the government advocate argued that in the light of the unclear scope of Article 6 of Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts, the court may be tempted to make a reference to the ECJ under the Article 234 EC procedure.<sup>46</sup> He nevertheless recommended that no reference should be made since the preliminary ruling procedure was time consuming and therefore incompatible with the need for a quick decision in precontractual interlocutory proceedings in public procurement cases before the Conseil d'Etat.<sup>47</sup> The Conseil d'Etat followed those submissions.

*B. Noncompliance with the Duty to Refer by EC States' Courts of Last Resort in Particular*<sup>48</sup>

An example of obvious noncompliance with the duty to refer is provided by a judgment of the Austrian Supreme Court of August 1, 2003.<sup>49</sup> Two parties residing in Germany had concluded a contract that contained a clause stating that conflicts arising from that contract were to be dealt with by the court of Linz in Austria. The Supreme Court had to give an interpretation of Article 23 of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. That provision states under the heading "prorogation of jurisdiction":

If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any

---

44. See Hans Petter Graver, *The Effects of EFTA Court Jurisprudence on the Legal Orders of the EEA/EFTA States*, in *THE EFTA COURT: TEN YEARS ON* (Carl Baudenbacher et al. eds., forthcoming June 2005).

45. See sources cited *infra* note 201.

46. Sixteenth Annual Report on Monitoring the Application of Community Law, COM(99)301 final, annex 6, at 253 [hereinafter Sixteenth Annual Report], [http://europa.eu.int/comm/secretariat\\_general/sgb/infringements/pdf/annexe6\\_rap98\\_en.pdf](http://europa.eu.int/comm/secretariat_general/sgb/infringements/pdf/annexe6_rap98_en.pdf) (last visited Mar. 7, 2005).

47. *Id.*

48. The Commission, as the guardian of the EC Treaty, is in charge of ensuring compliance with EC law. Every year, the Commission publishes an annual report on the application of Community law. *E.g., id.* Annex V of the reports reviews judgments of the ECJ not yet implemented. Annex VI surveys the application of Community law by national courts. The annual reports are compiled and available on the European Commission website: [http://www.europa.eu.int/comm/secretariat\\_general/sgb/droit\\_com/index\\_en.htm](http://www.europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm).

49. 126 JURISTISCHE BLÄTTER 187 (2004).

disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise . . .<sup>50</sup>

The Supreme Court reasoned that from a textual perspective, the agreement on prorogation of jurisdiction appeared to be valid since both parties had their residence in Germany. It decided, however, to subject the text of Article 23(1) to a teleological reduction because it could not be assumed that the drafters of the regulation had intended to give that provision a meaning that would cover purely national litigation having no connection with a foreign country and that therefore lacked any internationality. This interpretation, the Supreme Court went on to state, was so obviously correct that there was no room for a reasonable doubt. In other words, there was an *acte clair* which made a reference to the ECJ superfluous. In doing so, the Supreme Court made reference to a number of scholars that allegedly shared its opinion. It is, however, more than doubtful that the conditions of there being an *acte clair* were fulfilled in this case. One could easily come to the conclusion that a cross-border prorogation from Germany to Austria is per se international. Moreover, it appears that academics are deeply split over the issue. In light of the fact that the Supreme Court decided against the text of Article 23 of the Regulation in question, a reference would have been mandatory. The Supreme Court's ruling could even lead to a denial of justice if the courts of another Member State came to the opposite result by concluding that the prorogation of jurisdiction of Austrian courts is valid with the consequence that these courts have exclusive competence under the Regulation.<sup>51</sup>

German courts are generally among those who play by the rules. But here too there are exceptions. In a Brussels Convention case, the German Bundesgerichtshof refused to seize the ECJ of jurisdiction under the Article 234 EC procedure.<sup>52</sup> The plaintiff, an Italian company, claimed payment of 33,925 German marks for having supplied garments to a German dealer. The plaintiff had obtained a judgment by default in a German court. In a notice of opposition against that judgment, the defendant declared a set off with claims of the plaintiff's former German dealer who had ceded those claims to the defendant. The defendant argued that the agency agreement between the plaintiff and the former agent had lasted from December 15, 1980, until March 22, 1990, and that the former agent had the right to compensation for loss of clientele. The Italian plaintiff contested the international jurisdiction of the German courts for the claims in question. The first instance court upheld the judgment by default. It denied jurisdiction for the set off claims and held that these claims could only be dealt with by the Italian courts. The court of appeal upheld this decision and the Bundesgerichtshof affirmed. It argued that international jurisdiction is determined by the Brussels Convention. According to that Convention's Article 2(1), the Italian courts would be competent because the plaintiff had its seat in Italy. Another competence could, however, result from Article 5(1) of the Brussels Convention. Under that provision, a person resident in the territory of a Convention party can be brought before the courts of another party if a contract or claims resulting from a contract are the subject of the proceedings in the court of the place where the obligation has been fulfilled or should be fulfilled. The Bundesgerichtshof, in its judgment of May 12, 1993, found that the Brussels Convention did not contain an explicit provision on a set-off defense. Declaring a set off, the Bundesgerichtshof said, was, however, similar to a defense whereby

---

50. Council Regulation No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1, 8.

51. See Thomas Klicka, 126 JURISTISCHE BLÄTTER 188 (2004).

52. *Unzulässigkeit der Prozeßaufrechnung mit Streitigen und Inkonnexen Gegenforderungen im Bereich des EuGVÜ*, 27 NEUE JURISTISCHE WOCHENSCHRIFT 2753 (1993).

the counterclaim is brought by way of a cross-suit in pending proceedings. In such a case, Article 6(3) of the Brussels Convention prohibits the bringing of unrelated counterclaims before the internationally incompetent court. If, however, such a counterclaim could not even be brought by way of a cross-suit, this had to be ruled out a fortiori if the counterclaim was made by a declaration of set off. The Bundesgerichtshof added that a reference on how to construe Article 6(3) of the Brussels Convention was not necessary. Although the ECJ had not expressed itself on the issue, the correct interpretation of Community law was so obvious that there was no room for reasonable doubt. The Bundesgerichtshof referred to the ECJ's *CILFIT* decision and expressed its conviction that the courts of the other parties to the Convention as well as the ECJ shared its opinion. Just three months later, the ECJ came to the opposite result in *Danværn Production A/S v. Schuhfabriken Otterbeck GmbH & Co.*<sup>53</sup> The Danish Vestre Landsret (the Western High Court of Denmark), considering that the proceedings raised an issue of interpretation of the Brussels Convention, referred the question to the ECJ for a preliminary ruling on whether Article 6(3) covered counterclaims for set offs. According to the ECJ, the national laws of the Contracting States generally distinguish between one situation "where the defendant pleads, as a defence, the existence of a claim he allegedly has against the plaintiff, which would have the effect of wholly or partially extinguishing the plaintiff's claim" and another "where the defendant, by a separate claim made in the context of the same proceedings, seeks a judgment or decree ordering the plaintiff to pay him a debt."<sup>54</sup>

Procedurally, a defence is an integral part of the action initiated by the plaintiff and therefore does not involve the plaintiff being "sued" in the court in which his action is pending, within the meaning of Article 6(3) of the Convention. The defences which may be raised and the conditions under which they may be raised are determined by national law.

Article 6(3) of the Convention is not intended to deal with that situation.

By contrast, a claim by the defendant for a separate judgment or decree against the plaintiff presupposes that the court in which the plaintiff has brought proceedings also has jurisdiction to hear such an application.

Article 6(3) is specifically intended to establish the conditions under which a court has jurisdiction to hear a claim which would involve a separate judgment or decree.<sup>55</sup>

The ECJ therefore answered the national court's question by responding that Article 6(3) of the Convention applies only to claims by defendants who seek the pronouncement of a separate judgment or decree but does not apply to the situation where a defendant raises, as a pure defense, a claim which he allegedly has against the plaintiff. The defenses that may be raised and the conditions under which they may be raised are governed by national law.

In a case regarding the distinction between medicines and foodstuffs, respectively dietary supplements, the German Bundesgerichtshof considered that the EC rules were clear enough and declined to request a preliminary ruling from the ECJ.<sup>56</sup> Referring to the

---

53. Case C-341/93, *Danværn Prod. A/S v. Schuhfabriken Otterbeck GmbH*, 1995 E.C.R. I-2053, I-2075-77.

54. *Id.* at I-2075.

55. *Id.* at I-2076.

56. Twentieth Annual Report, *supra* note 75, annex 5 (discussing Bundesgerichtshof judgments of July 11, 2002, *Sportlernahrung* and *Muskelaufbaupräparate*).

definition of medicine in the second paragraph of Article 1 of Council Directive 65/65<sup>57</sup> and the case law of the ECJ,<sup>58</sup> the Bundesgerichtshof held that the concept of medicine must be interpreted broadly enough to cover all substances capable of affecting the actual functioning of the human organism. It observed that it was for the national authorities, subject to judicial review, to determine whether a product was or was not medicine. The entry into force of Regulation No. 178/2002 laying down the general principles and requirements of food law had no impact on the demarcation line between foodstuffs and medicines as the regulation merely introduced the concept of medicine as defined by Directive 65/65 into food law.<sup>59</sup> The Bundesgerichtshof concluded that there was no need for a reference to the ECJ. One may again ask the question of whether the interpretation of the national court was clear enough not to leave any scope for doubts.

In a case on the lawfulness of the parallel importation of dyed jeans, the Bundesgerichtshof, in this writer's view, clearly infringed its obligation under Article 234(3) EC.<sup>60</sup> The issue at stake was whether the Trademark Directive allowed for the international exhaustion of trademark rights or whether it required the Member States to limit exhaustion to instances where parallel imports have been put into circulation in the EEA. This question had been highly controversial in the academic and political debate after the enactment of Article 7(1) of the Trademark Directive.<sup>61</sup> According to that provision, the trademark shall not entitle the proprietor to prohibit its use in relation to goods that have been put on the market in a Member State under that trademark by the proprietor or with his consent.<sup>62</sup> The German legislature had implemented that article by copying it word for word from Section 24(1) of the 1994 Trademark Act (*Markengesetz*). The Bundesgerichtshof found that the Directive prevented EC Member States from opting for international exhaustion of trademarks without referring the question to the ECJ.<sup>63</sup> It is to be noted that at the same time the Austrian Supreme Court referred a very similar question that then led to the well-known judgment of the ECJ in *Silhouette*.<sup>64</sup> With its judgment in *Dyed Jeans*, the German Bundesgerichtshof, which had so far been the bulwark against attempts to bring down the principle of international exhaustion in trademark law had set the ball rolling.<sup>65</sup> The finding that this particular legal question would have

---

57. Council Directive 65/65 of 26 January 1965 on the Approximation of Provisions Laid Down by Law, Regulation or Administrative Action Relating to Proprietary Medicinal Products, 1965 J.O. (22) 369, 369. Article 1(2) defines a medicinal product as “[a]ny substance or combination of substances presented for treating or preventing disease in human beings or animals” and “[a]ny substance or combination of substances which may be administered to human beings or animals with a view to making a medical diagnosis or to restoring, correcting or modifying physiological functions in human beings or in animals.” *Id.* at 370.

58. See Case C-396/88, Criminal Proceedings Against Delattre, 1991 E.C.R. I-1487, I-1492–93; Case C-290/90, Commission v. Federal Republic of Germany, 1992 E.C.R. I-3317, I-3318–19.

