

THE PRINCIPLE OF THE EFFECTIVE PROTECTION OF THE INDIVIDUAL IN EC LAW AND THE DIALECTIC OF EUROPEAN INTEGRATION THEORY

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INTRODUCTION

By now the link between the political and legal aspects of the European integration process is firmly established and understood by both political scientists and legal experts. Yet, while this link is obvious at the *macro* level, for example, the well documented pro-integrationist stance of the European Court of Justice (the ECJ) in the 1970s and 1980s,¹ we are still far from establishing this link at the *micro* level or, as Burley and Mattli put it, the theoretical “microfoundations” of legal integration.² A lot of work is still needed to identify such links with reference to specific principles of EC law established by the ECJ or interpretations of specific articles of the Treaty by the ECJ.

The aims of this paper are twofold: first, to explore an original, alternative remedy for the effective protection of the individual in EC law; and second, to delve into the micro level by examining the theoretical repercussions of the principle of the effective protection of the individual in EC law as it has developed through a series of Court rulings. In particular this article examines the theoretical implications of two competing hypotheses about the development of the effective protection of the individual in EC law. The first hypothesis is that the effective judicial protection of the individual can be achieved through legal actions before the national Courts (indirect actions), following the *Francovich* state liability scenario. The second hypothesis is that the effective judicial protection of the individual can only be guaranteed through direct actions before the European Courts.

Although seemingly a procedural matter of minor importance, these two hypotheses encapsulate the fundamental dialectic of integration between the forces traditionally labelled *pro-* or *anti-*European or, in political science jargon, what O’Neil called the supranational and statecentric paradigms.³ Essentially this is a dialectic between functionalist, neofunctionalist and federal perspectives against realist or intergovernmentalist perspectives. The need to return to the original dialectic of integration has been a feature of both theoretical and empirical research in recent years.⁴ If anything, after three revisions of the Treaties

¹ See for example H. Rasmussen, “Between self restraint and Activism: A Judicial Policy for the European Court”, (1988) 13 *E.L.Rev.* pp.28-38.

² See A-M. Burley and W. Mattli, “Europe Before the Court: A Political Theory of Legal Integration”, *International Organization*, Vol.47, No.1, 1993, p.41.

³ See M. O’Neil, *The Politics of European Integration: A Reader*, Routledge, London, 1996.

⁴ See for example D. O’Reilly, “Testing Integration Theories: The Development of a European Air Transport Policy”, Paper delivered at 2nd *UACES Research*

in the space of 10 years, this dialectic would appear to be the single most persistent and most easily recognisable theme covering most aspects of the integration process.

With reference to the effective protection of the individual this dialectic is intensified by the ECJ's rulings on cases such as *Francovich*,⁵ *Factortame I*⁶ and *Dillenkoffer*,⁷ which have brought to the fore the debate about the ECJ's activist or minimalist role.⁸ In recent years, activism has been seen in terms of its integrative potential while minimalism as a pillar of the statecentric paradigm. At the epicentre of these two hypotheses lies the oldest point of contention with reference to the European integration process: national sovereignty.

Before we proceed to look at this dialectic with reference to Art 215(2) let us first briefly look at the two theoretical paradigms behind them. Space does not allow us to look at the different supranational and statecentric theories so we shall focus on two fundamental paradigms which stand at opposite ends of the *pro*- and *anti*-European spectrum: functionalism and intergovernmentalism.

THE THEORETICAL CONTEXT

Functionalism

Much of the functionalist approach to international relations has been formulated by David Mitrany in his book *A Working Peace System*. As the title of Mitrany's influential work suggests, the ultimate aim of the functionalist thesis is the preservation of world peace which, he proposes, can be achieved by seeking to link "authority to a specific activity [in order] to break away from the traditional link between authority and a defined territory".⁹

Central to the functionalist theory is the belief that national sovereignty is the root of international conflict due to the rivalry which exists between self-centred nation-states. Based on the assumption that community is "the sum of functions carried out by its members"¹⁰ Mitrany maintained that people have a sense of loyalty towards their nation-state because they can satisfy their welfare needs. If their needs are satisfied efficiently at a transnational level there would, inevitably, follow a shift of loyalties from the national to the transnational level.

Although Mitrany is not very specific in his use of "welfare needs" other functionalists, very much in the same vein of thought, have made a distinction between basic welfare needs such as health or housing and the

Conference, University of Loughborough, Sept. 1997; also see C. Stefanou, "European Integration Theory: *Macro-Micro* Themes, Spheres of Focus and Synthetic Theories", Paper delivered at *UACES Biannual Research Conference*, University of Birmingham, Sept. 1995.

⁵ See Joined cases C-6/90 and C-9/90 *Francovich v Italian Republic* [1991] ECR 5357

⁶ See case C-213/89 *Factortame and Others* [1990] ECR 2433.

⁷ See Joined cases C-178, 179, 188, 189 and 190/94 *Dillenkoffer and others v Commission* [1996] 3 CMLR 469.

⁸ See C. Stefanou and H. Xanthaki, *A Legal and Political Interpretation of Articles 224 and 225 of the Treaty of Rome: The FYROM Cases*, Ashgate/Dartmouth, 1997, pp.120-127.

⁹ D. Mitrany, *A Working Peace System*, Quadrangle, Chicago, 1966, p.27.

¹⁰ J.P. Sewell, *Functionalism and World Politics*, Princeton University Press, Massachusetts, 1966, p.17.

need to have values such as national pride or defence of the realm. It is argued that both inspire loyalty but that individuals have been misdirected in placing more importance on the need for "patriotic values" rather than the efficient satisfaction of their basic welfare needs. Because functionalism addresses the latter, rather than narrow notions of national interest, individuals would have to be "drawn into the co-operative ethos"¹¹ so that a sense of "Community" is established between them. The functionalist type of community is akin to Tönnies' *Gemeinschaft*¹² as the required shift of loyalties could not be achieved "...by a written act of faith but through active organic involvement"¹³. Thus, the functionalist school of thought does not place emphasis on written constitutions, relying instead on the gradual loss of nation-state power and authority through the development of international *Gesellschaft*.

Mitrany's approach tries to avoid, or ignore, politics altogether. He implies that the essence of functionally specific international institutions is that they are not politically determined and are rather free of ideological contemplation. His argument is that by creating transnational agencies to deal with specific "common needs that are evident", for example, transport, frontiers will eventually become obsolete as people will realise that their interests no longer lie solely with the nation-state. Thus, every time a transnational agency is created to deal with a specific welfare need, "...a slice of sovereignty is transferred from the old authority to the new".¹⁴ As authority would slowly slip out of the grip of the national governments to these institutions which transcend the nation-state a "socio-psychological" community, at the international level, would attract the loyalties of individuals. The underlying syllogism is that the more welfare needs are satisfied at the transnational level the fewer areas are left for rivalry between nation-states and therefore the risk of conflict is minimised.

This utilitarian approach assumes that individuals are constantly making rational calculations about their interests based on economic variables. This approach is very typical of the period during which Mitrany produced his functional thesis (as well as the immediate post-war period) as solutions to most national and international problems were sought in the field of economics which by that time had been established as the major discipline in the field of social sciences.

It is somehow ironic that functionalism is used within the theoretical framework of European integration because functionalism opposes the notion of international regional integration. As Mitrany put it: "There is little promise of peace in the mere change from the rivalry of Powers to the rivalry of whole continents, tightly organised and capable of achieving a high degree of, if not actual, self sufficiency".¹⁵ The link between functionalism and European integration is Jean Monnet's role in the creation of the European Coal and Steel Community (ECSC). Although it would be incorrect to label Monnet as a functionalist (Monnet never acknowledged Mitrany's influence) his plan shared some aspects of the functionalist theory. The gradual transfer of loyalties and authority from

¹¹ P. Taylor, *The Limits of European Integration*, Croom Helm, London, 1983, p.4.

