Democracy and Non-contractual liability of States for breaches of EU Law

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The constitutional structure of the socio-economic dimension of the European Union has been assembled through the definition of several economic policies. Recon WP7 undertakes research about those policies with the aim to clarify the fundamental guiding principles of the socio-economic constitution of the European Union. This purpose will not be pursued from an isolated or fragmented perspective, but rather from a constitutional one, that enables us to analyse the idea of the EU projected by each policy and to link the different outcomes of this specific environment in a more comprehensive image of the European Union. This perspective aims at contributing with the general plan of the RECON project by bringing light to the way in which democracy can be reconstituted in Europe. On this regard, the study of those economic policies or institutions will permit to understand the ways in which economic norms, policies and decisions are taken and hence it will facilitate the comprehension of the way in which powers are allocated and of the democratic legitimacy arguments that justify this allocation.

One of those socio-economic institutions of the European order is the system of non-contractual liability of both the European institutions and the Member States for breaches to EU Law. As we will try to show hereafter, the mechanism of compensation that the treaties and the ECJ have developed represents a decision-making procedure with strong political and economic implications. Political, because it reveals not only an option to make good the damages that states produce in exercising their powers, but it further expresses a precise design of the distribution of powers within the Union and a particular way to develop both the process of enforcing EU Law and the relation between that process and national legal orders. Economic, on the other hand, because when the Court decides to give damages, it also decides a certain model both of how to distribute in a more efficient way public economic resources and of how to build specific communities of risks and insurances.

The current research about public liability is divided into two parts. In the first part, which is covered by this paper, we will develop two main points. Firstly, we will describe the power-allocating norms over this institution, showing, in concrete, which theoretical framework is necessary to shape this allocation, or, what is the same, which kind of assumptions are needed to support the power-design that stand behind EU liability norms. Secondly, we want to illustrate what are the consequences of this framework and what are the costs that we need to pay when we accept the institution of public liability as progressively defined and reconstructed by the ECJ. The second part of the research, which a future paper will carry out, will show how the assumptions and the consequences of the public liability theory can affect democracy in the European Union. For this purpose, we will offer a multiple democratic assessment of the constitutional status quo by reference to the three RECON democratizing strategies, formulating at the end concrete proposals to move from the current state of affairs to a more democratic design of public liability in the EU sphere.

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§1. Introduction

Public liability is a classical and relevant topic both in domestic public law and at the EU level. Which are the elements that configure a public liability system, which are the breaches that generates it, which are the different explanatory models or supporting grounds for public liability, and which are the relations between the national models and the European model of public liability are some of the main points of concern considered by the scholars when studying this topic[1]. The answer to these inquiries combines normally theoretical and practical approaches.

The system of public liability in the EU sphere includes the study of two main sources: the liability of the European Communities institutions and the liability of member states for breaches of EU Law. While the first was expressly stated in one of the founding treaties (now art. 215 EEC) the second one was recognize in a clear and concise way by the case law only since 1990 in the famous *Francovich* case[2]. Thus, the treatment of public liability has coincided with the evolution of the judicial and doctrinal interpretation of art. 215 and the development of the case law post Francovich. Both case law and judicial and doctrinal interpretation of this provision have focus their efforts in determining the conditions or requirements for establishing public liability in the same way in which national legal systems have dealt with these conditions concerning liability for torts during centuries. In developing that task, and especially since the *Brasserie du Pêcheur* case[3], both models of EU liability –of Community institutions and of Member states– became closely interconnected sharing not only the common problems or the unclear points, but even their legitimacy. Indeed, the legitimacy of the Treaty provisions regulating liability of Community institutions has been transferred to the unregulated and jurisprudentially modelled liability of Member states. Both liabilities, in opinion of the ECJ, have become to be part of some common idea of protection of rights and its legitimacy derives precisely from this guarantee function. As the ECJ said, liability of European institutions was "constructed on the basis of the general principles common to the laws of the Member States and it is not appropriate, in the absence of particular justification, to have different rules governing the liability of the Community and the liability of Member States in like circumstances, since the protection of the rights which individuals derive from Community law cannot

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1 See, among others, BEBR, G. (1981) *Development of Judicial control of the European Communities*, The Hague: Martinus Nijhoff, p. 219ff; CRAIG, P. & BÚRCA, G. d. (2003) *EU Law*, 3th ed, Oxford: Oxford University Press, p. 257ff; HARTLEY, T. C. (2003) *The Foundations of European Community Law*, 5th ed, Oxford: Oxford University Press, p. 235ff; ISAAC, G. & BLANQUET, M. (2006) *Droit général de l'Union européenne*, 9th, Paris: Dalloz, p. 403ff; LENAERTS, K. & ARTS, D. (2006) *Procedural Law of the European Union*, 2nd ed, London: Sweet & Maxwell, p. 369ff; LEWIS, C. (1996) *Remedies and the enforcement of European Community Law*, London: Sweet & Maxwell, p. 250ff; NICOLAYSEN, G. (2002) *Europarecht I*, 2nd ed., Baden-Baden: Nomos, p. 419ff; SCHERMERS, H. & WAELBROECK, D. (2001) *Judicial Protection in the European Union*, 6th ed, The Hague: Kluwer Law International, p. 518ff; SCHWARZE, J. (2000) *EU-Kommentar*, Baden-Baden: Nomos, p. 2277ff; STEINER, J., WOODS, L. & TWIGG-FLESNER, C. (2006) *EU Law*, 9th ed., Oxford: Oxford University Press, p. 288ff; TESAURO, G. (2003) *Diritto Comunitario*, 3th ed., Padova: CEDAM, p. 334ff.

2 Case C- 6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* [1991] ECR I-5357

3 Case C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029.

vary depending on whether a national authority or a Community authority is responsible for the damage"[4].

§2. The allocation of the power to compensate

The European Communities did not establish an action to obtain a compensation for breaches of Community law caused by Member states right from the beginning. Indeed, the mechanism created for the purpose of diminishing those breaches was an action for infringement, stated in article 169 EEC (now 226). This rule, which continues to have the original wording, provides that "if the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations". "If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice". On the other hand, article 170 (now 227) established the same action but entitled Member states to make use of it.

As we can see, that mechanism was settled in a very flexible way. In fact, not every infringement of Community Law was to be understood as an attempt to disregard it or violate it. As Bebr puts it "it would be both premature and too drastic if the Commission would immediately lodge a legal action with the Court as soon it presumes a possible infringement were committed"[5]. In other terms, the treaties did not consider that all type of infringement would constitute immediately a wrong. As European rules do not impose obligations with clear and complete contents, the infringement would be always an ambiguous and undetermined question. A "dialogued procedure", this author contents, would be better to pursuit the necessary deterrence of unlawful actions and to impose a voluntary and not forced acceptance of the new reality of Community law. By this way, the action of infringement would stand as a "subtle, flexible instrument of persuasion, with a gradually increasing force of pressure, seeking to ensure the respect of Community obligations which, if it fails, may ultimately end up with a Court's judgement recording a default of a Member State"[6].

But it is not so hard to understand why this mechanism was not seen with good eyes by the ECJ. In the seminal case *Humblet*[7] the Court shows the contradictions

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[4] *Ibid*. The same idea was previously held by Advocate General Mischo in *Francovich*. The court, however, did not share this line of reasoning in that opportunity.
However, and despite the fact that the Court has equate both types of liability in some decisions, in practice the Court has not follow this homogenous line of reasoning along its case-law, since for some subjects the Court varies its decision depending on the actor that caused the damage. In fact the actions of Community institution are seen by the Court as primary legislature and, according with this, it argues that liability must be imposed only in exceptional circumstances, since the freedom of legislature must not be obstructed by the prospect of actions for damages (see *Brasserie*). On the other hand, the ECJ understand the relation between the member states acts and Community law mainly as a matter of hierarchy and hence reparation of damages is appreciate only as a corollary of the supremacy of EU Law. See. TRIDIMAS (1998), p. 24. In a similar vein, VAN GERVEN, (1998), p. 36ff.

