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Summary

Liability in European Community Law. A Study of the cases involving damage caused by several parties

The study concerns the problem of attributing liability when two different parties under Art. 288 (2) EC and under the Francovich doctrine cause damage to an individual. The main focus is on liability for damage caused by the European Union and the Member States as joint tortfeasors. The study also examines contributory negligence involving one or both of those public entities together with a third party, such as international organisations, third countries or individuals.

The fundamental problem is ensuring effective legal protection within in the EU when two different legal orders cause damage. To this end the study presents tort claims¹ under EU and the Member State law as two different but interdependent legal actions that are embedded in a coherent system of legal protection of individual rights in the EU. Furthermore, the EU's and the Member State's conduct must also conform to the main purposes of European liability law under Art. 288 (2) EC and the Francovich doctrine.

The study develops its arguments in three parts. Part one presents the cases dealt with, the method and the basic premises. Part two elaborates the theoretical bases and applies them to different classes of damage caused by several parties. Part three advances the conclusions to be drawn.

In the first part, the principal approach of the study is set forth. It is demonstrated that, while the traditional way of dealing with non-contractual liability in EC Law, namely elaborating legal principles common to the Member States, has the advantage of detecting different mechanisms and motivations for liability in Member State law, it fails to provide criteria for choosing the appropriate legal principle common to the Member State's legal orders. Therefore, the study interprets the different elements of tort claims in light of their purpose(s) and functions in European liability law and legal protection in EC Law.

¹ Tort is used here to mean non-contractual liability.

The study bases its arguments on the idea of equal legal protection by actions for damages against the EU and the Member States. Although the elements of liability of the EU under Art. 288 (2) EC and the Member States under the Francovich doctrine are not identical, since 2000 there has been a considerable convergence in respect to the elements of liability as well in terminology. This convergence justifies conceiving tort claims against the EU and the Member States in their respective legal orders as a type of parallel legal protection designed to ensure a minimum standard of legal protection for the individual. This has resulted in two systems, which, taken together, provide comprehensive legal protection for the individual. Therefore, although the EC's and Member State's legal orders are intertwined, neither the EC's nor the Member States' legal order needs a "subsidiary coverage" of the other for tort claims.

The key part of the study is found in part two, which is divided into five sections.

Section one considers the premises and conclusions in part one in more detail and establishes the framework and the instruments for later analysis. The study bases the duty to compensate for damage in European liability law on the attribution of damage to harmful conduct. Three different case groups are developed:

liability for damage in the case of joint tort-feasors, whether they acted together or independently of each other (*Haftung für Schädigung in Gemengelagen*),

liability for failure to prevent another party from causing damage (*Haftung wegen Schädigung durch Verletzung von Schadensabwendungspflichten*) and

liability for failure to implement or inadequate implementation of European directives by Member States (*Haftung wegen Schädigung durch Unterlassung der Umsetzung von Richtlinien*).

As the study defines the attribution of damage as the fundamental reason for liability, criteria for the attribution are needed. Those are found in the purposes of actions for damages under EC Law, which are the focus of section two. In this key part, the study develops the main purposes of tort liability in EC Law. Three main purposes are revealed: legal protection of individual rights, prevention of tortious conduct, and gap filling. Those purposes are limited by the contrasting purpose of the guaranty of the well-functioning of the EU-Institutions.

Building on and paralleling the discussion of the function of individual rights in the EU, the study demonstrates that the primary purpose of

actions for damages, both under Art. 288 (2) EC and under the Francovich doctrine, is the protection of individual rights. Prevention and gap filling are only of secondary importance. These reasons can only then be considered by the court when different solutions provide adequate legal protection for the claimant.

In each of the three case groups, the study then examines the three major questions of causation of damage by two parties involving joint tortfeasors:

- the attribution and allocation of responsibility between two parties,
- the relation between the action for damages and national actions of annulment,
- and the internal relationship of the parties responsible for the damage.

In cases of two entities acting together, liability lies with the entity that possesses the capacity to create a legally binding position. The study shows that the criteria for attributing liability allows allocating liability to only one entity, even if two different entities have acted jointly, e.g. the exercise of EC Law by the Member States. Even in cases of joint or reciprocal execution of EC Law, the spheres of exclusive liability can be defined. Liability is restricted to the legal capacity to create a legal position; factual influence is not sufficient to trigger liability. This solution has the advantage that the protection of individual rights is guaranteed, while at the same time the responsible entity can be deduced from the relevant enabling law. The criterion of liability based on legal capacity can also be used to reconstruct the jurisprudence of the ECJ.

The study then analyses the relation between actions for damages and national actions of annulment. The question arising is whether one first has to apply to the national courts for annulment before bringing a claim for damages. It is shown that national annulment actions are closely linked to European legal protection through the preliminary ruling procedure under Art. 234 EC. Therefore, any adequate conception of the system of legal protection under EC Law must include as an integral aspect the preliminary ruling procedure and, to this extent, national remedies. The study then develops the idea of what it calls coherent complementarity. When one examines the two legal orders, one finds that there is only one legal action which is specifically designed for any given case. The principle of coherent complementarity states that is this legal action which must be used by the plaintiff. Consequently, national legal remedies have to be used whenever they are available and adequate for the purpose of the claimant. This analysis

thus rejects the idea of European actions for damages being subsidiary to national remedies. The study develops the idea of a coherent complementarity of European and national remedies based on their functions. This leads to the result that national remedies have to be used whenever they provide full relief to the injured person. European actions for damages are admissible only where national remedies are not provided. Even though this question has to be answered on a case by case basis, it is possible to create case groups. For example, in cases of an illegal imposition of European duties, judicial relief is to be sought before national courts, as the appropriate remedy is a national annulment action. In contrast, claims based on the illegal rejection of applications for subsidies and “standard” tortious claims cannot be brought before national courts and therefore have to be judged before the European Courts.