59. Council Regulation 178/2002 of 28 January 2002 Laying Down the General Principles and Requirements for Food Law, Establishing the European Food Safety Authority and Laying Down the Procedures in Matters for Food Safety, 2002 O.J. (L 31) 1.

60. “*Gefärbte Jeans*” [Dyed Jeans], 1996 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 271 (BGH 1995) (F.R.G.) [hereinafter Dyed Jeans]; see also Carl Baudenbacher, *Trademark Law and Parallel Imports in a Globalized World—Recent Developments in Europe with Special Regard to the Legal Situation in the United States*, 22 FORDHAM INT’L L.J. 645, 664–65 (1999) (analyzing the court’s decision in *Dyed Jeans* as it applies to the application of trademark rights in the EC).

61. First Directive 89/104/EEC of the Council of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks, art. 7(1), 1989 O.J. (L 40) 1, available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31989L0104:EN:HTML> (last visited Mar. 30, 2005).

62. *Id.*

63. Dyed Jeans, *supra* note 60.

64. Case C-355/96, *Silhouette Int’l Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH*, 1998 E.C.R. I-4799.

65. See Dyed Jeans, *supra* note 60; see also Baudenbacher, *supra* note 60, at 664–65.

required a reference to the ECJ is underpinned by the fact that the EFTA Court came to the opposite result with regard to the (substantially identical) EEA law in its *Mag Instrument* judgment, where it held that under the respective provision of the Directive, EEA/EFTA states had retained the right to choose international exhaustion.<sup>66</sup>

The Swedish Supreme Administrative Court used the *acte clair* doctrine in a rather liberal way in a case concerning an application against a government decision that revoked a license to operate a nuclear power station following the enactment of the Swedish Nuclear Phase-Out Act of December 18, 1997.<sup>67</sup> The judgment is reported in the Commission's Annual Report on Monitoring the Application of Community Law.<sup>68</sup> The applicants argued that the decision was incompatible with several provisions of EC secondary law and with the Treaty provisions on free movement and competition. The Supreme Administrative Court decided not to refer questions to the ECJ although the legal issues of the case were rather complex.

In a judgment of June 12, 1998, the Belgian Court of Cassation recognized a copyright in user manuals to oppose marketing by a parallel importer of authentic products lawfully marketed in the Community together with photocopies of the user manuals.<sup>69</sup> The judgment has been listed in the 1999 report of the European Commission on the Application of Community Law by National Courts.<sup>70</sup> According to that report, the Court of Cassation confirmed a judgment of the court of appeal that had applied the judgments of the ECJ on repackaging of trademarked pharmaceuticals to copyright by way of analogy.<sup>71</sup> The argument of the parallel importer that the decisions in question could not be applied to copyright was rejected. The Commission report does not address the issue of whether the Court of Cassation discussed a possible reference to the ECJ under the Article 234 EC procedure. In this writer's view, such a step would have been warranted. In the end, the judgment of the Court of Cassation gives preference to a copyright in a user's manual over the principle of free movement of goods, one of the pillars of the EC internal market. In that context, it may be recalled that the EFTA Court ruled on November 24, 1998, that enforcement of a national copyright in a Summary of Product Characteristics accompanying pharmaceuticals "with the consequence that the competent national authority would be prevented from giving out/approving/laying down the same SPC for a product imported by way of parallel import as for a directly imported medicinal product" would restrict the free movement of goods and "lead to an artificial partitioning of the market in the [EEA]."<sup>72</sup> Accordingly, "[t]his would be disproportionate to the aim of protecting the copyright in the SPC."<sup>73</sup> In addition, the Court found that this would amount to a disguised restriction on trade in medicinal products between the Contracting Parties.<sup>74</sup> A justification under Article 13 EEA, the provision mirroring Article 30 EC, was therefore held to not be possible.

---

66. Case E-2/97, *Mag Instrument, Inc. v. California Trading Co. Norway*, Ultseen, 1997 REP. EFTA CT. 127, 136.

67. Seventeenth Annual Report on Monitoring the Application of Community Law, COM(00)92 final, annex 6, at 20 [hereinafter *Seventeenth Annual Report*], [http://www.europa.eu.int/comm/secretariat\\_general/sgb/infringements/pdf/com2000-92\\_en\\_vol6.pdf](http://www.europa.eu.int/comm/secretariat_general/sgb/infringements/pdf/com2000-92_en_vol6.pdf) (last visited Mar. 8, 2005).

68. *Id.*

69. Sixteenth Annual Report, *supra* note 46, at 259.

70. *Id.*

71. *Id.* (citing Case 85/76, *Hoffman-La Roche & Co. AG v. Commission*, 1 E.C.R. 461 (1979)); Joined Cases C-427, C-429 & C-436/93, *Bristol-Myers Squibb v. Paranova A/S*, 1996 E.C.R. I-3457).

72. Case E-1/98, *Norway v. Astra Norge AS*, 1998 REP. EFTA CT. 140, 152.

73. *Id.*

74. *Id.* at 151.

A case in point in the jurisprudence of the Spanish Tribunal Supremo concerns the conformity with EC law—in particular the freedom of establishment—of a decision of the national tax administration.<sup>75</sup> The decision consisted of a refusal to apply the concessionary tax scheme for groups of companies to a stable establishment of a Belgian firm. This was due to a national provision requiring both the holding company and the subsidiaries to be residents of Spain. Contrary to the request of the plaintiff, the court did not refer the case to the ECJ. After reciting the text of Article 43 EC, the Tribunal Supremo ruled on the compatibility of this type of tax decision with that provision.<sup>76</sup> It proceeded on the basis that the conditions laid down by Spanish law for Spanish firms require that both the holding company and the subsidiaries be public limited companies in accordance with national law. The Supreme Court added that it had been neither shown nor even alleged that the stable establishment of a Spanish firm in Belgium was eligible for the concessionary tax scheme for groups of companies.<sup>77</sup> The Tribunal Supremo found the argument of the plaintiff—that this judgment was contrary to two rulings of the ECJ<sup>78</sup> interpreting the scope of the current Article 43 EC in relation to the two subsidiaries—to be inadmissible as a ground for setting aside the judgments of the lower court. It stated that the two judgments of the ECJ and the decisions of the national courts did not constitute case law, the violation of which was a ground for setting aside a judgment for the purposes of Article 95.1.4 of the Administrative Jurisdiction Act 1956.<sup>79</sup> The Tribunal Supremo added that there was, in any event, no similarity with the two judgments of the ECJ.<sup>80</sup> The decision to refrain from seeking a preliminary ruling was based on the *acte clair* doctrine, alleging that the case did not raise doubts as to the interpretation of Article 43 EC.

Still, the Tribunal Supremo decided a case concerning Article 12 of Commission Regulation (EEC) No. 1984/83 of June 22, 1983, on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements in a case involving service stations without reference to the ECJ.<sup>81</sup> The Commission had criticized the interpretation given by the court of first instance in a letter, but the Supreme Court disregarded the letter and dismissed the action in cassation.

In a case reported in academic literature, the Greek Conseil d'Etat appears to have “clearly exceeded its *CILFIT* mandate.”<sup>82</sup> The Greek authorities had refused to recognize a French law degree acquired by a Greek national as being equivalent to a Greek law degree. The Conseil d'Etat, invoking the Greek Constitution and Article 126 EC, held in a judgment of September 25, 1998, that matters of education were reserved to the Member States and that certain restrictions on free movement had to be accepted.<sup>83</sup> Council Directive 89/48, being an act of secondary law was, according to the Conseil d'Etat, to be interpreted in light of Article 126 EC.<sup>84</sup> It may be added here that in two cases decided in

---

75. Twentieth Annual Report on Monitoring the Application of Community Law, COM(03)669 final, annex 6, at 45 [hereinafter Twentieth Annual Report], [http://europa.eu.int/comm/secretariat\\_general/sgb/droit\\_com/pdf/rapport\\_annuel/annexe5\\_en.pdf](http://europa.eu.int/comm/secretariat_general/sgb/droit_com/pdf/rapport_annuel/annexe5_en.pdf) (last visited Mar. 5, 2005).

76. *Id.*

77. *Id.*

78. Case 270/83, *Commission v. France*, 1986 E.C.R. 273, [1987] 1 C.M.L.R. 401 (1987); Case C-250/95, *Futura Participations SA v. Administration des Contributions*, 1997 E.C.R. I-2471, [1997] 3 C.M.L.R. 483.

79. Ley de la Jurisdicción Contencioso-Administrativa (L.J.C.A. 1956, 95.1.4). The ground for the appeal in cassation was “violation of the material statutory rules and case law.” Twentieth Annual Report, *supra* note 75, at 45 n.46.

80. *Id.* at 45.

81. *Id.* at 43.

82. *Id.*

83. Seventeenth Annual Report, *supra* note 67, at 18.

84. *Id.*

1997, the Greek Conseil d'Etat declined to refer to the ECJ. In both cases, the Conseil d'Etat endorsed the refusal of the public administration to recognize degrees from universities from other Member States in Greece.<sup>85</sup>

Apart from this selection, cases from Finland, France, Ireland, Italy—and from essentially any other Member State—could be mentioned in which high courts did not comply with the duty to refer.<sup>86</sup> For the sake of order, it may be mentioned that in some cases, the refusal to refer by a supreme court has been corrected by the national constitutional court. The Bundesverfassungsgericht, Germany's constitutional court, has annulled numerous judgments of the Bundesgerichtshof for violations of the principle that no person may be deprived of proper access to the courts laid down in Article 101(1) of the Basic Law because those courts had not made a reference to the ECJ for a preliminary ruling.<sup>87</sup> Another example is provided by a ruling of the Spanish Constitutional Court. That Court has consistently held that it was not its task to ensure the correct application of Community law in Spain and that a refusal of Spanish courts of last resort to refer questions under the Article 234 EC procedure did not constitute a violation of the procedural guarantees and the rights of the defense as laid down in the Constitution. In spite of that jurisprudence, the Constitutional Court in a judgment of April 19, 2004, annulled a decision of the Superior Court of Justice of Catalonia that had acted as the court of last resort.<sup>88</sup> The said court had refused to apply a Spanish statute and a statute of the autonomous community of Catalonia because it found them to be contrary to EC law. The Constitutional Court found that the Tribunal Supremo should have referred a question for preliminary ruling to the ECJ before concluding that the national rules in question were incompatible with Community law and refusing to apply them. One will notice that this judgment was given in a context that involved the protection of fundamental rights.<sup>89</sup>

### C. Effect of ECJ Rulings

#### 1. General

Preliminary rulings have a binding effect *inter partes*, which means that the referring court as well as all national courts dealing with the particular facts are bound by the ECJ's legal findings. It may happen on rare occasions that a court makes a reference to the ECJ and does not subsequently comply with the ruling obtained from Luxembourg. What occurs more frequently is that national courts deviate from existing ECJ case law that has been developed in other cases. In such cases, there may also be, as far as national courts of last resort are concerned, a violation of the duty to refer. The question then arises whether a preliminary ruling also has *erga omnes* effect, i.e., whether it is binding on all national courts in all the Member States. That seems to be reasonable for rulings stating the

---

85. *Id.* at 17.

86. *See, e.g.*, Twentieth Annual Report, *supra* note 75 (reviewing the application of Community law by national courts in regard to ECJ judgments through 2002).

