Aansprakelijkheid van Toezichthouders

Een analyse van de aansprakelijkheidsrisico's voor toezichthouders
wegens inadequaat handhavingstoezicht
en enige aanbevelingen voor toekomstig beleid

Deel II: Achtergrondstudies

Prof. Dr. Cees C. van Dam

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Inhoudsopgave

9 Europees Verdrag voor de Rechten van de Mens

Mr. M.J. Alink *

9.1 Inleiding

De vraag die in dit hoofdstuk centraal staat is welke beperkingen de jurisprudentie van het Europees Hof voor de Rechten van de Mens (EHRM) in Straatsburg stelt aan het beperken of uitsluiten van de aansprakelijkheid voor falend toezicht of gebrekkige handhaving. In een volledig onderzoek naar aansprakelijkheid voor toezichthouders mag een overzicht van de relevante jurisprudentie van het EHRM niet ontbreken. Het Europees Verdrag voor de Rechten van de Mens en de Fundamentele Vrijheden (EVRM) bevat immers een ieder verbindende verdragsbepalingen waardoor de overheid in strijd met een wettelijke verplichting handelt – waarmee naar Nederlands recht de onrechtmatigheid in de zin van art. 6:162 BW is gegeven – indien zij de normen voortkomend uit het EVRM niet naleeft.

Het EHRM heeft een aantal uitspraken gedaan die van belang zijn voor de Nederlandse overheidsaansprakelijkheid. Het gaat dan met name om door het EHRM vastgestelde uit het EVRM voortvloeiende posititieve verplichtingen voor de Staat voor wat betreft het preventief ingrijpen in gevaarlijke situaties, eigendomsbescherming, een informatieverplichting voor dreigende gevaren en de plicht een adequate rechtsgang te bieden indien de Staat haar verplichtingen niet is nagekomen.

Dat de invloed van de jurisprudentie van het EHRM op het terrein van overheidsaansprakelijkheid zich laat gelden in gerechtelijke procedures op nationaal niveau blijkt uit het feit dat in uitspraken van nationale instanties expliciet naar jurisprudentie van het EHRM wordt verwezen. Zo wordt in de uitspraak van de rechtbank 's-Gravenhage inzake de Enschedese vuurwerkramp voor de vestiging van aansprakelijkheid – onder verwijzing naar de uitspraak van het EHRM in de zaak Öneryildiz – onder meer getoetst of de verplichtingen voortvloeiend uit artikel 2 EVRM (het recht op leven) en artikel 1 Eerste protocol EVRM (het recht op eigendom) zijn nagekomen.[1] De rechtbank toetst of de gemeente en de Staat al dan niet conform de uit het Straatsburgse toetsingskader voortvloeiende normen hebben gehandeld.

> '...de rechtbank (acht) voor de vestiging van aansprakelijkheid relevant, naast andere omstandigheden, of de betrokken overheden op de hoogte waren of hadden moeten zijn van een reële en directe bedreiging van het leven van personen. Indien dat het geval was, had immers verwacht mogen worden dat zij tijdig afdoende maatregelen hadden genomen ter voorkoming van de ramp. Deze rechtsplicht kan onder meer worden gebaseerd op artikel 2 van het Europees Verdrag voor de Rechten van de Mens en de Fundamentele Vrijheden (EVRM), dat het recht op leven beschermt.
>
> De materiële schade als gevolg van de vuurwerkramp vormde voor eisers hoe dan ook een aantasting van hun recht op ongestoord genot van hun eigendom, daargelaten of sprake is van een inbreuk door de overheid. Tegen schending van dit recht door de overheid waakt artikel 1 van het Eerste Protocol bij het EVRM. Indien moet worden aangenomen dat de verantwoordelijke autoriteiten door het achterwege laten van passende maatregelen ter voorkoming van de ramp artikel 2 van het EVRM hebben geschonden, kan deze nalatigheid naar het oordeel van de rechtbank niet worden gerechtvaardigd door enig algemeen belang dat door de overheid wordt behartigd. Alsdan bestaat tevens aansprakelijkheid wegens schending van de positieve verplichtingen die artikel 1 van het Eerste Protocol bij het EVRM voor de overheid meebrengt.
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> Op grond van de jurisprudentie van het Europees Hof voor de Rechten van de Mens kan

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1 *Öneryildiz tegen Turkije*, EHRM 18 juni 2002 (Chamber judgment), *NJCM-bulletin* 2003, p. 54 ev, m.nt. Kuijer.

ook artikel 8 van het EVRM, dat ziet op eerbiediging van het privé-, familie- en gezinsleven, in milieugeschillen met succes worden ingeroepen. De verplichting voor de autoriteiten om wezenlijke informatie over risico's waaraan omwonenden door inrichtingen worden blootgesteld, aan hen door te geven, kan eerder op artikel 8 dan op artikel 2 van het EVRM worden gebaseerd. Bij milieuschade door hinder (geluid, stank) en gezondheidsschade door uitstoot van schadelijke stoffen kan tevens sprake zijn van een belemmering van het genot van de woning en nadelige beïnvloeding van het privé- en gezinsleven van omwonenden door uitblijven van overheidsingrijpen.'[2]

In het vervolg van dit hoofdstuk zal het Straatsburgse toetsingskader aan een nadere analyse worden onderworpen door een bespreking van de relevante jurisprudentie op grond van art. 2, art. 3, art. 6 en art. 8 EVRM alsmede art. 1 van het Eerste Protocol bij het EVRM. Uit de analyse zal blijken dat het niet eenvoudig is om het toetsingskader nader te preciseren nu het uiteindelijke oordeel van het EHRM over de vraag of het EVRM wel of niet geschonden is vaak erg casuïstisch is. De algemene lijnen die het EHRM in de jurisprudentie uitzet geven echter wel enig houvast voor een antwoord op de vraag welke beperkingen het EVRM oplegt met betrekking tot het beperken van aansprakelijkheid voor falend toezicht.

9.2 Toetsingskader: 'Positive Obligations'

9.2.1 Artikel 2 EVRM: Het recht op leven

Artikel 2 EVRM luidt als volgt:

'1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
a. in defence of any person from unlawful violence;
b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
c. in action lawfully taken for the purpose of quelling a riot or insurrection.'

Het EVRM verplicht Staten echter niet alleen om zich te onthouden van inmenging in de vrijheidsrechten, maar ook om in bepaalde gevallen actief op te treden om het leven te beschermen van een ieder die onder haar rechtsmacht ressorteert. Daartoe volstaat het niet om alleen bepalingen in de wet op te nemen die misdrijven tegen het leven strafbaar stellen. In sommige omstandigheden verplicht art. 2 EVRM de overheid om preventief op te treden ter bescherming van een burger wiens leven gevaar loopt.[3] De overheid heeft met andere woorden de positieve verplichting om actief het leven van burgers te beschermen en zal haar taken met betrekking tot toezicht op veiligheid en gezondheid derhalve naar behoren moeten uitvoeren om aan deze verplichting te voldoen.

Het EHRM kijkt bij de naleving van art. 2 EHRM naar drie elementen: (a) de implementatie van preventieve maatregelen, (b) het recht op informatie van het publiek ten aanzien van risico's voor de volksgezondheid en (c) de plicht een adequate rechtsgang te bieden.

Ad a) Positieve verplichting tot het nemen van preventieve maatregelen
In de zaak *Osman tegen het Verenigd Koninkrijk* nam het EHRM aan dat onder art. 2 EVRM de positieve verplichting bestaat om burgers te beschermen tegen levensbedreiging of bedreiging van hun lichamelijke integriteit door derden, wanneer sprake is van een daadwerkelijk en

2 Rb. 's-Gravenhage 24 december 2003, *NJCM-Bulletin* 2004, p. 698 ev., m.nt. T. Barkhuysen & M.L. van Emmerik; JB 2004, 69, m.nt. Albers.
3 Zie *Osman tegen het Verenigd Koninkrijk*, EHRM 28 oktober 1998; *Edwards tegen het Verenigd Koninkrijk*, EHRM 14 maart 2002; *Keenan tegen het Verenigd Koninkrijk*, EHRM 3 april 2001; *Mastromatteo tegen Italië*, EHRM 24 oktober 2002; *Öneryildiz tegen Turkije*, EHRM 18 juni 2002.

onmiddellijk gevaar waarvan de autoriteiten wisten of behoorden te weten.[4] In deze zaak ging het om een leraar die op ongezonde wijze gehecht was geraakt aan zijn 14-jarige leerling Ahmet Osman. Later raakte hij echter teleurgesteld in Ahmet en begon hij Ahmet te bedreigen. Nadat er verschillende vernielingen jegens de familie Osman werden gepleegd, besloot de politie de leraar aan te houden. Deze werd echter, ook na een officiële signalering, niet gevonden. Uiteindelijk schiet de leraar de vader van Ahmet Osman dood en verwondt hij Achmet. Moeder Osman en Ahmet Osman trachtten vervolgens tevergeefs in het Verenigd Koninkrijk de politie wegens nalatigheid in rechte aan te spreken. De politie zou, ondanks waarschuwingen, onvoldoende hebben gedaan om de leraar van zijn daden af te houden. Daarop wendden klagers zich tot Straatsburg waar zij zich beriepen op een schending van onder andere art. 2 EVRM. Het EHRM is van oordeel dat de Staat pas dan niet aan haar positieve verplichtingen heeft voldaan als voldoende is vastgesteld:

> '…that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'[5]

Het EHRM verwerpt de stelling dat de Staat alleen aansprakelijk is bij grove onachtzaamheid of bewust nalaten:

> 'Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligation of the Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (…). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all circumstances of any particular case.'[6]

De voorzienbaarheid van het gevaar is van groot belang.[7] Wie stelt dat de autoriteiten te kort zijn geschoten in het beschermen van het recht op leven, moet aantonen dat zij op de hoogte waren of hadden behoren te zijn van een reëel en onmiddelijk gevaar voor iemands leven, en dat zij hebben nagelaten die maatregelen te treffen die men redelijkerwijze van hen had mogen verwachten om dat gevaar af te wenden.

De positieve verplichting om preventief op te treden moet geen onmogelijke of disproportionele last opleggen aan de autoriteiten (in de zaak *Osman*: de politie). Het EHRM houdt rekening met de moeilijkheden die bij het handhaven van de openbare orde komen kijken, met de onvoorspelbaarheid van menselijk gedrag en met de beperkte middelen die beschikbaar zijn en dwingen tot het stellen van prioriteiten. Van de staat mag niet het onmogelijke worden verwacht, aldus het EHRM:

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4 *Osman tegen het Verenigd Koninkrijk*, EHRM 28 oktober 1998, *NJCM-bulletin* 1999, p. 512 ev, m.nt. Myjer.
5 Idem, para. 116.
6 Idem, para. 116.
7 In de Osman zaak werd door het Hof uiteindelijk geen schending van art. 2 EVRM aangenomen, omdat het op basis van de feiten concludeerde dat: *'(...) the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk (…).*' Vgl. *Edwards tegen het Verenigd Koninkrijk*, EHRM 14 maart 2002, waar door het Hof wel een schending van art. 2 EVRM werd geconstateerd. In die zaak ging het om een gevangene die door een psychisch gestoorde celgenoot werd vermoord. Het Hof overwoog dat gedetineerden in een kwetsbare positie verkeren en dat de autoriteiten verplicht zijn hen te beschermen. Het Hof concludeerde dat de autoriteiten op de hoogte waren van de psychische gesteldheid van de gedetineerde en dat zij hadden verzuimd de persoon die in de gevangenis in kwestie moest beslissen over de plaatsing van gedetineerden, hiervan op de hoogte te brengen. Dit leverde in casu een schending van art. 2 EVRM op; Vgl. ook *Mastromatteo tegen Italië*, EHRM 24 oktober 2002, waar tijdens een bankoverval door een gevangene op verlof de zoon van klager werd vermoord. Het Hof achtte in dit geval het gevaar onvoldoende voorzienbaar en nam geen schending van art. 2 EVRM aan.

> 'Bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materializing.'[8]

Voor het activeren van de positieve verplichting lijkt overigens niet zozeer relevant wie de gevaarlijke situatie primair veroorzaakt, alswel de vraag of de staat al dan niet duidelijke indicaties heeft of had kunnen hebben van de dreiging daarvan. Het kan dus zowel gaan om bedreigingen door medeburgers (zoals in *Osman*) als om gevaarlijke situaties die min of meer direct door de Staat zelf worden veroorzaakt (zoals uit de hieronder besproken zaak *Öneryildiz* zal blijken). In beide gevallen worden positieve verplichtingen voor de Staat aangenomen.

In de zaak *Öneryildiz tegen Turkije* verklaarde het EHRM de positieve verplichting voor de staat om maatregelen te nemen die nodig zijn voor de bescherming van het recht op leven van onder zijn rechtsmacht ressorterende personen, ook van toepassing op het gebied van milieurisico's.[9] Klager in deze zaak was Öneryildiz die met zijn familie in een sloppenwijk in de buurt van Istanbul woonde. De sloppenwijk was gebouwd in de directe nabijheid van een vuilnisbelt die door vier stadsdistricten werd gebruikt. De behuizing in de sloppenwijk was weliswaar illegaal, maar werd door de autoriteiten gedoogd. In 1991 bleek uit een onderzoeksrapport dat ten aanzien van de vuilnisbelt wettelijke regels werden geschonden en er een groot gevaar bestond voor een methaangasexplosie. Het rapport gaf aanleiding tot een langdurig dispuut tussen de burgemeester van Istanbul en de autoriteiten van de diverse deeldistricten over de vraag wie van hen verantwoordelijk was voor de vuilnisbelt. Op 28 april 1993 deed de methaangasexplosie zich echter voor. 39 mensen kwamen om het leven, waaronder 9 familieleden van Öneryildiz. Tevens werd door de explosie zijn huis verwoest. Öneryildiz klaagde in Straatsburg onder andere over een schending van art. 2 EVRM, aangezien zijn familieleden waren omgekomen door nalatigheid van de overheid. De Grand Chamber van het EHRM concludeerde dat:

> '…the Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ümraniye municipal rubbish tip. They consequently had a positive obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals (…), especially as they themselves had set up the site and authorized its operation, which gave rise to the risk in question.'[10]

Het argument van de Turkse overheid dat Öneryildiz zich met zijn familie illegaal in de buurt van de vuilnisbelt had gevestigd, wordt door het Hof afgewezen. Het enkele feit dat de autoriteiten geen toestemming hadden verleend om in de nabijheid van de vuilnisbelt te wonen is niet afdoende om te voldoen aan de verplichting van art. 2 EVRM tot bescherming van het recht op leven. De autoriteiten waren op de hoogte van het feit dat burgers waren gaan wonen op de bewuste plek (door de autoriteiten werd zelfs belasting geheven en werden publieke voorzieningen geboden) en dat er gevaren voor de volksgezondheid bestonden. De autoriteiten hadden feitelijk moeten optreden tegen de illegale bewoning. Het gedogen van de gevaarlijke situatie levert in deze omstandigheden een schending van art. 2 EVRM op.

Ad b) Positieve verplichting tot het verstrekken van informatie

Onder omstandigheden rust op de Staat tevens de positieve verplichting om voorlichting te geven over ernstige bedreigingen voor de gezondheid. Onder art. 2 EVRM werd deze verplichting door het EHRM aangenomen in de zaak *L.C.B. tegen het Verenigd Koninkrijk*.[11] De vader van L.C.B. was als militair tijdens een serie bovengrondse kernproeven op Christmas Island (1957-1958) in

8 *Osman tegen het Verenigd Koninkrijk*, EHRM 28 oktober 1998, para. 116.
9 *Öneryildiz tegen Turkije*, EHRM 30 november 2004 (Grand Chamber judgment).
10 Idem, para. 101.
11 *L.C.B. tegen het Verenigd Koninkrijk*, EHRM 9 juni 1998.

de open lucht opgesteld. L.C.B. werd in 1966 geboren en bleek op 4-jarige leeftijd leukemie te hebben. Uit een onderzoek in 1992 bleek dat een hoog percentage kinderen van soldaten die op Christmas Island hadden gediend leukemie hebben. Het EHRM overweegt dat de overheid op basis van art. 2 EVRM in principe verplicht is om adequate voorlichting te verstrekken indien zij beschikken over informatie dat iemand aan straling is blootgesteld en als gevolg daarvan een reëel gezondheidsrisico loopt.[12]

In de *Öneryildiz* zaak heeft het EHRM deze positieve verplichting tot het verstrekken van informatie nog eens herhaald en erkend als deelaspect van art. 2 EVRM. Het EHRM overweegt dat een dergelijke verplichting bestaat wanneer (a) men niet kan verwachten dat burgers zelf kennis hebben van een specifiek gevaar en (b) de autoriteiten deze informatie wel kunnen verstrekken.[13]

Ad c) Procedurele verplichtingen onder art. 2 EVRM

Als afsluitende toets onder art. 2 EVRM kijkt het EHRM of de Staat de procedurele verplichtingen voortvloeiend uit art. 2 EVRM is nagekomen.[14] Uit art. 2 EVRM vloeit de procedurele verplichting, als aanvulling op de handhavings- en informatieplicht, een effectief rechterlijk systeem te garanderen indien een gevaar zich, ondanks de verplichting dit te voorkomen, toch heeft verwezenlijkt. Tevens is de Staat verplicht een effectief en onafhankelijk onderzoek te verrichten naar de feiten en omstandigheden die het gevaar veroorzaakt hebben, de verantwoordelijken aan te wijzen en adequaat rechtsherstel te bieden, bijvoorbeeld door het toekennen van schadevergoeding.

Effectief en onafhankelijk onderzoek

De verplichting voor de Staat om een onderzoek te verrichten naar de feiten en omstandigheden die een bedreiging voor het recht op leven veroorzaakt hebben, is met name in zaken waarin sprake was van het gebruik van geweld door de autoriteiten tot ontwikkeling gekomen. Dat een dergelijk onderzoek ook zal moeten volgen wanneer er weliswaar geen sprake is van gebruik van direct geweld door de autoriteiten, maar van een situatie waarin iemand komt te overlijden onder omstandigheden waarvoor de Staat mogelijk verantwoordelijk is, blijkt uit het feit dat het EHRM ook in dat geval het vereiste van een effectief en onafhankelijk onderzoek van toepassing heeft verklaard.[15]

In de zaak *Kaya tegen Turkije* overwoog het EHRM dat de autoriteiten verplicht zijn een effectief en onafhankelijk onderzoek te verrichten indien een persoon onder verdachte omstandigheden om het leven is gekomen:

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12 *L.C.B. tegen het Verenigd Koninkrijk*, EHRM 9 juni 1998, Het EHRM wees de klacht van L.C.B. op de feiten af. Het Hof was onvoldoende overtuigd dat de vader van L.C.B. was blootgesteld aan gevaarlijke hoeveelheden straling, en er bestond twijfel over een causaal verband tussen de blootstelling van een vader aan straling en het optreden van leukemie bij een later geboren kind.

13 *Öneryildiz tegen Turkije*, EHRM 18 juni 2002 (Chamber judgment). In de uitspraak van de Grand Chamber van 30 november 2004 inzake Öneryildiz tegen Turkije wordt door de Grand Chamber naar de eerdere overwegingen van de Chamber hierover verwezen. De Grand Chamber (uitspraak 30 november 2004) overweegt overigens in para. 108 dat de overheid onder de bestaande omstandigheden niet had kunnen volstaan met enkel de eerbiediging van het recht op informatie en dat meer praktische maatregelen waren geboden om aan haar verplichtingen te voldoen: *'(...) the Court considers that in the absence of more practical measures to avoid the risks to the lives of the inhabitants of the Ümraniye slums, even the fact of having respected the right to information would not have been sufficient to absolve the State of its responsibilities.*'

14 Zie bijv. *Öneryildiz tegen Turkije*, EHRM 30 November 2004 (Grand Chamber judgment), para. 91: '*The obligations deriving from Article 2 do not end there. Where lives have been lost in circumstances potentially engaging the responsibility of the State, that provision entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished (…).*'

15 Zie Öneryildiz tegen Turkije, EHRM 30 november 2004 (Grand Chamber judgment) waarin het immers ging om een gevaarlijke woonsituatie die door de autoriteiten werd gedoogd en waarvoor de Staat verantwoordelijk werd gehouden. Het EHRM overweegt met betrekking tot de procedurele vereisten onder art. 2 EVRM in para. 93: *'(...) in areas such as that in issue in the instant case, the applicable principles are rather to be found in those which the Court has already had occasion to develop in relation notably to the use of lethal force, principles which lend themselves to application in other categories of cases.*'

> '… the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 to "secure to everyone within (its) jurisdiction the rights and freedoms defined in (the) Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of force by agents of the State.'[16]

De Staat zal zelf het initiatief tot het onderzoek moeten nemen en mag de uitvoering van het onderzoek niet afhankelijk maken van een verzoek door slachtoffers of nabestaanden daartoe. Het doel van het onderzoek is volgens het EHRM:

> '...to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.'[17]

In de zaak *Hugh Jordan tegen het Verenigd Koninkrijk* heeft het EHRM de in de jurisprudentie nader ontwikkelde vereisten waar bij het onderzoek aan zal moeten worden voldaan nog eens opgesomd:

> 'The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (…) and to the identification and punishment of those responsible (…). This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident (…). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.
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> A requirement of promptness and reasonable expedition is implicit in this context (…). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.
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> For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests'.[18]

Er zal kortom sprake moeten zijn van een effectief en onafhankelijk onderzoek dat zo nodig moet kunnen leiden tot bestraffing van de verantwoordelijken. Het onderzoek zal in elk geval prompt na de gebeurtenissen verricht moeten worden. Eventuele nabestaanden of slachtoffers dienen voldoende bij de uitvoering van het onderzoek te worden betrokken en de resultaten van het onderzoek zullen in principe openbaar moeten worden gemaakt.

Effectief systeem van rechtspleging

De positieve verplichting voor Staten om alle noodzakelijke maatregelen te nemen ter bescherming van het recht op leven, omvat tevens de plicht een juridisch systeem te ontwerpen ter afschrikking van bedreigingen van het recht op leven. Zo overwoog het EHRM in de zaak

16 *Kaya tegen Turkije*, EHRM 19 februari 1998, para. 105; Zie bijvoorbeeld ook *Cyprus tegen Turkije*, EHRM 10 mei 2001; *Kelly e.a. tegen het Verenigd Koninkrijk*, EHRM 4 mei 2001 en recent nog *Slimani tegen Frankrijk*, EHRM 27 juli 2004.

17 *Kaya tegen Turkije*, EHRM 19 februari 1998, para. 105; Zie ook *Hugh Jordan tegen het Verenigd Koninkrijk*, EHRM 4 mei 2001.

18 *Hugh Jordan tegen het Verenigd Koninkrijk*, EHRM 4 mei 2001, para. 105-109.

Öneryildiz tegen Turkije:

> 'The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.[19]

Dit betekent niet alleen dat de Staat zorg moet dragen voor het strafbaar stellen van inbreuken op het recht op leven, maar tevens dat er een effectief systeem van rechtspleging moet bestaan dat in bepaalde gevallen ook moet kunnen leiden tot het opleggen van repressieve, strafrechtelijke sancties op basis van het hierboven besproken vereiste effectieve en onafhankelijke onderzoek naar de feiten en omstandigheden die de inbreuk op het recht op leven hebben veroorzaakt. Het EHRM lijkt deze verplichting op de meer algemene verplichting die voortvloeit uit art. 13 EVRM (recht op een daadwerkelijk rechtsmiddel, zie ook onder par. 9.2.3) te baseren.[20]

Het EHRM heeft meermalen overwogen dat art. 2 EVRM soms strafrechtelijke handhaving van het recht op leven vereist.[21] Uit art. 2 EVRM kan weliswaar voor een klager niet het recht tot strafvervolging van derden worden afgeleid, maar het EHRM acht in bepaalde gevallen strafvervolging noodzakelijk om het publieke vertrouwen in het recht te behouden.[22] In de mogelijkheid tot het opleggen van strafrechtelijke sancties moet in elk geval zijn voorzien wanneer de inbreuk op het recht op leven opzettelijk is gepleegd.

Gaat het echter om niet-opzettelijke inbreuken op het recht op leven, dan hoeft niet in alle gevallen te worden voorzien in strafrechtelijke sancties. In dergelijke gevallen zou ook een civiele of bestuursrechtelijke procedure adequaat rechtsherstel of schadevergoeding kunnen bieden. Het EHRM overwoog dit in een zaak die lag in de specifieke sfeer van medische nalatigheid. In de zaak *Calvelli en Ciglio tegen Italië* ging het om nalatigheid van een arts ten gevolge waarvan de baby van klagers overleed. Het EHRM overwoog ten aanzien van de mogelijkheid tot adequaat rechtsherstel:

> '...if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a

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19 Öneryildiz tegen Turkije, EHRM 30 november 2004 (Grand Chamber judgement), para. 89. In para. 90 van dezelfde uitspraak overweegt het EHRM dat dit bovenal geldt als het gaat om het reguleren van gevaarlijke situaties: *'This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks*.'

20 *Öneryildiz tegen Turkije*, EHRM 18 juni 2002 (Chamber judgment). De Chamber besprak de vereisten van een effectief rechterlijk systeem onder art. 2 EVRM en kwam om die reden niet toe aan een bespreking van de klacht onder art. 13 EVRM. In de uitspraak van de Grand Chamber (EHRM 30 november 2004) wordt daarentegen na een bespreking van de procedurele verplichtingen onder art. 2 EVRM, tevens gekeken of dit zich verhoudt met de vereisten van art. 13 EVRM. Het Hof overweegt: *'(...) the Court's task under Article 13 in the instant case is to determine whether the applicant's exercise of an effective remedy was frustrated on account of the manner in which the authorities discharged their procedural obligation under Article 2.*' Het Hof concludeert uiteindelijk dat art. 13 EVRM met betrekking tot de klacht onder art. 2 EVRM geschonden is.

21 Zie bijv. *X en Y tegen Nederland*, EHRM 26 maart 1985, *NJCM-Bulletin* 1985, p. 410 ev., m.nt. Schokkenbroek. Het EHRM overwoog in para. 27 van die zaak: *'Effective deterrence is indispensable in this area and it can be achieved only by criminal law provisions.'*

22 Idem, para. 96: '*It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence (...) or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence. On the other hand, the national courts should not under any circumstances be prepared to allow life endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts (…)*.'

remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained.'[23]

Er zijn echter omstandigheden die er toe kunnen leiden dat ook nalatigheid een strafrechtelijk vervolg dient te krijgen. Factoren zoals de verantwoordelijkheid van de overheid op het desbetreffende beleidsterrein, het aantal (potentiële) slachtoffers en de ernst van de zaak spelen hierbij een rol.[24]

In de al eerder aangehaalde *Öneryildiz* zaak werden de gevolgde straf en civiele procedures door het EHRM als onvoldoende beschouwd om te voldoen aan de positieve verplichting van de Staat om voor een effectief systeem van rechtspleging te zorgen. Weliswaar werden de voor de vuilnisbelt verantwoordelijke burgemeesters strafrechtelijk vervolgd, zij werden echter slechts schuldig bevonden aan nalatigheid in de uitoefening van hun functies en werden slechts veroordeeld tot een voorwaardelijke geldboete. De strafrechter had zich bovendien niet uitgelaten over de verantwoordelijkheid van de burgemeesters voor de dood van de familieleden van klager. Het EHRM vond dat de burgemeesters op deze wijze een quasi-immuniteit genoten en dat de strafprocedure niet leidde tot adequaat rechtsherstel. Wat de administratieve procedure betreft was het EHRM van mening dat het zeer lang duurde voordat het recht van klager op schadevergoeding werd erkend en had het EHRM twijfels bij de hoogte van de uiteindelijk toegewezen, maar nog steeds niet betaalde, bedragen. Volgens het EHRM had derhalve ook de administratieve procedure niet geleid tot adequaat en effectief rechtsherstel. Het Hof concludeert dan ook dat de procedurele vereisten van art. 2 EVRM geschonden zijn:

'Accordingly, it cannot be said that the manner in which the Turkish criminal-justice system operated in response to the tragedy secured the full accountability of State officials or authorities for their role in it and the effective implementation of provisions of domestic law guaranteeing respect for the right to life, in particular the deterrent function of the criminal law. (...) It must be concluded in the instant case that there has been a violation of Article 2 of the Convention in its procedural aspect also, on account of the lack, in connection with a fatal accident provoked by the operation of a dangerous activity, of adequate protection "by law" safeguarding the right to life and deterring similar life-endangering conduct in future.'[25]

9.2.2 Artikel 3 EVRM: Verbod op foltering en onmenselijke of vernederende behandeling

Artikel 3 EVRM luidt als volgt:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

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23 *Calvelli en Ciglio tegen Italië*, EHRM 28 november 2001, para. 51, NJB 2002, p. 571, nr. 11. In casu strandde de strafrechtelijke vervolging tegen de arts wegens verjaring. Klagers waren echter tevens een civiele procedure begonnen. Deze procedure leidde niet tot een rechtelijk oordeel over de aansprakelijkheid van de betrokken arts, omdat klagers een schikking met diens verzekeringsmaatschappij overeenkwamen. Klagers beroofden zichzelf van een (art. 2 EVRM conforme) mogelijkheid om vast te stellen in hoeverre de arts verantwoordelijk was voor de dood van hun kind. Het Hof achtte art. 2 EVRM daarom niet geschonden. Vgl. in dit verband ook *Vo tegen Frankrijk*, EHRM 8 juli 2004, *EHRC* 2004, nr. 86.

24 Zie bijv. *Öneryildiz tegen Turkije*, EHRM 30 november 2004 (Grand Chamber judgment), para. 93: *'Where it is established that the negligence attributable to State officials or bodies on that account goes beyond an error of judgment or carelessness, in that the authorities in question, fully realizing the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity (…), the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative (…).'*

25 *Öneryildiz tegen Turkije*, EHRM 30 November 2004 (Grand Chamber judgment), para. 117-118. Zie uitgebreid T. Barkhusyen & M.L. van Emmerik, *EHRM-uitspraak Öneryildiz tegen Turkije: Europese grenzen aan het gedogen van gevaarlijke situaties en aan beperkingen van overheidsaansprakelijkheid bij ongelukken en rampen*, in O&A mei 2003, nr. 3.

