The Mysterious State Liability Doctrine of European Community: An Uncertainty Analysis

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Introduction

In the famous Francovich case, the European Court of Justice ruled that a Member State could be held liable for breaches of Community law, a breakthrough for individuals to protect their rights conferred by Community rules. Although the doctrine of Member State liability has been rapidly developed and elaborated by the Court in the following cases, it remains a doctrine with problematic uncertainties, both in the criteria of State liability defined by the doctrine, and the applications of the doctrine in real cases.

The purpose of this paper is taking a closer look at the current uncertainties of the State liability doctrine and how it might develop in the future, coupled with the suggested ways to enhance the certainty of the doctrine, in an attempt to upgrade the protection of individual Community rights and full-effective enforcement of Community law. Given the increasing number and importance of the disputes among private parties arisen from the failure of implementing relevant directives by Member States, the research of this paper may provide valuable insights for a healthy development of State liability doctrine. Four relevant aspects will be investigated to fulfill the purpose.

The paper will first introduce the creation and current art of the State liability doctrine and its impact on protecting individual Community rights. It is important to understand the context in which the doctrine has been developed. A better understanding of the sources and impact of the doctrine will reveal why avoiding uncertainties in the context is vital for future development. An insight of the role played by European Court of Justice as a creator, developer and explorer of the State liability doctrine, will be provided in Part One too. Last section of this Part will address the interesting relationship among the key judicial remedies at Community level, namely, supremacy, direct effect, indirect effect and State liability doctrine. Based on the case-law and the understanding of the intentions of the Court, a parallel
model is developed for State liability doctrine, in an attempt to better placing the doctrine in the overall remedy system.

The paper will then carry out uncertainty analysis in Part Two, where uncertainties are probed carefully. The uncertainties of the criteria of the State liability doctrine will be outlined one by one, to show both the extent and the dimension. The impact of these uncertainties is illustrated with a discussion of the lines of State liability cases, with celebrated cases including Brasserie/Factortame, Dillenkofer, British Telecommunications, Brinkmann, and Köbler and so on. The case-study involved in this Part also keeps a close eye on the newest cases such as Traghetti del Mediterraneo SpA, Carol Marilyn Robins, and Paul and Others. The uncertainty analysis will consider not only the test and elements of the criteria, but also the distribution of the jurisdiction between the Court and the Member States on each criterion, as the applicants and national courts will have to face the uncertainties in both procedural and substantive aspects. During the uncertainty analysis, the developing process of the principle of direct effect is borrowed to reflect on the relevant progress of the State liability doctrine. A matrix of the uncertainties is constructed at last to capture the principal uncertainties explored in this Part.

Chief analysis comes in the following sections of the paper. In part three, discussions will focus on all the uncertainties contained in the State liability doctrine. Reasons of the uncertainties are included in part four. In particular, the critical role of the Court is emphasized here to provide a clearer look behind the uncertainties. Finally, this paper will present possible solutions to avoid the uncertainties, and end with some concluding reflections.
Part One: Background of Member State liability For Breach of Community Law

1.1 Sources and impact of State liability doctrine

The way in which the individuals in European Union exercises and protects their own rights under the legal system of EU is profoundly influenced by the adoption of doctrine of member State liability for breaches of community law, widely known as Francovich doctrine. Before Francovich, the field was developed around the concept of direct effect. Direct effect is established to ensure the effective enforceability of Community law at the national level, with a balancing approach adopted by ECJ towards the principles of national procedural autonomy and effectiveness. On the concept of direct effect, individuals can provoke and rely on Community law in national courts to protect and claim their rights conferred. However, the adequacy and effectiveness of national rules being compatible to Community law is still questionable when the directive provisions concerned do not fulfill the requirement of direct effect, which includes three criteria:

1) the provision concerned must be sufficiently clear and precise for judicial application;
2) it must establish an unconditional obligations;
3) the obligation must be complete and legally perfect, and its implementation must not depend on measures being subsequently taken by Community institutions or Member States with discretionary power in the matter.¹

The three criteria are applied under two principles laid down by case law of the Court. The principle of equivalence means the procedural rules applying to enforcement of Community right must be no less favorable than those which apply to similar

¹ Advocate General Mayras in Reynolds v Belgian State
domestic actions, while the principle of effectiveness indicates that the exercise of Community rights should not in practice be impossible or excessively difficult. On the development of State liability doctrine, the two principles continue to play an important role as a guideline of application.

Similar to the concept of direct effect, State liability doctrine as well as the two principles is solely developed by the Court, with no explicit EC rule on the subject. The relatively weak source of the doctrine remained a hot area of debate. To enhance the credibility of the two principle, the Court explained in case Peterbroeck\(^2\) that “under the principle of co-operation laid down in Article 5(now 10) of the Treaty, it is for the Member States to ensure the legal protection which individuals derive from the direct effect of Community law.”

Before Francovich, State liability was usually classified as a matter of national law, while in Francovich and Others\(^3\), two genuine questions were raised to ECJ, first, could a directive be enforced without implementation in a Member States, second, should the member state compensate the loss of individuals arisen by the failure implementation?

Francovich and the other plaintiffs, brought action against the Italian government, asking the judges either to condemn the defendant to pay them their lost salaries, applying Council directive 80/987/CEE to their cases, or to hold it liable for the damages following from the defective incorporation of the directive into the national legal system. The plaintiffs' employers were firms which had become insolvent with salaries and other benefits unpaid, with insufficient assets to satisfy the demands of the employees in the subsequent bankruptcy proceedings.

The court confirmed the lack of direct effect of the directive in the light of

\(^3\) Joined Cases C-6/90 and C-9/90[1991]ECR I-5357
insufficiently precision, and went on to state that a “State must be liable for loss and
damage caused to individuals as a result of breaches of Community law for which the
State can be held responsible is inherent in the system of the Treaty”. The Court
creatively upheld the individual rights on the ground of fundamental principles of the
Treaty, which includes individuals under the legal system, making State liability a
principle of Community law, and more importantly, creating a new remedy under EU legal system.

In Francovich, the Court for the first time fully addressed the question of State
liability for breach of Community law and its basis in EC, not national law, laying
down following conditions to be as regards in the establishment of State liability
arising from non-transposition of a directive within the required period:

1) The result prescribed by the directive should entail the granting of rights to
individuals;
2) The contents of those rights must be identified on the basis of the provisions of
that directive;
3) The existence of a causal link between the breach of the State's obligation and the
loss and damage suffered by the injured parties.

Other aspects of damages claims are governed by the rules of national liability law.
For instance, “it is for the internal legal order of each Member State to designate the
competent courts and lay down the detailed procedural rules”. Further, according to
the ECJ, “the substantive and procedural conditions for reparation of loss and damage
laid down by the national law of the Member States must not be less favorable than
those relating to similar domestic claims and must not be so framed as to make it
virtually impossible or excessively difficult to obtain reparation”.

Although the doctrine at the closure of Francovich case is still ambiguous and
narrowly defined, the development of post-Francovich cases are vigorous, which is
especially fruitful in widening the scope of application of the doctrine, strengthening the legal base of the State liability and compensation, and establishing an overall-accepted rule in conditions of liability.

The impact of establishing the doctrine is profound to the Community legal order, which not only ensures the interests of individuals are not prejudiced, but also promotes the effective implementation of the directives among the Member States. On national level, the doctrine may result in a “spill-over” effect upon domestic tort law, for example, the State liability doctrine provided an alternative ingredients for determining State liability, most notably with the “sufficiently seriousness” criterion. See Chapter 3.4 for the detailed analysis of State liability doctrine influencing on national law.

1.2 State liability doctrine in developing

The doctrine includes three conditions under which the Member State can be held responsible:

1) The rule of Community law infringed must be one intended to confer rights on individuals;
2) The breach must be sufficiently serious;
3) There must be a causal link between the breach and damage.

The first and the last conditions are initially developed in Francovich, while the second one is inserted by Brasserie/Factortame.

Since the Francovich was ruled and the principle of State liability was laid down, remarkable efforts of the Court have been witnessed to complete and strengthen the

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5 Joined Cases C-46/93 and C-48/93 CMLR 889
doctrine, by referring frequently to Francovich judgment. Prior to Brasserie/Factortame, Francovich is quoted mainly to clarify the relationship between direct effect of directives and the Member States’ duties of interpreting national law in conformity with EC law, and to showcase the causal link between the breach of the state's obligation and the damage suffered. The purpose of the directive is also well-examined to conclude whether it is granting rights to individuals, and whether it is possible to identify the contents of those rights on the basis of the provisions of the directive. Cases in points are Faccini Dori vs Recreb6 and El Corte Inglés vs Blázquez Rivero7, where the court states, “Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive, provided that three conditions are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the State's obligation and the damage suffered.”

A big breakthrough is recorded in Brasserie/Factortame. Brasserie du Pêcheur concerns a claim brought by a French brewery. The German government denied their access to German market as the product did not meet the purity requirements stipulated by German law. According to ECJ’s judgment, the German law composed measures having an effect equivalent to quantitative restrictions on imports (Art. 30 EC), and the French company continued to bring an action in the Bundesgerichtshof (German Federal Court of Justice), in an attempt to recover their damages from the German government. the Bundesgerichtshof referred to the ECJ certain questions relating to the principles to be derived from Francovich. Factortame is a series of cases concerning a new framework of registration of fishing vessels in the United Kingdom, with Factortame III joined with Brasserie.

In Brasserie/Factortame, the doctrine is further shaped and become more detail-oriented. First, the case spelled out “seriousness” explicitly, and claimed the irrelevances of whether it is national authority or a Community authority and which organ of the State is responsible for the damage.

The test of seriousness has quickly become the hottest spot of debate in State liability cases. An informal guideline has been laid out by the Court in Brasserie/Factortame, which includes the clarity and precision of the rule breached, whether the infringement was intentional or involuntary, the measure of discretion left by the rule to a national or Community authorities, whether any error of law was excusable or inexcusable. The Queen v MAFF ex parte Hedley Lomas, where the exporter claimed damages for losses suffered as a result of a UK ban on the export of live sheep to Spain, which was imposed because Spanish slaughterhouses did not comply with requirements of Directive 74/577, has further taken the subjective concern into the test, where the State incorrectly transpose a directive in good faith may not amount to a sufficiently serious breach of Community law, while the failure of taking any measure necessary to give effect to a directive timely is regarded as serious breach. A point need to be addressed here is that fault is not adopted as a condition, due to the very different definition and interpretation of fault across the Member States.

Secondly, In Brasserie/Factortame, the Court broadened the application of the State liability doctrine, in responding to the major question raised to the Court in the case, (1) whether the principle of Member State liability developed in Francovich applied to national legislative acts, and (2) whether the right to compensation was conditional on the existence of fault or could be made subject to other restrictions found in national law on State liability. The application of the doctrine has been increasingly widened since, as the Court relies more and more on it to draw judgments concerning State liability. The scope is enlarged from non-transposition of a Directive in Francovich, to

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8 Case C-1/96 The Queen v MAFF ex parte Hedley Lomas
incorrect transposition of a Directive in British Telecom, and non-compliance with a judgment of the Count in Factortame III.

However, the expansion of the doctrine stayed inside the boundary of the basic liability conditions, while all the other aspects of damages claims such as time limits, scope of reparation are governed by the rules of national liability law. The substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favorable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.

A significant development of the doctrine was witnessed in Köbler (2003)\textsuperscript{10}, where the member State liability is confirmed for breaches of Community law attributed their national courts adjudicating at last instance. Mr Köbler, an Austrian university professor, was refused to be granted to university professors relied on the fact that the years of his service at German Universities were out of the calculation of a length of service increment. He claimed compensation for the loss he had unlawfully suffered as a result of the judicial decision by the Supreme Administrative Court, which acted contrary to the ECJ case law, infringed directly applicable provisions of Community law by treating the increment at issue as a loyalty bonus.

The impact of Köbler judicial liability is enhanced recently, in the judgment of case Traghetti del Mediterraneo SpA published in June 2006. The Court gave a comprehensive analysis on the establishment of Köbler judicial liability. Importantly, the Court precluded national legislations that are able to fundamentally avoid State liability arising from a court adjudicating at last instance, as the Court ruled that, “the Köbler judgment preclude national legislation such as that at issue in the main proceedings which, firstly, excludes all State liability for damage caused to individuals by an infringement of Community law committed by a national court

\textsuperscript{10} Case C-224/01, Gerhard Köbler v. Austria [2003] ECR I-10239
adjudicating at last instance, where that infringement is the result of an interpretation of provisions of law or of an assessment of the facts and evidence carried out by that court, and, secondly, also limits such liability solely to cases of intentional fault and serious misconduct on the part of the court.”

The strengthened Francovich doctrine has a great impact on the national remedial system, creating a brand new remedy individuals can resort to at Community level, on the principles of effectiveness and equivalence in the context of the provision of national remedies for Community rights. Member States, including Italy, UK, Netherland and Germany, all responded strongly to Francovich case, by denying the fundamental principles of the Treaty the Court used to justify the principle of State liability, and defending the national procedural autonomy of the Member States. Despite of all the objections, the doctrine has been making stride in the development of remedies at the Community level, with the consistent application of the doctrine.