[5] BEBR (1981), p. 279.

[6] BEBR (1981), p. 280. "The first stage of the infringement procedure is to serve as a warning, intended to inform the Member State about its presumed default and provide it with an opportunity to execute its Community obligations. The subsequent contentious procedure before the Court and its judgement, finding publicly the infringement of a Member State is the last resort, the *ultima ratio* of the EEC Treaty Article 169". In the same line, see SCHERMERS & Waelbroeck (2001), p. 609ff.

[7] Case 6/60 *Humblet v. Belgium* [1960] ECR 559. The plaintiff was a Belgian official of the European Coal and Steel Community that brought Belgium before the ECJ because Belgium had

existing between the rationale of that flexible system and other powers entrusted to the Court by the treaties. Indeed, on the one hand, the Court recognize that it "has no jurisdiction to annul legislative or administrative measures of one of the Member States" because "[t]he ECSC treaty is based on the principle of a strict separation of the powers of the Community institutions and those of the authorities of the Member States". Hence, "Community Law does not grand to the institutions of the Community [Court included] the rights to annul legislative or administrative measures adopted by a Member State". Up to this point, the Court applies the traditional conception of separation of powers, which is coherent with the mechanism of enforcement provided in identical terms by article 88 ECSC and founded on the same basis as article 169 EEC[8].

But, and here comes implicit the possible source of contradiction from the Court's point of view, if the Treaty attributes the Court the power to decide about the interpretation of a European rule, what would be the material effects of that interpretation. In other words, as AG Lagrange pointed out in his opinion on this case, one of the questions that the court had to solve in *Humblet* was what the powers of the Court were when someone applies directly to it[9]. The applicants in this case intelligently argued that if the Court cannot order a real nullity, its decision would be ineffective and the judgement would be reduced to a mere opinion "unable to annul illegal measures adopted by national authorities and order the Member States to make reparation for the resultant damages". The argument sustained by the applicants 'puts the finger on the sore spot'; to say that if the Court does not exercise a power it really means that it has not such a power, is a provocative strategy. And the Court reacts, and decides to take over this reasoning. "It would be erroneous to accept –said the ECJ– that this provision [art.16 ECSC] enables the Court to interfere directly in the legislation or administration of member states". "In fact if the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a member state is contrary to Community Law, that member state is obliged, by virtue of article 86 of the ECSC treaty, to rescind the measure in question and *to make reparation* for any unlawful consequences which may have ensued. This obligation is evident from the treaty and from the protocol which have the force of law in the member states following their ratification and which take precedence over national law". How can we have so little power?, seam to ask themselves the judges.

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violated the Protocol on the Privileges and Immunities of the ECSC by considering his Community salary in determining the Belgian supplementary tax rate.

[8] "[I]f the High Authority –continues the decision– believes that a state has failed to fulfil an obligation under the Treaty by adopting or maintaining in force provisions contrary to the Treaty, it may not itself annul or repeal those provisions but, in accordance with article 88 of the treaty, it may merely record such a failure and subsequently institute proceedings as set out in the treaty to prevail upon the state in question itself to rescind the measures which it had adopted". "The same applies to the Court of Justice. Under the terms of article 31 of the Treaty it has responsibility for ensuring that Community Law is observed and by article 16 of the protocol has jurisdiction to rule on any dispute relating to the interpretation or application of the protocol but it may not, on its own authority, annul or repeal the national laws of a member state or administrative measures adopted by the authorities of that state".

[9] "Has the Court – asks the AG – as the applicant maintains, the power to make an order affecting the national authorities, that is to say in the present case, the power to order the discharge or the reduction of the contested tax and to order that the consequential relief be given? In my opinion it certainly has not; that would be a clear incursion into the jurisdiction which the national courts have retained; the Court may not substitute its judgment for that of the authorities or of the national courts acting within the scope of the national fiscal legislation". Opinion of Mr. Advocate Lagrange in case 6/60 *Humblet v. Belgium* [1960] ECR 583

Thirteen years were needed for the Court to examine a new case of state liability. In *Commission v. Italy*[10] appears again the idea of the vain effects of the Court's decision when it has not a real force or contains no effective sanction. While in the operative part of its decision the Court stated the normal pronouncement that the state had failed to fulfil its "European obligations", it adds, in the findings of the judgment, that its decision "may be of substantive interest as establishing the basis of a responsibility that a member state can incur as a result of its default, as regards other member states, the Community or private parties".

Three years after the Court had to solve the *Rewe* case[11] brought before it via a reference made by the *Bundesverwaltungsgericht*. The German court asked whether, in the case that an administrative body of a state has infringed the prohibition on charges having an effect equivalent to customs duties, the Community citizen concerned has a right under Community Law to ask the annulment or revocation of the administrative measure and/or to a refund of the amount paid, even if under the rules of procedure of the national law the time-limit for contesting the validity of the administrative measure has expired. The question dealt precisely with the distribution of powers between legal orders. To solve the case, the Court grabbed the language of rights, technique which was strongly incorporated to European judicial reasoning in the well-known *van Gend en Loos* case[12]. The rules of a regulation "have a direct effect and confer on citizens rights which the national courts are required to protect". "[I]t is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community Law". This entails that the domestic legal systems of each member state are the ones that must grant the procedural conditions governing actions "to ensure the protection of the rights which citizens have from the direct effect of Community Law"[13].

It appears from the forgoing that the idea of direct effect is closely related with state liability for breaches of EU law. At the time of *Rewe* the state of arts on this topic was very clear. On the one hand, both Treaty and regulation provisions had direct effect as ruled in *van Gend en Loos* and since *van Duyn v. Home Office*[14] also Directives could have direct effect under some circumstances. This direct effect –as we will see below– implies that those rules give rights to the citizens, that these citizens can ask for the protection of those rights before their national courts, and that national courts are obliged to provide the conditions to protect them. In some way, assimilating the consequences of the direct effect doctrine, national courts understand their Community role within the judicial structure as supervisors in the implementation and application of Community law by legislative authorities[15]. Additionally, the power of the ECJ is not only passive but an active one, since it can impose obligations on Member states precisely to protect rights of citizens.

This is the atmosphere in which *Francovich* –the most important decision in the framework of state liability– appears. In this influential decision the ECJ recognised the duty of the member states to make good the damages in citizen's rights caused by

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[10] Case 39/72 *Commission of the European Communities v. Italian Republic* [1973] ECR 101

[11] Case 33-76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] 1989.

[12] Case 26-62 NV *Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1

[13] For that reason some scholars claim that the Francovich's liability principle was inherent to Community Law even before that judgment. WAELBROECK (1997), p. 313.

[14] Case 41-74 *Yvonne van Duyn v Home Office* [1974] 1337

[15] GRANGER (2007), p. 166

breaches of EU Law. Due to its importance, this decision has been largely studied[16]. Hence, we will not analyse it here in detail, but we will limit to reconstruct its underlying rationale. "The full effectiveness of Community rules –stated the ECJ– would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible. Such a possibility of reparation by the Member State is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law". "It follows that the principle whereby a State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty".