Ook onder art. 3 EVRM heeft het EHRM positieve verplichtingen voor de Staat aangenomen. Uit art. 3 EVRM vloeit de positieve verplichting voort om personen te beschermen tegen een onmenselijke en vernederende behandeling. Een voorbeeld hiervan is de zaak *Z. e.a. tegen het Verenigd Koninkrijk* waarin het EHRM tot een schending van art. 3 EVRM concludeerde, omdat de autoriteiten jarenlang geen maatregelen hadden genomen, terwijl zij reeds lange tijd op de hoogte waren van het feit dat er in een bepaald gezin kinderen ernstig verwaarloosd werden:

> 'The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (…). These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.'[26]

9.2.3 Artikel 6 EVRM: Het recht op toegang tot de rechter

De eerste zin van artikel 6 lid 1 EVRM luidt als volgt:

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

Artikel 6 EVRM waarborgt het recht tot toegang tot de rechter. Het recht op een rechtsingang mag echter aan bepaalde beperkingen worden onderworpen. Beperkingen moeten een legitiem doel hebben en bovendien proportioneel zijn. In de zaak *Osman* trachtten klagers tevergeefs in het Verenigd Koninkrijk de politie in rechte aan te spreken. De politie was in de ogen van klagers nalatig geweest en had onvoldoende bescherming geboden (zie voor een uitgebreidere beschrijving van de feiten de bespreking van deze zaak in hoofdstuk 2.1). De nationale rechter verleende evenwel tot in de hoogste instantie geen rechtsingang. Daarop wendden klagers zich met een beroep op art. 6 EVRM tot het EHRM. Met betrekking tot het recht op toegang tot de rechter overwoog het EHRM:

> 'The Court recalls that Article 6 § 1 embodies the 'right to a court', of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect.
>
> However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[27]

Het EHRM concludeerde in *Osman* dat de in het Verenigd Koninkrijk geldende regels met betrekking tot het beperken van de aansprakelijkheid van de politie op zich legitiem waren (namelijk gericht op het effectief functioneren van de politie), maar dat de toepassing niet proportioneel was. De beperking mag niet zover gaan dat in feite aan een staatsorgaan (in de

26 *Z. e.a. tegen het Verenigd Koninkrijk*, EHRM 10 mei 2001, NJB 2001, p. 1310, nr. 29. Vgl. *A. tegen het Verenigd Koninkrijk*, EHRM 23 september 1998 en *D.P. en J.C. tegen het Verenigd Koninkrijk*, EHRM 10 oktober 2002.
27 *Osman tegen het Verenigd Koninkrijk*, EHRM 28 oktober 1998, *NJCM-bulletin* 1999, p. 512 ev, m.nt. Myjer.

zaak *Osman* de politie) een immuniteit wordt toegekend. In *Osman* leidde de gehanteerde '*exclusionary rule*' volgens het EHRM tot een:

> '… watertight defence to the police and it was impossible to prise open an immunity which the police enjoy from civil suit in respect of their acts and omissions in the investigation and suppression of crime.
>
> The Court would observe that the application of the rule in this manner without further enquiry into the existence of competing public interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on a applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.
>
> In its view, it must be open to a domestic court to have regard to the presence of other public interest considerations which pull in the opposite direction to the application of the rule. Failing this, there will be no distinction made between degrees of negligence or of harm suffered or any consideration of the justice of a particular case.[28]

In de zaak *Z e.a. tegen het Verenigd Koninkrijk* kwam het EHRM echter terug op de overwegingen uit *Osman*. In de zaak *Z* hadden volgens klagers de lokale autoriteiten gefaald om adequate kinderbeschermingsmaatregelen te nemen. De door klagers ingezette nationale procedure eindigde uiteindelijk in een uitspraak van het *House of Lords* waarin werd gesteld dat lokale autoriteiten niet aansprakelijk kunnen worden gesteld voor nalatigheid in de uitoefening van hun wettelijke verplichtingen aangaande het welzijn van kinderen. Klagers wendden zich daarop tot het EHRM met de klacht dat zij geen toegang tot een rechter hadden (art. 6 EVRM) en geen effectief rechtsmiddel hadden om te klagen over de vermeende schending van het EVRM (art. 13 EVRM).

Het EHRM constateerde dat klagers geen mogelijkheid hadden om schadevergoeding te eisen van een lokale overheid op grond van nalatigheid. Het EHRM oordeelde echter vervolgens dat de beperkte toegang tot de rechter niet het gevolg was van een procedurele hindernis of van de toepasselijkheid van een immuniteit, maar het resultaat van de interpretatie van het materiële recht door de nationale rechter. Het is niet de taak van het EHRM om zich uit te spreken over de interpretatie van de inhoud van nationale regelgeving:

> 'The applicants, and the Commission, relied on *Osman* (...) as indicating that the exclusion of liability in negligence, in that case concerning the acts or omissions of the police in the investigation and prevention of crime, acted as a restriction on access to a court. The Court considers that its reasoning in *Osman* was based on an understanding of the law of negligence (...) which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and notably by the House of Lords. The Court is satisfied that the law of negligence as developed in the domestic courts (...) includes the fair, just and reasonable criterion as an intrinsic element of the duty of care and that the ruling of law concerning that element in this case does not disclose the operation of an immunity. In the present case, the Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law. (...).
>
> The applicants may not, therefore, claim that they were deprived of any right to a determination on the merits of their negligence claims. Their claims were properly and fairly examined in light of the applicable domestic legal principles concerning the tort of negligence. Once the House of Lords had ruled on the arguable legal issues that brought into play the applicability of Article 6 § 1 of the Convention (...), the applicants could no longer claim any entitlement under Article 6 § 1 to obtain any hearing concerning the facts. As pointed out above, such a hearing would have served no purpose, unless a duty of care in negligence had been held to exist in their case. It is not for this Court to find that this should have been the outcome of the striking-out proceedings since this would effectively involve substituting its own views as to the proper interpretation and content of domestic law.'[29]

28 *Osman tegen het Verenigd Koninkrijk*, EHRM 28 oktober 1998, para. 150-151.
29 *Z e.a. tegen het Verenigd Koninkrijk*, EHRM 10 mei 2001, *NJB* 2001, p. 1310, nr. 29. Voor een uitgebreide

De conclusie van het EHRM in *Z* dat art. 6 EVRM niet was geschonden, deed echter niet af aan het feit dat deze klacht in het kader van art. 13 EVRM (recht op een daadwerkelijk rechtsmiddel[30]) aan de orde kon komen. Het ging hier namelijk om het gebrek aan een effectief nationaal rechtsmiddel om te klagen over een vermeende schending van één van de rechten die door het EVRM worden beschermd. Art. 13 EVRM waarborgt de beschikbaarheid op nationaal niveau van een (zowel wettelijk als in de praktijk) 'effectief' rechtsmiddel in het geval de burger een '*arguable claim*' heeft dat een recht onder het EVRM geschonden is. Dit betekent dat de burger zonodig gepaste schadeloosstelling dient te krijgen:

> 'The Court recalls at the outset that Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State'.[31]

In de zaak Z concludeert het EHRM uiteindelijk wat art. 13 EVRM betreft dat klagers onvoldoende mogelijkheid hadden om een beslissing te verkrijgen over hun klacht dat de autoriteiten onvoldoende zorg in acht hadden genomen:

> 'The Court finds that in this case the applicants did not have available to them an appropriate means of obtaining a determination of their allegations that the local authority failed to protect them from inhuman and degrading treatment and the possibility of obtaining an enforceable award of compensation for the damage suffered thereby. Consequently, they were not afforded an effective remedy in respect of the breach of Article 3 and there has, accordingly, been a violation of Article 13 of the Convention.'[32]

Hoewel het EHRM in de zaak *Z* afstand neemt van het eerder in *Osman* ten aanzien van het in art. 6 EVRM gewaarborgde recht op toegang tot de rechter ingenomen standpunt, moet worden gezegd dat deze koerswijziging specifiek van toepassing is op de common law situatie in het Verenigd Koninkrijk. Het EHRM wijkt in *Z* zeker niet af van de ook in *Osman* verwoorde eis dat het recht op een rechtsingang niet aan dusdanige beperkingen mag worden onderworpen dat een staatsorgaan waartegen men wil procederen in feite immuniteit heeft. Naast art. 6 EVRM vereist ook art. 13 EVRM dat er een mechanisme beschikbaar is om eventuele aansprakelijkheid van de overheid voor het optreden van zijn organen en functionarissen vast te stellen.

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beschouwing over de achtergrond en de gevolgen van *Osman* en *Z* in het Verenigd Koninkrijk zie: Jane Wright*: The retreat from Osman: Z v United Kingdom in the European Court of Human Rights and beyond*, in: Duncan Fairgrieve, Mads Andenas and John Bell: Tort Liability of Public Authorities in Comparative Perspective, London: BIICL 2002, p. 55-80.

30 Artikel 13 EVRM luidt: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

31 Zie bijvoorbeeld *Aydin tegen Turkije*, EHRM 25 september 1997, r.o. 103, *NJB* 1997, nr. 26. Zie ook *Klass tegen Duitsland*, EHRM 4 juli 1978, waarin het EHRM overwoog: *'(...) Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order to both have his claim decided and, if appropriate, to obtain redress. Thus, Article 13 must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated*'. Voor een uitgebreide analyse van art. 13 EVRM zie D.J. Harris, M. O'Boyle & C. Warbrick: *Law of the European Convention on Human Rights*, Butterworths: London, Dublin, Edinburgh, 1995, p. 443-461.

32 *Z e.a. tegen het Verenigd Koninkrijk*, EHRM 10 mei 2001, para. 111.

9.2.4 Artikel 8 EVRM: Recht op respect voor privacy (milieubescherming)

Artikel 8 EVRM luidt als volgt:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Het recht op privacy van art. 8 EVRM beschermt niet alleen tegen fysieke inbreuken daarop (bijvoorbeeld binnentreden zonder toestemming), maar ook tegen niet-fysieke inbreuken als gevolg van geluid, geur en andere vormen van overlast, mits deze inbreuken van een voldoende niveau zijn. Net als onder art. 2 EVRM heeft het EHRM ook onder art. 8 EVRM duidelijk gemaakt dat het enkel opstellen van normen ter bescherming van de in art. 8 EVRM besloten rechten onvoldoende is. Staten hebben de verplichting dergelijke normen zelf te respecteren en de positieve verplichting om deze normen ook op deugdelijke wijze te handhaven ten opzichte van derden die daarop inbreuk maken.[33]

Relevant in het kader van aansprakelijkheid voor falend toezicht zijn met name de positieve verplichtingen die het EHRM in een aantal milieuzaken onder art. 8 EVRM heeft geformuleerd.

In de zaak *López Ostra tegen Spanje* legde het EHRM de verplichting op aan de staat om de omwonenden van een zuiveringsinstallatie te beschermen tegen de veroorzaakte milieuhinder.[34] In 1988 verrees 12 meter van de woning van klaagster in het stadje Lorca (belangrijk centrum voor de Spaanse leerindustrie) een zuiveringsinstallatie voor de behandeling van vloeibaar en vast afval afkomstig van leerlooierijen. De installatie bezat geen vergunning en had er ook geen aangevraagd. De vestiging van de installatie veroorzaakte een enorme stankoverlast en had voor klaagster gezondheidsklachten tot gevolg. Het EHRM stelt dat ernstige milieuvervuiling een inbreuk kan maken op de in art. 8 EVRM neergelegde rechten. De omstandigheid dat de overlast niet direct door de Staat, maar door een particulier wordt veroorzaakt doet hier niet aan af. Op de overheid rust de positieve verplichting om het privé- en gezinsleven effectief te beschermen. Bij de beoordeling of de overheid de positieve verplichting al dan niet op de juiste wijze is nagekomen, geniet de Staat een zekere beleidsvrijheid ('margin of appreciation') bij de afweging van enerzijds economische belangen en het recht op privé-leven van burgers anderzijds. Indien er echter geen redelijke afweging ('fair balance') tussen de belangen is gemaakt, levert dat een schending van het EVRM op:

> 'Whether the question is analysed in terms of a positive duty on the State – to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 (…) or in terms of an 'interference by a public authority' to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation.'[35]

Het EHRM concludeert uiteindelijk dat er in dit geval geen sprake is van een 'fair balance' en komt tot een schending van art. 8 EVRM:

> '… despite the margin of appreciation left to the respondent State, the Court considers that

33 Zie bijv. *Moreno Gómez tegen Spanje*, EHRM 16 November 2004, AB 2004, nr. 453, m.nt. Barkhuysen.
34 *López Ostra tegen Spanje*, EHRM 9 december 1994. Vgl. R.A. Lawson: *Een onaanzienlijk teken boven de rampzaligheid: over de potentiële betekenis van het EVRM voor, tijdens en na een ramp*, in Ramp en Recht, beschouwingen over rampen, verantwoordelijkheid en aansprakelijkheid, E.R. Muller & C.J.J.M. Stolker (red.), Boom Juridische Uitgevers 2001, p. 286.
35 Idem, para. 51.

> the State did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicants effective enjoyment of her right to respect for her home and her private and family life.'[36]

In de zaak *Moreno Gómez tegen Spanje* betrekt het EHRM de in *López Ostra* geformuleerde positieve verplichting op door de klaagster ondervonden geluidsoverlast veroorzaakt door vlakbij haar woning gelegen bars en discotheken. Verzoekster woonde sinds 1970 in een flat in een woonwijk in Valencia. Vanaf 1974 werd door de gemeente toegestaan dat bars en discotheken zich in de directe nabijheid van de woning van verzoekster vestigden. Hierdoor ontstond voor de bewoners enorme geluidsoverlast met slapeloosheid en gezondheidsklachten tot gevolg. In 1993 bleek uit een in opdracht van de gemeente opgesteld rapport van een geluidsexpert dat het geluidsniveau in de woonomgeving van klaagster onacceptabel was en de toegestane geluidslimieten ver werden overschreden. In 1996 werd door de gemeente Valencia een nieuwe wet met betrekking tot geluidsniveaus aangenomen. In de wet werden voorwaarden aangegeven waaraan een gebied moest voldoen om tot een zogenaamde 'acoustically saturated zone' te worden gerekend. Indien een bepaald gebied als zodanig werd bestempeld, was het niet toegestaan om vergunningen te verlenen aan nieuwe geluidsoverlast veroorzakende inrichtingen. Op 27 december 1997 werd de woonomgeving van verzoekster bestempeld als 'acoustically saturated zone', echter op 30 januari 1997 werd door de gemeente nog een vergunning afgegeven voor een discotheek gesitueerd in de flat van verzoekster. Op 17 oktober 2001 werd deze vergunning door het Hooggerechtshof overigens alsnog ongeldig verklaard.

Klaagster beriep zich in Straatsburg op een schending van art. 8 EVRM, aangezien de Spaanse autoriteiten verantwoordelijk waren voor het voortduren van de geluidsoverlast veroorzaakt door nabij haar woning gelegen discotheken. Het EHRM overweegt eerst:

> 'Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it may involve the authorities' adopting measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.'[37]

Het EHRM herhaalt vervolgens dat sprake moet zijn van een redelijke afweging tussen tegenstrijdige belangen van enerzijds het individu en de maatschappij anderzijds. Het EHRM concludeert dat de ernst (gedurende de nacht en ver boven gestelde limieten) en de duur van de geluidsoverlast maken dat onder deze omstandigheden art. 8 EVRM geschonden is. Het EHRM stelt vervolgens dat de door de gemeente Valencia genomen maatregelen (bijvoorbeeld de nieuwe regelgeving met betrekking tot geluidsoverlast) om de overlast tegen te gaan in principe afdoende zouden zijn geweest, ware het niet dat de gemeente zelf herhaaldelijk heeft bijgedragen aan het niet naleven van deze regels. Het Hof herhaalt dat het EVRM is bedoeld om rechten te garanderen die 'practical and effective' in plaats van 'theoretical or illusory' zijn. In casu concludeert het EHRM dat de overheid onvoldoende tegen de nachtelijke geluidsoverlast heeft opgetreden om de rechten van verzoekster te beschermen:

> 'In view of its volume – at night and beyond permitted levels – and the fact that it continued over a number of years, the Court finds that there has been a breach of the rights protected by Article 8.
>
> Although the Valencia City Council has used its powers in this sphere to adopt measures (such as the bylaw concerning noise and vibrations) which should in principle have been adequate to secure respect for the guaranteed rights, it tolerated, and thus contributed to, the repeated flouting of the rules which it itself had established during the period concerned. Regulations to protect guaranteed rights serve little purpose if they are not duly enforced and the Court must reiterate that the Convention is intended to protect effective rights, not illusory ones. The facts show that the applicant suffered a serious infringement of her right to respect for her home as a result of the authorities' failure to take action to deal with the night-time disturbances.

36 Idem, para. 58.
37 *Moreno Gómez tegen Spanje*, EHRM 16 November 2004, para. 55, AB 2004, nr. 453, m.nt. Barkhuysen.

In these circumstances, the Court finds that the respondent State has failed to discharge its positive obligation to guarantee the applicant's right to respect for her home and her private life, in breach of Article 8 of the Convention.'[38]

Positieve verplichting tot het verstrekken van informatie
Onder art. 8 EVRM formuleerde het EHRM reeds in de zaak *Guerra tegen Italië* de positieve verplichting voor de Staat om informatie betrekking hebbende op de volksgezondheid te verstrekken aan de betrokken burgers.[39] Klagers woonde in het Italiaanse stadje Manfredonia. Op ongeveer een kilometer afstand lag een chemische fabriek die op grond van criteria zoals neergelegd in de regelegeving ter uitvoering van Richtlijn 82/501/EEG (de 'post-Seveso'-richtlijn) was gekwalificeerd als *high risk*. De Italiaanse autoriteiten lieten echter na om informatie met betrekking tot de risico's voor milieu en bevolking, de genomen veiligheidsmaatregelen en de te volgen procedure in het geval van een ongeluk openbaar te maken. Het EHRM overweegt dat het aan burgers onthouden van informatie die voor hen en hun naasten essentieel is om de potentiële (milieu)gevaren in te schatten voor de plaats waar zij wonen een inbreuk op het door art. 8 EVRM beschermde recht op privé-leven oplevert.

9.2.5 Artikel 1 Eerste Protocol bij het EVRM: Recht op eigendom

Artikel 1 Eerste Protocol (EP) luidt als volgt:

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

Positieve verplichtingen onder art. 1 EP
De staat dient zich te onthouden van niet gerechtvaardigde inmengingen in het eigendomsrecht. De bepaling van art. 1 EP kan echter ook van belang zijn in horizontale verhoudingen, dat wil zeggen tussen burgers en private rechtspersonen. Daarvoor is vereist dat de Staat verantwoordelijk kan worden gehouden voor de schending van het eigendomsrecht in die horizontale verhouding. De Staat kan bijvoorbeeld door het onvoldoende bieden van rechtsbescherming hebben nagelaten de ene burger te beschermen tegen de eigendomsinbreuk van een andere burger.

Uit art. 1 EP kunnen derhalve voor de Staat ook positieve verplichtingen voortvloeien. In de *Öneryildiz* zaak werd het nalaten om preventieve maatregelen te nemen, gezien als een inbreuk op het ongestoord genot van eigendom (door de explosie op de vuilnisbelt werd immers ook het huis van *Öneryildiz* verwoest). Het EHRM overwoog:

'... effective exercise of the right protected by that provision (Article 1 of Protocol No. 1) does not depend merely on the State's duty not to interfere, but may require positive measures of protection, particularly where there is a direct link between the measures which an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions.
In the present case there is no doubt that the causal link established between the gross negligence attributable to the State and the loss of human lives also applies to the engulfment of the applicant's house. In the Court's view, the resulting infringement amounts not to 'interference' but to the breach of a positive obligation, since the State officials and authorities did not do everything within their power to protect the applicant's proprietary interests. (…) The Court (…), for substantially the same reasons as those given in respect of the complaint of a violation of Article 2 (…) finds that the positive obligation under Article 1 of

38 Idem, para. 60-61. Vgl. *Surugiu tegen Roemenië*, EHRM 20 april 2004 en *Taskin e.a. tegen Turkije*, EHRM 10 november 2004.
39 *Guerra tegen Italië*, EHRM 19 februari 1998, *NJCM-bulletin* 1998, p. 848 ev, m.nt. Kamminga.

> Protocol No. 1 required the national authorities to take the same practical steps as indicated above to avoid the destruction of the applicant's house.'[40]

Inmenging in het eigendomsrecht: toetsingskader EHRM
Het EHRM beziet volgens een vast toetsingskader of een inmenging in het eigendomsrecht kan worden gerechtvaardigd. In de eerste plaats moet de inmenging bij wet zijn voorzien.[41] Ten tweede moet met de inmenging een gerechtvaardigd algemeen belang ('public interest') worden gediend. Tot slot moet er sprake zijn van een gerechtvaardigd evenwicht ('fair balance'), tussen de eisen van het algemeen belang en de bescherming van de fundamentele rechten van het individu. Een inmenging in het eigendomsrecht moet in het algemeen belang plaatsvinden en mag geen onevenredige last ('excessive burden'), op de betrokkene leggen. In de zaak James e.a. tegen het Verenigd Koninkrijk overwoog het EHRM daarover het volgende:

> 'Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (...). This latter requirement was expressed in other terms in the Sporrong and Lönnroth judgment by the notion of the "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (...). The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden". Although the Court was speaking in that judgment in the context of the general rule of peaceful enjoyment of property enunciated in the first sentence of the first paragraph, it pointed out that "the search for this balance is (...) reflected in the structure of Article 1" as a whole'.[42]

In het kader van de toetsing genieten Staten in het algemeen wel een ruime 'margin of appreciation' (vgl. par. 9.2.4).[43] De overheid komt de vrijheid toe om in het algemeen belang, in het bijzonder met het oog op sociale en economische doelstellingen, beleid te voeren waarbij een inmenging in eigendomsrechten kan plaatsvinden:

> 'Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken (...). Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.
>
> Furthermore, the notion of "public interest" is necessarily extensive. In particular (...) the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measures under Article 1 of Protocol No. 1 and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted.'[44]

Art. 1 EP en het limiteren van aansprakelijkheid
In een recent arrest van de civiele kamer van het Gerechtshof Amsterdam kwam de vraag aan

40 *Öneryildiz tegen Turkije*, EHRM 30 november 2004 (Grand Chamber judgment), para. 134-135.
41 Zie bijvoorbeeld *Hentrich tegen Frankrijk*, EHRM 22 september 1994, para. 42.
42 Zie *James e.a. tegen het Verenigd Koninkrijk*, EHRM 22 februari 1986, para. 50; Zie ook *Sporrong en Lönnroth tegen Zweden*, EHRM 23 september 1982, para. 69.
43 Zie bijvoorbeeld *James e.a. tegen het Verenigd Koninkrijk*, EHRM 22 februari 1986, para. 46.
44 Zie uitgebreid hierover T. Barkhuysen & M.L. van Emmerik: *De betekenis van art. 1 van het Eerste Protocol bij het EVRM voor het Nederlandse recht inzake overheidsaansprakelijkheid*, O&A november 2002, p. 102 tm 116.

de orde of het in art. 1 EP neergelegde recht op ongestoord genot van eigendom, het recht op volledige (dus ongelimiteerde) schadevergoeding omvat. De vordering tot schadevergoeding wordt in deze als eigendom in de zin van art. 1 EP beschouwd. Het hof overwoog dat de bescherming van eigendom in de zin van art. 1 EP niet absoluut is. Regulering van dat recht is toegestaan wanneer dat in overeenstemming is met het algemeen belang. Uit art. 1 EP vloeit niet zonder meer het recht tot volledige (ongelimiteerde) schadevergoeding voort. Aan de limitering van aansprakelijkheid kunnen legitieme belangen ten grondslag liggen. Nadat is vastgesteld of met de limitering een legitiem doel wordt gediend, dient er tevens een 'fair balance' te bestaan tussen het algemeen belang enerzijds en de bescherming van individuele rechten anderzijds. Aan het vereiste van een 'fair balance' is niet voldaan, indien er sprake is van een 'individual and excessive burden' voor het individu.[45]

9.3 Onderlinge verhouding art. 2, art. 3 en art. 8 EVRM, alsmede art. 1 EP

Zoals blijkt uit het hiervoor gegeven overzicht van de jurisprudentie van het EHRM staan art. 2, art. 3 en art. 8 EVRM met betrekking tot positieve verplichtingen in verband met elkaar. De verplichtingen voortvloeiend uit art. 2 EVRM zijn aan de orde wanneer er sprake is van levensbedreigende situaties, terwijl de verplichtingen op basis van art. 3 en art. 8 EVRM van toepassing zijn op situaties die niet direct levensbedreigend zijn. Indien de bescherming onder art. 2 en art. 8 EVRM met elkaar wordt vergeleken, kan worden geconstateerd dat de bescherming van art. 8 EVRM eerder aan de orde is, namelijk al in het geval van bijvoorbeeld substantiële overlast (zie *López Ostra tegen Spanje* en *Moreno Gómez tegen Spanje*) of niet direct levensbedreigende milieugevaren (zie *Guerra tegen Italië*). Bescherming onder art. 2 EVRM komt pas aan de orde wanneer er een levensbedreigende situatie bestaat (zie bijvoorbeeld *Osman tegen het Verenigd Koninkrijk* en *Öneryildiz tegen Turkije*). Uit dit onderscheid volgt dat er een sterkere verplichting bestaat om direct handhavend op te treden als de rechten in art. 2 en art. 3 EVRM in het geding zijn.

Artikel 1 Eerste Protocol bij het EVRM neemt een ietwat andere positie in, maar zoals gezegd, zijn ook daar positieve verplichtingen voor de Staat aan de orde. In relatie met art. 2 EVRM kan nog worden opgemerkt dat in het geval art. 2 EVRM geschonden is en er bij de verwezenlijking van het gevaar ook schade aan eigendom is ontstaan (vgl. de casus *Öneryildiz*), er tevens aansprakelijkheid bestaat wegens schending van de positieve verplichtingen die art. 1 EP voor de overheid meebrengt.

9.4 Positieve verplichting tot handhaving en het houden van toezicht

Uit de weergave van de jurisprudentie van het EHRM onder art. 2 EVRM blijkt de verplichting voor de overheid om handhavend op te treden tegen levensbedreigende situaties waarvan zij op de hoogte is of had moeten zijn. Dit geldt zowel in het geval de Staat zelf direct verantwoordelijk

45 Gerechtshof Amsterdam, sector civiel recht, 12 augustus 2004 (LJN: AR2333). In deze zaak ging het om een vrouw (B) die zeer ernstig gewond was geraakt bij een ongeval. B was – nog staande op een treinperron – met een deel van haar arm ingeklemd geraakt tussen de sluitende deuren van een treinstel dat haar vervolgens rijdend heeft meegetrokken. B is op een gegeven moment ten val gekomen tussen de trein en het perron en heeft daarbij zeer ernstig letsel opgelopen. B vorderde vervolgens volledige schadevergoeding van de Nederlandse Spoorwegen (NS). De NS beriep zich echter op de limitering van haar aansprakelijkheid op grond van art. 8:110 lid 1 BW. Wat de toepassing van art. 1 EP betreft overweegt het Gerechtshof: '*De bescherming van eigendom in de zin van artikel 1 Eerste Protocol is niet absoluut. Regulering ervan is toegelaten wanneer dat in overeenstemming is met het algemeen belang. Uit artikel 1 Eerste Protocol vloeit dan ook niet voort dat B zonder meer recht heeft op volledige schadevergoeding. Aan de limitering van aansprakelijkheid kunnen immers legitieme belangen ten grondslag liggen. Het hof verwerpt dan ook de stelling van B dat artikel 8:110 BW zonder meer in strijd is met artikel 1 Eerste Protocol*.' Het hof overweegt vervolgens dat in het algemeen limitering van schadevergoeding in het vervoersrecht gerechtvaardigd is vanwege de noodzaak het ondernemersrisico beheersbaar te houden. In het onderhavige geval is het hof echter van oordeel dat het algemeen belang bij handhaving van de limitering niet opweegt tegen de bescherming van de individuele rechten van B. Naar maatstaven van redelijkheid en billikheid acht het hof het dan ook onaanvaardbaar dat de NS jegens B een beroep doet op de limitering van de aansprakelijkheid.

is als wanneer derden zulke situaties creëren. Artikel 2 EVRM biedt in beginsel geen ruimte voor het laten voortbestaan van een levensbedreigende situatie met het oog op andere belangen. Zo zullen financiële redenen om (voorlopig) geen einde te maken aan een bij de overheid bekende reële en directe (levens)bedreigende situatie voor het leven van personen onder art. 2 EVRM niet kunnen worden geaccepteerd. Dit betekent dat de overheid ook verplicht kan zijn om preventief handhavend op te treden, dat wil zeggen ingeval er een klaarblijkelijk gevaar bestaat voor de overtreding van een wettelijk voorschrift dat eisen stelt ter voorkoming van levensbedreigende situaties of in gevallen waar een gevaar dreigt terwijl een wettelijk voorschrift ontbreekt. Gedogen van reële en directe gevaren voor de volksgezondheid levert een schending van art. 2 EVRM op. De verplichting tot het nemen van preventieve maatregelen onder art. 2 EVRM geldt zoals uit de door het EHRM gebruikte overwegingen blijkt niet alleen wanneer de autoriteiten op de hoogte waren van het reële en onmiddellijke gevaar, maar ook indien zij op de hoogte hadden behoren te zijn.[46] Uit het feit dat de overheid op grond van art. 2 EVRM tevens verplicht is om in te grijpen indien zij op de hoogte *had behoren te of had kunnen zijn*, lijkt een zekere verplichting tot het houden van toezicht voort te vloeien.[47]

Dezelfde verplichtingen gelden voor de Staat ook ten aanzien van art. 3 EVRM. Bij art. 3 EVRM zal het veelal gaan om situaties gaan die weliswaar niet direct levensbedreigend zijn, maar desondanks een ernstige aantasting van de fysieke integriteit opleveren. Het EHRM zal ook in dergelijke gevallen handhavend optreden van de autoriteiten eisen en de Staat geen ruimte voor een belangenafweging laten.

Bij niet levensbedreigende situaties die ook geen ernstige schending van de fysieke integriteit opleveren, bestaat er onder art. 8 EVRM daarentegen wel ruimte om gelet op andere gerechtvaardigde belangen, zoals bijvoorbeeld het economisch welzijn van een Staat, de inbreuk op een door art. 8 EVRM beschermd recht voort te laten bestaan. Bij de afweging van algemeen en individueel belang onder art. 8 EVRM is het EHRM bereid een zekere 'margin of appreciation' aan de autoriteiten te laten. De doeleinden met het oog waarop een vrijheidsrecht mag worden beperkt zoals opgesomd in art. 8 lid 2 EVRM kunnen bij het afwegen van de belangen een rol spelen. Zodra er echter geen 'fair balance' tussen de belangen is getroffen, levert dat een schending van het EVRM op.[48]

Het EHRM is daarbij bijzonder kritisch in gevallen waarin Staten de door hen ter bescherming van art. 8 EVRM geformuleerde normen zelf niet in acht nemen, ook wanneer deze normen door derden worden geschonden en de Staat hiertegen niet optreedt.[49] In een dergelijk geval is het EHRM niet geneigd Staten een ruime 'margin of appreciation' te gunnen terzake een eventuele belangenafweging. Het gedogen door de autoriteiten van een schending van door hen zelf opgestelde regels hoeft in Straatsburg op weinig sympathie te rekenen. Het EHRM verlangt dat Staten de door hen gestelde normen ter bescherming van de uit het EVRM voortkomende rechten handhaven. Deze handhavingsverplichting wordt door het EHRM mede gebaseerd op het in de jurisprudentie van het Hof steeds terugkerende beginsel dat het EVRM zo moet worden uitgelegd en toegepast dat de daarin opgenomen rechten effectief beschermd worden.[50]

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46 Zie bijv. *Öneryildiz tegen Turkije*, EHRM 30 november 2004 (Grand Chamber judgment), para. 101: '*(…) It follows that the Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ümraniye municipal rubbish tip. They consequently had a positive obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals (…), especially as they themselves had set up the site and authorized its operation, which gave rise to the risk in question.*'

47 Zie T. Barkhuysen & M.L. van Emmerik, *EHRM-uitspraak Öneryildiz tegen Turkije: Europese grenzen aan het gedogen van gevaarlijke situaties en aan beperkingen van overheidsaansprakelijkheid bij ongelukken en rampen,* O&A, mei 2003, p. 109 tm 121.

48 Vgl. R.A. Lawson, '*Een onaanzienlijk teken boven de rampzaligheid: over de potentiële betekenis van het EVRM voor, tijdens en na een ramp*', in E.R. Muller & C.J.J.M. Stolker (red.), Ramp en Recht, Den Haag, Boom Juridische Uitgevers 2001, p. 277-292. Zie voor een uitgebreide beschouwing over de 'fair balance'-test van het EHRM R.A. Lawson, '*Positieve verplichtingen onder het EVRM: opkomst en ondergang van de 'fair balance'-test*', NJCM-Bulletin 1995, p. 558 ev (deel I) en p. 727 ev (deel II).

49 Vgl. in dit verband *Hatton tegen het Verenigd Koninkrijk*, EHRM 8 juli 2003 (Grand Chamber judgment), *EHRC* 2003, nr. 71, m.nt. Janssen.