¹² Tönnies argued that while *Gesellschaft* is competitive and characterised by contractual relationships *Gemeinschaft* involves some kind of loyalty or kinship or common values. See: F. Tönnies, *Fundamental concepts of Sociology: Gemeinschaft and Gesellschaft*, New York, 1940.

¹³ Mitrany, *op.cit.*, p.31.

¹⁴ *Ibid.*

¹⁵ Mitrany, *op.cit.*, p.45.

the national to the international (regional in this case) level *via* the allocation of a specific task to an international agency, the ECSC, so that a community transcending the nation-state would emerge, as well as the technocratic character of the High Authority, are notions which can easily be traced to functionalism. However, Monnet's approach differed fundamentally from functionalism on some key points.

Monnet's efforts were directed specifically to the creation of an international regional organisation, the ultimate aim of which was the creation of Europe as a single political, economic and social entity, based on a written Act. Monnet's view was that this process should start with salient areas of the economy (for example, steel production) and, unlike the functionalist viewpoint, Monnet's approach did not rely solely on the existence of a *Gesellschaft*, placing importance in the role of political elites, as well as leadership. Monnet's approach was more akin to the Federalist notions of the 1950s; however, because the basic notion has some resemblance with the functionalist thesis, Monnet's approach has been labelled "federalism/functionalism".

Intergovernmentalism

Intergovernmentalism refers to a theory which in its strict interpretation is "a method of designating international organisations according to their decision making capacity".¹⁶ It refers particularly to those organisations where the member states retain the right to *veto*, thus not accepting formal limitations of their sovereignty against their wishes.

Within the context of European integration intergovernmentalism (the word has often been used interchangeably with the "realist approach") usually describes political processes which have evolved in spite of Treaty agreements and provisions.¹⁷ In this sense intergovernmentalism is not an integration theory in the same manner as functionalism because it does not represent, or offer, an alternative theory of international or regional integration. Rather it has come to represent a body of thought which stresses the role of national governments as the dominant actors in Community politics. National governments, as opposed to central Community institutions, are seen as the only legitimate and effective agents of the aspirations of their people, having a monopoly in the management of external as well as internal relations.

The "billiard ball" analogy, offered as an answer to the neofunctionalist "cobweb model", is typical of the intergovernmental approach. National governments are seen as monolithic, trying to protect their hard shells against penetration from international organisations, such as the EU, and having the satisfaction of their domestic imperatives as their sole purpose.¹⁸ The EU is seen as the forum where this continuous struggle for the satisfaction of strictly national priorities and requirements takes place. Obviously, the issue of national sovereignty becomes central to the intergovernmental argument, especially when juxtaposed to the neofunctionalist logic of functional spillover.

¹⁶ C. Webb, "Theoretical Perspectives and Problems" in H. Wallace, W. Wallace and C. Webb (eds), *Policy Making in the European Community*, John Wiley and Sons, Chichester, 2nd edition, 1983, p.22.

¹⁷ *Ibid.*

¹⁸ See, W.J. Feld, *West Germany and the European Community-Changing Interests and Competing Policy Objectives*, Praeger, New York, 1981, pp.22-25; also see W. Hager, "Public Interest and the Market: The European Perspective of 1992", in P. Kazakos (ed), "The evolution of the Internal Market in Europe and Greece", Ionian Bank, Athens, 1989, pp.435-469.

Stanley Hoffmann one of the leading advocates of the realist approach, has argued that neofunctionalists failed to recognise the still dominant role of national governments in Community policy making because they failed to draw a distinction between “high” and “low” politics.¹⁹ High politics included issues vital to the existence of the nation-state, such as national security, economic policy and foreign policy while low politics included less controversial, largely administrative issues. Hoffmann maintained that agreement on issues of low politics was easier than agreement on matters of high politics because national governments felt less threatened and were, therefore, able to make some concessions which facilitated agreements. Hoffmann has subsequently modified his position, not least because practice showed that the distinction between high and low politics is not at all clear; less controversial issues can, and do, become salient where national sovereignty is not jeopardised. His approach, though, is typical of the intergovernmental emphasis on the nation-state and national sovereignty.

Having briefly looked at two integration theories, representative of the two opposing points of view, let us now turn our attention to the effective protection of the individual.

ARTICLE 215 (2) EC: THE INDIVIDUAL FIGHTS BACK

The effective protection of the individual is not only a lawful right for natural and legal persons, citizens of the EU,²⁰ but also a general principle²¹ of EC law “which underlines the constitutional traditions common to Member States and has been enshrined in Article 6 and 13 ECHR”.²² The principle was traditionally interpreted to entail the obligation of all national authorities to refrain from passing and/or applying any domestic law which could prevent the effective judicial protection of individuals.²³ After *Factortame I* and *Francovich*²⁴ the

¹⁹ Stanley Hoffmann “Reflections on the Nation-State in Western Europe Today”, in: Tsoukalis, L. (ed), *The European Community Past, Present and Future*, Basil Blackwell, Oxford, 1983, pp.21-38.

²⁰ See A. Barav, “La repetition de l’indu dans la jurisprudence de la Cour de Justice des Communautés Européennes” [1981] *Cahiers de droit européen*, p.509; also see the Opinion of Advocate General Leger delivered on 20 June 1995 in case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Thomas (Ireland) Ltd* [1996] ECR I-2553, cons.67.

²¹ W. van Gerven notes that “...it appears that the guarantee of effective judicial protection is a general principle of Community law”. See W. van Gerven, “Non-contractual liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a view to a common law for Europe” [1994] 1 *Maastricht Journal of European and Comparative Law*, p.11.

²² See Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097, par.14; also see cases 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651, par.18; Opinion of Advocate General Van Gerven in case C-128/92 *H.J. Banks v British Coal Corporation* [1994] ECR I-1209, at I-1253.

²³ See case 33/76 *Rewe v Landwirtschaftskammer für das Saarland* [1976] ECR. 1997, cons. 5; also see cases 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR. 2053, const. 12-17; 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR. 629, cons. 22; 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR. 3595; 222/84 *Johnston v Chief Constable of RUC* [1986] ECR. 1651 cons. 17-20. For a detailed analysis on the development of the principle of effective judicial protection see R. Caranta, “Judicial protection against Member States: A new *ius commune* takes shape” [1995] 32 CMLR, pp. 703-726.

principle is defined as the positive obligation of national authorities to create the legal and administrative environment that would allow the assertion of EU rights before the national courts.²⁵ So far the principle has been applied on national authorities. However, as a recognised general principle of EC law, which forms part of the law of the Union,²⁶ it is binding not only on national but also on EU authorities. Thus, it is the duty of both national and EU authorities to ensure that individuals have a realistic opportunity to achieve compensation for damages caused by the failure of Member States to comply with their EU obligations.²⁷

The question arising at this point is, which is the optimum legal route for the successful realisation of the principle of the effective protection of the individual in those cases, where the latter suffers damage due to Member States' violations of EC law. After the extraordinary advances of the state liability doctrine in the recent case-law of the ECJ, some EU specialists have turned to remedies before national courts.²⁸ Thus, it is argued that for his/her effective protection the individual must follow the state liability scenario, in other words s/he must initiate restitution proceedings for damages suffered due to Member States' violations of EC law before his/her national courts. Since one of the preconditions for awarding compensation is the establishment of the violation in question, the national judge will have to assess whether a breach of EC law has indeed taken place. For this assessment, a preliminary ruling by the ECJ will be desirable or necessary, depending on the nature of the national court involved. On the basis of the interpretation of the relevant legal provisions provided by the ECJ in its preliminary ruling, the national judge will then decide whether and to what extent compensation will be awarded in the particular case brought before him/her.