### 1.3 ECJ's role in the doctrine of member State liability

**A creator of a remedy at Community level**

In the development of State liability doctrine, the Court played as an innovator in a strict sense, creating an applicable and uniform rule for member State liability at Community level, which has also brought suspicious and objections in the legitimate of this creation. In Brasserie, the German government claimed that a right to damages could only be created by legislation, which is responded by the Court's classification of the extent of the member State liability to judicial interpretation, rather than a brand new creation of rights. The Court also backed its classification by stating that State liability rules are widely developed by court in many national legal systems.

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11 Case 173/03, *Traghetti del Mediterraneo SpA v Repubblica italiana*
12 European Court of Justice: 1991: paras 15-17
The Court made remarkable efforts in adopting the doctrine as an alternative remedy, in the cases where the involved directives had no direct effect, to upgrade the full-effectiveness of the directives in a broader view. In Francovich, the Court basically denied the direct effect of the directive but presented a gateway to the new doctrine, suggesting that the direct effect of a directive is irrelevant to the context of State liability, in which the full effectiveness of Community law is prioritized to be protected first. In the other word, just because the relevant directives have no direct effect which the individuals could rely upon, the irrelevance criterion here is particularly precious. In Marleasing, the Court ruled that “national court is required to interpret its national law in accordance with relevant directives as far as possible and if the result prescribed by the directive cannot be achieved by way of interpretation..., Community law requires the Member State to make good damage caused to individuals through failure to transpose a directive”, provided certain conditions were met.14

The Court's determination in establishing the doctrine is evident in many cases repeatedly mentioning Francovich case. Now, the doctrine of member state's liability to the individual in damages for losses caused by a breach by that state of community law is regarded as a fundamental doctrine developed by the court in recent years, following the doctrines of direct effect and supremacy of community law which are established in the leading cases of van Gend en Loos and Costa v. ENEL.15

The fundamental doctrines are differentiated from the general principles of Community Law in the way that they are developed through the case law of the Court, rather than expressed explicitly by the Treaties, which is however, essential for the Member State to accept in order to implement and effectively enforce the Community Law, despite of the possible uncertainties and disparities arisen between the

14 Case C-106/89, Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135
15 Case 26/62, Van Gend en Loos, [1963] ECR 1
community and domestic legal system.

**A developer of relationship between Community and national legal system**

The significance of the doctrine not only lies in the creation of a new remedy for individuals at Community level, but also because it revealed an encouraging trend of establishing a balance between Community and national legal system, in an attempt to paint a comfortable picture of effective protection of Community law rights and national procedural autonomy.

In earlier cases like Rewe and Comet\(^\text{16}\), the Court looked suspiciously generous in entrusting the enforcement of Community law rights to the legal system of the Member States, with the wording of the Court goes as in the absence of Community rules, it is for the domestic legal system of each Member State to determine the procedural conditions to ensure the protection of Community rights. A glance at the statement may form an impression of simply emphasizing the principle of national procedural autonomy, but the Court went on to add the principle of equivalence in which the procedural conditions should not be less favorable than those of national law, and the principle of effectiveness in which the procedural conditions should not undermine the effective realization of Community law rights.

In the cases development in the second stage showed that the Court shifted the emphasis to effectiveness, indicating sufficient effectiveness become the priority and a far-reaching right to effective protection is developed by the Court in Von Colson, Kamann and UNECTEF\(^\text{17}\).

At the time when the member State liability doctrine was formally set up in Francovich, the Court looked quite cautious and conservative in the wording towards


\(^{17}\) Case 14/83 *Von Colson and Kamman v Land Nordrhein-Westfalen* [1984] ECR 1891
the part concerning Member States. The Court’s argument was starting from EC Treaty defining the relationship between Community and national legal order, emphasizing that the two systems are supposed to be integrated according to the Treaty in which national courts are bound to apply. And more importantly, the Court upheld the legal status of individuals, who formerly stand a weaker chance in protecting their rights granted by the Community law, claiming that “Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions”.18

In Brasserie, the Court further expanded the effectiveness of the doctrine and facilitated the intervention by applying it to all breaches of Community law by member state, regardless of whether the breaches are conducted by legislative, executives, or judicial department of the governments. It not only shows the determination of the court to safeguard the newly-established doctrine, leaving no excuses to Member States who intend to escape the liability, but also enhanced the supremacy of Community laws, providing a port for the Court to intervene in traditional fields of State sovereignty, on the purpose of ensuring the full-effectiveness of Community law.

An explorer of the preliminary rulings procedure

During the development of member State liability doctrine, the Court acts indeed like a shrewd hunter, who is good at sharpening its weapon consistently, as it fueled the power of preliminary rulings procedure quietly in the post-Francovich cases. Preliminary rulings procedure impetuses the uniform application of the law by granting jurisdiction to the Court in responding to questions raised by national courts about the effect of Community law in cases pending before them. While the definition of the procedure remains unchanged, the Court now can do more with it.

18 Francovich Para 31.
In the judgment of Köbler, the Court presented strong defense to uphold the State liability doctrine for the decision of the court adjudicating at last instance, turning down all the negative observations submitted to the Court from five member state governments\textsuperscript{19} and the Commission. The Court started from the ultimate goal of State liability doctrine of protecting the rights derived by individuals from Community rules.

As the supreme courts in the member state is the last resort for individuals to claim the rights conferred by the Community law, they are of great importance in realizing the full effective of the Community rules. The obligation of the national courts, against whose decisions there is no judicial remedy available for individuals, to launch the preliminary reference procedure, can be found in EC Treaty Article 234(3) and supported by case CILFIT\textsuperscript{20}. In CILFIT, the Court took a liberal approach, as “the obligation to refer a matter to the Court exists only where a reasonable interpretative doubt has arisen would lead to the introduction of a subjective and uncertain factor…, to ensure certainty and uniformity in the application of the Community law”\textsuperscript{21}. Besides the criteria set out above, the national courts have full discretion in deciding if the procedure is necessary.

The decision in Köbler has a profound impact on national legal system, spurring national courts to resort to the preliminary rulings procedure to avoid potential liability. National judges are not likely to abuse their discretion under the CILFIT case-law, by refraining from making Article 234 EC references in respect of issues which are not genuinely covered by the acte clair doctrine.

As a result, the Court is bound to gain more chance of participating in the judge of cases involving Community law. It is certainly an effective method through which the

\textsuperscript{19} The five governments are German, Netherlands, Austria, French, and UK government. See Köbler Para 16-29
\textsuperscript{20} Case 283/81, \textit{CILFIT and others} \[1982\] ECR 3415.
\textsuperscript{21} Case 283/81 \[1982\] ECR 3415, 3439.
Court is able to connect with the final enforcement of the Community law at national level, so that the effectiveness and uniform application will be enhanced under the guidance of the Court in the preliminary rulings. A rich and steady flow of preliminary references to the Court from national courts was the precondition for a successful outcome of transforming the preliminary procedure into a vehicle for an effective Community judicial review of member state acts.22

Although the uncertainties and the legitimacy of Köbler judicial liability is still being heavily debated both in the EC institutions23 and Member States, the Court did pave a way to enhance both the power of State liability doctrine and the preliminary rulings procedure in protecting the effectiveness of Community law.

1.4 Relationship among supremacy, direct effect and State liability doctrine

One can not evaluate a legal doctrine without looking at its developing environment, especially political and legal background. State liability doctrine is now in an enlarged Europe, with the prevalent idea of Constitution for Europe. The trend of European constitutionalism is developed from a combination of the both the Treaty provisions which ensure the directly applicable of regulations, and the practice of the Court which created the rule of law of supremacy and direct effect. The constitutionalism is a further step to confirm the higher authority of the Community law, where the Community norms trump conflicting Member State norms.24 Highlighting the effective enforcement of the Community law in national courts, State liability is standing on the correct side of the trend, together with direct effect.

22 Hjalte Rasmussen, European Court of Justice, Gadlura Publishers, Copenhagen 1998, p 117
23 Opinion of AG Leger in Köbler
The relationship among supremacy, direct effect and State liability doctrine is found highly interesting, as none of them could be located in an explicit article in the EC Treaty, but all of them were introduced by the Court to realize the objective of the Treaty, and become fundamentally, indispensably, or increasingly important.

On a closer look, one will find there are different connections among these three principles of law. Supremacy, as the earliest developed principle, provides a foundation for the other two principles.

Born in 1964, the principle of supremacy has been developing into “the nature of the community law”\(^\text{25}\), applying to almost every type of the community law, including the law adopted by the institutions of the Community in exercising competences conferred on it. More remarkable achievement of supremacy principle is its widest acceptance among the Member States, which enables supremacy to play as the cornerstone for the later-developed principles. France for example, accepted and began to apply the principle of supremacy in 1972, right after the Jacques Vabre case which was ruled in favour of EC law. However, it is also doubtable that the early acceptance of supremacy principle is because it looks like a general principle\(^\text{26}\), which could also be found in international treaties, suggesting the national courts’ indifferent attitudes as little instant consequence will be incurred by the merely granting the supremacy.

The principle of the supremacy working as the foundation of State liability doctrine can be also proved in State liability case-laws. In the case-laws, the Court frequently mentions the principle of the primacy of Community law to enhance the requirement for the Member State to give full-effectiveness to Community rules, which in the cases embodied in the State liability doctrine.\(^\text{27}\)


\(^{27}\) Case C-118/00 Larsy, C-224/01 Köbler.
In contrast, both direct effect and State liability doctrine directly entails the rights of compensation to the individuals whose rights conferred by the Community law are infringed. Direct effect and State liability have in common that the legal consequences they entail are the consequences as determined by national law. The Court’s approach in State liability doctrine is exactly the same with that in direct effect case-law, which both emphasizes the principle of effectiveness and equivalence in applying national procedural rules.

Secondly, in establishing the principles of direct effect and State liability, one condition are mentioned by both – discretion. Although it is only a factor influencing the test of certain conditions in State liability, Bergaderm and the following case-law made it a strong test to establish the State liability with little, or no discretion. As it is first explained by the Court, the absence of discretion is considered to be a basic condition for direct effect. Further statement of the Court held that depending on the purposes of concerned Community norm, existence of the discretion does not necessarily block direct effect, but whenever the national court is able to perform the review of whether relevant authorities has remained within the limits of the discretion that is left, the Directive is considered to have direct effect. The uncertainties are arisen, when the court remained silent in interpreting the notion, in both direct effect and State liability case-law, while uniform understanding the word “discretion” is critical in many circumstances. Analysis of the uncertainties concerning discretion is carried out in Part Two.

In studying the relationship between State liability and direct effect, some claimed that the State liability is a supplement to direct effect, to which I shall raise my different opinion. The supplement role argued by Sacha, denied the plaintiff’s choice of which avenue he or she will follow, which means the liability arises in principle only if the injured party has been unable to safeguard his or her rights by means of

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29 Sacha Prechal, pp 301.
direct effect or consistent interpretation (indirect effect\textsuperscript{30}).

I place the State liability doctrine and direct effect in a parallel position, meaning whether or not an individual can rely on the principle of direct effect, he or she is able to bring the claim for damages against the Member State for its failure to implement a Directive, which means the procedure does not flow through the test of direct effect in order to trigger State liability claim. See Figure 1 for the comparison of the understanding of Sacha’s and mine.

The relationship between indirect effect and State liability doctrine is highly intimate. Indirect effect, also known as purposive interpretation, or the principle of effective judicial protection, is a principle of the Community law which requires national courts to ensure the effective judicial protection of the individual's Community rights by adopting a purposive interpretation of national law in light of the Directive. According to the principle of indirect effect, where national implementing legislation fails to give full effect to a Directive, individuals may still be able to derive their Community rights indirectly through the interpretation of national laws. Importantly, before the establishment of indirect effect, individuals cannot rely on a non-implemented directive against other individuals, as the directives lack "horizontal direct effect." Looking into the relationship between indirect effect and State liability doctrine, one will also find that, they share the same legal base, relying on the principle of effectiveness and Art 10 of the EC Treaty.

\textsuperscript{30} In the condition of “indirect effect”, the directive concerned must be taken into account by the national court when it interprets the national law, and the relevant national rules should be interpreted as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view. See Case C-91/92, \textit{Faccini Dori v. Recreb}, [1994] ECR I-3325, para 26.
The reasoning for this parallel model is two-folded. First, the Court emphasized the irrelevant of direct effect in State liability case, starting from Francovich, indicating the Court is determined to clear the way for the claim of State liability, even at absence of direct effect. A clearer statement of the Court is found in Brasserie, in para 21, “This will be so where an individual who is a victim of the non-transposition of a Directive and is precluded from relying on certain of its provisions directly before the national court because they are insufficiently precise and unconditional…the purpose
of reparation is to redress the injurious consequences of a Member State’s failure to transpose a Directive.” The Court is flexible on the remedies available to individuals, and it is up to the individuals to choose the way to protect their own rights. The Court's ruling in Evans31 backed this point. Mr Evans brought an action for damages against the UK for failing to implement the Directive correctly, after failed to rely on the principles of direct and indirect effect before the Court of Appeal. In preliminary ruling, the Court is expected to address the approach of the UK courts towards indirect effect, but the Court followed the claimant's choice of claiming for damages against the state using the State liability doctrine.