50 Zie bijv. *Moreno Gómez tegen Spanje*, EHRM 16 november 2004, AB 2004, nr. 453, m.nt. Barkhuysen.

9.5 Het EVRM en het Nederlandse overheidsaansprakelijkheidsrecht

In de voorgaande paragrafen is aan de hand van de jurisprudentie van het EHRM getracht het Straatsburgse toetsingskader weer te geven. Zoals reeds in de inleiding werd opgemerkt, is het niet eenvoudig om dit toetsingskader heel nauw te omschrijven. Zo is de gelding van sommige normen absoluut (onder art. 2 en art. 3 EVRM), maar gunt zoals gezegd het EVRM de Staat in andere gevallen (onder art. 8 EVRM) een 'margin of appreciation' en zal het in dat geval van de omstandigheden afhangen of de Staat op een Straatsburg conforme wijze deze belangenafweging heeft gemaakt. In de jurisprudentie van het EHRM worden echter wel algemene normen beschreven waaraan de Staat zich moet houden wat betreft het houden van toezicht, handhaving, informatieverstrekking, het nemen van preventieve maatregelen in het geval van levensgevaarlijke situaties en eigendomsbescherming. Indien de Staat de Straatsburgse normen niet naleeft, handelt zij in strijd met het EVRM en is daarmee ook naar Nederlands recht de onrechtmatigheid in de zin van art. 6:162 BW gegeven. Ter onderbouwing van een schadeclaim in Nederland kan daarbij ook een expliciet beroep kan worden gedaan op het EVRM.[51]

De verplichtingen uit het EVRM geven daarmee een nadere invulling aan hetgeen kan worden beschouwd als een onrechtmatige (overheids)daad in de zin van art. 6:162 BW.

9.6 Het EVRM en strafrechtelijke aansprakelijkheid in Nederland

De uit art. 2 EVRM voortvloeiende positieve verplichting tot het garanderen van een effectief rechterlijk systeem bij een inbreuk op het recht op leven, verplicht in bepaalde ernstige gevallen de weg van strafrechtelijke handhaving te bewandelen. In de mogelijkheid tot het opleggen van strafrechtelijke sancties moet in elk geval zijn voorzien wanneer in het kader van art. 2 EVRM de inbreuk op het recht op leven opzettelijk is gepleegd. Bij schending door nalatigheid is een strafrechtelijke procedure niet per se vereist en zou ook een civiele procedure kunnen voldoen, mits daarmee aansprakelijkheid kan worden vastgesteld en schadeloosstelling kan worden gerealiseerd. Er zijn echter omstandigheden die er toe kunnen leiden dat ook nalatigheid een strafrechtelijk vervolg dient te krijgen (zie par. 9.2.1).

Op grond van de huidige Nederlandse jurisprudentie kan de overheid maar in beperkte mate strafrechtelijk worden vervolgd.[52] Aangezien uit de jurisprudentie van het EHRM blijkt dat op grond van art. 2 EVRM onder omstandigheden de verantwoordelijken voor een inbreuk op het recht op leven strafrechtelijk aansprakelijk moeten kunnen worden gehouden, kan worden betoogd dat in Nederland een verruiming van de vervolgbaarheid van overheden en hun opdracht- of leidinggevende ambtenaren mogelijk noodzakelijk is voor die gevallen waar het EVRM een strafrechtelijk antwoord vereist.[53]

9.7 Conclusie

Het antwoord op de in dit hoofdstuk centraal staande vraag welke beperkingen het EVRM stelt aan het uitsluiten of beperken van de aansprakelijkheid voor toezichthouders kan aan de hand van de besproken jurisprudentie van het EHRM inzichtelijk worden gemaakt. Uit de door het EHRM in de jurisprudentie ontwikkelde normen die als verplichtingen voor de Staat uit het EVRM voortvloeien, blijkt dat de mogelijkheid om binnen de grenzen van dat verdrag aansprakelijkheid

51 Vgl. de in de inleiding geciteerde overwegingen van de Rechtbank ´s-Gravenhage (inzake Enschede). De rechtbank verwees overigens ambtshalve naar het EVRM want de betrokkenen hadden in die zaak (verrassend genoeg) zelf geen beroep op het EVRM gedaan.

52 Zie HR 23 april 1996, NJ 1996, 513 (Pikmeer I), HR 6 januari 1998, NJ 1998, 367 (Pikmeer II) en HR 25 januari 1994, NJ 1994, 598 (Volkel II).

53 Zie T. Barkhuysen & M.L. van Emmerik: *EHRM-uitspraak Öneryildiz tegen Turkije: Europese grenzen aan het gedogen van gevaarlijke situaties en aan beperkingen van overheidsaansprakelijheid bij ongelukken en rampen*, O&A 2003, p. 119-120; Zie van dezelfde schrijvers: *Het EVRM dwingt tot verruiming van de strafrechtelijke vervolgbaarheid van overheden*, NJB 2003, p. 1444-1445; Zie ook A.B. Blomberg: *Handhaven binnen EVRM-grenzen*, VAR-preadvies, VAR-reeks 132, Den Haag: Boom Juridische uitgevers 2004, p. 126-127.

uit te sluiten zeer beperkt is. Het tegendeel, het vaker (mede)aansprakelijk houden van de overheid voor schade, ook indien deze primair door een derde is veroorzaakt, lijkt bij het EHRM eerder het geval.[54] Daarentegen lijkt onder omstandigheden voor het limiteren van aansprakelijkheid onder het EVRM iets meer ruimte te bestaan.

Opgemerkt zij wel dat in het huidige Nederlandse wettelijke stelsel inzake overheidsaansprakelijkheid de in de Straatsburgse jurisprudentie ontwikkelde normen voldoende lijken te zijn opgenomen.[55] De verplichtingen uit het EVRM leidden derhalve niet zozeer tot een verruiming van overheidsaansprakelijkheid, maar geven wel heel duidelijk aan dat de overheid, indien de verplichtingen uit het EVRM niet zijn nagekomen, aansprakelijk moet kunnen worden gesteld.

Naar aanleiding van de jurisprudentie van het EHRM kan een onderscheid worden gemaakt tussen de verplichting tot civielrechtelijke en strafrechtelijke aansprakelijkheid, waarbij beide overigens in onderling verband tot elkaar staan.

Civielrechtelijke aansprakelijkheid

In de inleiding werd al aangegeven dat ook de Nederlandse rechter voor de vestiging van civiele aansprakelijkheid kijkt of de overheid heeft gehandeld conform de uit het Straatsburgse toetsingskader voortvloeiende normen. Uit de jurisprudentie van het EHRM blijkt immers dat de Staat (mede)aansprakelijk moet kunnen worden gehouden indien kan worden vastgesteld dat niet of onvoldoende is voldaan aan de positieve verplichtingen die uit het EVRM voortvloeien en daardoor schade is ontstaan. Indien de Staat de normen uit het Straatsburgse toetsingkader niet naleeft, handelt zij in strijd met het EVRM en is daarmee, zoals reeds eerder aangegeven, ook naar Nederlands recht de onrechtmatigheid in de zin van art. 6:162 BW gegeven. Samengevat kunnen de volgende in het kader van toezicht en naleving relevante normen worden onderscheiden. Hierbij dient overigens de kanttekening te worden gemaakt dat de rechtspraak van het EHRM niet veel houvast biedt om deze normen tot in detail te preciseren. Uiteindelijk zijn de specifieke feiten en omstandigheden van ieder geval van belang voor het antwoord op de vraag of het EVRM al dan niet geschonden is.

Onder art. 2 EVRM bestaan er voor de Staat positieve verplichtingen met betrekking tot het houden van toezicht, het verstrekken van informatie over ernstige bedreigingen voor de gezondheid en het nemen van preventieve maatregelen terzake van reële en direct dreigende gevaren waarvan de Staat op de hoogte is of had behoren te zijn. De overheid dient de maatregelen te nemen die men redelijkerwijze van hen had mogen verwachten om het gevaar af te wenden (vgl. par. 9.2.1 en par. 9.4).

Daarnaast vloeit uit art. 2 EVRM de positieve verplichting voort om op nationaal niveau een effectief systeem van rechtspleging te garanderen. De overheid is verplicht een effectief en onafhankelijk onderzoek in te stellen naar de omstandigheden die een levensbedreigend gevaar veroorzaakt hebben. De overheid dient vervolgens (op basis van dit onderzoek) aansprakelijk te kunnen worden gesteld indien een gevaar zich – ondanks de verplichting dit te voorkomen – toch heeft verwezenlijkt en hierdoor schade is ontstaan. In principe volstaat een civielrechtelijke procedure, mits daarmee aansprakelijkheid kan worden vastgesteld en schadeloosstelling kan worden gerealiseerd (zie par. 9.2.1). Deze mogelijkheid dient te bestaan zowel in het geval de overheid veroorzaker van de schade is, als in het geval een derde de schade primair heeft veroorzaakt en de overheid medeverantwoordelijk is wegens bijvoorbeeld falend toezicht (zie par. 9.2.1).

Uit art. 3 EVRM volgt de positieve verplichting voor de Staat om personen te beschermen tegen een onmenselijke en vernederende behandeling (par. 9.2.2).

Art. 6 EVRM garandeert het recht op toegang tot de rechter. Het recht op een rechtsingang mag niet aan dusdanige beperkingen worden onderworpen dat een staatsorgaan waartegen men wil procederen in feite immuniteit geniet. Naast art. 6 EVRM vereist ook art. 13 EVRM dat er een

54 In dezelfde zin ook I. Giesen: Toezicht en aansprakelijkheid, Kluwer, Deventer 2004, p. 72. Vgl. ook T. Barkhuysen & M.L. van Emmerik: *EHRM-uitspraak Öneryildiz tegen Turkije: Europese grenzen aan het gedogen van gevaarlijke situaties en aan beperkingen van overheidsaansprakelijkheid bij ongelukken en rampen*, O&A 2003, nr. 3, p. 121.

55 Vgl. T. Barkhuysen & M.L. van Emmerik: *EHRM-uitspraak Öneryildiz tegen Turkije: Europese grenzen aan het gedogen van gevaarlijke situaties en aan beperkingen van overheidsaansprakelijkheid bij ongelukken en rampen*, O&A, mei 2003, p. 118; Zie ook Van Dam (2002).

mechanisme beschikbaar is om eventuele aansprakelijkheid van de overheid voor het optreden van zijn organen en functionarissen vast te stellen (zie par. 9.2.3).

Onder art. 8 EVRM heeft de Staat de positieve verplichting om handhavend op te treden tegen overlast veroorzakende situaties die een inbreuk maken op het privé- en gezinsleven van burgers, mits deze inbreuken van voldoende niveau zijn. Staten hebben de verplichting de door henzelf, ter bescherming van de in art. 8 EVRM besloten rechten, opgestelde normen te respecteren en de positieve verplichting deze normen te handhaven ten opzichte van derden die daarop inbreuk maken. Daarnaast is de Staat ook onder art. 8 EVRM in bepaalde gevallen verplicht tot het verstrekken van informatie die voor burgers essentieel is om potentiële gevaren voor de gezondheid in hun woonomgeving in te schatten. Onder art. 8 EVRM heeft de Staat wel een zekere beleidsvrijheid ('margin of appreciation') bij de afweging van enerzijds economische belangen en het recht op privé-leven van burgers anderzijds. Indien er echter geen redelijke afweging ('fair balance') tussen de belangen is gemaakt, levert dat een schending van het EVRM op (zie par. 9.2.4 en par. 9.4), waarmee dan ook de onrechtmatigheid van het handelen van de overheid is gegeven.

Tot slot gelden ook onder art. 1 EP positieve verplichtingen. Volgens het EHRM is de Staat verplicht om, indien nodig, preventieve maatregelen ter bescherming van eigendom te nemen. Een limitering van aansprakelijkheid lijkt in het licht van art. 1 EP onder omstandigheden denkbaar. Een dergelijke limitering zal echter moeten voldoen aan het vereiste van proportionaliteit en mag in geen geval een onevenredige last op de betrokkene(n) leggen (zie par. 9.2.5).

Strafrechtelijke aansprakelijkheid

In die gevallen waar het EVRM een strafrechtelijk antwoord op een inbreuk op het recht op leven vereist (zie par. 9.2.1), is het de vraag of de huidige mogelijkheden daartoe in Nederland op dit moment toereikend zijn (zie par. 9.6). Voor zover het niet mogelijk is om het strafrechtelijk traject te gebruiken zal dit moeten worden gecompenseerd door middel van de mogelijkheid tot een bestuursrechterlijke of civielrechtelijke procedure.

Bestuursrechtelijke aansprakelijkheid

Afgezien van de mogelijkheid tot een strafrechtelijke weg, bestaat er de mogelijkheid tot een bestuursrechtelijke procedure. Het is echter de vraag of toepassing van het bestuursrecht hier kan volstaan. Bestuursrechtelijke handhaving achteraf, als er door de inbreuk op het recht op leven al slachtoffers zijn gevallen, heeft immers naar haar aard niet veel zin meer (of het moet zijn ter voorkoming van herhaling).[56]

Een ander problematisch punt bij het gebruik van het bestuursrecht in deze, is het beginsel van de formele rechtskracht. De onrechtmatigheid van een besluit (zoals bijvoorbeeld een vergunning, een handhavings- of een gedoogbesluit) dient primair via bestuursrechtelijke weg te worden vastgesteld. Indien het besluit niet in rechte (of tevergeefs) is aangevochten, wordt het geacht rechtmatig te zijn. In dat geval gaat de burgerlijke rechter uit van de rechtmatigheid van het besluit zonder zelf inhoudelijk na te gaan of dat ook daadwerkelijk het geval is. Het is de vraag of het beginsel van de formele rechtskracht in alle gevallen doorslaggevend zou moeten zijn.[57] In de jurisprudentie van het EHRM kunnen argumenten voor het aannemen van een uitzondering op de formele rechtskracht worden gevonden. Uit art. 2 EVRM vloeit immers de verplichting voor de Staat voort om, indien sprake is van een inbreuk op het recht op leven, te voorzien in een effectief systeem van rechtspleging om de oorzaken vast te stellen, de verantwoordelijken aansprakelijk te stellen en adequaat rechtsherstel, bijvoorbeeld in de vorm van schadevergoeding, te bieden (vgl. par. 9.2.1 onder '*effectief systeem van rechtspleging*'). Aan dit vereiste lijkt niet te kunnen worden voldaan wanneer op grond van de formele rechtskracht de totstandkoming van een besluit buiten beschouwing moet worden gelaten. Een ander argument voor een uitzondering op de formele rechtskracht ligt in het feit dat het EHRM zich met het oog op de effectieve bescherming van de in het EVRM besloten rechten

56 Vgl. A.B. Blomberg: *Handhaven binnen EVRM-grenzen*, VAR-preadvies, VAR-reeks 132, Den Haag: Boom Juridische uitgevers 2004, p. 126-127.

57 Vgl. Van Dam (2002); zie tevens de noot van T. Barkhuysen & M.L. van Emmerik bij Rb. ´s-Gravenhage 24 december 2003 (Enschede), NJCM-bulletin, 2004, p. 698-722.

waarschijnlijk niet veel aan zal trekken van procedurele vereisten ten aanzien van bezwaar- en beroepsmogelijkheden (vgl. par. 9.2.3). Het EHRM beoordeelt of de Staat als geheel een verwijt kan worden gemaakt en zal bij die beoordeling ook eventuele fouten terzake bijvoorbeeld de vergunningverlening betrekken.[58]

Civiel-, straf- en bestuursrechtelijke aansprakelijkheid: cumulatieve conclusie
In het licht van het voorgaande lijkt een immuniteit voor civiele aansprakelijkheid op weinig sympathie in Straatsburg te kunnen rekenen. In de gevallen waar strafrechtelijk optreden niet door het EVRM wordt vereist, zal immers wel op andere wijze de aansprakelijkheid van verantwoordelijken moeten kunnen worden vastgesteld en gepast herstel moeten worden geboden, bijvoorbeeld in de vorm van schadevergoeding en publicatie van de beslissing. Het is de vraag of een bestuursrechtelijke procedure in dat geval voldoende compensatie biedt. Toegang tot de burgerlijke rechter en het voorzien in een civiele procedure voldoet in dat geval aan de eisen van art. 2 EVRM, mits die procedure niet alleen een in theorie bestaande rechtsbeschermingsmogelijkheid is, maar ook daadwerkelijk in praktijk effectief blijkt (zie par. 9.2.1 onder '*effectief systeem van rechtspleging*' en par. 9.2.3).

Indien er geen mogelijkheden worden geboden om de verantwoordelijken straf-, bestuurs- dan wel civielrechtelijk aansprakelijk te stellen, wordt een ontoelaatbare immuniteit aan de verantwoordelijke autoriteiten verleend (vgl. par. 9.2.3). Hetzelfde geldt wanneer die mogelijkheden slechts resulteren in symbolische veroordelingen en/of schadevergoedingen (zie par. 9.2.1).

Tot slot kan worden opgemerkt dat het EHRM heeft overwogen dat het in bepaalde gevallen voor het behoud van het publiek vertrouwen in de rechtstaat van belang is dat waar het recht op leven in het geding is bepaalde gedragingen of ernstig nalaten, strafrechtelijk worden vervolgd.[59] Strafrechtelijke immuniteit voor de overheid lijkt daarom dus in strijd met het EVRM. Hieruit kan worden afgeleid dat hetzelfde mogelijk geldt ten aanzien van immuniteit voor aansprakelijkheid voor toezichthouders. Aansprakelijkheid voor de gevolgen van falend toezicht of gebrekkige handhaving is immers noodzakelijk voor het vertrouwen dat burgers in het houden van toezicht moeten kunnen hebben.

58 Zie de noot van T. Barkhuysen & M.L. van Emmerik bij Rb. ´s-Gravenhage 24 december 2003 (Enschede), NJCM-bulletin, 2004, p. 698-722.
59 Vgl. de in noot 22 geciteerde overweging van het EHRM.

10 European Community law

Professor Margot Horspool*

10.1 The Origins of the Principle of State liability for breach of Community law

The European Court of Justice (ECJ) has from its inception been concerned with the enhancement and effective exercise of the powers of the European Community. To this end, it has used the legislative instruments available to it, and, in particular, first, Treaty Articles and Regulations, and later, Directives, given a broad and imaginative interpretation in establishing principles of Community law. Long before the Draft Constitutional Treaty enshrined the principle of loyal cooperation between Member States and the Community[60] the ECJ interpreted Article 10 (initially Article 5) of the Treaty to emphasise such a duty.[61] The first principles, direct effect and supremacy of Community law, the 'twin pillars' of Community law, were developed in the cases of *van Gend & Loos v Nederlandsche Administratie der Belastingen*[62] and *Costa v ENEL* [63]. The Court made the famous pronouncement in *van Gend en Loos* that:

> 'The conclusion to be drawn… is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only members states but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage'.

A Treaty article[64] which was clear and unconditional and did not require a legislative implementing measure on the part of the state was, therefore to be interpreted 'according to the spirit, the general scheme and the wording of the Treaty'…as 'producing direct effects and creating individual rights which the national courts must protect. Initially the principle of direct effect only applied to Treaty articles and Regulations[65], but eventually it was extended to Directives.[66] The European Court of Justice also limited its jurisprudence concerning the direct effect of Directives to those cases which give the possibility to an individual to rely directly on the rights flowing from a Directive in the case of non-or defective implementation. In such a case, the ECJ, however, does not allow the Member State itself to rely on the Directive against an individual in respect of obligations which might flow directly from the Directive.[67]

A further limit to this expansive interpretation was reached in that the Court only acknowledged the existence of potential vertical direct effect of Directives[68], in contrast to that of Treaty articles and Regulations. This interpretation was then in itself expanded in that the concept of 'State' or public authority was stretched to its limits, so that anything which could be

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60 Article I-5 (2) Draft Constitutional Treaty.

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

62 Case 26/62 [1963] ECR 1.

63 Case 6/64 [1964] ECR 585.

64 Article 12 (now 25) EEC.

65 *Leonesio* , Case 34/73 *Variola SpA v Amministrazione Italiana delle Finanze [1973 ECR 981.*

66 Case 41/74 *van Duyn v the Home Office* [1974] ECR 1337.

67 Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR and Case 80/96 *Kolpinghuis Nijmegen* [1987] ECR.

68 Case 152/84 *Marshall v Soutwest Area Health Authority* [1986] ECR 723.

regarded as an 'emanation of the State'[69] was included in the concept of vertical direct effect. Thus, a recently privatised public utility like British Gas qualified.[70] This was quite clearly not a satisfactory situation as it meant that individuals in an identical or similar position would have very different rights depending on whether these rights could be asserted against a public authority or against a private entity. However, in spite of attempts to open up different avenues, such as that of indirect effect[71] and 'incidental direct effect'[72] these proved to be of only limited application, and the Court firmly stated in Case C-91/92 *Faccini Dori v Reccreb*[73] that direct effect could only apply vertically, in spite of a powerfully argued case by Advocate General Lenz.

Problems were also encountered in respect of the application of the principle of supremacy of Community law over national law. Although most Member States did not have major problems acknowledging such supremacy of Treaty articles over their national laws, the same attitude did not prevail in respect of the direct effect of Directives e.g. in the case of the Conseil d'Etat in France,[74] and of the German Constitutional Court in respect of Community general principles prevailing over entrenched clauses (*Ewigkeitsklausel)* in the German Basic Law.

The Court therefore turned to the exploration of other avenues. The question of what remedies were available to individuals wronged by Community law was initially very much left up to the Member States and, until the 1980s the Court contented itself with laying down guidelines for national courts to follow when they were considering what could constitute a suitable remedy for breach of Community law. The guidelines were laid down in two cases: *Rewe-Zentralfinanz v Landwirtschaftskammer*[75] and *Comet BV v Produktschap voor Siergewassen*.[76] In *Comet* the Court stated:

> 'It is for the domestic law of each Member State to designate the courts having jurisdiction and the procedural conditions governing actions at law intended to ensure the protection of the rights which subjects derive from the direct effects of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature'.

The position would be different only if these rules made it impossible in practice to exercise rights which the national courts have a duty to protect. In *Rewe* the Court said:

> 'Although the Treaty has made it possible….for private persons to bring a direct action (before national courts based on EC law), it was not intended to create new remedies in the national courts to ensure the observance of Community law…On the other hand…it must be possible for every kind of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions as would apply were it a question of observing national law'.

Thus, as long a national law provided a remedy similar to that provided for breach of a similar national rule, which in its effect was not less favourable than one in relation to a similar domestic action and did not make it impossible in practice to exercise Community law rights, i.e. as long as it complied with the principles of equivalence and non-discrimination, this was sufficient from the point of view of EC law. An illustration is Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio.*[77] *San Giorgio* reinforced the principle that national law must not make the remedy for breach of EC law extremely difficult. In fact, under *San Giorgio* there could be a better remedy for breach of Community law than for breach of national law. The question of how effective the remedy was, or the question of what was to happen when national law provided no remedy,

69 Case 152/84 *Marshall v Soutwest Area Health Authority* [1986] ECR 723.
70 Case C-188/89 *Foster v British Gas* [1990] ECR I-3313.
71 In Case 14/83 *Von Colson and Kamann v Land Nordrhein Westfalen* [1984] ECR 1891 and Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion* [1990] ECR I-4135.
72 In cases such as Case C-194/94 *CIA Security International v Signalsson* and Unilever.
73 Case C-91/92 [1994] ECR I-3325.
74 In Cohn Bendit, eventually conceded in Nicolo.
75 Case 33/76 [1976] ECR 1989.
76 Case 45/76 [1976] ECR 2043.
77 [1983] ECR 3595.

remained unclear for some time.

The ECJ judgment in 1989[78] concerned a failure by Greece to pay its obligatory contribution to the Community's own resources in the form of agricultural levies due on certain consignments of maize imported from a non-member country. After investigations carried out by the Commission, it had come to the conclusion that two consignments of maize allegedly imported from Greece to Belgium in May 1986 in fact comprised maize imported from Yugoslavia. The fraud had been committed with the complicity of certain Greek civil servants, including the use of false documents and statements. Greece did not contest the case when it was finally brought before the ECJ and Greece was duly found to be in breach of its obligations. It had stated it had started an administrative inquiry but nothing further appeared to have been done. The Commission also submitted that Member States are required by virtue of Article 5 EEC (now Article 10 EC), the obligation on member States to 'take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations' arising out of the Treaty. This would entail the duty 'to penalize any persons who infringe Community law in the same ways as they penalize those who infringe national law'.[79] The Court stated that 'whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.'[80]

In Case 14/83 *Von Colson v Land Nordrhein-Westfalen*[81] two German nationals claimed that the provisions of German law implementing Directive 76/207 (the Equal Treatment Directive) were inadequate to ensure that their EC rights were protected. The German law only enabled those wronged by breach of the rights contained in the Directive to recover the actual amount lost. The case is significant because the Court pronounced on the nature of the remedy that the national court must provide and ruled that sanctions must be *effective, adequate and act as a deterrent and must be such as to guarantee real and effective protection*. This started a new stage in the development of remedies. *Von Colson* drew on Article 5 (now Article 10 EC): the duty of the Member States to take all appropriate measures to ensure the fulfilment of obligations arising under the treaty, *and* to facilitate the achievement of the Community's tasks. It should also be noted that here, as throughout the whole corpus of EC law, the principle of proportionality applies and lies at the heart of the *Von Colson* judgment, ie the means chosen to provide the remedy must be appropriate to the infringement and it must be adequate, *and* act as a deterrent.

In Case 222/84 *Johnston v Royal Ulster Constabulary*[82] the Court enlarged upon the general principle of effective judicial protection and stated that EC law required that the principle of *effective judicial protection*, first raised in *Von Colson*, meant that the Member State must take measures which are sufficiently effective to achieve the aims of the Directive.

In the light of *Von Colson* and *Johnston* it could now be said that the concept of effective judicial protection includes a proper hearing and an effective remedy for the applicant and is an aspect of the general effectiveness principle laid down in *Simmenthal*[83] and reinforced in *Factortame*[84]. The general effectiveness principle referred to in those cases means that national courts are required to disapply any national measures which would prevent the effective application of Community law.

Effectiveness was taken a stage further in Case C-271/91 *Marshall v Southampton and South West Hampshire Area Health Authority (No 2)*[85] where the Court was considering Article 6 of Directive 76/207 again. The Court held that Article 6 was directly effective *and* that the requirement of effective judicial protection meant that the plaintiff who has suffered loss as the result of a breach of EC law (in this case because there was an upper limit for compensation

78 Case 68/88 *Commission of the European Communities v Hellenic Republic* [1989] ECR 2965.
79 Para 22 of the judgment.
80 Paras 24 and 25 of the judgment.
81 [1984] ECR 1891.
82 [1986] ECR 1651.
83 Case 106/77 Amministrazione delle Finanze dello Strato v Simmenthal SpA [1978] ECR 629.
84 Case C-213/89 R v Secretary of State for Transport, ex p Factortame Ltd (No 2) [1990] ECR I-2433.
85 [1993] ECR I-4367.

under the Employment Protection Act 1975) must receive full compensation for her loss. Where damages are chosen as the main remedy by the Member State, all the financial loss including interest on the award between the date of the breach and the judgment must be made good; the Court said that this was prevented by the application of the upper limit.

Thus the rule laid down in *Rewe* and *Comet* that the remedy must be comparable to remedies for breach of national law, ie non-discriminatory, and possible in practice to be relied upon, has been extended. If no remedy or an inadequate remedy exists in national law, it inevitably follows (although the Court did not actually say this), that the national system would have to improve on the one that was available or invent a new one.

Later cases, such as Case C-338/91 *Steenhorst-Neerings*[86] and Case C-66/95 *R v Secretary of State for Social security, ex p. Eunice Sutton*[87]*,* the Court showed a greater amount of caution in deciding what constitutes an effective remedy. In *Steenhorst-Neerings*, it considered the retroactive limitation of a benefit to be compatible with Community law; in *Eunice Sutton* non-payment of interest on a claim for social security benefit was contrasted with Marshall II and distinguished from the finding there on the basis that such benefits did not constitute compensation for loss as suffered in *Marshall.*

The principle of equivalence, ie that rules for protecting Community rights must not be less favourable than those governing domestic actions established in *Rewe* and *Comet* has been explained more fully recently, especially in Case C-261/95 *Palmisani v INPS*[88] and Case C-326/96 *Levez v Jennings (Harlow Pools) Ltd.*[89] Both cases involved the existence of time limits in national law. The ECJ in *Palmisani* explained that to establish that there is no discrimination between domestic and EC remedies in particular cases, it must be shown that the claims must be similar, the procedural rules on which the comparison is based must not be considered in isolation, but in their procedural context, and those procedures must not be chosen at random but must be of a similar kind.

In *Levez* the Court (at para 41) stated:

> 'The principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar.'

Here the evidence showed that other discrimination claims in UK law were not subject to the same limitation.

In Case C-78/98 *Preston v Wolverhampton Healthcare NHS Trust*[90], when asked by the House of Lords to provide further explanation, the Court emphasised that the equivalence of national procedural rules should be ascertained by an objective and abstract assessment, taking into account the role, operation and any special features of those rules.

At this point in the developing case law it is clear that national remedies and national procedure available for enforcing or protecting Community rights must comply with the principles of equivalence and effectiveness. It seems that the latter principle is often less important than the former.

As with remedies, Community law has adhered to what has been called the principle of procedural autonomy. This means that the procedure followed by national systems for the enforcement of EC law was a matter for each national legal system subject to the principles in *Rewe* and *Comet* (above). It is for the domestic system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions for the recovery of damages, *provided that any conditions may not be so framed as to render the recovery of damages impossible in practice or excessively difficult*. However, the implication of this is that national procedural rules can still make a remedy difficult to obtain. For example, in many cases time limits are short whether the matter is one of purely national law or of EC law and can lead to making the right in effect impossible to achieve. This is what occurred in *Rewe* and *Comet*.

86 [1993] ECR I-5475.
87 [1997] ECR I-2163.
88 [1997] ECR I-4025[annotated by Odman in 35 CMLRev 1395].
89 [1998] ECR I-7835.
90 [2000] ECR I-3201.

Guidelines in those cases tried to find a balance in demarcating the extent of national autonomy in matters of procedure and the effective enforcement of Community law. In Case C-208/90 *Emmott v Minister for Social Welfare*[91] the three-month limitation to bring an application for judicial review had led the ECJ to rule that, while reasonable time limits satisfied the principle of procedural autonomy, 'account must nevertheless be taken of the particular nature of Directives'. The consequence could be that for wrongly transposed Directives, time cannot begin to run until the Directive is properly transposed. This has given rise to many criticisms, especially as the *Francovich* principle may expose the state to massive claims. A number of subsequent similar cases have distinguished *Emmott* and it may now be said that the *Emmott* principle will only be applied when the state is seriously in default in failing to implement a Directive and obstructing the plaintiff from relying on it. The issue now appears to have been settled by Case C-188/95 *Fantask*[92]. Time limits appear to be acceptable to the ECJ provided that the principle of equivalence is upheld and despite the fact that they may threaten the effectiveness of the protection offered by EC law. But many other procedural rules can prevent or inhibit the application of EC law and can also threaten the principle of effectiveness. The following cases illustrate this.

In Cases C-430, 431/93 *Van Schijndel and Van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*[93] and Case C-312/93 *Peterbroeck, Van Campenhout SCS & Cie v Belgian State*[94] a more fundamental change to the general principle of procedural autonomy occurred. The issues here involved national courts whose procedural rules disabled Community law points from being argued when the parties had not argued EC law themselves. In most legal systems, it is the parties themselves who decide which facts and law will be presented to the Court, leaving the judge to decide the outcome on the facts and law as presented. But in order to secure the effective implementation of Community law, must the national judge raise EC law of his own motion, despite the principles of procedural autonomy, the passivity of the judge, and even where national law precluded the judge from taking the initiative?

Both cases were really concerned with, inter alia, the question of whether a national rule which presumptively precluded a national court from considering EC law of its own motion was itself compatible with EC law. Again drawing on Article 5 (now Article 10 EC) and the principle of co-operation the ECJ ruled: Each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.[95]

In *Peterbroeck* the Court held that the Belgian rule had to be disapplied because it made the application of EC law *impossible*. Therefore, pursuant to the obligation of co-operation under Article 5 (now Article 10 EC), and the principles of non-discrimination and equality and *effectiveness*, a national court must, if necessary, apply directly effective Community law *of its own motion if necessary* provided national law permits or obliges the court to do this for national rules. Thus if a rule of national law prevented the application of Community law, then this must be set aside (para 18).

