Developments

Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law?

Nicolo Zingales[*]

Abstract

In *Traghetti del Mediterraneo SpA in Liquidation v. Italian Republic*,[1] the European Court of Justice (ECJ) ruled that Community law precludes the existence of two types of national rules that limit State liability: (1) rules that exclude liability for damages due to an infringement of Community law that arises out of an interpretation of legal provisions or an assessment of facts or evidence carried out by a court adjudicating at last instance, or (2) those limiting liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State in other cases where a manifest infringement of the applicable law was committed. This article, while recognizing that the ruling in *Traghetti del Mediterraneo* is in line with previous case-law on Member States' liability for breach of EU law, casts some doubts as to whether such an invasion of an area traditionally regulated by national law is in fact desirable. It questions what the foundations are of the procedural rights conferred by European law, and, in doing so, the extent to which European law can tamper with the constitutional balance of a state. Finally, it provides some tentative solutions to the dilemma faced by Italian law following the delivery of the *Traghetti del Mediterraneo* judgement.

A. The pervasiveness of EU law: from setting objectives to dictating standards

Given the increasing level of political integration and the proliferation of legislation witnessed in the last 10 years of the European Union (EU), it is natural that many of the obligations imposed by the Union have not arisen from meticulously detailed legislation. This would be a daunting task, requiring solutions that take into account a host of different social, cultural and economic conditions for each of the

[*] PhD Candidate in International Law and Economics, Bocconi University, email: Nicolo.Zingales@phd.unibocconi.it.

[1] Case C-173/03, *Traghetti del Mediterraneo SpA in Liquidation v. Italian Republic*, Judgement of the Court (Great Chamber) of 13 June 2006, published in Recueil 2006 p. I-5177.

https://doi.org/10.1017/S2071832200018617 Published online by Cambridge University Press

Member States, thereby necessarily hampering the efficiency of the legislative machine and slowing the pace of European integration.

Rather, EU institutions have been relying much more upon a collaborative approach, taking advantage of what has represented one of the core instruments of promoting European integration: directives. Through directives, the EU merely sets the objectives to be achieved, thereby providing Member States with a framework designed to harmonize their rules and standards, but leaving considerable discretion as to the way of achieving those targets at the national level. This mechanism has allowed the EU to legislate extensively and effectively in a variety of fields, and prompted national markets to reach increasingly higher levels of integration. However, such a mechanism also involves the risk of obtaining significant differences between the legislatures across Europe, differences which may under certain circumstances hamper the full enjoyment of the internal market and the realization of the four fundamental liberties.

European law provides for three types of mechanisms to limit the persistence of such inconsistencies. First are the infringement proceedings initiated by the Commission ex article 258-260 of the Treaty. Second is the possibility for affected individuals to bring forward a case for breach of EU law, as implicated by article 340 of the Treaty and clarified in the *Francovich* case.[2] Third, and probably most important, is the duty of the judiciary to re-interpret , negate or shape national law according to the provisions of EU Law, as laid down in article 4.3 (previously 10) of the Treaty and reaffirmed by the European Court of Justice (ECJ) in the landmark cases *Van Gend en Loos*,[3] *Costa v. ENEL*,[4] and *Simmenthal*.[5]

The pivotal role played by judicial interpretation in the creation of Community law is apparent from the resulting framework. Besides the specific competences and obligations attributed to the judiciary by national procedural law, which is left free to operate as long it does not discriminate against Community claims (principle of non discrimination) or render the exercise of Community rights "virtually impossible or excessively difficult (principle of effectiveness),"[6] national courts are

[2] See joined Cases C-6/90 and C-9/90, *Andrea Francovich and Others v. Italian Republic*, 1991 E.C.R. I-5357.

[3] Case 26/62, *Van Gend en Loos v. Administratie der Belastingen*, 1962 E.C.R. 1.

[4] Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

[5] Case 106/77, *Amministrazione delle finanze dello Stato v. Simmenthal* 1978 E.C.R. 629.

[6] ECJ judgment of 16 December 1976 in Case 33/76, *Rewe-Zentralfinanz eG* and *Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 1976 E.C.R. 1989, para. 5; ECJ judgment of 16 December 1976 in Case 45/76, *Comet BV v. Produktschap voor Siergewassen*, 1976 E.C.R. 2043, paras. 12; ECJ judgment of 27 February 1980 in Case 68/79, *Hans Just I/S v. Danish Ministry for Fiscal Affairs*, 1980 E.C.R. 501, para. 25; ECJ judgment of 7 July 1981 in Case 158/80, *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v.*

born directly by EU law with the duty to interpret national law, consistently with EU law. In doing so, judges represent arguably the most efficient tool to ensure the approximation of rules and standards EU-wide, particularly when compared to the lengthy procedure followed by the Community to monitor and sanction deviations from the obligations imposed by the Community.[7]

To that end, one of the major tools that can be used by national judges is that of availing themselves of article 267, which provides for the possibility to suspend national proceedings in order to request a clarification to the ECJ concerning the validity or the interpretation of EU law. The same article, which is grounded on the principle of cooperation between national and European judges, also establishes an obligation to suspend national proceedings to request such clarification for courts of last instance, *i.e.* for cases pending "before courts of tribunals against whose decision there is no judicial remedy under national law".

