OPINION OF ADVOCATE GENERAL LÉGER
delivered on 8 April 2003 [1]

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1 — Original language: French.

1. Can a Member State be rendered liable for breach of Community law where that breach is committed by a supreme court? Is the Member State in question required to compensate individuals for the resulting loss or damage? If so, what are the conditions which give rise to such liability?

2. Such are, in substance, the delicate questions which the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) (Austria) has referred to the Court in these proceedings. [2] For the first time, the Court is requested to clarify the scope of the principle that a State is liable for loss or damage caused to individuals by breaches of Community law attributable to the State. That principle was established by the Court in *Francovich and Others* [3] and has been considerably developed since *Brasserie du pêcheur and Factortame* [4] in

2 — Earlier, these delicate questions had not failed to provoke lively interest amongst academic writers. See, in particular, H. Toner, 'Thinking the unthinkable? State Liability for Judicial Acts after *Factortame (III)*' in *Yearbook of European Law*, 1997/17, p. 165, and G. Anagnostaras, 'The principle of State Liability for Judicial Breaches: the impact of European Community Law', *European Public Law*, Vol. 7/2, 2001, p. 281.

3 — Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

4 — Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029.

respect of State liability for acts or omissions of the legislature or administrative authorities.

3. It is interesting to note that, in parallel, the Court is seised of an action for failure to fulfil obligations in Case C-129/00 *Commission* v *Italy*,[5] which particularly calls in question a dominant line of cases decided in the national courts, specifically the Corte suprema di cassazione (Supreme Court of Cassation) (Italy). That case requires the Court to consider issues analogous to those raised in these proceedings: must a Member State be answerable for the acts adopted by its courts (or by some of them) and, if so, to what extent? In addition, the Court is also seised of a request from the Netherlands for a preliminary ruling[6] on whether a national administrative body is required, under Community law, to reopen one of its decisions which has been confirmed by a final judicial decision, where the interpretation of the relevant Community legislation on which that administrative decision was based is belied by the Court in a subsequent preliminary ruling. That question referred for a preliminary ruling is worth mentioning although the issues are relatively different from those which concern us in the present case. I shall soon be delivering my Opinion in that case.

5 — A case pending before the Court, which concerns the arrangements for reimbursement of national taxes which were levied unlawfully, because they were in breach of Community law judgment of 9 December 2003, not yet published in the ECR.

6 — Case C-453/00 *Kühne & Heitz*, judgment of 13 January 2003, not published in the ECR..

I — The national legal framework

A — *The principle of State liability*

4. In Austrian law, the principle of State liability is enshrined in the Federal Constitution[7] and defined by the Federal Law of 18 December 1948.[8] Paragraph 2 of that law provides:

'(1) It is not necessary to designate a specific body upon an application for damages; it is sufficient to establish that the loss or damage could have been caused only by breach of the law by a person acting on behalf of the defendant.

(2) There shall be no right to redress where the injured party could have avoided the loss or damage by means of a legal remedy, in particular an appeal to the Verwaltungsgerichtshof [Austria[9]].

7 — Article 23(1) of the Federal Constitution provides that 'the Federation, the Lander, the districts, the communes and the other public-law authorities and bodies shall be liable for the loss or damage which persons acting on their behalf in execution of the laws have by culpable and unlawful conduct inflicted on whatever person'.

8 — Federal Law governing the liability of the Federation, the Lander, the districts, the communes and the other public-law authorities and bodies for loss or damage resulting from the execution of the laws (BGBl., 1949/20).

9 — That court, entitled 'Administrative Court', is the only court with jurisdiction in administrative matters. It intervenes following an internal administrative review. Its decisions are not subject to appeal. Although it is not superior to any other court in the field within its jurisdiction, it plays the role of a supreme court (hereinafter otherwise known as 'the supreme administrative court').

(3) A decision of the Verfassungsgerichtshof [Austria [10]], the Oberster Gerichtshof [Austria [11]] or the Verwaltungsgerichtshof shall not give rise to a right to redress.'

5. It follows from those provisions that the liability of the Austrian State is expressly precluded in respect of loss or damage caused to individuals by decisions of supreme courts.

6. Moreover, disputes concerning State liability come within the inherent jurisdiction of the courts of first instance in civil and commercial matters (Landesgericht (regional court) (Austria), Handelsgericht Wien (commercial court, Vienna) (Austria)).

B — *The special length-of-service increment for university professors*

7. Paragraph 50a of the 1956 Gehaltsgesetz (salary law), [12] as amended in 2001, [13] provides that a university professor is eligible for a special length-of-service increment to be taken into account in the calculation of his retirement pension. The grant of that increment is conditional, in particular, on completion of 15 years' service as a professor at Austrian universities.

II — Facts and main proceedings

8. Mr Köbler has been employed since 1 March 1986 under a public-law contract with the Austrian State in the capacity of ordinary university professor in Innsbruck (Austria). By letter of 28 February 1996 to the competent administrative authority, he applied for the special length-of-service increment for university professors. In support of his application, he relied on completion of 15 years' service as an ordinary professor at universities in various Member States of the European Community, in particular Austria. That application was rejected on the ground that Mr Köbler did not fulfil the length-of-service conditions under Paragraph 50a of the 1956 salary law, namely completion of the required service exclusively at Austrian universities.

9. Mr Köbler thus appealed against that decision to the Verwaltungsgerichtshof. He claimed that the length-of-service conditions imposed by that law for eligibility for the increment at issue amount to indi-

10 — This is the constitutional court.

11 — This is the supreme court in civil and commercial, social security, employment law and criminal law matters. Within that court system, it is superior to other courts of first or second instance.

12 — BGBl., 1956/54.

13 — BGBl. I, 2001/34.

rect discrimination contrary to the principle of freedom of movement for workers guaranteed by Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and by Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. [14]

10. In the light of such an argument, the supreme administrative court referred a question to the Court for a preliminary ruling in order to ascertain whether Article 48 of the Treaty and Articles 1 to 3 of Regulation No 1612/68 are to be interpreted as meaning that, under a pay scheme which provides that salary is dependent, *inter alia*, on length of service, activities of equal value previously undertaken in another Member State must be treated in the same way as activities previously undertaken in the country under consideration. [15]

11. By letter of 11 March 1998, the Court asked the supreme administrative court whether it deemed it necessary to maintain its question submitted for a preliminary ruling in the light of the judgment of 15 January 1998 in *Schöning-Kougebetopoulou* [16] which had been delivered in the meantime. The national court requested the parties to give their views on the matter, since at first sight the legal issue which was the subject-matter of the question submitted for a preliminary ruling had been resolved by that judgment of the Court in a sense favourable to Mr Köbler's claims. On 24 June 1998, the national court finally withdrew its request for a preliminary ruling, and then dismissed Mr Köbler's application on the ground that the special length-of-service increment is a loyalty bonus which objectively justifies a derogation from the Community law provisions on freedom of movement for workers.

12. On 2 January 2001, Mr Köbler brought an action for damages against the Republic of Austria before the Landesgericht für Zivilrechtssachen Wien. [17] He submits that the judgment of 24 June 1998 of the supreme administrative court infringed directly applicable provisions of Community law. In his submission, the Court's case-law does not treat the increment at issue in the same way as a loyalty bonus. As a consequence, he seeks compensation for the loss which he has unlawfully sustained as a result of the judicial decision in question which refused to grant the special length-of-service increment which he is entitled to claim under Community law. The Republic of Austria opposes that application for compensation on the ground that the judgment of the supreme administrative court is not contrary to Community law and that, in any event, a decision of a supreme court (such as the Verwaltungsgerichtshof) cannot give rise to State liability. It states that such liability is expressly excluded under Austrian law, a provision which is not contrary, in its submission, to the requirements of Community law.

14 — OJ, English Special Edition 1968 (II), p. 475.

15 — See the order for reference [in Case C-382/97 *Kobler*].

16 — Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47.

17 — This is a court of first instance in civil and commercial matters.

III — The questions referred for a preliminary ruling

13. Having regard to the arguments put forward by the parties, the Landesgericht für Zivilrechtssachen Wien decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the case-law of the Court of Justice to the effect that it is immaterial as regards State liability for a breach of Community law which institution of a Member State is responsible for that breach (see Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029) also applicable when the conduct of an institution purportedly contrary to Community law is a decision of a supreme court of a Member State, such as, as in this case, the Verwaltungsgerichtshof?

(2) If the answer to Question 1 is yes:

Is the case-law of the Court of Justice according to which it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law (see *inter alia* Case C-54/96 *Dorsch Consult* [1997] ECR I-4961) also applicable when the conduct of an institution purportedly contrary to Community law is a judgment of a supreme court of a Member State, such as, in this case, the Verwaltungsgerichtshof?

(3) If the answer to Question 2 is yes:

Does the legal interpretation given in the abovementioned judgment of the Verwaltungsgerichtshof, according to which the special length-of-service increment is a form of loyalty bonus, breach a rule of directly applicable Community law, in particular the prohibition on indirect discrimination in Article 48 [of the Treaty] and the relevant settled case-law of the Court of Justice?

(4) If the answer to Question 3 is yes:

Is this rule of directly applicable Community law such as to create a subjective right for the applicant in the main proceedings?

(5) If the answer to Question 4 is yes:

Does the Court... have sufficient information in the content of the order for reference to enable it to rule itself as to whether the Verwaltungsgerichtshof in the circumstances of the main proceedings described has clearly and significantly exceeded the discretion available to it, or is it for the referring Austrian court to answer that question?'

IV — The subject-matter of the questions referred for a preliminary ruling

14. The national court essentially raises four series of questions. The first relates to the possible extension of the principle established by case-law, that a State is liable for loss or damage caused to individuals by breaches of Community law, to the situation where a supreme court is responsible for that breach. [18] The second concerns the substantive conditions which give rise to such liability. [19] The third relates to the determination of which court or tribunal has jurisdiction to assess whether those substantive conditions are fulfilled. [20] The fourth seeks to ascertain whether, in the present case, those substantive conditions are fulfilled. [21]

15. It is important to emphasise that all those questions concern exclusively supreme courts and not ordinary courts. As a consequence, I will restrict my analysis to the position of supreme courts and will not consider that of ordinary courts.

16. It is appropriate to examine first of all the question of principle. The answer to that question will determine whether it is necessary to examine the subsequent questions.

V — The principle of State liability for breach of Community law by a supreme court

A — *The observations of the parties*

17. According to Mr Köbler, it follows from *Brasserie du pêcheur and Factortame* that a Member State can be rendered liable for breach of Community law, whatever be the organ of the State responsible for the

18 — First question in the order for reference.

19 — This is what is apparent, in substance, from the first, third and fourth questions in the order for reference.

20 — Second and fifth questions in the order for reference.

21 — Third and fourth questions in the order for reference.

breach. It is not relevant whether this organ is part of the legislature, executive or judiciary. Moreover, the liability of the State for its judicial activities cannot be limited to the ordinary courts, to the exclusion of supreme courts, because that would enable Member States to organise their judicial systems in such a way as to avoid all liability and would thus run the risk of leading to national situations which were divergent in respect of the judicial protection of individuals.

18. According to both the Republic of Austria and the Austrian Government, Community law cannot preclude the existence of legislation expressly excluding the liability of the State for breach of law — including Community law — by its supreme courts. Such legislation does not make the implementation of Community law impossible or excessively difficult so long as parties are able to rely on Community law before the supreme courts. It is justified by requirements of legal certainty relating to the need to bring disputes to a final conclusion. Furthermore, the establishment of a principle that the State is liable for the acts or omissions of its supreme courts presupposes that the Community can also be rendered liable for the acts or omissions of the Court of Justice, which is difficult to envisage since the Court would become both judge and party to the proceedings.