However, in *Van Schijndel*[96] the Court, while reaffirming this principle, took the view that in this case the raising of the new EC point would force the national court to give up its passive role and go beyond what the parties had decided was the dispute, the Belgian rule so disenabled the party from raising the EC point (due to the short time scale) that the rule that made it impossible for the national court to raise the EC point of its own motion could not be justified. These cases seem difficult to reconcile. Jacobs Advocate General (whose views had not been followed in *Peterbroeck* but had been followed in *Van Schijndel*) writes: The Court was perhaps influenced by the fact that in *Peterbroeck* the Belgian rule was rather restrictive by comparison with

91 [1991] ECR I-4269.
92 [1997] ECR I-6783.
93 [1995] ECR I-4705.
94 [1995] ECR I-4599.
95 See supra note 35, paras 12-14.
96 See supra note 34.

equivalent rules in other Member States and should be thought of as a 'hard case' and rather exceptional.

What do these cases tell us in relation to the autonomy of procedure principle? The two cases do not seem substantially different but it may be that in a case where the national court would really have to abandon its passive role in relation to the parties, too many important justifications for passivity would have to be jettisoned. On the other hand, where the national rule did not have the same scope, but it would nevertheless make the exercise of Community rights impossible, procedural autonomy must give way to supremacy of EC law. Thus, in order to determine whether a given national rule renders the exercise of a Community right excessively difficult, the reasons for the application of that general rule in the context of the case should be examined to see whether it is justified. Thus the question of excessive restrictiveness would seem to depend on the precise details and circumstances of the individual case.

This complicates the role of the national court and makes prediction difficult because each time the national court will be involved in applying a type of proportionality test whereby the rule in question will have to be analysed in order to ascertain its objective, and whether the means adopted can be justified by some fundamental principle of the domestic legal system. The test is vague and can result in an easy justification for any rule. It may be that this shows that a balance is being struck between procedural autonomy and the principle of effectiveness.

The following cases seem to show a confirmation of the Court's concern to strike such a balance: in *Eco Swiss China Time v Benetton International*[97] the Court held that if a national court was required by its domestic rules of procedure to grant an application for the annulment of an arbitration award as national rules of public policy had not been observed, it was also obliged to grant such annulment if there had been failure to comply with the prohibition under Article 85(1). The national rules were subject to strict limits of public policy. Although the Court acknowledged that such strict national limits were necessary in order to safeguard the effectiveness of arbitration proceedings, it was in the interest of uniform interpretation of Community law that an application based on Community law should be granted, as the arbitration body, according to the Court's own case law, was not a court or tribunal within the meaning of Article 177 (now 234 EC) and, therefore could not make a preliminary reference itself.

In Case C-302/97 *Konle v Austria*,[98] the Court ruled that any public body which is responsible for causing a breach, should make reparation. There is no need in a federal state like Austria to make changes in the distribution of powers of such bodies but simply to ensure that national procedural rules do not make it more difficult to protect the rights of individuals derived from the Community legal system.

It is still for the national court to decide the remedy and to follow its own procedures, but clearer guidance now exists on what that remedy should be as well as the validity of national procedure. The principle of effectiveness is paramount. What 'effectiveness' amounts to will vary from case to case, but it must be appropriate (this may be the same as proportionate), adequate (ie compensate the victim for actual loss) and readily available, ie in practice not excessively difficult. If it is excessively difficult because of procedural rules (as in *Peterbroeck*[99] and in *Eco Swiss China Time*[100]) then the national court is required to raise EC law of its own motion so as to ensure the effective application of EC law. Nevertheless, each case must be considered within its own context and the context includes the procedural rule in question (see above *Peterbroeck* at paras 12-14).

10.2 State liability for breach of Community law

One of the difficulties which those seeking to rely on Community rights may face is that Community law itself inhibits the possibility of a remedy, for example, where as a consequence of the doctrine of horizontal direct effect the plaintiff cannot enforce a Community right against a private party and hence the wronged plaintiff can get no remedy at all. But usually this occurs

97 Case C-126/97 [1999] ECR I-3055.
98 [1999] ECR I-3099.
99 See supra note 35.
100 See supra note 38.

because of the failure of the Member State to implement the Directive. Until Case C-6 & 9/90 *Francovich and Bonifaci v Italy*,[101] as has been seen, the ECJ had left remedies in the hands of national legal systems, but since that case the Court has departed from this position and laid down a new Community rule of state liability. In *Francovich* Italy had failed to implement Directive 80/987 on the protection of employees in the event of the insolvency of their employer. Although the Directive was held not to be directly effective, the Court held that the protection of Community rights would be weakened if individuals were unable to obtain any effective remedy when their rights were infringed by a breach of Community law for which a Member State can be held responsible. The Court, again drawing on Article 5 (now Article 10) of the EC Treaty, ie the obligation of the Member State to ensure fulfilment of the obligations arising out of the Treaty, introduced the principle of state liability to the individual, stating that this, a right to a Community remedy, not a national remedy, derives from the Treaty and is inherent in its system. Provided that the plaintiff could show that the right being relied upon was one which could be identified from the Community measure and that a causal link existed between the state's breach of its obligation and the harm suffered by the individual, the state would be liable in damages even if the measure was not directly effective. Thus a successful plaintiff must in principle be able to recover his loss from the state.

The principle of state liability is known in most of the Member States which have a civil law system and this was, therefore, not considered to be as major a development by most states as it was by the common law members of the Community. Although very important, the case left open a number of questions, principally as to the conditions under which liability would arise.

In the long running Cases C-46/93 and C-48/93, *Brasserie du Pêcheur v Germany*, and *R v Secretary of State for Transport, ex p Factortame (Factortame 3)*[102] answers to these questions were given by the Court. In those cases Germany and the UK had respectively been in breach of the Treaty by enacting laws which breached Treaty provisions. The ECJ ruled that liability would not arise for all breaches; but in those cases where the breach is sufficiently serious in that the state had manifestly and gravely disregarded the limits of its discretion liability would arise. Where there was no discretion (as in *Francovich*) and the state had simply failed in its obligation under Article 189 (now Article 249 EC), for example to implement a Directive, then, provided that the other *Francovich* conditions were present, that is identifiable individual rights and a causal link, liability would arise. But when the breach occurred in cases where the state had had a wide discretion to make legislative choices, the right to reparation depended not only upon the breach having been sufficiently serious but on a number of other factors. The factors to be considered, with respect to the definition of a serious breach, include: a) the clarity and precision of the rule breached; b) the measure of discretion left to the national authorities; c) the question whether the infringement and damage caused was intentional or involuntary; d) whether any error of law was excusable; and e) whether the position of the Community institutions may have contributed towards the Member State's breach of Community law. A breach of Community law will be sufficiently serious if it has persisted despite a judgment that has established the infringement or a preliminary ruling or settled case law of the Court has made it clear that the conduct constituted an infringement. What was not relevant was whether the measure in question creates direct effect, or whether an Article 169 or 170 (now Articles 226 and 227 EC) action had established the breach.

Case C-140/97 *Rechberger v Austria*,[103] concerned incorrect implementation of the Package Travel Directive 90/314 EEC in two points: Only trips with a departure date of 1 May 1995 or later were protected by the Directive and instead of providing for full refunds and repatriation costs in the case of insolvency of the travel company, Austria had only provided for insurance cover or bank guarantee. Austria had acceded to the Union on 1 January 1995, and had no discretion in the duty of full implementation. Such incorrect implementation constituted a sufficiently serious breach. Austria's argument was that there was no direct causal link, only the result of a chain of 'wholly exceptional and unforeseeable events'. The Court answered that even such events would not have presented an obstacle to the refund of money or the repatriation of travelers if the Directive had been correctly implemented and found, therefore, that there was a causal link.

101 [1991] ECR I-5357.
102 [1996] ECR I-1029.
103 [1999] ECR I-3499.

When the Court finds that there has been a serious breach as discussed above, and that the measure in question (whether a Directive or Regulation or Treaty article) creates identifiable rights for the individual seeking to rely on it, and that there is a causal link, the national Court must provide a remedy. Where the *right* to damages exists, then it is national law which will determine the nature and extent of damages. The right to full compensation had already been established in *Marshall (No 2);*[104] exemplary damages for unconstitutional or oppressive conduct must also be available where this is provided for in national law and the total exclusion of profit in the context of economic and commercial litigation is not acceptable, as this would make reparation practically impossible in these circumstances. The ECJ has in effect harmonised the conditions for State liability with that of the conditions for liability of the Community institutions under Article 288 EC.

There have been other cases where the breach has consisted of either non-implementation of Directives (as in *Francovich*) or improper implementation of them (*BT* case below) or improper application of them (*Hedley Lomas* see below). The Court has, in applying the principles laid down in *Francovich* and the *Factortame* and *Brasserie du Pêcheur* cases, provided additional qualifications. For example where the state had a wide discretion as in Case C-392/93, *R v HM Treasury, ex p British Telecommunications plc*,[105] where the issue was concerned with incorrect implementation of a Directive. It was claimed that the Member State could determine which services were to be excluded from its scope, but the UK had chosen (wrongly as it turned out) to exclude certain services from the operation of the Directive. This was held to be improper implementation. The important question was whether the UK had to pay compensation to the injured party. It was urged that a distinction ought to be drawn between non-implementation as in *Francovich* and improper implementation as here. The Court refused to draw this distinction, but reiterated that the only question was whether the breach was sufficiently serious – ie had there been a manifest and grave disregard on the limits on the exercise of its powers. In the instant case the Court found that no such breach had occurred because the wording of Article 8(1) of the Directive was imprecise and ambiguous and the construction placed on it by the UK was not manifestly incorrect; furthermore no guidance from the Court existed and the Commission had not raised the matter with the UK when that country had implemented the Directive in question. This appeared to imply that an element of fault has to be present in order for liability to be established.

On the other hand in Case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd*[106] the issue of non-compliance with the requirements of Directive 74/577 led to the plaintiff suing the UK government for loss of profit they had suffered. Hedley Lomas are exporters of live animals destined for slaughter in Spain; the UK government had systematically refused to grant export licences for this purpose on the grounds that the Spanish slaughterhouses did not observe the provisions of the relevant Directive. In the action brought by Hedley Lomas claiming damages for their loss during the period of the ban, the Court declared that the export ban was a quantitative restriction on exports within the meaning of Article 34 (now Article 29 EC), and was not covered by Article 36 (now Article 30 EC). The lack of monitoring of slaughterhouses could not excuse the UK from non-compliance with the law: In this regard the Member States must rely on trust in each other to carry out inspections in their respective territories. In *Hedley Lomas* it was also made clear that administrative as well as legislative measures could give rise to an action for breach of Community law.[107]

Where the state has completely failed to implement a Directive, that will constitute a serious breach *per se*. In Cases C-178, 179, 189 and 190/94 *Dillenkofer v Germany*[108] the Court stated that if the Member State fails to take any measures to achieve the objectives of the Directive, that Member State has manifestly and gravely disregarded the limits of its discretion. That gives rise to a right of reparation on the part of the individual, provided that the rights can be identified and a causal link exists as required by *Francovich*.

In Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission*[109] ,

104 See supra note 26.
105 [1996] ECR I-1631.
106 [1996] ECR I-2553.
107 See below p. 38.
108 [1996] ECR I-4845.
109 [2000] ECR I-5291.

the Court said that the concept of a 'sufficiently serious breach' of Community law by an institution must be interpreted in the same way with regard to an institution as it is for a Member State. This concerned an action by a pharmaceutical company and its chief executive, seeking compensation for damage allegedly suffered as a result of the preparation and the adoption of a Commission Directive relating to cosmetic products. The Court dismissed the appeal against the judgment of the CFI and recalled the principle laid down in Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur and Factortame*[110] that the conditions under which the Member States may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The 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. As regards non-contractual liability of the Community as well as that of the Member States, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where the Member State or the institution has 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. Moreover, the general or individual nature of a measure taken by an institution is not a decisive criterion for identifying the limits of such discretion.

In Case C-424/97 *Haim*[111], the question as to discretion was also raised. Mr Haim, a dentist, brought an action to obtain compensation for the loss of earnings which he claimed to have suffered as a result of the refusal of an association of dental practitioners, a public body, to register him, in breach of Community law. The Court was asked whether, where a national official had no discretion in applying national law conflicting with or in a manner not conform with Community law the mere fact that he did not have any discretion in taking his decision gives rise to a serious breach of Community law. The Court replied that the existence and scope of the discretion which should be taken into account when establishing whether or not a Member State has committed a sufficiently serious breach of Community law must be determined by reference to Community law and not by reference to national law. The question of discretion was, therefore, not relevant. Liability for reparation for loss and damage caused by non-compliance with Community law lies with any public body which caused the damage.

The Court left the question as to whether the Member State had a broad or a narrow discretion for the national court to decide. However, it emphasised that the rule in *Hedley Lomas* was not an absolute one: where there was little or no discretion a mere infringement may, but would not necessarily, constitute a sufficiently serious breach. The Court listed the factors to be taken into account as it had done already in *Factortame*. These included: the clarity and precision of the rule infringed; whether the infringement was intentional; whether any error of law was excusable, and any position taken on the issue by a Community institution.

In Case C-150/99, *Sweden v Stockholm Lindopark AB*[112] there was an example of when the *Hedley Lomas* rule could be satisfied. Sweden had transposed the Sixth VAT Directive incorrectly. Article 13 provided for exemptions from the general principle under Article 2 which made every supply of services carried out for consideration by a taxable person subject to VAT. The Article 13 exemption, however, only applied to the supply of sports facilities carried out by non-profit-making organisations, whereas Swedish law provided for a general exemption for the supply of all sports facilities. The claimant, who ran a golf course, complained that the general exemption meant that he could not deduct VAT on the goods and services necessary for the running of the golf course. The question was, therefore: Did the implementation of such a general exemption constitute a serious breach of Community law which could render a Member State liable in damages? The Court held that this was indeed the case. The provisions of the Directive were sufficiently clear, precise and unconditional for an individual to rely on them as against the Member State before a national court.

There is little doubt that the case of *Köbler*[113] is one of the most important cases in this

110 See supra note 43.
111 [2000] ECR I-5123.
112 [2001] ECR I-493.
113 Case C-244/01 *Köbler v Austria* [2003].

respect to come before the Court. Up to that judgment, the question of whether a last instance court in Member States could be considered as organs of the state which could cause liability of that state to arise in case of an erroneous judgment had not been addressed. Herr Köbler, a university professor, had applied for a special length of service increment related to his pension under the Austrian 1956 Salary Law. This was refused on the basis that his service had not been completed entirely at Austrian universities, but at Universities in other Member States. Herr Köbler alleged that this constituted indirect discrimination contrary to Article 39 of the Treaty and Council Regulation 1612/68 on the freedom of movement of workers in the Community. An original reference to the European Court by the supreme Administrative Court had been withdrawn following an inquiry by the EC whether the Court wished to maintain its request for a reference in the light of the ECJ's ruling in Case C-15/96 *Schöning-Kougebetopolou v Freie und Hansestadt Hamburg*[114] which gave strong support to Herr Köbler's case as it had held that promotion on grounds of length of service with a public body without taking account of comparable employment in other Member States constituted indirect discrimination. Nevertheless, the Austrian Court then dismissed his claim on the basis that it considered the special increment as a loyalty bonus, which constituted an objective justification for a derogation from the freedom of movement provisions.

On a second reference the fundamental question was raised whether the decision of a national supreme court could give rise to state liability, in the light of the fact that Austrian law expressly precluded state liability in respect of loss and damage caused by decisions of its supreme courts. Not surprisingly, a number of Member States intervened: Germany, France, The Netherlands and the United Kingdom, and the case was heard by the full Court. Objections raised were many, ranging from *res judicata*, the principle of legal certainty, the independence of the judiciary to the judiciary's place in the Community legal order and the comparison with procedures available before the Court to render the Community liable under Article 288 EC. The Court held, however, that the principle of state liability must apply even where the infringement is attributable to a supreme court. This was consistent with the decisions in *Francovich* and *Factortame* and with the principle of international law where the state is viewed as a single entity. The principle of state liability for judicial decisions was accepted, albeit subject to restrictive and varying conditions.[115] The European Court of Human Rights also provided for compensation where the Convention was infringed by a court of last instance.[116] National courts played an essential role in the protection of the rights of individuals which they derive from Community law. The effective protection of those rights would be weakened if individuals were unable to obtain redress for damage caused by a decision of a supreme court which was in infringement of Community law. This extension of state liability was not incompatible with the principle of *res judciata*: A claim for compensation need not involve the invalidation of the decision giving rise to the damage. In line with settled case law, the Member States themselves would have to designate which courts would determine issues of liability arising from supreme court decisions.

The Court also confirmed that the *Factortame* conditions still applied and considered whether the breach could be seen as being sufficiently serious. However, it then gave a very restrictive interpretation as regard must be had to the special nature of the judicial function and to the legitimate requirements of legal certainty. It stated (in paragraph 53);

> 'State liability for an infringement of Community law can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.'

There was a clear discrimination on the facts and the Austrian Court's decision was incorrect. It then applied the 'sufficiently serious' condition in a very restrictive way[117] and concluded that the court's withdrawal of its reference had simply been based on a misreading of *Schöning* and that, therefore, the infringement could not be regarded as manifest in nature and sufficiently serious. Thus, although the principle of a potential liability of the Member State for breach of Community law through an incorrect judgment of a supreme court was acknowledged, the requirements for

114 [1998] ECR I-47.
115 As Advocate General Léger had pointed out in his Opinion at paragraphs 77 to 82.
116 See ECtHR *Dulaurans v France* , judgment of 21 March 2000 nyr.
117 In contrast to the AG's Opinion.

such a breach to be established appear to be so stringent, that the possibility of such a breach at least at the present time seems small.

In the national law of some Member States, however, state liability for an unlawful act is limited and difficult to establish, and the absence of any judicial remedy is in principle manifestly a breach of the principle of effective protection of EC law. This has created a particular problem for the UK. In the UK the right to damages is a private law action and it is not enough to prove a breach by the defendant of his Community law rights. Damages will only be available if the defendant's action constitutes a tort, a breach of contract or a breach of a statutory right entitling him to damages. This approach does not fulfill British Community obligations.

Interim Measures as a Remedy

These are important because the validity of EC law (and sometimes national law) has to be decided by the ECJ and the time lag requires that rights be preserved pending the decision. In Case C-213/89 *R v Secretary of State for Transport, ex p Factortame*[118] for example, the plaintiff sought an injunction to have the operation of section 14 of the Merchant Shipping Act 1988 disapplied pending the final determination of the legality of that provision by the ECJ. An injunction is a temporary order of the court to maintain a current state of affairs or to prevent the other party doing something which would prejudice the outcome of the case.

The application of the effectiveness principle might require an interim measure to be available to the party seeking to rely on EC law. It is for national courts to uphold rights guaranteed by Community law; thus in the UK, where an injunction could not be granted against the Crown, the Court ruled that such a national legal rule must be set aside. The law now is that the national courts are required to grant injunctive relief according to criteria established for national law but taking into account the need to protect Community law rights. Thus the urgency of the matter, the balance of probabilities of success, and the impact on the outcome are the major factors, ie whether there is a substantial risk of irreparable harm if the injunction is not granted.

When, however, the issue depends either on the validity of a national measure based on the Community regulation, or the validity of the Community measure itself, a different approach to the grant of interim relief has been followed (Cases C-143/88 and C-92/89 *Zuckerfabrik Süderditmarschen AG*[119]). Here the stress has been on upholding the validity of the Community measure; it is presumed to be valid so long as a competent court has not made a finding of invalidity. Serious doubt as to validity must exist, the national court must make a reference to the ECJ and pending that the suspension of enforcement must retain the character of an interim measure. All national courts must take a uniform approach to this because otherwise the uniform application of Community law would be jeopardised. In Joined Cases C-465/93 and C-466/93 *Atlanta Fruchthandelsgesellschaft mbH v Bundesamt für Ernährung und Forstwirtschaft*[120] an application for positive interim relief was requested; the applicants wanted the supply of bananas to be continued pending a challenge to the Community measure concerned. The Court upheld its approach in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Aachen*[121] stating that the '...interim protection which national courts must afford to individuals must be the same, whether they seek suspension or enforcement of national administrative measures adopted on the basis of a Community regulation or the grant of interim measures settling or regulating the disputed legal position or relationships for their benefit' (at para 28).

The Court also considered the criteria for interim relief in this kind of case. For the urgency test to be satisfied the damage relied upon must materialise before the ECJ can give a ruling on the contested measure, and the national court must take account of the damage which will be caused to the legal regime which the contested measure establishes, including the cumulative effect if other courts adopted similar measures. In particular the national court must respect the balance struck by the ECJ between the Community interest and the interest of the economic sector concerned.

118 [1990] ECR I-2433.
119 [1991] ECR I-415.
120 [1995] I-3761, I-3799.
121 See supra note 60.

10.3 Environmental liability with special reference to the 'Seveso Directives'

Historical Background
The *Seveso* accident happened in 1976 at a chemical plant manufacturing pesticides and herbicides. A dense vapour cloud containing tetrachlorodibenzoparadioxin (TCDD) was released from a reactor, used for the production of trichlorofenol. Commonly known as dioxin, this was a poisonous and carcinogenic by-product of an uncontrolled exothermic reaction. Although no immediate fatalities were reported, kilogramme quantities of the substance lethal to man even in microgramme doses were widely dispersed which resulted in an immediate contamination of some ten square miles of land and vegetation. More than 600 people had to be evacuated from their homes and as many as 2.000 were treated for dioxin poisoning.

In 1982, Council Directive 82/501/EEC on the major-accident hazards of certain industrial activities[122], - the so-called Seveso Directive – was adopted. After major accidents at the Union Carbide factory at Bhopal, India in1984 where a leak of methyl isocyanate caused more than 2.500 deaths and at the Sandoz warehouse in Basel, Switzerland in1986 where fire-fighting water contaminated with mercury, organophosphate pesticides and other chemicals caused massive pollution of the Rhine and the death of half a million fish, the Seveso Directive was amended twice, in 1987 by Directive 87/216/EEC of 19 March 1987[123] and in 1988 by Directive 88/610/EEC of 24 November 1988.[124] Both amendments aimed at broadening the scope of the Directive, in particular to include the storage of dangerous substances.

The Seveso II Directive
The Commission in 1986 and the Member States, in accompanying resolutions concerning the Fourth (1987) and the Fifth Action Programme on the Environment (1993), had called for a general review of the Seveso Directive to include, amongst others, a widening of its scope and a better risk-and-accident management. A resolution from the European Parliament also called for a review.

On 9 December 1996, Council Directive 96/82/EC on the control of major-accident hazards[125], - the so-called Seveso II Directive - was adopted. Member States had up to two years to bring into force the national laws, regulations and administrative provisions to comply with the Directive. From 3 February 1999, the obligations of the Directive have become mandatory for industry as well as the public authorities of the Member States responsible for the implementation and enforcement of the Directive.

The Seveso II Directive fully replaced its predecessor, the original Seveso Directive. Important changes have been made and new concepts were introduced into the Seveso II Directive. These include a revision and extension of the scope, the introduction of new requirements relating to safety management systems, emergency planning and land-use planning and a reinforcement of the provisions on inspections to be carried out by Member States.

Legal basis, aim and scope
The Seveso II Directive is based on Article 174 (ex-Article 130s) EC. Of course, Member States can maintain or adopt stricter measures than those contained in the Directive (Article 176 (ex-Article 130t) EC.

The aim of the Seveso II Directive is two-fold. Firstly, the Directive aims at the *prevention* of major-accident hazards involving dangerous substances. Secondly, the Directive aims at the *limitation of the consequences* of major accidents not only for man (*safety and health aspects*) but also for the environment (*environmental aspect*). Both aims are directed towards ensuring high levels of protection throughout the Community in a consistent and effective manner.

The scope of the Seveso II Directive is limited to the *presence of dangerous substances in establishments*. It covers both, *industrial "activities"* as has been extended to cover the *storage* of dangerous chemicals. The Directive can be viewed as inherently providing for three levels of

122 OJ No L 230 of 5 August 1982.
123 OJ No L 85 of 28 March 1987.
124 OJ No L 336 of 7 December 1988.
125 OJ No L 10 of 14 January 1997.

proportionate controls in practice. A company which holds a quantity of dangerous substance less than the lower threshold levels given in the Directive is not covered by this legislation but will be proportionately controlled by general provisions on health, safety and the environment provided by other legislation which is not specific to major-accident hazards. Companies which hold a quantity of dangerous substance above the lower threshold contained in the Directive, will be covered by the *lower tier* requirements. Companies which hold even larger quantities of dangerous substance (*upper tier establishments*), above the upper threshold contained in the Directive, will be covered by all the requirements contained within the Directive.

Important areas excluded from the scope of the Seveso II Directive include nuclear safety, the transport of dangerous substances and intermediate temporary storage outside establishments and the transport of dangerous substances by pipelines.

General and Specific Obligations

The Directive contains general and specific obligations on both operators and the Member States' authorities. The provisions broadly fall into two main categories related to the two-fold aim of the Directive (a) control measures aimed at the prevention of major accidents and (b) control measures aimed at the limitation of consequences of major accidents.

All operators of establishments coming under the scope of the Directive need to send a notification to the competent authority and to establish a Major-Accident Prevention Policy. In addition, operators of *upper tier establishments* need to establish a Safety Report, a Safety Management System and an Emergency Plan.

The competent authorities of the Member States may, at the request of an operator, decide that he may limit the information to be provided in his Safety Report (dispensation rule). The Commission Decision of 26 June 1998[126] contains harmonised criteria to be applied by the competent authorities when examining requests for dispensations.

Safety management systems

The introduction of Safety Management Systems has taken account of the development of new managerial and organisational methods in general and, in particular, of the significant changes in industrial practice relating to risk management which have occurred over the past ten years. One of the main objectives pursued by this obligation is to prevent or reduce accidents caused by management factors which have proven to be a significant causative factor in over 90% of the accidents in the European Union since 1982.

Emergency Plans

Internal Emergency Plans for response measures to be taken inside establishments have to be drawn up by the operator and to be supplied to the local authorities to enable them to draw up *External Emergency Plans*. Emergency Plans have to be reviewed, revised and updated, where necessary. Important new elements require operators to consult with their personnel on Internal Emergency Plans and on the local authorities to consult with the public on External Emergency Plans. For the first time, the Seveso II Directive contains an obligation to regularly *test* the Internal and External Emergency Plans *in practice*.

Land-Use Planning

This new provision reflects the 'lesson learnt' from the Bhopal accident that the land-use planning implications of major-accident hazards should be taken into account in the regulatory process. Member States are obliged to pursue the aim of the Directive through controls on the siting of new establishments, modifications to existing establishments and new developments such as transport links, locations frequented by the public and residential areas in the vicinity of existing establishments. In the long term, Land-use Planning Policies shall ensure that appropriate distances between hazardous establishments and residential areas are maintained.

Information to and consultation of the public

The Seveso II Directive gives more rights to the public in terms of access to information as well as in terms of consultation. Operators as well as public authorities have certain obligations to

126 OJ No L 192 of 8 July 1998, p. 19.

inform the public. Whereas *passive* information means *permanent availability of information* i.e. that this information can be requested by the public, *active* information means that operators or competent authorities themselves need to be pro-active, for example through the distribution of leaflets or brochures informing the public about behaviour in the case of an accident.

Accident Reporting
Member States have the obligation to report major accidents to the Commission. In order to fulfil its information obligations towards the Member States, the Commission has established a so-called Major-Accident Reporting System (MARS) and the Community Documentation Centre on Industrial Risks (CDCIR) at the Major-Accident Hazards Bureau[127] established within its Joint Research Centre (JRC) in Ispra, Italy.

Inspections
In the Directive, an attempt is made to ensure increased consistency in enforcement at European level through greater prescriptive detail of the obligations of the competent authorities. The most important new element is that competent authorities are obliged to organise an *Inspection System* which can either consist of a systematic appraisal of each establishment or of at least one on-site inspection per year.

Administrative co-operation
A coherent implementation and consistent application of the provisions of the Seveso II Directive throughout the Community necessitates close co-operation between the competent authorities of all Member States and the European Commission. The forum for such an administrative co-operation is the Committee of Competent Authorities (CCA) which consists of representatives of the Member States and the Commission services. The work of the CCA is based upon consensus. It discusses all issues concerning the implementation of Seveso II and gives guidance as to their practical application.

Reporting by the Commission on the implementation of the Seveso Directives
Seveso II asks Member States to provide the Commission with a three-yearly report for upper tier establishments covered by Articles 6 and 9 and for the Commission to publish a summary of this information every three years.

Under Seveso I, previous reports had been drawn up to assess the progress made with the implementation of the Directive. The first report about the implementation of the original Seveso Directive was published by the Commission in 1988[128], followed by the report related to the period 1997-1999, published on 31 January 2002.[129]

The latest report covers the period 2000-2002. It is the first report assessing the progress made with the implementation of Seveso II. The report summarises the information provided by the 15 Member States on the basis of a questionnaire.

The main results of the report are as follows:

- The 15 Member States have fulfilled their legal obligation pursuant to Article 19.4 of Directive 96/82/EC and have provided the Commission with a three yearly report.
- 3278 upper tier establishments were reported, that is about 1 site per 114.000 habitants. 93 % of the upper tier establishments had sent their safety report to the competent authorities, and 91 % of the establishments have drawn up an internal emergency plan. The data shows also that external emergency plans have been drawn up for 34 % of the establishments. Information on safety measures has been issued for 64 % of the Seveso sites. 66 % of the upper tier establishments had been subject to inspections in 2002.
- The Member States had to transpose the Seveso II Directive not later than 3 February 1999. Nevertheless, many specific deadlines were one, two or three years later than the deadline for transposition. Important deadlines such as for sending notifications, safety reports or emergency plans fell within the reporting period. Therefore the assessment of the data provided for 2000 and 2001, sometimes on the basis of the old Seveso I Directive, proved to

127 http://mahbsrv.jrc.it.
128 COM (88) 261l
129 OJ No C 028 of 31 January 2002l

be difficult. Nevertheless, the results related to 2002 appeared to be more consistent and, therefore, the report focused on the data provided for 2002.

- The fact that most Member States were late in transposing the Directive led often to a late fulfilment of obligations, such as the sending of the safety reports by the operators. In turn, this late sending of safety reports led to some delays in the drawing up of external emergency plans.
- Following complaints from individuals or organizations, the Commission has opened a number of cases. The majority of these cases are related to land use planning.
- The accidents in Enschede and Toulouse highlight the need for more work at EU level in the field of land use planning. As requested by the amended Directive, a technical working group has been set up with a view to draw up by 31 December 2006 guidelines defining a technical database with risk data and risk scenarios, to be used for assessing the compatibility between Seveso establishments and residential and other sensitive areas.
- For the next reporting period 2003-2005, the report will be based on a completely transposed Seveso II Directive and will take account of the amendment. The 10 new Member States will also contribute to the next report.
- During the reporting period the acceding countries which became Member States on 1 May 2004 were already aware of the Directive and the reporting procedures. The Commission had undertaken a screening process showing that the legislation is generally in place. Furthermore, a questionnaire for the year 2003 focusing on the main issues, such as safety reports, emergency planning, public information, inspections or strategy for land use planning was sent to the new Member States and the two Candidate Countries Bulgaria and Romania. They were invited to send their contributions by the end of April 2004.

First Amendment of the Seveso II Directive

In the light of recent industrial accidents (Toulouse, Baia Mare and Enschede) and studies on carcinogens and substances dangerous for the environment, the Seveso II Directive 96/82/EC was extended by Directive 2003/105/EC of the European Parliament and of the Council of 16 December 2003[130] amending Council Directive 96/82/EC**.** The most important extensions of the scope of that Directive are to cover risks arising from storage and processing activities in mining, from pyrotechnic and explosive substances and from the storage of ammonium nitrate and ammonium nitrate-based fertilizers. The Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 July 2005.

The Directives lay down the minimum requirements and most Member States will already have legislation exceeding these minimum requirements. The question arises, however, whether on the basis of this legislation and in cases of defective or non-implementation of the Directive the Community could require the Member State to institute criminal proceedings against those it holds responsible.