Second, it is logically unacceptable for the national courts to assess the direct effect of certain provision first, in circumstance where the Directive has well possibly not been implemented in the country. The national courts may consider that the interpretation of the directive provision not been included in the national legal system would exceed its powers under national law, or would prejudice the general principles of Community law, in particular, the principle of legal certainty)32. The situation has been handled by the Court before, in Kolpinghuis, (Case 80/86, Kolpinghuis Nijmegen [1987] E.C.R. 3969.), where the Court held that the principles of legal certainty and non-retroactivity would be infringed if national courts were required to interpret national law to comply with an unimplemented Directive to impose a criminal sanction upon an individual.33

Last, the scope of the State liability doctrine is different from that of direct effect. A case involves direct effect does not mean there will be non-implementation of the directive, while State liability arisen from non-implementation of a directive does not necessary exclude the direct effect of the directive. Although in early post-Francovich cases, the Court appeared to first try to apply the direct effect, and use the State

31 Case C-63/01 Samuel Sidney Evans v. Secretary of State for the Environment, Transport and the Regions
33 See also Sara Drake, Twenty years after Von colson: the impact of ‘indirect effect’ on the protection of the individual's Community rights, (2005) 30 E.L.Rev. June
liability doctrine at the absence of direct effect\textsuperscript{34}, the later cases all held the State liability doctrine as the central legal basis.

1.5 Conclusion

Part One has portrayed the pattern of the invention and development of the State liability doctrine as a judge-made, case-developed principle which becomes of great importance in the Community legal order, recognized as one of the principles of Community law. This Part then analyzed the crucial role played by the Court as a creator, a developer and an explorer in creating Francovich remedy on Community level. Last but absolutely not the least, it sought to demonstrate the State liability doctrine in a broader picture of Community legal order, drawing the norms of the supremacy, direct effect and State liability together to paint a concurrent landscape of Community protection of individual rights and the full effectiveness of Community law.

Part One not only tries to deliver an overall impression for the State liability doctrine, but also hopes to hint the underlying uncertainties of the doctrine, which will now be examined in the following part.

Part Two: Uncertainty analysis - The mysterious doctrines

Because of the extensive involvement of the Court during the development of member State liability doctrine, and due to the lack of a Treaty foundation or harmonisation, the doctrine has been developed with mist in the eyes of individuals and national judges. As there is no sign of total harmonization on Community remedy, the outlook

\textsuperscript{34} Case C-91/92 \textit{Faccini Dori v Recreb} [1994] ECR I-3325, [1995] 1 C.M.L.R. 665. In the case, the establishment of both horizontal direct effect and indirect effect were failed, and the Court reached the final judgment on the basis of Francovich principle.
of the doctrine will continue to be fully dependent on the Courts’ litigation practice, which is rather unpredictable judging from the historical path of the doctrine. The following chapters are devoted to exhibiting the uncertainties widely seen or hidden in the State liability doctrine. To exam the uncertainty, questions will be asked to each criterion of State liability doctrine, namely first the rule of Community law infringed must be one intended to confer rights on individuals, second, the breach must be sufficiently serious, and third, there must be a causal link between the breach and the damage. The questions to be asked are:

1) What is the rule set out by the leading cases in Francovich/Brasserie?
2) What are the conflicting judgments?
3) Which court to execute the test - the Court or the national courts?

2.1 What is the right that is conferred to individual?

According to State liability doctrine, if a Member State committed a breach of Community law whereby individuals suffer losses or injury, they are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals.

According to the first criterion of State liability doctrine, the national courts have to ensure that Community law take full effect and have to protect the rights which they confer on individuals, on the basis of the rules of law infringed must be intended to confer rights on individuals. Although the criterion is the first to be tested in deciding State liability, it remained the most “flexible” condition derived from Francovich, where the State liability doctrine was established/or initiated.

The first criterion originates from the third requisite of the “Schöppenstedt Formula”, a formula governing Community liability for a normative act, which states that the
superior rule of law must be one for the protection of the individual. Despite the former study on intention of rules to determine liability there remains no test expressly stated by the Court.

The flexible feature of the first criterion is evident since the Court have never pictured or defined either when rights will or will not exist, nor the meaning of “be intended to”, or how their nature or scope should be. In other words, it is barely clear for the national courts to decide whether the rules of law concerned have the intention to confer rights on individuals, as there are considerable uncertainties on the criterion.

“The rights conferred to individuals” is actually not an alien concept in the Community legal system, as the chief purpose of direct effect is to secure the enforceability of rights conferred on individuals by Community legislation including treaties, regulations, directives, etc in national courts. A “vertical” direct effect reflects the relationship between an individual and the State, while “horizontal” effect reflects the relationship between individual and individual. When a vertical direct effective right is confirmed by national court, it is surely clear that the concerned provision has intention to confer rights to individuals and the first condition of State liability doctrine is therefore satisfied. The certainty of the first condition in this condition is however not so useful in the previous State liability cases, as in most cases, claimants brought up a State liability claim at the absence of direct effect. In a case involving directly effective directives, the doctrine is no more than another assurance of the effective enforcement of rights conferred to individuals35, and another injection of confidence to the claimants that there rights to the remedy will not be hampered by possible procedural rules of national law.

What is Rights?

As a concept and as a central word of the first criterion of the State liability doctrine

as well as in the absence of interpretation from the Court the notion of *rights*, which individuals derive from Community law, is however, an ambiguous concept. Looking at the abundant preliminary questions submitted to the Court about whether a directive creates *rights* for individual, one can easily find that the existing concept of rights on Community level is too general and not a practical one in the State liability context. Moreover, the development from Francovich requirement to State liability doctrine has made the issue more mysterious, since the focus seemed to be shifting from the existence of the rights to the intention of the concerning directive, as stated in the first criterion.

Unlike the other criteria including sufficiently serious and causal link, which the Court has given clear explanation or at least unexhausted examples on crucial terms such as “seriousness”, the Court continues to ignore the requests of interpreting the terms “rights” and “intended to”. Moreover, it is difficult to draw implications from the case-law, as the cases are predominantly positive in the existence of such intention. Of course, the task of determining the purpose of a legal provision often involves more than pure legal analysis and for this reason it is quite difficult to lay down general tests (but ECJ is doing it all the time).

An important discussion in this area is the difference between public interests and individual rights. According to the first criterion, the rights intended to be conferred by the directives should be directed towards individual but not towards the general public. In Francovich, judge Schockweiler gave an opposite example of public interests vs individual interests in environmental law, claiming some environmental law directives are not intended to confer rights for individuals. This “obvious” example of public interests was soon challenged by a number of cases brought under Article 226 which regarded environmental directives which intended to create rights for individuals. All that can be affirmed from the above discussion is that some directives especially environmental directives are protecting public interest more than other directives, which hardly sheds lights on the rule of deciding whether the
The individual rights have been increasingly important in the balance of public interests and individual rights in Community litigation. A recent judgment by the European Court of Human Rights on the matter of aircraft night flights at Heathrow Airport, London, UK. The applicants alleged that Government policy on night flights at Heathrow airport gave rise to a violation of their individual rights to respect private and family life contrary to Article 8 of the European Convention on Human Rights (ECHR). According to the development of the case-law in “environmental human rights”, the Court has increasingly held that Article 8 embraces the right to a healthy environment and to protect against pollution and other harmful effects to health. The Court took a progressive vision on the Convention, which should be interpreted “in the light of present-day conditions”. Finally the Court ruled that “…the general reference to the economic well-being of the country is not sufficient to justify the failure of the State to safeguard an applicant’s rights under Article 8… [T]he… fair balance between the rights of the applicants and the interests of the broader community must be maintained. The margin of appreciation of the State is narrowed down because of the fundamental nature of the right to sleep, which may be outweighed only by the real pressing (if not urgent needs) of the State.”

The development of human rights case-law in the Community is expected to broaden the scope of the rights implied by the directives in State liability cases. The Court obviously emphasized individual rights in applying State liability doctrine, however, a clear addressing of the balance between individual rights and public interest will be helpful for the national courts to handling the mounting number of individual claims against wider public interest.

Moreover, in earlier cases concerning Community liability, such as Kampffmeyer v. Commission, the Court had already refrained the argument of public interests,

37 Case 5, 7, 13-24/66, [1967] ECR 245, a case concerned German grain dealers who had been refused permits to
reasoning that the fact that a provision has been enacted in the general interest does not prevent it from having the intention to protect the interests of particular individuals.

In a recent case Paul\textsuperscript{38}, the Court denied that Directive 94/19/EC concerning on deposit-guarantee schemes conferred rights on depositors, on the ground that,

1) it is not explicitly stated in the Directive,

2) the area the Directive intends to harmonize is limited to mutual recognition of authorisations and prudential supervision but not coordination of the national rules on the liability of national authorities in respect of depositors;

3) in order to protect a plurality of interests, defective protection to depositors should not be held State liability.

The judgment is strange, as despite explicit reference to protection of depositors in the Directive, the Court said that the Directives did not confer rights on depositors.

\textbf{Weak in gene?}

However, on the other hand, the criterion might be naturally weak, due to the vague relationship between a directive and individuals. According to EC Treaty Article 249, “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed…”, this makes clear that directives are not intended to be directly effective nor addressing directly to individuals. The relation between a directive and individuals is perceived as the following: If the state had failed to implement a directive and the individual claimed that he or she was entitled to invoke the right that would have been conferred on him if the directive had been implemented.

\textsuperscript{38} Case C-222/02 Paul and Others v. Germany [2004]

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\[^{38}\text{import maize from France into Germany. The importers brought proceedings against the Commission for damages arisen from the false approval of the ban by the Commission.}\]
Directives play an increasingly important role in the regulation and harmonisation of European Union, as they cover every area of legal order with considerable complexity and details, they are practically more vital than the Treaty for the individuals. For directives to enter into effect, they must first be legally implemented in the Member States, which requires the adoption of new legislative acts, the amendment of existing law, or the repeal of provisions preventing the accomplishment of a directive’s objectives. In some cases, the directives that have been legally implemented may still fell short of being correctly applied.

Despite the great importance of directives in the legal system of the Community, they are often vague and largely open to a variety of interpretations, as they are supposed to be adaptive to different national legal orders. The vagueness is also partly due to political compromise within the Council. Literatures on internal inconsistent and incompatible among the directives are quite well developed.

Taking a closer look at the relationship of a directive and individuals, one will find the relationship is of great complexity. The classic circumstance in which directives may produce direct effect is vertical, against State. For horizontal direct effect, the Court has not showed the possibility that directives might also define rights which individuals were able to assert against other individuals. In case Marshall\(^{39}\), the Court ruled that, it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court exists only in relation to ‘each Member State to which it is addressed’. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.

Directive as a source of individual rights is highly dependent on the Court’s interpretation, especially in the State liability cases, the objective instead of the

\(^{39}\) Case 152/84 [1986] ECR 723
substantive right is more critical. A fundamental difference of direct effect and State liability doctrine in terms of the first criterion, namely the directive concerned must intend to confer rights to individuals, is revealed here. For direct effect, it is crucial that the right is possible for the individual to invoke in national court where the substantive content of specific provisions in the directive is important, which is therefore required by the principle of direct effect to be sufficiently clear and precise. While for State liability doctrine, on terms of the protection of the individual rights conferred by the Community law, it is the injuries suffered by the applicants that is relevant to final compensation, in relevant to the rights covered by the directives concerned. The difference, although not so visible in the wording, is just the reason why the Court has adopted different approach in cases concerning State liability and direct effect. The vague relationship between directives and individuals also contributes more power to the Court in State liability cases.

The combination of the weak relationship between directives and individuals, the importance of the directives with regard to individual’s Community rights, and the lack of uniform implementation of directives among member state due to the vagueness of directive, created a dilemma in defining the individual Community rights from the directive.

A shrinking criterion?

While all the other criteria received remarkable attention and development, the first criterion concerning the identification of whether the directives intended to confer rights on individuals seems to drive towards a narrower road.

A glance at the Francovich doctrine and the current State liability doctrine or so-called Francovich/Brasserie doctrine reveals that the first two conditions in Francovich version is replaced by the first condition in State liability doctrine. The question is which part of the Francovich doctrine did the Court abandon? Did the
Court intend to merge the two conditions into one, or is the two conditions now serving as the considerations behind the State liability doctrine? Is it sufficient if the directive is meant to confer rights on individuals in the future?

The Francovich requirement concerning individual rights is finalized in Faccini Dori40, a case closely following Francovich, where the Court added that, “Moreover, if the result prescribed by the directive cannot be achieved by way of interpretation, it should also be borne in mind that, in terms of [Francovich], Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive, provided that three conditions are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the contents of those rights on the basis of the provisions of the directive…” 41. This is maybe the origin of the current State liability doctrine, where the purpose or intention of the directive counts. And the third, the breach of the obligation to transpose the directive within the time limit must have caused the damage suffered by the claimant.

The Court is rather relaxed on this criterion, the mere fact of a directive aiming at the protection of individual is sufficient. In Dillenkofer, the Court relied on the fact that the directive is serving the purpose of protecting consumers, by interpreting Article 7 of the directive.42 The Court seemed to adopt the approach of German tort law to examine whether the objectives of the directive are to protect a group/class of individuals.