As we can appreciate, Francovich liability meant a radical change in the way in which Community Law would deal with states' infringements. Indeed, it meant an evolution from a flexible mechanism to deter states from committing wrongs to a more direct and inflexible respond towards EU law breaches. According to the former, the solution to face the infringement is "institutional", given that it is the Commission the competent to adopt the measure, deciding well to bring or not the state before the Court, or else agrees with the state involved different plans for restituting the legal order. At the same time, it is the Commission, as an EU institution, the one that balances the European interests, the national sovereignty interests, and the private interests. On the other hand, Francovich doctrine entitles private citizens before a wide range of national courts with the power to question the actions of their member state. This entails that the state's breaches of EU law are solved at a judicialised environment, and not any more allowing negotiations or agreements among the state and European institutions.

It is seemingly clear that after Francovich member states wanted to stop judicial activism through the reform of the mechanism of penalty payments for breaches under article 228 EEC (old article 171), expressing an unambiguous sign to recover the

[16] Among others, see: CARANTA, R. (1993) "Governmental Liability after Francovich", in *Cambridge Law Journal*, vol. 52, nº 2, p. 272-297; CARNELUTTI, A. (1992) "L'arrêt Francovich Bonifaci. L'obligation des États membres de réparer les dommages causés par les violations du droit communautaire", in *Revue du Marché Unique Européen*, nº 1, p. 187-192 ; CRAIG, P. (1993) "Francovich, Remedies and the Scope of Damages Liability", in *Law Quarterly Review*, nº 109, p. 594-621; DOUGAN, M. (2000) "The *Francovich* Right to Reparation: Reshaping the Contours of Community ", in *European Public Law*, vol. 6, nº 1, p. 103-128; FLYNN, L. (1995) "Francovich in the National Courts", in *Irish Law Times and Solicitors' Journal*, nº 13, p. 16; HANFT, J. E. (1992) "Francovich and Bonifaci v. Italy: EEC Member State Liability for Failure to Implement Community Directives", in *Fordham International Law Journal*, vol. 15, nº 4, p. 1237-1274; HARLOW, C. (1996) "Francovich and the Problem of the Disobedient State", in *European Law Journal*, vol. 2, nº 3, p. 199-225; HERVEY, T. L. (1997) "Francovich Liability Simplified", in *Industrial Law Journal*, nº 26, p. 74-79; KÜNNECKE, M. (2008) "Divergence and the Francovich remedy in German and English courts", in *The Coherence of EU Law: The Search for Unity in Divergent Concepts*, (eds. S. Prechal & B. van Roermund), Oxford: Oxford University Press, p. 233-253; NEVILLE BROWN, L. (1996) "State Liability to individuals in Damages: An Emerging Doctrine of EU Law", in *Irish Jurist Reports*, nº 31, p. 7-21; OGREN, M. L. (1994) "Francovich v. Italian Republic: Should Member States be Directly Liable for Nonimplementation of European Union Directives?" in *The Transnational Lawyer*, nº 7, p. 583; ROSS, M. (1993) "Beyond Francovich", in *Modern Law Review*, nº 56, p. 55-73; SCODITTI, E. (2004) "Francovich" presa sul serio: la responsabilità dello Stato per violazione del diritto comunitario derivante da provvedimento giurisdizionale", in *Il Foro italiano*, vol. IV Col. 4-7; SMITH, H. (1992) "The Francovich case: state liability and the individual's right to damages", in *European Competition Law Review*, vol. 13, nº 3, p. 129-132.

flexible mechanism before the Commission and undermining the liability model. Following the will of Member states, on 1992 the Maastricht Treaty changes article 171 in order to enable the ECJ to order lump-sum payments or penalties to be paid by member states for non compliance with one of its judgments. The raison d'être of that change was to develop a more credible public alternative to Francovich's mechanism. In other word, after the change it would be "more difficult for the Court to extend the non-contractual liability doctrine based on the argument that no credible alternative for enforcing Community legislation existed"[17]. But the amendment came late. Francovich's doctrine had arrived for remaining[18].

Moreover, despite the fact that Francovich tried to solve a specific case of non transposition of directives, it was clear from the beginning that its rationale could be applied beyond the boundaries of this breach, even though the warnings that some scholars pointed out during the time after this decision concerning the problems of such a likely broadening[19].

Thus, new types of breaches would be added after Francovich and new kind of acts would be subjected to this liability control exercise by the ECJ. Indeed, the failure or the delaying on the transposition of a directive was reaffirmed in *El Corte Ingles*[20], in *Dillenkofer*[21], in *Bonifaci*[22], in *Palmisani*[23], in *Maso*[24], *in Rechberger* [25] and in *Robins*[26] cases; national statutes that were found to be contrary to EU law were understood as ground of liability since *Brasserie du Pêcheur*[27], *Eunice*[28] or *Konle* [29]; not proper incorporation of directives–if they fulfil the general requirements– could give rise to liability since *British Telecommunications*[30] or *Denkavit*[31]; and administrative acts should be as well subjected to the control of the court since *Hedley Lomas*[32],

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17 "Moreover, member states gave a significant political signal by *not* picking up the Francovich doctrine with any provisions in primary law. Individuals were *not* granted the written right in Community law to proceed against member states for breaches of Community law and no mention is made of damage compensation to be paid to individuals for state acts not compatible with European law". ROOSEBEKE (2007), p. 72-73.

18 "*Francovich* must then be seen as an assertion of power or even act of defiance by the ECJ –it was certainly not a step taken at the behest of the member states". HARLOW (2004), p. 58.

19 See CRAIG (1993), p. 604ff

20 C-192/94 *El Corte Inglés SA v. Cristina Blázquez Rivero* [1996] ECR I-1281.

21 C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v. Bundesrepublik Deutschland* [1996] ECR I-4845

22 C-94/95 and C-95/95 *Danila Bonifaci and others and Wanda Berto and others v. Istituto nazionale della previdenza sociale* [1997] ECR I-3969

23 C-261/95 *Rosalba Palmisani v. Istituto nazionale della previdenza sociale* [1997] ECR I-4025

24 C-373/95 *Federica Maso and others and Graziano Gazzetta and others v. Istituto nazionale della previdenza sociale and Repubblica italiana* [1997] ECR I-4051

25 C-140/97 *Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v. Republik Österreich* [1999] ECR I-3499

26 C-278/05 *Carol Marilyn Robins and Others v. Secretary of State for Work and Pensions* [2007] ECR I-1053

27 Cit. above n. 3

28 C-66/95 *The Queen v. Secretary of State for Social Security, ex parte Eunice Sutton* [1997] ECR I-2163

29 C-302/97 *Klaus Konle v. Republik Österreich* [1999] ECR I-3099

30 C-392/93 *The Queen v. H. M. Treasury, ex parte British Telecommunications plc.* [1996] ECR I-1631

31 C-283/94, C-291/94 and C-292/94 *Denkavit International BV, VITIC Amsterdam BV and Voormeer BV v. Bundesamt für Finanzen* [1996] ECR I-5063

32 C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland)* Ltd. [1996] ECR I-2553. Even some scholars have argued that breaches of International agreements can be sanctioned trough state liability. See GASPARON (1999).

Norbrook[33] or *Salomone Haim*[34]. Even court decisions were considered as able of causing damages when contrary to EU Law since *Köbler*[35]. Finally, the obtaining of compensation by lawful statutes has been also considered and evaluated by European courts as perfectly possible[36].

Thus, through the analysis of all these decisions, it is possible to reconstruct the functioning of the current system of State liability for breaches of EU Law as containing the following features:

1) State liability for breaches of EU Law is a principle inherent in the system of the Treaty that applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission is responsible for the breach[37] and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation[38].