However, this is as far as judicial cooperation goes. Although justices can always proceed to the preliminary reference procedure and pose the ECJ any question they might have concerning the interpretation and application of EU law, they do not have any duty as such unless they are members of the court of last instance.[8] Thus, such duty represents the only limit to judicial discretion imposed by the EU court system. With respect to the limit imposed, the courts of last instance nonetheless retain some level of discretion as to the evaluation of the conditions that trigger this duty. First, they may consider that - notwithstanding the requests made by the parties to determine the validity or interpretation of EU law - such a question does not arise, as there is no scope for any reasonable doubt as to the manner in which the question raised is to be resolved (the *acte clair* doctrine). Also, the courts of last

---

Hauptzollamt Kiel, 1981 E.C.R. 1805; ECJ judgment of 19 November 1991 in Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic,* 1991 E.C.R. I-5357, paras. 42-43; ECJ judgment of 9 June 1992 in Case C-96/91, *Commission v. Spain*, 1992 E.C.R. I-3789, para. 12; ECJ judgment of 14 December 1995 in Case C-312/93. *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*, 1995 E.C.R. I-4599, para. 12; ECJ judgment of 24 September 2002 in Case C-255/00, *Grundig Italiana SpA v. Ministero delle Finanze*, 2002 E.C.R. I-8003, para. 33; ECJ judgment of 21 February 2008 in Case C-426/05, *Tele2 Telecommunication GmbH, formerly Tele2 UTA Telecommunication GmbH v. Telekom-Control-Kommission*, not yet reported, para. 51.

[7] See article 258 of the Treaty on European Union, 7 February 1992, O.J. C 224/1 (1992), [1992] 1 COMMON MARKET LAW REVIEW (CMLR) 719, 31 ILM, vol. 247, 1992, [hereinafter TEU] (amending Treaty Establishing the European Economic Community, 25 March 1957, 298 UNTS 11, Gr. Brit. T.S. No. 1 (Cmd. 5179-II), *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in Treaties Establishing the European Communities (EC Off 'l Pub. Off. 1987)), incorporating changes made by the Treaty of Lisbon, Dec. 13, 2007, O.J. C 306/1 (2007) [hereinafter Lisbon Treaty].

[8] See in this regard a recent judgement of the ECJ on 15 September 2009, in Case 405/03, *Intermodal Transports BV v. Staatsecretaris van Financiën*, 2005 E.C.R. I-8151 emphasizing the importance of there being no duty imposed on the lower courts.

instance may find that the question is materially identical to one which has already been resolved by the ECJ (the "*acte eclairè*" doctrine, which has been considerably narrowed in *CILFIT*).[9] Secondly, they may decide that such a question is not relevant for the solution of the case at hand.

But what if a court errs in making one of these determinations? Can the state justify the lack of compliance with EU law pointing at the independence of the judiciary? Or, on the other hand, is it entitled to adopt a special regime establishing the exclusive responsibility of the state, and exempting judges from civil liability to preserve their independence? In other words, does Community law require states to establish personal sanctions for the judges concerned? The first question finds an easy answer in the combination of general principles of international law with article 5 the Treaty.[10] However, the answers to the latter questions lie in a somewhat more ambiguous area of European integration; more specifically, that which pertains to the intrusion of European standards into national procedural and administrative law.

As a matter of principle it should be emphasised that national courts must enjoy wide discretion, as this is intrinsic to the nature of their adjudicatory function. This principle is particularly important with regard to preliminary references. Imposing the unconditional duty to raise every sort of question to the ECJ - even if limited to those instances where a serious doubt arises - would lead to an overload of the latter. Moreover, this kind of mechanism is likely to generate 'rent-seeking' behaviours by litigants at the national level, namely through an increasing use of such questions to have national proceedings suspended and thereby the application of possible sanctions delayed. It is therefore crucial to limit as much as possible the instances in which there is a duty to raise such questions.

To understand why a limit is necessary, it is perhaps useful to turn one step back and consider the foundations of the modern concept of the state: in order to have a democratic functioning of the state, a legal system presupposes the division of

[9] The correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the court of justice and take upon itself the responsibility for resolving it. See Judgement of the ECJ on 6 October 1982, Case C-283/81, *CILFIT v. Ministero della Sanità*, 1982 E.C.R. 3415 and more recently on 15 September 2009, Case 495/03, *Intermodal Transports* see, *supra*, note 8.

[10] "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

political power into three branches, with the judiciary being truly independent and the most important of these powers.[11] This concept is based on the key principle of separation of powers developed by Montesquieu, which is identified as a common basis of the modern European constitutions.