87. *See, e.g.*, *Pflicht zur Vorlage an den EuGH*, 1036/99, 2001 NEUE JURISTISCHE WOCHENSCHRIFT 1267 (BverfG 2001) (F.R.G.).

88. *Informations rapides sur les développements juridiques présentant un intérêt communautaire*, REFLETS No. 2, at 8–10 (2004), [http://www.curia.eu.int/fr/coopju/apercu\\_reflets/common/recdoc/reflets/2004/reflets2004\\_2.pdf](http://www.curia.eu.int/fr/coopju/apercu_reflets/common/recdoc/reflets/2004/reflets2004_2.pdf) (last visited Apr. 1, 2005).

89. *Id.*

invalidity of a provision of secondary law.<sup>90</sup> Once such a provision is declared void, it cannot be applied any more, and this must be enforced from Finland to Greece and from Portugal to Hungary, no matter which Member State's court made the reference. In the more frequent cases where the ECJ interprets Community law, the rulings of the ECJ are not legally binding on other courts. However, in practice, judgments of the ECJ rendered under Article 234 EC will in many cases have a factual *erga omnes* effect. One may speak of a factual precedent for all national courts (in German, *Leitbildfunktion*). The relationship between the ECJ and the national courts of the EC Member States, which in strict legal terms seems to be bilateral in nature, thereby becomes somewhat multilateral. This actually deserves a positive comment: homogeneity and legal certainty are enhanced, EC law is developed further, and the ECJ need not deal with the same issue several times.

The doctrine of *acte clair* is based on the assumption that ECJ rulings produce an *erga omnes* effect. National courts in many cases refrain from making a reference to the ECJ on such grounds. One can assume that this is day-to-day practice in courts all over Europe. Rather random examples are a judgment of the Bundesgerichtshof from September 27, 1999, in which that court had to give interpretation of Article 12 to the Basic Law on professional freedom and referred to the principles developed by the ECJ in *Bosman*, or a judgment of the Austrian Supreme Court (Oberster Gerichtshof) from July 15, 1999, in which that court, referring to the ECJ's *Centros* ruling, held that paragraph 10 of the Austrian private international law act was contrary to Articles 43 and 48 EC.<sup>91</sup> That provision stated "that a firm's capacity to have legal personality is to be assessed according to the law of the state in which the actual seat of the main office of the firm is located."<sup>92</sup> The Swedish Supreme Court (Högsta Domstolen) held in a judgment of July 9, 1998, that the EC Trademark Directive did not prohibit the use of a protected motor vehicle trademark by a nonfranchised operator to indicate that he carried out repairs on this make "provided the mark was not used in a fraudulent manner to give the impression that there was an economic relationship between the nonfranchised operator and the trademark."<sup>93</sup> Barely four months earlier, the ECJ had reached the same conclusion in the *BMW* case.<sup>94</sup> In the field of state liability too, lower national courts have very often based their rulings on the ECJ's case law. An example is a judgment of the Brussels Court of First Instance of September 9, 1999, which awarded damages against the Belgian State for having not fully implemented Article 7 of Directive 90/314 on package travel, package holidays, and package tours.<sup>95</sup> The factual *erga omnes* effect is of particular importance for lower courts, which are under no obligation to make a reference. An example of this is provided by a judgment of the Brussels Court of Appeal of September 15, 2000, which, referring to the ECJ's case law in *Silhouette* and *Sebago*, held that Article 7 of the Trademark Directive prohibits international exhaustion.<sup>96</sup>

That ECJ preliminary rulings have in some way the character of precedents is also reflected in the ECJ's practice of serving judgments in other cases on a national court referring a question if the ECJ is of the opinion that taking notice of the former judgment

90. See, e.g., PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 442–44 (3d ed. 2003) (referring to Case C-66/80, SpA Int'l Chem. v. Amministrazione delle Finanze dello Stato, 1981 E.C.R. 1191).

91. Seventeenth Annual Report, *supra* note 67, at 22–23.

92. *Id.* at 23.

93. *Id.* at 21 (citing Case C-63/97, Bayerische Motorenwerke AG v. Deenik, 1999 E.C.R. I-905, I-929–30).

94. *Id.*

95. *Id.* at 31.

96. Eighteenth Annual Report on Monitoring the Application of Community Law (2000), COM(01)309 final, annex 6, at 42 [hereinafter Eighteenth Annual Report], [http://europa.eu.int/eur-lex/en/com/rpt/2001/act309en01/com2001\\_0309en01-06.pdf](http://europa.eu.int/eur-lex/en/com/rpt/2001/act309en01/com2001_0309en01-06.pdf) (last visited Mar. 4, 2005).

may make the referral superfluous.<sup>97</sup> Further, advocates general have argued that due to their abstract formulation, preliminary rulings are capable of being generally applied.<sup>98</sup> In the United Kingdom, national judges have accordingly been instructed to decide cases based on existing preliminary rulings and to avoid further references unless they want to challenge previous ECJ case law.<sup>99</sup>

## 2. Referring EC States' Courts Deviating from Preliminary Rulings

It has been mentioned that on very rare occasions, national courts that have referred questions to the ECJ have deviated from the ECJ's preliminary ruling. This clearly constitutes an infringement of the Treaty. The *Data Delecta* case concerned proceedings between an English company and a Swedish company about payment for the supply of goods.<sup>100</sup> A question related to discrimination on grounds of nationality was raised. A provision of Swedish civil procedure law required a non-Swedish plaintiff not resident in Sweden to furnish security to guarantee payment of the cost of the judicial proceedings that the person might be ordered to pay. This provision should not apply if contrary to international conventions. In September 1994, the Högsta Domstolen requested an opinion from the EFTA Court<sup>101</sup> on the conformity of the Swedish provision with the EEA Agreement. Sweden was at the time an EFTA state party to the EEA Agreement. After Sweden's accession to the EC in 1995, the case was withdrawn<sup>102</sup> and referred to the ECJ. That Court found that the Swedish provision on the security for judicial costs constituted discrimination on the grounds of nationality and was therefore incompatible with the general prohibition to discriminate (now Article 12 EC) and the provisions on free movement of goods and services.<sup>103</sup> The ability to bring an action before the national courts in order to resolve disputes arising from economic activities was considered as a corollary to those freedoms. The Högsta Domstolen did not follow the ECJ's ruling.<sup>104</sup> It contended that the facts of the case had occurred before Sweden's accession to the EC. For this reason, it held that the case was not about the exercise of the free movement as established in the EC Treaty. Therefore, the ECJ's answer was considered to be nonapplicable to the facts of the case. The Högsta Domstolen did not see any possibility of a retroactive application of EC law and consequently upheld its former case law stating that the Swedish provision was valid. In light of this outcome, one may ask why the Högsta Domstolen referred the case at all. If the facts had occurred before Sweden's accession to the EC, that must have been clear to the justices from the very beginning. Moreover, if the facts had occurred in 1994, the Högsta Domstolen should have applied EEA law, which with regard to the legal issue in question, was identical in substance to EC law.

---

97. In *Köbler*, the Registry proceeded in this manner. C-224/01, *Köbler v. Austria*, para. 8 (E.C.J. Sept. 30, 2003), at <http://europa.eu.int>.

98. See LISA CONANT, *JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION* 66 (2002).

99. Paul P. Craig, *Report on the United Kingdom*, in *THE EUROPEAN COURT AND THE NATIONAL COURTS, DOCTRINE AND JURISPRUDENCES: LEGAL CHANGE IN ITS SOCIAL CONTEXT* 205 (Anne-Marie Slaughter et al. eds., 1998).

100. Case C-43/95, *Data Delecta Aktiebolag v. MSL Dynamics Ltd.*, 1996 E.C.R. I-4661.

101. Case E-7/94, *Data Delecta Aktiebolag v. MSL Dynamics Ltd.*, 1994-95 REP. EFTA CT. 109 (noting the withdrawal of the Högsta Domstolen's request for an EFTA ruling).

102. *Id.*

103. *Data Delecta Aktiebolag*, 1996 E.C.R. at I-4676.

104. Å 1195 (S. Ct., Nov. 13, 1996) (Swed.), published in *Nytt Juridiskt Arkiv I*, 671-76, summarized in *French in 1999 CAHIERS DE DROIT EUROPÉEN* 642-43.

The case *Arsenal Football Club plc v. Matthew Reed*<sup>105</sup> concerned a trademark violation. In 1989, Arsenal Football Club registered the words “Arsenal” and “Arsenal Gunners” as well as the cannon and shield emblem as trademarks for a wide range of merchandise. Since 1970, Mr. Reed had been selling football souvenirs and memorabilia that virtually all bore symbols referring to Arsenal at a number of stalls outside the football ground. He informed his customers that these were not official souvenirs by placing a large signboard clearly stating the origin of the products. Arsenal brought a trademark violation action. The national court referred two questions to the ECJ for a preliminary ruling on the interpretation of the EC Trademark Directive: First, it wanted to know whether the holder of a trademark that had been validly registered may prevent third parties in business life from using a trademark on products identical to those for which the mark was registered. Such use entailed no statement as to the origin of the products. Second, it wanted to know the impact on the trademark holder’s rights of the fact that the general public might perceive the mark as a badge of support for loyalty or affiliation to the trademark proprietor. The ECJ recalled the primary purpose of a trademark—to provide consumers with a guarantee as to the true origin of a product or service, allowing them to distinguish it clearly from goods of different origin. The Court concluded, “certain uses for purely descriptive purposes are excluded from the scope of Art. 5(1) of the directive because they do not affect any of the interests which that provision aims to protect.”<sup>106</sup> Therefore, they did not “fall within the concept of use within the meaning of that provision.”<sup>107</sup> The national court considered the following in the ECJ’s judgment to be the reason not to comply with it: the ECJ stated that “in circumstances as those in the present case,” the trademark proprietor could rely on Article 5(1)(a) of the directive to prevent that use.<sup>108</sup> Another paragraph led the judge to conclude that the ECJ had come to a finding of facts, namely that use of the sign is liable to affect the origin of goods:

Once it has been found that, in the present case, the use of the sign in question by the third party is liable to affect the guarantee of origin of the goods and that the trademark proprietor must be able to prevent this, it is immaterial that in the context of that use the sign is perceived as a badge of support . . . .<sup>109</sup>

This “fact finding” was, according to Justice Laddie, contradictory to that of the national court, and, therefore, the latter held itself not bound by the ECJ’s conclusions as regards the facts. One may wonder whether the ECJ’s findings can also be understood in a different way. Either way, the direct effect of the ruling is brought into question by those conflicts of competence. The conflict was eventually resolved when the court of appeal set aside the first instance court’s decision.<sup>110</sup>

### 3. EC State Courts Deviating from Existing ECJ Case Law

Quite another matter is what happens if national courts of EC Member States deviate from ECJ case law that has been rendered in other cases. It has been said that “[t]he formal

---

105. Case C-206/01, *Arsenal Football Club plc v. Reed*, 2002 E.C.R. I-10273; *see also* *Arsenal Football Club plc v. Reed*, [2002] E.W.H.C. 2695 (Ch. 2002) (answering on remand questions raised by the ECJ); Twentieth Annual Report, *supra* note 75, at 66.

106. *Arsenal Football Club*, 2002 E.C.R. at I-2073, para. 54.