19. That view is broadly shared by the French and United Kingdom Governments.

20. According to the French Government, by the judgment in *Brasserie du pêcheur and Factortame* the Court neither expressly nor impliedly included judicial organs amongst the organs which may render the State liable for breach of Community law. The fundamental principle of respect for *res judicata* precludes the establishment of a mechanism which renders the State liable in respect of the content of a supreme court's decision. That principle should prevail over the right to redress. Furthermore, the system of legal remedies established in the Member States, which is supplemented by the mechanism of references for a preliminary ruling under Article 234 EC, offers individuals a sufficient safeguard against the risk of an error of interpretation of Community law. In the alternative, the French Government stated at the hearing that State liability for the acts or omissions of supreme courts should be subject to special rules which are particularly restrictive and radically different from the rules governing State liability for legislative or administrative acts, having regard to the specific nature of the conditions under which the judicial function is exercised.

21. According to the United Kingdom Government, it is clear from *Brasserie du pêcheur and Factortame* that the Court seemed prepared to countenance the possibility of the State incurring liability for judicial acts. However, the imposition on the State of liability for acts or omissions of its judicial organs can be envisaged only very restrictively. That restrained approach is all the more necessary in the light of the Court's case-law on the Community's non-contractual liability for the failure of the Court of First Instance to satisfy the requirements of a fair hearing within a

reasonable time. Furthermore, any acceptance of such a system of State liability would be contrary to the fundamental principles of legal certainty and, in particular, the acceptance of *res judicata*, the reputation and independence of the judiciary and the nature of the relationship between the Court of Justice and the national courts. Lastly, according to the United Kingdom Government, it would be questionable to have proceedings on the liability of the State for acts or omissions of its judicial organs heard by the national courts of that State in the light of the requirements of impartiality, unless those courts were to make references to the Court of Justice for a preliminary ruling on the matter, which would amount to establishing an appeal before the Court, contrary to the wishes of the framers of the EC Treaty.

22. The German and Netherlands Governments do not oppose the idea of the liability of the State for the acts or omissions of its supreme courts. However, at the hearing, the Netherlands Government submitted that it is a matter governed by national law, not Community law, and that, in any event, such State liability should be limited to very exceptional cases. The German Government also argues in favour of exceptional rules governing liability based on those existing in German law.

23. According to the Commission of the European Communities, the principle of State liability for any type of public authority stems from both the Treaty (Article 10 EC and the second and third paragraphs of Article 249 EC) and the Court's settled case-law according to which it is for each Member State to ensure that individuals obtain redress for loss and damage caused to them by non -compliance with Community law, whichever public authority is responsible for the breach.

B — *Analysis*

24. I shall examine, first, whether in such circumstances Community law imposes on Member States an obligation to make reparation *vis-à-vis* individuals and, second, whether the obstacles raised by some of the parties to these proceedings preclude the recognition of such an obligation.

1. Does Community law impose on Member States an obligation to make good the loss or damage caused to individuals by breach of Community law by a supreme court?

25. I take the view that this question should be answered in the affirmative. [22] That reply is based on three series of

22 — I have already briefly expressed my view to that effect in my Opinion in Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, point 114.

arguments relating to, first, the broad scope given by the Court to the principle of State liability for breach of Community law, second, the decisive role of the national court in the implementation of Community law, in particular where it is acting as a supreme court, and, third, the situation obtaining in the Member States, in particular in the light of the requirements for protection of fundamental rights.

(a) The scope of the principle established by case-law of State liability for breach of Community law

26. The scope of the principle of State liability for breach of Community law must be analysed having regard to the Court's two abovementioned leading judgments on the subject, namely, *Francovich and Others* and *Brasserie du pêcheur and Factortame*.

(i) *Francovich and Others*

27. The principle of State liability was established by the Court in *Francovich and Others* in a particular situation distinguished by failure to transpose a directive without direct effect, which prevents individuals from invoking before the national courts the rights conferred on them by that directive. [23] In spite of the specific nature of the situation in question, which was particularly 'pathological', the Court expressed itself in very general terms: 'it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible'. [24] No details were given about the State organ responsible for the loss or damage.

28. That conclusion is based on an analysis whose scope is also very general. According to the Court, 'the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty'. [25] That principle is somehow consubstantial with the system of the Treaty, it is necessarily attached to it. That indissoluble and irreducible link between the principle of State liability and the system of the Treaty results from the specific nature of the Community legal order.

23 — Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23).

24 — Paragraph 37.

25 — *Ibidem*, paragraph 35. That phrase has been repeated verbatim by the Court in, *inter alia*, *Brasserie du pêcheur and Factortame*, paragraph 31; Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 38; *Hedley Lomas*, paragraph 24; Joined Cases C-178/94, C-179/94, C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20; Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I-5063, paragraph 47; Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, paragraph 106; Case C-319/96 *Brinkmann* [1998] ECR I-5255, paragraph 24; Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 26; Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 36, and Case C-118/00 *Larsy* [2001] ECR I-5063, paragraph 34.

29. The Court recalls that 'the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions'. [26]

30. Furthermore, it has been 'consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals'. [27]

31. The Court deduces from those two premisses that '[t]he full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.' [28]

32. Secondarily, the Court states that, under Article 5 of the EC Treaty (now Article 10 EC), the Member States are required to nullify the unlawful consequences of a breach of Community law. [29]

33. A number of lessons can be drawn from that reasoning.

34. First of all, as Advocate General Tesauro pointed out in his Opinion in *Brasserie du pêcheur and Factortame*, 'in *Francovich* the Court did not confine itself to leaving it to national law to draw *all* the legal inferences from the infringement of provisions of Community law, but held that Community law itself imposed on the State an obligation to make reparation *vis-à-vis* individuals'. [30]

35. Furthermore, that obligation to make reparation constitutes a fundamental principle of Community law, which is as fundamental as that of the primacy of Community law or direct effect. Like those

26 — *Francovich and Others*, paragraph 31. The Court refers to Case 26/62 *Van Gend & Loos* [1963] ECR 1 and Case 6/64 *Costa* [1964] ECR 585.

27 — *Francovich and Others*, paragraph 32. The Court refers to Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 16, and Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19.

28 — *Francovich and Others*, paragraph 33.

29 — *Ibidem*, paragraph 36.

30 — Point 22.

two principles, the obligation on the State to make good the loss or damage caused to individuals by breach of Community law helps to ensure the full effectiveness of Community law through effective judicial protection of the rights which individuals derive from the Community legal order. Indeed, the principle of State liability constitutes the necessary extension of the general principle of effective judicial protection or of the 'right to challenge a measure before the courts', whose importance has been regularly underlined by the Court and whose scope has been constantly extended through its case-law.

36. In my view, the reasoning of the Court in *Francovich and Others* is fully transferable to the case of a breach of Community law by a supreme court. The full effectiveness of rules of Community law would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a supreme court is responsible.

37. In order to obtain effective judicial protection of the rights which they derive from Community law it is not sufficient for individuals to be entitled to invoke Community law before a supreme court or for that court to be required to apply Community law correctly. It is also necessary, if a supreme court renders a decision contrary to Community law, for individuals to be in a position to obtain redress, at least where certain conditions are fulfilled.

38. Where there is no possibility of an appeal against a decision of a supreme court, an action for damages alone serves — in the final analysis — to ensure that the right infringed is restored and, finally, to ensure that the effective judicial protection of the rights which individuals derive from Community law is of an appropriate level. [31]

39. In that regard, it is important to bear in mind that, in spite of the considerable advantages which State liability may have for individuals, 'reinstating [the] financial content [of the individual's right] is something less, a minimum remedy compared with full substantive reinstatement, which remains the optimum means of protection'. [32] Nothing is worth as much as the immediate, direct and substantive protection of the rights which individuals derive from Community law.

31 — In this respect, the question of the liability of the State for the acts of its supreme courts raises issues which are appreciably different from those of the liability of the State for the acts of its ordinary courts or its courts in general.

32 — See the Opinion of Advocate General Tesauro in *Brasserie du pêcheur and Factortame*, point 34.

40. As a consequence, I am of the opinion that the principle of State liability for breach of Community law must be extended to the situation where that breach is committed by a supreme court. That conclusion is all the more inevitable in the light of *Brasserie du pêcheur and Factortame*.

(ii) *Brasserie du pêcheur and Factortame*

41. In *Brasserie du pêcheur and Factortame*, the Court deduced from its decision in *Francovich and Others* that the principle of State liability — since it is inherent in the system of the Treaty — holds good for any breach of Community law, whatever be the organ of the State whose act or omission was responsible for the breach. [33]

42. By that statement, the Court is no longer acting on the basis only of the system of the Treaty. It is also acting on the basis of the need for Community law to be uniformly applied and on the useful comparison with State responsibility in international law.

43. As regards the uniform application of Community law, the Court has held that 'in view of the fundamental requirement of the Community legal order that Community law be uniformly applied..., the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities'. [34] In my view, that fundamental requirement of the Community legal order is imposed on judicial authorities with the same force as on parliamentary authorities. The guarantee of compliance with Community law — in which the mechanism of State liability plays a large part [35] — cannot vary at the will of the Member States, according to the domestic rules on the division of powers between constitutional authorities or those on the powers of State institutions and the conditions for the exercise of such powers.

33 — Paragraph 32, in conjunction with paragraph 31. That expression has been repeated and extended by the Court in Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 62; *Haim*, paragraph 27, and *Larsy*, paragraph 35, in the following terms: '[i]t is for each Member State to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation'. That clarification is addressed in particular to the federal Member States.

34 — *Brasserie du pêcheur and Factortame*, paragraph 33. See, also, Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 26.

35 — The Court did not fail to point out, in the famous *Van Gend & Loos* judgment, that '[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States' (p. 13).

44. As to State responsibility in international law, the Court has held that, 'in 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'. [36] The Court held further that this must àpply *a fortiori* in the Community legal order since a major interest is taken in the legal situation of individuals. [37]

45. In doing so, as the French Government submitted, the Court intended to refer to the principle of State unity. It is now important to draw from that all the appropriate conclusions in respect of State liability for the acts or omissions of a supreme court. It is commonly accepted in international law that that principle, which is customary in nature, has a double meaning.

46. In the first place, that principle means that an unlawful act is necessarily attributed to the State, and not to the State organ which committed it. Only the State is a person recognised as having rights and duties in international law, to the exclusion of its organs. On that basis, only the State can be rendered liable. [38] That principle is not unknown to Community law [39] or indeed to national law. [40] As I stated in my Opinion in *Hedley Lomas*, '[Community law] sees only one liable party (the State), just as, in proceedings for failure to fulfil Treaty obligations, it sees only one defendant (the State)'. [41] It follows that '[i]t is not a specific organ of the State but rather the Member State *qua* State which must provide compensation'. [42]

47. In the second place, the rule of State unity means that the State is liable for the loss or damage which it causes by any act or omission contrary to its international obligations, whichever State authority is responsible for it. That principle is clearly set out in Article 4(1) of the draft articles on the responsibility of States, which were drawn up by the International Law Commission and approved, on 28 January 2002, by a resolution of the General

36 — *Brasserie du pêcheur and Factortame*, paragraph 34.

37 — In Community law, State liability can be — directly — put in issue by individuals. This is not the case in international law, because it is the State, in the name of the diplomatic protection of its nationals, which takes account of the interests of individuals. State liability is thus only indirectly put in issue by individuals.

38 — See, on that subject, Nguyen Quoc Dinh, *Droit international public*, LGDJ, 6th ed. entirely reworked by P. Daillier and A. Pellet, 1999 (pp. 740 to 751), and I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I, Clarendon Press Oxford, 1983 (p. 144).

39 — See footnote 42 to the Opinion of Advocate General Tesauro in *Brasserie du pêcheur and Factortame*.