This is not to say, however, that an independent body shall act completely unrestrained. Rather, it is advisable to surround the judiciary with a limiting framework designed to prevent possible abuses. This is the reason why, notwithstanding the aforementioned need for independence, judges may be held accountable in limited circumstances according to their national laws. Yet this is the case only for some countries; others have plainly rejected this hypothesis,[12] and in others its concrete applicability is highly contested.[13] Naturally, these norms of liability represent a special regime, in consideration of the particularly delicate activity and the peculiar role played by the judiciary in ensuring respect of the law.

Until recently, it had always been considered that the decision on whether to provide for such norms within a country's legal system is at the exclusive discretion of the national legislator, which is the only figure with the authority to make decisions affecting so significantly a country's basic constitutional structure.[14] Such belief was grounded on the argument that, absent an international treaty on this matter, no interference into national policy-making should, in principle, be permitted.

A recent judgement of the ECJ, however, showed that this conventional wisdom - at least with regard to the liability of the State for the undertaking of their judges - is increasingly being challenged.[15] One certainly cannot go as far as to say that, in fact, the *Traghetti del Mediterraneo* judgement implies a rejection of the principle of state

---

[11] For a concise summary of the main ideas of Montesquieu, see Montesquieu, *The Spirit of Laws, in* DEMOCRACY AND THE RULE OF LAW, 13, 26, 223-224 (Adam Przeworski, J.M Maravall eds., 2003)

[12] This is the case under English, American and Dutch law

[13] This is the case of France and Greece: for the former, see J.Van Compernolle and G. Glosset-Marchal, *La responsabilitè du fait des actes du service public de la justice: Elements de droit comparè et perspectives de ``lege ferenda'*, *in* LA RESPONSABILITE' DE POUVOIRS PUBLICS, 413-438 (Bruylant ed., 1981). For the latter, see the decisions of the Athens Court of Appeal in Case 6044/79, (1980) NoB 308±9 and Case 6772/87, (1987) NoB 1630. Both citations are taken from Georgios Anagnostasos, *The Principle of State Liability for Judicial Breaches: The Impact of European Community Law*, 7 EUROPEAN PUBLIC LAW 281 (2001)

[14] See CARRÈ DE MALBERG, CONTRIBUTION A LA THEORIE GENERALE DE L'ET 174 (1920).

[15] Case C-173/03, *Traghetti del Mediterraneo SpA in Liquidation v. Italian Republic*, Judgment of the Court (Great Chamber) of 13 June 2006

sovereignty, which is still of the highest hierarchy in international law.[16] It does, however, shed light on the scope for the application of this principle in the context of the EU, clarifying that the limits set for national procedural autonomy also apply in the area of national laws concerning the responsibility of judges.

More precisely, the court held the following:

> Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court.

Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the judgment in Case C 224/01 *Köbler* [2003] ECR I 10239.[17]

An instinctive reaction to this ruling is to question the legitimacy of European law to impose these principles on national law. Does the principle of national procedural autonomy not preclude the EU from second-guessing the optimal rules to be embedded in a system to restrain judicial power?

Additionally, one can wonder whether these principles are in fact desirable not only from the point of view of enforcing EU law, but also from the perspective of maintaining a proper constitutional balance. The following sections will address these questions in order.

---

[16] CARRÈ DE MALBERG (note 14), 234; and GEORGE JELLINEK, GESETZ UND VERHORDNUNG: STAATSRECHTLICHE UNTERSUCHUNGEN AUF RECHTSGESCHICTIGLICHER GRUNDLAGE 198 (1887)

[17] See, *supra*, note 15 at 47.

B. *Francovich* and its progeny

Since the *Francovich* case, articles 226 to 228 of the Treaty have been interpreted as providing the possibility for individuals to pursue redress for damages incurred in violation of EU law.[18]

In that case, the Court introduced damages as a remedy for the lack of implementation of EU directives. The right to damages, however, was not unconditional: the Court established a three-step test to be fulfilled for such a right to arise. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights from the directive. Third, there must be a causal link between the breach of the State's obligation and the harm suffered by the individuals.

The Court stated that the aforementioned articles had to be given such interpretation in order to allow the *effet utile* of Community law to unfold.[19] Moreover, the fact that upon meeting such conditions an individual had a claim for redress against the state could be foreseen by a reading of article 5 of the Treaty, under which Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law.

A few years later, the ECJ was called upon for another crucial decision: whether to expand the application of the *Francovich* principle beyond the mere failure to implement a directive, to cases where national legislation has been implemented but is inconsistent with the directive. In that context, aware of the discretionary nature of the legislative activity and the difficulty of the task of implementing an EU directive, the Court was more cautious and refined the doctrine by requesting that a "sufficiently serious breach" be established in order to find state liability. The Court further specified that:

> The decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion. The factors which the competent court may take into consideration include the clarity and precision of the rule breached,

[18] "A judgment by the Court under Articles 169 and 171 of the Treaty 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." Case 39/72, *Commission v. Italy*, 1973 E.C.R. 101, para. 11.