2) Three conditions must be fulfilled to cause State liability for breaches of EU Law, namely a) the rule of law infringed by the state must be intended to confer rights to persons; b) the breach must be sufficiently serious; and c) there must be a direct causal link between the breach of the obligation and the damage sustained by the injured party[39].

3) It is for the national courts to determine whether the conditions for State liability for breaches of Community law are met. The ECJ may nevertheless indicate certain circumstances which the national courts should take into account in their evaluation[40].

4) Although it is national legislation on liability the one called to regulate the obligation for the State to make reparation for the consequences of the loss or damage caused, the conditions for reparation of that loss laid down by national law on cases of breaches of

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33 C-127/95 *Norbrook Laboratories Ltd v. Ministry of Agriculture, Fisheries and Food* [1998] ECR I-1531

34 C-424/97 *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123

35 C-224/01 *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239

36 T-138/03 *É. R., O. O., J. R., A. R., B. P. R. and Others v. Council of the European Union and Commission of the European Communities* [2006] ECR II-4923. "The second paragraph of Article 288 EC bases the obligation which it imposes on the Community to make good any damage caused by its institutions on the 'general principles common to the laws of the Member States' and therefore does not restrict the ambit of those principles solely to the rules governing non-contractual liability of the Community for unlawful conduct of its institutions. National laws on non-contractual liability allow individuals, albeit to varying degrees, in specific fields and in accordance with differing rules, to obtain compensation in legal proceedings for certain kinds of damage, even in the absence of unlawful action by the perpetrator of the damage. When damage is caused by conduct of the Community institutions not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institutions and to the unusual and special nature of the damage in question are all met". In the same vein, see the so called "Banana saga": Cases T-69/00 *Fabbrica italiana accumulatori motocarri Montecchio v. Council of the European Union and Commission of the European Communities* [2005] ECR II-5393; T-151/00 *Le Laboratoire du Bain v. Council of the European Union and Commission of the European Communities* [2005] ECR II-23; T-383/00 *Beamglow Ltd v. European Parliament, Council of the European Union and Commission of the European Communities* [2005] ECR II-5459; T-135/01 *Giorgio Fedon & Figli SpA, Fedon Srl and Fedon America, Inc. v. Council of the European Union and Commission of the European Communities* [2005] ECR II-29 and the recent and ambiguous judgment of 9 September 2008 C-121/06P *FIAMM and FIAMM Technologies v Council and Others.*

37 Cit. above n. 35

38 Cit. above n. 29

39 Cit. above n. 3

40 Inter alia, C-150/99 *Svenska staten v. Stockholm Lindöpark AB and Stockholm Lindöpark AB v. Svenska staten* [2001] ECR I-493

EU Law must not be less favourable 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[41].

5) In order to determine whether there is a serious breach of Community law, account must be taken to the extent of the discretion enjoyed by the Member State concerned in taking the measure subjected to judicial review. However, the existence and the scope of that discretion must be determined by reference to Community law and not by reference to national law. The sphere of discretion which may be conferred by national law on the official or the institution responsible for the breach of Community law is therefore irrelevant in this respect[42]. At the same time, in cases where the allegedly wrongful act committed by the state consists of legislative action involving measure of economic policy, the applicant, following the *Schöppenstedt* case[43], must prove that the act consists of a sufficient flagrant violation of a superior rule of law and that the rule of law is for the protection of the individuals[44].

6) The ECJ has empowered national courts to determine when an infringement of Community law by a Member State constitutes a sufficiently serious breach with a very open and flexible (if not ambiguous) method. As the ECJ has pointed out "a national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it. Those factors include, in particular, the clarity and precision of the rule infringed, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law"[45]. Therefore, it remains unclear which of these elements must exist to cause liability, since the court asks national courts to take into account "all of them" for evaluating the admissibility of the claim, but at the same time it only exemplifies a couple of them.

As we can see, through all this development, the ECJ has empowered national courts with a very forceful tool, i.e. the competence to analyse the European legality of national public acts in the moment when they assign to those acts the category of "wrong" originating compensation to citizens affected by them. Two immediately consequences can be derive from this overall system of compensation fashioned by the court. It gives citizens some kind of "right to enforce rights" since it aims to protect supposedly stated rights, and it gives national courts the power to remedy damages caused on citizens goods through the levying of an obligation on states' budget to pay them a quantity equal to the damage.

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41 Cit. above n. 22

42 Cit. above n. 34

43 Case 5/71 Zuckerfabrik Schöppenstedt v. Council [1971] ECR 975

44 Case C-213/89 *R. v. Secretary of State for Transport, ex parte Factortame Ltd. Ans others* [1990] ECR I-2433

45 Cit. above n. 34. In the vein, C-63/01 *Samuel Sidney Evans v. The Secretary of State for the Environment, Transport and the Regions and The Motor Insurers' Bureau* [2003] ECR I-14447. In the case of liability by court's decisions and in order to determine whether the infringement is sufficiently serious the ECJ has argued that "the competent national court must, taking into account the specific nature of the judicial function and the legitimate requirement of legal certainty, determine whether that infringement is manifest". Cit. above n. 35

However, these two consequences of Francovich liability and the features of it mentioned above cannot be spontaneously auto-derived. Rather, for being sustained in a coherent way, it is necessary to assume the following specific premises[46].

A) First of all, the ECJ doctrine on State liability needs to presuppose that EU Law produces immediate rights on citizens.

On this regard, every decision of compensation is always an exercise of comparison between an action, an omission or a rule with other rule or rules that contain either a general ground of liability or precise causes of it. To bring about a result from this contrast we need to precise the contents of the latter rule, which means to individualize the obligations drawn by it[47]. The research of this topic leads to the well known problem of the direct effect of the EU Law –field where several studies have been done and where we will not enter mainly because the considerable size and depth of the debate[48]– ever since the idea of contrasting presupposes the understanding of the type of relation among the rules involved in the contrasting.

However, it is worth to point out that the explanation of this first premise is strongly complex since one of the key ideas of direct effect is related precisely with the creation of individual rights. Thus, it represent a curious paradox that the explanation of the conferral of rights on individuals generated by EU Law provokes an argumentative circle since, at it has been argued, the necessary precondition for the existence of direct effect is precisely that conferral[49].

B) Secondly, we must assume that rights imposed by EU Law contain clear obligations and that national regulations cannot be valid if they lessen the contents of those rights. In other words, it must be presupposed that rights imposed by EU Law are understandable by themselves and that they cannot be appreciate in relation or in coordination with national legal orders.

Accordingly, since the object of comparison is national law, it is binding to take for granted that European Law, as the parameter of constitutionality, cannot be integrated by the group of national rules that could be contested. Nevertheless, this conclusion is in clear contradiction with several claims made by the ECJ on other matters. Firstly it contradict the integration of the system of European liability stated by article 288(2) EEC where the general principles common to the laws of the Member States must be taken into account in the creation of this system. Secondly it is hardly compatible with the idea of the constitutional common traditions of the states as a way

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46 A detailed study of these premises will overflow the boundaries of this research, so we will only limit here to enunciate them.

47 This is the way by which the control of legality/constitutionality has been fashioned at the national level.

48 See, among others, IPSEN, H. P. (1965) "The Relationship between the law of the European Communities and National Law", in *Common Market Law Review*, vol. 2, p. 379-402; PESCATORE, P. (1983) "The Doctrine of Direct Effect: An Infant Disease of Community Law", in *European Law Review*, nº 8, p. 155-177; CRAIG, P (1992) "Once upon a time in the west: Direct Effect and the Federalization of EEC law", in *Oxford Journal of Legal Studies*, vol. 12, nº 4, p. 453-479; CRAIG, P. (1997) "Directives: Direct Effect, Indirect Effect and the Construction of National Legislation", in *European Law Review*, nº 22, p. 519-538; ENCHELMAIER, S. (2003) "Supremacy and Direct Effect on Community Law Reconsidered, or the use and abuse of political science for jurisprudence", in *Oxford Journal of Legal Studies*, nº 23, p. 281-299.