10.4 State liability in financial services

There has been an increasing trend for some time in cases against banking supervisors for alleged negligence or improper conduct. Supervisory action has been made increasingly more accountable by means of legislation, mainly the implementation of European Directives[131]. However, up to the present time, EC legislation has avoided putting any provisions on liability for supervisory authorities in its banking Directives. It might have been expected that this may be considered not to be necessary if the rules under *Francovich* liablity could be applied to supervisory authorities, thus creating a uniform remedy without the need for specific regulation. However, in *Peter Paul*[132] it was made clear by the ECJ that EU banking Directives could not be

130 OJ No L 345 of 31 December 2003.

131 See Directive 94/19 EC providing that deposit protection systems in Member States should provide for compensation of deposits for at least 20,000 euros.

132 Case C-222/02 *Peter Paul, Cornelia Sonnen-Lütte and Christian Mörkens v Bundesrepublik Deutschland*, Judgment of 12 October 2004, nyr.

interpreted in such a way as to give rise to *Francovich* liability of a Member State for deficient prudential supervision of credit institutions. Although commentators have argued that this is a retrograde step and that the ECJ decision may be based on the wrong arguments and is mainly inspired by a fear of litigation and a potential detrimental impact on state finances, it seems to be fairly clear, at least for the time being, that this avenue for increasing review of this liability is closed.[133]

Different situations where supervisor's liability could arise: Interests of depositors and credit institutions may and probably will diverge in case of bankruptcy of the institution concerned. Insufficient action when financial difficulties arise which may range from passivity, lack of adequate intervention measures such as the replacement of managers or temporary suspension of business to a less clear situation of negligence if supervisory authorities have neglected adequately to supervise an institution in difficulties. Following the two Banking Directives[134] the House of Lords in the *Three Rivers* case[135], which arose out of the bankruptcy of the BCCI (Bank of Credit and Commerce International) the House of Lords did appear to give an interpretation of the English tort of misfeasance in public office which took account of the application of Community law concepts such as the awareness of a 'sufficiently serious' risk of loss to warrant a finding of recklessness on the part of the supervisor. Lord Hope of Craighead dealt with the Community law aspects of the case, asking whether the First Banking Directive entailed the granting of rights to individual depositors and whether the contents of such rights were identifiable in that they conferred rights on individuals. There seems to be some indication that the requirements for direct effect of Community law, a provision has to be precise, unambiguous and unconditional, was being applied rather than the *Francovich* requirements whether a provision conferred rights on individuals and whether those rights were identifiable.[136] Perhaps the question should be asked why the House of Lords did not refer the matter of interpretation of Community law to the ECJ, as the case does not seem to comply with the *CILFIT* criteria[137] and could not reasonable be considered to be *acte clair.* The correct application was clearly not 'so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised' was to be resolved. Nor is the conclusion obvious that the House of Lords could necessarily be convinced that the question would be equally clear to other Member States with different legal systems and different methods of interpretation, bearing in mind the peculiar characteristics of Community law, the different language versions, and the contextual understanding of Community law. Could it be argued that clarification of the 'European' point was not necessary for the judgment to be rendered?

The same reluctance to refer could then be seen in the case of the lower German courts in Peter Paul. However, the German Supreme Civil Court, the *Bundesgerichtshof* took a different view and made a preliminary reference to the ECJ.

Peter Paul and others held a bank account with BVH Bank für Vermögensanlagen and Handel AG which had received authorisation from the Federal supervisory authority (the *Bundesaufsichtsamt)* to engage in banking transactions, but it was not a member of a deposit guarantee scheme. The Bank had applied to join the deposit-guarantee fund of the *Bundesverband Deutscher Banken,* the Federal Association of German Banks, but had been unsuccessful. It later withdrew from the admission process as it did not fulfil the necessary conditions. Over a period of seven years, from 1991 to 1997, the Federal supervisory authority carried out several examinations of its affairs as the bank had got into difficulties and, following

133 Michel Tison in 42 CMLRev 639-675: Do not attack the Watchdog! Banking Supervisor's liability after *PETER PAUL.*

134 Council Directive 77/780 EEC, (First Council Directive) on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, of 12 December 1977; Council Directive 89/646 EEC (Second Council Directive) on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780 EEC.

135 *Three Rivers District Council and others v Bank of England (No 3),* [1996] 3 All ER 607; *Three Rivers DC and Others v Bank of England* [1999] 4 All ER 800 (CA); *Three Rivers DC* [2000] 2WLR 1220 (House of Lords' first decision); *Three Rivers DC* [2001] UKHL 16(House of Lords' second decision).

136 See for an extensive discussion of the case: Misfeasance in Public Office, Governmental Liability, and European Influences by Mads Andenas and Duncan Fairgrieve in Tort Liability of Public Authorities in Comparative Perspective, Duncan Fairgrieve, Mads Andenas and John Bell (eds) (London: BIICL 2002).

137 Case 283/81 *CILFIT Srl and Lanificio di Gavardo v Ministry of Health* [1982] ECR 3415.

the third examination the Authority filed a bankruptcy petition and revoked the bank's authorisation to engage in banking transactions. Paul and others had deposit accounts with the bank and declared claims in the context of the bankruptcy proceedings. They brought proceedings before the Regional Court (*Landgericht)* in Bonn claiming that they would not have lost their deposits of Directive 94/19 had been transposed within the prescribed time as this would have caused the Supervisory Authority to take measures against the bank before they made their payments. The Regional Court held that the belated transposition[138] constituted a serious breach of Community law by Germany and ordered, therefore, the State to pay the amount of compensation provided for in the Directive, amounting to 20,000 euros, plus interest.[139] In respect of the pecuniary loss exceeding that amount the claims were rejected by the Regional Court and by the Higher Regional Court, Cologne (*Oberlandesgericht Köln).* Under German law liability for breach of official duty is incurred under Paragraph 839 of the BGB read together with Article 34 of the Basic Law (GG) in the event of a breach of official duty…'as against a third party'. However, the –*Bundesaufsichtsamt* exercised the functions assigned to it 'only in the public interest'.[140]

Upon appeal to the highest Civil Court, the *Bundesgerichtshof,* the Court said that the State had not expressly denied misconduct on the part of the Supervisory Authority but had simply denied liability on the ground that that authority exercises its functions only in the public interest. If the rule concerned can indeed limit liability in this way, the lower courts were correct in their findings. If the Court were to hold that Directive 94/19 or the other Directives in the field of credit institutions confer on depositors the right to have the competent authorities take supervisory measures in their interest, Paragraph 6(4) of the KWG would be contrary to Community law. None of the Directives cited by the claimants contained any express reference to the protection of depositors, but the claimants stated that, if they were to form part of an overall scheme of banking supervision rules they would be denied effectiveness of the *Bundesaufsichtsamt* were to exercise its functions only in the public interest. Consequently, the Court stayed the proceedings and made a preliminary reference to the ECJ, submitting the following questions:

> (a) Did the relevant provisions of the Directive[141] confer on the depositor, in the event of the deposit being unavailable, in addition to the right to be compensated by a deposit-guarantee scheme up to the amount specified in Article 7(1) the more far-reaching right to require that the competent authorities avail themselves of the measures mentioned in Article 3(2) to (5) and, if necessary, revoke the credit institution's authorisation?
> (b) In so far as such a right is conferred on the depositor, does that also include the right to claim compensation for damage resulting from the misconduct of the competent authorities beyond the amount specified in the Directive?

The Court answered that the Directive intended to introduce cover for depositors in the event of unavailability of deposits made with a credit institution which was a member of a deposit guarantee scheme. If such compensation, therefore, was guaranteed by the scheme the Directive[142] could not be interpreted as precluding a national rule to the effect that' the functions of the national authority responsible for supervising credit institutions are to be fulfilled only in the public interest, which under national law precludes individuals from claiming compensation for damage resulting from defective supervision on the part of that authority'.[143]

The second question concerned the provisions of a number of other Directives harmonising the law on prudential supervision which were combined in Directive 2000/12 /EC.[144] Those

138 By the Law transposing the EC Deposit-Guarantee schemes Director and the EC Investor-Compensation Schemes Directive, o 16 July 1998 (BGBl I, p.1842) which entered into force on 1 August 1998.
139 See Art 7(1) of the Directive.
140 Paragraph 6(4) of the Kreditwesengesetz (KWG).
141 Articles 3 and 7 of Directive 94/19.
142 And, in particular, Article 3(2) to (5).
143 Para 32 of the judgment.
144 Directive 2000/12/EC of the European Parliament and of the Council relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L126, p.1). A further number of Directives were also addressed, to which the Court did not specifically refer in its judgment: - European Parliament and Council Directive 95/26/EC of 29 June 1995 [amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance, Directives 79/267/EEC and 92/96/EEC in the field of

Directives were adopted under Article 57(2), now Article 47(2) EC which direct the Council to issue such Directives in order to make it easier for self-employed persons to take up and pursue activities as self-employed persons. It was clear from the various preambles to the Directives that the approach adopted by the legislature in the filed of credit institutions was to achieve only the essential harmonisation 'necessary and sufficient to secure the mutual recognition of authorisations and of prudential supervision systems.[145] One of the objectives of the planned harmonisation was to protect depositors and a number of supervisory obligations were imposed. This, however, did not mean that, therefore, the Directives conferred rights on depositors to seek compensation if defective supervision meant that their deposits would be 'unavailable'.[146] The Treaty base meant further that the harmonization was restricted to 'that which is essential, necessary and sufficient'[147] to ensure the application of home State prudential supervision. A coordination of national rules of liability of national authorities, however, did not seem necessary in view of the complexity of banking supervision and the involvement of many different interests and such liability did not exist in a number of Member States, including Germany. The new Directive did give minimal guarantees to depositors and, although Germany had been late in implementing the Directive, the depositors had received such compensation. The answer to the second question was, therefore, the same as the answer to the first question.

Finally, the third question asked if in case of an affirmative answer to one or more of the above questions the liability of the State would be incurred only in accordance with principles governing State liability and, if so, whether, the Member State had committed a sufficiently serious breach. The Court answered that, in accordance with settled case law (see section I above) State liability could only arise where, in particular 'the rule of law infringed is intended to confer rights on individuals. In this case, for the same reasons underlying the answers to the two previous questions, the Directives could not be regarded as conferring rights on individuals.

Commentators have argued that the Court's approach is a narrow one and that it seems to interpret *Francovich* liability as only arising when a measure confers rights on individuals, whereas this is a condition applying to direct effect, and that it was precisely the difficulties with that condition which the *Francovich* judgment intended to remedy. The Court also seems to have taken a very strict approach in only referring to 'legally enforceable' rights, whereas a more flexible approach might open a right to compensation if there was more emphasis on the protection of the rights of depositors. This might be more in line with the Court's general approach to State liability and to Article 288 liability,[148] where liability is assessed in accordance with the 'general principles common to the Member States'. The common denominator is for example the '*Schutznorm*' rule which implies a flexible approach to rights. The ECJ stated that Article 57(2) EC only provides for 'essential harmonisation' but this may leave the depositor without remedy if there is an exclusion[149] of supervisory liability.

It may well be that the *Peter Paul* judgment is a peculiar one on the facts and should not necessarily be seen as a backward step in respect of State liability in general. It may not even be applicable in other areas of prudential supervision, particularly where the interests of investors are regarded as being important.[150]

The question also arises whether after *Köbler* the position of a plaintiff in cases like *Three*

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life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (Ucits) with a view to reinforcing prudential supervision (OJ 1995 L 168, p.7: recital 15 in the preamble; the following Directives were referred to in the second part of the second question, asking whether they, too, could provide assistance with interpretation: - 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis (OJ 1992 L 110, p. 52): 11th recital in the preamble;- 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions (OJ 1993 L 141, p. 1): eighth recital in the preamble;- 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ 1993 L 141, p. 27): 2nd, 5th, 29th, 32nd, 41st and 42nd recitals; however, the Court did not refer to those, either.

145 Para 37 of the judgment.

146 Para 40 of the judgment.

147 Para 42 of the judgment.

148 Michel Tison in 42 CMLRev 639-675: Do not attack the Watchdog! Banking Supervisor's liability after *Peter Paul.*

149 According to Prof Tison, such exclusion of liability does not apply in 'a number of Member States' but only in Germany and Poland.

150 E.g. in the Prospectus Directive 2003/71 EC.

Rivers[151] would be strengthened in that a court would be more inclined to make a preliminary reference. It is true that on the evidence of *Peter Paul* the ECJ might well have given a similar answer to a court referring in *Three Rivers.* On the other hand, it has long been argued that the *CILFIT* criteria are out of date and unworkable now the European Union has been extended to 25 (an soon more) members and *Köbler*, if nothing else, points out the problem.

10.5 Liability for inadequate supervision or enforcement

Actions for damages may be contractual, quasi-contractual, or tortuous. Quasi-contractual liability, ie actions based on unjust enrichment, are not provided for specifically, but the Court has found in staff cases that there is Community liability based on the general principle of unjust enrichment recognised by most Member States. This was so, for example, in Case 18/63 *Wollast v Commission*[152] where a Commission employee was found to have been unjustly enriched by receiving full pay during a period when she had not worked because she had been dismissed. The dismissal had been annulled by the Court, and she was thus entitled to payment. However, a deduction was made from the full pay as she had not had certain expenses e.g. for child care.

Community liability in tort ('non-contractual liability') is governed by Articles 235 and 288(2) EC. This liability is not specified and it has been a matter for the Court to interpret its ambit. The Community may be liable for both *'fautes de service',* ie wrongful acts on the part of one of its institutions, and *'fautes personnelles'*, ie wrongful acts on the part of its servants. As long as the wrongful acts are committed in the performance of a Community official's duties, the institution concerned may be sued. These concepts are derived from French law, but are applied by the Court in its own way.

In determining liability 'in accordance with the general principles common to the laws of the Member States' (Article 288(2) EC), the ECJ has drawn on the common elements governing tortious liability in the Member States in order to develop its own specific principles of Community law.

There is no limitation on the person bringing the action. Against whom should the action be brought? Article 288(2) states that 'the Community' shall make good any damage. In Cases 63-69/72 *Werhahn v Council and Commission*[153] the Court ruled that the action should be brought against the institution which is responsible. If two institutions are involved, it is quite correct to bring the action against both. (Where Community liability is involved because of one of its institutions' actions, the Community should be represented before the ECJ by the institution(s) against which the matter giving rise to liability is alleged).

Unlike in the ECSC Treaty, there is no requirement of fault in the EC Treaty. Nevertheless, the ECJ has always required proof of fault. There should be a fault committed by the Community as well as damage suffered by the applicant and a causal link between the fault committed and the damage. A *faute de service* includes any failure in the organisation and function of the public authority:

- civil wrongs (ie all sorts of torts);
- abusive application of powers; see Cases 5, 7, 13-24/66 *Kampffmeyer*[154]: improper use of crucial provisions of a regulation is capable of giving rise to liability on the part of the Community;
- non-performance of obligations; see Cases 9 & 12/60 *Vloeberghs v High Authority*;[155]
- inadequate organisation of the administration; see Case 23/59 *Feram*[156]; Cases 156/79 & 51/80 *Gratreau*;[157]
- inadequate supervision; see Cases 19, 21/60 and 2-3/61 *Fives Lille Cail*;[158] Cases 29, 31, 36, 39-47, 50, 51/63 *Laminoirs*;[159]

151 And see earlier cases such as *Chiron Corporation v Murex Diagnostics Ltd* [1995] 1 WLR 243 CA and *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd ex p. Else* [1993] QB 534, CA.
152 [1964] ECR 163.
153 [1973] ECR 1229.
154 [1967] ECR 317.
155 [1961] ECR 393.
156 [1959] ECR 501.
157 [1980] ECR 3943.

- erroneous information; see Cases 19, 20, 25, 30/69 *Richez-Parise*;[160]
- unlawful termination of staff contracts; see Cases 7/56 & 3-7/57 *Algera*;[161]
- insufficient protection of rights of staff members; see Case 110/63 *Willame*;[162]
- breach of internal rules; see Cases 10 and 47/72 *Di Pillo*;[163]
- breach of a superior rule of law; see e.g., Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt*[164] (non-discrimination);
- breaches of the duty of confidentiality and the duty to warn the applicant; see Cases 145/83 and 53/84 Adams.[165]

In his opinion in Cases 9 and 11/71 *Compagnie d'Approvisionnement v Commission (No 2)*,[166] the Advocate-General left open the possibility that the principle of 'equality in the face of public burdens' might be applied in Community law. Under this doctrine the state may be liable in certain circumstances in the absence of fault if it can be demonstrated that measures taken by the state have placed an abnormal and unjustifiably severe burden on certain individuals who have thus been required to make a disproportionate sacrifice in the general interest. However, the Court ruled that no liability arose here, but did not say anything further on the general question of strict liability.

The damage must be actual and certain (*réel et certain*). In Cases 5, 7, 13-24/66 *Kampffmeyer*[167] the ECJ admitted claims for loss of profit; also loss due to currency fluctuations: Case 74/74 *CNTA.*[168] In staff cases, damages may be claimed for anxiety and injured feelings by a Community employee wrongfully dismissed or unfairly treated: Cases 7/56 and 3-7/57 *Algera.*[169] Actual damage must be proved or at least imminent damage which is foreseeable with sufficient certainty: Cases 56-60/74 *Kampffmeyer*.[170]

The damage must not be too remote: Case 4/69 *Lütticke;*[171] there should a causal link between the damage and the act complained of. Damage may be adjudged to be non-existent where the applicant is able to pass on the loss sustained to his customers: Cases 64, 113/76, 167, 239/78, 27, 28 and 45/79 *Dumortier (Quellmehl & Gritz)*.[172]

The ECJ has accepted the notion of a causal link on a number of occasions without any further elaboration. See e.g. Case 4/69 *Lütticke* (1971).[173] In Cases 64, 113/76, 167, 239/78, 27, 28 and 45/79 *Dumortier (Quellmehl & Gritz)* (1982) the ECJ gave a further clarification: in the field of non-contractual liability for legislative measures, there is no obligation for the Community to make good: '...every harmful consequence, even a remote one, of unlawful legislation'; the damage alleged must be '...a sufficiently direct consequence of the unlawful conduct of the institution concerned'. The burden to prove the causal link between the harmful behaviour of Community institutions and the alleged damage falls on the applicant: Case 40/75 *Bertrand.*[174] The causal link may be severed by contributory negligence on behalf of the applicant: C-308/87 *Grifoni*.[175] In Case 169/73 *Compagnie Continentale*[176] the Court said that in a claim based on misleading information the required causal link will be established only if the information would have caused an error in the mind of a reasonable person. See also the general discussion of

158 [1961] ECR 561.
159 [1965] ECR 1123.
160 [1970] ECR 325.
161 [1957] ECR 81.
162 [1965] ECR 803.
163 [1973] ECR 763.
164 [1971] ECR 975.
165 [1985] ECR 3539, 3595.
166 [1972] ECR 391.
167 [1967] ECR 317.
168 [1975] ECR 533.
169 [1957] ECR 81.
170 [1976] ECR 711.
171 [1971] ECR 325.
172 [1982] ECR 1733.
173 See supra note 115.
174 [1976] ECR 1.
175 [1990] ECR I-1203.
176 [1975] ECR 117.

causal link in the Advocate-General's opinion in this case (at paras 148-154).

Apportionment is reserved for claims of particular merit: Cases 145/83 and 53/84 *Adams v Commission* (1985). This is one of the few cases in this field where an individual has been awarded substantial damages, but it is a remarkable and tragic one. Mr. Adams was employed by the Swiss pharmaceutical company Hoffmann-La Roche and had passed certain confidential documents on to the Commission which contained evidence of violation of the competition law Article 86 (now Article 82 EC) of the Treaty. He had left Switzerland but returned there for a visit and was arrested and imprisoned for having violated Swiss law on commercial secrecy. While he was in prison his wife committed suicide. After his release he sued the Community for damages. The Court held that the Commission had violated its duty of confidentiality by not taking steps to prevent Hoffmann-La Roche from learning the name of the informant. However, Mr. Adams's damages were reduced by 50% to take into account his own contribution in failing to protect his own interests.

Non-contractual liability under Article 288(2) EC exists as a separate remedy from the remedies for judicial review under Articles 230 and 232 EC. This was not the view taken originally by the ECJ in Case 25/62 *Plaumann.*[177] The case was declared inadmissible as Plaumann lacked locus standi. However, the Court declared the action admissible, although it then dismissed the case on its merits. It said that a reviewable act which has not been annulled cannot form the basis of an action for damages. This is an extremely restrictive interpretation which had been rejected by the Court in Cases 9 and 12/60 *Vloeberghs v High Authority* (1961).[178] It had been contended there that Vloeberghs did not have standing to bring an action for review and, therefore, could not bring a tort action. The Court had held that review actions and tort actions were separate remedies. Then, in Case 4/69 *Lütticke v Commission* (1971)[179] the Court rejected the *Plaumann* approach and held: 'The action for damages provided for by Article 178 (now Article 235 EC) and the second paragraph of Article 215 (now Article 288 EC) was established as an independent form of action with a particular purpose to fulfil within the system of actions and subject to the conditions for its use, conceived with a view to its specific purpose'.

This was further confirmed in Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* (1971)[180] which concerned a regulation under which no compensation was payable in case of loss. The company sued for damages and the Council contested admissibility on the grounds that such compensation would nullify the legal effect of the regulation. The Court said again that it concerned two separate types of action. *Schöppenstedt* was also important because it set out for the first time the principles governing Community liability for acts of the institutions. The language it used in setting out these principles has been echoed in the later judgments of the Court concerning liability of Member States for violation of Community law. The current practice is, in appropriate cases, to claim in the alternative: see e.g. Case 112/77 *Töpfer*.[181]

Article 288(2) EC can be used as a separate remedy from the remedies under Articles 230 and 232 for judicial review to obtain damages for the effects of an unlawful regulation, even though the regulation is of legislative nature and cannot be the subject of an action by a private party under Article 230 EC. See e.g. Cases 9 and 11/71 *Compagnie d'approvisionnement (No 2)* (1972);[182] Case 4/69 *Lütticke* (1971).[183]

Liability extends to acts of a legislative or normative character, such as regulations, provided that there is a 'sufficiently flagrant violation of a superior rule of law for the protection of the individual' ('*Schöppenstedt* formula'): See Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt* (1971)[184]; see also Cases 83, 94/76, 4, 15 and 40/77 *HNL*;[185] Cases 197-200, 243, 245 and 247/80 *Ludwigshafener Waltzmühle*;[186] Case 281/84 *Zuckerfabrik Bedburg*[187] and Cases 194-

177 [1963] ECR 199.
178 See supra note 100.
179 See supra note 115.
180 See supra note 108.
181 [1978] ECR 1019.
182 See supra note 110.
183 See supra note 115.
184 See supra note 108.
185 [1978] ECR 1209.
186 [1981] ECR 3211.
187 [1987] ECR 49.

206/83 *Asteris.*[188] The *Schöppenstedt* formula contains three requirements:

- Breach of a superior rule of law. Mere administrative acts would not constitute a 'superior rule of law'; see Case 74/74 *CNTA* (1975).
- The breach must be sufficiently serious. See Cases 83, 94/76, 4, 15 and 40/77 *HNL*[189] the Community may not incur responsibility for damage caused by a legislative act on the sole condition that it has been found illegal or invalid. In a legislative field involving wide discretion, the Community will not be liable unless the institution concerned has 'manifestly and gravely disregarded the limits on the exercise of its powers'. The principle evident from cases such as *Dumortier*[190] that damages are likely to be awarded only where there is a small number of potential claimants has now changed. From Cases C-104/89 and C-37/90 *Mulder No 2*[191], it appears that a damages claim may be successful even where there is a large number of potential claimants. The above cases seem to show that this requirement has two aspects to it: (a) the degree of harm suffered and the extent to which it is concentrated on a small group of victims; (b) the extent to which the law has been violated (the conduct of the institution concerned must be verging on the arbitrary). The severity of both these requirements has, however, as outlined, been lessened.
- The rule of law infringed must be one for the protection of the individual. See Cases 9 and 12/60 *Vloeberghs* (1961)[192]: the principle of free movement of goods was not intended for the benefit of coal importers; and Cases 5, 7, 13-24/66 *Kampffmeyer* (1967)[193]: a provision in an EC regulation intended at ensuring 'appropriate support for agricultural markets' intended to benefit, inter alia, the interests of individual undertakings such as importers. From the case law it seems that as long as the rule of law can be construed as designed in part to benefit a particular group of people then the third requirement is met. Moreover, the fact that an individual would not have *locus standi* to challenge the rule under Article 230 EC due to lack of direct and individual concern does not necessarily mean that the provision is not intended to protect his interests. Not only must the group affected be small and clearly defined but it must also be closed. In Case C-152/88 *Sofrimport*[194] the ECJ pointed out that undertakings such as the applicants, with goods in transit at the time when the regulations were made, constituted a 'restricted group which could not be extended after the contested measures took effect'.

In the case of *faute personnelle* (*acts of Community servants*) the Community is liable on the principle of vicarious liability. In Case 9/69 *Sayag v Leduc*[195] the ECJ held that 'in the performance of their duties' in Article 288(2) EC means that the Community is only liable for those acts of its servants which, by virtue of an internal relationship, are the necessary extension of the tasks entrusted to the institutions. This is a very restrictive interpretation of Community's vicarious liability and would mean that the use of a private car by a Community servant could only be considered as constituting performance of his duties in the case of *force majeure* or exceptional circumstances of such compelling nature that the Community could not otherwise perform its functions. This, therefore, did not cover the use of a servant's private car during the performance of his duties.

In the case of a concurrent fault on the part of the Member States the ECJ has proceeded by way of the following analysis: (a) is there joint liability on the part both of the Community and the Member State? If there is then (b) is the Member State to be considered primarily liable so that it would be reasonable for it rather than the Community to pay compensation? If so, then (c) the applicant must pursue his remedy in the national courts before the ECJ can further entertain his claim: See Cases 5, 7, 13-24/66 *Kampffmeyer* (1967)[196]; Case 96/71 *Haegeman.*[197] But where

188 [1985] ECR 2815.
189 See supra note 129.
190 [1979] ECR 3091.
191 Cases 64, 113/76, 167, 239/78, 27, 28 and 45/79 *Dumortier (Quellmehl & Gritz)* [1992] ECR I-3061.
192 See supra note 99.
193 See supra note 111.
194 [1990] ECR I-2477.
195 [1969] ECR 329.
196 See supra note 111.

the real complaint is about the conduct of Community institutions, or where it is clear that national law can provide no remedy, an action under Article 288(2) EC may be admissible: see Case 281/82 *Unifrex*;[198] Case 175/84 *Krohn.*[199]

10.6 The parallel between the principles of State and Community liability

Until *Factortame* and even after it there were important differences between the two. In Community liability the Court made a distinction between administrative and legislative acts which was based on the effects of the act: were they of individual or of general application. According to the *Schöppenstedt* formula liability only arose if there was a flagrant violation of a superior rule of law. In *Köbler* the argument was that such a condition should apply to infringements by national courts, if liability were to be extended to actions by national courts. However, *Bergaderm* was concerned with Community action, the liability arising from the Commission's adoption of a Directive. The Court did not consider the superior rule of law condition and held that the general or individual nature of a measure was not a decisive criterion for identifying the limits of an institution's discretion. This would indicate that the difference between legislative and administrative measures was no longer considered to be of major importance. The Court reiterated the principle on which the *Factortame* conditions were based: The conditions for State liability and Community liability must be the same. Thus the *Factortame* conditions applied here and the important factor was whether there had been a manifest and grave disregard on the limits of the Institution's discretion. It is now being argued, therefore, that the relationship of influence between Community liability and State liability has been inverted. The State liability principle appears to be increasingly guided by the principles of Community liability. At the least we can say that the two principles have become much more closely aligned. This was confirmed by the Advocate General in *Köbler* when he said: we can now speak of an alignment between the two systems.[200] This did not mean, however, that the two systems needed to develop entirely in parallel as, for example, the Community could not be made liable for a decision by the Court of Justice.[201]

197 [1972] ECR 1005.
198 [1984] ECR 1969.
199 [1986] ECR 753.
200 Case C-224/01 *Köbler v Austria* [2004] All ER (EC) 23, 57.
201 See para 94 of the Opinion.

11 Belgium

Professor Dr Michel Tison*

11.1 Public bodies responsible for controlling market behaviour or health and safety

11.1.1 Introduction

The organization of supervision over market behaviour, public health and safety is under Belgium law scattered over a multiplicity of laws and regulations. This situation is further complicated by the division of powers in the federal system: while the regulation of economic behaviour is mainly a federal matter, food safety and health can be regulated at both federal and regional level. If a supervisory system is put in place, each separate law will indicate who is in charge of supervising the compliance with the requirements laid down in the law or regulations adopted on basis of that law. This makes it extremely difficult to sketch a clear overall picture of supervisory bodies in economic life.

Notwithstanding this fragmentation, many laws in a similar area will attribute supervisory competence to the same body. This, in many federally regulated matters, the agents of the Economic Inspection, which forms part of the Ministry of Economic Affairs, will often be appointed as competent for both supervising the rules, investigating complaints, and report possible infiringements.

Under Belgian law, a distinction must generally be drawn between “regulators” and “supervisors”. As a general rule, regulation will be laid down in laws, which may attribute to the executive the power to adopt further regulations. This regulatory power cannot, in general, make the object of a further sub-delegation: this is only possible for aspects of minor importance. Hence, the authorities in charge of supervision, i.e. monitoring the compliance by the regulated persons with the laws and regulations applicable to them, will normally not have the power to “regulate”, i.e. lay down enforceable rules of a general nature. While “regulation” will be entrusted to the executive (federal government, regional government, the competent minister or, more exceptionally, an independent agency), supervision will often be entrusted to a specific agency, or to public servants depending of the competent authority, but specifically in charge of investigating and supervising the regulated matters.

11.1.2 Overview of supervisory bodies

Without pretending to be exhaustive, the following overview can be provided

I. Market Behaviour

A. General:

- Law 14 July 1991 on commercial practices and information and protection of the consumer (Wet 14 juli 1991 betreffende de handelspraktijken en de voorlichting en bescherming van de consument)
    - Provisions on selling techniques, advertisement, distance selling, unfair contract terms etc.
    - Supervisory authority: agents of the Economic Inspection

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    - Supervisory powers: investigation and official record (proces-verbaal) of infringements, on-site inspections
- Law-Decree of 1945 on prices ('Prijzenwet')
    - Notifications of price modifications to competent Minister; possibility to impose maximum prices for certain goods
    - Supervisory authority:
    - Supervisory powers:

B. Telecommunication

- Law of 21 March 1991 on the reform of certain government enterprises (Wet 21 maart 1991 betreffende de hervorming van sommige economische overheidsbedrijven)
    - Provisions on competition between suppliers, interconnection systems, universal access etc.
    - Supervisory authority: Belgian Institute for postal services and telecommunication (Belgisch Instituut voor Postdiensten en Telecommunicatie – BIPT: see Law of 17 January 2003)
    - Supervisory powers: see Law 17 January 2003: general investigation powers ; staff members may be entrusted with powers of "judicial officer", and make searches, seize documents etc.