40 — On the basis of that principle, a number of French administrative courts have held the State liable for breach of Community law, while at the same time not expressly approving the principle of such liability for the acts or omissions of the legislature. See, to that effect, my Opinion in *Hedley Lomas*, points 118 to 125.

41 — Point 126 in conjunction with point 113.

42 — *Ibidem*, point 112.

Assembly of the United Nations.[43] That provision states that '[t]he conduct of any State organ[44] shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State'.[45]

48. On that subject, it is interesting to note that the international responsibility of a State has already been acknowledged — relatively early — in cases where the content of a definitive judicial decision infringed the international obligations of the State in question.[46] Such cases are regarded, under international law, as a denial of justice, that is, a breach of the customary — and more and more treaty-based — obligation of judicial protection by the State of foreign nationals.[47]

49. The system established by the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') brings an interesting light to bear on the issue of State liability for the acts or omissions of a supreme court. Before the European Court of Human Rights, individuals may directly put in issue State liability for the acts or omissions of a national court, on the basis of failure to fulfil the requirements of a fair hearing — *in procedendo* —, but also on the basis of breach of a substantive rule — *in iudicando* — such as adversely to affect the very content of the judicial decision.[48] By means of such proceedings, individuals may be eligible for compensation in the form of 'just satisfaction'. As certain governments have stated, it is interesting to note that the rule whereby all domestic remedies must have been exhausted means that the judi-

43 — See the Annex to the Resolution (Doc A/Res/56/83).

44 — A State organ is defined in Article 4(2) as including any person or entity which has that status in accordance with the internal law of the State.

45 — Those provisions should be compared with those provisionally adopted in 1973 in the same forum, according to which '[t]he conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organisation of the State'. See *Yearbook of the International Law Commission*, 1973, Vol. II, p. 197.

46 — Italian-Venezuelan Tribunal, award of 3 May 1930, *Martini* (2 RIAA 978). That award was made in the context of a difference relating to the performance of a contract for a coal-mining concession granted by the Republic of Venezuela to an Italian undertaking. The Venezuelan State was held liable by reason of a decision of the Federal Court of Cassation (Venezuela) which was held to be partially incompatible with an international arbitral award made in accordance with an international agreement to which that State was a party.

47 — The concept of 'denial of justice' covers various cases such as the refusal to allow foreigners access to the courts, excessive delay or conversely the unusually expedited conduct of proceedings, manifestly malicious conduct *vis-à-vis* an applicant or a foreign national, a definitive judgment which is incompatible with the international obligations of the State or manifestly unjust, and the refusal to enforce a judgment in favour of a foreigner (see Nguyen Quoc Dinh, op. cit.).

48 — That is the case, in particular, in respect of disputes on family matters and status in civil law (pursuant to Article 8 of the European Convention on Human Rights), disputes on the right to property (under Article 1 of Protocol (No 1)) or disputes relating to freedom of expression (under Article 10 of that convention). As regards freedom of expression, see, *inter alia*, the judgment of the European Court of Human Rights of 26 April 1979 *Sunday Times* v *United Kingdom* in respect of a House of Lords decision which, by applying the concept of contempt of court, prohibited the publication of newspaper articles about a medicinal product during the course of the proceedings to which that product had given rise (Series A No 30).

cial decision at issue is that of a supreme court. On the other hand, it is not clear that Article 13 of the ECHR imposes on the Contracting States the obligation to make available to individuals a domestic remedy — including an action for damages — against a judicial decision. [49]

50. Those explanations about State unity in international law are well known in Community law. It is in that context that we can place the principle, referred to in paragraph 34 of *Brasserie du pêcheur and Factortame*, that 'in the Community legal order... all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law'. It is on the basis of that principle that the Court stated, in paragraph 35 of that judgment, that '[t]he fact that, according to national rules, the breach complained of is attributable to the legislature cannot affect the requirements inherent in the protection of the rights of individuals who rely on Community law and, in this instance, the right to obtain redress in the national courts for damage caused by that breach'.

51. It follows from all these arguments that, by the judgment in *Brasserie du pêcheur and Factortame*, the Court did not merely expressly acknowledge, in the Community legal order, the principle of State liability for the acts or omissions of the legislature. In fact, it also — impliedly, but necessarily — extended that principle to judicial acts, in any event to those of supreme courts. [50] The present proceedings thus give the Court the opportunity to state explicitly what it has already implied.

52. In any event, even if that reading of *Brasserie du pêcheur and Factortame* is not adopted, I do not see how the Court could rule otherwise than in favour of State liability for acts or omissions of a supreme court. In addition to the fact that it would fit harmoniously into the extension of the Court's case-law which has just been broadly outlined, the acknowledgement of such liability seems to be the corollary of the mission — of the utmost importance — conferred on the supreme courts in the direct, immediate and effective protection of the rights which individuals derive from Community law. The situation which obtains in the Member States, in particular in the light of the requirements of protection of fundamental rights, also points in that direction.

49 — See, on that point, L.-E. Pettiti, E. Decaux and P.-H. Imbert, *Commentaire article par article de la convention européenne des droits de l'homme*, Economica, 2nd ed., 1999, p. 462.

50 — See, also, to that effect, A. Barav, 'Responsabilité et irresponsabilité de l'État en cas de méconnaissance du droit communautaire', *Liber Amicorum Jean Waline*, p. 435; D. Simon, 'La responsabilité de l'État saisie par le droit communautaire', *AJDA*, July-August 1996, p. 494, and L. Dubouis, 'La responsabilité de l'État législateur pour les dommages causés aux particuliers par la violation du droit communautaire et son incidence sur la responsabilité de la Communauté', *RFDA*, May-June 1996, p. 585.

(b) The decisive role of the national court in the implementation of Community law

53. Established by law, the European Communities have been developed and consolidated essentially through law. Since the national courts have the function of applying the law, including Community law, they inevitably constitute an essential cog in the Community legal order. At the 'crossroads' of a number of legal systems, their role is to make an important contribution to the effective application of Community law and, eventually, to the development of the process of European integration. Accordingly, we can understand why the Court has always, throughout its case-law, underlined the decisive role of the national courts in the implementation of Community law. We can also detect the progressive development of a real 'Community judicial ethic'. [51] As A. Barav has noted, 'both the primacy of Community law and its direct effect constitute, above all, instructions to the national courts'. [52] By virtue of those two principles, [53] a national court is required to play the role of both judge in a conflict of — national and Community — norms and 'natural' protector of the rights which individuals derive from Community law.

54. The function of the national court involves a dual obligation: to interpret, as far as possible, its national law in accordance with Community law and, where that is not possible, to disapply the national law which is contrary to Community law. [54]

55. As regards the obligation of interpretation in conformity with Community law, it has been established by the Court both in respect of primary Community law (the Treaty provisions) [55] and secondary Community law (in particular directives). In that regard, the Court has held that the Member States' obligation under a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts. It has concluded that, 'in applying domestic law [whether its provisions predate or are subsequent to the directive] the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording

51 — That expression was employed by F. Grévisse and J.-C. Bonichot in 'Les incidences du droit communautaire sur l'organisation et l'exercice de la fonction juridictionnelle dans les États membres', *L'Europe et le droit, Mélanges en hommage à Jean Boulouis*, Dalloz, 1991, p. 297 et seq.

52 — A. Barav, 'La plénitude de compétence du juge national en sa qualité de juge communautaire', *L'Europe et le droit, Mélanges en hommage à Jean Boulouis*, Dalloz, 1991, p. 1 et seq.

53 — These two fundamental principles of the Community legal order were established by the Court in the famous cases of *Van Gend & Loos* and *Costa*.

54 — I will not refer to the role of the national court in respect of the assessment of the validity of a measure of secondary Community law. I will concentrate on the situation at issue in the main proceedings, namely the application by the national court of its national law which is alleged to be contrary to Community law.

55 — See, in particular, Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11.

and purpose of the directive in order to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC)'. [56] The Court has held that '[t]he principle of interpretation in conformity with directives must be followed [by a national court] in particular where a [Member State] considers... that the pre-existing provisions of its national law satisfy the requirements of the directive concerned' [57] with the result that it did not believe it necessary to transpose the directive into national law.

56. The only restriction on the national court, in that exercise of interpretation in conformity with Community law, is not to impose on an individual an obligation laid down by a directive which has not been transposed or to determine or aggravate, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions. [58]

57. As regards the obligation to disapply national law which is contrary to Community law, it was vigorously asserted by the Court in *Simmenthal*. On the basis of the principles of direct applicability and the primacy of Community law, the Court laid down the requirement that 'a national court which is called upon, within the limits of its jurisdiction [as an organ of a Member State], to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means'. [59]

58. It is clear from *Simmenthal* that the national court is bound by a major obligation, comparable to an obligation to achieve a certain result. It must ensure the immediate protection of the rights which individuals derive from the Community legal order. That requirement of immediacy in the protection of the rights conferred by Community law satisfies a dual purpose of effectiveness: effectiveness of protection and, as a consequence, effectiveness of the legal rule itself.

59. In that regard, it has been pointed out that, although the national court, like any organ of a Member State, is required to apply Community law, its mission is 'all the

56 — See, in particular, Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26; Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 26; Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 41, and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 24.

57 — Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 21.

58 — *Arcaro*, paragraph 42, referring to Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraphs 13 and 14.

59 — Paragraph 24 in conjunction with paragraph 16. Some indications to that effect could already be seen in Case 13/68 *Salgoil* [1968] ECR 453.

more crucial because, "faced with the final stage of the rule's execution", it is the guarantor of compliance with that rule'. [60] Its position is all the more 'strategic' because it is incumbent upon it to assess the relationship of its domestic law with Community law and to draw the necessary conclusions. Thus the national judge is no longer necessarily, as Montesquieu was able to say in earlier times, 'the mouthpiece of the law'. On the contrary, he is required to cast a critical eye over his domestic law in order to ensure, before applying it, that it is in conformity with Community law. If he takes the view that his national law cannot be interpreted in conformity with Community law, he is required to disapply it and even to apply provisions of Community law in place of his national law by means of a substitution of norms, unless that — also — results in an aggravation of the legal position of individuals. [61]

60. That case-law has played a large role in developing the function of the courts, in reinforcing their authority within the State at the expense, in certain national legal systems, of constitutional developments. At the same time, this means that the courts must make the necessary effort to adapt to a legal environment which has been extended and made more complex as a result of the difficulties which may be caused by the relationship between domestic law and Community law. However, it should be pointed out that the national courts are not left entirely to themselves, they may be assisted in their task by the Court, thanks to the system of judicial cooperation provided by the procedure of references for a preliminary ruling.

61. As an extension of *Simmenthal*, the Court held in *Factortame and Others* [62] that the national court must set aside any obstacle of national law which precludes it from granting, if necessary, interim relief designed to protect rights which individuals claim to derive from Community law. That case involved granting interim relief pending the delivery by the national court of a decision as to the substance on whether the rights relied on by individuals on the basis of Community law existed, that fact being itself conditional on the Court's reply to a question referred by that national court for a preliminary ruling on the interpretation of the rules of Community law concerned. That judgment demonstrates the Court's interest in preventing individuals sustaining — seemingly irreparable — loss or damage as a result of the national court's application of domestic rules whose conformity with Community law might reasonably be called in question. The requirement of immediate protection for rights which individuals derive from the Community legal order is far from negligible, since the Court entrusts the national judge with a

60 — See M. Wathelet and S. Van Raepenbusch, 'La responsabilité des États membres en cas de violation du droit communautaire. Vers un alignement de la responsabilité de l'État sur celle de la Communauté ou l'inverse?', *Cahiers de droit européen*, 1-2, 1997, pp. 13, 17.