49 From this point of view, "direct effect" is understood as "the capacity of a provision of EC law to confer rights on individuals which they may enforce before national courts". CRAIG & DE BÚRCA (2003), p. 180. A large part of this conundrum is clearly caused by the ambiguity of the term "right". The mere faculty to invoke something before courts or a specific content of this invocation can be understand as the contents integrated in the idea of rights and the consequences of each understanding will deeply change the way to comprehend the form to enforce them.

to complement the constitutional law of the EU. Finally it is clearly incoherent with the structure of normative sources where national legislation is the way to enforce and developed the aims contained in directives.

C) Thirdly, it must be understood that it is inherent to a process of conferral of rights that the way to enforce them has to be implemented through the design of an action of compensation when a public or private act diminishes the contents of those rights[50]. Nonetheless, I think that it can also be accepted that compensation should not be inherent to the structure of rights and that there could be other ways to enforce them, but even in this case it must be accepted that compensation is the most efficient form to protect those rights.

However, these premises are not easy to accept. As the early EU Law taught us, compensation is not the only way to enforce rights. Indeed the so-called "public enforcement" –i.e. the use of governmental agents to detect and to sanction violators of legal rules[51]– stated on art. 228 EEC is a strong instrument to protect a vast number of rights, in the same way, for instance, as Criminal or Environmental responsibility protects several and defined public goods[52]. On the other hand, concerning the level of efficiency there is no agreement whether the private enforcement such as the current mechanism of Francovich State liability is more efficient than the above mentioned public enforcement. For instance, regarding the deterrence effect of both types of enforcement van Roosebeke contents that public enforcement can be more efficient than private one in diminishing some kinds of states wrongs[53].

D) Finally it must be assumed either that there exists a rule that entitle national courts to protect rights through a compensation system and that those courts are the ones who must operationalise that system, or without existing a specific rule, this entitlement is inherent to the conferral of rights.

However, it is quite clear that the treaties do not contain such a rule, as it does exist in the field of liability of European institution. On the other hand, the argument of the inherence of the empowerment of national judges as a way of protecting rights is clearly unconvincing[54]. In fact there are countries where despite certain rules are fashioned through the form of rights, the enforcing of those rules is not developed before national courts through compensation actions. In federal states like United States, for instance, it is a general rule that the enforcement of Federal statutes cannot be done through action of compensation initiated by national citizens before its national courts. In this sense, the Supreme Court has repeatedly held that the Eleventh Amendment to the Constitution established on that regard a constitutional rule of state immunity[55] and that only the legislatures of the states can limit their sovereignty through a regulation of liability. This is so mainly because this regulation calls for "a careful weighing in the balance of public interest against that of the individuals, an estimation of the remoteness and foreseeability of the damage, and an assessment of the expense and administrative difficulty involved"[56]. This idea of balancing of the interests involved was clearly

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50 See CRAIG (1997), p. 77ff.

51 POLINSKY and SHAVELL (2007), p. 405.

52 For that reason, it is unsupported the argument that the Treaty contained no provisions concerning the consequences of breaches of Community Law by Member States and that the liability rule was only conceived through a method of Treaty interpretation pursuant to article 164 of the Treaty. Cit. above n. 3; CRAIG (1997), p. 78.

53 See VAN ROOSEBEKE, B. (2007), p. 203ff.

54 The question of the relation between rights and judicial protection is far for being simple as Beljin have pointed out. BELJIN (2008), p. 98ff.

55 See *Alden v. Maine* [1999] 527 U.S. 706.

56 STREET (1949), p. 367.

exposed by Mr. Justice Holmes in *Kawananakoa v. Polyblank* when he claimed that "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal rights as against the authority that makes the law on which the right depends"[57].

Thus, in a large series of cases, which began with *Seminole Tribe v. Florida*[58], the Supreme Court of EEUU has consistently held that the Congress may not authorize individuals to sue states in federal courts for damages to enforce laws regulating state commercial activity[59].

As we can see, the support of the Francovich doctrine is not precisely strong enough. More than a few of its assumptions are not supported by convincing justifications. This panorama generates problems in several fields linked with the very design of the EU architecture. And this is so because the decision to implement a mechanism of public liability in the way stated in Francovich implies a diverse range of other decisions. As we said above when the Court decides to give damages it decides about both a design of the distribution of powers within the Union, a particular way to develop both the process of enforcing EU Law and the relation between that process and the national legal orders, and a certain model both of how to distribute in a more efficient way the economic resources and of how to build a specific community of risks. These implicit choices, indeed, reveal how important is the decision to implement a mechanism of enforcing EU Law via compensation and how necessary is the legitimacy of a decision when it involves a series of other options that at the end of the day fashion the specific way by which we looks the EU and its relation with the member states.

Accordingly, weak basis on the structure of that fundamental decision of damages can cause serious problems in the other collateral decisions as we will show below and it enable us to comprehend where is the legitimacy deficit located and how can we begin to reconstitute it.

§3. The incidence of Liability in the design of the distribution of powers in the EU

One of the most important theorist of public tort law in the United States, Peter Schuck, wrote that "if we would design a just an effective system of public tort remedies, we must first ask ourselves how we wish to be governed"[60]. In fact, it is uncontested that private theory of tort law is an important part of the study of European liability, but only its combination with the theory of judicial review of acts of public bodies can explain state torts in a more suitable way[61]. When a court deals with a case of liability of public powers (either of member states or of Community institutions) the problem is not only to look for a fair compensation of the damages that apply the principles of commutative justice or to find the best corrective sanction. In cases of liability for normative acts there is a legal rule that supports the action considered against EU Law by the court, and to tackle with this type of liability implies, thus, to make a comparative judgment between the normative act that has been challenged as unlawful and the EU rule that stands as a parameter. Public liability is, therefore, a decision about how we wish to be governed because it always involves an idea of how

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57 205 U.S. 349 (1907)

58 517 U.S. 66 (1996). In the same vein, Alden v. Maine, 527 U.S. 706 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. V. College Savings Bank, 527 U.S. 627 (1999); College Savings Banks v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

59 See. PFANDER (2003), p. 237.

60 SCHUCK (1983), p. 1.

61 ANDENAS & FAIRGRIEVE (1998), p. 295ff.

to design checks and balances between public powers and how to build a suitable relationship between norms[62]. To give the power to compensate citizens for the damages produced by unlawful statutes, for example, entail always a power to review them.