107. *Id.*

108. *Id.* para. 60.

109. *Id.* para. 61.

110. *Arsenal Football Club plc v. Reed*, [2003] 3 All E.R. 865 (C.A. 2003) (appeal taken from Ch.).

absence of binding precedents in the European legal system . . . constitutes a permissive condition that can always be relied on by national courts to legitimate a restrictive approach to ECJ interpretation.”<sup>111</sup> One could, however, argue that such deviation constitutes a breach of Community law since the ECJ, by interpreting the provisions of Community law, concretizes these provisions in a general way that can only be challenged by the legislator, but not by a national court of its own accord. Furthermore, it goes without saying that if such a case concerns a court of last resort, there will also be an infringement of the obligation to refer.

An example of such swerving is provided by a judgment of the Administrative Court of Athens, Greece, from 1999.<sup>112</sup> The matter brought before the ECJ concerned the non-implementation of a directive on the recognition of a diploma. The national court:

took the view that the failure to transpose Directive 89/48/EEC<sup>113</sup> did not constitute *in casu* a violation by the State of its Community obligations and accordingly, did not give rise to an obligation to compensate for loss sustained by individuals because of the failure to incorporate the Directive into national law. The Administrative Court thus appears to have gone further than [a parallel] ruling, which merely indicated that the Directive was not applicable in a situation purely internal to a Member State without entering the debate on the conditions governing state’s civil liability for failing to incorporate the Directive into national law.<sup>114</sup> Furthermore the fact that Greece had been condemned by a previous [ECJ] judgment on precisely the same grounds<sup>115</sup> was not taken into account.<sup>116</sup>

So there could actually have been room for the grant of damages.

A further case on point is a judgment of the Spanish Tribunal Supremo of December 28, 2001. That court applied the principle of international exhaustion of trademark rights in a case involving the parallel importation into Spain of Bacardí rum that had been lawfully manufactured and marketed in Mexico. In light of the main function of the trademark, to guarantee the consumer the origin of the product, the Tribunal Supremo held that since the rum in question was genuine and a ban on imports of rum made in Mexico brought no advantages to the consumer, parallel imports were lawful. With this ruling, the Tribunal Supremo brought itself in conflict with the ECJ’s jurisprudence as developed in the *Silhouette* case.<sup>117</sup>

In a judgment of February 26, 1999, the Greek Conseil d’Etat did not address the problems of *Francoovich*, even though the appellant had argued that the state was liable for having wrongly implemented Directive 89/48/CEE of December 21, 1988, regarding a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three-year’s duration. This occurred despite the fact that the ECJ acknowledged that the state was under an obligation to implement the directive, but concluded that it was for the legislature and the executive to fulfill that

---

111. CONANT, *supra* note 98, at 68.

112. See Eighteenth Annual Report, *supra* note 96, at 46.

113. Council Directive 89/48/EEC on a General System for the Recognition of Higher-Education Diplomas Awarded on Completion of Professional Education and Training of at Least Three Years’ Duration, 1989 O.J. (L 19) 16.

114. See Joined Cases C-225, C-226 & C-227/95, *Kapasakalis v. Greek State*, 1998 E.C.R. I-4244, I-4250.

115. Case C-365/93, *Commission v. Hellenic Republic*, 1995 E.C.R. I-499, I-509.

116. Eighteenth Annual Report, *supra* note 96, at 46.

117. Case C-355/96, *Silhouette Int’l Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH*, 1998 E.C.R. I-4799.

obligation; the courts had no jurisdiction to intervene in the matter “by acknowledging the civil liability of the State for the infringement of its . . . obligations.”<sup>118</sup>

In certain countries, deviations from existing ECJ case law may be corrected by higher national courts. To give an example, the Bundesfinanzhof, the highest German court in financial and tax matters, at one stage refused to comply with the ECJ’s jurisprudence on direct effect of non- or misimplemented provisions of directives. The Bundesfinanzhof was of the opinion that this doctrine, as established, *inter alia*, in *Becker*, was not compatible with Article 249 EC.<sup>119</sup> The German Bundersverfassungsgericht found, however, that the ECJ’s ruling constituted a legitimate rewriting of the law and annulled the Bundesfinanzhof’s judgment.<sup>120</sup>

#### D. State Liability Cases in Particular

##### 1. General

In state liability cases, it is, as a matter of principle, for the national court to apply the three conditions developed by the ECJ to the facts of the particular case according to national law.<sup>121</sup> This includes the rule that consequences of a breach are governed by national law. In order not to jeopardize the uniform application of EC law, this application of national law is subject to the principles of equivalence and effectiveness.<sup>122</sup> That means that the rules in question (e.g., time limits, causation, mitigation of loss, assessment of damages) must be applied equally under national law and must not make it excessively difficult to obtain effective reparation. There are two main factors that may lead to an outcome of the national proceedings that leaves the plaintiff empty handed: the mere application of national provisions compensating the lack of procedural and substantive rules on the EC level and the application of the principles established by the ECJ to the facts itself.

##### 2. Restriction of Damages by the National Legal Framework

As the EC legal order lacks common principles with regard to the compensation itself, states must make reparations in accordance with the rules of national law. There are, however, factors that may lead to an outcome in the national court that do not give satisfaction to injured individuals. First of all, there may be obstacles as to the compensability of damages caused by legislative acts, such as those in German law that do not accept liability for so-called legislatives *unrecht* (wrongdoing by the legislature).<sup>123</sup> Moreover, the requirement under English law of the requirement of proof of malfeasance in public office—such an abuse of power being inconceivable in the case of the legislature—

---

118. Eighteenth Annual Report, *supra* note 96, at 54.

119. *Kloppenburg II*, 1985 EUROPARECHT 191 (BFH 1985).

120. *Kloppenburg II*, 1988 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 223 (BVerfG 1987).

121. See Joined Cases C-46 & C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany*, 1996 E.C.R. I-1029, I-1151, [1996] 1 C.M.L.R. 889 (1996); Case C-392/93, *The Queen v. H.M. Treasury, ex parte British Telecomm. plc*, 1996 E.C.R. I-1631, I-1668, [1996] 2 C.M.L.R. 217 (1996); Case C-319/96, *Brinkmann Tabakfabriken GmbH v. Skatteministeriet*, 1998 E.C.R. I-5255, I-5281; Case C-118/00, *Larsy v. Institut National d’Assurances Sociales pour Travailleurs Indépendants*, 2001 E.C.R. I-5063, I-5100.

122. See Joined Cases C-6 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, I-5415–16, [1993] 2 C.M.L.R. 66 (1993).

123. See, e.g., *Brasserie du Pêcheur*, 1996 E.C.R. at I-1154.

may jeopardize effective reparation for loss and damage and must consequently be set aside.<sup>124</sup> The concept of fault on the part of the responsible organ, having different contents in the various Member States, can only play a role in the overall assessment of whether there is a sufficiently serious breach but cannot be, as such, decisive for the granting of reparations.<sup>125</sup> Further problems are created by restrictions with regard to the extent of reparations: from an EC point of view, they have to be commensurate with the loss sustained.<sup>126</sup> That the injured party must show reasonable diligence in limiting the extent of the damage may be taken into account as a general principle common to all Member States. General limitations, such as the total exclusion of loss of profit, which is not considered a part of the undertaking's protected assets under German law, have to be set aside. On the other hand, English courts may have to award exemplary damages if this were to be done in a purely internal constellation. Finally, mention must be made of temporal concerns for reasons of legal certainty, e.g., time limits and statutory limitation.<sup>127</sup>

### 3. What is the Role of the ECJ in Applying the Conditions to the Facts?

In preliminary-ruling proceedings, the national court is the master of the facts. As a general rule, it is therefore the referring court which will apply the three conditions to the facts. However, in certain situations, the ECJ does answer the respective questions and thereby apply the principles to the facts itself. Although this obviously conflicts with the general rule of task sharing, it is justified by the Court by a typical line like the following: “[T]he Court has available to it all the materials enabling it to establish whether the conditions necessary for liability of the Member State to be incurred are fulfilled.”<sup>128</sup> It goes without saying that when the ECJ has to decide whether it has sufficient information to answer the respective questions, some degree of discretion is involved. One may ask what the criteria for this decision are. It is to be borne in mind that the principle of state liability, as developed in the ECJ's case law, constitutes a limitation of the sovereignty of the Member States and, according to the feelings of some national judges, even of national courts.

The ECJ will in most cases examine whether the first condition of whether a given provision of Community law confers rights on individuals is fulfilled. This issue poses merely a legal, not factual, question and is thus subject to full control by the ECJ. In *Francovich*,<sup>129</sup> the relevant breach consisted in the nonimplementation of the EC Insolvency Directive.<sup>130</sup> The applicants brought proceedings against the Italian State arising out of the failure to implement the mentioned directive. Both were owed wages by their employers. Since no steps had been taken pursuant to the directive to guarantee payment of wages, they argued that the state was liable to pay them the sums owed. With regard to the first condition, the ECJ came to the conclusion that the directive entails the grant of rights to individuals. Moreover, it held that the content of that right concerned a

---

124. *Id.*

125. *Id.* at I-1155–56.

126. *Id.* at I-1156.

127. Case C-261/95, *Palmisani v. Istituto Nazionale della Previdenza Sociale*, 1997 E.C.R. I-4025, [1997] 3 C.M.L.R. 1356 (1997).

128. Case C-224/01, *Köbler v. Austria*, para. 101, (E.C.J. Sept. 30, 2003), at <http://europa.eu.int>; see also Case C-118/00, *Larsy v. Institut National d'Assurances Sociales pour Travailleurs Indépendants*, 2001 E.C.R. I-5063, I-5100 (“[T]he situation in the present case is that the Court has all the necessary information to be able to assess whether the facts of the case must be held to constitute a sufficiently serious breach of Community law.”).

129. *Joined Cases C-6 & C-9/90, Francovich v. Italy*, 1991 E.C.R. I-5357, [1993] 2 C.M.L.R. 66 (1993).

