system), the legal content and the interaction of which are determined independently and obscurely by the European Court, the Strasbourg institutions, and national courts.

PHILIP ALLOTT

MEMBER STATE LIABILITY IN DAMAGES

In three recent judgments the European Court of Justice has clarified certain issues pertaining to member State liability in damages. In Brasserie du Pêcheur S.A. v. Federal Republic of Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd. (Cases C-46 and C-48/93, judgment of 5 March 1996, [1996] 2 W.L.R. 506) the Court held that liability in damages may arise not only where a member State fails to take implementing measures in order to transpose a directive into national law but also where the national legislature by positive action infringes a provision of the Treaty. The Court established that member State liability in damages is a universal principle. It held that since the principle of State liability is inherent in the system of the Treaty, it "holds good for any case in which a member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach" (para. 32). It follows that a member State is liable irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. Also liability is not confined to breach of provisions which are not directly effective, the right of reparation being "the necessary corollary" of, rather than a substitute for, direct effect. The conditions which must be fulfilled in order for State liability in damages to arise differ depending on the nature of the breach of Community law. Where the breach emanates from the national legislature in circumstances where the legislature has wide discretion comparable to that of the Community institutions in implementing Community policies, Community law confers a right of reparation where three conditions are fulfilled: (1) the rule of law infringed must be intended to confer rights on individuals; (2) the breach must be sufficiently serious; and (3) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. The second condition was not specified in Francovich (Cases C-6 and C-9/90 [1991] E.C.R. 1-5357), but failure to transpose a directive is in itself a serious breach. In Brasserie du Pêcheur the Court listed the following factors as being material in determining whether an infringement passes the threshold of seriousness (para. 56): the clarity and precision of the rule breached; the measure of discretion left by that rule to the national authorities; whether the
infringement and the damage caused were intentional or involuntary; whether any error of law was excusable or inexcusable; the fact that the position taken by a Community institution may have contributed towards the omission; and the adoption or retention of national measures or practices contrary to Community law. In any event, a breach of Community law will be sufficiently serious if it has persisted despite a judgment of the European Court which establishes the infringement in question.

What is perhaps striking—but, it is submitted, correct—is that the conditions under which the right of reparation may be exercised are based much less on national law than one might have thought. The Court held that, subject to the right to reparation which flows directly from Community law where the conditions of liability are satisfied, the State must make reparation for the consequences of the loss caused in accordance with the domestic rules on liability, provided that the conditions for reparation laid down by national law are not less favourable than those relating to similar domestic claims and that they are not such as in practice to make it impossible or excessively difficult to obtain reparation. The Court identified two such conditions which make the exercise of the right to reparation excessively difficult and are thus incompatible with Community law. Under German law, where a legislative act is in breach of a higher-ranking national law, for example the Constitution, a right of reparation ensues only where the applicant can be regarded as the beneficiary of the obligation breached. The Court held that such a restriction would make it in practice impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law. It also held that the requirement imposed by English law of proof of misfeasance in public office would make it in practice impossible to obtain reparation.

In determining the conditions of State liability in damages, the Court drew comparisons with the conditions governing the liability of the Community institutions. It will be noted however that the discretion of member States when they act within the sphere of Community law remains both in terms of its nature and in terms of its extent fundamentally different from the discretion exercised by the Community institutions. That in turn influences the scope of liability. The case where member State liability for breach of Community law may be most akin to the liability of Community institutions is where a member State exercises discretion conferred upon it by Community regulations in the field of the common agricultural policy in breach of one of the fundamental principles, e.g. equality or proportionality. Liability will be easier to establish where a member State commits a breach of Community law in circumstances where it has limited...
discretion. In *R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd.* (Case C-5/94, judgment of 23 May 1996), the Court held that where, 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 discretion, or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach. The case concerned breach of Article 34 by the refusal of the United Kingdom authorities to issue a licence for the export of sheep intended for slaughter in Spain.

State liability in damages is based on the requirement to provide effective protection of Community rights and not on the laws of member States. As Leger A.G. stated in *Hedley Lomas*, with regard to liability arising from acts of the legislature, "there are no general principles which are truly common to the member States" (emphasis in the original). Subject to the conditions of liability being fulfilled, it seems that liability may arise not only for breach of Treaty provision but also for breach of Community legislation.

In *R. v. H.M. Treasury, ex parte British Telecommunications plc* (Case C-392/93, judgment of 26 March 1996), the Court held that the conditions provided for in *Brasserie du Pêcheur* must also be fulfilled in order for liability to arise where a member State incorrectly transposes a directive into national law. In issue was Article 8(1) of Directive 90/531 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sector (O.J. 1990 L 297, p. 1). The Court found that the United Kingdom had interpreted the directive erroneously and, as a result, it had implemented it incorrectly, but held that the incorrect implementation did not amount to a serious breach. The Court stated that Article 8(1) was imprecisely worded and was reasonably capable of bearing the interpretation given to it by the United Kingdom in good faith. That interpretation was shared by other member States and was not manifestly contrary to the wording of the directive and the objectives pursued by it. Also, no guidance was available to the United Kingdom from the case law of the Court with regard to the interpretation of Article 8. Finally, the Commission did not raise the matter when the implementing legislation was adopted. In *British Telecommunications plc* the Court equated, with regard to the conditions of liability, the incorrect transposition of a directive with a breach of Community law by the national legislature in circumstances where it has wide legislative discretion. The two cases, however, are different. In the case of an incorrect implementation of a directive, liability arises as a result of an error of interpretation. The question turns on whether that error was justifiable. Where a member State acts in a field where it has wide...
legislative discretion, liability arises because the member State exercises its discretion in a way which is incompatible with Community law.

With regard to the extent of reparation, the Court held in *Brasserie du Pêcheur* that it must be commensurate with the loss or damage sustained. Total exclusion of loss of profit as a head of damage for which reparation may be awarded cannot be accepted. However, the judgment is more equivocal than that in *Marshall II* (Case C-271/91, [1993] E.C.R. I-4367), where it was held that the compensation awarded must be such as to enable the damage sustained as a result of discriminatory dismissal to be made good in full.

The recent judgments on State liability in damages are balanced and do not result in an unwarranted extension of liability. They make it clear, however, that Community law must be taken seriously or otherwise the public purse (and the taxpayer) will suffer. The judgments are but an intermediate act in unfolding drama. A number of issues remain to be resolved. The Court may soon be asked to resolve whether a right of reparation for breach of Community law exists against an individual. One thing, however, is certain. The days when the Court declared that the EC Treaty did not intend to create new remedies have long gone.

**Takis Tridimas**

**SHOCK VERDICT: NUCLEAR WAR MAY OR MAY NOT BE UNLAWFUL**

It is, as Dr. Johnson might have said, not the fact that it was done badly, but the fact that it was done at all that makes the Advisory Opinions sought by the World Health Organization and by the UN General Assembly from the International Court in the cases of the *Legality of the Threat or Use of Nuclear Weapons* (1996) 35 I.L.M. 899 so appalling.

The Court was asked by the World Health Organization, “In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?” By eleven votes to three it refused to give an Opinion, on the ground that the WHO does not need to know whether the use of nuclear weapons is lawful in order to do its proper job of planning for health risks arising from them. The three dissenting judges (Shahabuddeen, Weeramantry and Koroma) considered that the WHO request was not concerned merely with the general legality of the use of nuclear weapons, but with the distinct question whether their use would breach obligations under the WHO treaty. The