After the establishment of current State liability doctrine, in Norbrook Laboratories43 case, the Court stated that “the scope of the right conferred on applicants for marketing authorization may therefore be adequately identified on the basis of those

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40 Case C-91/92 Faccini Dori [1994] ECR I-3325
41 Case C-91/92, para 27.
42 Case C-178/94 [1996] ECR I-4845
directives\textsuperscript{44}. The word “identified” remind us the second condition of Francovich, where the contents of those rights must be identified on the basis of the provisions of that directive. From this case Norbrook Laboratories, we can assume that the Court was merging the two Francovich requirements as mentioned in Chapter 1.1 into the State liability doctrine, which should have equal focus on both “intention” and “identifiable”. This assumption however, is also suspiciously inconsistence with Francovich judgment, in which the Court held that “it should be possible to identify the content of rights on the basis of the provisions of the directive.”\textsuperscript{45} Since in Francovich, the Court put the requirement of “intention” and “identifiability” in separate condition, it should be agreed that the first condition in State liability doctrine has no perceivable meaning of requiring the rights to be determinable.

In a more recent case Rechberger\textsuperscript{46} concerning package travel, the court held that the purpose of the directive is to protect consumers against the risks arising from the insolvency or bankruptcy of package travel organizers. It is suggested again by this judgment that directives directly mentioning “consumers” are more likely to be treated as conferring rights to individuals.

Latest opinion of advocate general Kokott delivered on 13 July 2006, on Carol Marilyn Robins\textsuperscript{47}, claimed that the purpose of the legal rule infringed must be to grant rights to the individual, whose content can be identified with sufficient precision on the basis of the directive, according to the case-law of the Court.\textsuperscript{48} This is really far from the actual practice of the Court, especially inconsistent with the case-law on the wording of “sufficient precision”. In fact, the right conferred is seldom of precision from the Directives concerned, as the Court mostly deduce the right only based on the purpose of Directive.

\textsuperscript{44} Case C-127/95, para 108.
\textsuperscript{45} para40
\textsuperscript{46} Case C-140-97 Rechberger and Others v Austria [1999] ECR I-3499
\textsuperscript{47} Opinion of advocate general Kokott, Case C-278/05 Carol Marilyn Robins, John Burnett and Others v Secretary of State for Work and Pensions delivered on 13 July 2006
\textsuperscript{48} Kokott, para 87
In most of the cases, the Court is more concerned with the other two criteria, leaving the question of whether it confers rights on individuals just a requirement to mention. Although the first criterion is extracted and squeezed from the first two conditions of Francovich doctrine, the “rights to individual” seems to be based on broadest interpretation, covering all classes of rights, creating no difficulties for individuals who claimed damages arising from Member States breaching Community law.

2.2 To what extent a breach can be considered sufficiently serious?

The meaning of sufficiently serious

The criterion of sufficiently serious breach attracted most literatures, thanks to the ambiguous wording and the abundant sources available for analysis from the Court’s case law. Leading case Brasserie/Factortame brought up the concept, stating that a breach of Community law is sufficiently serious, where a Member State has manifestly and gravely disregarded the limits on its discretion, with the following factors to be taken into consideration.

1) The clarity and precision of the rule breached
2) The extent of discretion left by that rule
3) Whether the infringement and the damage caused was intentional or involuntary
4) Whether any error of law was excusable or inexcusable
5) The fact that the position taken by a community institution may have contributed towards the omission and the adoption or retention of national measures or practices contrary to Community law.

Moreover, the Court considers that a breach is sufficiently serious if it has precedent

cases, especially when it comes to implementation of directives in Member States. In Bergaderm, the Court confirmed that where the Member State or the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.\(^{50}\)

The most illuminating explanation in decisive test of sufficiently serious came in Dillenkofer\(^{51}\), a case concerning German government’s failure of implementing Directive on package travel, causing Mr Dillenkofer being unable to claim under the directive for repayment of the money he had paid in advance when the travel operators collapsed. As in Francovich, there had been a failure to adopt measures for the transposition of a directive within the prescribed period, the Court explained that the condition did constitute a sufficiently serious breach, where it be shown that the Member State failed to take any of the measures necessary to achieve the result prescribed by the Directive within the period prescribed. The Court further confirmed the condition saying that although not expressly mentioned in Francovich, it was nevertheless evident from the circumstances of that case. This is by far the most affirmative condition that satisfies the sufficiently serious criterion.

In its judgment in British Telecommunications, inadequate transposition of a directive has also recognized as the event giving rise to damage by the Court.

Further application of the test concerning the extent of discretion is found in Bergaderm\(^{52}\) and Lomas\(^{53}\), in which the Court ruled that “where the Member State or the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.”

\(^{50}\) In Case C-352/98, para 44.
\(^{51}\) Case C-178/94 [1996] ECR I-4845
\(^{52}\) Case C-352/98 Laboratoires Pharmaceutiques Bergaderm SA
\(^{53}\) Case C-5/94 Hedley Lomas [1996] ECR I-2553
In Lindöpark\textsuperscript{54}, the Court further explained the usage of the various factors that can be taken into consideration by the national courts. It emphasized that these factors were supposed to be considered globally and they are not cumulative requirements thus the absence of any one of which does not mean that there is no serious breach. In another word, it is a reference for the national courts to base their decision upon, with the outcome very much dependent on the circumstances. As any one of them may be a sufficient though not a necessary condition to establish State liability. Taking the example mentioned the above paragraph, the Court has held that if, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

The opinion of AG Alber in Samuel Sidney Evans\textsuperscript{55} summarized the development of this criterion. “Basing itself on the statements concerning a considerably reduced, or even an absence of any, discretion in its judgment in Hedley Lomas, the Court stated as follows in Dillenkofer and Others: So where, as in Francovich, a Member State fails, in breach of the third paragraph of Article 189 [249]of the Treaty, to take any of the measures necessary to achieve the result prescribed by a directive within the period it lays down, that Member State manifestly and gravely disregards the limits on its discretion.”

**Does fault play a role?**

It is worth mentioning that although no further fault, such as negligence is a necessary precondition for State liability, this does not mean that the mind of the Member state concerned is totally irrelevant. The Court stressed that fault is not a condition in State

\textsuperscript{54} Case C-150/99 Swedish State v. Stockholm Lindöpark Aktiebolag

\textsuperscript{55} Opinion of AG Alber delivered on 24 October 2002 (1), Case C-63/01 Samuel Sidney Evans v. Secretary of State for the Environment, Transport and the Regions
liability doctrine but can be taken into consider by national courts for the purpose of determining whether or not a given breach of Community law is sufficiently serious.\textsuperscript{56}

The approach pursued by the Court is very much compatible with Member State legal practice. For example, in Factortame, the House of Lords of UK applied the test of a sufficiently serious breach and held that “deliberate intention to infringe would obviously weigh heavily in the scales of seriousness. An inadvertent breach might be relatively less serious on that account. Liability may still be established without any intentional infringement.”\textsuperscript{57}

However, I need to argue here that the fault actually played a role more influential than previous thought. A key case to analyze here is Brinkmann\textsuperscript{58}. The case is about a false classification of the tobacco product manufactured by Brinkmann under Directive 79/32/EEC by the Danish authorities, leading to a different tax expense, which does not involve loss resulting from non-implementation but from misapplication of the Directive. Literatures are strongly conflicting on interpretation of the judgments. Some think that the Court ruled the breach was sufficiently serious, but the liability was not constructed as there was no direct causal link between the breach and the alleged damage.\textsuperscript{59} On the other hand, some translated the judgment into that the misapplication does not give rise to liability because no sufficiently serious breach of EC law obtained: there was no clear guidance from the Directive, and the interpretation of it was not untenable nor in bad faith.\textsuperscript{60}

\textsuperscript{56} Brasserie, para 79
\textsuperscript{57} R v. Secretary of State for Transport, ex p Factortame Ltd [2000]
\textsuperscript{59} Carsten Kremen, Liability for breach of European community law: an analysis of the new remedy in the light of English and german law, in Yearbook of European law 2003, Oxford University Press, pp217
\textsuperscript{60} Alska Scherer, State Liability - Ten years after Francovich - Is German State Liability law compatible with EC law?, Lund University, Master of European Affairs programme, Law Master thesis, pp14
All the confusion arisen among the literatures is stemmed from the very complicated judgment. On analyzing the case, the Court gave good reasons pointing to the breach is not sufficiently serious. The Court held that a Member State is not liable for erroneous interpretations of Community law where the provision in question did not clearly rule out such a reading, taking into account that also other Member States and/or the Commission had given the same interpretation. However, the Court still confirmed that the breach is per se sufficiently serious, and in the final judgment, the Court more unexpectedly denied the State liability on the ground of no direct causal link.

A background factor one cannot ignore in the case is that the Danish authorities nonetheless had applied the definitions of the Directive. Although mistakenly interpreted, the mistake is quite excusable. In the opinion of the A-G, he stated that “the interpretation given to the definitions in the Directive - neither of which corresponded exactly to Brinkmanns' product - by the Danish authorities was not manifestly contrary to the wording of the Directive or to its purpose. As the Directive was regarded as being open to a number of perfectly tenable interpretations.” Other than the excusable factor raised by the A-G, there is another possible reason that “the Danish authorities have given immediate effect to the relevant provisions of the Second Directive containing precise definitions of tobacco products”.61 Although the Court strangely rejected the establishment of State liability on the ground of lack of causal link, but not the insufficiently breach, fault played an important role in the final outcome.

In all, the good or bad faith of the concerning Member State is indispensable in applying the State liability doctrine by the Court. The importance of fault is not explicitly recognized by the Court, but actually implied by the Court’s decision, making the uncertainties of deciding the second criterion of State liability doctrine much stronger, especially when it is predominantly a Court’s call to decide whether

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61 Judgement para 29.
there is sufficiently serious breach as is revealed in the following paragraphs.

**How important is the concept of discretion?**

The Court in Brasserie ruled that the serious breach test should be carried out only where the member state enjoys a wide discretion. However, the Court did not provide clear guidance on the concept of discretion. In Brasserie, the Court simply stated that the German legislature in Brasserie had a wide discretion in laying down rules on beer purity,62 which is followed by a controversy statement of the German ban on the marketing under the designation “Bier” of beers imported from other Member States was quite clearly contrary to Article 30.63 How wide is the discretion in this case did the Member state enjoy? Although it may be argued that the ban on marketing is an inexcusable mistake fundamentally hindering the development of the single market, it is not adopted by the Court to reason the conflicting on discretion here. In Factortame, the Court again ruled that the Member States had wide discretion on the case, on the, on the basis of first the registration of vessels is within the jurisdiction of Member States and second, the harmonization of fisheries policy still leaves “a margin of discretion” to the Member States.64 However, whatever the approach the Court tried to follow in determine discretion, it is evident that discretion, as a pre-test to apply the sufficiently serious breach condition, is indispensable in establishing State liability.

The element became increasingly important in the cases after Brasserie, represented by Hedley Lomas, Dillenkofer, Bergaderm and Lindöpark, most of which has been mentioned in previous paragraphs. In these cases, the Court all held that, where a member State was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach. In this

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62 Brasserie, para 48.
63 Brasserie, para 59.
statement, the existence of discretion is crucial in application of the State liability doctrine. The uncertainty is brought up as there are different understandings of discretion. What is the description of a Member state was not called upon to make any legislative choices? Does it mean that whether the Member State is being called upon to make a choice as to form and methods? In both Hedley Lomas and Dillenkofer, the national authority has obviously been called upon to do this. Regarding the Member States had only considerably reduced, or even no, discretion, the analysis is highly case-dependent, where the Court made case-by-case judgment. In Hedley Lomas, for instance, the Court pointed out that the United Kingdom had no real discretion to refuse the export licences in the case.65

Who is competent to verify whether the breach is sufficiently serious?

According to the Court, it is within the competence of the national court to decide whether the breach of Community law is sufficiently serious, as is stated in EUR-Lex: “This must be decided by the national courts, which have sole responsibility for ascertaining the facts and assessing the seriousness of the infringements of Community law.”66 The Court of Justice's judgment nevertheless offers the national courts a number of basic guidelines. According to AG Alber in Samuel Sidney Evans67, appraisal of the questions whether damage has been suffered by the claimant - and, if so, to what degree - and whether any such damage was causally linked to the breach of duty is a matter for the national court.

The situation is hardly reflecting the principle lay out above. Among all the State liability cases, the Court acted most proactively towards the second criteria, providing its decision directly in the preliminary rulings judgments to identify the existence of sufficiently serious breaches. Typical justification of this practice adopted by the

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65 See also Chris Hilson, Liability of Member States in Damages: The Place of discretion, International and Comparative Law Quarterly [VOL.46, 1997]
67 Opinion of AG Alber delivered on 24 October 2002 (1), Case C-63/01 Samuel Sidney Evans v. Secretary of State for the Environment, Transport and the Regions
Court is found in almost every State liability case, for example in Larsy\textsuperscript{68}, the Court stated that, “Whilst it is in principle for the national courts to determine whether the conditions for Member States to incur liability for an infringement of Community law are met, the 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.” The Court then went ahead to say that in this case, the criterion of sufficiently serious breach is satisfied.