61 — It follows from Case 14/86 *Pretore di Salò* [1987] ECR 2545, paragraph 20, that a directive 'cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive'. See, also, Case 152/84 *Marshall* [1986] ECR 723, paragraph 48, and *Kolpinghuis Nijmegen*, paragraphs 9 and 13. The Court has stated that this case-law seeks to prevent a Member State from taking advantage of its own failure to comply with Community law. See *Faccini Dori*, paragraph 22; Case C-192/94 *El Corte Inglés* [1996] ECR I-1281, paragraph 16, and *Arcaro*, paragraphs 36 and 42.

62 — Paragraph 23.

mission which is particularly effective and efficient, making him more like a judge hearing an application for interim measures.

62. The involvement of the national courts in the protection of rights derived from the Community legal order can be seen with particular clarity in disputes over the recovery of sums overpaid. As early as 1983, the Court held that the 'entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes'. [63] That entitlement to repayment requires the availability at national level of an appropriate remedy which enables individuals to recover in total the sums which they have wrongly and in fact paid. It also means, as a corollary, that the national courts have an obligation to enjoin the administrative authorities to repay the sums at issue to the persons concerned.

63. That case-law represents an important step forward in the definition of the function of national courts. Not only are they required to sidestep provisions of their domestic law — which are contrary to Community law — in order to allow applications for reimbursement (as an extension of *Simmenthal*), but they are also obliged to enjoin the administrative authorities to effect the reimbursement. [64]

64. A decisive and complementary step was taken with *Francovich and Others* and *Brasserie du pêcheur and Factortame*. As we know, the Court established the principle of State liability for loss or damage caused to individuals by breaches of Community law attributable to the State. It follows that individuals are entitled to redress by putting in issue — before the national courts — the liability of the State. That mechanism of liability is a necessary supplement to that of the recovery of sums overpaid, in cases where the loss or damage caused by a State organ is not the result of the execution of an order to pay a sum of money and therefore cannot be made good by the restitution of such a sum. It also makes it possible to overcome the limits of the obligation of interpretation in conformity with Community law and of the legal scope of directives. [65]

65. Finally, it should be borne in mind that, in certain cases, the national courts are

63 — Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12.

64 — This mechanism of a court injunction to the administrative authorities was far from being recognised in a number of Member States on account of the traditional principle of the separation of powers.

65 — The Court has stated that, '[i]f the result prescribed by the directive cannot be achieved by way of interpretation,... in terms of the judgment in... *Francovich and Others*, Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive'. See, in particular, *Faccini Dori*, paragraph 27, and *El Corte Inglés*, paragraph 22. Those judgments were given in cases where a directive could not have direct effect because of the absence of horizontal direct effect (that is, in relations between individuals).

obliged to raise of their own motion a plea in law based on the Community legal order, if none of the parties has relied on it. [66]

66. It can easily be inferred from all this case-law that the Court confers on the national courts an essential role in the implementation of Community law and in the protection of the rights derived from it for individuals. Indeed people like to call the national courts, according to an expression commonly employed, 'Community courts of ordinary jurisdiction'. That expression must not be understood literally, but symbolically: where a national court is called upon to apply Community law, it is in its capacity as an organ of a Member State, [67] and not as a Community organ, as a result of dual functions.

67. That essential role of the national courts in the application of Community law has ultimately resulted in the recognition of a 'right to challenge a measure before the courts' and in its being enshrined as a general principle of Community law. The Court has held that 'judicial control... reflects a general principle of law which underlies the constitutional traditions common to the Member States [and which] is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms'. [68]

68. That concept of a 'right to challenge a measure before the courts' is the corollary of the rule of law. As Advocate General Darmon stated in his Opinion in *Johnston*, '[a]lthough the principle of legality is the cornerstone of the rule of law, it does not exclude consideration of the demands of public order. Indeed, they must be accommodated in order to ensure the survival of the State, whilst at the same time arbitrary action must be prevented. Review by the courts is a fundamental safeguard against such action: the right to challenge a measure before the courts is inherent in the rule of law'. [69] He concluded that, '[f]ormed of States based on the rule of law, the European Community is necessarily a Community of law. It was created and works on the understanding that all

66 — The Court has held that Community law precludes, in certain circumstances (in particular in the absence of a second court), the application of a national procedural rule which prevents the national court, seised of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period. See Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 21. Furthermore, the Court has held that where, by virtue of domestic law, courts or tribunals must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned. It stated further that the same is true where domestic law confers on courts and tribunals a mere discretion — and not an obligation — to apply of their own motion binding rules of law. See Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705, paragraphs 13 and 14.

67 — *Simmenthal*, paragraph 16.

68 — Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18. The fundamental nature of such a principle has been recalled on a number of occasions. See, *inter alia*, Case C-97/91 *Oleificio Borelli* v *Commission* [1992] ECR I-6313, paragraph 14; Case C-1/99 *Kofisa Italia* [2001] ECR I-207, paragraph 46; Case C-226/99 *Siples* [2001] ECR I-277, paragraph 17; Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45, and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39.

69 — Point 3.

Member States will show equal respect for the Community legal order'. [70] It can be concluded that the 'right to challenge a measure before the courts' is both 'a victory over and an instrument of the rule of law'. [71]

69. These considerations are now, significantly, taken up in Article 6(1) of the Treaty on European Union, resulting from the Maastricht Treaty, which states that '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.

70. I take the view that equal respect by the Member States for the Community legal order, in accordance with the requirements of a Community based on the rule of law, formed of States based on the rule of law, means that the Member States are to be held liable for breaches of Community law, irrespective of whether the organ responsible was the legislature, the executive or the judiciary. It is impossible to see how a Member State could prima facie escape all liability for the acts or omissions of its supreme courts when, specifically, those courts are responsible for applying and ensuring compliance with Community law. That would amount to an insuperable paradox. It follows that, although the specific nature of the judicial function, when compared with that of the administrative authorities or the legislature, may provide justification for establishing special rules governing liability, it can in no way justify prima facie the exclusion of the principle that a State is liable for the acts or omissions of its supreme courts.

71. This conclusion is commensurate with the leading role played by the supreme courts in the application of Community law.

72. In accordance with their traditional functions of ensuring that the law is uniformly interpreted, the supreme courts are responsible for ensuring that the other national courts apply Community law correctly and effectively. To that end, it is incumbent upon them to pay very particular attention to the conformity of domestic law with Community law and to draw all necessary conclusions.

73. Moreover, experience shows that the supreme courts are regularly faced with situations which justify such analysis and are thus required to interpret national provisions in conformity with Community law, and even to disapply those provisions by reason of their incompatibility or their inconsistency with Community law. The Court's case-law on the legal issue con-

70 — *Idem.*

71 — See J. Rideau, *Le droit au juge dans l'Union européenne*, LGDJ, Paris, 1998, and, more specifically, F. Picod, 'Le droit au juge en droit communautaire', pp. 141 to 170.

cerned certainly provides some useful pointers in that regard. [72] Furthermore, certain supreme courts do not hesitate to show great vigilance in respect of the obligation to raise of their own motion the application of Community law. [73]

74. In addition, it should be borne in mind that the framers of the Treaty gave to the supreme courts a decisive role in the implementation of the mechanism of judicial cooperation provided by the preliminary ruling procedure. Article 234 EC states that, unlike the other national courts or tribunals which have a mere discretion to refer a question to the Court for a preliminary ruling, courts or tribunals against whose decisions there is no judicial remedy are obliged to do so. [74]

75. The importance of the obligation to make a reference, imposed by Article 234 EC, was forcefully pointed out by the Court in *CILFIT and Others*. [75] The establishment of such an obligation seeks to prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law. [76] It is the supreme courts which are responsible for referring questions for a preliminary ruling in order to prevent the extension or occurrence of divergences in judicial decisions between the Member States and, in particular, between the ordinary courts of the State in which they exercise their functions.

72 — This is what is shown, in particular, by the case-law of the Cour de cassation (Court of Cassation) (France) on the maintenance of employment contracts when the legal situation of the employer is modified. The provisions to that effect in Article L. 122-12 of the Code du travail (Employment Code) have been interpreted by the Cour de cassation, by dint of a reversal of precedent, in an extensive manner which is consistent with the interpretation by the Court of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26). See the judgment of the Cour de cassation of 16 March 1990 (Bull. civ. Ass. Plén. No 3), subsequent to the ruling in Case 324/86 *Tellerup* [1988] ECR 739, and a number of judgments of the Cour de cassation, in particular that of 22 January 2002 (Bull. civ. 2002, V, No 25, p. 22), subsequent to the ruling in Case C-175/99 *Mayeur* [2000] ECR I-7755. We can also cite the example of the case-law of the Bundesgerichtshof (Federal Court of Justice) (Germany) on the right to rescind doorstep contracts. The provisions to that effect in German law have been interpreted extensively in accordance with the interpretation by the Court of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 732, p. 31). See the judgment of the Bundesgerichtshof of 9 April 2002 (XI ZR 91/99, *Neue Juristische Wochenschrift* 2002, p. 1881), subsequent to the ruling in Case C-481/99 *Heininger* [2001] ECR I-9945.

73 — The Court has held that the requirement to raise of its own motion the application of Community law is not mandatory where the national court would thereby be obliged to go beyond the ambit of the dispute defined by the parties or to examine facts which have not been argued before it (see *Van Schijndel and Van Veen*, paragraphs 20 to 22). This last point concerns essentially the supreme courts since they generally have jurisdiction to adjudicate only on matters of law, and not fact. That being so, the limits to the jurisdiction of the supreme courts do not prevent a number of them from exercising review 'upstream' on mixed grounds of fact and law by reproving a lower court for having failed sufficiently to examine whether, in the light of a number of facts which the supreme courts themselves cannot appraise, the application of Community law should lead to a different outcome. See, on that subject, G. Canivet, 'Le rôle de la Cour de cassation française dans la construction d'une Europe du droit', in *L'Europe du droit*, Conférence des notariats de l'Union européenne, Brussels, 2002, p. 153.

74 — This general scheme has been modified in part in respect of certain particular fields which, under the Treaty of Amsterdam, have come within the scope of Community law. This is true of all the fields under Title IV of the EC Treaty (visas, asylum, immigration, judicial cooperation in civil matters). Article 68(1) EC provides that courts or tribunals against whose decisions there is no judicial remedy are alone to have jurisdiction to refer questions to the Court for a preliminary ruling in those new fields of Community law. That exclusive jurisdiction is coupled with the establishment of an obligation for them to make such a reference. That system strengthens still further the leading position of the supreme courts in the application of Community law.

75 — Case 283/81 *CILFIT and Others* [1982] ECR 3415.

76 — *Ibidem*, paragraph 7.

76. All these arguments show to what extent the role of the national courts — and, above all, that of the supreme courts — is decisive in the application of Community law and in the protection of the rights derived from it for individuals. That decisive role necessarily means, as a *quid pro quo*, accepting a principle of State liability for the acts or omissions of supreme courts. In order to be further persuaded of this — if that is necessary — it is sufficient to take cognisance of the state of the domestic law of the Member States in this regard.

(c) The state of the domestic law of the Member States on State liability for the acts or omissions of courts

77. To my understanding, all the Member States accept the principle of State liability for judicial acts. All — except for the moment Ireland [77] — accept that principle in respect of judgments themselves where they infringe legal rules applicable in their territory, in particular where there is a breach of fundamental rights.

78. However, the scope of that principle varies according to the nature of the legal rule infringed and/or the source of the judgment.

79. As regards the nature of the legal rule, only the United Kingdom and the Kingdom of the Netherlands clearly limit the scope of State liability to cases of infringement of the rules laid down in Article 5 (deprivation of liberty) or Article 6 of the ECHR (relating to the guarantees of a fair hearing *in procedendo*, that is while the judgment is being prepared, and not the guarantees *in iudicando*, that is those relating to the content of the judgment itself).

