European public law: new developments of old principles

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The newly established section at ERA is honoured to present the first issue of ERA Forum dedicated solely to questions relating to its area of expertise, i.e., European public law.

1 State liability principle

On 1–2 December 2011, ERA organised for the second time a conference¹ marking the anniversary of the *Francovich* judgment of the European Court of Justice²—the ruling which, twenty years ago, established the principle of member state liability for infringement of European Union law. Since then, the Court has extended its state liability jurisprudence to infringements by the legislature (*Brasserie du Pêcheur/Factortame*³) and by the judiciary (*Köbler*⁴). According to the principle,

¹The first anniversary conference was organised by ERA in Trier in Summer, 2001. For the published contributions (updated after the *Köbler* judgment in the summer of 2003), see *Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle*, edited by Sofia Moreira de Sousa and Wolfgang Heusel (Bundesanzeiger, ERA Series of Publications, 2004, Vol. 37).

²Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357.

³Judgment of the Court of 5 March 1996 in Joined Cases C-46/93 and C-48/93 *Brasserie Du Pêcheur SA v Germany and R. v Secretary of State for Transport, ex parte Factortame Ltd. and others* [1996] ECR I-01029.

⁴Judgment of the Court of 30 September 2003 in Case C-224/01 *Gerhard Köbler v Republic of Austria* [2003] ECR I-10239.

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the law in each member state has to recognise the principle of state liability both for legislative omissions and judicial wrongs, regardless of national traditions and principles.

Five articles which are included in this issue of *ERA Forum* analyse the implications for European Union law of the *Francovich* judgment and subsequent rulings, review their implementation in selected member states and present new perspectives and contexts for the doctrine.

Two articles concern the relevance of liability on the part of the European Union to liability on the part of member states. *Sean Van Raepenbusch* shows the convergence of the two liability systems. It is argued that the Court of Justice has developed its case law on the non-contractual liability of member states for infringements of European Union law on the basis of European Union liability. Non-contractual liability depends however on several conditions, such as the degree of discretion available to the authority or its unlawful behaviour, that are further explained in the article. In the second article *Jill Wakefield* analyses the changes in the liability of European Union institutions, taking into account judgments in *Bergaderm*,⁵ *FIAMM*⁶ and *Schneider*.⁷ She shows the development of the jurisprudence on the non-contractual liability of the Union for damage done by its institutions or servants in the performance of their duties. It is explained in detail what the conditions are for engaging Union responsibility for external and internal policies. Furthermore, the obligation to which the institution is subject is presented, *i.e.*, the obligation of the Union regulator and administrator, the obligation owed to the Union in a regulatory regime and the obligation to uphold fundamental rights in an administrative process. Finally, non-contractual liability for lawful legislative acts is discussed.

The next article by *Kathrin Maria Scherr* presents a comparative overview of the application of the principle of state liability to breaches of European Union law committed by a national court adjudicating at last instance. This analysis presents the various legal approaches in the national legal systems of member states to the idea of state liability in respect of judicial breaches. The author examines the truth of the claim that the concept of state liability of judicial breaches constitute a common principle accepted in all member states, as was asserted by Court of Justice in its famous *Köbler* judgment.

Finally, two articles present new perspectives and contexts for the state liability principle. The first article, by *Bernd J. Hartmann*, deals with the mandatory and voluntary alignment of national government liability law in Europe after *Francovich*. In his analysis he presents monistic, partly dualistic and partly monistic-dualistic solutions that member states have chosen to pursue. The second article by *Angela Ward* addresses the question of damages under the European Union Charter of Fundamental

⁵Judgment of the Court of 4 July 2000 in Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm SA and Goupil v Commission* [2000] ECR I-5291.

⁶Judgment of the Court of 9 September 2008 in Joined Cases C-120/06 P and C-121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (FIAMM Technologies) v Council and Commission and Giorgio Fedon & Figli SpA and Fedon America, Inc. v Council and Commission* [2008] ECR I-6513.

⁷Judgment of the Court (Grand Chamber) of 16 July 2009 in Case C-440/07 P *Commission v Schneider Electric SA* [2009] ECR I-06413.

Rights, *i.e.*, the liability of the European Union and its member states for breaching the European Convention on Human Rights and the European Union Charter. Her analysis is based on the jurisprudence of the Court of Justice of the European Union and of some of the world's leading federations' courts. First, she considers the provisions of the Charter in the light of the concept of 'individual rights' within the meaning of European Union damages law. Second, she discusses the types of Charter breach that might meet the condition of 'serious breach'. Finally, she discusses the position of fundamental rights principles in future damages case law and the possibility of enlarging the conditions of liability in order to open up access to damages for breach of the Charter.