The main advantage of such a remedy lies in the enforcement of EC law before the individual's national courts and through proceedings conducted under the national rules of civil procedure.²⁹ However, inevitably, any remedy discussed in the courts of fifteen different jurisdictions presents inherent problems, such as inequalities in *locus standi* and time-limit requirements, in the availability and extent of legal aid, in the compensation awarded and in the payment and rate of interest.³⁰ When

²⁴ See case C-213/89 *op.cit.*; also see A.P. Tash, "Remedies for European Community Law claims in Member States courts: toward a European Standard" [1993] 1 *Columbia Journal of Transnational Law*, p.394 who notes that "the Factortame case goes far further than Von Colson because the Court actually specified the new remedies that the national courts must provide".

²⁵ See P. Oliver, "Le droit communautaire et les voies de recours nationales" [1992] *Cahiers de droit européen*, pp.348 and 353; Labayale, "L'effectivité de la protection juridictionnelle des particuliers" [1992] *Revue française de droit administratif*, pp.619 and 630. Also see R. Caranta, *op.cit.*, p.710.

²⁶ See J. Steiner, *Enforcing EC Law*, Blackstone, London, 1995, p.10.

²⁷ See C. Stefanou and H. Xanthaki, "Are national remedies the only way forward? Widening the scope of Article 215(2) of the Treaty of Rome" in J. Lonbay and A. Biondi (eds), *Remedies for Breach of EC Law*, John Wiley and Sons, Chichester etc., 1997, pp.85-101, at 87.

²⁸ See R. Caranta, *op.cit.*, p.710. Also see Massera, "L' amministrazione e i cittadini nel diritto comunitario" [1993] *Rivista Trimestrielle di Diritto Pubblico*, p.47.

²⁹ See J. Bridge, "Procedural aspects of the enforcement of EC law through the legal systems of Member States" (1984) 9 *E.L.Rev.*, p.31.

³⁰ *Ibid.*, p.32; also see C. Harding, "The choice of court problem in cases of non-contractual liability under EEC law" [1979] 16 *CMLR*, p.391; T.C. Hartley,

combined with references for preliminary rulings additional problems include the length of time required for a final decision, especially when appeals or cassations are involved. It is argued, amongst others by Harding, that a direct legal action before the ECJ would be faster and cheaper.³¹ Such direct action would also resolve another inherent problem of the *Francoovich* scenario, namely the frequent unwillingness by national judges to refer to the ECJ. As Voss points out, German judges are consistently put off from referring cases to the ECJ primarily because of the length of proceedings.³² Perhaps more vivid is the example of the Greek *Areios Pagos*, the civil and criminal Supreme Court, which has never referred to the ECJ because its Secretariat is unfamiliar with the format of the reference forms.³³

So far it has been established that one possible route for the final realisation of the effective judicial protection would be the strengthening of the state liability doctrine and the harmonisation of the national legal remedies that lead to compensation for damages due to unlawful actions or omissions by Member States.³⁴ Another possible solution would be the parallel strengthening of direct actions for damages before the Court of First Instance (the CFI) and the ECJ against the Commission and the Member State which infringes EC law on the grounds that they are concurrently liable. This is not an entirely new scenario. The concept of concurrent liability between Union institutions and Member States based on the second paragraph of Art 215, concerning the possibility of compensation for individuals who suffered damages due to wrongful acts

“Concurrent liability in EEC law: a critical review of the cases” (1977) 2 *E.L.Rev.*, p.264; also see C. Harding, *op.cit.*, p.265, note 37 who notes that “since the question would be governed by national law, the difficulty could not be solved by means of reference under Art.177 EEC”. T. Hurtle in “Non-contractual liability: where to sue”, (1975-1976) 1 *E.L.Rev.*, p.399, notes that under such procedures the “jurisdiction of the European Court depends on a matter of national law: the existence of a remedy before the national courts”.

³¹ See C. Herding, *op.cit.*, p.391.

³² Voss also quotes “ignorance of Community law” as an additional reason for the reluctance of German judges to refer cases to the Court of Justice. See R. Voss, “The National Perception of the Court of First Instance and the European Court of Justice”, [1993] 30 *CMLR*, p.1124.

³³ See C. Geraris, “The beginning of a dialogue between the Community and the Greek judge” [1988] *Nomiko Vima*, p.1037 who notes that while the secretariat of the *Areios Pagos* argues that the reference to the ECJ could only occur after an action on behalf of the litigants of the case, the latter lack the *locus standi* to actually take the secretariat’s advice and announce the Greek judgment to the ECJ. For further analysis on the Greek courts and their enforcement of EC law, see H. Xanthaki, *The establishment of foreign companies in Greece with particular reference to the compliance of Greece with the law of the European Union*, P.Sakkoulas, Athens, 1995, pp.145-153.

³⁴ See W. van Gerven, “Bridging the gap between Community and national laws: Towards a principle of homogeneity in the field of local remedies?” [1995] 32 *CMLR*, pp.690-691 who notes that this harmonisation comprises three aspects, namely the definition of the exact scope of the rights conferred by EC law, the provision of adequate sanctions guaranteeing the enforcement of these rights and the introduction of effective legal remedies for securing these rights. Also see A. Barav, *op.cit.*, pp.522-523; Peter Oliver, “Enforcing Community rights in the English courts” (1987) 50 *Modern Law Review*, p.894; F. Snyder, “The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques” (1993) *Modern Law Review*, pp.45-47.

or omissions by the Union, its institutions and members of staff acting during the performance of their duties, is a doctrine already presented before the ECJ. Academics recognise the following circumstances as giving rise to concurrent liability:

- the application by Member States of wrongful acts issued by EU institutions;
- unlawful decisions taken jointly by Member States and the Union; and
- cases of infringement of EC law by Member States.³⁵

In the pre-*Francovich* era a claim for damages before the CFI or the ECJ, on the basis of concurrent liability between the Member State that infringes EC law and the Commission that does not act towards the prevention or abolition of this infringement, would have been considered admissible. However, its success would have been hindered by the, admittedly widely accepted, view that the Commission's involvement in cases of violations of EC law by Member States stems from its right, rather than its duty, to act.³⁶ Support for this argument signifies that the Commission has the mere discretion to act and that, therefore, its failure to do so can only give rise to liability in circumstances of extreme negligence.

This article, however, follows a different approach. It is proposed here that concurrent liability should be accepted in most cases of infringement of EC law by Member States. Such liability is based on the combination of Arts 5 and 155. Indeed, Art 5, which introduces the Member States' obligation to comply with their EU duties, constitutes an ideal legal basis for the establishment of the Member States' liability for damages caused to individuals as a result of the States' acts or omissions. Insofar as the Commission is concerned, Art 155 –as interpreted consistently by the case-law of the ECJ during the last decade– places not only a general right, but also a duty, on the Commission to ensure that EC law is applied within the Member States.³⁷ Thus, any failure of the Commission to ensure the implementation of EC law by Member States gives rise to its liability for any damages caused to individuals by the violation of EC law by the States involved.³⁸ It must be noted, however, that such liability occurs only

³⁵ See W. Wils, "Concurrent Liability of the Community and a Member State" (1992) 17 *E.L.Rev.*, pp.194-198; also see A. D. E. Lewis, "Joint and several liability of the European Communities and National Authorities" 33 [1980] *Current Legal Problems* 99-119, at 100.

³⁶ See P. Craig and G. de Burca, *EC Law: texts, cases and materials*, Clarendon Press, Oxford, 1995, p.539.

³⁷ The Commission is considered to have the "right and duty" to pursue its mission as a guardian of the Treaties, to monitor the application of EC law, as well as to monitor and enforce compliance with the rules of Community law. See cases 351/88 *Laboratori Bruneau v Unita Sanitaria Locale RM/24 von Monterotondo (Rom)* ECJ Fourth Chamber, Transcript, 11 July 1991; 248/89 *Cargill BV v Commission* [1991] 1 ECR 2987; C-301/87 *France v Commission* [1990] 1 ECR 307; Joined cases 326/86 and 66/88 *Benito Francesconi and others v Commission*, Transcript 4 July 1989; 141/87 *Commission v Italy* [1989] ECR 943 and [1991] 1 CMLR 234. It should be noted here that the "procedure for establishing an infringement, as laid down in Article 155 of the Treaty, imposes upon it [the Commission] an obligation unlimited in time". See case 324/82 *Commission v Belgium* [1984] ECR 1861.