The possibility of national court to handle the test of sufficiently serious breach continued to slide in Köbler, where the Court found that the full effectiveness of the Treaty would be undermined and the protection of rights derived from Community law would be weakened, if individuals were unable to obtain reparation in respect of infringements resulting from judicial decisions delivered at last instance as there would be no further possibility of correction. The criterion of seriousness here is limited to that the court of last instance has manifestly breached Community law. As the Court repeatedly emphasized that its ruling applied only to national judges acting at last instance, it is unlikely that the national court has the chance to identify the criterion.

However, in both Bergaderm and Norbrook Laboratories, the Court gave no explicit statement to determine whether the breach was sufficiently serious or not, leaving the test to the competent national courts.

\section*{2.3 Whether the link is broken or too remote?}

\textbf{What needs to be taken into consideration in deciding the link?}

The key question raised to the Court in Francovich was whether Community law contained a legal principle according to which a Member State would be liable to
compensate losses incurred by the plaintiffs, who are unable to base their claims of payments against the State directly on the provisions of the non-implemented directives. It is the positive answer from the Court that set off a new episode in State liability on Community level. The meaning is two fold. Apparently the words “unable to base” is referring to the lack of direct effect of the rules concerned which the individuals cannot invoke the rights bestowed on them in front of national courts, but more importantly, the absence of direct effect also indicating the rules are either ambiguous, insufficiently clear, conditional, or dependent on further action being taken by Community or national authorities. Generally speaking, the rules involved in Francovich State liability are usually weak in terms of application, with the rights contained being hard to identify.

For causal links, the literatures seemed to have natural avoidance to the criterion, due firstly to the lack of relevant case-laws, and also partly to the practice that the determination of this criterion is predominately up to the national courts. More importantly, in cases when the national authorities act manifestly and gravely against Community law, for example, non-implementation of a directive, combining with a clear identification of individual rights conferred by the directive, the causal link can be established without difficulties, given the concerned rights are injured. Therefore, in such circumstances, the third criterion of the State liability doctrine can be easily deduced from the determination of the first two criteria, making the preliminary questions on causal link much harder to find in State liability cases.

The only clear guidance provided by the Court is that the causal link between unlawful act of Member States and the loss alleged by the applicant must be direct, excluding any remote indirectly linked causation. To identify direct causal link is not as simple as it is thought to be.
It is shared by most of the literatures that according to the Brinkmann\textsuperscript{69}, there will be no causal link between the breach and the damage where this damage would have occurred anyway when relevant directives are correctly implemented. However, it is arguable that the link seemed vaguer, when it is argued that the right of the individual would have been affected anyway if the directive had been implemented.\textsuperscript{70}

And the only clear limitation to the discretion enjoyed by the national courts in determining the third criterion is again the principle of effective and equivalent.

It is also observed that the difficulties of proving the direct causal link starts from determining whether the wrongful conduct is attributed to national authorities or to Community institutions\textsuperscript{71}. It is not always easy to tell who is more responsible for the damage suffered by the applicant arisen from the adoption of an unlawful legislation made by the Community institutions. The case-law suggests that the damages caused by the illegal legislative measure itself should be repaired by the relevant Community institution, while if any erroneous application was made by the domestic authorities, the Member State liability should be established. But the uncertainty occurs when the fault is shared by both national authority and Community institution. Similarly, the cross-border wrongful conducts by several Member States to cause single damage is also facing the difficulty of proving direct causal link and distribution of the liabilities.

It is worrisome that the national courts, with the discretion of determining the causation criterion, may undermine the effectiveness of the State liability doctrine. By denying the direct causal link, the national court can even achieve judgment quite contrary to what the Court meant to rule. The celebrated case Brasserie is ended up in the national court after the preliminary rulings like this: The national court ruled that

\textsuperscript{69} Case C-319/96 \textit{Brinkmann tabakfabriken v Skatteministeriet} [1998] ECR I-5255, critique by Tridimas supra note 16 at 305.

\textsuperscript{70} The opinion of AG lenz in Case C-91/92 \textit{Faccini Dori} [1994] ECR I-3325, para 6.

\textsuperscript{71} Georgios Anagnostaras, \textit{Not as unproblematic as you might think}, (2002) 27 E.L.Rev. Dec, pp 663-676
there was consequently no direct causal link between the sufficiently serious breach of the Community rules and the damage sustained by it, specifically, between the loss suffered and the prohibition on the marketing.

To sum up, harmonization of the rules in causation has no sign to emerge currently, by which the Court may be again accused of being interventionist. Legal uncertainty remains to the extent that the Member States may flee from financial liability at a sufficiently serious breach of the Community rules.

**What has been left for the national courts to decide?**

It is shared by the Court and national courts that the national court should take the primary role in deciding whether the final criterion is met for a right to reparation to arise. The Court has well reserved this matter to national judges until the outbreaking case of Brinkmann, where the Court made specific rulings on the causation to finally deny the establishment of State liability.

It is to some extent understandable as the establishment of the causal link between the breach of Community law by the Member States and the damages suffered by the individual is the most complex criterion to identify. The test involves the estimation of the loss resulting from false implementation, indicating a precise understanding of the Directives or the purpose of the Directives is a must.72 National court, as a passive acceptor of tons of Directives could be barely competent on this task, while the Court holding the responsibility of interpreting the Community law is obviously in a more proper position to decide.

Moreover, although the national courts usually have a deep insight in a State liability case, and they are experienced in judging causation in national tort cases, the rules

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followed by them are varied largely across European Union, represented by the tort law framework in France, Germany and England. It is still worrisome to see non-uniform application of the State liability doctrine in establishment of causal link, and allocation of responsibility in different countries, when it comes to a case involving cross-border or Community factors. The Court, seemingly ready to accept the disparity in different Member States, indicated in the State liability doctrine, but practically, is acting exactly the opposite.

The unexpected issue is not the denial of causal link, as the interpretation turned out to be shared by other Member States and the Commission, but the fact that the Court determined the test itself, which is supposed to be referred back to the national court. Unlike most previous cases, the Court went on to decide itself whether the facts in issue constitutes a direct causal link. It is then difficult to predict that when the ECJ decided to rule itself on the matter of whether a sufficiently serious breach obtained instead of leaving this for the national court to decide.

It is also unclear whether the Court will step in to prevent the application of national causation rules which excludes State liability in a way that individual rights conferred by the Community law are not fully protected.

2.4 What should be included in the compensation?

A call well-reserved to national courts

The Court repeatedly argued that the effectiveness of Community norms would be jeopardized if individuals are deprived of the possibility of obtaining compensation when their rights are infringed by a Member State. Compensation as the central word here is the ultimate result intended to obtain by both the Court and the individuals. Without an effective reparation system, individuals will have no incentive to bring the

73 Opinion A-G Jacobs 22 January 1998
74 See also Fiona Smith and Lorna Woods, Causation in Francovich: The Neglected Problem, International and Comparative Law Quarterly [Vol.46]
case to national court, even if the breaches of Community law are recognized by the court.

The Court insisted on the principle of national autonomy in determining the detailed exercise of the right, namely the substantive rules for recovery is fully based on national legal system. So it is again in principle up to the national court to decide what can be included in the reparation. The Court also applied the limitation in Rewe/Comet, stating that at the absence of explicit provision, the enforcement of Community rights before the national courts takes place in accordance with national remedies and procedural rules, save in so far as they discriminate against Community cases (Principle of equivalence) or render the exercise of Community rights virtually impossible in practice (Principle of effectiveness).

In other words, the Court confirmed that the national legal system to determine the details of reparation, but then relied on the principle of effectiveness to justify possible interference from the Community.

The substantive rules of reparation are generally well-established in member state legal system, as tort law is one of the most important branch of a national legal order. However, being a part of private law, it is the least harmonized area on Community level, with the Court is suspiciously inexperienced in dealing with the cases in the field.

The Court does have some principles concerning the reparation, for instance, in Brasserie, the Court laid out two guidelines for the national courts, first is the well-know effective protection, and the second is that the national court may “inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.”, as this is a general principle common to the
legal systems of the Member States. And in Lindöpark\textsuperscript{75}, whilst there has thus apparently been agreement between the parties on the amount of the basic claim in this case, it should be pointed out that in principle reparation for loss caused to individuals as a result of breaches of Community law must be commensurate with that loss.

It is also held by the Court that where domestic law permits the trader to plead such damage in the main proceedings, it is for the national court to give such effect to the claim as may be appropriate.\textsuperscript{76} “Such damage” in the context means the damages whether or not there had been passing on. The Court looks more concerned with the protection of individual rights granted by Community rules, as full compensation is supported by the Court “unless that would amount to unjust enrichment”.

In many State liability cases, the applicants are claiming not a specific sum of money, but compensation for loss suffered as a result of Member State breaching Community law. The Court held that the national law should rule the calculation, type and way of payment of the compensation. As is seen in Sutton\textsuperscript{77}, the Court ruled that national court has the jurisdiction to assess the amount of damage, whenever the national law does not treat breaches of EC law less favorable than similar domestic claims nor makes it virtually impossible/excessively difficult to obtain reparation. It continues to say that the issue of what type of damage should be compensated is also up to the national courts to decide.

Due to the national courts are responsible for deciding the details of the damage, it is for the national court to ensure, that the reparation is adequate. In previous case practice, the national courts generally agree that the limitations of the individual rights as envisaged in the Directive also limit the quantum of damages.

\textsuperscript{75} C-150/99 Stockholm Lindöpark
Lessons from the direct effect case-law

The biggest uncertainty concerning the compensation in State liability case occurs when the Court will step in and put the limitation on the national rules on the basis of incompatible with Community law. A closely related case-law group is the one of direct effect developed during 1980-1990, represented by Marshall⁷⁸ and Von Colson⁷⁹.

In Von Colson, the Court held that, “…that compensation must in any even be adequate in relation to the damage sustained.”⁸⁰ According to the opinion of the Advocate General, the wording “adequate” here does not mean that the compensation must be equal to the damage sustained, therefore an upper limit on compensation by the national law in this case does not incompatible with Community law, given that this limit is high enough to enable the adequate compensation to the damage. A specific scope of the compensation requirement is spoken out by the AG. He held that the key components of damage being considered in traditional practice need to be taken into account by the national courts, namely loss of physical assets, loss of income, moral damage and interests. But the idea of “adequate compensation” is wiped out by the Court’s final decision, replaced by full compensation based on the principle of effectiveness, denying the legality of the upper limit on compensation set out by the national law.⁸¹

In State liability case law, the principle of effectiveness is again upheld by the Court, reflecting the determination of the Court to defend the individual rights conferred by the Community law by granting full compensation as an incentive for individuals to bring the cases of Member States breaching Community law to courts. In another word, the uncertainties in State liability compensation is relatively lower than the

⁷⁸ Case C-152/84, [1986] ECR 723.
⁸⁰ Case 14/83, para 23.
⁸¹ See also Barry Fitzpatrick and Erika Szyszczak, Remedies and Effective Judicial Protection in Community Law, The modern law review, vol 57, no 3, (May 1994), pp 434-441
other conditions explicitly stated in the State liability doctrine, as 1) the Court remained quite consistent in recognizing the jurisdiction of the national courts on the compensation matter, and 2) the Court has adopted the rules established in direct effect case-laws that as long as the compensation fit the requirement of effectiveness and equivalence, the Court will not interfere to question relevant national laws.

However, in Brassiere, the Court is widely considered to override important national laws including sovereign liability and measurement of damages. Because the Court in the judgment denied the application of national rules about total exclusion of loss of profit as a head of damage for which reparation may be awarded, by reasoning that such a total exclusion of loss of profit would make the reparation of damage practically impossible.82 Despite of being critical on the State liability doctrine so far, I would like to argue for the Court this time. Firstly, its course of conducting towards the compensation issue in Brasserie is consistent with the effective principle it laid out at first place. Secondly, imaging the situation the Court would be facing, if it becomes a practice among Member States that the national laws can easily deprive the actual recovery of the loss suffered by the individual linking to the failure of transposition certain directive by the Member State. The essence of State liability doctrine then will be undermined even if the national courts announced the existence of the State liability. Thirdly, from economic point of view, lack of monitoring on the reparation phase in the Member State would encourage the national courts to drive away from the principle of full-compensation and effective protection, and inadequate compensation would finally disappoint the injured person and potential plaintiff, which will in turn impair the effective and power of the State liability doctrine as a precious Community remedy available to individuals.

2.5 Conclusion

It seems impossible to be confident about the doctrine until the case law develops

82 para 87.
further. At present on can only be sure that the Court’s strong attitude towards protecting individual rights and full-effectiveness of the Community law, while the detailed application of the doctrine remaining ambiguous. Moreover, as explained in this part, deeper harmonization is out of favor among the Member States, who are striving to protect their judicial sovereignty. The Court on the other hand, seemed to assume more responsibilities in the State liability cases, which makes the future development of case law more controversial.