[19] This can be traced back to the judgement delivered on 21 October 1970, in the case *Transports Lesage et Cie c. Hauptzollamt Freiburg*, C-23/70, 1970 E.C.R. 861

> the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law. On any view, a breach of Community law will be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.[20]

The scope of this principle has been extended to cover actions undertaken by other entities, such as political sub-units in a Federal system,[21] and even independent public law authorities.[22] Such extension does not come as a surprise for those who are already acquainted with the European legal system, for it resembles the evolution of the jurisprudence on quantitative restrictions under article 41 of the Treaty.

A further step, however, has been the expansion of this principle to the actions taken by national courts which result in a violation of Community law. This was probably less expected due to the widespread acceptance of the principle of sovereign immunity, according to which a State may not be sued without its consent.[23]

Nonetheless, looking carefully at the warning given by the Court in *Brasserie du Pecheur*, one may have foreseen that the ECJ was likely to give an even broader application of this principle in the near future. On that occasion, indeed, the Court listed a series of circumstances that would be considered an unacceptable restriction to the liability of the State for judicial breach inconsistent with the limits of procedural autonomy.

---

[20] Judgement of the ECJ on 5 March 1996, in Case C-48/93, *Brasserie du Pêcheur SA v. Germany, R. v. Secretary of State for Transport* 1996 E.C.R. I-1029

[21] See Case C-224/01, *Kobler v. Austria*, 2003 E.C.R. I-10239, para. 62.

[22] Case C-424/97, *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, 2000 E.C.R. I-5123.

[23] See Peter H. Schuck, *Civil Liability of Judges in the United States*, 37 AMERICAN JOURNAL OF COMPARATIVE LAW (Am. J. Comp. L.) 677 (1989).

By way of example, the Court made compensation dependent upon the infringing law being aimed at an individual situation, or on showing misfeasance in public office, and – importantly – even to the introduction of "fault" as an additional condition. Arguably, this was a strong sign from the ECJ about its next step, hinting at the possibility of intruding into national systems for inadequate standards governing the conditions to exercise the right to redress for breach of Community law.

This possibility materialized in 2004 in *Kobler*,[24] in which the Court considered whether the *Verwaltungsgerichtshof* (Austrian Supreme Court) had violated its referral obligation with regards to questions of free movement of workers. This was held to be a "sufficiently serious" breach of EU law that would cause liability for the Austrian Republic.

Of further importance, the Court came to its decision by referring to fundamental principles of international law, noting that:

> [Under] international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply *a fortiori* in the Community legal order since all State authorities including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.

It seems striking that the Court refers to a principle of international law - namely, the accountability of a state for the actions of any of its branches of power - in order to justify the liability of a state, while ignoring another fundamental principle of international law - sovereign immunity - for the purpose of establishing jurisdiction over the state. Relying on the sovereign immunity principle, one could argue that the Treaty does not contain any provision compelling Member States to impose specific duties or obligations upon their judges. As a consequence, Member States have not given their specific consent to jurisdiction on this matter, and could therefore not be called to respond before the ECJ in this context.

The sovereign immunity argument, however, can be set aside on two grounds. First, sovereignty lies with the citizens rather than the state, and its most important characteristic is the power of its holder to set limits to its exercise and to require respect of those limits by all legal subjects. Accordingly, the violation of the

[24] See, *supra*, note 21.

principle of legality by the public authorities constitutes a breach of the sovereign nature of the state, and thus the imposition of the appropriate sanctions (be it at a national or at a supra-national level) can be seen as a means of restoring its *imperium* (authority).[25] Second, that Member States joining the European Union have given up part of their sovereignty, including accepting to be submitted to the jurisdiction of the ECJ, precisely to the extent that the effective exercise of EU rights so requires. After all, this is in line with the principle of national procedural autonomy, and with the obligation to ensure fulfilment of the objectives of the EU that is enshrined in article 5.

As additional arguments, the Court emphasised its incompetence - and unwillingness - to second-guess the division of powers and investigate matters such as the allocation of jurisdiction within the administration of a State, and the fact that a principle of state liability for judicial breach had developed in the context of the European Convention on Human Rights (ECHR). Once again, then, it is worth noting that the Court solves conflicts of laws by referring to concepts and practices developed in the context of international law.

Extremely cautious was the approach to the question of the "sufficiently serious" breach, regarding which the Court stressed the special character of the judicial breach, stating that "the competent national Court, *taking into account the specific nature of the judicial function*, must determine whether that infringement is manifest"(emphasis added). Largely resembling those laid down in *Brasserie*, the Court identified a list of factors to define what may be considered a manifest infringement.[26] In doing so, it seemed to answer negatively the question of whether the traditional test for state liability could still hold for cases concerning judicial breach. The Court stated that "regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty", and that state liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred "only *in the exceptional case* where the court has *manifestly infringed* the applicable law."[27]

---

[25] In this light, see ANAGNOSTASOS (note 13) at notes 3 and 4, CARRE' DE MALBERG (note 14); JELINEK (note 16), 198 and following, and PROKOPIS PAVLOPULOS, CIVIL LIABILITY OF THE STATE 74 (1986).

[26] The Court specified that "[...]Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC." Also, as a rule of thumb, that "In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter." See *Kobler*, *supra*, note 21, at 56.