80. All the other Member States [78] — excluding the Hellenic, Portuguese and French Republics, where the situation is evolving and more nuanced — accept the principle of State liability irrespective of the nature of the legal rule infringed.

81. As regards the source of the judgment, only the Republic of Austria and the Kingdom of Sweden limit State liability to the decisions of ordinary courts, excluding those of supreme courts. The Swedish legislation excluding State liability for the acts or omissions of supreme courts seems to have been the result of the absence of an appropriate national court or tribunal to

77 — Pending the enactment of a bill (European Convention on Human Rights Bill, 2001).

78 — The Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of Spain, the Italian Republic, the Grand Duchy of Luxembourg, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

hear any action for damages of that type. However, that exclusion of liability does not apply where a decision has been reversed or amended by the supreme court itself.

82. It follows from this comparative legal analysis that, in spite of the divergences which exist today, the principle of State liability — for a judgment of a supreme court in breach of a legal rule — is generally acknowledged by the Member States, or at least a strong tendency in that direction can be detected.

83. That acknowledgement is found not only in written rules (whether constitutional or legislative), but also in case-law. It is interesting to note that the Kingdom of Belgium is the only Member State which has acknowledged, in its case-law, the general principle of the liability of the State for the actions of its courts. That principle was laid down by a judgment of the Cour de cassation (Belgium) of 19 December 1991, *De Keyser*, [79] in proceedings between an individual and the Belgian State as a result of a judgment which had become *res judicata*, on the ground that that judgment declared the automatic bankruptcy of a company, in breach of the principles requiring a fair and public hearing. That supreme court held that 'the principles of the separation of powers, the independence of the judiciary and its judges and *res judicata* do not imply that the State generally escapes the obligation under the legislative provisions cited above (Articles 1382 and 1383 of the Civil code) to make good loss or damage caused to third parties as a result of its wrongful conduct or that of its organs in the administration of the public service of justice, in particular in the performance of acts which constitute the direct object of the judicial function'.

84. Lastly, it is interesting to note that, in Italy, this principle of liability, laid down in legislation, has been recently applied by decision of the Tribunale di Roma (District Court, Rome) (Italy) of 28 June 2001 to a case in which the Corte suprema di cassazione had acted in breach of Community law. [80]

85. It follows from this comparative legal analysis that the principle of State liability for the acts or omissions of supreme courts can be acknowledged as a general principle of Community law. It is settled case-law that, in order to acknowledge the existence of a general principle of law, the Court does not require that the rule be a feature of all the national legal systems. Similarly, the fact that the scope and the conditions of application of the rule vary from one

79 — *Journal des tribunaux*, 1991, p. 141. See, also, the interesting Opinion of Advocate General Velu in that case (*Journal des tribunaux*, 1992, pp. 142 to 152) and the commentaries on that judgment in European legal writings (in particular in *European Review of Private Law* 2, 1994, pp. 111 to 140).

80 — *Giurisprudenza di merito*, 2002, p. 360.

Member State to another is not material. The Court merely finds that the principle is generally acknowledged and that, beyond the divergences, the domestic laws of the Member States show the existence of common criteria. [81]

86. It follows from all these arguments about the scope of the principle of State liability, the role of the national courts and the state of the domestic law of the Member States that Community law imposes on those States an obligation to make reparation for breach of Community law by a supreme court. That conclusion cannot be undermined by the supposed obstacles raised by some of the parties to the present proceedings.

2. The obstacles raised by some of the parties to the present proceedings are not such as to preclude State liability for breach of Community law by a supreme court

87. A number of obstacles have been put forward by the Republic of Austria and the Austrian, French and United Kingdom Governments. These obstacles relate to the independence of the judiciary, the comparison of the rules governing Member State liability with those governing Community liability, *res judicata* and the impartiality of the national courts which would adjudicate on such actions for damages. I will examine these various arguments in the order indicated.

(a) The independence of the judiciary

88. It should be recalled that the argument based on the independence of the judiciary is irrelevant in Community law, as in international law. As we know, under international law, a State cannot rely on the particular characteristics of its constitutional organisation in order to escape liability. That situation is only a particular expression of the general principle that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. [82] It follows that 'the conduct of an organ of a State — even an organ independent of the executive power — must be regarded as an act of that State'. [83]

81 — See, on that subject, my Opinion in Case C-87/01 P *Commission* v *CEMR*, pending before the Court, points 51 to 53.

82 — See Article 27 of the Vienna Convention on the Law of Treaties 1969.

83 — See the advisory opinion of the International Court of Justice of 29 April 1999 relating to a difference between the United Nations Organisation and the Malaysian State further to failure by the authorities of that State, in particular the judicial authorities, to observe the immunity from legal process of a person entitled to claim it on the basis of the 1946 Convention on the Privileges and Immunities of the United Nations (paragraph 63).

89. The same is true under Community law. The Court consistently repeats 'that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits under Community directives'. [84] It concludes, according to settled case-law, that 'the liability of a Member State under Article 169 arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution'. [85]

90. Moreover, it might be asked whether the question of the independence of the judiciary should not be raised more in the context of the establishment of rules governing the personal liability of judges than in the context of rules governing the liability of the State. [86]

91. In addition, it must be pointed out that such arguments — however legitimate they may be — have not, in a fair number of Member States, prevented the establishment of such rules governing State liability.

(b) The parallel between the rules governing Member State liability and those governing Community liability

92. It is true that the definition of the substantive conditions governing the system of rules on Member State liability is not without effect on those governing Community liability. In that regard, the Court's case-law has been responsible for aligning those conditions, as illustrated in particular by *Brasserie du pêcheur and Factortame*, [87] in respect of Member State liability, and then *Bergaderm and Goupil* v *Commission*, [88] in respect of Community liability.

84 — See, in particular, Case 52/75 *Commission* v *Italy* [1976] ECR 277, paragraph 14; Case 390/85 *Commission* v *Belgium* [1987] ECR 761, paragraph 7; Case 9/86 *Commission* v *Belgium* [1987] ECR 1331, paragraph 5; and, more recently, Case C-276/98 *Commission* v *Portugal* [2001] ECR I-1699, paragraph 20, and Case C-352/01 *Commission* v *Spain* [2002] ECR I-10263, paragraph 8.

85 — See, in particular, Case 77/69 *Commission* v *Belgium* [1970] ECR 237, paragraph 15, and Case 8/70 *Commission* v *Italy* [1970] ECR 961, paragraph 9, concerning a failure to fulfil obligations as a result of parliamentary action. This should be compared with the Court's settled case-law on a national court's duty to interpret its domestic law in a manner consistent with a directive on the ground that 'the Member States' obligation under a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts' (see *Marks & Spencer*, paragraph 24. See also Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, paragraph 49).

86 — This was the view of the Cour de cassation (Belgium) in *De Keyser*, in accordance with the Opinion of Advocate General Velu on that point (*Journal des tribunaux*, 1992, p. 142).

87 — Paragraph 42.

88 — Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 39 to 47.

93. Moreover, the functioning of the Community system of justice has already been called in question on the ground that the Court of First Instance infringed the principle that decisions are to be adopted within a reasonable time. [89] That claim was examined by the Court, in its capacity as supreme court in the Community legal order.

94. However, we cannot infer that the rules governing Member State liability and the rules in respect of the Community must develop in strict parallel. As Community law now stands, the Community cannot be rendered liable on account of a decision of the Court of Justice, since it is the supreme court in the Community legal order. It would no doubt be different, in particular, if the European Community, or the European Union, were a signatory to the ECHR and agreed to be subject to review by the European Court of Human Rights in respect of the protection of fundamental rights in the application of Community law. [90]

89 — See, on that subject, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375.

90 — See, on that subject, the Opinion of the Court of 28 March 1996 concerning a proposal for accession by the Community to the European Convention on Human Rights (Opinion 2/94 [1996] ECR I-1759, paragraphs 20, 21, 34 and 35.

(c) Respect for *res judicata*

95. It is necessary to clarify the meaning of this concept before determining the effect which can reasonably be given to it.

96. *Res judicata pro veritate habetur*: a matter adjudicated is held to be true. That principle of Roman law is recognised by all the Member States [91] and the Community legal order. It means that a judicial decision — by which a dispute has been resolved — cannot be challenged, except by way of the judicial remedies prescribed by law. It follows that, where all remedies have been exhausted, such a decision (with legal authority) can no longer be challenged by the commencement of the same type of proceedings (it thus has the force of *res judicata*). As a number of governments have submitted, that principle is based on the need to ensure stability in legal relations by avoiding the endless reexamination of disputes. It is thus the result of a dual requirement: legal certainty and the sound administration of justice.

91 — See Opinion of Advocate General Jacobs in *Peterbroeck*, paragraph 23. That rule is also shared by the Member States in the field of criminal law in the form of the *non bis in idem* principle (see Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345).

97. What conclusion can be drawn in the context of the application of Community law? Are the Member States entitled to rely on the principle of *res judicata* in order to oppose an action for damages against the State on the basis of a decision of a supreme court in breach of Community law? In the absence of Community legislation on the matter, the answer must be sought within the area of the procedural autonomy of the national systems and the necessary limitations associated with it relating to respect for the principle of equivalence and effectiveness.

98. First of all, it should be borne in mind that, according to settled case-law, '[i]n principle, it is for the national courts to ascertain whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under national law comply with the principle of equivalence', [92] that is to say, that the rules are not less favourable than those relating to similar domestic claims. The national courts are in the best position to make such an appraisal since it requires a relatively detailed knowledge of national procedural rules. None the less, the Court generally takes the trouble to make some observations on that point in order to guide the national courts in their task. [93]

99. As we know, a number of Member States have acknowledged the right of individuals to bring an action in damages against the State on the basis of the breach of a rule of national law by a decision of a supreme court. In accordance with the principle of equivalence, those Member States are obliged to treat in the same way a similar action on the basis of Community law.

100. Furthermore, and in any event, it should be noted that no Member State is entitled to confer on the principle of *res judicata* a broader scope in respect of actions for damages on the basis of Community law than in respect of those on the basis of national law.

101. According to the prevailing traditional definition, the legal authority of a judicial decision — and, as a consequence, *res judicata* — is applicable only in certain circumstances, where there is a threefold identity — of subject-matter, legal basis and parties — between a dispute already resolved and a subsequent dispute. The legal authority of a decision is thus in

92 — See, in particular, Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 33; Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 39, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 56.

93 — See the case-law cited in footnote 92.

principle relative and not absolute.[94] As a consequence, it must be stated that a dispute — such as the dispute in the main proceedings — which relates to a claim for reparation of loss or damage caused by a breach of Community law and is brought against the State does not fulfil that requirement of threefold identity (which is cumulative, not alternative).

102. Moreover, that is why the rule of the legal authority of a judicial decision has not prevented a number of Member States from establishing rules governing State liability for the content of judicial decisions.

103. It follows that, by reason of the principle of equivalence, the Member States are not entitled to rely on the principle of *res judicata* to oppose prima facie such an action for damages against the State. That is all the more true in the light of the principle of effectiveness.[95]

104. It should be borne in mind that Member States are obliged to make good loss and damage caused to individuals by breaches of Community law attributable to those States. That principle was laid down by the Court in *Francovich and Others*[96] and has been consistently reasserted since then, in particular in *Brasserie du pêcheur and Factortame*.[97] Member States are therefore obliged not to make it in practice impossible or excessively difficult to exercise the right to redress, which is a right conferred by the Community legal order. It is clear that the exclusion of a judicial remedy designed to obtain redress tends to deny the existence of such a right and therefore necessarily runs counter to the principle of effectiveness which limits the procedural autonomy of the Member States.