130. Council Directive 80/987/EEC, *supra* note 26.

breach of primary EC law, namely the free movement of goods.<sup>131</sup> *Brasserie du Pêcheur*, a French company, claimed before the national German court that it was forced to discontinue exports of beer to Germany in 1981 because the competent German authorities considered that its beer did not comply with the famous German *Reinheitsgebot* (purity requirement) laid down in Sections 9 and 10 of the German *Biersteuergesetz*.<sup>132</sup> The relevant German provision concerned the conditions under which the designation “beer” could be applied and which additives producers were allowed to use. The joined case *Factortame* raised similar questions with regard to the compatibility of the U.K. Merchant Shipping Act 1988<sup>133</sup> with the right of freedom of establishment. According to this act, the compulsory registration of fishing vessels was subject to certain conditions relating to nationality, residence, and domicile of the fishers. The noncompliance with the established requirements deprived the fishermen of the right to fish. As far as the first condition was concerned, the ECJ held that the Treaty provisions concerning free movement of goods and freedom of establishment undoubtedly confer rights on individuals.<sup>134</sup> The breach in *Hedley Lomas*<sup>135</sup> consisted of a refusal by the U.K. authorities to grant licenses for the export of live sheep to Spain on the grounds that Spanish slaughterhouses were not complying with an EC directive.<sup>136</sup> The U.K. government conceded a breach of Article 29 EC, the prohibition of export restrictions. However, it argued that it was justified under Article 30 EC for the protection of animal welfare, which was ultimately not recognized by the ECJ. In examining the conditions for state liability, the ECJ found that Article 29 EC intends to confer rights on individuals.<sup>137</sup> The *Dillenkofer* case arose as a consequence of the nonimplementation of the Package Tour Directive by Germany.<sup>138</sup> After the insolvency of their tour operators, a number of travelers had to return from their holiday locations at their own costs. The directive provides for means to ensure repatriation and that money paid is refunded in the event of the operator’s insolvency. The ECJ was expressly called upon to examine the first condition for state liability: whether individuals are granted rights whose content is sufficiently identifiable and answered in the affirmative.<sup>139</sup>

In the above-mentioned *Köbler* case,<sup>140</sup> the ECJ held that Austria was liable for a breach of EC law by its Supreme Administrative Court. Mr. Köbler had been employed under a public law contract with the Austrian State in the capacity of a university professor. In 1996, he applied for a special length-of-service increment and claimed that the years he had completed at universities in other Member States were to be taken into account as regards the required length of service. According to him, the condition of completion of fifteen years of service solely in Austrian universities amounted to indirect discrimination unjustified under EC law. Upon the interpretation of an earlier ECJ judgment,<sup>141</sup> the national court withdrew its initial request to the ECJ but then dismissed Mr. Köbler’s claim on the grounds that the special length-of-service increment was a loyalty bonus that

---

131. Joined Cases C-46 & C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany*, 1996 E.C.R. I-1029, [1996] 1 C.M.L.R. 889 (1996).

132. *Biersteuergesetz*, v. 14.3.52 (BGBl. I S.149) (F.R.G.).

133. Merchant Shipping Act, 1998, c. 12.

134. See *Brasserie du Pêcheur*, 1996 E.C.R. at I-1150.

135. Case C-5/94, *The Queen v. Ministry of Agric., Fisheries & Food, ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. I-2553.

136. Council Directive 74/577/EEC of 18 November 1974 on Stunning of Animals Before Slaughter, 1974 O.J. (L 316) 10.

137. Ex parte *Hedley Lomas*, 1996 E.C.R. at I-2612–13.

138. Joined Cases C-178, C-179, C-188, C-189 & C-190/94, *Dillenkofer v. Federal Republic of Germany*, 1996 E.C.R. I-4845.

139. *Id.* at I-4883.

140. Case C-224/01, *Köbler v. Austria*, paras. 32–34, (E.C.J. Sept. 30, 2003), at <http://europa.eu.int>.

141. Case C-15/96, *Schöning-Kougebetopoulou v. Freie und Hansestadt Hamburg*, 1998 E.C.R. I-47.

objectively justified a derogation from the EC provisions on the free movement of workers. In a second action, this time for damages, Mr. Köbler asked for compensation of the loss allegedly suffered as a result of the nonpayment of this increment. He considered the interpretation of the earlier judgment of the ECJ to be improper, and, because of this, that the subsequent withdrawal of the request was the relevant infringement. The national court dealing with the matter referred a question to the ECJ concerning the liability of Member States for decisions adopted by a supreme court in general and its conditions. The ECJ dealt with the application of the principles to the facts regarding the first condition, according to which the infringed provision must be intended to confer rights upon individuals. The rules whose infringement were at issue were Articles 48 EC and 7(1) of Regulation No. 1612/68, which are undisputedly intended to confer rights on individuals. The *Stockholm Lindöpark* case<sup>142</sup> concerned whether the exemption from the value added tax (VAT) for certain sports activities provided for by Swedish law did, if considered incompatible with the VAT Directive, constitute a sufficiently serious breach of Community law. The ECJ held that it had decided earlier that the provisions of the directive in question conferred rights on individuals that they can invoke against Member States.

The second condition calling for a sufficiently serious breach is clearly the deciding criterion in most instances. It may, as the case may be, be answered by the ECJ or the national court. But one must acknowledge that in *Brasserie du Pêcheur* the ECJ has established a variety of criteria to be taken into account in the assessment. The factors to be taken into consideration include the clarity and precision of the rule breached, the measure of discretion left by the rule, 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 toward the omission, and the adoption or retention of national measures or practices contrary to Community law. If it is, however, clear from the Court's previous case law that the conduct in question constitutes an infringement, a sufficiently serious breach exists.

In *Francovich*, the ECJ stated that the breach of EC law to transpose the directive correctly had been confirmed by an earlier judgment of the Court.<sup>143</sup> In light of later judgments, this must be understood in the sense that the breach was of sufficiently serious nature. In *Brasserie du Pêcheur*, the ECJ took a very careful approach: it expressly considered it a general task of the national court to apply the principles to the facts. However, as mentioned, the ECJ gave quite detailed guidance.<sup>144</sup> In light of the respective considerations, it was clear that the German *Reinheitsgebot*, both the prohibition on marketing under the designation "beer" and on the import of beer containing additives, could have been taken from earlier case law.<sup>145</sup> The ban of beer containing additives, for instance, had been declared incompatible with Article 28 EC in the famous *Reinheitsgebot* judgment of 1987.<sup>146</sup> Similar considerations prevailed in the *Factortame* case. Thus, in reality, the margin left for the national courts with regard to finding or not finding a sufficiently serious breach was rather narrow. In *British Telecommunications*,<sup>147</sup> the United Kingdom had misimplemented Directive 1990/351 on Procurement Procedures on Entities

---

142. Case C-150/99, Sweden v. Stockholm Lindöpark AB, 2001 E.C.R. I-493, [2001] 2 C.M.L.R. 319 (2001).

143. Joined Cases C-6 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, I-5416, [1993] 2 C.M.L.R. 66 (1993).

144. See Joined Cases C-46 & C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany*, 1996 E.C.R. I-1029, I-1151-55, [1996] 1 C.M.L.R. 889 (1996).

145. See *id.* at I-1151.

146. Case C-178/84, *Commission v. Federal Republic of Germany*, 1987 E.C.R. I-1227.

147. Case C-392/93, *The Queen v. H.M. Treasury, ex parte British Telecomm. plc*, 1996 E.C.R. I-1631, [1996] 2 C.M.L.R. 217 (1996).

in Certain Utilities Sectors. British Telecommunications sought the annulment of the U.K. regulations implementing that directive. An annex to the domestic measure had excluded British Telecommunications from an exemption provided in Article 8 of the directive. The company argued that it was entitled to compensation for loss caused by this. The ECJ, after reiterating the three conditions for state liability, held:

Whilst it is in principle for the national courts to verify whether or not the conditions governing state liability for a breach of Community law are fulfilled, in the present case the Court has all the necessary information to assess whether the facts amount to a sufficiently serious breach of Community law.<sup>148</sup>

That means that the Court itself dealt with the second condition. Due to the imprecision of the wording and the lack of guidance from past rulings or from the Commission, the breach was not considered to be manifest in nature.<sup>149</sup> The other two conditions did not, therefore, play a role anymore. In *Hedley Lomas*, the ECJ held that the mere infringement of Community law may be sufficient to fulfill the second condition of a sufficiently serious breach where the Member State was not called upon to make any legislative choices and had only reduced, or even no, discretion. This applied to the case at issue since the United Kingdom was not even in a position to produce any proof of noncompliance with the directive by the Spanish slaughterhouses.<sup>150</sup> In *Dillenkofer*, the ECJ made it clear that the nonimplementation of a directive within the time prescribed constituted per se a sufficiently serious breach, since the legislature did not have any discretion in these cases.<sup>151</sup>

The ECJ confirmed this principle in *Brinkmann*.<sup>152</sup> The national provision empowered the Danish minister for fiscal affairs to lay down definitions of tobacco products in order to implement an EC directive. This power was not exercised at the material time. The administrative decision at stake was a decision of the highest Danish tax authority on the classification of some tobacco products. The applicant brought an action before a Danish court claiming a different and more favorable classification of its products under the tax scheme and compensation for the loss suffered as a result of the erroneous administrative decision. The ECJ held that the directive was not correctly implemented because the competent minister had not adopted any rule in the implementation of the directive. Although this is normally to be considered a sufficiently serious breach on the part of the legislature, the interpretation of the directive by the Danish authorities was not manifestly wrong.<sup>153</sup> *Larsy II* dealt with retirement pensions for self-employed nursery gardeners who worked in both Belgium and France.<sup>154</sup> After the brother of the appellant in the case at issue had already succeeded before the ECJ in his claim for a full double pension, the second brother, in a comparable situation, sued the Belgian State for not having granted him the same rights. The question to be answered by the ECJ was confined

---

148. *Id.* at I-1668.

149. *Id.* at I-1669.

150. Case C-5/94, *The Queen v. Ministry of Agric., Fisheries & Food, ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. I-2553, I-2613.

151. Joined Cases C-178, C-179, C-188, C-189 & C-190/94, *Dillenkofer v. Germany*, 1996 E.C.R. I-4845, I-4879–80.

152. See Case C-319/96, *Brinkmann Tabakfabriken GmbH v. Skatteministeriet*, 1998 E.C.R. I-5255, I-5280–81 (reviewing the conditions under which a Member State incurs liability for losses caused by incorrectly classifying tobacco products under a Council directive on customs law).

153. *Id.*

154. Case C-118/00, *Larsy v. Institut National d'Assurances Sociales pour Travailleurs Indépendants*, 2001 E.C.R. I-5063.

to the second condition. Having reiterated that the assessment of the three conditions is, in principle, for the national courts, the Court nevertheless considered itself in a position to establish the existence of a sufficiently serious breach.

Concerning the second condition, in the *Köbler* case, the ECJ took account of the course of procedure, namely the previous readiness of the Austrian court to grant Mr. Köbler his rights, and the subsequent change of mind concerning the qualification of the right in question as a loyalty bonus, which was based on a wrong interpretation of the Court's judgment in *Schönigh-Kougebetopoulou*. The Court expressly held that the Supreme Administrative Court had infringed its obligation to refer the case under Article 234(3) EC in the absence of an *acte clair*.<sup>155</sup> Besides the infringement of substantive law, the Court assessed this infringement as to whether it constituted a "manifest" one. However, the questions of substantive law were considered open and a reply was not obvious. Nor did the Court regard the second breach as being manifest in nature.<sup>156</sup> Interestingly enough, the Court supported its decision to not consider the infringement in question as sufficiently serious by a vague reference to the "circumstances of the case."<sup>157</sup> The conclusion, therefore, may be a twofold one: not only did the Court use a very cautious approach toward the national judiciaries, despite being prepared to take account of their wrongdoings in principle, but it also seems that the ECJ was not too happy with its own role in the dialogue under Article 234 EC in the case at issue. In *Stockholm Lindöpark*, it was, in view of the clear wording of the directive, evident that Swedish law was incompatible.<sup>158</sup> Therefore, the mere infringement was deemed to be a sufficiently serious breach. In some recent cases, the ECJ has left the answer to the question of whether there is a sufficiently serious breach to the national court but has, at the same time, referred to the list of factors to be taken into account that was put forward in *Brasserie du Pêcheur/Factortame* and subsequent cases.<sup>159</sup> In the *Konle* case, the ECJ held that Austria had, by the fact that the Tyrol region had been maintaining in force its legislation on the acquisition of real property and requirements applying to foreign acquirers, violated the principle of free movement of capital under the EC Treaty.<sup>160</sup> The Court stated that it was a matter for the national courts to apply the principles governing state liability for breaches of EC law in accordance with the guidelines provided by the Court in its case law.