C. Energy (electricity and gas):

- Law of 29 April 1999 on the organisation of the electricity market (Wet van 29 april 1999 betreffende de organisatie van de electriciteitsmarkt)
    - Provisions on authorisation and supervision of network-managers (netbeheerders), on authorisations for electricity infrastructure, on obligations to providse a universal service etc.
- Law of 12 April 1965 on the transport of gas-like and other products through pipelines (Wet van 12 april 1965 betreffende het veroer van gasachtige producten en andere door middel van leidingen)
    - Supervisory authority: Commission for the Regulation of Electricity and Gas (CREG – Commissie voor de Regulering van de Electriciteit en het Gas: See Art; 2" Law of 29 April 1999 and Art. 15/14 Law of 12 April 1965)
    - Supervisory powers:
        - CREG: investigation powers + on site verifications

D. Agriculture:

- Law 3 February 1995 on the Belgian Intervention and Restitution Bureau (Wet 3 februari 1995 houdende oprichting van het Belgisch Interventie- en Restitutiebureau)

E. Banking, insurance and capital markets

- Law of 2 August 2002 on the financial sector and financial services & various royal decrees (Wet 2 augustus 2002 betreffende de financiële sector en de financiële diensten
    - Regulation: organization of prudential supervision, entrusted to the Banking, Finance and Insurance Commission (Commissie voor het Bank-, Financie- en Assurantiewezen, CBFA): competent to supervise credit institutions, insurance undertakings, investment firms and financial information (vetting of prospectuses for public offerings of securities)
    - Supervisory authority: CBFA, independent public authority with legal personality
    - Supervisory powers: investigations, on site verifications, power to order replacement of board members, to suspend activites, to revoke authorization
    - Liability: Art. 68 Law 2 August 2002: liability of the CBFA, its organs and staff is limited to situations of fraud or gross negligence

II. Health and Safety

A. General

- Municipal Law, Art. 133-135 (Nieuwe Gemeentewet – K.B. 24 juni 1988) : Municipality is responsible for the application of all police laws, for ensuring safety and order in publicly accessible places, including road safety, prevention of and intervention in case of calamities (fire, natural disasters, epidemics etc.)
- Law of 9 February 1994 concerning the safety of products and services (Wet 9 februari 1994 betreffende de veiligheid van producten en diensten)
    - General obligation for producers to offer only safe products and services;
    - Government is empowered to regulate production and distribution of categories of products or services
    - Competent minister can prohibit (categories of) products or impose a provisional prohibition
    - Supervision: conformity of products with regulations, investigation of infringements: civil servants appointed by Royal Decree
    - Supervisory powers: investigation and official record (proces-verbaal) of infringements, on-site inspections, sequestration of products, ...

B. Enforcement of public order by the police

- Law of 5 august 1992 on the police function (Wet 5 augustus 1992 op het politieambt)

C. Prevention of fire and explosions

- Law of 30 July 1979 concerning the prevention of fire and explosions and concerning the mandatory liability insurance in these cases (Wet 30 juli 1979 betreffende de preventie van brand en ontploffing en betreffende de verplichte verzekering van de burgerrechtelijke aansprakelijkheid in dergelijke gevallen
    - Empowers government to impose to specifiy fire prevention requirements for constructions generally, and specific standards for specific categories of constructions (see e.g. Royal decree 22 May 1990 on fire prevention standards for buildings)
    - Supervision: Mayor of municipality supervises application of the standards, upon report of the fire department
    - Supervisory powers: investigation and official record (proces-verbaal) of infringements, on-site inspections; provisional closing of premises

D. Food Safety

- Law of 4 February 2000 creating the federal agency for the safety of the foodchain (Wet 4 februari 2000 houdende oprichting van het Federaal Agentschap voor de Veiligheid van de Voedselketen)
    - Regulation: Agency is competent to elaborate, apply and supervise measures relating to the analysis and containment of all risks which can harm the health of consumers, within the objective of protecting the safety of the foodchain and the quality of food i order to protect consumers' health (art. 4, § 1)
    - Supervision: The Agency has, within the (regulatory) tasks assigned to it, overall competence to supervise the application of various food and health related laws (as enumerated *inter alia* under section II, B)
- Law of 11 July 1969 concerning pesticides and commodities for agriculture (Wet 11 juli 1969 betreffende de bestrijdingsmiddelen en grondstoffen voor de landbouw, tuinbouw, bosbouw en veeteelt)
    - Empowers government to regulate the use of commodities for agriculture
    - Enforcement/supervision: by various civil servants: police, appointed agents of Ministry of Agriculture
    - Supervisory authority: agents of the Economic Inspection
    - Supervisory powers: investigation and official record (proces-verbaal) of infringements, on-site inspections, sequestration of products
- Law of 28 March 1975 on trade in agricultural and fishery products (Wet 28 maart 1975 betreffende de handel in landbouw-, tuinbouw- en zeevisserijproducten

- Empowers government to determine all conditions relating to production, transport, composition, conservation, treatment, ... of products of agriculture and seafishery (laid down in approx. 50 royal decrees)
- Supervision: by various civil servants: police, appointed agents of Ministry of Agriculture, ...(see article 5)
- Supervisory powers: investigation and official record (proces-verbaal) of infringements, on-site inspections, sequestration of products, ...

- Law of 24 January 1977 concerning the protection of the health of consumers as regards nutritional and other products (Wet 24 januari 1977 betreffende de bescherming van de gezondheid van de verbruikers op het stuk van de voedingsmiddelen en andere producten)
  - Empowers governemnt to regulate the production and trade in nutritional and other products, to regulate advertisement for these products and to regulate safety measures to be takrn in respect of all persons involved in the production or trade of these products; in situations of urgency, the competent Minister of Public Health can provisionally prevent or halt the distribution of specific products.
  - Supervision: by civil servants of the Ministry of Public Health, appinted by Royal Decree (see article 11)
  - Supervisory powers: investigation and official record (proces-verbaal) of infringements, on-site inspections, sequestration of products, ...

11.2 Liability for inadequate supervision and enforcement

11.2.1 General principles

Under Belgian law, public authorities are subject to the same rules as any other legal subject as regards non-contractual liability, unless a specific legal provision contains a partial or full exemption from liability (see *infra*). In its so-called *Flandria*-judgment of 5 november 1920,[202] the *Cour de Cassation* held that an act of a public authority, notwithstanding its administrative nature, could constitute a 'negligence' in the sense of the Civil code provisions on tort liability. Thus, the provisions of the Civil code, in particular Articles 1382 to 1386 Civil Code will equally apply: a public authority will be held to compensate persons who have suffered damages that have been caused by the negligence of the public authority.

(1) Negligence
The "negligence" ("fout") can be the consequence of the breach of either (i) a duty imposed by the law or (ii) the duty of care.

(i) the breach of a legal duty that precribres a specific behaviour to the supervisor, will *in se* constitute negligence, unless it is objectively justified.[203]

(ii) For assessing whether the duty of care has been fulfilled, courts will take as a reference the situation of a normal, diligent person, placed in the same circumstances of time and facts. Negligence will be established when the "normal, diligent supervisor" would have acted in another way, where even the slightest deviation could constitute negligence (*culpa levissima*). In practive however, the exercise of supervision will very often entail a certain degree of discretion. The reference to the normal and diligent supervisor should therefore in addition take account of the discretion enjoyed by the supervisor. It is not for the courts to substitute themselves to the supervisor in the sphere of this discretionary power, as they would otherwise interfere into the exercise of policy discretion by the executive, which would run contrary to the separation of powers.[204]

202 Cass. 5 November 1920, *Pasicrisie*, 1920, I, p. 193. See also Cass. 7 March 1963, *Pasicrisie*, 1963, I, p. 744.
203 See Cass. 19 December 1980, *Arresten van het Hof van Cassatie*, 1981, p. 449.
204 Compare W. Van Gerven, *Hoe blauw is het bloed van de prins?*, Antwerp, Kluwer, 1984, p. 51-57. Others consider the discretion as a factual circumstance to be taken into account when assessing liability of the

(2) Damages
The categories of damages for which the victim can claim compensation towards the supervisor are not different from what applies in general tort law. Under Belgian law, all damages, both material and moral, and both direct and indirect damages, can be claimed, as long as the requirement of causation with the negligence is satisfied.

(3) Causation
Only those damages that have been caused by the negligence of the supervisor will be awarded compensation. Belgian law adheres to the theory of equivalence as regards the determination of the causal link[205]: causation will be established for the concrete damage that would not have occurred without the negligence. No further distinction or hierarchy is operated as regards the relative importance of the negligence or other events.
The plurality of faults, or own negligence from the part of the victim, will generally not influence the assessment of causation itself, but can lead to reducing the proportion of damages to be incurred by the supervisor.

(4) Personal liability and liability for employees/civil servants
For the assessment of liability of the supervisor, who by definition is not a physical person, persons who act for the public authority (so-called "organs") are assimilated to the authority itself. Consequently, liability is borne directly by the authority itself. Furthermore, the public authority will be liable for the acts or negligence committed by its employees within the exercise of their assignments, similarly as the liability of an employer for its employees.

Liability will normally be borne by the supervisor itself, when it has separate legal personality. In the absence of legal personality, the legal entity from which the supervisor depends will be responsible for compensating the victims.

Until recently, and unless specific laws provided for exceptions, a staff member or agent of the supervisory body could also incur personal liability for its negligence towards the victims. This situation clearly contrasted with the protection enjoyed by employees under general labour law: according to Article 18 of the Act on Labour Agreements (Wet Arbeidsovereenkomsten), employers bear liability towards third parties for the negligence committed by their employees. The employees could only be held personnally liable towards their employers or third parties in the event of intentional negligence (opzettelijke fout), gross negligence (zware fout) of a frequently occurring normal negligence.

The Law of 10 February 2003 has extended the limited tort liability regime of employees to all civil servants. Hence, the victims will only have a limited possibility to claim damages from the civil servant in person, but will be able to claim damages, according to normal liability rules, from the supervisor itself.[206]

Finally, it should be mentioned that specific laws may derogate from or complement specific aspects of the general rules as regards liability. Thus, in the financial sector, the supervisory authority enjoys a partial exemption form liability (see *infra*). Often, personal liability of civil servants is also confined by law (e.g. police).

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supervisor according to the "standard" reference of a normal and diligent person (see L. Cornelis, *Beginselen van het Belgische buitencontractuele aansprakelijkheidsrecht*, I, Antwerp, Maklu, 1989, p. 207-211. The difference between both approaches is largely academic: in both situations, the court will, in assessing the supervisor's behaviour, refrain from interfering into the sphere of discretion.

205 Cass., 22 December 1947, *Pasicrisie*, 1947, I, p. 555.

206 A similar rule applies, pursuant to the Law of 25 March 1999 to the mayor of a municipality: his personal liability towards the municipality will be limited to situations of intentional or gross negligence. Towards third parties, the mayor remains personally liable for all kinds of negligence. Likewise, the municipality will have to bear liability for the acts of the mayor, acting as an organ of the municipality. Furthermore, the liability of the mayor or of the aldermen (*schepenen)* toward third parties must, according to the law (Art. 329bis Municipal Law) be covered by a liability insurance.

11.2.2 Case law on liability of public bodies/supervisors

Liability of public and supervisory bodies is assessed according to normal liability rules, and decided by the normal civil courts. Except for specific issues (such as liability of the judiciary or of the Parliament), the liability has not been discussed extensively in legal writing. Quite some cases have nevertheless been reported. They demonstrate how the courts apply the general principles of tort law to the acts and behaviour of public and supervisory bodies.

For the sake of clarity, we have used a similar scheme as used above in enumerating the various supervisory bodies. As far as we know, no cases have been reported in the field of market behaviour (except for the financial services area: see *infra*, section 11.3). We will therefore concentrate in this section on the area of Health and Safety

(A) General: police and fire departments

Different cases have been reported involving liability for negligence in the performance of duties related to maintaining public order by police forces and to combating fire by firemen.

As regards the *police function*, account should be taken of the Law of 5 August 1992, which contains specific provisions with respect to liability for damages caused by police forces in the performance of their duties. Given the organization of the unified police corps at two levels (federal police and local police), liability for damages will be incurred either by the *State* (federal police) or by the *municipality* (local police). If the municipality has borne liability for its local policemen, with respect to an assignment given by the State, the municipality will be able to take recourse to the State for the compensation granted to the victims. (Article 47 Law of 5 August 1992)

Conversely, police officers are protected, in a similar way as employees in labour law, from personal liability, whether towards the State/municipality or towards third persons: they will only be liable for their intentional negligence, gross negligence, or often occurring normal negligence. (Article 48 Law of 5 August 1992).[207]

With respect to fire prevention, supervision over the applicable standards lies with the mayor of each municipality. Deficiences in supervision, to be assessed according to normal liability standards, could provoke personal liability of the mayor, and liability of the municipality, for which the mayor acts as organ.

Fighting fire is the primary responsibility of the fire brigades within a municipality (or group of municipalities). Shortcomings in this regard will entail liability of the public authority from which the fire brigade depends and, more exceptionally, personal liability of the firemen concerned, if fraud, gross negligence or commonly occurring normal negligence is established. This limitation of liability applies not only to professional firemen, who can be considered as civil servants, but also to volunteers.[208] This regime of limited personal liability, introduced in 2004[209], is similar to the present regime concerning personal liability of civil servants in general and of employees in general labour law.

Finally, it should be mentioned that the regime applicable to firemen applies by analogy to memebers of the civil protection (Civiele bescherming) in the performance of their legal duties under the law of 31 December 1963 (*inter alia*, intervention in situations of calamity, natural disaster etc.).

Cases:

- Court of Appeal Antwerp, 16 February 2000[210]

The use of force by police officers must be proportionate to the concrete circumstances, including the physical condition of the police officer and the arrested person. The court decides that the use of different techniques to immobilize a person during a razzia in a bar was disproportionate. The court qualifies the behaviour as a gross negligence and holds the police-officer and the

207 The mere fact that a policemen is found guilty of a criminal offence (e.g. in traffic matters) is not sufficient to trigger tort liability: see Cass. 2 December 1997, *Pasicrisie*, 1997, I, 1328.
208 See art. 15-19 Law 31 December 1963 on civil protection, as amended by law of 27 December 2004.
209 See Art. 455 of the Program Law (Programmawet) of 27 December 2004.
210 *Rechtskundig Weekblad* 2000-2001, p. 482.

municipality jointly liable for compensation.

- Court of Appeal of Brussels, 4 January 2001

A woman, who had been repeatedly severely threatened by her ex-husband, had several times pressed charges at the police and with the penal prosecutor. The police did not take any initiative towards the ex-husband, although similar complaints had been lodged by other persons. After having been severely hurt by her ex-husband, the woman claimed damages from the State and the municipality. The Court holds the municipality liable for the negligence of the local police in investigating the serious complaints. It considers that the damage consists of the loss of a probability to avoid the risk of aggression being realized, and which is amounted to 80% of the actual damage suffered by the victim.

- Court of Appeal of Liège, 14 June 1994[211]

When the threats expressed towards a person are, by contrast, vague and in circumstances where the person expressing the threats will not necessarily execute them, the municipality will not be liable for the fact that the police did not intervene:

- Peace Court Sint-Kwintens-Lennik, 26 june 1995[212]

The police had seized a motorbike from a driver who was not properly insured, and hed kept the motorbike in a municipal warehouse. The judge considers that the polie has an obligation as to restitute the motorbike at the appropriate moment. The municipality bears liability for the fact that its personnel has neglected to lock the doors of te warehouse, thereby allowing third persons to steal various parts of the motorbike.

- Civil Tribunal of Ghent, 23 September 2002[213]

The municipality is held liable for the negligence of its firebrigade in fighting a fire, when it has not acted as normal and diligent firemen.would have acted in similar circumstances.Given the presence of highly inflammable isolation materials, the firemen shuld have taken the necessary precautionary measures to avoid the fire to start again.

(B) Art. 135 Municipal Law: liability for road safety

Numerous cases have been decided on liability of a municipality for ensuring the road safety. Before the enactment of the 'new municipal law' in 1988, liability was based on the general rules of tort law. Two situations of liability can be discerned in the case law: first, situations where negligence is established because the municipality, by not taking adequate measures, has created a situation of unusual danger, which frustrates the legitimate confidence of users in normal road safety: (Liability based on Art. 1382 Civil Code). Second, situations where the municipality is held liabile for damages caused by defective roads (Art. 1384, para 1 Civil Code).of a negligence (creation of an unusual danger in traffic), or liability for damages caused by defective goods. Art. 135 of the Municipal Law now encompasses both situations of liability.

Cases:

- Cour de Cassation, 21 October 1977, *Arresten van het Hof van Cassatie*, 1977, p. 228
  A municipality has the obligation to make publicly accessible only roads which are sufficiently safe. Hence, in order to fulfill its obligation to ensure road safety, it must take appropriate measures to eliminate any unusual danger. This obligation subsists even if the unusual danger was provoked by a third person. (See also Cour de Cassation, 27 November 1980, *Pasicrisie*, 1981, I, p. 361; Cour de Cassation, 26 May 1994, *Rechtskundig Weekblad*, 1994-95, p. 745)

- Cour de Cassation, 30 March 1978, *Pasicrisie*, 1978, I, p. 820
  The municipality is not liable when the unusual danger was caused by an external cause, such as an exceptional flooding

211 Revue Générale des Assurances et des Responsabilités, No. 12533.
212 *Algemeen juridisch Tijdschrift*, 1995-96, p. 243.
213 *Nieuw Juridisch Weekblad*, 2003, No. 40, p. 894.

(C) Food safety

- Peace Court Westerlo, 13 October 2000[214]
  The body responsible for quality control of cattle and meat (Instituut voor Veterinaire Keuring) is held liable for lack of diligence in having tests done: it had taken 12 days for the results to be communicated, thereby causing damage, notably loss of value of the meat. The judge considers that the supervisor cannot invoke technical problems of the laboratory as a defence: the supervisor mus be orgnaized in such a way that, in case of technical problems, it can rely on other laboratories.

11.3 Statutory immunities as regards liability of public bodies

To our knowledge, the financial sector constitutes the sole example where a supervisory body benefits from a partial exemption from liability. Until 2002, the fianncial supervisors were subject to the normal liability rules, but no specific cases have been reported where the supervisor had effectively been held liable.[215]

In the latest financial market reform through the Law of 2 august 2002, a provision was introduced (Art. 68), according to which the CBFA fulfils its duties solely in the public interest. Neither the CBFA, nor its organs or personnel can be held liable toward third parties for their decisions, acts or behaviour within the exercise of the statutory tasks of the CBFA, except in case of fraud or gross negligence.

The introduction of this partial exemption from liability was justified by Governement with reference to international recommendations issued by the Basle Committee for Banking Supervision, which recommends that banking supervisors and its personnel be protected in law for their action in good faith. It should be noted, however, that the derogatory regime applies not only to the exercise of banking supervision, but more generally to all statutory duties performed y the CBFA. This also includes, beside "prudential" supervision of financial intermediaries, also the approval of prospectuses for public offerings of securities, the supervision of financial information requirements incumbent on listed companies and the supervision of certain market practices, such as insider dealing. It can be doubted whether this exemption fully complies with the consitutional principle of equality before the law.[216]

The precise meaning of the standard of "gross negligence" in the abovementioned provision is not entirely clear. One may assume that inspiration will be sought in similar provisions in other laws, such as for liability of employees or civil servants. Generally, the notion of "gross negligence" is understood as the fault which would not only be committed by a similar reasonable and careful person, but would not be committed by any reasonable and careful person.

To our knowledge, the CBFA is not covered by a liability insurance for its limited liability arising out of Art. 68, Law of 2 August 2002.

11.4 Estimation of the current situation as regards liability of supervisors

Contrary to other countries, the liability of supervisory bodies does not seem to be extensively discussed in public fora or in academic circles. It is generally felt that the tradition of full liability of public authorities since the 1920 *Flandria* judgment of the *Cour de Cassation* is an important rule for the protection of citizens, and ensures equality in terms of right to compensation, irrespective of the identity of the person who caused the damage. Illustrative in this respect is the fact that the creation of new agencies to cope with important public health related issues (e.g. Agency for Food safety, created after the dioxine-crisis), did not provoke any discussions as to the

214 *Rechtskundig Weekblad* 2002-2003, p. 471.

215 In a few cases, allusios were made as to possible liability of the banking supervisor according to normal liability rules. Followiong the bankruptcy of the Antwerp base Bank Fisher in the second half of the '90s, a liability claim has been brought before the court against the CBFA. No judgment has been delivered yet in this case.

216 See M. Tison, "De aansprakelijkheid van de prudentiële toezichthouder: een juridische benadering in vergelijkend en europees perspectief", in M. Tison, C; Van Acker, J. Cerfontaine (eds.), *Financiële regulering: op zoek naar nieuwe evenwichten*, Antwerp, Intersentia, 2003, p. 397.

desirability to limit the liability of the agency.

The only case of limitation of liability has been financial supervision, where the Law of 2 August 2002 undoubtedly was inspired by a fear for overlitigation and disproportionate financial risks compared to the resources of the supervisory body. More specifically, the CBFA is currently facing an action in damages for alleged negligence in supervision of a bank, which will be decided under the old regime of application of normal liability rules (see *above*, section 11.3 and footnote 14).

11.5 Government concerns about financial burdens of liability

Absent extensive debates on tort liability of public bodies, the main concerns on the financial burdens of liability arose in the context of financial supervision. During the parliamentary debates on the bill which became the Banking Law of 22 March 1993, Government took the position that liability would have to be borne exclusively by the legally independent supervisor, the CBFA. Doubts may be expressed as to this approach, as the CBFA is funded exclusively through contributions of the supervised entities.An alternative could be to consider the CBFA as a organ of the State in the exercise of its public function, which would oblige the State to participate in the compensation.

In other areas, there does not seem to be an overt concern.

11.6 Liability insurance

In general, public bodies are eligible for covering their potential liability just as private individuals are. There are generally no public data available as to the liability insurance coverage for the public bodies and supervisors/regulators mentioned above.

However, several insurers do effectively offer liability insurance coverage to certain public bodies, such as municipalities and provinces. For instance, municipalities will generally have a liability insurance covering liability of their police force (insofar as it is organised at the level of a single municipality, which is rather exceptional[217]), of their fire brigades, and of their liability arising out of their obligations as regards road safety or other general safety mattters. Likewise, it seems that provinces do take liability insurance coverage as regards provincial roads.

It is far less clear to which exttent specialised agencies and supervisors have taken liability insurance coverage as regards the exercise of their functions.

Finally, as mentioned above, the law sometimes imposes compulsory liability insurance, as is the case for the coverage of personal liability of mayors and aldermen in municipalities.

217 Local police departments will most often be organised on an inter-municipal level (e.g. three municipalities), in which case liability insurance will be taken jointly by the municipalities concerned in a single insurance contract).

12 Germany

Prof. Dr. Gert Brüggemeier*

12.1 Public bodies responsible for controlling market behaviour or health and safety

12.1.1 Introduction

State supervision of economic activities in Germany has a long tradition. In the following report four fields will be distinguished from each other. These are: supervision of financial services (par. 12.1.2), control of product safety (par. 12.1.3), control of industrial and technical facilities, particularly automobiles (par. 12.1.4) and workplace safety (par. 12.1.5); this is a special case and thus it is not considered here in great detail.

12.1.2 Supervision of Financial Services

In the field of financial supervision the supervised are insurance companies, banks and the capital market. For the *insurance* sector in 1902 a central Imperial Office for Private Insurance Companies was created[218] (since 1952 known as the Federal Supervisory Agency for Insurance Companies / *Bundesaufsichtsamt für das Versicherungswesen*). *Banks* have been regulated since 1962 by the Federal Supervisory Agency for Credit Institutions / *Bundesaufsichtamt für das Versicherungswesen*[219] (with forerunners in the 1930s). The capital market (particularly the stock exchange) has been regulated since 1995 by the Federal Agency for Stock Exchange/*Bundesaufsichtsamt für den Wertpapierhandel* (principally, stocks, bonds and mutual funds). The Act of 22 April 2002 created one unified supervisory agency for banks, insurance companies and issuers of securities (entry into force as of May 1, 2002) in the Federal Body for Supervision of Financial Services *(Bundesanstalt für Finanzdienstleistungsaufsicht – BAFin*).[220] The BAFin is a federal agency with full legal personality, located in Bonn and Frankfurt. This federal body fulfils its legally defined tasks as to banking law, insurance supervision law and securities law as well as other tasks. Furthermore, it works to establish and support member states' supervisory systems within the EU (§ 4 (1) *FinDAG*). In accordance with § 4(4) *FinFAG* the Federal Authority fulfills its tasks only "in the public interest".

12.1.3 Product Safety

In product safety we must distinguish between 1) pharmaceutical products, 2) technical equipment and consumer products, and, finally, 3) food and feed.

Safety of *pharmaceutical products* is achieved through two procedures: *pre* and *post market controls*. *Pre-marketing controls* require that a given product first be granted permission from the state before it may be sold on the open market. The the public authority makes a decision as to the merchantability of the medicine prior to its release to the public. *Post-marketing* control is a procedure in which a decision is made as to whether the merchandising of permitted medicines may continue. Both processes are determined in Germany by the Pharmaceutical Products Act

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218 Gesetz über die Beaufsichtigung der Versicherungsunternehmen (Versicherungsaufsichtsgesetz – VAG), Imperial Gazette (Reichsgesetzblatt – RGBl) 1901, pp. 139.

219 Gesetz über das Kreditwesen (KWG), Federal Gazette (Bundesgesetzblatt – BGBl) I 1961, pp. 881.

220 Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht (FinDAG), (Bundesgesetzblatt – BGBl) I 2002, p. 1310.

(*Arzneimittelgesetz – AMG*). In this field in 1995 a European Agency for the Evaluation of Medical Products (EMEA) was established in London.[221] It can determine whether to admit products for the entire internal market. The EMEA coordinates the tasks of the member states' health authorities.[222] In Germany this is principally the Federal Institute for Pharmaceutical and Medical Products *(Bundesinstitut für Arzneimittel und Medizinprodukte – BfArM*), headquartered in Berlin.[223] This Federal Authority with full legal personality is, since 1994, the successor to the traditional Imperial Health Agency (est. 1876) and the Federal Office of Health (*Bundesgesundheitsamt* (*BGA*) – est. 1952). It processes the admission of medicines and also runs the post-market control of admitted medicines for the national market. As the Federal Republic of Germany is in fact a federal state, the BfArM works in cooperation with the German health authorities at the state level.

Supervision of *technical equipment and consumer products* today falls within EC product safety law. Conceptually, this follows a two-tiered approach: the new conception, in the field of technical harmonisation and normalisation of the EC Commission of 1985[224] and the EC Product Safety Regulation. In the latter it is again a matter of distinguishing between vertical regulation through product safety directives such as, for example, toys,[225] machines[226] and medical products[227] on the one hand and the field of product safety generally, regulated by the EC product safety directives 1992 and 2001 on the other hand.

The modified EC Directive on general product safety 2001/95[228] is, in Germany, implemented by the Devices & Products Safety Act (*Geräte- und Produktsicherheitsgesetz – GPSG*) in 2004.[229] The duty of the manufacturers and merchants to produce and sell only safe products stands in the foreground. However additional official duties have also been introduced for the national market supervision authorities. In the case of justified suspicion the marketing of a product can be forbidden. (§ 8 (4) No. 6 GPSG). Likewise, manufacturers can be obligated to undertake product recalls (§ 8 (4) No. 7) or to place warnings on their products (§ 8 (4) No. 8). Finally, the member states' authorities themselves can issue warnings to the public.

Food and feed are regulated both nationally and at the community level. National provisions of feed and food purity laws forbid the marketing of food and feed which damages human or animal health. At the EC, labelling requirements should permit a product in the food chain to be linked to its producer. On the basis of Regulation No. 178/2002[230] the European Food and Safety Agency (EFSA) has been established with its seat, finally, in Parma. Its task is the scientific advising of European institutions in all questions connected with food safety (risk evaluation) including animal health, the protection of animals, and plant health. It supports and coordinates the authorities in the Member States as to those tasks necessary for food safety.

Unlike pharmaceutical products law, there is *no* federal supervisory body for product and food safety. The implementation of the regulations of European and national product and food safety law and the supervision of markets is the task of the federated states (*Länder*). Mostly this is the task of the *Gewerbeaufsichtsämter* of the states.

221 Regulation No. 2309/93, OJ 1993 L 214/1.

222 Biotechnologically und genetechnologically produced medicines can at present be applied for only at the European Agency.

223 Gesetz über die Neuordnung zentraler Einrichtungen des Gesundheitswesens, BGBl. I 1994, p. 1416. – Furthermore, there is still a Federal Institute of Infectious Illnesses (Bundesinstitut für Infektionskrankheiten – Robert Koch-Institut), the Federal Institute for Protection of Consumer Health and Veterinary Medicine (Bundesinstitut für den gesundheitlichen Verbraucherschutz und Veterinärmedizin), the Paul-Ehrlich-Institut and the Federal Institute for Risk Evaluation (Bundesinstitut für Risikobewertung).

224 OJ 1985 C 136/1; cf. thereto Joerges, Falke, Micklitz & Brüggemeier, Die Sicherheit der Konsumgüter und die Entwicklung der Europäischen Gemeinschaft, 1988.

225 OJ 1988 L 187/1.

226 OJ 1989 L 183/9.

227 OJ 1993 L 169/1.

228 OJ 2002 L 11/4.

229 Devices and Products Safety Act (Geräte- und Produktsicherheitsgesetz – GPSG), BGBl. I 2004, p. 2; cf. Klindt, NJW 2004, 465; Potinecke, DB 2004, 55.

230 OJ 2002 L 31/1.

12.1.4 Industrial/Technical Facilities

The states' *Gewerbeaufsichtsämter* are also obligated to supervise technical (dangerous) facilities such as nuclear power plants, aerial-tramways, roller-coasters etc. Most important, at least in number, are motor vehicles. These fall within the competence of the Technical Inspection Authority (*Technische Überwachungsvereine – TÜV)* . In Germany motor vehicles are subject to regular obligatory safety checks (§§ 21, 29 StVZO). *Technische Überwachungsvereine* are legal persons of private law, but are tasked with verifying the mandatory safety measures. The state recognized experts exercise sovereign functions although acting as private law bodies. Their liability is considered to be a form of state liability. The responsibility falls on the respective state that tasks them with the supervisory function.

12.1.5 Workplace Safety

Workplace safety at the private work-place in Germany is primarily the task of the professional collectives (*Berufsgenossenschaften*) – and this since 1884, when legally obligatory workplace accident insurance was introduced in Germany. Statutorily mandated accident insurance has insofar replaced civil liability law both in the relationship of employer-employee (*respondeat superior*) and in the relations between employees (fellow servants). The professional collectives are independent self regulating legal bodies established by the accident insurance companies, which however are financed by the employers. They establish accident prevention regulations for prevention of accidents (*Unfallverhütungsvorschriften*) whose observance is enforced by technical supervisory civil servants.

Additionally, there are state regulations for work safety. The enforcement of their observation, just as in product safety law, is the task of the *Gewerbeaufsichtsämter* of the federated states in Germany.

12.2 Liability for inadequate supervision and enforcement?

12.2.1 Introduction

State liability in Germany is an incoherent and confusing field of law. It has been fundamentally re-ordered by the State Liability Act of 1981.[231] However this Act was declared unconstitutional by the Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) in 1982 as the German Federal Legislator, according to the German Constitution, did not then have the necessary competence to enact such a law.[232] Despite the fact that in the intervening time federal competence in this field is now a given, no new legislative initiative for such a reform has been undertaken.

12.2.2 German State Liability Law

German state liability law stems from two different sources: Private Law and Public Law. The point of departure remains the *individual liability of civil servants in tort* (§ 839 BGB). This has as a precondition that the civil servant negligently or wilfully breached an official duty (*Amtspflicht*) which he/she owes to a private third party. He or she must then compensate the victim's resulting damages.

As to tasks of civil servants which are in exercise of *sovereign* power, the *state* has taken on the obligation of remedying the damage in the 20th century (Art. 131 Weimar Constitution of 1919; Art. 34 German Constitution of 1949, hereafter *Grundgesetz – GG*).

At the same time, this governmental liability for violations of official duties by civil servants is

231 BGBl. I 1981, p. 553.
232 BVerfGE 61, 149 = NJW 1983, 25.

extended to each state employee who exercises sovereign powers – whether the employee is or is not a civil servant.

In so-called "private market" transactions (*fiscal tasks*: the state as market participant as opposed to sovereign regulating authority), for example, public hospitals, tort law liability of public employees is still applicable (§ 839 *BGB*: civil servants, § 823 (1) *BGB*: non-civil servants). Likewise, the state as employer of these public employees in this field of fiscal tasks can be held liable under § 831 (1) *BGB* (vicarious liability).