105. It follows that the principle of *res judicata* cannot preclude the establishment of an obligation on the part of the Member States to make good loss or damage caused

94 — The legal authority of a decision is in principle relative. In French law, see Article 1351 of the Code civil; D. Tomasin, *Essai sur l'autorité de la chose jugée en matière civile* (including elements of comparative law), Paris, 1975, and Couchez, 'Procédure civile', Armand Colin, 11th ed., 2000, p. 165. In Spanish law, see A. Oliva Santos, *Sobre la cosa juzgada (Civil, contencioso-administrativa y penal, con examen de la jurisprudencia del Tribunal Constitucional)*, Editorial Centro de Estudios Ramón Areces, SA, pp. 44 to 57. In German law, see Paragraphs 322 ZPO and 121 VmGo. In Austrian law, see Paragraph 411 ZPO. 'Absolute' legal authority (*autorité absolue de la chose jugée*) applies generally only to decisions which annul an act in the context of a review of legality. See, in particular, R. Chapus, *Droit du contentieux administratif*, 2nd ed., Montchrestien, Paris, 1990, pp. 587 to 600. That rule can be compared to that applicable in the Community legal order in the context of actions for annulment on the basis of Article 230 EC.

95 — The principle of effectiveness means that the procedural rules for actions intended to ensure protection of the rights which individuals derive from Community law must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of those rights.

96 — Paragraph 37.

97 — Paragraph 36.

by a decision of a supreme court in breach of Community law. [98]

106. That conclusion is all the more necessary in the light of the principle of the primacy of Community law. A national rule, such as that of respect for *res judicata*, cannot be enforced against an individual in order to defeat an action for damages on the basis of Community law.

(d) Guarantees of the national courts' impartiality

107. I accept that it is legitimate to wonder whether the national courts — which would have to hear and adjudicate on actions for damages against the State as a result of a decision of a supreme court — would offer sufficient guarantees of impartiality in the light of the requirements imposed by Article 6(1) of the ECHR. [99]

108. It is the settled case-law of the European Court of Human Rights that '[t]he existence of impartiality... must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect', and that 'in this connection, even appearances may be of a certain importance'. [100]

109. That being so, this delicate question is no doubt not unprecedented for the Member States which have already established a system of State liability for the acts or omissions of courts, including supreme courts.

110. Furthermore, as we shall see below, it is not for the Court to adjudicate on the determination of which courts have jurisdiction in the matter, since that question falls, as a matter of privilege, within the sphere of Member State autonomy.

98 — That conclusion is not contrary to the Court's finding in Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraphs 43 to 48. In that case, the domestic procedural rules at issue restricted the possibility of applying for annulment of an arbitration award whose validity was challenged on the basis of Article 85 EC, that award proceeding upon an interim arbitration award which had acquired the force of *res judicata* since no application for annulment had been made in respect thereof within a certain time-limit. Although the Court recognised that procedural rule, on the basis of the principles governing the national judicial system, such as the principle of legal certainty and acceptance of *res judicata*, which is an expression of that principle, it cannot be concluded from that that the same should be true in an action for damages, because neither its purpose nor necessarily its effect is to reverse, vary or set aside a judicial decision.

99 — This requirement of judicial impartiality is also an element of the Charter of Fundamental Rights of the European Union (Article 47).

100 — See, in particular, *Piersak* of 1 October 1982 (Series A, No 11, paragraph 31); *De Cubber* of 26 October 1984 (Series A, No 86); *Hauschildt* of 24 May 1989 (Series A, No 154, paragraph 46), or *McGonnell* of 8 February 2000 (Series A, No 2112). See, on that subject, my Opinion in *Baustahlgewebe* v *Commission*, point 67.

111. Lastly, a guarantee of impartiality could be identified in the mechanism of judicial cooperation provided by the preliminary ruling procedure. Indeed in order to dispel any reasonable doubt as to its impartiality, the national court might choose to refer a question for a preliminary ruling and thus entrust to the Court the responsibility of examining whether the supreme court concerned has in fact acted in breach of Community law and, if so, to what extent. Recourse to such a procedure would offer a dual advantage since it would make it possible both to dispel any reasonable doubt as to the impartiality of the national court and to give guidance to that court in this delicate exercise by avoiding the risk of error in the appraisal of an alleged error.

112. In such circumstances, the role which the Court would be invited to assume — as an international court independent of the national courts — could be compared to that of the European Court of Human Rights in the examination of individual complaints. However, it would be excessive to infer that such a situation would lead to the establishment of a final remedy, that is to make the Court a final court of appeal. It is not a question of making a reference for a preliminary ruling automatic, but rather of pointing out that such a reference is possible. I do not regard this type of reference as anything other than the expression of a mechanism of judicial cooperation founded on the logic of dialogue and mutual trust between courts.

113. That argument as to the guarantees of the national courts' impartiality is no more able than the arguments based on the independence of the judiciary, the parallel with the rules governing the liability of the Community or *res judicata* to preclude the acknowledgement of the principle of State liability for breaches of Community law by a supreme court.

114. As a consequence, the answer to the first question submitted for a preliminary ruling must be that the principle that the Member States are required to make good loss or damage caused to individuals by breaches of Community law attributable to those States is applicable where a supreme court is responsible for the alleged breach.

VI — The substantive conditions determining imposition of State liability for breach of Community law by a supreme court

115. Before making any remarks about the present case, it is important to outline the general characteristics of the rules governing State liability for the acts or omissions of a supreme court.

A — *Observations of the parties*

116. The parties which have taken a position on this point have argued in favour of rules governing liability which are specific, restrictive and limited to exceptional, or very exceptional, cases.

117. According to the German Government, State liability is dependent on the supreme court's decision being objectively indefensible and the result of an intentional breach of Community law.

118. According to the Netherlands Government, State liability should arise in the case of a manifest and grave breach of the obligation to make a reference for a preliminary ruling, in the context of preparing the judicial decision. It states that an alleged breach of the obligation to make such a reference should be assessed in the light of the situation obtaining when the judicial decision is adopted. That view is in some respects the same as Mr Köbler's.

119. According to the Commission, State liability should be associated with a sufficiently serious breach of Community law, in a case where a supreme court commits a manifest abuse of its power or obviously misconstrues the meaning and scope of Community law. Such a breach includes, in particular, the case of a breach of the obligation to make a reference for a preliminary ruling.

B — *Analysis*

120. At this point, one question comes immediately to mind: is the definition of the substantive conditions determining such liability a matter of national law or Community law?

121. I am of the opinion that a simple reference to national law would have considerable drawbacks in terms of coherence in the effective protection of the rights derived by individuals from Community law, which include the right to redress. As Advocate General Tesauro pointed out in his Opinion in *Brasserie du pêcheur and Factortame*, 'a mere reference to national law would be in danger of endorsing a discriminatory system, in so far as for a given infringement Community citizens would receive different protection, some none at all'.[101] He drew the following conclusion: '[i]n order for protection in damages to be assured in all the Member States in at least a homogeneous — if not exactly uniform — manner, it is vital that

101 — Point 49.

it should be Community law itself which lays down at least the minimum conditions determining the right to compensation'. [102] I can only share those views. That is the exercise which the Court undertook in *Brasserie du pêcheur and Factortame*, in respect of State liability for the acts or omissions of the legislature, refining the rule in *Francovich and Others*.

122. It is thus necessary to examine the minimum 'Community' conditions to be satisfied if the State is to be rendered liable for the acts or omissions of its supreme courts. Is it enough purely and simply to transpose the conditions which have been laid down by the Court in respect of the legislature or the administrative authorities? In my view, the answer to that question must be no, because of the specific nature of the judicial function. None the less, it is important to maintain a certain coherence with the systems of rules which have been defined for those other two State organs and which have been applied on several occasions.

123. According to an expression which has become customary, the Court has laid down a principle that 'Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties'. [103] It is important to determine the meaning and scope of those three substantive conditions under which the State is liable for the acts or omissions of supreme courts, noting that these are minimum conditions. They do not prevent the State incurring liability under less strict conditions on the basis of national law. [104]

1. The nature of the rule infringed

124. It is commonly acknowledged that the requirement that the rule infringed must be intended to confer rights on individuals does not necessarily mean that the rule concerned must be directly effective. It is sufficient for that rule to entail the grant of rights to individuals and for the content of those rights to be identifiable with sufficient precision (on the basis of the provisions of the rule in question). [105] The direct effect of the legal rule at issue is not necessary, but sufficient to fulfil that requirement. In my opinion, that requirement in respect of State liability for the acts or omissions of the legislature or the administrative authorities is transposable to liability for the acts or omissions of supreme courts.

102 — Point 50.

103 — See *Brasserie du pêcheur and Factortame*, paragraph 51.

104 — *Ibidem*, paragraphs 66 and 74.

105 — See, in particular, *Francovich and Others* (paragraphs 40 and 44); *Dillenkofer and Others* (paragraphs 33 to 46), and Case C-140/97 *Rechberger and Others* [1999] ECR I-3499, paragraphs 22 and 23.

125. Furthermore, I take the view that State liability for the acts or omissions of a supreme court cannot be limited to the case of infringement of a higher-ranking rule, to the exclusion of all other rules. A number of arguments point in that direction.

126. First of all, the decision as to whether a legal rule is higher-ranking is far from easy, in particular in a legal system such as the Community legal order which has no hierarchy of norms. [106]

127. Furthermore, that condition that the legal rule infringed must be higher-ranking, which was laid down by the Court a number of years ago in respect of the non-contractual liability of the Community, has been recently abandoned by means of *Bergaderm and Goupil* v *Commission*, so that we can now speak of an alignment of the two systems of liability (Community and Member States). [107]

128. Finally, having regard to that aim of coherence between the systems of rules governing liability, it would be at least curious to introduce such a requirement now. Just as '[t]he protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage', [108] the same should be true between the various organs of the State, subject to certain modifications associated with the specific function in question.

129. Now that the nature of the rule of Community law infringed has been clarified, it is next necessary to determine the conditions to be satisfied by the breach of Community law if it is to be capable of giving rise to reparation.

2. The nature of the breach of Community law

130. It follows from *Francovich and Others* that 'although Community law imposes State liability, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage'. [109]

131. That condition relating to the nature of the breach at issue was clarified by the Court in *Brasserie du pêcheur and Fac-*

106 — See, to that effect, Opinion of Advocate General Tesauro in *Brasserie du pêcheur and Factortame*, points 71 and 72.

107 — Paragraph 42.

108 — See *Brasserie du pêcheur and Factortame*, paragraph 42.

109 — Paragraph 38.

tortame. Extending its case-law on the conditions for the non-contractual liability of the Community for its legislative activity, the Court drew a distinction between the following two situations.

132. First, where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach. That is the case where Community law imposes on the national legislature, in a field governed by Community law, obligations of result or obligations to take action (such as to transpose a directive within a certain time-limit) [110] or to refrain from taking action. That broad definition of State liability has been adopted on several occasions by the Court, in particular in respect of failure to transpose a directive, [111] transposition in breach of the temporal effects of a directive, [112] refusal by the administrative authorities to issue an export licence when the grant of such a licence should have been quasi-automatic having regard to the existence of harmonising directives in the field concerned. [113]

110 — See *Francovich and Others* (paragraph 46 referring to the failure to transpose in that case).

111 — *Dillenkofer and Others*, paragraph 26.

112 — *Rechberger and Others*, paragraph 51.

113 — *Hedley Lomas*, paragraphs 18, 28 and 29.