The third condition, the establishment of a causal link, is more or less entirely left to the national courts without any guidance from Luxembourg's case law. In *Francovich*, the ECJ did not deal with the third condition calling for a causal link. Its conclusion that "a Member State is required to make good loss or damage caused to individuals by failure to transpose [the Insolvency] Directive" may be understood as an invitation to the national court to examine the issue itself.<sup>161</sup> In *Brasserie du Pêcheur*, the proof of existence of a direct causal link was again left entirely to the national court.<sup>162</sup> In *Hedley Lomas*, the

---

155. Case C-224/01, *Köbler v. Austria*, paras. 118–120, (E.C.J. Sept. 30, 2003), at <http://europa.eu.int>.

156. *Id.* paras. 120–124.

157. *Id.* para. 124.

158. Case C-150/99, *Sweden v. Stockholm Lindöpark AB*, 2001 E.C.R. I-493, [2001] 2 C.M.L.R. 319 (2001).

159. See Case C-424/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, 2000 E.C.R. I-5123, I-5134–40; Case C-127/95, *Norbrook Labs. Ltd. v. Ministry of Agric., Fisheries & Food*, 1998 E.C.R. I-1531, I-1599–1600, [1998] 3 C.M.L.R. 809 (1998).

160. Case C-302/97, *Konle v. Austria*, 1999 E.C.R. I-3099, [2000] 2 C.M.L.R. 963 (1999). *Konle* was decided after the ECJ's landmark judgment in *Brasserie du Pêcheur/Factortame*.

161. Joined Cases C-6 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, I-5416, [1993] 2 C.M.L.R. 66 (1993).

162. Joined Cases C-46 & C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany*, 1996 E.C.R. I-1029, I-1152, [1996] 1 C.M.L.R. 889 (1996).

establishment of a causal link was expressly assigned to the national court.<sup>163</sup> The same happened in *Norbrook*.<sup>164</sup> In *Dillenkofer*, the existence of a causal link was not discussed in the ECJ's judgment. In other cases, the assessment of that condition is implicitly left to the national court.<sup>165</sup> In *Brinkmann*, the Court examined whether there was a causal link between the infringement and the suffered loss and answered this question in the negative (the third condition). This was due to the fact that since the national authorities had given immediate effect to the (precise) definitions in the directive, the lack of implementation of the definitions by ministerial decree did not in itself give rise to liability on the part of the state.

#### 4. Cases in Which Plaintiffs Left the National Courts Empty Handed

In a number of state liability cases decided by the ECJ, the conditions were applied to the facts by the national court in a manner that left the plaintiff without any compensation. The best-known example is probably the Bundesgerichtshof's ruling in *Brasserie du Pêcheur/Factortame*. In *Brasserie du Pêcheur/Factortame*, the ECJ did not apply the conditions to the facts, but it gave some indications with regard to the second condition—the nature of the breach.<sup>166</sup> The Bundesgerichtshof did not, however, grant any damages. As far as the provisions governing the designation “beer” were concerned (prohibiting the use of the name “beer” if the ingredients did not correspond to German law), the Bundesgerichtshof found the breach to be sufficiently serious.<sup>167</sup> It stated that the breach of EC law must have been obvious for the German authorities taking into account earlier ECJ judgments. In further examining the issue of the designation “beer,” the Bundesgerichtshof, however, could not see a direct causal link between the breach of EC law and the damage suffered. With regard to the prohibition to use certain additives, the Bundesgerichtshof held that the breach was not sufficiently serious. It is probably this type of outcome that will make the ECJ willing to answer the question concerning the second condition (and sometimes even the question concerning the third condition) itself. It is to be noticed in this context that in *Factortame*, the English courts, including the House of Lords, had no problem establishing the existence of a sufficiently serious breach.<sup>168</sup> The question of whether there was a causal link was left until after the determination of the seriousness of the breach. In any case, in the end damages were paid. In *Dillenkofer*, the plaintiff did not succeed with his claim because the relevant contract regarding the trip was concluded before the end of the transition period: the ECJ's judgment, however, made compensation possible for many other plaintiffs.<sup>169</sup> Within the period of delay of the transposition of the Package Travel Directive 90/314/EEC in Germany, 120 travel agencies went bankrupt. Altogether, until today, more than 9,000 lawsuits have been filed against Germany with claims exceeding 20 million German marks. Approximately half of these claims have finally been satisfied. As in the case of Mr. Dillenkofer, in many cases no compensation was awarded because the contract between the travel agency and the consumer had been concluded before the end of the transposition period of the Package

---

163. Case C-5/94, *The Queen v. Ministry of Agric., Fisheries & Food, ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. I-2553, I-2614.

164. *Norbrook Labs.*, 1998 E.C.R. at I-1600.

165. See *Haim*, 2000 E.C.R. at I-5133–40.

166. See *Brasserie du Pêcheur*, 1996 E.C.R. at I-1151–52.

167. *Brasserie du Pêcheur*, 1996 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 761 (BGH 1996).

168. *Regina v. Sec'y of State for Transp., ex parte Factortame Ltd. (No. 5)*, [2000] 1 A.C. 524, 546–47 (H.L.1999) (appeal taken from C.A.).

169. *Joined Cases C-178, C-179, C-188, C-189 & C-190/94, Dillenkofer v. Germany*, 1996 E.C.R. I-4845.

Travel Directive. This consideration concerns all cases where a package had in fact been booked before January 1, 1993, even though payments and traveling took place after that date. Some other plaintiffs did not succeed because they did not book a trip within the meaning of Article 2(1) of the directive. Basically, conditions of the German law of state liability have been applied, but modified. This is true for the principle of subsidiarity of state liability and for the law of limitation.<sup>170</sup>

In other cases, national courts, without making a reference according to Article 234 EC, did not properly apply the principles on state liability as set out in the ECJ's case law. The most serious attack on the ECJ's state liability jurisprudence was carried out by the Italian Supreme Court (the Corte di Cassazione). Five years after the ECJ's judgment in *Franovich*, the Corte di Cassazione annulled a ruling of a lower Italian court that had granted damages in a parallel case.<sup>171</sup> It held that there was no provision in Italian law holding the state responsible for exercising its legislative powers.<sup>172</sup> The Corte di Cassazione maintained this position until 1998, when it held that a compensation claim could be based on the provisions of the Italian Civil Code on the civil liability of the state.<sup>173</sup>

A further example is provided by a judgment of the Cour d'Appel de Liège, which did not consider a breach of EC law to be sufficiently serious and therefore dismissed the claim for damages.<sup>174</sup> Several Belgian firms took the Belgian State to court. They alleged that the adoption of the act of December 10, 1997, prohibiting tobacco advertising was in breach of EC law<sup>175</sup> and had caused losses, in particular those regarding the organization of the Formula One Grand Prix. After dismissal of the claim by the first instance court, the Cour d'Appel de Liège restated the principle that a Member State can be held liable where the legislature is accused of the infringement. It went on to consider the criteria established by the ECJ, in particular the extent of discretion enjoyed by the national legislature in the relevant field.<sup>176</sup> Having regard to a proposed EC directive that also provided for a general ban on advertising and sponsoring involving tobacco, the court of appeal concluded that it was hard to consider the breach to be serious. This led the national court to conclude that there was no sufficiently serious breach and to dismiss the claim in the first instance proceedings.<sup>177</sup>

In yet another case, the United Kingdom had not implemented Directive 93/104 on the organization of working time. The plaintiff, under the threat of redundancy, had agreed to work on a night shift and subsequently asked to be transferred to a day shift. After the refusal by her employer, she resigned on medical grounds. Having established that the plaintiff was to be regarded as a night worker, the high court decided that failure to

---

170. See Karlheinz Stöhr, *Schadenersatzansprüche Wegen Verspäteter Umsetzung der EG-Pauschalreiserichtlinie*, 1999 NEUE JURISTISCHE WOCHENSCHRIFT 1063.

171. CONANT, *supra* note 98, at 60.

172. *Id.*

173. See Sixteenth Annual Report, *supra* note 46, at 273. In a judgment of July 14, 1998, the Milan Magistrate's Court, without referring to the ECJ's *Franovich* judgment, granted a worker compensation from the Italian State when his employer's business was transferred (within the meaning of Council Directive 77/187 "on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses"). Seventeenth Annual Report, *supra* note 67, at 32-33.

174. Sixteenth Annual Report, *supra* note 46, at 271.

175. Loi interdisant la publicité pour les produits du tabac [Tobacco Advertising Prohibition Act], 1998 MONITEUR BELGE 3737, available at <http://www.moniteur.be> (last visited Apr. 1, 2005).

176. See Case C-392/93, *The Queen v. H.M. Treasury, ex parte British Telecomm. plc*, 1996 E.C.R. I-1631, I-1668-69, [1996] 2 C.M.L.R. 217 (1996).

177. 53 JOURNAL DE TRIBUNAUX: DROIT EUROPEEN 210 (1998) (citing a decision of the Tribunal de Première Instance de Verviers).

transpose the directive automatically constituted a serious breach of EC law. Nonetheless, the claim was dismissed because the plaintiff did not establish that she would have been able to force her employer to transfer her to day work and thus keep her job if she had been able to rely on provisions transposing the rights conferred by the directive into national law. Thus, the plaintiff lost her case due to a lack of causality.

In a case decided on June 25, 1997, by the Spanish Audiencia Nacional, some Dutch and German companies presented a claim to obtain compensation from the Spanish State. In particular, they argued that the Spanish authorities had caused damages to them by adopting, on February 15 and February 16, 1991, certain measures restricting intra-Community trade of pigs coming from Germany and the Netherlands. The Spanish administration argued that those measures were justified under Article 30 EC and under Article 10 of Directive 90/425/EEC of June 26, 1990, on the grounds of protecting public health; they were adopted after a new pig epidemic disease had been detected. The plaintiffs alleged that the aforementioned measures were contrary to Community law because in a meeting of the Permanent Veterinary Committee held on February 12 and February 13, 1991, Member States decided that unilateral measures would not be adopted. The Spanish court rejected the plaintiff's arguments, holding that the declaration lacked binding force. Since there was no infringement of Community law, no damages were awarded to the plaintiffs.

In the *Three Rivers District Council* case, depositors in BCCI (the Bank of Credit and Commerce International), which had been placed in liquidation, sued the Bank of England for damages for lack of supervision of BCCI in breach of the First Banking Directive (Directive 77/780).<sup>178</sup> Their claim was based on *Francovich* or, in the alternative, on the English-law tort of malfeasance in public office—to be suitably amended, the plaintiffs argued. The high court held that the directive did not impose a supervisory duty capable of founding a damages claim for breach of Community law. Assessing the first condition of state liability—the conferral of rights upon individuals—the court found that the First Banking Directive constituted a first step toward harmonization of the systems of supervision of credit institutions. It had not conferred rights on savers or other creditors nor a right of action in damages against the supervising authority. As the plaintiffs could not establish a sufficient right or interest in relying upon a directly effective provision of the directive, they could not rely upon *Francovich* liability either, as that required the same type of right.<sup>179</sup> The ruling to the effect that the directive does not confer rights on individuals vis-à-vis the supervisory body was affirmed by the majority of the Court of Appeal as well as by the House of Lords in a judgment of May 18, 2000.<sup>180</sup> This was the final judgment insofar as the claim based on Community law is concerned. The House of Lords regarded the matter of depositors' rights under *Francovich* liability as an *acte clair*; it therefore abstained from making a reference for a preliminary ruling. However, according to the dissenting opinion of Auld L.J. in the Court of Appeal, the First Banking Directive did impose clearly defined obligations on both Member States and supervisory bodies, giving rise to Community law-based rights in damages for the benefit of depositories in order to enforce those obligations.<sup>181</sup>

---

178. *Three Rivers Dist. Council v. Bank of England*, [1997] 3 C.M.L.R. 429 (Q.B. 1996) (U.K.).