[27] *Id.*,at 53.

https://doi.org/10.1017/S2071832200018617 Published online by Cambridge University Press

One commentator has argued that, notwithstanding the somewhat ambiguous phrasing of paragraph 53 of the Court's judgment, the best interpretation on whether the "manifest infringement of the applicable law" is a new requirement for liability, or rather just a way to apply the general requirement for liability that the breach of community law must be "sufficiently serious", is likely to be the latter.[28]

However, an opposite argument can be sustained if one thinks of the test crafted by the Court in *CILFIT*, which is particularly rigorous in exempting national courts from their obligation to make preliminary reference to the ECJ. Not only must there not be any reasonable doubt as to the validity or interpretation of EU law, they must also be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Thus, given the strict criteria identified in that context, it is arguable that the emphasis put in *Kobler* on the "exceptional case" and the "manifest infringement" is justified by the need to distinguish the due diligence from a gross negligence standard.

Not surprisingly, the same criteria were used in *Traghetti del Mediterraneo* to hold that a national law cannot preclude the possibility for an individual to seek redress from the State for the ruling of a national court or tribunal which constitute a "manifest infringement" of EU law. This case was about the extent to which a Member State can impose additional requirements on individuals wishing to be compensated for judicial breach. More precisely, the problem was that the Italian law n. 117 (emanated on 13 April 1988) governing the liability of magistrates established the responsibility of the State (which then has the right of recourse *vis-a-vis* the single magistrate) only for those judicial acts committed with malice or gross negligence. This is a standard that apparently excludes liability for those mistakes arising out of a manifest violation of EU law, if they were not committed with the requisite subjective element. The ECJ repudiated this outcome, implying that the effectiveness of EU law cannot be sacrificed for any reason pertaining to the national interest, however compelling its theoretical underpinning may be.

If that is the case, then the question arises: where does European law concretely end, and national procedural autonomy begin? The quick answer is simply that there is no fine line, which is precisely what creates the confusion in both national courts and national legislatures. There is some authority in academic literature advancing the proposition that all the conditions for state liability are solely governed by European law, which prevents the operation of any contrasting

[28] Mark H. Wissink, *EuGH, 30.9.2003, C-224/01, Gerhard Köbler v. Republik Österreich – Liability of a Member State for Damage Caused to Individuals by Infringements of Community law for Which It is Responsible*, 3 EUROPEAN REVIEW OF PRIVATE LAW (E.R.P.L.), 419 – 442 (2005).

national regulation.[29] Yet this argument may be contested from a legitimacy perspective, arguing that this is not an area for which Member States have explicitly given up their competence, and where any possibility of "Europeanization" is necessarily encroached upon by semi-voluntary restrictions on the reach of national legislative power, imposed pursuant to the duty of cooperation between the EU and Member States contained in article 4.3 of the Treaty. What is not surprising is that in this particular context, as much as in similar areas where the Community does not enjoy explicit competence, "Europeanization" is triggered by the Court's action, leaving it for Member Sates to enact the appropriate implementing measures.

In order to ascertain the legitimacy of such an intrusion into national procedural law, the focal point of our inquiry must be the following: how are the limitations to national procedural autonomy to be specified in the context of State liability? Because procedural autonomy is -as pointed above- constrained by the need to respect the prohibitions to discriminate against Community claims and to render the exercise of Community rights "virtually impossible or excessively difficult", the particular connotation of "virtually impossible or excessively difficult" in the latter is going to dictate standards directly in the context of national substantive law.

Once again, then, the limitations imposed by the principles of effectiveness and non-discrimination prove to be a very important tool for the Court of Justice to 'take–over' in areas traditionally covered by national law. Nonetheless, one should also not forget that what the Court does in this context is not substantially different from its review of Member States' implementation of EU directives or compliance with EU legislation, for it often evaluates the appropriateness of national laws and refines their details in light of the principles set by the EU law in the matters at issue.

This important task is necessary to ensure that the fundamental principles of EU law are upheld and respected across different sectors and policy areas. But the influence of the ECJ at a national level does not – and cannot – stop here. A by-product of its rulings regarding any one Member State is that the deriving principle will be enforceable across the entire Community, having become a constitutive part of EU law. As a matter of fact, every time the Court of Justice is called upon to adjudicate on something that has not been previously addressed or clarified by its case-law, it will make a choice that is going to determine the minimum standard to be applied by each Member State concerning that particular matter. This is one of the most important consequences of the EC Treaty, directly related to the cession of sovereignty in that context and to the recognition of the primacy of European law.

---

[29] J.H. JANS, R. DE LANGE, A. PRECHAL AND R.J.G.M. WIDDERSHOVEN, EUROPEANISATION OF PUBLIC LAW (2007).

In the case of liability for judicial breach, the normative choice taken by the ECJ was surely necessary to ensure the equal treatment of rights conferred by European law. Such choice was also, however, substantially constitutional in nature. First, determining how a state is to discipline the activity of its judges is likely to alter the constitutional balance within that state, as the standards dictated at EU level might require that the judiciary will be called upon a more cautious assessment of the facts, depending on the amendments of the standards of liability urged by the ECJ. Second, establishing that a state is responsible for judicial breaches can diminish the value of the rule of law in that state, which will be automatically seconded to the hierarchically more important rule of law established by the EU institutions.