133. Second, where a Member State takes action in a field in which it has a broad discretion, it can incur liability only in case of a sufficiently serious breach, that is, where, in the exercise of its legislative function, it has manifestly and gravely disregarded the limits on the exercise of its powers. [114]

134. However, it may be asked whether such a distinction is currently relevant having regard to recent developments in the Court's case-law on State liability for the acts or omissions of the legislature or the administrative authorities.

135. In the first situation outlined in *Brasserie du pêcheur and Factortame*, that is to say, where the Member States have considerably reduced, or even no, discretion, the Court's assessment of whether there is a sufficiently serious breach depends less and less on the finding of a mere infringement of Community law. It is based, by contrast, more and more on criteria comparable to those which apply in the second situation outlined in *Brasserie du pêcheur and Factortame*, that is to say, where the Member States have a broad discretion.

114 — *Brasserie du pêcheur and Factortame*, paragraphs 45, 47, 51 and 55.

136. Thus the Court held that 'a mere infringement of Community law by a Member State may, but does not necessarily, constitute a sufficiently serious breach'. [115] It held further that, '[i]n order to determine whether such an infringement of Community law constitutes a sufficiently serious breach, a national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it'. [116] It stated that '[t]hose factors include, in particular, the clarity and precision of the rule infringed, [117] whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law'. [118] It is striking that those factors are identical, in every respect, to those set out in *Brasserie du pêcheur and Factortame*, in a situation where it was found that the legislature had a broad discretion. [119]

137. That case-law was confirmed by *Larsy*, [120] in respect of the grant by the Belgian administrative authorities of a retirement pension to a self-employed worker. The Court was careful to state that, in that case, the competent national institution had no substantive choice. [121]

138. In these circumstances, as the Court's case-law stands at present, I am of the opinion that it is not necessary to determine whether, in the exercise of the judicial function, the State has a broad discretion or not. On the other hand, it is important to determine whether the factors adopted by the Court in order to evaluate whether there is a sufficiently serious breach of Community law, for which the legislature or the administrative authorities are responsible, can be totally or partially transposed to the case of a breach for which a supreme court is responsible.

139. In my opinion, the decisive factor is whether the error of law at issue is excusable or inexcusable. That characterisation can depend either on the clarity and

115 — *Haim*, paragraph 41. The dispute in the main proceedings arose between a dental practitioner and a German association of dental practitioners of social security schemes as a result of that association's refusal to enrol him on the register of dental practitioners so that he could then be eligible for appointment as a dental practitioner under a social security scheme. Mr Haim brought an action for the liability of the State for the acts of the administrative authorities in order to obtain compensation for the loss of earnings which he claimed to have unlawfully suffered. The Court did not state whether this case fell within the first or second situation outlined in *Brasserie du pêcheur and Factortame*. It left the national court to decide that point, its being made clear that the existence and scope of the discretion of the Member State concerned must be determined by reference to Community law and not by reference to national law (paragraph 40).

116 — *Ibidem*, paragraph 42.

117 — That factor was also taken into account in *Rechberger and Others*, paragraphs 50 and 51, in respect of the transposition of a directive in breach of its temporal effects (to be compared with *Dillenkofer and Others*), and in *Stockholm Lindöpark*, paragraphs 39 and 40. In those two judgments, the Court stated that the Member State concerned did not have a legislative choice. It was thus indeed a case of the first situation outlined in *Brasserie du pêcheur and Factortame*.

118 — *Haim*, paragraph 43.

119 — Paragraph 56.

120 — Paragraph 39.

121 — Paragraph 41.

precision of the legal rule infringed, or on the existence or the state of the Court's case-law on the matter. A number of examples can be given to that effect.

140. Accordingly, the State can be rendered liable, for example, where a supreme court gives a decision contrary to provisions of Community law although their meaning and scope are clear. That would be the case where the wording of the provisions in question was clear and precise in every respect and unambiguous, so that it ultimately leaves no room for interpretation, but only straightforward application.

141. The State can also be rendered liable, for example, where a supreme court gives a decision which manifestly infringes the Court's case-law, as it stands on the day when the judgment at issue is delivered. The judgments of the Court, in particular preliminary rulings, are necessarily binding on the national courts as to the interpretation of provisions of Community law. [122] The national courts cannot disregard the case-law of the Court. They are entitled only to refer a question for a preliminary ruling in order to obtain useful guidance in order to resolve a dispute pending before them. [123]

142. By contrast, the State cannot be rendered liable on the basis of a decision of a supreme court which is contrary to a judgment of the Court which was delivered after the national decision, when that decision was consistent with the Court's case-law as it stood at that date, *a fortiori* where there was every reason to believe that the Court's case-law was stable. In such a case, if there is an error, the supreme court cannot be criticised for having failed to fulfil any of its obligations, because it rightly decided on the basis of the case-law as it stood at the time of its decision. In my opinion, that analysis is not incompatible with the temporal effects of preliminary rulings on interpretation.

122 — See, in particular, Case 29/68 *Milch-, Fett- und Eierkontor* [1969] ECR 165, paragraph 3, and Case 52/76 *Benedetti* [1977] ECR 163, paragraph 26.

123 — A national court may or must refer a question for a preliminary ruling, even if it has already referred one in connection with the same dispute. That possibility was made clear by *Milch-, Fett- und Eierkontor*, paragraph 3. The Court stated that a further reference for a preliminary ruling can be justified 'when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer to a question submitted earlier' (see *Pretore di Salò*, paragraph 12, and the order in Case 69/85 *Wünsche* [1986] ECR 947, paragraph 15). That mechanism has been used on several occasions by the national courts. See, in particular, Case 8/78 *Milac* [1978] ECR 1721; Case 244/80 *Foglia* [1981] ECR 3045; Joined Cases C-134/91 and C-135/91 *Kerafina — Keramische und Finanz-Holding and Vioktimatiki* [1992] ECR I-5699, and *Denkavit and Others*.

143. As we know, the Court has consistently held [124] that the interpretation which it gives to a rule of Community law clarifies and defines the meaning and scope of that rule as it ought to have been understood and applied from the time of its coming into force, so that the rule thus interpreted may, and must, be applied by the courts even to legal relationships *arising and established* before the judgment ruling on the request for interpretation is given. However, in my opinion, it is also necessary for such legal relationships not to have been *definitively confirmed* by a judicial decision, *a fortiori* where that is a decision against which there is no remedy. If the legal relationships at issue have been definitively confirmed by a decision of a supreme court, the principle of legal certainty precludes the liability of the State on that head. [125]

144. Finally, in my opinion, State liability cannot be prima facie precluded in the case of a supreme court's manifest disregard for its obligation to make a reference for a preliminary ruling where, for example, there is no case-law of the Court on the point of law at issue at the time when the national court gives its decision.

145. To this day, the Court has never given a specific ruling on that subject. [126]

146. As we know, the obligation to make a reference for a preliminary ruling is fundamental. It contributes greatly to the guarantees that Community law will be uniformly applied and the rights which individuals derive from the Community legal order will be effectively protected. Those considerations were in the Court's mind when it determined, in *CILFIT and Others*, [127] the scope of the obligation to make a reference for a preliminary ruling imposed by the Treaty.

147. Furthermore, the obligation to make a reference for a preliminary ruling tends to form part of the analysis of the 'right to challenge a measure before the courts' (or the 'right to obtain a judicial determination'). According to the settled case-law of the European Court of Human Rights, although '[t]he right to have a preliminary question referred to... the

124 — See, in particular, Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraph 16; Joined Cases C-367/93 to C-377/93 *Roders and Others* [1995] ECR I-2229, paragraph 42; Joined Cases C-197/94 and C-252/94 *Bautiaa and Société française maritime* [1996] ECR I-505, paragraph 47, and Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 15.

125 — It is indeed in the interest of legal certainty that the Court has acknowledged certain limits to the temporal effects of its judgments, relating to reasonable limitation periods for bringing proceedings (see *Edis*, paragraph 20, and the case-law to which it refers). It is interesting to note that in that case Advocate General Ruiz-Jarabo Colomer pointed out, in point 24 of his Opinion, that the Court's 'judgments... are not endowed with a kind of supra-temporal effect'. He stated that '[o]n the contrary, their effects must apply to those legal situations which, under domestic law, are still open to challenge or review and which, accordingly, may be the subject of a decision of a judicial authority'.

126 — In 1975, in its suggestions on the European Union, the Court expressed the view that it would be timely to provide — in the Treaty — for an appropriate guarantee to protect the rights of individuals in the event of a breach of Article 177 of the EC Treaty (now Article 234 EC). However, it left open the question whether that guarantee should be an appeal before the Court by the parties to the main proceedings, mandatory proceedings for failure to fulfil an obligation or an action for reparation against the State concerned at the request of the injured party (EC Bulletin, Supplement 9/75, p. 18).

127 — Paragraphs 13 to 17.

Court of Justice is not absolute..., it is not completely impossible that, in certain circumstances, refusal by a domestic court trying a case at final instance might infringe the principle of fair trial, as set forth in Article 6(1) of the Convention, in particular where such refusal appears arbitrary'. [128] Moreover, as was stated at the hearing, this corollary of the 'right to obtain a judicial determination' takes a particular form in Germany. [129]

148. In those circumstances, it is logical and reasonable to consider that manifest breach by a supreme court of an obligation to make a reference for a preliminary ruling is, in itself, capable of giving rise to State liability.

149. However, in such circumstances there is a risk, in putting in issue State liability, of encountering certain difficulties in adducing proof of a direct causal link between breach of the obligation to make a reference and the damage pleaded. That proof of the causal link requires that the individual be in a position to establish that the failure to make a reference necessarily caused him actual and certain, not hypothetical, damage which would not have occurred if the supreme court had decided to refer a question for a preliminary ruling.

150. That evidence will no doubt be relatively easy to adduce where damage is purely non-material, consisting in the loss of an opportunity to have one's claims succeed. [130]

151. The same will probably not be true of material damage. Proof of the causal link between such damage and breach of the obligation to make a reference requires that the individual claiming to be injured establish that the decision of the supreme court would have upheld his claims if it had in fact referred a question for a preliminary ruling. Unless the Court delivers a judgment on the point of law in question soon

128 — See, in particular, decisions of 23 March 1999 on the admissibility of the application in *André Desmots* v *France* (No 41358/98, paragraph 2); of 25 January 2000 in *Peter Moosbrugger* v *Austria* (No 44861/98, paragraph 2), and judgment on the merits of 22 June 2000 in *Coëme and Others* v *Belgium* (Nos 32492/96, 32547/96, 33209/96 and 33210/96, paragraph 114), and decisions of 4 October 2001 on admissibility in *Nicolas Calena Santiago* v *Spain* (No 60350/00) and of 13 June 2002, on the admissibility of the application in *Lambert Bakker* v *Austria* (No 43454/98, paragraph 2). In all those cases, the European Court of Human Rights held that the absence of a reference for a preliminary ruling was not vitiated by arbitrariness.

129 — The German Constitutional Court considers that the Court of Justice is a 'legally appointed judge' of the parties for the purpose of Article 101 of the German Constitution. It follows that, where a supreme court does not make a reference for a preliminary ruling, in breach of Article 234(3) EC, the Constitutional Court has jurisdiction to quash such a judgment on the ground of breach of the Constitution. See, for example, the order of 9 January 2001 of the Bundesverfassungsgericht (Federal Constitutional Court) concerning a decision of the Bundesverwaltungsgericht (Federal Administrative Court) on equality for men and women in the medical profession (BvR 1036/99).

130 — See, on that subject, the case-law of the European Court of Human Rights in connection with the examination of individual complaints based on breach of Article 6 of the ECHR (in particular *Coëme* v *Belgium*, cited above, paragraphs 155 to 158). According to the European Court of Human Rights, it is not possible to speculate on what would have been the outcome of proceedings in conformity with Article 6 of that convention and thus to allow a claim for reparation of material damage. By contrast, taking account of the seriousness of the non-material damage sustained, it accepts that the mere finding of breach of the abovementioned provisions is insufficient and justifies the award of a certain sum by way of reparation.

after the decision of the supreme court is given and that judgment supports the individual's claims, it is difficult to imagine how proof of such a causal link could be adduced.