On this regard, it is common that one of the strong arguments used by supporters of Francovich liability is the inherency of the compensation system when assuming the supremacy of the EU Law or better when a superior rule of law gives rights to citizens[63]. This argument, however, is clearly fragile. And this is so because in national systems even acts *prima facie* against rights can be considered legitimate and can be protected by law. In fact, it is possible to say that the relation between norms inside national orders has been built upon a very complex basis and not following a simple structure of reasoning such as the mere application of the hierarchy principle. Accordingly, this relation has been understood in a way where decisions that contravene a superior rule not always deserve the nullity or the compensation to supposedly affected citizens. In the case of judicial review of legislation –and this is the central feature of the European model by contrast with the American one– there is some kind of "regulated hierarchy" by which the Law rules the relation between norms and the effects of a possible contravention. The judicial review is in this vein a regulated, positivised and rationalised function. As Cruz Villalón says "by contrast to the unlimited scope of the principle of the primacy of the Constitution, in the way in which courts actually understand it and interpret it, in the European system, it is the legislature, normally constituent power, the one that determines which are the specific consequences for statutes derived from the principle of supremacy of the Constitution: which is the content and scope of the principle, who and before whom it can be invoked, with what consequences"[64]. Thus it is common to see that in several countries statutes are set aside by Constitutional Courts but its past effects are protected by law and this protection involve the impossibility to ask damages caused by the annulled norm[65]. In other legal orders the Constitution states that the unconstitutionality only generates the abolition of the norm, with the consequences that no action on damages can be exercise since the court acts only as "negative legislature" paraphrasing Kelsen's famous words. As we can see this way of thinking involves a specific position about the nature and importance of statutes. They are conceived as the most perfect exercise of

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[62] This way of thinking explains better the restrictions, conditionings, or additional requirements posed by the Court in judging public liability. The requirement of a "sufficiently serious breach" of the EU rule of law, the restrictive approach when the unlawful act is a choice of economic policy or the exceptionality of the liability for judicial acts shows the different approach between this kind of liability and the private one. Indeed, those restrictions are better explained from a public perspective of distribution of power than a private one focused only in a corrective or commutative justice.

[63] See, for instance, *Opinion of Mr. Advocate General Mischo in case C-6/90 and C-9/90 Andrea Francovich and Danila Bonifaci and others v. Italian Republic* [1991] ECR I-5357; *Opinion of Mr. Advocate General Tesauro in case C-46/93 and C-48/93 Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029; HANFT (1992), p. 1266ff. On the other hand, the idea of rights as the central point in the public liability debate has been strongly pointed out by Lee. LEE (1999), p. 50ff.

[64] CRUZ VILLALÓN (1987), p. 32-33.

[65] Even the same consequence must be sustain when the ECJ exercise the power that art. 231(2) EEC entrust it, that is, to state which of the effects of a regulation that has been declared void by the Court shall be considered as definitive. This power, even when it was settled only for regulations, it has been used as a general competence of the ECJ in cases of nullity of European norms. See LETELIER (2007), p. 26ff.

representative powers and as such they enjoy some kind of "democratic dignity"[66]. This dignity imposes that the relation of hierarchy with the Constitution is not understand as a zero sum game but it admits strong and deep nuances.

Consequently, the relation of norms must not be deduced only from a rights-based structure, but it must be constructed from the perspective of the specific design of allocation of powers that the society is willing to have in a particular moment of its history[67]. This design shapes at the same time both the contents of rights and the allocation of public powers synthesizing the ancient task of societies, namely the optimization both of private and public goods. Therefore, the option for a liability system implies a policy-making decision, even when its justification is right-based. The decision to enforce rights as the main requirement to determine the existence or inexistence of liability cannot be an independent, neutral or "aseptic" decision[68].

Despite this, the logic applied by the Court when it compels states to make good damages is based on a very instrumental idea of compensation because, as we have seen, it is conceived only as a consequence of the protection of rights. Following Cohen, that simplistic idea ignores the special characteristics of one of the actors and overlooks the institutional position of the Court within the architecture of public powers. It fails as well to appreciate the peculiar role of the state in allocating and distributing wealth, in a variety of forms, to individuals and groups[69]. Peter Cane points out this perspective: If the regulation of tort law is a matter of distribution of the benefits and burdens of tort liability and not only a question of commutative justice, one of the challenges with which we must deal is a constitutional one, namely "to delineate the respective roles of the courts and the other branches of government in expressing distributive judgments through rule-making"[70].

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66 Among others, see WALDRON, J. (1999) *The Dignity of Legislation*, Cambridge: Cambridge University Press and (1999) *Law and Disagrement*, Oxford: Oxford University Press; LAPORTA, F.J. (2007) *El imperio de la Ley: una visión actual*, Madrid: Trotta

67 The problem concerning which is the Court entitled to determine the nullity of acts of the European institutions is a good example of the assertion that hierarchy or conferral of rights does not determine by themselves the competence of national courts for protecting those rights or this legal order. Indeed, since the ECJ had held that national courts were also judges of the European Law, and that pursuant art. 234(b) EEC national courts must only refer questions to the ECJ in case of doubts, it was perfectly possible that national courts were entitled to set aside acts of the European institutions when they contravene in a explicit way the contents of the treaties. But, despite this, the ECJ retained this competence ruling in *Foto-Frost* that national courts can consider the validity of those acts only in a positive way, that means only considering that this act is valid. On the contrary, the decision points that national Courts "do not have the power to declare acts of the Community institutions invalid", mainly because "the main purpose of the powers accorded to the Court by article 177 is to ensure that Community law is applied uniformly by National Courts". "That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal coherence of the system of judicial protection established by the treaty". Case 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost.* [1987] ECR 4199. The same rationale can explain the restricted competence of ECJ in cases of liability of European institutions. "Since the Community judicature has exclusive jurisdiction under Article 215 of the Treaty (now Article 288 EC) to hear actions seeking compensation for such damage, remedies available under national law cannot ensure effective protection of the rights of individuals aggrieved by measures of Community institutions". T-18/99 *Cordis Obst und Gemüse Großhandel GmbH v. Commission of the European Communities* [2001] ECR II-913. In the same line, T-52/99 *T. Port GmbH & Co. KG v. Commission of the European Communities* [2001] ECR II-00981

68 See COHEN (1990), p. 636.

69 See COHEN & SMITH (1986), p. 5.

70 CANE (2001), p. 420.

§4. The incidence of Francovich Liability in the process of enforcing EU Law and its aptitude to change national law.

The overall implications of *Francovich's* doctrine are not so easy to predict even nowadays. But one thing is at least clear. This theory has penetrated in national legal orders and it has transformed them in a very powerful way.

This invasion and transformation is however paradoxical. In fact, one of the main arguments since *Francovich* and mainly through its development in *Braserie du Pêcheur*[71] has been that the liability of States is based in an idea of the existence of common rules among member states' public liability[72]. The wording of art. 288(2) EEC applies in this matter since it states that the Community shall make good any damage "in accordance with the general principles common to the laws of the Member States". In this regards it can be said that the legitimacy of the European's system of torts is based on national legal orders. These principles act in liability issues in a similar way as common constitutional tradition act in human rights matters. They integrate the solution and legitimate it.

On the other hand, the national-based construction of the system of liability has been also recognised by ECJ when it held that Community Law "was not intended to create new remedies in the national courts to ensure the observance of Community Law other than those laid down by national law"[73]. Through this reasoning the EU Law manifest its will of respecting national systems of torts and to use this normative background as a way to enforce European law.

Finally the idea that the Francovich liability is based in some national rationality by which States face their own liability is reflected in the determination of the extension of the reparation. As the ECJ held the criteria must not be less favourable than those that are applied in national legal orders and they cannot be such as to make the claims for damages impossible or excessively difficult to obtain a monetary compensation.

Nevertheless the praxis exhibits a clear and contrary tendency. The decisions of the Court in liability matters have meant a real and strong change of national rules on State liability[74]. In this regard, it is possible to state that EU Law has used national principles on torts to define and complete its system of compensation but it has ignored other strong principles laid on national states after years of debates and deliberative agreements.

At least three manifestations of this contradiction can be identified.