All in all, it can be recognized that the Court has not departed from the previous case law regarding the liability of Member States for breach of Community law. However, it has also not taken such a drastic approach as to close the door entirely to balancing the primacy of EU law with particularly sensitive concerns linked to the effective functioning of the national legal system. The importance of these concerns, which will be surveyed alongside the following section, is often used to infer that a special treatment of judicial breach in EU law is justifiable. The main questions are whether in fact much weight should be given to these concerns and, of course, whether the Court will be willing to give any leeway on the supreme objective of effectiveness of EU law.

C. What are the problems with such broad concept of state liability?

In *Kobler*, arguments against the liability of a Member State were advanced not only by the Republic of Austria and the Austrian Government, but also by the French and United Kingdom governments, which felt directly affected by the possible outcome of the dispute. Those arguments were based on *res judicata*, the principle of legal certainty, the independence of the judiciary, the judiciary's place in the Community legal order and the comparison with procedures available before the Court to render the Community liable under Article 340 EC.

The first and perhaps most important of those arguments was the need to preserve the principle of *res judicata*. The French government submitted that conferring a right to reparation on the ground of an allegedly mistaken application of Community law, by a definitive decision of a national court, would run against this "fundamental value in legal systems founded on the rule of law and the observance of judicial decisions."[30] In support of its statement, the government recalled the

[30] See, *Kobler* , *supra* note 21, at 23

https://doi.org/10.1017/S2071832200018617 Published online by Cambridge University Press

judgement delivered by the Court in *Eco Swiss*,[31] where some limits to the principle of effective protection of EU rights were admitted in light of the importance of the principle of legal certainty and the acceptance of *res judicata*, which is an expression of that principle.[32]

The concept of *res judicata* employed in this reasoning seems much broader than the one recognized by the ECJ in the *Eco Swiss* case. For instance, the French government seemed to imply that the mere fact that a dispute has been adjudicated with a definitive decision on a certain issue prevents any other court from coming back to the same issue in *any* other proceeding involving the same parties. This broad notion of the principle conflicts with a softer version, according to which decisions on the same issue among the same parties are not precluded so long as the object of the dispute (*i.e.*, the *petitum* or the *causa petendi)* is different.

The ECJ, upholding the softer meaning given in the *Eco Swiss* judgement, noted that the integrity of the principle in itself is not touched by the possibility for individuals to seek redress for the mistaken application of Community law, since "proceedings in this case do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*."[33] However logical the decision confirming the embracement of this softer version of *res judicata*, it is far from uncontroversial. The question to be posed is this: what about countries, such as the United Kingdom, that have based their legal system on a stronger version of the principle of *res judicata*? Should they be required to make an exception to such an important milestone of their legal tradition?

The United Kingdom Government, indeed, complained about two key consequences of establishing Member State liability for judicial breach of EU law. First, the authority and reputation of the judiciary would be diminished if a judicial mistake could in the future result in an action for damages. This is difficult to contest, and in stark contrast with the legislative role attributed to the courts in common law countries. What would the value of their holding be, if an English citizen could in fact challenge it in a subsequent proceeding, in spite of the definitive character of the holding? Nevertheless, the Court of Justice replied noting that, to the contrary, extending state liability to judicial breach would have led to an enhancement of judicial authority in the long run. The Court held that

---

[31] See judgment of the ECJ on 1 June 1999, in Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, 1999 E.C.R. I-3055.

[32] See, *Kobler*, *supra* note 21, paras. 43-46.

[33] *Id.*, at 39

> [T]he existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary.[34]

Second, a significant complication arises when it comes to deciding which court is competent to adjudicate in such a case of state liability, particularly in the United Kingdom where there is a unitary court system and a strict doctrine of *stare decisis.* How acceptable is it that a lower court evaluates the assessment made by another court of superior rank, or - even worse - that the same court judges on its merits, thereby becoming the judge of its past behaviour? The latter scenario would clearly be attackable under article 6 ECHR, which prescribes the need for Member States to respect the right to a fair hearing from an impartial and independent tribunal established by the law.

A solution to this problem could be that of establishing a special tribunal to hear cases involving alleged breach of EU law by the judiciary. However, it has been noted that such an independent tribunal would likely face a similar problem, particularly when having to adjudicate *Kobler*-style actions on the validity or the interpretation of EU law.[35] Committing an error on the application of EU law would trigger liability even for the undertakings of those tribunals; who will then be called to judge upon them? The same tribunal that had allegedly mistaken the application of EU law in the first place? These doubts seriously call in question the concrete feasibility of a full reception into national laws of the "Member State liability for judicial breach" principle. Nonetheless, the Court dispensed with this enormous problem simply by attributing to national law the task of allocating jurisdiction and delineating the applicable legal rules, thus reminding us that:

> According to settled case-law, in the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law.[36]

What is striking in this quotation is that the Court seems to recognize a full and complete autonomy for national law in regulating domestic procedures. As we

---

[34] *Id.*, at 43

[35] See Peter J Wattel, Kobler, CILFIT and Welthgrove, *We can't go on meeting like this*, 41 CMLR 177–190, (2004).