179. *Id.*; see also THE ALL ENGLAND LAW REPORTS: ANNUAL REVIEW 424 (1996); cf. Christos Hadjiemmanuil, *Civil Liability of Regulatory Authorities After the Three Rivers Case*, 1997 PUB. L. 32.

180. *Three Rivers Dist. Council v. Bank of England*, [2000] 2 W.L.R. 1220, 1257, [2000] 3 All E.R. 1 (H.L. 2000) (U.K.) (appeal taken from the Court of Appeal).

181. In addition to extensive citation of this opinion in the House of Lords' ruling, see *Three Rivers Dist. Council v. Bank of England*, [2000] 2 W.L.R. 15, [1999] 4 All E.R. 800 (C.A. 1998) (U.K.).

In *Bowden v. South West Water Services Ltd.*, a case decided by the high court on December 17, 1997,<sup>182</sup> the application of the *Francovich* principle in the environment sector was at stake. A mussel fisherman claimed that he had been driven out of business because his fishing waters had been classified under a directive and because of pollution of the waters. One of the grounds for his claim was a breach of statutory duty consisting in the nonimplementation of the following directives: Directive 76/160 (bathing waters), Directive 79/923 (shellfish waters), Directive 91/492 (bivalve mollusks), and Directive 91/271 (urban waste waters). According to the high court, no *Francovich* liability arises from the incorrect or nonimplementation of any of these directives as they do not confer any rights upon individuals. The ruling stated that “improvements in water quality for bathers, and in treatment standards of waste water, may assist other interest groups, but that is not enough to give them a right of action.”<sup>183</sup> The Court of Appeal in its judgment of December 15, 1998, principally dealt with whether the relevant directives create rights for the fishermen.<sup>184</sup> Referring to *Dillenkofer*, the court held that two of the directives did not protect shellfishermen. As for the Shellfish Waters Directive, rights for mollusk fishermen could be derived from it. If it was established that this directive had not been implemented (properly), a right to compensation did exist. It was not for the Court of Appeal to decide this issue at this stage of the proceedings, but for the court hearing the case at first instance.

## 5. Conclusions

From the foregoing, the following conclusion may be drawn: it is hard for the parties to the national proceedings in actions for damages to predict who will finally apply the legal findings to the facts. From a standpoint of legal certainty and predictability, this is probably not an ideal situation. Even in the light of the guidelines given in *Brasserie du Pêcheur*, there seem to be loopholes for those national judges who are not absolutely enthusiastic to follow the ECJ’s state liability jurisprudence and see their government pay. The ECJ’s willingness to answer the respective questions itself if it has sufficient knowledge about the facts, no matter whether the national court has the same knowledge, must probably be seen against this background. In certain cases, it seems like there is a firm will of the ECJ to decide the case ultimately in Luxembourg, and not in the respective Member State. It can only be guessed that this may be the case in instances where the Court is worried that compensation will eventually not be paid to individuals and economic operators. The driving force behind giving the rules on the allocation of competences, in these instances, a wide interpretation, is the protection of individual rights. In other cases, such as *Köbler*, it seems as if the ECJ wanted to give a signal to the national judiciary to the extent that, despite the fact that national courts’ decisions can trigger state liability in theory, the Court will be very reluctant to do so in practice. In view of the importance of the communication and cooperation process with national courts, this motivation is understandable.

### E. *The Consequences of Noncompliance with the Duty to Refer*

If noncompliance with the duty to refer by a national court of last resort is obvious, there is a breach of Community law by the Member State concerned. The same holds true in the rare cases in which a national court has, after having requested a preliminary ruling

---

182. *Bowden v. S.W. Water Servs. Ltd.*, [1998] 3 C.M.L.R. 330 (Q.B. 1998) (U.K.).

183. *Id.* at 346.

184. *Bowden v. S.W. Servs. Ltd.*, [1998] 3 C.M.L.R. 180 (C.A. 1998) (U.K.).

from the ECJ, not complied with that ruling. In practice, the question is relevant whether a breach of the duty to make a reference under Article 234(3) EC is in fact sanctioned or not. The Commission is reluctant to bring actions for infringement of the Treaty in cases of breach by a national court. However, there seems to be a change of attitude in recent times. At least the ECJ's judgment in *Commission v. Italy* can be read to that extent.<sup>185</sup> In this case, the Italian courts, including the Corte di Cassazione, continued to uphold a legal situation that had been declared incompatible with EC law. With regard to a Member State's responsibility for breaches of Community law by its judiciary, the ECJ held that:

[I]solated or numerically insignificant judicial decisions in the context of case-law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account. That is not true of a widely-held judicial construction which has not been disowned by the supreme court, but rather confirmed by it.

Where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with Community law, others leading to the opposite application, it must be held that, at the very least, such legislation is not sufficiently clear to ensure its application in compliance with Community law.<sup>186</sup>

It goes without saying that the concept of "significant judicial decisions" needs further clarification. It is to be noticed that the Commission has been accused of going too far in instituting proceedings against a state that is not in the position to influence its independent judiciary.<sup>187</sup>

#### F. *The Legal Situation in the EEA/EFTA*

##### 1. General

The EFTA Court is cooperating with the national courts of the EFTA state parties to the EEA Agreement in the framework of Article 34 of the Agreement on the Establishment of an EFTA Surveillance Authority and an EFTA Court (SCA) procedure, which has been modeled on the template of Article 234 EC. In order to avoid constitutional problems in certain EFTA states, the drafters of the SCA have deviated from Community law, particularly in two respects: (1) Unlike national courts of last resort in the EC with respect to the ECJ, national supreme courts of the EEA/EFTA states are not obliged to refer European law questions to the EFTA Court. (2) Unlike preliminary rulings of the ECJ under the Article 234 EC procedure, decisions rendered by the EFTA Court in response to a question by a national court are, strictly speaking, not legally binding on the referring national court. In the SCA, they are therefore referred to as "advisory opinions." In practice, the differences between EEA Law and Community law are, however, not visible, and the EFTA Court calls its opinions under the Article 34 SCA procedure "judgments."

---

185. Case C-129/00, *Commission v. Italy* (E.C.J. Dec. 9, 2003), at <http://europa.eu.int>.

186. *Id.* paras. 32–33.

187. Bernhard Hofstötter, *Harte und Milde für Judikativunrecht vor dem EuGH*, 2004 EUR. L. REP. 60.

## 2. Which Cases are Referred Under the Preliminary Reference Procedure?

When it comes to whether to refer cases to the EFTA Court or not, it appears that the national courts of the EEA/EFTA states apply some sort of an extended *acte clair* doctrine. In doing this, the case law of the ECJ concerning provisions of EC law that are identical in substance with provisions of EEA law is to a certain degree taken into account. This has two consequences. On the one hand, the number of references to the EFTA Court is limited. The figures can nonetheless be compared with the number of references from the national courts of the former EEA/EFTA countries Finland and Sweden to the ECJ.<sup>188</sup> That supports the thesis of Hans Petter Graver that whether or not national courts are willing to refer questions under the preliminary-reference procedure is less dependent on whether they are located in the EC or in the EFTA pillar of the EEA than on features of the legal culture.<sup>189</sup> On the other hand, the cases referred to the EFTA Court will often deal with legal questions that have not or not fully been decided by the ECJ. The EFTA Court has received requests under the Article 34 SCA procedure by the supreme courts of Iceland, Norway, and Sweden as well as by the Supreme Administrative Court of Liechtenstein. But there have also been cases in which a reference would have been the right thing to do and which did not reach the EFTA Court.<sup>190</sup>

## 3. Compliance with EFTA Court Rulings

The referring courts in the EFTA countries have always found a construction allowing them to comply with the EFTA Court's rulings.<sup>191</sup> If a national court that has referred questions to the EFTA Court were to refuse to follow the latter's ruling, it would bring its country into a status of breach of the EEA Agreement.<sup>192</sup> Justice Hans Flock, writing for the unanimous Norwegian Supreme Court, stated in the first *Finanger* case that, although the opinion of the EFTA Court is advisory, it must be accorded preeminent weight due to the task of the EFTA Court in guaranteeing homogeneous interpretation, the specialized knowledge of the EFTA Court, and the fact that Member States and institutions of the EFTA and the EC have the right to submit observations.<sup>193</sup> Opinions of the EFTA Court are—from a sociological standpoint—not weaker than preliminary rulings of its big sister

---

188. Sweden has 8.8 million inhabitants. Since 1995, the ECJ has received forty-nine requests under the Article 234 EC procedure from Swedish courts. Three references had originally been lodged with the EFTA Court and were withdrawn after Sweden's accession to the EU. Nine references are actually pending (as of July 4, 2004). Finland has a population of 5.2 million. The ECJ has received thirty-six references from Finnish courts; nine references are pending (as of July 2004). Norway's current population is 4.5 million. Since 1994, the EFTA Court has received twenty-three references from Norwegian courts and four are actually pending (as of July 2004). Iceland has a population of 300,000. The EFTA Court has received nine references from Icelandic courts. The Liechtenstein population consists of 34,000 people. The EFTA Court has received five references so far from it, all from the Supreme Administrative Court.

189. See Graver, *supra* note 44.

190. See *id.*

191. With regard to national courts in Iceland, see Thorgeir Örlygsson, *Hvernig Hefur Ísland Brugðist við Ákvörðunum EFTA-dómstólsins?*, 2004 TIMARIT LÖGFRÆÐINGA 375; regarding courts in Liechtenstein, see Andreas Batliner, *Die Anwendung des EWR-Rechts Durch Liechtensteinische Gerichte—Erfahrungen eines Richters*, 25 LIECHTENSTEINISCHEN JURISTEN-ZEITUNG (2004); and regarding courts in Norway, see Graver, *supra* note 44.

192. See Henrik Bull, *The EEA Agreement and Norwegian Law*, 5 EUR. BUS. L. REV. 291, 296 (1994) (discussing the incorporation of EC regulations and directives in Norwegian law, as well as the legal effect of preliminary rulings and advisory opinions of the ECJ and EFTA Court).

193. Case 55/1999, Rt. 2000, at 1859 (S. Ct., Nov. 16, 2000) (Nor.), translated in EUROPEAN COURTS PROCEDURE 3.042 (2002).

court, the ECJ.<sup>194</sup> As far as the question is concerned of whether other national courts deviate from existing EFTA Court case law, there have not been any problems so far.