In many countries, the influence of *Francovich* liability has changed the current restricted idea of liability, mainly through the transformation of the requirement of "unlawfulness" of public authorities' acts. The conception of public duties, the idea of proportionality in administrative practice, the premise that an illegal act *per se* will not give rise to damages liability[75], for instance, both of them elements developed through decades by judicial decision-making and doctrine, have mutated since this European

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71 Cit. above n. 3

72 It is curious also that the European Group on Tort Law has renounced to study this topic in its task to identify the common core of European Tort Law. As Fedtke says, state liability "is too much under the influence of national public law (both administrative and constitutional) as to be amenable to straightforward common solutions". FEDTKE (2006), p. 42.

73 Case 158/80 *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v. Hauptzollamt Kiel* [1981] ECR 1805.

74 See TRIDIMAS (2000), DOUGAN (2000), p. 103-128.

75 See, CRAIG (1998), p. 83ff.

decision. In Italy, the idea of legitimate interest (*interesse legittimo*)[76] that constituted a necessary element for fulfilling with the standing's requirement has been affected as well. In the same way, from the perspective of public liability grounds Francovich has obliged UK to evolve from a system of precise causes of public liability to a general action for damages completely strange for UK's common law system[77].

Secondly, on several countries the doctrine of Francovich liability produced deep distortions in the regulation of compensation for damages caused by admit it but in a very restrictive way[78]. In this regard, e.g. the Federal Supreme Court of Germany has consistently rejected claims of victims based on a budgetary prerogative of the Parliament[79]. The important contribution of German Law in this field and the important self restraint attitude of national judges to give this type of compensation have been completely neglected by the ECJ[80]. Thus, it has obviated the constantly rejection of this instrument by the states[81].

Thirdly, Francovich doctrine and in particular the right-based construction of compensation has produced an evident disrupt in cases of recovery of unlawful payments. Many countries have chosen a system of prospective decision (even giving them constitutional status like in Austria) by which the Courts can manipulate the effects of the annulments of administrative acts or statutes invoking mainly reasons of legal certainty. Also the ECJ has this power in case of annulment of regulations. But the ECJ has understood that only a completely restitution of the unlawful payments by the state can restore the rights of the citizen in a proper way[82]. The same idea can be applied when the national judges reject state liability suits for budgetary reasons[83].

But above all, the change introduced by EU law in national legal orders has spread several questions about the coherence of the system. If national legislations restrict the effects of the annulment of unconstitutional statutes, and restrict as well the compensation for state liability, which would be the reasons that explain why other

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[76] CARANTA (1993), p. 287ff; MALFERRARI (2004), p. 117-143.

[77] See THOMPSON (2004), p. 166ff; HOSKINS (1998), p. 91ff. It has meant for UK courts that they have had applied extraordinary efforts to cluster that general ground in one of the traditional causes of liability. The breach of statutory duty seems to be the favourite of the scholars. See CONVERY (1997), p. 603ff.

[78] See. LEE (1999), p. 21ff. In France, for instance, despite liability by statutes was recognize before Francovich, it was build under the restrictive ground of "rupture of equality before public burden" and only available for abnormal and special damages caused by legislation. CHAPUS (1994), p.1152ff. "Since Francovich calls for something more akin to a fault-based regime, it put pressure on the French courts to modify this case law, to avoid a dual regime for responsabilité du fait des lois, depending on whether a claim fell under the Community umbrella or not". GRANGER (2007), p. 165.

[79] FEDTKE (2006), p. 47

[80] In analysing this topic, we can see very clear the false relation between rights and liability. The fact that a country does not accept compensation for unlawful statutes either because the unlawfulness is declared by no retroactive effects or because this kind of liability is not accepted in general terms does not mean that in this country the Constitution is not enforced.

[81] See GRANGER (2007), p. 163ff

[82] Cases C-309/85 *Bruno Barra v. Belgian State and City of Liège* [1988] ECR 355; C-62/93 *BP Soupergaz Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprossopeion v. Greek State* [1995] ECR I-1883; C-309/06 *Marks & Spencer plc v. Commissioners of Customs & Excise* [2008]; C-199/82 *Administration des financés de l'État italien v. SpA San Giorgio* [1983] ECR 3595; C-397/98 and C-410/98 *Metallgesellschaft Ltd and Others), Hoechst AG and Hoechst (UK) Ltd v. Commissioners of Inland Revenue and HM Attorney General* [2001] ECR I-1727; C-192/95 a C-218/95 *Société Comateb and others v. Directeur général des douanes et droits indirects* [1997] ECR I-165.

[83] FEDTKE (2006), p. 50

forms of unlawfulness, such as the breaches of EU law, should have more guarantees[84]. Moreover, if since Francovich member states must fix the jurisdiction and the procedure by which that special liability have to be exercise, the problem appears immediately: how can member states deal with a system of liability unknown for them or not ruled by their legal orders[85]. The ECJ has rather impose its doctrine of supranational liability on national system –as Harlow says– in a clear "selfish" way[86].

Following this reasoning, Francovich liability is problematic precisely in its basis because it has not read properly national liability principles. The way out is not simple, and even tougher if this debate is inserted in the bigger discussion about which is the right way to understand the supremacy of EU Law, which is the same debate that neoconstitutionalists and legalists develop concerning the supremacy of the constitution in the national sphere. Perhaps the greatest expression of this complexity arises when the principles of state liability are constitutionalised, because in this case the discourse of the Court is affecting not only legislation, but overriding or changing member states' fundamental laws.

Harlow tries to search for a solution arguing that certain degree of flexibilization is needed: "a constructive relationship between the Community organs demands dialogue rather than command and understanding rather than sanction"[87]. But, as it can be expected, the determination of the conditions and procedures for achieving flexibilization is a very complex task. This latter discussion is tightly connected with the level of Europeanisation required for national decision-making process to be coherent with the design of the institutional set up that has been politically decided.

§5. Liability as a way to encourage efficiency and to build a community of risk

Market has been recognized as the main source of allocation of goods in modern societies, but it is not the only one. Allocation of goods can be done with results similar to the ones of the market by acts of public powers, among other ways[88]. When the government levies taxes or when it specifically distributes social welfare benefits it distributes goods among citizens. In this sense, it is possible to assert that the justice's yardsticks are not but the ideological projection of the allocation of goods' systems that one society privileges[89].

As we have seen, one of the main justifications of public liability is being a response to, or a consequence of, the structure of rights. If we want to give rights to individuals they must be logically protected by enforcement mechanisms, because otherwise they would be only declarations of intention and not real rights. In this scenery, liability appears evidently as an inherent way to produce that enforcing. This approach is hold by the ECJ when it says "that the purpose of a Member State's liability under Community law is not deterrence[90] or punishment but compensation for the

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[84] In relation with damages for violation of constitutional rights, Mullan says that "the great variety of rights and freedoms created by the Charter as well as the range of situations in which those rights may be violated suggest strongly that the task of defining the scope of damages for constitutional wrongs involves a careful calibration of a wide range of considerations and factors". MULLAN (1996), p. 126.

[85] SENKOVIC (2000), p. 103ff.

[86] HARLOW (1996), p. 200.

[87] HARLOW (1996), p. 200.

[88] See TARELLO (1988), p. 221ff.

[89] TARELLO (1988), p. 229

[90] Such as the majority of the scholars think. Craig, Once more.... p. 85.

damage suffered by individuals as a result of breaches of Community law by Member States"[91]. The logic behind this assertion is clearly a right-based idea.

However, this rationale has several problems.

First of all, it presupposes that the process of giving rights follows a straightforward and unambiguous logic. Advocates of the line of argumentation which conceives liability as a mechanism of enforcing rights are probably of the opinion that the specific task of giving rights is a political one, while compensation is only an instrumental task. But the problem is that the structure of rights is not so clearly delimitated in EU Law; in fact, it is very common that the ECJ creates rights in the very moment of offering the compensation. Hence, on the one hand, the political tasks to give and define rights and, on the other, the commitment to enforce them, have no clear boundaries, and in practice they converge in a single relevant aim: the distribution of economic resources.