³⁸ The ECJ has repeatedly held that "the action before the Court under Art 169 constitutes one of the Commission's institutional prerogatives and is associated

if the Commission's inaction was a result of its incompetence or negligence rather than a conscious decision falling within the discretion allowed to it by the Treaties.³⁹ This might occur in cases where the Commission failed or omitted to initiate even the first, informal, administrative phase of the procedure introduced by Art 169, or when the Commission wrongfully ignored the information presented to it by individuals on the occurrence of an alleged violation.⁴⁰ If the Commission fails to act or if the Commission improperly uses its discretion in deciding not to act, the European judges should award compensation to the individuals involved. If they decide not to do so, then they themselves are violating the principles of equality and of legitimate expectations.

This second scenario has been analysed extensively in the last two decades by EU legal experts, most of whom have criticised it as unrealistic and impractical. It is argued in this paper that the proposed remedy can find considerable support in the post-*Francovich* case-law and, therefore, should no longer be ignored by analysts and judges.

The Francovich Effect

The main criticism of the concurrent liability scenario has been that a joint legal action is neither easily conceivable nor practical, as it would entail judgment on the basis of European law for the liability of the Commission and of national law for the liability of the Member States.⁴¹ However,

with its general task under Article 155". See case 137/88 *Sneemann and others v Commission* [1990] 1 ECR 369; also see cases 355/87 *Commission v Council* [1991] 1 CMLR 586 and [1989] ECR 1517; 205/84 *Commission v Germany* [1987] 1 CMLR 69. It must be noted that the Commission may also take preventative measures. See Joined cases 188 to 190/80 *France, Italy and UK v Commission* [1982] ECR 2545. It goes without saying that the Commission has the right and duty to act under Art 171 EC. See case 48/71 *Commission v Italy* [1972] ECR 527, [1972] CMLR 699. Clearly when the Commission does bring an action against the Member State in question, it fulfils its duty to ensure that EC law is implemented and, in principle, cannot be held liable for damages.

³⁹ According to the ECJ's caselaw what is involved in this case is "decisions of principle which must be reserved to the full Commission", whose discretion must be interpreted widely. See cases 137/92P *Commission v BASF AG and others*, *Financial Times* 3-8-1993 and 21-7-1994, Transcript, 15 June 1994; 23/75 *Rey Soda v Cassa Conguaglio Zucchero* [1975] ECR 1279; 337/82 *St. Nikolaus Brennerei und Likorfabrik, Gustav Kniepf-Melde GmbH, Rheinberg v Hauptzollamt Krefeld* [1984] ECR 1051, [1985] 3 CMLR 83.

⁴⁰ According to the regrettable, but admittedly current, position of the CFI and ECJ, "as far as proceedings under Article 169 are concerned, persons who have lodged a complaint do not have the possibility of bringing an action before the Community judicature against a decision of the Commission not to take action on their complaint". See the recent judgment of the CFI in case T-575-93 *Casper Koelman v Commission* [1996] ECR II-1, con.71; also in case T-84/94 *Bilanzbuchhalter v Commission* [1995] ECR II-101, con. 23; also see the ECJ's judgment in case 247/87 *Star Fruit v Commission* [1989] ECR 291, cons. 10-14.

⁴¹ See, amongst others, G. Lysen, "Three questions on the non-contractual liability of the EEC" [1985] 2 *Legal Issues of European Integration*, pp.86-120, at 104; also see P. Oliver, "Joint liability of the Community and the Member States" in H. Schermers, T. Heukels and P. Mead (eds), *The non-contractual liability of the EC*, Martinus Nijhoff, Dordrecht-Boston-London, 1988, pp.125-147, at 127-128; for the difficulties deriving from the application of two

Francovich introduced a theory of state liability which is established, judged and assessed following EC legal principles. After this subjection of both elements of concurrent liability to EC law provisions, concurrent liability can be judged during the one trial before the European courts, as these have exclusive jurisdiction to deal with claims for damages against EU institutions. Furthermore, in most cases of concurrent liability the acts of the EU and the Member States interlock in such a way that the liability of both parties can be established only if the complaints against both are taken into account jointly. It is, therefore, precisely the doctrine of state liability which has recently made the concurrent liability scenario not only attractive in theory, but also possible in practice.

In addition to this procedural contribution *Francovich* has clarified the substantive conditions for the establishment of the Member State's liability in the concurrent liability remedy. Moreover, by doing so, it has defined the elements of EU liability thereto. Indeed, the elements of state liability in *Francovich* can be used in the concurrent liability scenario as the conditions for the liability of the Member State for damages caused to the individual due to failure or omission to comply with EC law. Furthermore, following Advocate General Mischo's expressly supported view that "the grant of damages by a national court for breach of Community law by a Member State should be subject to the same conditions as the grant for damages by the Court of Justice for infringement of that same Community law by a Community institution",⁴² the *Francovich* conditions are now also applicable in the non-contractual liability of EU institutions. *Francovich* argued that these conditions must be interpreted by the national laws of the Member States.⁴³ However, in view of the variety of the relevant legal provisions in the national laws of the Member States⁴⁴ and the inequalities that it may cause,⁴⁵ a European doctrine on the content of the conditions of state liability would obviously serve the principle of the effective protection of the individual more fully.⁴⁶

different sets of legal rules, see Joined cases 5, 7 and 13-24/66 *Kampffmeyer v Commission* [1967] ECR 245; also see case 30/66 *Firma Kurt A. Becker v Commission* [1967] ECR 285.

⁴² See Opinion of Advocate General Mischo on Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italian Republic* [1991] ECR I-5370-5402, con.71.

⁴³ See Joined cases C-6/90 and C-9/90 *op.cit.*, cons. 42 and 43. It must also be noted that Lord Mackenzie Stuart notes that Art 215(2) EC was deliberately ambiguous on this matter. See Lord Mackenzie Stuart, "The non-contractual liability of the EEC" [1975] 12 CMLR, p.495.

⁴⁴ See F. Schockweiler, G. Wivenes and J.M. Godart, "Le regime de la responsabilite extra-contractuelle du fait d'actes juridiques dans la communaute europeenne" [1990] *Revue Trimestrielle de droit europeen*, pp.27-74; also see Bruno du Ban, "Les principes generaux communs et la responsabilite non contractuelle de la Communaute" [1977] *Cahiers de droit europeen*, pp.397-434; T. Elster, "Non-contractual liability under two legal orders" [1975] 12 CMLR, pp.91-100 and 254-257.

⁴⁵ See M. Brealey and M. Hoskins, *Remedies in EC law*, Longman, London, 1994, p.74.

⁴⁶ See W. Wils, *op.cit.*, p.192, who notes that "the Court of Justice will determine, in its case law, the conditions under which Community law mandates liability of a member state, for different categories of Community law violations"; also see Joined cases C-6/90 and C-9/90 *op.cit.*, cons.41 and 43. It must also be noted that a European doctrine would facilitate the abolition of inequalities even under the remedy introduced by *Francovich*, since EC law would then

The Elements Of Liability In The Post-Francovich Era

The substantive conditions that establish EU liability under the pre-*Francovich* case-law,⁴⁷ include a sufficiently serious breach of Community law, the existence of harm (loss or damage) and a causal link between the two. In the remedy analysed here the Commission's failure to fulfil its duty would be considered a serious breach of EC law, unless the Commission could prove that its omission was due to a higher public interest which justified the harm caused to individual interests. Damage includes any actual, certain, concrete, assessable, direct (positive) or consequential (negative) loss. Compensation for the individual on the basis of concurrent liability would be equal to the amount of money that the individual would have gained, had s/he been allowed to pursue his/her rights under EC law. Interest and other claims would also be taken into account. The third and last element of the EU's liability is the causative link between the wrongful act or omission and the damages suffered by the individual. This is fulfilled when the damage is a sufficiently direct consequence of the unlawful act or omission of the EU institution involved.