[36] See, *supra*, note 21, at 46

have seen above, however, this independence is in reality confined by the dictation of minimum standards by the ECJ.

The issue of coincidence between the judge and the judged was also not tackled with regard to a second argument, namely in addressing the grievance of the Austrian government with regard to the inapplicability of article 340 (and thus of the liability principle) to an infringement by the Court of Justice. The argument was that liability cannot arise because in such a case the ECJ would be required to determine a question concerning damage which it itself had caused, so as to render it judge and party at the same time. By analogy, the argument goes, the liability of the Member States could not be incurred in respect of damage caused by a court adjudicating at last instance. Although the ECJ did not consider this analogy to be relevant in the *Kobler* case, it came back to this issue in later cases, clarifying that article 340 fully applies to infringements occasioned by EU institutions, thereby implicitly rejecting the aforementioned theory.

The Court then turned to analyse the second major grievance it had identified from the arguments of the parties: the risk of compromising judicial independence. Here the Court dismissed the argument perhaps too quickly, holding that:

> [T]he possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called into question.[37]

Although this reasoning is well grounded on the actual principles of international law, its fundamental flaw is that it neglects the factual situation in most Member States, where state liability is intertwined with the personal liability of the judges. If that is the case, imposing stricter scrutiny to judicial behaviour for the purpose of establishing state liability necessarily implies expanding the personal liability of judges, at least in the absence of a complete reform of the laws governing judicial behaviour.[38] The argument made here is that this would at least in part jeopardize the independence of judicial activity; the judiciary would feel more constrained in its operation by the stricter legal standard for personal liability, and hesitate before engaging in a process of complete and extensive review.

---

[37] *Id.*, at 42

[38] A reform that would be quite difficult to implement, since it would disrupt with the legal tradition of most Member States concerning liability of civil servants and public employees: see for example in Italy the Presidential Decree 10 January 1957 n.3, art. 22

This is the reason why a fundamental reform, in any case, should be very cautious in eroding the preferential treatment accorded to the judiciary, considering not only the peculiar nature of its jurisdictional function, but also the procedural safeguards designed to ensure the correctness of their choices.[39] And even where those choices are mistaken, the public interest is not necessarily better served by the condemnation of the judge, for it would impair her confidence in further decisions and the very concept of its independence. As submitted by the United Kingdom in the *Kobler* case:

> [I]nherent in the freedom given to national courts to decide matters of Community law for themselves is the acceptance that those courts will sometimes make errors that cannot be appealed or otherwise corrected. That is a disadvantage which has always been considered acceptable.[40]

D. The legal and political dilemma: what to do with judicial immunity?

The arguments made above are some of the reasons why in systems such as the United States and the United Kingdom, judges are immune from civil liability. Judicial immunity in those contexts contributes to giving the judiciary more authority and, above all, independence from the other branches of power. Total immunity, however, seems unattractive both for the consequential effects and for the deterrence that a system of liability implies. First, it seems that if judges are not punished, they will be likely to recognize their mistakes in the future. Second, if there is no substantial threat of a sanction, the judge will not be deterred in the first place from making wrong decisions.

Arguably, a legal system could try to compromise between the interests of independence and accountability by setting a liability standard at a relatively high level; for example, in cases of inexcusable error, attributing such liability to the state but foreseeing the disciplinary sanction of an increased control *vis-a-vis* the mistaken judge or tribunal. The risk, however, is that such a system would not sufficiently discourage moral hazard and would result in being too burdensome for the finances of the state.

A recent law and economics study on this particular issue, *i.e.* the most welfare-enhancing theoretical model of judicial liability, identified the standard of

[39] Safeguards which include, but are not limited to, the right to appeal judgement and the various "due process" minimum rights imposed by the European Court of Human Rights (ECHR).

[40] See, *supra*, note 27.

"inexcusable error" as being the optimal trigger of liability.[41] This study, recognizing the inherent tension between the liability standard and the level of independence, proposes the individuation of liability in correlation with a negligence standard, rather than a diligence duty. This is because the description of a single desirable "socially efficient" behaviour of judges, is not only elusive, but of questionable legitimacy.[42] What is ironic, and perhaps striking, is that this type of "optimal trigger of liability" is precisely the one used by the aforementioned Italian law to identify judicial liability (namely "gross negligence or malice").

It is therefore submitted here that the ECJ should have thought twice before issuing its *Traghetti del Mediterraneo* decision, which essentially requests the Italian government to amend its law on judicial responsibility. The ramifications this judgement may have on the operation of the current Italian law (as well as parallel laws in other EU Member States) are twofold. One possibility is that the government introduce a preferential treatment for breach of EU law, under which there would be no need to prove fault in order to charge the courts with judicial mistake. Basically, this would mean either a "due diligence" parameter based on the professional standards of European judges,[43] or a strict liability system for cases of manifest violations.