Part Two analyzed the uncertainties of the doctrine, condition by condition. For the first condition, the obvious change in the wording of conditions from Francovich to Brasserie invited different guesses on the interpretation of the condition. While the shortage of the Court’s attention and explanation in the first criteria adds another layer of mists. For the second condition, where most of the literatures focused, the chapter examined the meaning of “sufficiently” from a progressive view, added a new flavor of the sub-criteria of fault and the uncertainties arisen from. For the last condition as well as compensation, which is largely to the discretion of the national courts, the chapter raised conflicting cases and introduced the comparative study between direct effect and State liability cases. A summary of the uncertainties is shown in Figure 2.

**Figure 2: The matrix of uncertainties of State liability doctrine**

By Hui Yu (2006)

<table>
<thead>
<tr>
<th>First criterion: The rule of Community law infringed must be one intended to confer rights on individuals</th>
<th>Second criterion: The breach must be sufficiently serious</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Definition of Rights</td>
<td>1) Definition of sufficiently serious</td>
</tr>
<tr>
<td>2) Individual rights vs general interests</td>
<td>2) Role of fault</td>
</tr>
<tr>
<td>3) Intention and identifiability</td>
<td>3) Extent of discretion</td>
</tr>
<tr>
<td>4) Broad interpretation approach</td>
<td>4) Jurisdiction – ECJ vs national courts</td>
</tr>
</tbody>
</table>
### Third criterion: There must be a causal link between the breach and damage

1) Absence of community standard of direct causal link
2) Jurisdiction – ECJ vs national courts

### Compensation

1) When ECJ will interfere on the ground of national rules are incompatible with Community law

This Part reveals the uncertainties which provoke thoughts of digging into the roots of these mysterious criteria, and looking into the future development of the doctrine. The paper will now investigate where did all these uncertainties of State liability come from in Part Three and provide a comprehensive outlook in the last part.

## Part Three: Probing the sources of uncertainties

### 3.1 A doctrine with little root in the Treaty

As a recognized source of the Community law, the judgments of the Court is the core engine running the Community legal remedy system. State liability doctrine is one of them.

In the Community remedy system, it is surprising that despite of the thirty years of development of the supremacy and direct effect, and the general recognize across the Community, the principles remained out of any form of written law. But whether the doctrine will carry less uncertainties when it was written into the Treaty remained doubtful. Because Community law is known to be particularly vague and open-textured, which is then interpreted by the Court, delivering a meaning quite different from what the provisions appear to say.

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84 Bruno de Witte, *Direct effect, supremacy, and the nature of the legal order* in The evolution of EU Law, Edited by Paul Craig and others, Oxford University Press 1999, pp194.
Only one thing is for sure, the doctrine has been entirely dependant on the judgments of the Court, developed on a case-by-case base. This path of the doctrine has been and will be leading is controversial. On one hand, the uncertainties of the doctrine may well be amplified by the case development, as demonstrated by Brinkmann and Köbler in which the Court acting contrary to prior cases and expanding the scope of the doctrine unexpectedly. On the other hand, there is also a prominent outlook that the Court will fill in the gaps of the unknown areas and erase the uncertainties of the doctrine.

Again, it is useful to reflect on the evolving process of the principle of direct effect in predicting the trend of State liability doctrine. The principle of direct effect was soon stabilizing after an early and short-lived “rebellion” from the Member State86, as in Van Gend en Loos, the Court assumed the sole authority to decide which provisions of the Community law have direct effect. The one-cut decision looked very effective, which does decrease the degree of legal uncertainties for direct effect principle. The process of the acceptance among Member States towards direct effect principle is described as “easy” by Bruno de Witte. Does this imply that strong judgments are required to decrease the level of legal uncertainties? To some extent, the Court has already adopted the strategy, by taking more responsibilities and giving more opinions in State liability cases through preliminary rulings and enhancing the functions of preliminary rulings procedure. In fact, the Court's bold approach appears evident in the overall Community remedy system. For instance, in indirect effect case-law, the Court has delivered strong guidance to the national courts as to how national law should be interpreted so as to in recent cases including Coote, Centrosteel and Pfeiffer87. Nevertheless, the confidence of the national courts in the doctrine is largely influenced by the determination of the Court - a tougher attitude of the Court will more or less strengthen the certainties of the doctrine.

86 Bruno de Witte 1999
87 Case C-185/97 Coote, C-456/98 Centrosteel, and Case 397/01 Pfeiffer
However, the reflection from the development of direct effect is highly conditional on State liability doctrine, as the State liability cases concern not only the interpretation of directive provisions, but also the measures had been taken by the Member State. It is sometimes very difficult for the Court to handle the case better than the national courts who are more familiar with the specific status on the implementation of the directive.

Further, the absence of the written provision on State liability also facilitates the adjustable interpretation of the Court, especially on the continuous expanding scope of the State liability doctrine. For instance, after Köbler, the Court argued that the doctrine has never been interpreted as excluding the wrongful conduct by judiciary, in another word, although the Member State may be unfamiliar with the application in judicial authorities, the Court can still establish such case-law, as long as it is necessary to effectively protect the individual rights conferred by Community law.

### 3.2 The complexity of the cases

The case of considerable complexity is considered by itself a source of legal uncertainty. This is so called the factual uncertainties in the case.

Despite the uncertainties seemed uncountable from the analysis above, the principle of legal certainty is actually highly defended by the Court, and has long been placed as the general principle of law by the Court, listed together with the principle of proportionality, freedom of commercial activity and non-discrimination.88

Looking at the development of precedent, one can see that although the doctrine of precedent does not apply to the Court, but the Court generally follows its own

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previous decisions for the sake of legal certainty. Further, this is a general principle of law familiar to all the legal systems of the Member States. The Court also stresses the legal certainty issue frequently in its judgments. In Kloppenburg\(^89\), a case in 1981, the Court raised that “Community legislation must be unequivocal and its application must be predictable for those who are subject to it.” The Court also pointed out in Kolpinghuis\(^90\) that it is the national courts’ obligation to interpret domestic law to comply with EC law, which is subject to the general principles of law which form part of Community law, and “in particular, the principles of legal certainty and non-retroactivity.

A key case concerning State liability indicated how far the Court is willing to go to protect the confidence and legitimate expectations in the Community’s legal orders is MAFF. In MAFF, the Court ruled that the legitimate expectations of the holders of fishing licenses had not been infringed by the Ministry introducing a more restrictive fishing licensing policy to protect the remaining fish stocks in UK. In most instances there are other principles which run counter to legal certainty and the protection of legitimate expectations; here the right balance will need to be struck. (Sedley J)

As EC directives continue to touch new unregulated areas to promote the harmonization of the European Union, the need for specialized knowledge and experiences on the part of the Court has been increasing too.\(^91\) In a typical State liability case, the Court is required to at least consider, 1) the objective of the directive and specific articles in relevance; 2) the anticipated result of a correct implementation of the directive; 3) the actual status of implementation in the Member State concerned; 4) the relationship between the status of implementation and the loss of the individuals. In practice, the Court analyzed more information than this for each case.

\(^{89}\) Case 70/81 Kloppenburg
\(^{90}\) Case 80/86 Kolpinghuis Nijmegen
\(^{91}\) See also Alan Dashwood and Angus Johnston, *The future of the judicial system of the European union*, Oxford and Portland, Oregon 2001, pp72
3.3 Political reasons?

Interaction with State liability of Community institutions

Interestingly, as an invention of the Court, State liability for breaches of Community law is integrated with the rules governing the liability of the Community institutions for unlawful conduct which is set out in EC Treaty Articles 235 and 288(2). The impetus of the integration is again coming from the Court, suggesting the Court’s efforts in harmonizing the system starting from the Community level, and providing more litigation sources to increase the certainty, as the case law on either the Member States or the institutions can be helpful in understanding the case law in the other. It is hard to say that the move of the Court decreased the uncertainty of the doctrine, but on the other hand stirred the debate on different standard on the Community institutions and the Member States.

One of the criticisms of Francovich judgment is that it seemed to apply a higher standard of liability to Member States found to be in breach of Community rules than on the Commission for loss. The differentiated standards added another layer of mists to the State liability doctrine. Indeed, it is frequently quoted to criticize the Court’s inequality attitude that the Court ruled positive State liability of the Member States in five of the first six cases to come before it.92 Court ruled the However, what is more important to consider in our context is not whether the rules should be equally strict for Community institution and Member States, but the certainty of the application in both branches.

Even though the starting point of the State liability case law is the protection of individual rights conferred by Community rules, later practice clearly shows that the State liability doctrine has become an important element of European Union governance. Previous cases have indicated significant progress in protecting

92 See also Trevor C Hartley, pp 61
consumers, tourists, employees, and small businesses. Given the Member State unable to effectively secure the rights of these individual groups, the Court is proven to stand firmly with the individuals. The active step-in of the Court brought considerable financial and political burden and cost to the overall welfare of the Community. Despite of the cost, the State liability doctrine continue to be one of the most effective instrument of Community governance, as it guards the individual rights granted by the Community law and alerts the Member States with fault or inadequate action in implementing Community law. A direct result thanks to this “guard and alert” is the smooth operating of the single market, free movement of goods, establishment, services, and especially capital and person, at an economic view.

In my opinion, the strict application of State liability doctrine in both Community institutions and Member States is politically important, as it upgrades the accountability of European Union and the transparency of the Community law enforcement in Member States. I should stress that, this does not concern whether the equal rules should be applied to Community institutions and Member States, but the application needs to be consistent and strict, whatever the rules set out for each branch.

**Accountability and transparency**

With the quick enlargement of European Union in recent years, more researches are devoted to study the relationship between the Member State and the Union, lack of transparency of Community rules enforcement in Member State is one of the major questions, challenging future development of the Union.

In European Union, transparency could interpreted under various of titles, which are, among others, simplification of founding rules, easy to trace the influence of interest groups in the decision-making process, and transparent enforcement procedures.93

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93 Peter Dyrberg, *Accountability and legitimacy: What is the contribution of transparency?* in *Accountability and legitimacy in the European Union*, Edited by Anthony Arnull and Daniel Wincott, pp 84, Oxford University Press,
The significance of the transparency principle has been outlined by the Court in the litigation against the Netherlands\textsuperscript{94} concerning incorrect implementation of the Directive. As the Directive are intended to confer rights to consumers, it is crucial that the legal results of national implementing measures be effective and sufficient so that the individuals would be fully aware of their rights, which they may rely on them before national courts.\textsuperscript{95}

**Cumulative impact on political decisions of Member States**

More notably, the Court continues to expand scope of the State liability doctrine, inspiring many appeals to try their chances in new areas of juridification of the doctrine. The cumulative effects are found in similar court-made rules like Cassis de Dijon\textsuperscript{96} rulings concerning mutual recognition of national standard, and the principle of direct effect. The case law on the free movement of goods and on equality of treatment has compelled many Member States to revise their legislation to avoid financial liabilities.\textsuperscript{97}

It looks like in the previous paragraph, that the uncertainties of the scope of State liability has a great impact on the politics lives in the Member States. However, while looking deeper in the issue, one will find that it is just the problematic transposition deficit among the Member State that induce the Court to move further and further in the scope of the State liability doctrine, in an attempt to capturing the implementation deficit in more areas. The increasing directive output during the development of the Single European Market and the expansion of the European Union, jointly holding the implementation of the Directives become major problem that can threaten the healthy
integration of the Community. The implementation theory therefore, is high-developed incorporating three major factors that affect the implementation in Member State, namely institutional, political and substantive factors\textsuperscript{98}. Despite of the profound theory to help the implementation, the difficulties remained steep. As is revealed, in the majority of the countries (eight out of fifteen), domestic politics typically plays an important role at the transposition stage.\textsuperscript{99}

3.4 Whom to blame - The Court or the national courts?

\textbf{The opinion of the majorities}

From the analysis of the State liability doctrine in Part 2, it is witnessed that the doctrine is weak in basic concepts like “rights”, unfamiliar terms like “sufficiently seriousness” and suddenly exploring into virgin areas like the courts adjudicating at last instance. All of these seemed add up to the fault of the European Court of Justice, who initiated the doctrine, expanded the applicable of the doctrine, and made all the unpredictable rulings. Indeed, this seems a widely accepted idea to blame the Court. As is commented on the Köbler case, the criteria of deciding whether the national court shall be held liable are obscure.\textsuperscript{100} The unpredictable rulings of the Court conflicted with its general retrospective practice which is based on the principle of “legal certainty”, which requires that those who act reasonably on the basis of the law as it ought to be should not be frustrated in their legitimate expectation.

Starting from Brasserie du Pêcheur and Factortame III, the Court seemed to drive in an unlimited-extension road in terms of the scope of the State liability doctrine. Three major strides have been made until now. First stride came in Brasserie du Pêcheur and Factortame III, where the Court clearly taken the scope of Francovich liability beyond

\textsuperscript{99} Gerda Falkner and Others 2005, pp 344
\textsuperscript{100} \textit{Thinking the Unthinkable? State Liability for Judicial Acts after Factortame III}, Helen Toner, Yearbook of European Law, Volume 17: 1997 Edited by Ami Barav
the specific issue of non-implementation of Directives. Specifically, the Court responded that, “The principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the breach in question.” The scope is much wider than the one in Francovich, with “non-implementation of Directives” not mentioned but included in the explanation. The second and third occurred in British Telecommunication\textsuperscript{101} and Köbler, where the scope extended to a case of incorrect implementation and the liability as a result of errors made in application of EC law by Member States’ judiciaries.