In the pre-*Francovich* era the ECJ had interpreted the concepts of Art 215(2) to a certain extent. In view of the limited number of cases brought before the ECJ on the basis of Art 215(2) and the even more limited ECJ judgments on this provision, there are still gaps in the existing doctrine. Their interpretation lies with the ECJ and, according to the text of Art 215(2), the general principles of law common to the laws of the Member States. After *Francovich* and the development of the EC doctrine on non-contractual liability for damages, however, these gaps can be adequately and validly clarified by reference to the post-*Francovich* judgments, which we will now proceed to examine.

In the second *Marshall* case Advocate General Van Gerven discussed in some detail the definition of damage in state liability, the extent of compensation and the possibility of awarding interest for claims brought before the ECJ under Art 215(2).⁴⁸ In particular, the Advocate General expressed the view that a Member State must compensate individuals for four types of damages, namely loss of physical assets (*damnum emergens*), loss of income (*lucrum cessans*), moral damage and damage as a result of the effluxion of time. The compensation awarded must be adequate in relation to the damage sustained but does not have to be equal thereto. However, Mr. Van Gerven did admit that this rule should not prevent Art 215(2) from introducing a principle of compensation in full. This line of argumentation was not accepted by the ECJ, which in its judgment held that the prevailing doctrine in EC law is that of full compensation for damages caused to individuals. Moreover, the award of interest must be regarded as an essential component of compensation.

specify the standards of procedural and substantive rules of this remedy under national law. See John Bridge, *op.cit.*, p.40.

⁴⁷ See case 4/69 *Lütticke v Commission* [1971] ECR 325, con. 10; also see case 281/84 *Zuckerfabrik Bedburg v Council* [1987] ECR 49, con.17; and cases 153/73 *Holtz and Willemsen v Council and Commission* [1971] ECR 325, con.10; case 253/84 *Gaec de la Segaude v Council and Commission* [1982] ECR 117, con.9; case 253/84 *Briantex and di Domenico v EEC and Commission* [1989] ECR 3623, con.8; and the CFI judgment in case T-575/93 *Casper Koelman v Commission* [1996] ECR II-1, con.89.

⁴⁸ See case C-271/91 *M. H. Marshall v Southampton and South West Area Health Authority* [1993] ECR I-4367; [1993] 3 CMLR 293.

The second *Marshall* case introduced a series of post-*Francovich* judgments which, while referring to issues seemingly irrelevant to the remedy analysed here, did (directly or indirectly) interpret Art 215(2) and the concept of concurrent liability. The first point worth mentioning here concerns the suggestion of Advocate General Van Gerven that the individual may be entitled to some degree of compensation on the basis of the state liability doctrine and full compensation under Art 215(2). Even though this view was not endorsed by the ECJ in this case, it indicates that ECJ officials recognise that there are two parallel (not necessarily self-excluding) remedies for the achievement of compensation for damages: the *Francovich* scenario and the concurrent liability doctrine. This introduced a turn in the role awarded to the latter, which for a long time was considered a mere last resort to be followed only when all other national and EC remedies have either been exhausted or are obviously futile. The second noteworthy point concerns the categorically expressed provision of the ECJ concerning the prevalence of the doctrine of full compensation in cases of state liability and the consequent view that in concurrent liability compensation is owed in full. This covers damages for loss of physical assets, loss of income, moral damage and damage as a result of the effluxion of time, including interest thereon.

In *Banks*⁴⁹ Advocate General Van Gerven stressed the view that the right of individuals to seek compensation before the national courts “is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty”.⁵⁰ Thus, the state liability doctrine must not be seen as an end in the pursuit for effective protection of the individual. *Francovich* introduces merely one of the choices available in parallel for the individual who seeks compensation for damages. One result of this parallel co-existence is the recognition of the Art.215(2) remedy as an autonomous measure, which may not be viewed as one of last resort. Another result of this co-existence and the need for the harmonisation of the results achieved by both routes is the view that the criteria introduced by the ECJ for the establishment of liability under Art 215(2) are based on common legal principles of the Member States which apply to all types of non-contractual liability.

This view was also supported in *Francovich* and *Asteris*, where it was held that the essence of all types of non-contractual liability, both of the national authorities and of EU institutions, is the underlying breach of EC law and it would therefore be inconceivable for this same breach to give rise to different consequences depending on the type of authority involved.⁵¹ This argument is of paramount importance for the concurrent liability doctrine. Firstly, this line of thought demolishes the procedural barriers concerning a single trial judging both the liability of the Member State and that of the Commission before the same court, thus rendering the action for damages due to concurrent liability of the Member State and the Commission realistic in practice. Secondly, it allows the development of

⁴⁹ See case C-128/92 *H. J. Banks and Co Ltd v British Coal Corporation* [1994] 4 ECR I-1209.

⁵⁰ See Opinion of Advocate General Van Gerven in case C-128/92 *H. J. Banks and Co Ltd v British Coal Corporation* [1994] 4 ECR I-1209, con.37; also see cases C-120/88 *Commission v Italy* [1991] ECR I-621, con.10; case C-119/89 *Commission v Spain* [1991] ECR I-641, con.9; C-159/89 *Commission v Greece* [1991] ECR I-691, con.10; 72/85 *Commission v Netherlands* [1986] ECR 1219, con.20; 166/85 *Commission v Italy* [1986] ECR 2945, con.11.

⁵¹ See Opinion of Advocate General Mischo in Joined cases C-6/90 and C-9/90 *op.cit.*, con.71; also see Joined cases 106/87 and 120/87 *Asteris v Hellenic Republic (Ypopyrgeio Oikonomikon) and Commission* [1988] ECR 5515, con.8.

one single theory on non-contractual liability established on the basis of the recent ECJ case-law on state liability and the previous case-law on Art 215(2).

So far the Advocate General in *Banks* was reaffirming the view supported by the Advocate General in *Francovich*. This is important in itself, as it demonstrates that the Opinion of Advocate General Mischo is not a mere eccentricity, a one-off view, in EC legal theory. The main significance of the Opinion of Advocate General Van Gerven, however, is that it took the *Francovich* argument one step further. Since, under *Francovich*, there is a single theory on non-contractual liability, the question arising here is: which are its elements, the ones introduced by *Francovich* or the ones introduced by the well-established pre-*Francovich* case-law on Art 215(2)? Mr Van Gerven referred to this issue and supported the view that it lacks substance, as both sets of conditions really refer to the same elements of liability. Thus, damage, illegal conduct and causal link are the conditions applicable not only in claims based on Art 215(2), but also in the *Francovich* scenario. The reason they were not all named by the ECJ in the second case is that the loss and damage factors were “evidently fulfilled” in the factual circumstances of *Francovich*.⁵²

The same view was put forward in the Opinion of Advocate General Tesauo in the well-known joined *Brasserie* and *Factortame* cases.⁵³ Mr Tesauo held that the first condition of state liability, namely that the infringed legal provision should entail the granting of rights to individuals, is always met in the case of provisions having direct effect. The second condition, namely that the right deriving from the infringed provision should have a precise content, is satisfied by all provisions with direct effect. The reference to only one of the Art 215(2) elements in the *Francovich* judgment, namely causal link, is due to the fact that the other two conditions, damage and illegal conduct, were obviously satisfied. Thus, Mr Tesauo re-affirmed that the common elements of non-contractual liability both of the Member States and the Commission are damage, illegal conduct and causal link. It must be noted here that this position was endorsed by the ECJ in its judgment on the case for the first time.