152. In my opinion, it would be excessive to require a national court, which was seised of an action for reparation of alleged material damage, to refer a question to the Court for a preliminary ruling in order to know the response which it might have given if it had in fact been seised of such a question.

153. These arguments and the examples which have been given show that, in order to assess whether a supreme court has committed a sufficiently serious breach capable of giving rise to State liability, it is important to ascertain whether that court has made an error of law which is excusable or inexcusable.

154. I take the view, in this context, that it is neither necessary nor appropriate to pay particular attention to factors such as the position of the Community institutions or whether the breach of Community law was intentional or involuntary.

155. As regards the position of the Community institutions (at least that of the Commission), contrary to what is true for State liability for the acts or omissions of the legislature or the administrative authorities, it is difficult to accept that this factor is relevant in assessing whether the State must be made liable for the acts or omissions of a supreme court. Supreme courts are not in the best position to have cognisance of the Commission's conduct, such as its bringing infringement proceedings which call in question, for example, the consistency of national law provisions with Community law.

156. As regards whether the breach of Community law was intentional or involuntary, it must be acknowledged that it would be particularly difficult to adjudicate on whether a subjective element existed, *a fortiori* where, as is very likely, the judgment in question was collegiate. Furthermore, in my view, it would be delicate to ask a national judge to ascertain whether one of his brethren had acted on the basis of a malicious intention to infringe a rule of law.

3. The direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties

157. This aspect has already been tackled in respect of breach of the obligation to

make a reference for a preliminary ruling. It is sufficient for there to be a direct causal link between the breach concerned and actual and certain damage of a pecuniary or non-material kind.

158. As a consequence, it is necessary to tell the referring court that, where a supreme court is responsible for a breach of Community law by a Member State, injured individuals have a right to redress if the purpose of the rule of Community law infringed is to confer rights on them, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the individuals. Subject to that reservation, the State must make reparation in accordance with the domestic rules on liability for the consequences of the loss or damage caused by the breach of Community law attributable to the State, provided that the conditions laid down by national law are neither less favourable than those relating to similar domestic claims nor such as to make it in practice impossible or excessively difficult to obtain redress.

VII — The determination of the court or tribunal with jurisdiction to assess the merits of the action for damages

159. This point concerns both the determination of the competent national court or tribunal and the respective roles of the national court and the Court of Justice in assessing the merits of an action for damages brought against the State on the basis of its liability for the acts or omissions of a supreme court.

A — *Determination of the competent national court or tribunal*

160. By its second question, the national court seeks essentially to ascertain whether the Member States are free to determine which national court or tribunal has jurisdiction to hear an action for damages brought against the State on the basis of its liability for the acts or omissions of a supreme court.

161. It must be noted that, according to settled case-law, 'it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. However, it is the Member States' responsibility to ensure that those rights are effectively protected in each case'. [131] The Court concluded that '[s]ubject to that reservation, it is not for

131 — That principle was laid down in Case 179/84 *Bozzetti* [1985] ECR 2301, paragraph 17, referring on that point to *Salgoil* (particularly p. 675). It was confirmed, in particular, in Case C-446/93 *SEIM* [1996] ECR I-73, paragraph 32, and *Dorsch Consult* (cited by the referring court).

the Court to involve itself in the resolution of questions of jurisdiction... in the national judicial system'. [132]

162. In response to the referring court's question on this point, it is important to state that that principle of institutional autonomy, subject to the reservation that effective judicial protection be ensured, is also applicable to any actions for damages brought by individuals against the Member States on the basis of their liability for the acts or omissions of a supreme court.

B — *The respective roles of the Court of Justice and national courts in assessing the merits of the action for damages*

163. By its fifth question, the referring court seeks essentially to ascertain whether it is for that court to assess in the particular case the merits of the action for damages or whether that task is for the Court.

164. It should be borne in mind that, in *Brasserie du pêcheur and Factortame*, the Court held that it 'cannot substitute its assessment for that of the national courts, which have sole jurisdiction to find the facts in the main proceedings and decide how to characterise the breaches of Community law at issue'. [133] Nevertheless, it held that it would be 'helpful to indicate a number of circumstances which the national courts might take into account'. [134] That case-law has been confirmed on several occasions. [135] It is fully applicable in the case of an action putting in issue State liability for breach of Community law by a supreme court. I will therefore do no more than make a few observations on the present case.

VIII — The present case

165. By its third and fourth questions, the national court seeks essentially to ascertain whether in the present case the substantive conditions determining imposition of State liability are fulfilled.

166. As a preliminary point it should be noted that the rule of law purportedly infringed, namely Article 48 of the Treaty, is directly effective and its purpose is therefore necessarily to confer rights on individuals. [136] That article sets out in paragraph 1 the principle of freedom of

132 — *Idem.*

133 — Paragraph 58.

134 — *Idem.*

135 — See, in particular, *Konle*, paragraph 59, *Haim*, paragraph 44, and *Stockholm Lindöpark*, paragraph 38.

136 — See, in particular, Case 41/74 *Van Duyn* [1974] ECR 1337, paragraphs 5 to 8, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 129.

movement for workers. That freedom is to entail in particular, in the words of Article 48(2), the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. Those Treaty rules were implemented and amplified by Regulation No 1612/68.

167. Furthermore, it should be stated that the Court has held that the principle of non-discrimination, laid down in Article 39(2) EC and implemented by Regulation No 1612/68, applies to '[a]ny Community national, irrespective of his place of residence and his nationality, who has exercised the right to freedom of movement for workers and has been employed in another Member State'. [137] As a consequence, according to the Court, the fact that an individual who relies on the principle of non-discrimination is a national of the Member State in question, and not of another Member State, has no bearing on the application of such a principle. [138] According to that case-law, Mr Köbler was therefore entitled to rely on the principle of non-discrimination against workers, laid down by Article 39(2) EC.

168. Furthermore, according to settled case-law, that principle prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [139] In *O'Flynn*, the Court stated that 'conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers... or the great majority of those affected are migrant workers..., where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers... or where there is a risk that they may operate to the particular detriment of migrant workers'. [140]

169. In the light of this case-law, that is manifestly true of the condition for granting the special length-of-service increment depending on completion of 15 years' service as a professor at — exclusively — Austrian universities. It must be stated that there is a risk that that condition may operate to the particular detriment of migrant workers, that is to the detriment of workers who have exercised their right to freedom of movement. That is true of those who, like Mr Köbler, have left their Member State of origin and gone to work in another Member State and then return to the first State to pursue their career.

137 — See Case C-443/93 *Vougioukas* [1995] ECR I-4033, paragraphs 38 to 42. See also Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 9.

138 — *Scholz*, paragraph 8.

139 — See, in particular, Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11; Case C-27/91 *Le Manoir* [1991] ECR I-5531, paragraph 10; Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 9; *Scholz*, paragraph 7, and Case C-237/94 *O'Flynn* [1996] ECR I-2617, paragraph 17.

140 — Paragraph 18.

170. In my opinion, it is difficult to accept that the Verwaltungsgerichtshof made an excusable error when it held that the requirement of such a condition, which is indirectly discriminatory, was reasonably justified by the wish to reward an employee's loyalty to his employer.

171. Even if that purported justification were applicable in the present case, on the ground that Austrian universities are covered by one employer, unlike in *Schöning-Kougebetopoulou*, the supreme court should have checked whether the length-of-service condition in question was proportionate to such an objective. I would point out that the Court has frequently stressed that general requirement of proportionality. [141] It was also careful to point it out in paragraph 21 of the ruling in *Schöning-Kougebetopoulou*, which it forwarded to the supreme court in response to its order for reference, even though, in that case, the Court held that the purported justification based on reward of an employee's loyalty to a particular employer was not material. In that case, it was therefore not necessary, in order to resolve the dispute in the main proceedings, to assess the proportionality between the length-of-service condition at issue and such a justification. [142]

141 — See, in particular, Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* [1993] ECR I-4309, paragraph 15; *O'Flynn*, paragraph 19, and the judgment of 12 March 1998 — delivered a few months before the Verwaltungsgerichtshof gave its decision — in Case C-187/96 *Commission* v *Greece* [1998] ECR I-1095, paragraph 19.

142 — See *Schöning-Kougebetopoulou*, paragraphs 26 and 27.

172. In the present case, it is regrettable that the Verwaltungsgerichtshof did not check whether the principle of proportionality had been complied with. It is difficult to consider that the length-of-service condition at issue is proportionate to any justification of that kind. Without any doubt, it goes beyond what is necessary to achieve the objective relied on. [143]

173. Furthermore, that supreme court should have maintained the question it had referred for a preliminary ruling, even if that meant supplementing it in order to obtain some clarification on the scope of *Schöning-Kougebetopoulou*. If we apply the rule in *CILFIT and Others*, it is difficult to consider that the supreme court was in fact convinced, first, that the application — even if correct — of Community law was so obvious as to leave no scope for any reasonable doubt as to the manner in which the point of law raised was to be resolved and, second, that the matter was equally obvious to the courts of the other Member States and to the Court of Justice. [144]

143 — Moreover, that is what the Court held subsequently in respect of Austrian legislation which was less restrictive of freedom of movement for persons. Under that legislation previous periods of employment spent in other Member States are taken into account in determining the pay of teachers, but under stricter conditions than those applicable to periods spent in Austria. After rejecting the alleged justification based on the reward of loyalty, given the large number of employers, the Court was careful to state that, in any event, the discriminatory restriction at issue was not proportionate to such an objective (see Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, paragraph 50).

144 — *CILFIT and Others*, paragraph 16.

174. As a consequence, the answer to the questions referred by the national court must be that Article 39 EC is to be interpreted as having the purpose of conferring rights on individuals. In circumstances such as those of the main proceedings, it can be considered that the error made by the Verwaltungsgerichtshof as to the meaning and the scope of that article of the Treaty is inexcusable, and thus capable of giving rise to State liability.

IX — Conclusion

175. Having regard to all these considerations, I propose that the Court give the following answers to the questions referred by the Landesgericht für Zivilrechtssachen Wien for a preliminary ruling:

(1) The principle that the Member States are required to make good loss or damage caused to individuals by breaches of Community law attributable to those States is applicable where a supreme court is responsible for the alleged breach.

(2) Where a supreme court is responsible for a breach of Community law by a Member State, injured individuals have a right to redress if the purpose of the rule of Community law infringed is to confer rights on them, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the individuals. Subject to that reservation, the State must make reparation in accordance with the domestic rules on

liability for the consequences of the loss or damage caused by the breach of Community law attributable to the State, provided that the conditions laid down by national law are neither less favourable than those relating to similar domestic claims nor such as to make it in practice impossible or excessively difficult to obtain redress.

(3) The principle that it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law, subject to the reservation that effective judicial protection be ensured, is applicable to actions for damages brought by individuals against a Member State on the basis of an alleged breach of Community law by a supreme court.

(4) The national courts have sole jurisdiction to assess whether the substantive conditions for imposing State liability for the acts or omissions of a supreme court are fulfilled, in particular to determine whether the error of law which is the cause of the breach of Community law in question is excusable or inexcusable. In that assessment, they may take account of the observations made by the Court in that regard.

(5) Article 39 EC is to be interpreted as having the purpose of conferring rights on individuals. In circumstances such as those of the main proceedings, it can be considered that the error made by the supreme court concerned as to the meaning and the scope of that article of the Treaty is inexcusable, and thus capable of giving rise to State liability.