2 Subsidiarity principle

On 9–10 June 2011, ERA organised its first seminar on the European Union principle of subsidiarity, aiming at providing lawyers with a practical analysis of the application of the subsidiarity principle and the subsidiarity check after the Lisbon Treaty. Two papers from this seminar are included in this issue of ERA Forum. *Adam Cysgan* first introduces the concept of national Parliament within the European Union polity. He presents the role of national parliaments in European Union affairs before and after the changes introduced by the Lisbon Treaty and evaluates the subsidiarity monitoring arrangements for national parliaments. The Lisbon Treaty includes now a so-called 'early warning mechanism' for the monitoring of subsidiarity. This provides national parliaments with a political tool to challenge the compliance of a legislative proposal with the subsidiarity principle. The early warning mechanism has two different procedures: the 'yellow' and 'orange' card procedures. Both are discussed in detail. Furthermore, the author presents the limits and main challenges to monitoring of subsidiarity by national parliaments. Finally, he discusses inter-parliamentary cooperation, a concept that has been reinforced by the Protocol 1 of the Treaty of Lisbon which identifies COSAC (the Conference of European Affairs Committees of national parliaments) as a key forum. The author argues that, despite improved procedures and opportunities for participation in European Union affairs, national parliaments' role in the decision-making process has not significantly changed.

This article is followed by *Philipp Kiiver's* detailed and practical analysis of certain procedural aspects of the European Union early warning system for the subsidiarity principle. In particular he discusses the admissibility criteria for opinions from national parliaments on European Union draft legislation. He provides a very helpful list of Treaty provisions referring to national parliaments, dividing them into three groups: information rights, provisions envisaging or implying an evaluation by national parliaments, provisions envisaging or implying an active input from national parliaments, and provisions of dubious legal value. His analysis consists of the procedural framework of the subsidiarity check and a presentation of a form and scope of reasoned opinions that are now part of a legally formalised communication framework between national parliaments and Brussels. Finally, Kiiver puts forward very useful, practical recommendations for members of national parliaments and parliamentary staff involved in the drafting of reasoned opinions. The recommendations

follow directly from the discussion during a workshop held in the course of the above-mentioned ERA seminar.

3 Staff Regulations

A different area of law of European Union public law is dealt with by *Bernardo Cortese* and *Julian Currall*. The articles by both authors were presented as papers during the first ever seminar on case-law concerning the staff regulations and the procedure before the Civil Service Tribunal, organised by ERA for the first time on 7–8 November 2011.

Bernardo Cortese deals in his article with recent developments regarding selected rights under European Union civil service law. He discusses the principle of equal treatment in European Union civil service law, and in particular the approach taken by the European Union Courts. Furthermore, he presents the question of a balance between the interests of the institutions and organs and the fundamental rights of their temporary staff workers, as seen in recent case law of the Court of Justice of the European Union.

His analysis is followed by an article by *Julian Currall* on the particularities of the procedure before the Civil Service Tribunal of the European Union—the first specialised Union jurisdiction, established in 2004.⁸ Due to the distinct character of the Tribunal, the procedure which applies before it is different in a number of respects from the procedure before the General Court of the European Union. He divides these differences into two groups: respectively, differences which may be encountered during the procedure and differences which may affect the content of the judgment. The first group refers to, *inter alia*, objections as to admissibility, simplified written procedure, the possibility of not having a hearing, settlements and measures organising procedure and measures of inquiry. Finally, while presenting procedural differences which may affect the content of the judgment, he explains in detail the issues of pleas raised *ex officio* and costs. This analysis is very useful for any lawyer who knows already the procedure before the General Court but must now deal with this European Union specialised tribunal.

4 Food law

Finally, this issue also includes an article on food law in the European Union. *Irina Kireeva*⁹ presents a comprehensive overview of the existing labelling requirements with regard to the origin of food products in the European Union, including special rules on beef and veal, eggs and poultry meat, fish and aquaculture products, honey, fruits and vegetables, wines, olive oils and finally, mineral waters. In her article she

⁸Council Decision 2004/752/EC, Euratom establishing the European Union Civil Service Tribunal (OJ L 333 of 9.11.2004, p. 7).

⁹For another article on food law by the same author please see *ERA Forum*, Issue 2/2009, p. 199 (*European case law and the WTO ruling on conflicts between geographical indications and trademarks*).

discusses the new Regulation on the provisions of food information to consumers.¹⁰ Finally, this article gives an introduction to the debate on country of origin labelling in the *Codex Alimentarius* Commission.¹¹

¹⁰Regulation (EU) No. 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No. 1924/2006 and (EC) No. 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No. 608/2004 (OJ L 304 of 22.11.2011, p. 18).

¹¹The *Codex Alimentarius* Commission was created in 1963 by FAO and WHO to develop food standards, guidelines and related texts such as codes of practice under the Joint FAO/WHO Food Standards Programme.