The situation is different where third countries are involved. The study shows that the results sketched above cannot be applied to this situation. This is particularly the case when considering the attribution of damage. For example, in contrast to the results found in the relation between joint or several acts of Member States and EU, the EU has to be liable also in the event of factual influence on third countries’ authorities. Nor can the principle of coherent complementarity be applied to this constellation.

Finally, in cases where two parties acted jointly, the relationship between the parties *inter se* is examined. This relation has been rarely discussed in the literature and has never been an issue in the European jurisprudence. The study shows that in the area of customs and agriculture law, the internal relationship between European and national authorities is governed by secondary European legislation. There is a need for an *inter se* settlement in only one constellation: where there is a factual influence by European authorities on national authorities, that factual influence has a *quasi*-binding effect for the national authorities, and the Member State thereby becomes liable to a third party. In this case, a compensatory claim against the EU must be granted to the injured Member State. This claim for *inter se* compensation between EU and Member States finds its basis in Art. 10 EC.

In the fourth section of part two, the liability for the breach of duty to prevent damage is examined. This section relates to cases where a community rule requires the prevention of damage, which is directly caused by a third party. This constellation is quite different to where both the EU and Member State cause damage by positive and joint action. In the situation examined in this section, attribution of liability cannot be

found in the act, but rather in the omission to prevent a third person from suffering damage or loss. Therefore the necessity of granting a claim is weaker than in cases of commission, where the damage has been directly and actively caused by a third person. Consequently, a compensatory claim based on a breach of duty to prevent an injury needs a stronger justification. This justification can be found in the criterion of the protective purpose of the norm. The underlying criteria to determine whether a norm has a protective purpose, and thus triggers a compensatory claim, are examined in detail. The study shows how the protective purpose of a norm can be discerned. The method parallels the one used to determine whether an EU directive is directly applicable. In this instance, however, it is the protective purpose of the individual that has to be imminent to a norm, and the protective purpose must be actionable, i.e. one of the norm's purposes must be to give the protected person the right to claim damages. The nature of the action, whether it is, for instance, a demand for action to prevent the damage in the first place, or whether the damage can only be liquidated, is a different, though related question. This means that there are cases where a person may not be able to institute proceedings which would prevent the damage from occurring, but instead must accept the injury and later claim his loss.

The foregoing also applies to infringements of public international law, which are incorporated into EC law by Article 307 EC, by the EU.

Using the different criteria for determining the protective purpose of a norm, the study defines two different case groups relating to the duty to prevent damage: administrative duties of surveillance and control, one the hand, and an obligation of protection of fundamental freedoms and human rights, on the other. Referring to the criteria developed at the beginning of this section, the study argues that, in the case of surveillance and control, a protective purpose is only imminent in relation to specialised duties. For example, if the European Commission breaches its general duty of supervision, EU liability will not be triggered for damage caused by a Member State acting in breach of Community law. The second case group is then discussed. Here it is argued that liability is more likely to result from a breach of an obligation of protection of the four fundamental freedoms than from the breach of European human rights under the EU.

Having defined the principle instances whereby a duty to prevent another person from suffering damage or loss is breached, the study then re-examines the relationship between the entity that directly and actively caused the damage and the entity that breached the obligation to

prevent the damage. This constellation is highlighted in cases of public health, e.g. where a manufacturer introduces an unsafe product (under EU law) on the market thereby causing injury to the consumers. The manufacturer directly and actively caused the injury, whereas the Member State failed in its control and inspection duties and the EU in its oversight of the Member State. In contrast to the situation where one entity creates a legally binding position (and thus only that party is liable), in this case all of the tort-feasors are jointly and severally liable for the full amount of the damage. This relation between several parties who cause damage can partly be applied to concurrent liability between the EU and a third country. Coherent complementarity can be applied here, so that relief must be sought from the party that provides full relief, just when the EU and the Member State jointly cause damage.

Due to the fact that all tort-feasors are jointly and severally liable *vis-à-vis* the injured party – each tort-feasor is liable for the full amount – there has to be a mechanism to allocate the liability *inter se*. This mechanism is again found in Article 10 EC. The criterion for the allocation can again be found in the protective purpose of the duty breached. As a general principle, the party that directly and actively caused the damage has to compensate it in full. Liability must be shared between both parties *inter se* only if the duty breached aims to protect not only the injured party but also the other party responsible for the damage.

In the third case group the study examines the allocation of liability in cases of non-implementation of European directives. It is argued that the attribution of the damage is effected through the breach of the duty arising from Article 249 EC, which is specified by the right which had to be established for the individual.

Finally, the second part examines the application of coherent complementarity to the third case group and shows that it is applicable here as well. Thus, the injured party must first apply to the national courts for an action of avoidance (or other such actions) as long as the national law permits this and such actions are just and reasonable for the injured party, before seeking damages.

In the third and last part of the study the main results are grouped and formed as theses.