To sum up, it is undeniable that the Court creates the uncertainties in the following aspects surrounding the State liability doctrine: 1) The lack of interpretation in the core definitions such as “Rights” and “Causal links”, 2) The lack of clarity in some rulings such as Brinkmann, 3) Inconsistent application of the State liability doctrine such as its responses to the compensation; 4) Unpredictable extension and empower the scope of State liability doctrine such as in Köbler.

\textbf{Taking a different view – courts relationship revisited}

Let us now switch our view to another angle, to see what the Member States and their national courts have been doing surrounding the development of the State liability doctrine, and relationship between the Court and national courts being shaped by the doctrine.

First, the very origin of the State liability doctrine should be totally attributed to the Member States, as the Court is far from a daydreamer to create the complicated doctrine from illusion. The Member States have thousands of reasons to refuse to implement a Directive to protect their own legal norms. For example, in the directives regulating workers, the Swedish government resisted the effect of a clause in the

\textsuperscript{101} Case C-392/93
Pregnant Workers Directive in which a two-week compulsory maternity leave is required, and introduced national measures that is more or less symbolic transposition and obviously not sufficient. For the same Directive, Austria and Italy refused to lift their bans on night work for pregnant women.\textsuperscript{102} In the literatures studying the reasons behind the reluctance to comply, interest group appears as increasingly important factors.\textsuperscript{103} And the national legislation to which the directives applied tend to be highly sensitive in nature, often involving political issues.

As a soft-rooted judge-made rule, State liability doctrine, although full of uncertainties, now has developed to a general principle of the Community, thanks of course to the vigorous efforts of the Court, but more importantly, also owning to the support of Francovich judgment in Member State’s court, despite of the questioning in the Court’s competence in creating rules of holding the Member State financially liable.\textsuperscript{104} In Francovich, the Court ruled that the principle of State liability is inherent in the system of the Treaty, which is actually only based on a general article\textsuperscript{105} in the Treaty. In French court, several cases are ruled in the spirit of Francovich judgment, although not explicitly mentioned by the national court, as in none of these cases did the court followed traditional well-established French public-law to specify \textit{faute}, but simply referred to an “illicit situation” which caused damage to the claimant. This is very similar to the analysis carried out in Francovich, in which specifying the seriousness and establishing the damage-loss link is key to the final judgment.

The cooperation between Community and Member States is always encouraged in political field, as is easily observed in Nice amendments to the Treaty of Amsterdam, which remove the major procedural barrier of the possible veto in the context of the EC Treaty, and of police and judicial cooperation under the third pillar. Enhanced cooperation is expected to involve all the Member State to enact legislation binding

\textsuperscript{102} Gerda Falkner and others, \textit{Complying with Europe: EU Harmonisation and Soft Law in the Member States}, Cambridge University Press, 2005, Chapter 14, pp293-316.
\textsuperscript{103} Knill and Lenschow, Heritier 2001, 
\textsuperscript{104} See Part One, A creator of a remedy at Community level 
\textsuperscript{105} Article 10, EC Treaty.
on them, including some of the new Member State after enlargements.\textsuperscript{106} Although there is a dysfunction trend after the enlargement, as the increasing refusal of supreme courts to refer is observed\textsuperscript{107}, the dysfunction is not evident in State liability cases.

The upgraded power of preliminary rulings procedure, as the single most important mechanism for fostering cooperation between the Court and the national courts\textsuperscript{108}, played a central role in the development of State liability doctrine. Most national courts are praiseworthily “cooperative” during the development of State liability, launching a good amount of preliminary rulings to seek judgments from the Court. It appears that the vague doctrine really puzzled the national judges, but another bold guess indicates that the national courts are likely to shift their responsibilities to hold the state financially liable to the Court.

The national courts with a preliminary ruling from the Court at hand, will be much certain and comfortable to obtain the decision. The reliance on the Court is definitely enhanced after Köbler, where failure to necessary referring could become a reason for State liability. As the Court carried a dominant role in most of the State liability cases, one of the key functions of the State liability doctrine – giving guidance to national court in handling future cases, became weak and even irrelevant. Since the national courts look more like a passive acceptor, rather than a participant, the Court put little priority to secure the legal certainty, while pouring its major attention to the deeper penetration of the State liability doctrine into the Community legal system, a direct result is the continuously broadened scope, which no one knows whether and when the scope will be further explored.

It is also hard to explain why the national court continues to refer the issue of

\textsuperscript{106} See also John A Usher, Enhanced Cooperation or Flexibility in the Post-Nice Era, Oxford University Press 2002.
\textsuperscript{107} European union law for the twenty-first century--rethinking the new legal order, edited by Takis Tridima and Paolisa Nebbia, Oxford 2004.
\textsuperscript{108} Jacque and Weiler, On the Road to European union-a new judicial architecture: an agenda for the intergovernmental conference.
compensation to the Court, when the State liability doctrine clearly states that the
details of compensation is subject to the national law, at the absence of the
Community stipulations. Is judicial cooperation relationship designated by EC Treaty
Article 177 between the Court and national courts gradually switching into one that
the Court is always competent to make the call for the national courts regardless of
the previous exercising practice of their own jurisdiction? In the book Introduction to
the Law of the European Communities\textsuperscript{109}, the professors state that “It (the Court) does
not, therefore, consider itself competent to examine the facts of the case, but confines
itself to answering the questions of interpretation of that Article raised by such an
obligation. Nor does it have jurisdiction to pronounce on the question whether
particular laws or administrative acts of a Member State are compatible with
Community law.” This is astonishingly different from what we have been witnessing
during the development of State liability case, among most of which the Court, gave
its judgments on both very detailed facts such as whether the causal link existed or
whether lost interests should be included as a part of compensation, and the
compatibility of national law with the Directive concerned. Although the book further
mentioned that it is quite often that “the Court was inspired by the facts of the case in
its interpretation of Community law and has given an interpretation in concreto”, it
still comes short in explaining the State liability cases, where the Court is doing much
more fact-analyzing than rule-interpretation.

3.5 Conclusion

Whilst it is clear that the Court tried to stipulate the State liability doctrine in great
details, especially the criteria like sufficiently serious, the reality present in the state
liability cases suggests the complexity of the factors, political considerations are also
important factors, and the interactions between the Court and the national courts are
all influencing factors behind the uncertainties of the doctrine. This is especially true

\textsuperscript{109} Edited by Laurence W. Gormley and others, \textit{Introduction to the Law of the European Communities}, Kluwer
where the doctrine presents itself as merely judge-made, and where the case-law
development is far from mature.

Part Three demonstrates the reasons of the legal uncertainty of the State liability
doctrine is not simply a contestable principle made the Court, but really a marvelous
creation of the Court aiming at upgrading the EC remedy system for individuals, and
the effectiveness of the Community law. The uncertainty is attributed to complicated
causes.

Part Four: The outlook of State liability and the
proposal for future development

4.1 Legal certainty

Promising sign of recent decrease of legal certainty

It is cheerful that the Court has learnt to be more proficient in handling State liability
preliminary ruling requests. The cases decided in the late review period, especially in
2004 and 2005, are becoming more and more predictable and more strictly ruled in
accordance to the State liability doctrine.

In Delena Wells\textsuperscript{110}, a case concerning the obligation to remedy the failure to carry out
an environmental impact assessment on certain projects, where English measure
granting consent for mining operations without an environmental impact assessment
being carried out. The court generally nodded the obligation of remedy, and then
brought up procedural autonomy and principle of effectiveness and equivalence, and
left the detailed procedural rules applicable to domestic legal order.

\textsuperscript{110} Case C-201/02, Delena Wells and Secretary of State for Transport, Local Government and the Regions, 7
January 2004
Although the cases brought to the Court reflect increasing sophistication, the Court is more and more experienced in handling its previous case law in State liability. It is more certain than ever that the Court will depart from Francovich and Brasserie/Factorfame to establish its argument, although the result is out of expectation sometimes. Moreover, Francovich cases are now cited not only in the State liability case, but in cases involving compensation such as Andrea Vassallo111, in which the Court also leave the provisions implementing issues to the internal legal order of the Member States. This is also because only few cases, like Brinkmann or Köbler, require the Court to explore or innovate the usage of the doctrine, with most of the cases, although maybe complicated, could be decided simply by applying the doctrine.

In the circumstances where the Court intends to push the development of the doctrine, it is expected that the Court can show or at least indicate the direction of the new move, which will make it easy for the national courts to give their own judgments in consistence with the Court’s strategy and the trend of Community legal order. In a legal field of making judgment on a case-by-case base like State liability, a swinging approach adopted by the Court will make the case even more complex and unpredictable.

At last, it should be made clear that the promising prospect in the decreasing uncertainties is just a sign obtained from a short-period-reivew, namely cases after 2003. But from the overall development of State liability case-law, one can see little trend which indicates the degree of uncertainties for future cases will slip, despite of the dropping after 2003 (See Figure 3).

111 Case C-180/04, Andrea Vassallo vAzienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate, 7 September 2006. See also other examples in Case C-212/04, C-141/04, C-142/04.
Figure 3: Case review of State liability on terms of degree of uncertainty

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Major areas of the Doctrine</th>
<th>Degree</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>C-91/92 Faccini Dori</td>
<td>V</td>
<td>Low</td>
</tr>
<tr>
<td>1996</td>
<td>C-46/93 &amp; C-48/93 Brasserie/Factortame III</td>
<td>I, II</td>
<td>High</td>
</tr>
<tr>
<td>1996</td>
<td>C-392/93 British Telecommunications</td>
<td>II</td>
<td>Middle</td>
</tr>
<tr>
<td>1996</td>
<td>C-5/94 Hedley Lomas</td>
<td>II, IV, V</td>
<td>Low</td>
</tr>
<tr>
<td>1996</td>
<td>C-178, 179 and 188-190/94 Dillenkofer</td>
<td>I, II</td>
<td>Middle</td>
</tr>
<tr>
<td>1997</td>
<td>C-192/95 to C-218/95 Comateb</td>
<td>IV</td>
<td>High</td>
</tr>
<tr>
<td>1998</td>
<td>C-127/95 Norbrook Laboratories</td>
<td>I, II</td>
<td>Middle</td>
</tr>
<tr>
<td>1998</td>
<td>C-319/96 Brinkmann</td>
<td>II, III</td>
<td>High</td>
</tr>
<tr>
<td>1999</td>
<td>C-302/97 Konle</td>
<td>V</td>
<td>Low</td>
</tr>
<tr>
<td>1999</td>
<td>C-140/97 Rechberger</td>
<td>I</td>
<td>Low</td>
</tr>
<tr>
<td>2001</td>
<td>C-150/99 Stockholm Lindöpark</td>
<td>II</td>
<td>Middle</td>
</tr>
<tr>
<td>2001</td>
<td>C-118/00 Larsy f</td>
<td>II</td>
<td>Middle</td>
</tr>
<tr>
<td>2003</td>
<td>C-224/01 Köbler</td>
<td>II, III</td>
<td>High</td>
</tr>
<tr>
<td>2003</td>
<td>C-63/01 Evans</td>
<td>II</td>
<td>Low</td>
</tr>
<tr>
<td>2004</td>
<td>C-201/02 Delena Wells</td>
<td>IV</td>
<td>Low</td>
</tr>
<tr>
<td>2004</td>
<td>C-222/02 Paul</td>
<td>I</td>
<td>Middle</td>
</tr>
<tr>
<td>2006</td>
<td>C-173/03 Traghetto del Mediterraneo SpA</td>
<td>II</td>
<td>Low</td>
</tr>
</tbody>
</table>

Notes:

1. **Major areas of the Doctrine** indicates that the State liability doctrine is carefully analyzed in the case by the Court.

2. **I, II, III** denote the three conditions of the doctrine, **IV** denotes compensation, and **V** denotes
the relationship of the doctrine with other legal principles of the Community, such as principle of direct effect, principle of procedural autonomy and principle of proportionality.

3. Degree indicates the degree of uncertainties assessed on the basis of the unpredictable factors and the impact on the development of State liability doctrine.

4.2 Procedural autonomy

The Court’s admitted the principle of national procedural autonomy was consistent with some of the Court’s previous case law, but it left the possibility for further litigation regarding the scope subject to national legislation to impose additional conditions, particularly “ substantive” conditions, to the right to compensation. This issue, among others, was addressed by the Court in the joined cases, Brasserie du Pêcheur and Factortame III.

The Court rulings in Magorrian and Cunningham and Levez declared that the national procedural rules were incompatible with the principle of effectiveness as they were likely to undermine the core interests of applicants, suggesting the Court were ready to interfere where a national procedural rules pose a threat to the enforcement of Community law.

The principle of national procedural autonomy is further challenged in State liability cases, in which the principle not only gives in to the principle of effectiveness, but also is subject to “relevant Community provisions”, as is ruled in Factortame III. The Court’s attitude is reflected vividly in its response to an Italian judge of first instance, who questioned on whether the Court behaved properly in interfering into a national system of judicial review. The Court held that, “…any judicial practice which might impair the effectiveness of the community law by withholding from the national court

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114 C-246/96, Magorrian and Cunningham v Eastern Health and Social Services Board and DHSS [1997]; C-326/96 Levez/Jennings Ltd, [1998]
having jurisdiction to... set aside national legal provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.” Based on this, the court can basically step in at any time into the national judicial procedure, as long as the procedure is regarded as an obstacle for the protection of individual rights and full-effectiveness of the Community law. This is justified by the Advocate-General Mischo that in certain cases Community law itself confers jurisdiction on national judicial authorities, in an attempt to ensure effective protection of the Community rights.