#### 4. State Liability in Particular

In *Sveinbjörnsdóttir*, the EFTA Court left it to the national court to apply the three conditions to the facts of the case before it.<sup>195</sup> The referring Reykjavík District Court accepted the principle of state liability. It found that all the three conditions for liability were fulfilled and granted the plaintiff compensation. The Supreme Court of Iceland confirmed that judgment on appeal. When the second state liability case, *Karlsson*, was referred to the EFTA Court, the Norwegian government, submitting observations, invited the EFTA Court to overrule *Sveinbjörnsdóttir*.<sup>196</sup> The Norwegian government essentially reiterated its arguments from *Sveinbjörnsdóttir* that in Community law, the principle of state liability is inseparable from the principle of direct effect and that both principles constitute complementary elements of the supranationality of Community law, which, in the Norwegian government's view, is absent in EEA law. The Icelandic government declared that it was perforce prepared to live with *Sveinbjörnsdóttir*. The Court saw no reason to follow the Norwegian invitation—quite the opposite. It confirmed its *Sveinbjörnsdóttir* ruling and rejected the argument that since state liability is in Community law inseparably connected with the principles of direct effect and supremacy, it cannot be part of EEA law because those principles are not features of EEA law. As far as the conditions of state liability are concerned, the Court examined the first two conditions itself and concluded that they were fulfilled: Article 16 EEA, the provision corresponding to Article 31 EC, was found to confer rights on individuals and the breach of the provision was held to be sufficiently serious to entail liability. In view of the ECJ's case law on the compatibility of state import monopolies with Article 31 EC, Iceland should have acted on January 1, 1994, the date of entry of the EEA Agreement. The Court found that it was clear long before the entry into force of the EEA Agreement that an import monopoly could not be maintained. The Icelandic State was in the best position to assess which legislative amendments were due by January 1, 1994. With regard to the third condition, the Court held that it is for the national court to decide whether there is a causal link between the breach and any damage sustained. That damages had to be paid was not in dispute before the Icelandic court. As of this writing, the case before the national court has been stayed because the parties have asked an expert to calculate the damage of the *Karlsson* firm.

The EFTA Court's state liability jurisprudence appears to also have factual *erga omnes* effect in that it is followed by other national courts than those who have referred a respective question to the EFTA Court. After having lost her first case in the Norwegian Supreme Court, Veronika Finanger brought an action for compensation against the government of Norway because of misimplementation of the Motor Vehicle Insurance Directive. The Oslo City Court ruled in favor of Ms. Finanger in the spring of 2003.<sup>197</sup> That court based its judgment not only on the EFTA Court's *Sveinbjörnsdóttir* and *Karlsson* judgments but also on the Icelandic Supreme Court's ruling in *Sveinbjörnsdóttir*. It found that the breach of EEA law committed by Norway was in fact sufficiently serious.

---

194. See HANS PETER GRAVER, DIE AUSDEHNUNG DES EUROPÄISCHEN GEMEINSCHAFTSRECHTS AUF NICHTMITGLIEDER DER UNION—DAS BEISPIEL NORWEGENS (ARENA, Working Paper No. 01/21, 2001) (on file with author).

195. Case C-236/99 (S. Ct., Dec. 16, 1999) (Ice.).

196. Case E-4/01, *Karlsson v. Iceland*, 2002 REP. EFTA CT. 240.

197. Case 0210919 A/83 (Oslo City Ct., Mar. 13, 2003) (Nor.).

As of this writing, the judgment is on appeal. It is important to note that the Norwegian government gave up its opposition to the principle of state liability as such and limited itself to arguing that the breach in question—the misimplementation of the Motor Vehicle Insurance Directive—did not constitute a sufficiently serious breach. In those proceedings, paragraph 30 of the EFTA Court's *Karlsson* judgment has led to controversy. The EFTA Court held that:

[t]he finding that the principle of State liability is an integral part of the EEA Agreement differs, as it must, from the development in the case law of the Court of Justice of the European Communities of the principle of State liability under EC law. Therefore, the application of the principles may not necessarily be in all respects coextensive.<sup>198</sup>

The Norwegian government argued that this means that the second condition for state liability, i.e., the existence of a sufficiently serious breach, is to be seen as less strict in EEA law than in Community law. On the other hand, it has been said that paragraph 30 of the *Karlsson* judgment must be interpreted to the effect that in view of the homogeneity objective underlying the EEA Agreement on the one hand and the lack of EC-style direct effect on the other, the requirements for a sufficiently serious breach must be lower in EEA law than in Community law.<sup>199</sup>

It must finally be emphasized that the EFTA Court's case law has also been followed by the national courts in Austria and Sweden in the above-mentioned cases *Rechberger* and *Andersson*. In *Rechberger*, it appears that the case before the District Court of Linz has been settled and that damages have been paid in this framework. In *Andersson*, the referring first instance court found after the preliminary ruling of the ECJ that the rules on state liability applied. But the court of appeal reversed. In a judgment of November 26, 2004, the Högsta Domstolen has now acknowledged state liability to constitute a principle of EEA law and found in favor of the plaintiffs. The Högsta Domstolen extensively relied on the EFTA Court's rulings in the *Sveinbjörnsdóttir* and *Karlsson* cases.<sup>200</sup>

#### IV. IMPLEMENTATION OF INFRINGEMENT RULINGS

##### A. EC

As the guardian of the EC Treaty, the European Commission can initiate proceedings intended to terminate national measures conflicting with EC law. The aim is to ensure Member State compliance with EC law. Under Articles 226 and 227 EC, the ECJ may declare provisions of national law incompatible with Community law upon an application by the European Commission or by another Member State and thus independently from given lawsuits before national courts. Whereas it is clear that the latter must set aside such national provisions, the real addressee of an infringement action ruling is not a national court, but a national legislature. According to Article 228(1) EC, a Member State that has been found to be in breach of the Treaty shall be required to take the necessary steps to comply with the ECJ's judgment. There seems to be a ranking of the individual Member States indicating that differences exist with regard to efficiency and enforcement. An

---

198. Case E-4/01, *Karlsson v. Iceland*, 2002 REP. EFTA CT. 240, 249.

199. Georg Gorton, *Staatshaftung im EWR nach Köbler—Eine Zwischenbemerkung*, 2004 EUR. L. REP. 65.

200. T 2593-01 (S. Ct., Nov. 26, 2004) (Swed.).

interim report recently presented by Heidelberg political scientist Tanja Börzel<sup>201</sup> distinguishes between model pupils, latecomers, and average performers. The best performing states are the three Scandinavian countries, the United Kingdom, and the Netherlands. Last are the Mediterranean countries, including France and Spain. All the other countries are located in the midfield. There appears to be a correlation between a country's legal culture, including the importance of the rule of law, and its willingness to comply. Beyond that, countries with strong economic resources appear to pursue their own interests, a factor that has prompted France, Germany, and the United Kingdom to be among the most frequent violators. The same is said to be true of the countries that make large contributions to the EU budget. Furthermore, the design of the national legislative process may play a role, in particular in countries adhering to a federal system.

Judgments of the ECJ are declaratory in nature. For a long time, the Member State in question could comply or it could not. This situation was obviously rather frustrating, not only for the Commission but also for individuals and economic operators who had been the victims of the practices in question. An example is provided by Italy's nonimplementation of the Insolvency Directive, in spite of an ECJ judgment declaring that Italy was in breach of the EC Treaty. That case ultimately led to the ECJ's (first) *Francovich* judgment on state liability. That is why in the Treaty of Maastricht a new provision, Article 228 EC, was inserted that allows the Commission to seek a judgment of the ECJ imposing a penalty payment on a Member State in cases of noncompliance. Some authors tend to question the efficiency of this new action. They criticize the lack of power to seek an injunction in case of refusal to comply as well as the fact that there is no power of the ECJ to require the state to comply within a certain time limit.<sup>202</sup> The first two cases decided by the ECJ under Article 228 EC concern actions of the Commission against Greece<sup>203</sup> and Spain.<sup>204</sup> Since its introduction, proceedings according to Article 228 EC have been initiated in several cases.<sup>205</sup> One must hope that the judgments will be effectively enforced, at least as a contribution to the enforcement of the rights of the individual.

## B. EEA/EFTA

The EFTA Surveillance Authority or another EFTA state may take an EFTA state that does not comply with its obligations under the EEA Agreement to the EFTA Court (as set forth in Articles 31 and 32 of the Agreement on the Establishment of an EFTA Surveillance Authority and an EFTA Court). According to Article 33 of that Agreement, an EFTA state that has been found to be in breach of the EEA Agreement by the EFTA Court is obliged to take the necessary measures to comply with that judgment. Although the EEA Agreement does not contain a provision allowing for the imposition of fines in cases of noncompliance, national legislatures of the EEA/EFTA states have always followed EFTA Court judgments finding that by maintaining a certain part of national legislation an EEA/EFTA state has violated its obligations under the EEA Agreement. This may have to do with the fact that in a small organization like the EEA/EFTA, it is difficult for a national legislature to get

---

201. Tanja Börzel, *Regieren Jenseits des Nationalstaats: Auch Ohne Legitimes Gewaltmonopol?*, Address at the Walter Hallstein Symposium (Nov. 12, 2004), noted in Tanja Börzel, *Regieren Jenseits des Nationalstaates*, NEUE ZÜRCHER ZEITUNG, Nov. 15, 2004, at 2 (outline of remarks available at <http://www.walter-hallstein-symposium.de/symposium.html#> (last visited Apr. 1, 2005)).

202. CRAIG & DE BURCA, *supra* note 90, at 402–04.

203. Case C-387/97, *Commission v. Hellenic Republic*, 2000 E.C.R. I-5047.

204. Case C-278/01, *Commission v. Spain* (E.C.J. Nov. 25, 2003), at <http://europa.eu.int>.

205. See, e.g., Twentieth Annual Report, *supra* note 75, annex 5 (reviewing judgments of the ECJ through the end of 2002 that have not yet been implemented).

away with noncompliance as well as to accommodate differences with features of legal culture.

## V. CONCLUSIONS

The EC legal order stands out against classic public international law because of the recognition of the so-called constitutional principles of direct effect, primacy, and state liability. These principles confer important rights on individuals and economic operators. To what extent the monist system that has thereby been created is in fact effective depends, however, on whether those rights are being enforced in practice. This question has been examined in this article with respect to preliminary rulings and enforcement actions against Member States. It seems to be fair to conclude that overall, the Article 234 EC preliminary ruling system, which is a system of cooperation based on the willingness of the national courts to play by the rules, functions well, in particular if one takes into account what for Americans is probably not obvious: that national traditions are so diverse and that the position of the judiciary differs from one Member State to the other. If there is a judgment of the ECJ under Article 234 EC, not only the referring national court but most national courts of the EC Member States will, as a rule, act in a bona fide manner and respect it. ECJ preliminary rulings have, therefore, in most (albeit not in all) cases factual *erga omnes* effect. The only major problem appears to be the unwillingness of certain courts of last resort to refer questions to the ECJ, although a legal issue is far from clear. That may also imply deviation from existing ECJ case law. On certain occasions, the implementation of ECJ state liability rulings in the national courts can lead to unsatisfactory results. In EEA/EFTA cases, the lack of a duty by national courts of last resort to make a reference to the EFTA Court and the lack of a legally binding effect of preliminary rulings on the referring court have hardly led to a different situation as compared to the Community.

As far as the enforcement of infringement actions against Member States is concerned, the insertion of a provision that allows for the imposition of fines on EC Member States that do not comply with a first judgment of the ECJ has certainly increased the pressure. In the EEA/EFTA, compliance with infringement rulings of the EFTA Court has never been a problem.