A second problem concerns the level of executions of each and all rights. Indeed, this vague scenario of giving and executing rights implies that when the ECJ enforce a certain right it necessarily debilitates others. In fact, when resources are limited and rights are guaranteed in general terms, for instance through constitutional open-texture clauses, the specific way to develop some of those rights is not defined in advance. Thus when the state compensates some specific action or omission, it moves away money from other items (in the way of rights as well) of the general budget, e.g., health and other welfare benefits, for covering the right that the Court creates, specifies or intends to protect[92]. In these terms, the decision of compensation of the ECJ has a very intense political content[93] and rights are always in a pitched battle for gaining resources. Following these reasoning, it can be asserted that the measures of execution or the normativity of some rights is precisely the resources that state spend to put them into practice. In that regards it is not clear that the judiciary would be in the best position to implement this kind of distribution of resources since its capacity of reading the needs of society is very limited. Moreover, the judiciary, as an institution, is also poorly equipped to make assessments of the net social cost or benefit of governmental decisions[94].

The ideas just mentioned have been extensively developed through the debate about the nature and function of tort law that tackles with the ECJ's rationale asserting that the aim of State liability is only a compensative one. Weinrib's proposal is that only corrective justice is the central and immanent topic of tort law, and that is in particular the concept of risk the link between plaintiff and defendant in a relation dominated by his idea of "correlativity". The plaintiff's right (recognized by the legal order) constitutes the subject matter of the defendant's duty (not to interfere with the

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[91] C-470/03 *A.G.M.-COS.MET Srl v. Suomen valtio and Tarmo Lehtinen* [2007] ECR I-02749

[92] The way to enforce open texture norms such as the ones that generate some of the fundamental rights is a very complex issue since normally the contents of those rules are left to legislative development. Thus, health, social security, housing right, are prerogatives with soft enforcing since it is not so obvious in which situations it is possible to sue the State for a lacking of those social services mainly because the standards of service are defined by statutes or regulations, and its level of guarantee depends on the public budget available and of the specific measures taken by the legislature and executive.

[93] That is, because legal rules are a tool or "an instrument deployed in order to cut down some expenditure here, and to allocate a little more elsewhere". FEDTKE (2006), p. 42.

[94] LEE (1999), p. 33. "Compared to the legislative and executive organs of government, the courts have less flexibility, less access to technical expertise, and less capacity to investigate the social and economic impact of various policies".

embodiment of the plaintiff's right) in such a way that wrongful interference entails the duty to repair[95].

Instead, Cane's theory of tort law differs from Weinrib's one. For Cane, tort liability can be examined from both sides of the relational situation inserting relativity into the analysis. Thus, tort liability is, from the defendant's perspective, a burden in the form of obligation to avoid and repair harm, and from the claimant's perspective, a resource and benefit. Thus, "when courts make rules about the circumstances in which tort liability to repair harm will arise, they contribute to the establishment of a pattern of distribution of that resource and burden within society"[96].

One of the strong objections to the distributive justice explanation of tort law is that in tort the justice can be obtain only at local scale, while a distributive goal can only be assess at global scale[97]. However, this objection, which can be successfully justified in the private liability sphere, is problematic when applied to public tort law since the payer is a public entity guided by a distributive goal and founds come precisely from the community of tax payers. This point of view can justify the restrictive approach of this type of liability. "Where an action in damages is successful, it is ultimately the taxpayer who is called upon to cover the cost. Viewed from that perspective, a public authority should incur liability as a result of legislative action only where the interest of compensating a group of person who suffer loss is judged as more worthy of protection that the interest of the taxpayer"[98].

On the other hand, efficiency is one of the principles that advocates of Francovich liability defend. However, this argument suffers also from a pathologic lack of clarity. In fact, efficiency can be understood as a neutral value that strongly depends on which is the task that it aims at improving. In carrying out that task it is not so difficult to see that scholars do not agree about what type of assignment should be considered efficient. Some agree that Francovich increases the efficiency of the general system of judicial review[99] while others refer to some idea of economic efficiency[100].

Concerning the latter, it is far from clear that Francovich liability involves such idea of economic efficiency. In fact, in terms of the deterrence objective pursued by state tort law, there is no empirical evidence to support that conclusion; in addition, not even private torts is conclusive in this respect[101]. Furthermore, even by using a system for measuring the deterrence effects of Francovich liability, it has been concluded that this mechanism cannot be efficient in all types of breaches of EU Law[102].

Concerning the community of risks that Francovich liability seems to create, we can see that, at a first sight, this type of liability appears as promoting a solidaristic view of the EU since it hinders the transferral of the costs of state's action to other actors within a common area of interest. In fact, one of the explanations of the purpose of that

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95 WEINRIB (1995), p. 135. And the remedy "reflects the fact that even after the commission of the tort the defendant remains subject to the duty with respect to the plaintiff's right". Several effects of this theory can be seen in WEINRIB (2000), p. 1-37.

96 CANE (2001), p. 419.

97 In the classical example, if four persons have 10 units of goods and A caused the destruction of 4 B's units, the equality will not be restored if A gives B four units. It will be restored only if B receives one unit of each of the others, thereby constituting a new distribution of nine units each. ALEXANDER (1987), p. 6-7.

98 TRIDIMAS (1998), p. 32.

99 WAELBROECK (1997), p. 314.

100 Although it is referring to the impact of tort on accidents generated by activities of the state itself through bureaucrats and public bureaucracies. COHEN (1990), p. 213ff.

101 See DEWES, D., DUFF, D., TREBILCOCK, M. (1996) *Exploring the Domain of Accident Law, Taking the facts Seriously*, New York: Oxford University Press.

102 See VAN ROOSEBEKE, B. (2007), p. 207ff.

liability uses the externalities theory, which suggests that its purpose "is to ensure that public decision-makers in each Member State internalize the costs which their decisions may impose on interests located in other Member States"[103]. On that regards, Francovich doctrine would promote "decisions that maximize the aggregate welfare of the entire Union, and prevents decisions that increase the welfare of one country while imposing greater costs on another"[104]. The problem of this point of view is that we need to measure which are the social cost and the social benefits of it.

§6. A Democratic point of view of Francovich Liability

The relation between the effects of Francovich liability principle and democracy is twofold. As we have seen, public tort law is a mechanism for allocation of economic resources and this type of allocation is precisely one of the tasks of the political process. Thus, the questions of why and how to distribute economic wealth can involve a wide component of democratic legitimacy. Francovich liability implies a decision of a specific structure of political power allocation and in that choice the ECJ has attributed itself a central role that it is necessary to be revisited. The way by which this process of allocation has been done must be analysed from a democratic legitimacy perspective, with the purpose of evaluating both the rationale underlying this process and its conformity with democratic values.

On the other hand, Francovich liability has meant a strong intervention on national legal orders changing some of its important democratic decisions about how to deal with unlawful acts and how wrongs can be converted or not in compensation. The ECJ has decided not only about European matters but about core components of national systems. This situation must be as well considered from a democratic point of view because it involves a group of decisions that is not so evident that improve democratic values.

These and other cleavages of the relation between liability and democracy will be specifically tackled in a future paper, being the inquiry to be solved in which way the constitutional set up of Francovich liability generates a democratic deficit at EU level, and if so, what are the possible paths for reconstituting European democracy.

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[103] LEE (1999), p. 24.
[104] LEE (1999), p. 38.

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