As far as it is a matter in the given context of the direct liability of state agencies and institutions, the parallel to private law organisational liability holds. The official duty of public servants has developed into an organisational duty of the state agencies, authorities or institutions to organise the field of their services such that the relevant public tasks are efficiently and correctly undertaken. *This organisational duty is the official duty of the supervisory bodies*.[233]

The decisive precondition of governmental liability is whether and to what extent the official duty (*Amtspflicht*) serves the ends to protect private interests. No liability arises from the breach of an official duty where that duty only obligates the civil servant to the maintenance of public order or to the protection of the general public. The intentional or negligent breach – individual wrongful conduct or organisational fault – of an official duty which protects third parties leads to the direct governmental liability of the state. Just as in private tort law an objective yardstick applies for negligence.[234] (In cases of ordinary negligence the individual civil servant is not liable if in addition to him or her another, which can also be the state-employer, is held liable: This is the so-called subsidiarity clause of § 839 (1) (ii) *BGB*.)

Two aspects here are not free from doubt: First, When, in cases of objective wrongs of the civil servant, is there a presumption of organisational fault of the agency? Second, how far does the subsidiarity clause of § 839 (1) (ii) *BGB* apply in cases of state liability according to Art. 34 German Constitution (*GG*)? This clause served initially to protect individual civil servants. But with the transition to indirect governmental liability this provision lost its protective purpose as a privilege of the employee.[235] The Federal Judicial Court (*Bundesgerichtshof – BGH*) has increasingly limited the scope of application of the subsidiarity clause without, however, having placed the validity of the clause itself in question. For the question treated here, the state control of private economic activities, we can in the existing law (*de lega lata*) proceed from the position that the subsidiarity clause applies; i.e., state liability is not found e.g. in cases of damages to consumers by unsafe products if the manufacturer, importer, or seller is/can be liable.

12.2.3 Liability of Supervisory State Authorities

In its origins state supervision of economic activities in Germany exclusively served the public interest. Private third party protection was denied. This changed during the 20th century. As a result a body of law developed that was complex and unclear ("casuistry without systemacy"[236]). However the general tendency can be stated today that state supervision does not merely aim at the protection of the public interest in security and order but also, in principle, at the protection of private legal rights as well. But this scope of protected private interests varies depending on the matter at hand. Generally however the protection of personal rights (the rights to life, bodily integrity and health) is admitted, whereas the protection of pure economic interests is more often than not denied.

1. Supervision of Financial Services

After uncertainties in the past, the legal situation regarding the newly minted Federal Institute for Financial Services Supervision (*Bundesanstalt für Finanzdienstleistungsaufsicht – BAFin*) appears now to have been clarified with the decision of the *Bundesgerichtshof* (*BGH*) of 20th

233 See Brüggemeier, "From Individual Tort for Civil Servants to Quasi-Strict Liability of the State: Governmental Liability in Germany", in Fairgrieve, Andenas & Bell (eds), Tort Liability of Public Authorities in Comparative Perspective, 2002, pp. 571.

234 Compare. AK-BGB/Rittstieg, 1979, § 839 para.. 34: „Kunstfigur eines geschulten, gewissenhaft arbeitenden und pflichtgetreuen Durchschnittsbeamten".

235 Cf. thereto, Ossenbühl, Staatshaftungsrecht, 5th edn. 1998, p. 79 with further references.

236 Blankenagel, DVBl 1981, 15.

January, 2005. According to this judgment *the BAFin is under no official duty to protect individual bank clients, insured persons, or purchasers of securities.* Up to this moment this has been a point of strife and the decision of the BGH cannot be seen as entirely settled law. We must thus distinguish between four phases in the development of state liability in supervision of financial services.

a) Case law up to 1979

For a long time the clearly dominant view both in the case law and legal scholarly writing was that bank and insurance supervision served only the general interest and that the supervisory bodies did not owe an official duty to individual bank clients or insured persons.[237] There simply was no individually protected legal right.

In a decision on the supervision of insurance companies the *Bundesgerichtshof* (*BGH*) denied even in 1972 any third party protection in such cases.[238] The facts of the case were: The victim of a traffic accident brought an action against the Federal Republic because of the insolvency of the third party insurance of the keeper of a motor vehicle responsible for the accident, said insolvency leaving the plaintiff without any coverage. The basis of the action was a theory of negligent control of the solvability of the insurance company by the state's supervisory agency. The then existing *Bundesaufsichtsamt für das Versicherungswesen* was legally required to take into account the interests of the insured (§§ 8 (1) No. 2, 81 (2) (i) *VAG*). However, this goal was said to uniquely address the group of *all insured persons* generally and not the particular interests of individuals. The effect of the state's supervision of the workability of the insurance industry on individual insurance contracts was simply a reflex of that predominant goal.

The decision here, as to the mandatory liability insurance of keepers of motor vehicles, had to hold true, *a fortiori*, for the supervision of other private insurance branches as well.

b) Case law since 1979

A short time later the BGH decided in two judgments as to *bank supervision* to take the opposite view. In the *Wetterstein* judgment of 1979 it was a matter of illegal banking transactions, namely the illegal participation of a bank in a real estate investment fund.[239] The determining factor of the different outcome as to third party protection by the official duties of the supervisory body is the qualification of the state function in question as an exercise of police power for the protection against dangers. According to the German Constitution of 1949 the police powers – protection against danger – serve not only the protection of the public generally but also individuals specifically. Individual protection is no longer merely reflexively granted by the state's task to guarantee public order and safety. Where important individual interests are at stake they are also self-evidently individually protected.

The second decision was a matter of the collapse of the *Herstatt* banking house. An interest group of damaged customers of the bank sued on the theory that the state supervisory agency intervened too late. Here, again, the *BGH* admitted in principle state liability on the facts presented.[240]

With regard to the final outcomes however both claims remained unsuccessful: No negligence of the supervisory agency could be proven.[241]

The positions taken in these decisions were at first controversial. Increasingly however the literature has adopted the view of the *BGH.*[242] That notwithstanding, there was broad consensus that a differentiated treatment of banking and insurance supervision cannot be justified. If state supervision of banks is the exercise of a police function this is true for the whole state supervision of financial services in general. As a consequence an official duty to protect third private parties can be taken as a given. Protected third parties are in any event at least the clients of the bank

237 OLG Bremen, NJW 1953, 585; OLG Hamburg, BB 1957, 950; cf. also the then contemporaries (Kommentare) on Kreditwesengesetz and on Versicherungsaufsichtsgesetz.
238 BGHZ 58, 96 = NJW 1972, 577.
239 BGHZ 74, 144 = NJW 1979, 1354.
240 BGHZ 75, 120 = NJW 1979, 1879 – Herstatt-Bank; also BGHZ 90, 310 – Spar- & Kreditbank (on personal scope of protection).
241 BGH, WM 1982, 124 (Wetterstein); BGH, WM 1982, 1246 (Herstatt).
242 Cf. thereto Gratias, Staatshaftung für fehlerhafte Banken- und Versicherungsaufsicht im Europäischen Binnenmarkt, 1999 with further referances.

and insurance company who have concluded banking and insurance contracts.[243]

c) Legal Reform of 1984

The federal legislator reacted to this situation generated by the decisions of the *BGH* concerning the bank supervisory authority. In 1984 it introduced into the Acts on banking and insurance supervision the clear indication that the respective supervisory tasks were exercised "only in the public interest". Again, this led to concerns of the constitutionality of this new provision which were already expressed in the legislative proceedings by representatives of the Federal Council of the States (*Bundesrat*). The literature also expressed doubts that the legislator through this legal statement can exclude judicially affirmed state liability claims because of the constitutional guarantee that the state be liable for its wrongful acts (Art. 34 GG).[244] Notwithstanding this controversy the legislator adopted the same position when it inaugurated 2002 the new supervisory agency – the *Bundesanstalt für Finanzdienstleistungsaufsicht (BAFin*): "Financial supervision is only undertaken in the public interest" (§ 4 (4) *FinDAG*).

d) The BVH Bank Case 1997

The plaintiffs had placed money in the BVH bank in the 1990s. The bank fell in financial difficulties. After special examinations of the financial situation of the BVH bank, the federal supervisory authority filed a bankruptcy procedure on its behalf and took away the bank's permission to perform financial services. The BVH Bank was not a member of any deposit guarantee system. Thus the plaintiff suffered a total loss. The plaintiffs brought various actions for damages against the Federal Republic of Germany. It was a matter of two legal theories:

(1) First, the delayed implementation of the EC Directive 94/19 on deposit guarantee schemes[245] stood in the foreground. According to Article 3(1)(ii) of the Directive, a credit institution can only take deposits if it is also covered by a deposit guarantee system. According to Article 7(1) the deposits are guaranteed in cases of loss of up to 20,000 ECU. The Member States are permitted to restrict the compensation of the depositors to 90% of the actual deposit. Directive 94/19 was to be implemented no later than 30th June, 1995. At first, Germany did not implement the Directive and instead brought a complaint against the directive's legality. This claim was rejected by the ECJ in 1997.[246] The Directive was only implemented in Germany as of 1998. The court of first instance, *Landgericht Bonn,* condemned the Federal Republic of Germany to payment of a sum which corresponded to the minimum coverage of 20,000 ECU for a violation of Community law (Art. 249 ECT).[247]

(2) The second aspect of the case was the question of those damages that were not covered by the deposit guarantee scheme. The plaintiffs brought claims on the basis of national state-liability law due to negligent supervision of the BVH Bank by the *Bundesaufsichtsamt für das Kreditwesen*. The court of first instance (*Landgericht Bonn*) and appellate court (*Oberlandesgericht Köln*) had rejected claims on these grounds;[248] They took the position that § 6 (4) *KWG* was both constitutional and conformed to EC law. The *Bundesgerichtshof* (*BGH*) in 2002 put the issue temporarily in abeyance and addressed the ECJ, in accord with Art. 234 of the EC Treaty, to decide whether secondary Community law on harmonisation of banking law in the single market, in particular whether the Deposit Guarantee Schemes Directive 94/19/EC and the Bank Directive 2000/12/EC, bar the exclusion of state liability in Germany for failures in bank supervision – that is, whether in other words § 6 (4) *KWG* be compatible with European law.[249]

The ECJ decided in its decision of 12th December 2004[250] that community law is not the basis of any individual right going beyond the protections foreseen in the Directive (notably,

243 BGHZ 90, 310, 313 ff.
244 See especially, MünchKommBGB/Papier, 4th edn. 2004, § 839 para. 255; id., in: Maunz/Dürig, Kommentar zum Grundgesetz, Art. 34 para 190.
245 OJ 1994 L 135/5.
246 ECJ, 13.5.1997, case C-233/94 Germany/Parliament and Council [1997] ECR I-2405, EuZW 1997, 436.
247 LG Bonn, NJW 2000, 815.
248 OLG Köln, NJW 2001, 2724 = EWiR 2001, 961 Art. 34 GG (Sethe).
249 BGH, NJW 2002, 2464 – BVH-Bank
250 ECJ, judgment 12.10.2004, case C-222/02, P. Paul/Bundesrepublik Deutschland, NJW 2004, 3479 = EWiR 2005, 219 § 4 FinDAG (Pott); also cf. thereto Häde, Keine Staatshaftung für mangelhafte Bankenaufsicht, EuZW 2005, 39.

deposit guarantee). Harmonisation is limited to that which is necessary for the free movement of financial services, recognition of the principle of country of origin and coordination with the national bank supervision system. Mentioning the interests of the banking clients as one of the balancing factors in a particular directive does not mean that their individual protection is compulsory.

On the basis of this clarification of community law the *BGH* in its decision of 20th January, 2005 went on to decide that the exclusion of individual causes of action of bank clients due to 6 (4) *KWG* (now § 4(4) *FinDAG*) is valid and does not breach either fundamental rights or constitutionally guaranteed protective duties of the state.[251] It is however astonishing that the BGH in light of the meanwhile dominant view in constitutional law scholarship that § 6 (4) *KWG* is in fact unconstitutional[252] nevertheless decided this claim instead of introducing a so-called concrete normative control procedure according to Art. 100 *GG* in order to present the question of the constitutionality of § 6 (4) *KWG* (= § 4 (4) *FinDAG*) to the German Federal Constitutional Court. A constitutional complaint (*Verfassungsbeschwerde*) by the plaintiffs against this judgment of the *BGH* has not yet – as far as can be seen – been raised.[253]

2. Pharmaceutical Products Safety

The federal institute for pharmaceutical and medical products (Bundesinstitut für Arzneimittel und Medizinprodukte – BfArM) fulfils sovereign tasks in the field of medicine safety. The medicine safety law does not provide for any clause excluding third party protection such as in § 6 (4) KWG (= § 4 (4) FinDAG). It is free from doubt that the then Federal Health Office and the contemporary Federal Institute for Pharmaceutical and Medical Products does owe official duties to individuals, e.g. patients and pharmaceutical enterprises.[254] This holds for both complexes of supervisory tasks of the authority: Product admission to the market and post-marketing control. A breach of this official duty can in particular arise from (i) admission of a dangerous medicine or a delayed recall to the detriment of a patient or (ii) in the failure to admit a safe medicine, to the detriment of a patient or (iii) in the non-admission or delayed admission of a pharmaceutical product, to the detriment of the enterprise.[255] Particular problems will in these cases raise the issue of proof of negligence. In supposed errors in the post-market control it is mostly a matter of the definition of the time where a "justified suspicion" of the negative effects of the medicine existed. Negligence was also a central point in the question of governmental liability for the then existing Federal Health Office in the case of HIV infection of haemophiliacs through blood products prior to the introduction of high temperature sterilisation procedures.[256] Complaints made by health insurance companies which had performed services on infected persons against the pharmaceutical enterprises have been without exception rejected by German courts. There have been no actions for compensation brought against the Federal Republic of Germany alleging supervisory failure of the Bundesgesundheitsamt in this context. The concluding report of the investigating commission of the German Parliament on HIV infection through blood products had in fact found negligent breaches of the official duty of the Bundesgesundheitsamt; but it also affirmed the subsidiarity of state liability under Art. 34 GG and § 839 (1) (ii) BGB.[257] This complex of cases was then regulated by a system of state compensatory payments (HIV-Hilfe-Gesetz).[258] In sum, as far as can be seen until now, claims for damages against the medicine safety authorities, whether federal or state, are seldom successful.

3. Product Safety

In product safety it is generally a matter of prevention of damages through state authorities *via* risk evaluation, risk management and risk communication. Thus the state's tasks are

251 BGH, NJW 2005, 742.
252 See, Gratias, Staatshaftung, l.c., 1999, pp. 67 with further references.
253 Written information by the Bundesverfassungsgericht of 24.3.2005.
254 See, Deutsch/Spickhoff, Medizinrecht, 5th edn. 2003, pp. 645; Hart, Hilken, Merkel & Woggan, Das Recht des Arzneimittelmarktes, 1988, pp. 168.
255 See, e.g., Müller, Die Haftung für die verzögerte Zulassung von Arzneimitteln, PharmaR 1991, 226.
256 Cf. thereto Schlussbericht des 3. Untersuchungsausschusses des Deutschen Bundestages v. 25.10.1994, BT-Drs. 12/8591; Brüggemeier, Staatshaftung für HIV-kontaminierte Blutprodukte, 1994.
257 See Schlussbericht des 3. Untersuchungsausschusses, BT-Drs. 12/8591, pp. 188.
258 HIV-Hilfegesetz, BGBl. I 1995, p. 199.

circumscribed, independently from the regulatory schemes in the respective field. As regards technical work equipment, consumer products, food and feed, the federated states' supervisory authorities fulfil this task first and foremost through *post-marketing control*. There is in these fields no procedure for admission of a product to market. The Directive on general product safety directive, EC/2001/195 is silent as to the liability of the authorities. This is a matter for the relevant national laws.

The authorities vested with supervision face a dilemma: On the one hand, it is a matter of the protection of the health and safety of the consumer. On the other, it is the protection of the manufacturers and merchants against unjustified interventions in their profession. Two fact patterns are to be distinguished: (i) the liability of the supervising authority to *producers and merchants* (ii) the liability of the supervising authority to *consumers* due to an absence or delay of measures of control and enforcement.

If the market supervision authority (*Gewerbeaufsichtsamt*) applies an instrument of post-marketing control (warning to consumers, product recall) then the producer can have a right to damages against the state under a theory of state-liability (*Staatshaftung*) according to § 839 *BGB*, Art. 34 *GG*. Because it is a measure for prevention of dangers it is a sovereign act. On the one side it is well acknowledged that whoever markets a product (whether merchant, importer or manufacturer) is protected against negligence of the state supervisory authorities in the exercise of their powers of control. On the other side stands the protection of the rights of consumers to life, body and health: The state authorities are, according to the *GPSG*, the addressees of an official duty (*Amtspflicht*) to organise post-marketing control in an orderly fashion. This duty encompasses the protection of the interests of these private parties as well. The following aspects are particularly relevant thereto:

- comprehensive determination of the facts
- right of the suspected enterprises to be heard
- appropriate action
- exercise of discretion without error

The greatest liability risk is in the competent determination of facts and the risk evaluation. True facts of product dangers are in principle to be communicated. Incorrect product information, given in good faith, is by the same token to be corrected (§ 10 (5) *GPSG*). The negligent or erroneous product warning represents an intervention in the running of the enterprise of the producer and can create a right to compensation for pecuniary damage, such as lost profits.

Prominent examples of cases can be found in the law of food purity. In 1990 the state of *Baden-Württemberg* was found by an appellate court to be liable for damages of 12 million DM. In press releases the regional authority in *Stuttgart* had inaccurately linked the *Birkel* bakery with the scandal of Dutch liquid eggs.[259] At the height of the mad cow scandal in 2001 the trial court (*Landgericht Wiesbaden*) reached the opposite result in a comparable case.[260] Here the Hessian Social Ministry had published a list of enterprises which had fraudulently labelled sausages as free of beef. The plaintiff was wrongly included in the list of fraudsters. In addition, a decision of the German Federal Constitutional Court (*BVerfG*) in 2002 on the glycol-wine scandal of the mid 1980s has to be taken into account.[261] The federal ministry for youth, family and health, in collaboration with the states' authorities, had published a list of German and Austrian wines in which diethyleneglycol had been mixed. The administrative courts rejected the complaint of wine sellers which found themselves on the list. Their constitutional claim before the *Bundesverfassungsgericht* was also unsuccessful. The *BVerfG* came to a constitutional legitimation of the product warnings of the authorities, at least insofar as the demands on accuracy and objectivity of the information are fulfilled. It remains however unclear whether this also holds true for product warnings issued in good faith which later prove to be false.

4. Technical Facilities / Motor Vehicles

In safety checks of motor vehicles through experts of the *Technische Überwachungsvereine*

259 OLG Stuttgart, NJW 1990, 2690.
260 LG Wiesbaden, NJW 2001, 2977.
261 BVerfG, NJW 2002, 2621.

(*TÜV*) the tendency in the recent case law is that negligently missed defects which lead to an accident create state liability and that each victim of the accident can, because of his or her bodily injury bring an action against the state (*Bundesland*).[262] "Even a gigantic amount of motor vehicles and safety checks does not create any room free from liability here, for such would be in conflict with the demand of legal protection of the population". In contrast however, the pure economic loss of the purchaser of a motor vehicle, inspected prior prior to sale by a technical expert of the TÜV, yet nevertheless found to be defective, will not be compensated by the federated state.

12.3 Which statutory immunities exist as regards liability of public bodies?

In the field of *state supervision of financial services* as to pure economic damages of bank and insurance clients the legal rule "no liability" can be seen from the statutory statement that the Federal Institute for Financial Supervision (*Bundesanstalt für Finanzaufsich*t) performs its tasks "only in the public interest" (§ 4 (4) *FinDAG*). The *BGH*, with its judgment of 20th January 2005[263] confirmed the constitutionality of this no-liability clause.

In the scholarly writing as to this issue the majority view is that such an exclusion of liability is permitted only exceptionally and must be justified by showing that its basis in the public good, taking into account the principle of proportionality, outweighs other interests.[264] Until the *Bundesverfassungsgericht* makes a decision on this issue the question of the constitutionality of § 4 (4) *FinDAG* must be considered still open. Commentary and opinion from both the scholarly community and legal practice on the *BGH* judgment of 20th January 2005 are not yet available.
In the field of *product safety* the absence of a third party effect of the authorities' official duties (*Amtspflicht*) is *not* a problem. There is no provision like § 4 (4) *FinDAG* in product safety law. The proof of negligence of the market supervisory authority is the central precondition to a finding of liability. The glycol decision of the Bundesverfassungsgericht[265] could be interpreted here as indicating that the state has a prerogative in post-marketing control and product warning. From that view follows that a broader space for discretionary decision making by the supervisory bodies would be introduced into liability law. "Defensible" actions would be covered; only grossly negligent erroneous information would result in liability. That position is not doubtless; however, due to a lack of sufficient case law no more clarification can be given. It is equally unclear whether this would only apply to manufacturers and their pure economic losses claims or whether it would also apply to consumers who through failures in market supervision are injured in their bodily integrity and health.

12.4 How is the current situation as regards liability of supervisors estimated?

It remains to be seen whether the BVH Bank case will result in a new discussion as to the liability of the authorities for supervision of financial services in Germany and at the European level. Both the judgement of the ECJ of 12 December 2004 and the judgement of the BGH of 20th January 2005 leave questions open and appear not to be the last word in this matter.

The food scandals of the last decade have unleashed more intensive discussions about the role of the state in providing product information and product warnings. The *Birkel* judgment of the Stuttgart court of appeals (1990) had here at first placed a strict, restrictive accent on the question. The glycol decision of the German Federal Constitutional Court (*BVerfG*) stepped a bit in the opposite direction. But the preconditions and bases for intervention of state authorities in basic entrepreneurial freedoms remained unclear. In order to dispel this lack of clarity a consumer information Act as basis for enabling the authorities to provide product warnings was

262 OLG Koblenz, NJW 2003, 297.
263 BGH, NJW 2005, 742.
264 MünchKommBGB/Papier, 4th edn. 2004, § 839 para. 255 (The president of the Federal Constitutional Court, writing extra judicially!).
265 BVerfG, NJW 2002, 2621.

pleaded for. As essential elements of such a consumer information law were stated:[266]

- a legal right of consumers, upon request, to have access to information about enterprises and products at the disposition of state authorities;
- a legal right of access to information relevant to safety of products and services held by the enterprise.
- the imposition of a duty on the market supervisory authorities to periodically publish reports as to the information available with regard to safety and quality of products

The proposed model Acts and/or drafts of bills are before parliaments both at the federal and state level for such a consumer information Act. However no such law has yet been enacted. Enterprises and opposition parties in Parliament regard such a law as a new brake on innovation and one more step in the direction of the bureaucratisation of the market economy.

12.5 What are the amounts of compensation following the Banking Directives?

This is determined by the facts of the BVH case (see above, 2 II d). A damage, exceding of the ceiling of deposit guarantee schemes (€ 20 000) requires as a precondition a claim under national state liability law. The possibility of such a claim in German law was denied by the *Bundesgerichtshof* (*BGH*) in its judgment of 20th January, 2005.

12.6 Are supervisors insured against liability?

There is no third party insurance coverage for governmental liability available.

266 See, e.g. Knitsch, Die Rolle des Staates bei der Produktinformation, ZRP 2003, 113, 118.

13 England and Wales

Dr. Duncan Fairgrieve*

13.1 Public bodies responsible for controlling market behaviour or health and safety

13.1.1 Economic regulators

In 1997 significant changes were made to the UK's monetary and financial stability policy frameworks. The Bank of England was given operational independence in relation to monetary policy and plans were set out for consolidating the main financial regulators into a single statutory body, the Financial Services Authority. In parallel, the arrangements for coordinating policies relating to financial stability were strengthened.

The Treasury has responsibility for the overall institutional structure of regulation and the legislation that governs it and, should the need arise, for deciding whether public funds should be used in responding to a crisis. (www.hm-treasury.gov.uk).

The Bank of England (www.bankofengland.co.uk) is responsible for the overall stability of the financial system as a whole. It is the UK central bank and gained operational independence in 1997. The Bank is also responsible for maintaining stability in the monetary and financial system, vital to the proper functioning of the economy. As well as providing banking services to its customers, the Bank of England manages the UK's foreign exchange and gold reserves and the Government's stock register. Since 1997 the Bank has had statutory responsibility for setting the UK's official interest rate. Interest rates decisions are taken by the Bank's Monetary Policy Committee, which judges what interest rate is necessary to meet a target for overall inflation in the economy, set each year by the Chancellor of the Exchequer. This is part of the Bank's objective to 'maintain the integrity and value of the currency' - to achieve price stability in the economy. The Bank implements its interest rate decisions through its financial market operations by setting the interest rate at which the Bank lends to banks and other financial institutions. It also collates and publishes monetary and banking statistics, analyses and promotes initiatives to strengthen the financial system, and monitors financial developments to try to identify potential threats to financial stability. It also undertakes work on the arrangements for handling financial crises should they occur and is the financial system's 'lender of last resort' in exceptional circumstances.

The **Financial Services Authority** (FSA) (www.fsa.gov.uk) is responsible for the authorization and supervision of financial institutions, and for the supervision of financial markets and clearing and settlement systems. It is also responsible for regulatory policy in these areas. The Financial Services Authority (FSA) is an independent non-governmental body, given statutory powers by the Financial Services and Markets Act 2000. It is a company limited by guarantee and financed by the financial services industry. It regulates the financial services industry in the UK. It has four main aims: (1) Maintaining confidence in the UK financial system, by, among other things, supervising exchanges, settlement houses and other market infrastructure providers; conducting market surveillance; and transaction monitoring. (2) Promoting public understanding of the financial system. (3) Securing the right degree of protection for consumers, by vetting at entry; this aims to allow only those firms and individuals satisfying the necessary criteria (including honesty, competence and financial soundness) to engage in regulated activity and by monitoring how far firms and individuals are meeting these standards. Where serious problems arise they investigate and, if appropriate, discipline or prosecute those responsible for conducting financial

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business outside the rules. They can also use their powers to restore funds to consumers. (4) Helping to reduce financial crime, focusing on three main types of financial crime: money laundering; fraud and dishonesty; and criminal market misconduct such as insider dealing.

The **Competition Commission** www.competition-commission.org.uk) is an independent public body established by the Competition Act 1998. It conducts in-depth inquiries into mergers, markets and the regulation of the major regulated industries, undertaken in response to a reference made to it by another authority: usually by the Office of Fair Trading (OFT) but in certain circumstances the Secretary of State, or by the regulators under sector-specific legislative provisions relating to regulated industries. The Commission has no power to conduct inquiries on its own initiative.

13.1.2 Social welfare/child protection

The **Occupational Pensions Regulatory Authority** (Opra) (www.opra.gov.uk) looks into reports that pension schemes have broken the law. Opra can take action on certain reported breaches of pensions legislation, imposing civil penalties on those responsible or taking criminal breaches of pensions law to court. Opra also helps people trace pension schemes that they have lost touch with and collects the levies that pay for pension protection.

The **Commission for Social Care Inspection** (Department of Health) (www.dh.gov.uk) carries out local inspections of all social care organisations, public, private, and voluntary, against national standards and publish reports; registers services that meet national minimum standards; carries out inspections of local social service authorities; publishes an annual report to Parliament on national progress on social care and an analysis of where resources have been spent; validates all published performance assessment statistics on social care; and publishes the star ratings for social services authorities.

The **General Social Care Council** (GSCC) (www.gscc.org.uk) is the social care workforce regulator. It registers social care workers and regulates their conduct and training. It is the guardian of standards for the social care workforce in England. Its job is to increase the protection of service users, their carers and the general public by regulating the social care workforce and by ensuring that work standards within the social care sector are of the highest quality. The GSCC acts as a guardian of standards in social care practice and as a champion of a committed workforce; requires the highest standards of conduct from social care workers, and compliance with a code of practice; and promotes the highest standards of training for social care workers.

Local Authorities and **Social Services** protect people from abuse, neglect, accident and self-harm; assess people's needs for services and arrange them; promote voluntary and self-help activities. Services to children and families are provided under the Children Act 1989: this requires the local authority social services to assist children in need and protect children who are at risk of significant harm, to maintain the Child Protection Register, to provide support for children with special needs, to provide residential homes and to care for children and young people being looked after by Social Services.

13.1.3 Food agencies

The **Food Standards Agency (FSA)** (www.food.gov.uk) is an independent food safety watchdog set up by an Act of Parliament in 2000 to protect the public's health and consumer interests in relation to food. The Agency's key aims are to: reduce food-borne illness by 20% by improving food safety right through the food chain, to help people to eat more healthily, to promote honest and informative labelling to help consumers, to promote best practice within the food industry, and to improve the enforcement of food law.

The **Drinking Water Inspectorate (DWI)** (www.dwi.gov.uk) is responsible for assessing the quality of drinking water in England and Wales, taking enforcement action if standards are not being met and appropriate action when water is unfit for human consumption. To comply with the Water Supply (Water Quality) Regulations the DWI publishes annually a list of approvals, including a list of all substances, products and processes for which approval has been granted, refused, revoked or modified, or for which their use has been prohibited.

13.1.4 Drugs agencies

The **Medicines and Healthcare products Regulatory Agency** (MHRA) (www.mhra.gov.uk) safeguards public health by: (i) ensuring that medicines for human use, sold or supplied in the UK, are of an acceptable standard of safety, quality and efficacy, (ii) ensuring that medical devices meet appropriate standards of safety, quality and performance, and (iii) promoting the safe use of medicines and devices.

The **National Institute for Biological Standards and Control** (NIBSC) (www.nibsc.ac.uk) is a multidisciplinary scientific establishment which has a national and international role in the standardization and control of biological substances used in medicine. Batches of these medicines must be independently assessed before they are released onto the market and NIBSC performs this control testing for the UK.

The **National Institute for Clinical Excellence** (NICE) (www.nice.org.uk) is part of the NHS. It works on behalf of the National Health Service and the people who use it. It makes recommendations on treatments and care using the best available evidence. It is the independent organisation responsible for providing national guidance on treatments and care for people using the NHS in England and Wales. The guidance is intended for healthcare professionals, patients and their carers to help them make decisions about treatment and healthcare.

13.1.5 Health inspectorate

The **Health and Safety Executive (HSE)** (www.hse.gov.uk) and the Health and Safety Commission (HSC) are responsible for the regulation of almost all the risks to health and safety arising from work activity in Britain. Their mission is to protect people's health and safety by ensuring risks in the workplace is properly controlled. They look after health and safety in nuclear installations and mines, factories, farms, hospitals and schools, offshore gas and oil installations, the safety of the gas grid and the movement of dangerous goods and substances, railway safety, and many other aspects of the protection both of workers and the public. Local authorities are responsible to the HSC for enforcement in offices, shops and other parts of the services sector.

The **Environment Agency** (www.environment-agency.gov.uk) works in diverse areas such as flood defence, pollution control, town planning, farming and waste. Its area of responsibility covers all of England and Wales. Its activities range from influencing Government policy and regulating major industries nationally, to day-to-day monitoring and clean up operations at a local level. The environment agency grants permits for England and Wales concerning pollution prevention and control legislation for 'A1 installations'.

Local Authorities are responsible to the HSC for enforcement of regulating risks to health and safety from work activity in offices, shops and other parts of the services sector. Concerning pollution, local authorities issue permits for certain sources of pollution. They give advice and information, and monitor and control air, smoke, smells, septic tanks, contaminated land and noise nuisances, and radon monitoring. They grant permits concerning Local Air Pollution Control (LAPC) for Part B processes currently regulated under the Environmental Protection Act 1990, Local Authority Integrated Pollution Prevention and Control (LA-IPPC) for Part A2 activities/installations which are subject to local authority regulated PPC and Local Authority Pollution Prevention and Control (LAPPC) for Part B activities/installations.

13.1.6 Building inspectorate

The **Planning Inspectorate** (www.planning-inspectorate.gov.uk) processes planning and enforcement appeals and holds inquiries into local development plans. It also deals with a wide variety of other planning related casework including listed building consent appeals, advertisement appeals, and reporting on planning applications.