The respect to national procedural rules is an important aspect of the fundamental principle of legal certainty, as both the national courts and the applicants are more likely to be familiar with the national procedural rules rather than those created by the Court. Procedural harmonization is hardly welcome and is deemed unnecessary in terms of protection of individual rights and a regulatory waste.115

In prospect, it is observed that the Court is actually using the procedural autonomy to encourage wider acceptance of the newly-created doctrine among the national courts. Besides confirming the scope and conduct of the compensation is governed by the national law, the Court explicitly allowed that the national courts could not refer most legal questions regarding liability to the Court in State liability cases,116 a sign that the Court pays growing respect to member state sovereignty in judicial procedure.

The trend of showing emphasis on procedural autonomy is not a guaranty of future non-interference from the Court, as the Court continues to put principle of effectiveness as a priority. Further, the Member State sovereignty is fundamentally threatened by the overall institutional design of the Community. Because the

Parliament has little legislative power, the Council highly relied on the unanimity of its members, while the Court is holding the key of creating and interpretation of community legal norms. As further integration continues to be the Commission’s target, the Court’s efforts in ensuring uniform application of Community rules will be fully support by the Commission.117

Preliminary rulings

The Case Köbler seemed to solve two major questions haunting the current preliminary rulings procedure system. The procedure is criticized to place too much reliance upon the national courts to exercise their discretion to refer cases to the Court according to the acte clair doctrine. Further, before Köbler, preliminary rulings procedure does not offer any means for litigants to challenge incorrect applications of EC law handed down by courts of last resort within the national system. In Köbler, the Court introduced State liability to restrict the national courts at the last instance.

However, the effect of such liability remains suspicious. Practical issues arisen from carrying out the Köbler State liability. Difficulties come from enforcement of the State liability sanction in a system with the separation of powers among the legislature, the executive and the judiciary. It is also likely that the same supreme court will have to decide whether its own earlier judge constituted a sufficiently serious breach according to the Köbler State liability, as the Court ruled, “Application of that principle cannot be compromised by the absence of a competent court.”118

Second trend to be noted in Köbler is that the Court is obviously more confident119 in enforcing the State liability doctrine to sensitive sectors like national judicial system, suggesting the State liability doctrine will soon become a default remedy in across-border damage cases as the Court has already confirmed its position as the

117 See also Martin Shapiro, The European Court of Justice, in The Evolution of EU Law, edited by Paul Craig and Grainne de Burca, Oxford, 1999
118 Case C-224/01 Köbler, para. 44-45
119 Derek Beach, Explaining judicial autonomy and constraint in the EU – comparing the creation and development of the principle of state liability and fundamental human rights by the ECJ, University of Copenhagen, Denmark, 2005
principle of Community law.

Overall, it is obvious in State liability case-law that the Court extends preliminary rulings beyond the scope of offering interpretations of the doctrine. While criticizing the Court's aggressive strategy towards its jurisdiction of preliminary rulings, it is also worth considering that full effect of preliminary rulings pursuant to Art 35 would be undermined if individuals were not able to rely upon the State liability doctrine to recover the damage due to the national laws. The State liability case-law accords primary responsibility on national courts to ensure the effective enforcement of directives. Crucial to the success of the doctrine is still the willingness of national judges to engage in complex and unfamiliar fields of interpretation of both national legislations and Community law, in order to give effect to the rights conferred by Community law.

A deep insight of Köbler liability reveals that the Court has been bold but very cautious in handling the case involving member state’s judiciary system, where the Court imposed strict restrictive conditions in exceptional cases for the State liability to incur. The limited standard adopted by the Court, signaling the Court’s intention to protect the legal certainty of national judiciary order and to build a comfortable relationship between Community court and the national courts.

4.3 Acceptance of the doctrine among the Member States

The application of State liability doctrine in member state is not as influential as it expected, not to mention the occasions in which the individuals have actual be awarded with the damage caused by the state's breach of EC law. A remarkable ruling in national courts is CanalSatelite\textsuperscript{120}, a recent development of the State liability doctrine in Member States. In this case, Spanish court awarded the digital satellite

\end{footnote}
television operator CanalSatellite Digital €26.4 million in damages based on the application of State liability doctrine. Spanish court achieved the final judgment mainly based on the analysis of the Court's previous judgments in preliminary ruling procedures in State liability. This is extremely evident in determine the criterion of sufficient seriousness, in which Spanish court referred to almost every case-law from Brasserie and Factortame, Dillenkofer, and British Telecommunications to support its final establishment of a sufficiently serious breach of Community law.

It is worth relating the trends of implementation of directives with the acceptance of the State liability doctrine, as the increasing implementation rate is an optimistic sign for further acceptance. See Figure 4.

**Figure 4: EU rate of legal implementation (directives) 1991-2000**

Moreover, as the Directives are under the increasing influence of the Anglo-Saxon method of drafting, which attached great importance to precision and details. The Directives of great clarity, are helpful to identify the content of rights, leaving little discretion to the Member States, suggesting that a new stage of Community law is on the way.
From an economic point of view, the financial compensation obtained by the individuals who suffered from the non-implementation will not always be an adequate recovery of the potential rights which are infringed, some of which is hardly recoverable. The ultimate protection of individual rights conferred by the Community law is certainly correct and timely transposition of the directive into the national legal order by the Member States.

Further, the acceptance of the State liability doctrine among member state is also expected to be promoted by the individuals and NGOs, as they hope to rely on the doctrine to obtain reparation of the damages with a causal link to breaches of Community law by the Member States. These attempts also may further assist the Court to broaden the scope of the doctrine. A case in point is the environmental cases, it is argued by environmental law scholars that the principle of State liability is not restricted to compensating directly injured parties only, but should be understood as entailing a general responsibility to repair any damage which could pass the test of the State liability doctrine.\(^{121}\) This view is somewhat radical as it is clearly stated by the Court that the loss and damage link should restricted to be “direct”, as is stipulated in Brasserie, but the attempt of utilizing State liability doctrine as a vital instrument for enforcement of EC environmental law is remarkable. Besides environmental law, most Community legislation has come in the form of directives, which is neither unconditional nor sufficiently precise to have directly effective, suggesting State liability doctrine will not only be an effective way but quite likely the only way to obtain the reparation for the injured parties.

The ultimate goal of analyzing the prospect of increasing acceptance of State liability doctrine among the Member States is to estimate the future effect of the doctrine in the Community legal order. In addition to direct effect, State liability doctrine is

expected to be a powerful device, placed at the disposal of national courts to enable them to accomplish their role under Community law. However, the current State liability doctrine, even fully-adopted by the national courts could hardly be effective in some situation where individual rights are infringed and remedy is need, as the case-law excludes the directive on the purpose of general interest. Moreover, if the loss suffered by the individual is too small to cover the cost of bringing proceedings, or where it is hard to prove the causal link, the State liability doctrine remained an ineffective remedy.122

**Part Five: Concluding remarks**

Despite all the uncertainties revealed in the previous chapters, the State liability doctrine remained a strong and innovative instrument of protecting individual Community rights and the effectiveness of Community law. Underpinning the debate surrounding the State liability doctrine is the awkward question of whether the State liability doctrine should go further to strengthen the remedies on Community level, and how could the Court tackle the uncertainties as a consequence in further penetration. Further, it is also an open question whether this doctrine will curb the non-, mis-, and inadequate-implementation of Directives among Member State in the long term. One plausible view is that all the judge-made rules including the principle of supremacy, direct effect, and State liability represent a new dimension of Community remedy, boosting the confidence of individuals in the Community legal order. Indeed, the impeded access to the rights conferred by the Community law of the individuals is obviously more serious hindrances than the mist of the judgments in State liability case-laws.

It is undisputable that the Court played the central role in the development of the overall Community remedies system. Köbler and further cases intruding into national judicial system, have located more harmonization ambitions to the State liability

doctrine, although questions about how far should Köbler liability go remain open. Latest application of Köbler liability\textsuperscript{123} seemed to suggest that the Court will continue to strictly limit the scope of judicial liability of Member States, instead of pushing the limitation further. But in the long run, just like Michael Dougan said, “it remains to be seen whether there might ever be circumstances in which infringements of the Treaty perpetrated via decision delivered by lower courts and tribunals will furnish the basis for Member State liability under Francovich.”\textsuperscript{124}

\textsuperscript{123} C-173/03 Traghetti del Mediterraneo SpA

\textsuperscript{124} Michael Dougan, \textit{Legal Developments}, JCMS 2004 Vol 42, Annual Review pp. 77-94.
Table of Cases

European Court of Justice

Case 26/62, *Van Gend en Loos*, [1963] ECR 1
Case 70/81 *Kloppenburg*
Case 14/83 *Von Colson and Kamman v Land Nordrhein-Westfalen* [1984] ECR 1891
Case 80/86 *Kolpinghuis Nijmegen*
 Joined Cases C-178/94, C-179/94, C-188/94, C-189/94, C-190/94 *Dillenkofer and Others v Germany *
Case C-1/96 *The Queen v MAFF ex parte Hedley Lomas*
Case C-246/96, *Magarrian and Cunningham v Eastern Health and Social Services Board and DHSS* [1997]
Case C-326/96 *Levez/Jennings Ltd*, [1998]
Case C-140-97 *Rechberger and Others v Austria* [1999] ECR I-3499
Case C-185/97 *Coote*
Case C-352/98 *Laboratoires Pharmaceutiques Bergaderm SA, C-456/98 Centrosteel, and Case 397/01 Pfeiffer*
Case C-150/99 *Swedish State v. Stockholm Lindöpark Aktiebolag*
Case C-118/00 *Larsy*
Case C-63/01 *Samuel Sidney Evans v. Secretary of State for the Environment, Transport and the Regions*
Case C-224/01, *Gerhard Köbler v. Austria* [2003] ECR I-10239
Case C-201/02, *Delena Wells and Secretary of State for Transport, Local Government and the Regions*,
7 January 2004
Case C-222/02 Paul and Others v. Germany [2004]
Case 173/03, Traghetti del Mediterraneo SpA v Repubblica italiana
Case C-180/04, Andrea Vassallo v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate, 7 September 2006.
Case C-278/05 Carol Marilyn Robins, John Burnett and Others v Secretary of State for Work and Pensions delivered on 13 July 2006

Bibliography

Alan Dashwood and Angus Johnston, The future of the judicial system of the European union, Oxford and Portland, Oregon 2001
Alska Scherer, State liability - Ten years after Francovich - Is German State liability law compatible with EC law?, Lund University, Master of European Affairs programme, Law Master thesis, pp14
Anthony Arnall, The European Union and its Court of Justice, Oxford University Press, 1999, p172
Benaud Dehousse, Integration through law revisited: some thoughts on the juridification of European political process, in The Europeanisation of Law: The legal effects of European Integration, edited by Francis Snyder, Oxford – Portland Oregon 2000, pp 25
Bruno de Witte, Direct effect, supremacy, and the nature of the legal order in The evolution of EU Law, Edited by Paul Craig and others, Oxford University Press 1999
Chris Hilson, Liability of Member States in Damages: The Place of discretion, International and Comparative Law Quarterly [VOL.46, 1997]
Derek Beach, Explaining judicial autonomy and constraint in the EU – comparing the creation and development of the principle of State liability and fundamental human rights by the ECJ, University of Copenhagen, Denmark, 2005
Helen Toner, Thinking the Unthinkable? State liability for Judicial Acts after Factortame III, Yearbook
of European Law, Volume 17: 1997 Edited by Ami Barav
Hjalte Rasmussen, European Court of Justice, GadJura Publishers, Copenhagen 1998, p 117
Jacque and Weiler, On the Road to European union—a new judicial architecture: an agenda for the intergovernmental conference
John A Usher, Enhanced Cooperation or Flexibility in the Post-Nice Era, Oxford University Press 2002.
Karen Davies, Understanding European Union Law, Cavendish Publishing Limited, 2001
Martin Shapiro, The European Court of Justice, in The Evolution of EU Law, edited by Paul Craig and Grainne de Burca, Oxford, 1999
Sahca Prechal, Directives in EC Law, Oxford University press, second, completely revised edition, 2005
Sara Drake, Twenty years after Von colson: the impact of ‘indirect effect’ on the protection of the individual’s Community rights, (2005) 30 E.L.Rev. June
Smith and Lorna Woods, Causation in Francovich: The Neglected Problem, International and Comparative Law Quarterly [Vol.46]
Takis Tridima and Paolisa Nebbia, European union law for the twenty-first century--rethinking the new
legal order, Oxford 2004
Trevor C Hartley, Constitutional Problem of The European Union, Oxford and Portland, Oregon, 1999
Van den Bergh, Roger and Shäfer, Hans-Bernd, State liability for Infringement of the E.C. Treaty:
pp. 552-567.