Another contribution of the Opinion of Mr Tesauo refers to the interpretation of these three elements. Illegal conduct is defined as any action or omission which conflicts with the rules of the system on a strictly objective and hence no-fault basis. The damage must be real, that is certain and actual damage. Any conditions concerning the nature or seriousness of the damage caused by unlawful actions or omissions have no legal *raison d'être* either in the case of state or in the case of Union liability. Damage includes any financial loss, consequential damage and loss of profits and earnings with interest thereon. Causal link exists if the damage in question is a direct consequence of the action or omission giving rise to liability. Thus, causal link does not exist if the injured party has not done everything reasonably possible to prevent or limit the damage suffered.

From this brief reference to the post-*Francovich* state liability judgments and the relevant Opinions of the Advocate Generals the following conclusions can be drawn:

⁵² See Opinion of Advocate General Van Gerven in case C-128/92 *H. J. Banks and Co Ltd v British Coal Corporation* [1994] 4 ECR I-1209, cons.50 and 51.

⁵³ See Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany* and *R v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-1029.

- (a) state liability is not a fool-proof remedy for the protection of the individual;
- (b) an alternative route, existing in parallel with the state liability scenario, is the claim for damages on the basis of concurrent liability between the Member States and the EU under Art 215(2);
- (c) the conditions for the establishment of state and Community non-contractual liability are the same, have been introduced by *Francovich* and the ECJ case-law on the liability of EU institutions under Art.215(2);
- (d) these conditions are illegal conduct, damage and causal link;
- (e) illegal conduct is defined as any breach of EC law;
- (f) damage refers to real, that is certain and actual, damage;
- (g) the damage must be the direct consequence of the illegal conduct;
- (h) the recognition that non-contractual liability is established on the basis of the same set of conditions has opened the way to the admissibility of the claim for damages due to concurrent liability between the Member States and the Commission;
- (i) reparation is owed in full; and
- (j) reparation includes compensation for any financial loss, consequential damage and loss of profits and earnings with interest thereon.

The contribution of these judgments to the interpretation of Art 215(2) and the strengthening, from a practical point of view, of the concurrent liability remedy is quite extraordinary, especially if one takes into account that the cases in question were not brought before the ECJ either on the basis or for the interpretation of this legal provision. The post-*Francovich* case-law of the ECJ, or at least the consistent suggestions of the Advocate Generals thereon, have managed to award autonomy, admissibility and substance to a so far hypothetical remedy, namely one not tried in practice, at least not in the form and under the factual conditions proposed here.

However, one question still remains: which are the possible types of illegal conduct which may give rise to non-contractual liability? In other words, are legislative actions or omissions by the EU or the Member States included in the concept of illegal conduct? Moreover, if the answer to this question is affirmative, which are the additional conditions, if any, applicable in these cases? The question is of particular interest in view of the very stringent conditions introduced by the ECJ case-law concerning Community liability for legislative actions.⁵⁴ For the purpose of this paper and the remedy referred to here this issue is significant in relation to the liability of the Member States. Since in the scenario examined here the liability of the EU refers to the failure or the omission of the Commission to act towards the abolition of a violation of EC law by Member States, the liability of the Union can not be characterised as liability deriving from legislative actions. The question therefore is whether the individual can achieve compensation under Art.215(2) for damages suffered due to the passing of a national legislative measure that clashes with EC law or due to the maintenance in force of such a measure in combination with the Commission's failure or omission to act towards the abolition of this violation?

⁵⁴ See H.J. Bronkhorst, "The valid legislative act as a cause of liability of the Communities" in H. Schermers, T. Heukels and P. Mead, *op.cit.*, pp.13-22.

Concurrent liability for legislative actions

In his Opinion in *Brasserie* Advocate General Tesauro supported the view that the principle of state liability introduced by *Francovich* “holds good for any situation in which Community law is infringed and not merely where there has been a failure to implement a directive”.⁵⁵ The ECJ itself had in the past admitted that the principle of the effective protection of the individual cannot be realised in a judicial system where the sources of state liability would be only those allowed under Art.169.⁵⁶ Moreover, the ECJ has extended the application of the principle of state liability in other factual circumstances, such as in the *Dori* and *Miret* cases.⁵⁷ On the basis of these arguments the Advocate General was of the opinion that the individual does have the right to seek compensation for damages suffered due to actions or inaction of any type of national public authorities, including the legislature. This position was expressly and clearly confirmed by the ECJ in its judgement.

Since legislative liability is accepted the question is which are the conditions under which such liability is established. The ECJ examined the applicability of both the *Francovich* set of conditions and of those introduced by the previously restrictive case-law of the ECJ on Art.215(2) and concluded that the particular circumstances surrounding the important role of legislative authorities and the wide discretion usually awarded to them for the fulfilment of their duties justifies the imposition of additional elements for the establishment of legislative state liability. These conditions, also applicable on EU liability for unlawful legislative action or inaction, include a breach of an EC provision aiming to confer rights to the individual, the seriousness of the breach in question and a causal link between the breach and the damage suffered by the individual; however, they do not include fault by the legislative organ in question. A serious breach of EC law occurs when the relevant legislative authority, national or EU, has “manifestly and gravely disregarded the limits on its discretion”.⁵⁸ Thus, the breach would undoubtedly be serious if the ECJ has already declared the action or inaction illegal following proceedings under Art 169 or if the infringed provision has been adequately clarified by a preliminary ruling or well-established CFI or ECJ case-law.

Three weeks after the *Brasserie* judgment the Court issued another decision on a similar matter, namely on the liability of the state for damages caused to individuals due to timely, but incorrect, transposition of a directive.⁵⁹ The *BT* case gave both Advocate General Tesauro and the ECJ judges the opportunity to reaffirm the principles introduced in *Brasserie* on legislative liability and the conditions for its establishment. The ECJ held once again that liability deriving from actions or inactions of the national legislature is acknowledged by EC law as depending on the fulfilment of three conditions which are the conference of rights to individuals by the infringed rule, the seriousness of the breach in question and the causal link between the breach and the damage suffered by the

⁵⁵ See Opinion of Advocate General Tesauro in Joined cases C-46/93 and C-48/93, *op.cit.*, con.25.

⁵⁶ See case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I, con.13.

⁵⁷ See case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325, con.27; also see case C-334/92 *Wagner Miret v Fondo di garantía salarial* [1993] ECR I-6911, con.23.

⁵⁸ See *ibid.*, con.55.

⁵⁹ See case C-392/93 *R v H.M. Treasury, ex parte British Telecommunications Plc* [1996] 2 CMLR 217.

injured parties. The ECJ accepted that the timely but incorrect transposition of a directive by the national legislature of Member States does constitute a serious breach of EC law. In *Dillenkoffer* the ECJ held that the failure of Member States to take any steps for the transposition of a directive within the period laid down for that purpose also is a serious breach,⁶⁰ whereas in *Lomas* the ECJ accepted that a serious breach of EC law occurs in every case of infringement, as long as the national legislature had very little discretion.⁶¹

The *Lomas* judgment seems to approach the issue of legislative state liability in a slightly different manner to the one adopted by the other recent relevant state liability cases. Indeed, in *Lomas* the interpretation of the second condition for the establishment of state liability appears to be much broader, as the ECJ seems to support the view that a breach of EC law is always serious unless the national legislature can prove that in this particular case it has wide discretion. Should this interpretation be adopted, the remedy proposed here will acquire an even wider use, since the liability of the state and the consequent right of the individual to seek compensation will exist in the vast majority of infringements of EC law by the legislature of Member States. In order to better understand the legal basis of the ECJ's judgment in *Lomas*, one must look at the relevant detailed analysis in the Opinion of Advocate General Léger. The Advocate General's main point was that legislative state liability does not have the same legal basis as the restrictively interpreted EU legislative liability under Art 215(2). Indeed, legislative state liability derives from the failure of the state in question to respect the primacy of EC law, or from the state's "simple failure to fulfil a precise non-discretionary commitment", whose observance gives rise to liability *per se*.⁶² Thus, legislative state liability may result both from inaction, namely the maintenance of unlawful rules or the failure to adopt lawful rules), as well as from positive action, namely the adoption of unlawful rules.