Another alternative, leaving aside that of implementing a complete reform of the law at issue, would be to introduce an annex to the statute to restrict the scope for the interpretation of the term "gross negligence". At a minimum, this annex should include a reference to the cases of manifest infringement identified so far by EC law, and flesh out other factors that would guide the assessment of the court in this regard. These amendments, if done properly, would probably be able to prevent other cases of conflict between national and EU law on judicial breach. Nothing, however, can be claimed as certain given the evolving nature of EU law and the speed at which this occurs.

Finally, two additional comments need to be made to warn Member States against an overly broad implementation of the principle of judicial liability laid down in *Traghetti del Mediterraneo*. These comments concern the practical consequences of a heightened scrutiny for judicial behaviour. First, the functioning of national courts

---

[41] For similar conclusions, see Aspasia Tsaoussi and Eleni Zervogianni, *Judges as Satisficers: A Law and Economics Perspective on Judicial Liability* available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009455 on 10/01/2010.

[42] *Id.*, 8

[43] This would be something that would not require substantial reforms to take place, since that is the basic rule governing professional liability in Italy, a regime to which the law n. 117 of 1988 on the compensation of damages caused by magistrates in the discharge of judicial duties and civil liability of magistrates (G.U. 15 April 1988, n. 88) creates an exception.

of last instance will be inevitably slowed, and the number of preliminary references sent to the Court of Justice will increase, because judges will fear incurring liability for having missed a necessary preliminary reference. This is likely to alter the dynamics at the ECJ and eventually extend the time required for it to deliver a judgement. What seems even worse, some of the preliminary references will be probably avoidable, either because they are not strictly indispensable to the decision of the dispute or because the national court could have found the solution in the previous case-law, but nonetheless did not feel so confident as to maintain an *actè eclaire* stance.[44] Finally, there is also the risk that these implications, added to the threat of judicial liability coming from EU law, would affect the harmonious relationship so far existing between national and Community courts.

E. Conclusions

This article has been motivated by the recognition of the increasing expansion of the role of the ECJ, and its progressive intrusion into some areas of law that have traditionally been left to the realm of national law. The most recent case on this route has been *Traghetti del Mediterraneo*, where the Court deemed inappropriate the system by which Italy limited the liability of magistrates in cases of manifest breach of EU law.

This article reviewed the test used to determine the existence of a right to reparation for breach of EU law, and thereafter verified that a mistaken application or interpretation of EU law by the judiciary could fall within the scope of this test. It has been questioned, however, whether the mere fact that the state is responsible for the compliance with EU law by its institutions legitimates the European Court of Justice to interfere with the system of liability established in the national context. According to the ECJ, this is justified because in this context an individual has to exercise one of the basic rights conferred by EU law, namely the right to reparation for breach of such law. It has been submitted throughout this article that the problem with this argument is that it neglects the crucial importance of fundamental principles enshrined in the national legal systems, such as the rule of

[44] As a consequence, it has been argued that the ECJ will increasingly recur to Article 104(3) of its Rules of Procedure, which provides the following "special procedure" allowing the Court to "bounce back" references for preliminary ruling without answering the question: 'Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the answer to such a question may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt, the Court may, after informing the court or tribunal which referred the question to it, hearing any observations submitted by the per-sons referred to in Article 23 of the Statute and hearing the Advocate General, give its decision by reasoned order in which reference is made to its previous judgements or the relevant case-law."

law, the authority and the efficiency of the judicial mechanisms and above all the independency of the judiciary. Particular importance should be given to the latter principle: reducing the independence of the judiciary, indeed, has substantial effects on the relationships between the three branches of power. It follows that changing the parameters that establish the conditions under which a judge can be subject to liability suits will have a substantial impact on the constitutional balance of a state.

To limit the friction of the ruling in *Traghetti del Mediterraneo* with the functioning of national legal systems and to prevent any adverse impact on the future of European integration, this article has argued in favour of a "special treatment" for state liability in case of judicial breach, and envisaged prospective changes to the national laws currently disciplining the liability of magistrates.

While there remains an open question as to which system ought to be used by national law to hold the judiciary accountable – and subject to civil actions – for the incorrect application of EU law, this article has attempted to bring a concrete example of the overarching role played by the ECJ in building up the increasingly expanding body of European laws and principles. Even though the utmost importance of such role for the process of European integration cannot be disputed, some criticism may be cast on the fact that in doing so, the Court sometimes bypasses the procedural safeguards that the EU would be required to respect if it were to pursue the same objectives via the legislative process. For example, cases like *Traghetti del Mediterraneo* show that the Court is often not in the best position to address national rules that are the result of balancing a variety of fundamental concerns, especially when such rules are constitutional in nature. In this respect, it is argued that the Court should have at least assessed more thoroughly the rules for liability of judges devised by Italian law, and taken them fully into account before handing out a judgement which, as such, is likely to significantly affect a national judicial system.