This interpretation, which was after all followed by the ECJ in its final judgment, seems to indicate a turn in the case-law of the Court concerning the conditions for the establishment of state legislative liability. It seems that the ECJ is now focusing on the realisation of the effective protection of the individual and that in order to achieve this aim it is willing to compromise some of its prior restrictive doctrines regarding the liability for legislative actions. It can therefore be stated that the post-*Franovich* judgments on state liability have demolished an additional barrier concerning the remedy of concurrent liability analysed here. Concurrent liability may derive from the failure of the Commission to exercise its duties in combination with any action or omission of any organ of the national authorities, irrespective of their nature and role. This includes the administrative, legislative and judicial authorities of the Member States.

Concurrent liability: A remedy of last resort?

Another hurdle in the effectiveness of the concurrent liability doctrine concerns the condition, imposed by long and well-established ECJ case-law, that this remedy should be seen as one of last resort, used only after all the other possible legal routes have been either unsuccessfully used or are obviously futile. The question arising here concerns the effect, if any, of the post-*Franovich* judgments on this doctrine. The matter was tackled

⁶⁰ See Joined cases C-178, 179, 188, 189 and 190/94 *Dillenkoffer and others v Commission* [1996] 3 CMLR 469.

⁶¹ See case C-5/94 *R v Minisrty of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553; [1996] 2 CMLR 391.

⁶² See *ibid.*, cons.108, 153 and 156 accordingly.

in *Brasserie*, where Advocate General Tesauro expressed the view that the right to reparation should not be limited to parties having already brought an action for a similar claim before the national courts. This view was shared by the judges of the case, who held that any such requirement would clash with the principle of effectiveness, since it would exclude the admissibility of any claim for damages for breaches of EC law not already declared as such in proceedings under Art 169. In *Dillenkoffer* the ECJ held that reparation of loss and damage cannot depend on an already judicially established breach of EC law.

In *Lomas*, however, Advocate General Léger argued that an action for damages before the ECJ is inadmissible only if the individual in question can obtain full compensation in proceedings before the national courts. This view, which ignores the recent change in the case-law of the ECJ, was based on the, admittedly consistent, case-law of the ECJ during the pre-*Francovich* era.⁶³ The Léger view, which contradicts at least two recent ECJ judgments, can only be viewed as a mere reminder of a long established tradition of the past and it is hoped that it will constitute a mere temporary break in the new approach on the relationship between the remedy of Art 215(2) and other remedies initiated before the national and European courts. It is the clear current wish of the ECJ and its officials to ensure that the effective protection of the individual becomes much more than a theoretical doctrine. The introduction of a parallel system of remedies initiated before the national or the European courts would award to the individual the choice to achieve the same aim, that is compensation for damages, through two different –but hopefully equally effective– legal routes. Should the *Brasserie* and *Dillenkoffer* approach be followed in the future, the post-*Francovich* ECJ case-law will have managed to destroy another barrier in the effectiveness of the concurrent liability remedy, its use as a legal action of last resort.

ARTICLE 215 (2) AND THE INTEGRATION DIALECTIC

Having looked at the effective protection of the individual, let us now return to the integration dialectic which the two competing hypotheses represent. In crude terms, with reference to the European integration process, the supranational theoretical vein has three main requirements for the development of integration: (a) The creation of a supranational authority; (b) the deposition or transfer of sovereignty from the nation-state to the supranational authority; and (c) a shift of loyalties by the people from the national level to the supranational level. Of course, this list of requirements is rather simplistic; there are different approaches with reference to the speed of the transfer of sovereignty, for example, the evolutionary and revolutionary federalist approach,⁶⁴ or the development

⁶³ See Case 281/82 *Unifrex v Commission and Council* [1984] ECR 1969, co.11; also see case 20/88 *Roquette Frères v Commission* [1989] ECR 1553; [1991] 2 CMLR 6.

⁶⁴ For example, after the split in 1947 the federalist movement was split in two groups. The “evolutionary” or gradualist *Centre d’action Européenne Fédéraliste* (AEF) argued that Europe was, and was likely to remain in the near future, a society of nations each with a clear political identity. A revolutionary process which “forced” federalism on the nations of Europe was, therefore, doomed to failure because it was likely to result in an outright rejection and subsequent hostility, to the notion of a United States of Europe. They proposed to achieve their aim in stages by drawing the attention of the public to the notion of a united Europe, by a campaign for direct elections to the European Parliament and finally by the ratification of a new Treaty (drafted by the EP)

of the “we” feeling. However, all supranational theoretical models seem to agree that the shift of peoples’ loyalties is a necessary condition for the realisation of integration.

This “push” to win the hearts and minds of the people of Europe is not new. It is consistent with the Commission’s attempts to establish a “Peoples’ Europe” and dates back to the mid-1980s and the attempts to rally public support for the Single European Act. The logic of the supranational hypothesis –that the effective protection of the individual can best be achieved through direct actions to the European Courts– seems to be in line with the third requirement of the supranational theoretical vein, concerning the shift of loyalties, mentioned above. If individuals can bypass their national courts and seek compensation for their grievances directly from the European Courts then clearly the new supranational centre of authority would appear to fulfil an important part of their welfare needs. Although a shift of loyalties (or, at this early stage, a partial shift of loyalties) from the nation-state to the EU would not be an inevitable or automatic consequence, it is obvious that the existence of a new centre of authority which serves the interests of the EU citizen can become a powerful tool in the hands of supranationalists. Given that this process is seen, by and large, as a gradualist one the role of the ECJ, especially its activism, becomes an important tactical element in the supranational strategy.

As we have already seen, providing the ECJ is in an activist mood, existing provisions (that is, Art 215(2) in conjunction with Arts 5 and 155) can offer an effective way to protect the citizens of the Union.⁶⁵ Through legal integration, and irrespective of the time-variant of the process of functional spillover, through a mixture of “formal” and “informal” integration⁶⁶ the establishment of a “political community” can be supported not only by elites but by direct appeal to the people of Europe. Thus, the proposed interpretation of Art 215 – which would explicitly allow the individual to pursue, before the European Courts, claims for compensation on the basis of concurrent liability – can become a litmus test with wider implications for the European integration process. In fact, the recent ECJ rulings, analysed previously, indicate that the Court, in the best activist tradition, is still prepared to create new competencies for itself at the expense of the national court system.⁶⁷

which would embody the federalist principles. This strategy places great emphasis on representative central institutions.

The “revolutionary” *European Federalist Movement* proposed the drafting of “militant Europeanists” in support of a directly elected EP. The sole purpose of that Assembly would be the drafting of a federal constitution to be ratified by the governments of the member states. Heraud and Spinelli have elaborated on this strategy which shared with the evolutionaries the focus on a campaign to raise public awareness. However, the distinct difference between them and the evolutionaries was the time factor. While the evolutionaries agreed that the process of federating Europe would be on-going and probably long, the revolutionaries had a sense of urgency, mistrusting national governments and fearing that a resurgence of nationalism could redress the balance against the process of integration.

⁶⁵ See C. Stefanou and H. Xanthaki, “Are national remedies the only way forward?...”, 1997, *op.cit.*

⁶⁶ See W. Wallace, *The Transformation of Western Europe*, RIIA, Pinter, London, 1990, pp.53-67.

⁶⁷ In these cases the ECJ held that claims for compensation which are based on concurrent liability are admissible even if all other legal means at the national

In contrast, the logic of the statecentric hypothesis – that the effective protection of the individual can best be achieved through the national courts – very much reflects the intergovernmentalist/realist paradigm which resists the erosion of national sovereignty, preferring instead to keep important judicial powers within the sphere of the nation-state. It is well understood that many member states object to the ECJ's activism which they consider as an encroachment on their autonomy. As far as direct actions before the European Courts are concerned, under Art 215(2), it is obvious that national governments dislike a process which can bypass the national court system and land them with compensation claims. As a general rule, national governments dislike developments which affect the nation-state but are beyond their control. The introduction of a European citizenship has provided general background for the effective protection of the individual⁶⁸ which appears to be moving towards the supranational paradigm for which, as Snyder notes, "...the principle of State liability may prove a powerful political and legal symbol".⁶⁹ One might therefore expect a considerable backlash from the member states and their national courts to the procedure introduced by Art 215(2), given the issues at stake.

Yet, neither the member states themselves nor their national courts have really reacted as strongly as might be expected to the activist interpretation of Art 215(2) by the ECJ, which has essentially transformed this Article to a vehicle for judicial review.⁷⁰ Until recently, it was argued that national governments had not been alarmed because despite its activist interpretation of Art 215(2) the ECJ had ensured that "vertical review" relied on the behaviour of national courts and their willingness to refer cases to the ECJ.⁷¹ Torn between activism and minimalism, in *Francovich* the ECJ had produced another compromise. Even though there was more scope for individuals to seek compensation the national courts remained at the epicentre of such procedures. However, following the *Brasserie* and *Dillenkoffer* rulings this position has changed. The understanding that EC law will be dispensed in the national courts "...influenced by rules which are characteristic of the law of that Member State"⁷² may be in jeopardy as the ECJ's jurisprudence impinges on remedies at the national level and to some degree contributes to a transformation of national legal systems.

level have not been exhausted. See H. Xanthaki, "The effective protection of the individual, the Community level: Article 215(2)EC in the Post *Francovich* era", Paper presented at *UACES Second Research Conference*, University of Loughborough, 10-12 Sept. 1997.

⁶⁸ For an elaboration of this argument see K. Bradley and A. Sutton, "European Union and the Rule of Law" in A. Duff, J. Pinder and R. Price (eds), *Maastricht and Beyond, Building the European Union*, Routledge, London & NY, 1994, pp.262-264.

⁶⁹ F. Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" (1993) *Modern Law Review*, p.45. See also, however, the recent developments in S. Fries and J. Shaw "Citizenship of the Union: First Steps in the European Court of Justice," *European Public Law*, 1998 (vol 4) pp. 533-59.

⁷⁰ See T.R. Roberts, "Judicial review of legislative measures: the ECJ breathes life into the second paragraph of Article 215(2) of the Treaty of Rome" 26 *Columbia Journal of Transnational Law* [1988], p.281.

⁷¹ See M. Shapiro, "The European Court of Justice" in A.M. Sbragia (ed), *Euro-Politics Institutions and Policy making in the 'New' European Community*, The Brookings Institution, Washington D.C., 1992, p.127.

⁷² J. Bridge, *op.cit.*, p.35. Also see J. Steiner, "How to make the Action Suit the case: Domestic Remedies for Breach of EEC Law" (1987) 12 *E.L.Rev.*, p.102.

The prevalence of national courts in this process has traditionally been accepted as necessary primarily because of the lack of harmonisation of national legal remedies.⁷³ Although some experts have argued that the transformation of legal systems is already taking place,⁷⁴ national courts, like all branches of power, protect themselves against intrusions from outside bodies and are reluctant to give up power. Although German judges tend not to refer to the ECJ claiming that the length of proceedings can cause unnecessary delays, the example of the Greek *Areios Pagos* indicates that the real reasons may lie with the national courts' "nationalistic" or self-serving tendencies. After all they would not be the first branch of power to indulge in "empire building".

Returning to our two hypotheses, it does appear that the recent rulings of the ECJ lean towards the supranational paradigm. Whether this is part of an orchestrated plan is a subject for speculation. In recent years there has been evidence to suggest that the ECJ approaches cases with strong "nationalistic" overtones in a minimalist frame of mind.⁷⁵ Yet, the rulings on *Brasserie* and *Dillenkoffer* indicate a resurgence of activism which, though, may be somewhat out of place. As Arnall has noted:

"In a Community in which the political institutions are functioning reasonably effectively and the Member States are carrying out regular reviews of the Treaties, the need for, and even the legitimacy of, an overtly activist approach by the Court of Justice may increasingly come to be questioned."⁷⁶

Having revised the treaties three times within the space of ten years the member states have certainly shown their willingness to update the Treaties and carry forward the process of integration at their own pace. Under the circumstances it might have been better for the ECJ to exercise its minimalist option.

The emphasis on the individual citizen of the EU has become the *leitmotif* of integration in the 1990s. Both the Commission and the European Parliament have declared that in the years to come they will focus their attention on the rights of the citizens of the EU. And yet, integration theorists have not examined the individual in the context of the EU. As the state is the basic unit of reference, in traditional International

⁷³ This is the oldest legal argument in favour of the prevalence of national courts. See for example the arguments put forward by Lord Mackenzie Stuart in 1975 and those put forward by Advocate General van Gerven in 1995. See Lord Mackenzie Stuart, "The non-contractual liability of the EEC" [1975] 12 *C.M.L.Rev.*, pp.493-512 and W. van Gerven, "Non-contractual liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a view to a common law for Europe" [1994] 1 *Maastricht Journal of European and Comparative Law*, pp.690-695. Also see the comments of Advocate General Capotorti in the *Express Dairy* case 130/79, [1980] ECR 1887, p.1910.

⁷⁴ Steyger has argued that this transformation can be seen already in legislation concerning the implementation of Community directives. See E. Steyger, *Europe and its Members a Constitutional Approach*, Dartmouth, Aldershot, 1995, pp.89-116.

⁷⁵ For the ECJ's minimalist tendencies on cases which touch on "sensitive" aspects of national sovereignty, such as the *Commission v Greece* case C-120/94 see C. Stefanou and H. Xanthaki, "Article 224 of the Treaty of Rome and the repercussions of case C-120/94", [1995] 3 *Web Journal of Current Legal Issues*.

⁷⁶ A. Arnall, "Judging the New Europe", (1994) 19 *E.L.Rev.*, p.13.

Relations, the individual has been largely ignored by EU experts. At this stage, the effective protection of the individual is a principle established by the ECJ and as such it is subject to different interpretations. From a political viewpoint the issues raised by Art 215(2) pose some sovereignty questions. Clearly Europhiles would like a broader interpretation of Art 215(2) while Eurosceptics would regard a broad interpretation as an encroachment on the authority of the nation-state. If anything, the two hypotheses reflect the different political dynamics and perceptions about the EU's destination in the 21st century and perhaps the need for an explicit regulation which settles the issue.

CONCLUSION

This article looked at the theoretical implications of two competing hypotheses about the principle of the effective protection of the individual. In the absence of explicit Treaty provisions the Treaty-based vehicle for this principle is Art 215(2). For the time being, this principle is largely determined by the ECJ which, in its rulings, would appear to lean towards the supranational paradigm.

The recent ECJ case-law on state liability was viewed by some as the final solution to the problem of ineffective protection for the individual suffering damages due to the failure of member states to comply with their EU obligations. It is true that the contribution of the post-*Francovich* judgments on the judicial protection of the individual and its ability to seek compensation before its own national courts have been remarkable. However, the state liability doctrine had an effect not yet noted by academics and legal commentators. It opened the way to a more realistic doctrine of concurrent liability by demolishing many of the restrictions concerning the remedy of Art 215(2), namely the inadmissibility of a concurrent liability claim before the ECJ, the ambiguity concerning the substantive conditions of state and EU liability, the restrictions on legislative state liability and the view that any remedy based on Art 215(2) is inevitably one of last resort.

What the two competing views on the effective protection of the individual expose is that the fundamental dialectic of integration is still present after 40 years of Community life. With reference to theories of political integration, despite the continuing search for "synthetic" theories,⁷⁷ many theorists seem to have come full circle, rediscovering this fundamental dialectic in practically all aspects of Community life. The growth of Eurosceptics around Europe has simply reminded political scientists that this dialectic can only be ignored at their peril.

⁷⁷ See C. Stefanou 1995, *op.cit.*