Applications to obtain permission to carry out mineral (quarries, peat working etc) and waste (landfill, tipping, waste recycling, waste transfer stations, sewage treatment plants etc) developments should be made to the **County Council** (local authorities). Applications for the Council's own development's (Regulation 3 applications) for schools, libraries, Social Service developments and new roads etc. should also be submitted to the County Council. Applications for any other developments including residential/commercial properties, building conversions, extensions and Listed Building consents should be made to the relevant District/Borough Council.

13.1.7 Medical services/health care professionals bodies

The mission of the **Council for the Regulation of Healthcare Professionals** and the **Council for Healthcare Regulatory Excellence** (CHRE) (www.chre.org.uk) is to protect the public interest, promote best practice and progress regulatory excellence in relation to the regulation of healthcare professionals. The CRHP promotes high standards and consistency across the whole range of healthcare professions, and oversees the work of nine subsidiary regulatory bodies. The CRHP enforces consistent standards of practice across the: General Medical Council, General Dental Council, General Optical Council, General Osteopathic Council, General Chiropractic Council, Health Professions Council, Nursing and Midwifery Council, Royal Pharmaceutical Society of Great Britain, and the Pharmaceutical Society of Northern Ireland. The CRHP takes the lead in developing best practice in regulation. In the public interest, it fosters communication and shared objectives amongst the Councils. To protect the public in extreme cases, the CRHP has the power to refer regulators' decisions on fitness to practise to the High Court; or will enforce a change in their rules.

The **General Medical Council** (GMC) (www.gmc-uk.org) was established under the Medical Act of 1858. It has strong and effective legal powers designed to maintain the standards the public have a right to expect of doctors. If a doctor fails to meet those standards the GMC acts in order to protect patients from harm. If necessary it can strike the doctor off the register and removing his right to practice medicine. Its legal authority is the Medical Act, which gives it powers to protect, promote and maintain the health and safety of the public.

The **General Dental Council** (GDC) **(**www.gdc-uk.org) protects the public by regulating dental professionals in the UK. The GDC's aims are to protect patients, to promote confidence in dental professionals and to be at the forefront of healthcare regulation. The GDC registers qualified professionals, sets standards of dental practice and conduct, assures the quality of dental education, ensures professionals keep up-to-date, helps patients with complaints about a dental professional and works to strengthen patient protection.

The **General Optical Council** (GOC) (www.optical.org) is the statutory body which regulates dispensing opticians and optometrists and those bodies corporate carrying on business as optometrists or dispensing opticians. The Opticians Act 1989 details the GOC's powers and duties. The GOC's main aims are to protect the public and promote high standards of professional conduct and education amongst opticians.

The **Nursing and Midwifery Council** (www.nmc-uk.org) is an organisation set up by Parliament to ensure nurses and midwives provide high standards of care to their patients and clients. The NMC is responsible for maintaining a register of nurses, midwives and specialist community public health nurses. The NMC has the power to remove or caution any practitioner who is found guilty of professional misconduct. In rare cases (e.g. practitioners charged with serious crimes) it

can also suspend a registrant while the case is under investigation.

The **Health Professions Council** (HPC) (www.hpc-uk.org) is an independent statutory regulatory council, formed to regulate healthcare professions that fell outside the boundaries of more established bodies, previously mentioned. It sets standards for the training, conduct and performance of twelve healthcare professions. As well as supervising established professions, the HPC is designed to be able to register and regulate new job titles. This ensures that new roles that evolve from changing work patterns are subject to the same consistent standards. The HPC regulates: arts therapists, biomedical scientists (MLT), chiropodists, podiatrists, clinical scientists, dieticians, occupational therapists, orthoptists, paramedics, physiotherapists, prosthetists and orthotists, radiographers and speech and language therapists. In order to work in one of these professions, practitioners must first be registered. The HPC is able to inform members of the public whether their practitioner is registered with them. It will also consider complaints and allegations of malpractice against them. It also supports practitioners into and through their careers by setting standards for education and training providers, and with the provision of continuing professional development initiatives.

The **Royal Pharmaceutical Society of Great Britain** (RPSGB) (www.rpsgb.org.uk) is the regulatory and professional body for pharmacists in England, Scotland and Wales. The primary objective of the Society is to lead, regulate and develop the pharmacy profession. The Society has responsibility for a wide range of functions that combine to assure competence and fitness to practice. These include controlled entry into the profession, education, registration, setting and enforcing professional standards, promoting good practice, providing support for improvement, dealing with poor performance, dealing with misconduct and removal from the register.

13.2 Liability for inadequate supervision and enforcement?

Under English law, damages liability for regulators concerning inadequate supervision and enforcement is governed by extra-contractual liability, or tort law. There are a restricted number of torts which are applicable in these circumstances. The main torts which must be examined are: (1) Misfeasance in public office; and (2) Negligence.

13.2.1 Misfeasance in Public Office

Misfeasance in public office is the only specifically 'public law' tort in English law. It provides a remedy for citizens who have suffered loss due to the abuse of power by a public officer acting in bad faith.[267]

For a long period, a neglected tort, misfeasance has experienced something of a renaissance. In the last few years, it has undergone sustained scrutiny at the highest level, culminating in the case of *Three Rivers District Council v Bank of England*.[268] This litigation arose out of alleged wrongdoing by the Bank of England in supervising the Bank of Credit and Commerce International (BCCI). Following the liquidation of BCCI, depositors brought damages claims against the Bank of England for alleged failures in its supervisory role. These claims were struck out in the High Court and Court of Appeal.[269] Appeal was made to the House of Lords, and in order to simplify matters the procedure was divided into two hearings.[270]

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267 Generally, see Craig, 875-880; Arrowsmith, 226-234; Wade and Forsyth, 765-771; J. McBride, 'Damages as a Remedy for Unlawful Administrative Action' [1979] CLJ 323; M. Andenas and D. Fairgrieve, 'Misfeasance in Public Office, Governmental Liability and European Influences' (2002) 51 ICLQ 757.

268 *Three Rivers DC* [2000] 2 WLR 1220 (House of Lords' first decision); *Three Rivers DC* [2001] UKHL 16 (House of Lords' second decision).

269 At first instance, after initial proceedings concerning various preliminary issues of law, Clarke J acceded to the Bank of England's application to strike out the action (Judgment of 30 July 1997 (unreported)). The Court of Appeal upheld Clarke J's decision in a joint majority judgment of Hirst and Robert Walker LJJ; Auld LJ dissented: *Three Rivers DC v Bank of England* [1999] EuLR 211.

270 *Three Rivers DC* [2000] 2 WLR 1220; *Three Rivers District Council* [2001] UKHL 16.

As a result of the House of Lords decisions, it is possible to identify a series of elements which a claimant must show to bring a successful claim based upon misfeasance in public office. It must be shown that the defendant is a public officer,[271] and that the claim relates to the defendant's exercise of power as a public officer.[272] The crux of the tort, however, is the mental state of the defendant. The manner in which the *mens rea*[273] of misfeasance has been framed by the courts is an essential part of understanding the role of this tort in controlling public wrongdoing. The mental element is the tort's main control-mechanism. Indeed, the recent litigation has focussed exactly upon this element.

The mental elements of this tort boil down to two limbs. First, the most stringent arm of this tort is known as targeted malice and requires proof that a public officer has acted with the intention of injuring the claimant.[274] The second limb is less strict and in essence is made out when a public officer acts in the knowledge that he thereby exceeds his powers and that this act would probably injure the claimant.[275]

The *Three Rivers* litigation has had an important effect on the tort of misfeasance in public office. There is no doubt that the tort has been brought to the attention of litigators by virtue of this high-profile litigation.[276]

It is clear also that the *Three Rivers* decisions have substantially broadened the test of misfeasance in public office. The cause of action has evolved from being a prohibitively restrictive tort of intentional wrongdoing to become essentially a tort of (subjective) recklessness in which bad faith may be constituted by the elements of recklessness. In sum, misfeasance is now an intentional tort for which recklessness suffices.

The evolution in respect of the mental elements of misfeasance will no doubt broaden the appeal of this tort. There are other reasons why this tort may play a more prominent role in providing compensation for governmental wrongdoing.

First, the notion of proximity, a prerequisite of liability in negligence,[277] would now seem to have no role to play in respect of the tort of misfeasance in public office. The majority in the Court of Appeal in *Three Rivers* had indicated that proximity might play a limiting role where the number of claimants was large and alleged 'range of duty' was wide.[278] However, the House of Lords took a different view, and the Court of Appeal's approach to proximity was rejected by Lord Steyn and Lord Hutton.[279] The absence of the proximity requirement may indeed serve to make the tort of misfeasance in certain circumstances a more realistic option to claimants than the tort of negligence, particularly where the class of the potential claimants to which a duty of care in negligence would be owed is very broad.

Secondly, the tort of misfeasance may be prove to be an attractive option where claims are brought to recover pure economic loss, in respect of which the courts have been reluctant to allow claims in negligence.[280] This policy of caution has not - as yet - been extended to the tort of misfeasance in public office, and it is no coincidence therefore that many of the leading misfeasance cases concern economic loss,[281] of which *Three Rivers* is an example *par excellence*. Misfeasance in public office might provide a remedy for those who traditionally would have difficulties in availing themselves of a negligence claim, such as disappointed applicants for commercial licences, or those who have suffered loss due to adverse planning decisions.

Inspired by the publicity provided by the *Three Rivers* litigation, there has been a rash of recent attempts to use the tort of misfeasance in public office as an instrument for governmental

271 *Three Rivers DC* [2000] 2 WLR 1220, 1230-1231.
272 Ibid.
273 P. Cane, 'Mens Rea in Tort Law' (2000) 20 OJLS 533.
274 *Bourgoin SA v MAFF* [1986] QB 716, 776. See also *Dunlop v Woollahra Municipal Council* [1982] AC 158, 172.
275 *Three Rivers DC* [2000] 2 WLR 1230 and [2001] UKHL 16.
276 It should be noted that in December 2005, the liquidators of BCCI dropped their damages action against the Bank of England, on the basis that it was no longer in the best interests of the creditors for the litigation to continue..(The Independent, 3 November 2005).
277 See discussion in section 2.1.2.1 above.
278 [1999] EuLR 211, 270-272 (CA).
279 [2000] 2 WLR 1220, 1233 and 1267.
280 For general discussion, see chapter 7, section 2.1.1.
281 *Bourgoin S.A. v MAFF* [1986] QB 716; *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689 (Canadian Supreme Court).

accountability,[282] including a second claim impugning the Bank of England in its regulatory role.[283] Although few of the claims have had much success,[284] not all have been rejected,[285] and in a recent case the corporate officer of the House of Commons was successfully sued for misfeasance in public office arising from the unequal treatment of tenders for a construction contract concerning the new Parliament building.[286]

13.2.2 Negligence

In order to succeed in a claim based on negligence, the claimant must show: a duty of care; breach of that duty; that the breach caused recoverable loss.

The following elements have been laid down for determining the existence of a duty of care:[287] foreseeability of harm; whether the parties were in a sufficiently proximate relationship; and if it is fair, just and reasonable to impose a duty of care.

The duty of care concept has dominated the application of negligence to public authorities. We will thus examine the manner in which duties of care have been formulated in respect of public authorities, with specific reference to regulatory authorities.

A basic principle of English law is that the negligence liability of public authorities is determined according to the ordinary common law principles of negligence. No action will arise from the mere careless performance of a statutory function.[288] The claimant must show that the factual situation falls within the ambit of a common law duty of care.

Policy Concerns

Over a long period of time, the courts have repeatedly invoked a number of public policy concerns in refusing to impose duties of care upon public authorities. It is not possible to give an exhaustive catalogue of these policy issues, but a brief account will be given of those concerns which have appeared in state liability cases. The multi-disciplinary nature of administrative decision-making has often been invoked against the imposition of a common law duty of care.[289] The existence of alternative remedies for claimants has also militated against common law duties: the courts have thus expressed preference for recourse to statutory appeal mechanisms,[290] judicial review, the Criminal Injuries Compensation Board,[291] and the Ombudsmen schemes.[292] It has also been held that the sensitive and delicate nature of public bodies' activities can work against judicial scrutiny in negligence actions.[293] The negative impact that potential damages liability might have on public service provision has also been given as a

282 *Greville v Sprake* [2001] EWCA Civ 234; *Thomas v Chief Constable of Cleveland* [2001] EWCA Civ 1552; *L v Reading Borough Council* [2001] 1 WLR 1575; *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 2 WLR 1789; *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435; *Chief Constable of Kent v Rixon*, The Times 11 April 2000; *Abdul Rauf Qazi v London Borough of Waltham Forest* (QBD, 3 August 1999); *Harris v Evans* [1998] 3 All ER 522; *Barnard v Restormel BC* [1998] 3 PLR 27.

283 *Hall v Bank of England* (CA, 19 April 2000) (Bank of England sued for misfeasance in public office, on basis of Bank's alleged inaction in supervising a company, Bradford Investments PLC, of which the claimants were shareholders).

284 See the failed case brought by Railtrack PLC shareholders against the Secretary of State for Transport, Local Government and the Regions at the time, the Rt. Hon. Mr Stephen Byers M.P., alleging that he had committed "targeted malice" against the shareholders in Group, including the Claimants (*Weir v Secretary of State for Transport and DoT* (High Court, 14 October 2005)

285 *Racz v Home Office* [1994] 2 AC 45 (refusal to strike out claim in respect of vicarious liability for misfeasance of prison officers); *Elliott v Chief Constable of Wiltshire* The Times, 5 December 1996 (refusal to strike out action arising from the revelation of a journalist's criminal convictions by a police officer); *Toumia v Evans* The Times, 1 April 1999 (refusal to strike out alleged misfeasance of prison warders in refusing to unlock prisoners' cells).

286 *Harmon Facades Ltd v The Corporate Officer of The House Of Commons* (1999) 67 ConLR 1; *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons (No 2)* (2000) 72 Con LR 21.

287 *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617-618.

288 *X (Minors)* [1995] 2 AC 633, 732-735; *W v Home Office* [1997] Imm AR 302, 309.

289 *X (Minors)* [1995] 2 AC 633, 749-750; *Hussain v Lancaster CC* [2000] QB 1, 25.

290 *Jones v Department of Employment* [1989] QB 1, 22.

291 Now the Criminal Injuries Compensation Authority.

292 *Clough v Bussan* [1990] 1 All ER 431; *X(Minors)* [1995] 2 AC 633, 751, 762; *Harris v Evans* [1998] 3 All ER 522; *W v Home Office* [1997] Imm AR 302, 310; *Dixon v Home Office* (CA, 30 November 1998).

293 *X (Minors)* [1995] 2 AC 633, 750.

reason for not finding a duty of care. Thus it has been feared that potential liability would prompt authorities to engage in liability-avoiding defensive practices, as well as diverting time and resources in repelling speculative claims.[294] The so-called 'floodgates concern' has also had an impact on public authority liability. The practical complexities of actions in tort against public authorities have often been cited by the courts, which have rejected duties on the basis that to establish whether an action should succeed would involve time-consuming litigation inevitably diverting resources -both financial and in terms of manpower- from the core activity of public service provision.[295]

Looking to sectors of public authority activity, examples of this restrictive approach can be found. Actions in negligence against the police have been dominated by the rule in *Hill v Chief Constable of West Yorkshire* whereby public policy precludes claims concerning the investigation and suppression of crime.[296] The *Hill* rule has been applied in many police cases,[297] and has been extended to other agencies involved in the criminal justice system,[298] so that for instance the Crown Prosecution Service does not owe a duty of care to those it is prosecuting.[299] Exceptions to this stark exclusionary rule were nonetheless forged. Indeed, Lord Keith in the *Hill* case held that a police officer may be tortiously liable to a person who is injured as a direct result of his acts or omissions.[300] Liability also arose when the police assumed some measure of responsibility for the claimant.[301]

The social welfare and education spheres have also been the objects of judicial attention in recent years. Prior to the recent case of *Barrett*,[302] the social services were afforded a generous degree of protection from actions in negligence,[303] and claims in respect of child protection had rarely succeeded.[304] In the education sphere, prior to the recent House of Lords' decision in *Phelps*,[305] it had been held that for policy reasons local authorities were not under a *direct* duty of care to children for the exercise of statutory functions to provide suitable education under the various Education Acts.[306]

Negligence and Regulatory Authorities

This restrictive approach of the courts is also evidenced in the sphere of regulatory activity. Negligence actions against regulatory authorities have met with resistance,[307] thus providing

294 *Rowling v Takaro Properties Ltd* [1988] AC 473, 502; *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175, 198; *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 63; *Hughes v NUM* [1991] 4 All ER 278; *Skinner v Secretary of State for Transport* The Times, 3 January 1994; *Elguzouli-Daf v Commissioner of Police* [1995] QB 335, 349; *W v Home Office* [1997] Imm AR 302, 310.

295 *Phelps v Hillingdon LBC* [1999] 1 WLR 500, 522 (CA), now overruled by the House of Lords' decision: [2001] 2 AC 619.

296 *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

297 *Clough v Bussan* [1990] 1 All ER 431; *Alexandrou v Oxford* [1993] 4 All ER 328; *Osman v Ferguson* [1993] 4 All ER 344. See also *Calveley v Chief Constable of the Merseyside Police* [1989] 1 AC 1228.

298 No duty is owed by the Home Office or its immigration officers to take reasonable care in decision-making regarding detained asylum seekers: *W v Home Office* [1997] Imm AR 302. See also *Dixon v Home Office* (CA, 30 November 1998).

299 *Elguzouli-Daf v Commissioner of Police* [1995] QB 335.

300 This explained the finding of liability in the cases of *Knightley v Johns* [1982] 1 WLR 349; *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242.

301 *Swinney v Chief Constable of Northumbria Police (No 1)* [1997] AC 464. See also *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 QB 283; *Reeves v Commissioner of Police of The Metropolis* [1999] 3 All ER 897.

302 [2001] 2 AC 550.

303 *X(Minors)* [1995] 2 AC 633. See J. Wright, 'Local Authorities, the Duty of Care and the European Convention on Human Rights' (1998) 18 OJLS 1.

304 Mainly concerning misstatements: *T v Surrey CC* [1994] 4 All ER 577.

305 [2001] 2 AC 619.

306 *X (Minors)* [1995] 2 AC 633. On the other hand, it was held that individual teachers could owe a common law duty to exercise reasonable care in teaching, and local authorities could thus be vicariously liable in such situations: [1995] 2 AC 633, 766. But this was interpreted in a very restrictive manner by the Court of Appeal in *Phelps: Phelps v Hillingdon LBC* [1999] 1 WLR 500, 522 (CA), now overruled by the House of Lords' decision: [2001] 2 AC 619.

307 C. Hadjiemmanuil, *Banking Regulation and the Bank of England* (London, 1996), chapter 5; H. McLean, 'Negligent Regulatory Authorities and the Duty of Care' (1988) 8 OJLS 442.

protection for bodies acting in the sphere of health and safety,[308] control of financial institutions,[309] and the supervision of compliance with building regulations.[310] Policy concerns marked claims against planning authorities,[311] with rare findings of negligence.[312]

Nonetheless, it should be mentioned at this stage that there have been signs in recent cases that the courts' general approach to state liability may have evolved. There are indications that the tide is turning. Two recent cases, *Barrett v Enfield LBC*,[313] and *Phelps v Hillingdon LBC*,[314] which concerned the fields of social welfare and education, indicate a shift in favour of compensation seekers. This new approach has been reinforced by other cases at a domestic and European level.[315]

Might the courts' change in approach herald an evolution as regards regulatory liability? Powerful arguments in favour of a different approach can be made. Recent cases militate against exclusionary rules on liability. The force of policy considerations have been considerably weakened after the recent cases of *Barrett* and *Phelps*.

Nonetheless, it should be emphasised that courts have not restricted themselves to the use of policy concerns to deflect monetary actions brought against public bodies exercising a regulatory function. Regulatory cases have often failed for want of proximity between the parties.[316] Even where the necessary degree of proximity exists, such as the planning sphere, developments may well be thwarted by the wariness of the courts to the recovery of pure economic loss,[317] or cases where there is a causally peripheral role of the defendant.[318]

Case Summaries

***Anns v Merton London Borough Council* [1978] AC 728** (12/5/77)

Claim by lessees of a block of flats suffering from structural movements. Claimed that problems due to Council's failure to inspect the walls properly or at all to ensure that foundations were built to appropriate depth when approving building plans. Held: a LA may be liable in negligence for its failure to inspect building foundations properly or at all, provided that it is shown that the action taken was carried out otherwise than in the bona fide exercise of its discretion and negligently. Council had a power, not a duty to inspect building work. Failure to carry out inspections would not lead to Council liability unless the Council had failed to properly exercise it's discretion not to make an inspection and failed to exercise reasonable care to ensure compliance with the laws in force. Where inspections are carried out, the Council retains discretion as to the manner of such inspections – Council might be liable in negligence for failure to take reasonable care if discretion

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308 *Philcox v Civil Aviation Authority* The Times, 8 June 1995; *Reeman v DoT* [1997] 2 Lloyd's Rep 648; *Harris v Evans* [1998] 3 All ER 522. Liability arose exceptionally for negligent misstatement in *Welton v North Cornwall DC* [1997] 1 WLR 570. For a more liberal approach see also *Perrett v Collins* [1998] 2 Lloyd's Rep 255 (concerning personal injury) and *Watson v British Boxing Board of Control Ltd* [2001] QB 1134 (concerning personal injury; BBBC is a regulatory, but not a public, body), analysed by J. George (2002) 65 MLR 106.

309 *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175; *Davis v Radcliffe* [1990] 2 All ER 536.

310 *Murphy v Brentwood DC* [1991] 1 AC 398; *Tesco Stores v Wards Constructions Ltd* (1995) 76 BLR 94.

311 *Strable v Dartford BC* [1984] JPL 329; *Lam v Brennan* [1997] PIQR P488; *Ryeford Homes Ltd v Sevenoaks District Council* [1989] 2 EGLR 281. See also *Haddow v Secretary of State for the Environment* [1998] NPC 10 upheld in *Haddow v Tendring District Council* (CA, 9 July 1998).

312 *Lambert v West Devon BC* [1997] JPL 735

313 [2001] 2 AC 550. On this case, see S.H. Bailey and M.J. Bowman, 'Public Authority Negligence Revisited' [2000] CLJ 85; P. Craig and D. Fairgrieve, '*Barrett*, Negligence and Discretionary Powers' [1999] PL 626; A. Mullis, '*Barrett v Enfield London Borough Council*: A compensation-seeker's charter?' (2000) 2 CFLQ 185; W. Van Gerven, J. Lever and P. Larouche, *Tort Law* (Oxford, 2000) 363.

314 [2001] 2 AC 619. On this case, see B. Markesinis, 'Plaintiff's tort law or defendant's tort law? Is the House of Lords moving towards a synthesis?' (2001) 9 Torts Law Journal 168; D. Fairgrieve, 'Pushing back the Boundaries of Public Authority Liability: Tort Law Enters the Classroom' [2002] PL 288; J. Greenwold, 'Lawyers in the Classroom: the New Law of Educational Negligence' (2000) *Education and the Law* 245; M. Harris, 'Education and Local Authorities' (2001) 117 LQR 25.

315 For a more detailed analysis of this topic, see D.Fairgieve, *State Liability in Tort* (OUP, 2003).

316 *Yuen Kun Yeu* [1988] AC 175; *Ryeford Homes Ltd v Sevenoaks District Council* [1989] 2 EGLR 281; *Tidman v Reading Borough Council* [1994] 3 PLR 72; *Gaisford v Ministry of Agriculture Fisheries and Food* The Times, 19 July 1996; *Reeman v DoT* [1997] 2 Lloyd's Rep 648.

317 *Ryeford Homes Ltd v Sevenoaks District Council* [1989] 2 E.G.L.R. 281. Although recovery of economic loss caused by governmental activity is by no means excluded: *Lonrho plc v Tebbit* [1992] 4 All ER 280.

318 *Yuen Kun Yeu* [1988] AC 175, 195. See Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 LQR 301, 314.

was not bona fide exercised. Overruled by *Murphy v Brentwood DC* [1991] 1 AC 398 (see below).

***Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175** (10/6/87)
Commissioner charged with regulatory functions in granting deposit-takers licences. Y deposited money with a licensed deposit-taker who went into liquidation and he lost the money. Y claimed that the commissioner was negligent in granting or failing to revoke the deposit-taker's licence before Y deposited the money, since the commissioner knew or ought to have known that the deposit-taker had run his business fraudulently. Held: there was not sufficient proximity between the commissioner and the depositors to result in a duty of care or to warrant day-to-day control of deposit-taking companies. The nature of the ordinance conferring the regulatory functions on the commissioner was not such as to warrant reliance by Y on the soundness of a deposit-taker licensed under it.

***Murphy v Brentwood District Council* [1991] 1 AC 398** (26/7/90)
Claim for economic loss due to negligent council approval of building plans (via independent contractors) resulting in defective raft foundations with resultant risks to health and safety. Defect could not be remedied and house was sold at a loss. Held: council is not liable in tort for negligent application of the building regulations where the resulting defects have not caused physical injury, but merely economic loss. Distinguished by *Blue Circle Industries Plc v Ministry of Defence* [1997] Env LR 341; *Cowlin v Elvin* [1999] CLY 1409; *Londonwaste Ltd v Amec Civil Engineering Ltd* 83 BLR 136; *Storey v Charles Church Developments Ltd* 73 Con LR 1; *Targett v Torfaen BC* [1992] 3 All ER 27. Not followed by *RSP Architects Planners and Engineers v Ocean Front Pte Ltd* [1998] 14 Const LJ 139.

***Philcox v Civil Aviation Authority* [1995] 92(27) LSG 33** (25/5/95)
P sued the CAA in negligence, when his aircraft crashed a month after it was certified airworthy by the CAA. Held: CAA supervises aircraft owners, not in their own interest but in the interest of the general public. There is therefore no duty owed by the CAA to aircraft owners to inspect their aircraft thoroughly, since it is the primary responsibility of the aircraft owners that they maintain aircraft in a safe condition, the role of the CAA is not to protect them from their own mistakes.

***X (Minors) v Bedfordshire County Council* [1995] 2 AC 633** (29/6/95)
This involved five cases, two concerning the protection of children from sexual abuse (one where the LA failed to act, one where it acted erroneously without sufficient investigation of the facts) and three concerning failures of LEAs when dealing with the education of children with special educational needs. Held: a breach of a statutory duty does not by itself give rise to a private law cause of action, however, one will arise if the statutory duty was imposed for the protection of a limited class of the public and Parliament intended members of that class to have a private right of action for breach of that duty. The statutory provision of some other means of enforcement is a factor to be taken into account when considering whether or not a private right of action exists. For such an action to exist there must also be a duty of care at common law (not a mere breach of a statutory power or duty). Decisions made where statutory discretion exists cannot be actionable in common law, unless so unreasonable that it falls outside the discretion (however, any policy discretion falls outside the scope of judicial intervention). As regards the protection of children from sexual abuse cases, it was considered that it was not just and reasonable to impose a common law duty of care on authorities in addition to their statutory duties to protect children. The LA employees (social workers and psychiatrists) did not assume any professional duty of care to the plaintiffs. In special needs education cases, it was not just and reasonable to impose a common law duty of care on LEAs when operating their statutory discretion under the Education Act. An LEA offering psychological advice to the public does have a duty of care in its conduct, as does an LEA employee offering advice to parents and children. Distinguished by *Barrett v Enfield LBC* [2001] 2 AC 550 and *Sutradhar v Natural Environment Research Council* [2004] EWCA Civ 175. Doubted by *Phelps v Hillingdon LBC* [2001] 2 AC 619.

***Welton v North Cornwall District Council* [1997] 1 WLR 570** (17/7/96)
Claim by W for damages for economic loss due to an environmental officer stating that costly building work and alterations should be carried out by the guesthouse to comply with Food regulations, upon threat of closure. Such statements were negligent misstatements as to the

extent of the alterations required to comply with the law. Held: the fact that an environmental officer exercises his functions under statutory powers does not preclude the existence of a duty of care. The environmental officer had assumed responsibility and induced reliance by W, creating a relationship from which a common law duty of care arose. Under the circumstances it is clear that the claimants would rely on the accuracy of such statements.

Harris v Evans **[1998] 1 WLR 1285** (24/4/98)
Claim for economic loss of a bungee jumping business (H) which was prohibited from offering bungee jumping following the negligent advice of E, a health and safety executive advising the local authority. The court held that in the statutory regime governing an HSE inspector's powers and duties, provision is made for a statutory appeals procedure. Also, a cautious and defensive approach by statutory authorities is necessary in this instance. E had the same power to take action, as did the LA, who, in the event, took such action, therefore the person who took that action to prohibit H's activity was immaterial. H's claim did not succeed.

Perrett v Collins **[1998] 2 Lloyd's Rep 225** (22/5/98)
Claim for personal injuries following the crash of an aircraft during a test flight, in which C was a passenger. C sued D1 (pilot and owner), D2 (inspected aircraft and certified that it was in an airworthy condition) and D3 (issued the certificate of fitness for flight). D2 and D3 contested liability and any duty of care. The court held that, as a passenger in an aircraft, C was entitled to assume that the appropriate safety requirements had been satisfied and that proper care had been taken when the aircraft was inspected for those purposes. The inspection and issue of a certificate of airworthiness was an independent and crucial role.

Barrett v Enfield London Borough Council **[2001] 2 AC 550** (17/6/99)
Claim in negligence against a LA by a child in care for psychiatric harm caused to him by the LBC's breach of duty of care through it's failure to place him for adoption, locate suitable foster homes and oversee his reintroduction to his birth mother. Held: LA owed a duty of acre to a child for whom it is responsible. Distinguished *X (minors) v Bedfordshire CC*, as in this case the child was already in care, so therefore the CC could be liable to subsequent actions. For action to succeed a breach of a duty of care must be shown. In this case a duty of care exists to protect the interests of the child and the LA cannot be absolved from liability if a failure to take reasonable care could be proved. Distinguished by *Palmer v Tees HA* [2000] 2 LGLR 69.

Watson v British Boxing Board of Control Ltd **[2001] QB 1134** (19/12/00)
Claim by a boxer (W) that the BBBC had breached its duty of care towards him by failing to ensure that he received immediate ringside medical attention. Held: there was sufficient proximity since BBBC was responsible (via the making of regulations) for determining the nature of medical facilities and assistance to be provided to restrict the foreseeable injuries to boxers, its members were a determinate class of persons and its situation could be distinguished from that of a rescuer since injuries sustained by professional boxers were almost inevitable and foreseeable. It was reasonable for BBBC to contemplate that W would rely on its skill and expertise to take reasonable care in providing for his safety, the BBBC being the sole body regulating professional boxing. There were no policy reasons why the BBBC should not have such a duty of care.

Phelps v Hillingdon London Borough Council **[2001] 2 AC 619** (27/7/00)
Claim by P and three others, all suffering from various learning difficulties, against their local authorities. Held: a local education authority could be vicariously liable for the acts of its employees, there being no justification for a blanket immunity policy in respect of education officers performing the authority's functions with regard to children with special educational needs. An employee (e.g. educational psychologist), exercising a particular skill or profession, might owe a duty of care to particular pupils where it could be foreseen that those pupils might be injured if due skill and care were not exercised in the performance of that duty. In this case compensation was sought for the child's reduced level of academic achievement and the consequential loss of wages due to negligent employees. Note that courts consider any public policy reasons for not imposing liability and are slow to find negligence where this would interfere with the performance of the LEA's duties.

Sutradhar v Natural Environment Research Council **[2004]** EWCA Civ 175 (20th February 2004)
A claim for personal injury arising from the consumption of polluted water in Bangladesh was struck out where there was an insufficient relationship of proximity between the claimant (who drank polluted groundwater in Bangladesh) and the defendant, a UK statutory body that had published a report on the hydrochemical character of groundwater in parts of Bangladesh (report commissioned for the Overseas Development Agency).

Wattleworth v Goodwood Road Racing Co and others **[2004]** EWHC 140 (4th February 2004)
An experienced amateur racing driver was owed a duty of care by both the motor racing venue where he crashed and died, and by the sport's national licensing body, but neither had been in breach of that duty. A body regulating international events owed no duty, despite having given additional advice on safety (not sufficiently proximate). (Case refers to *Perrett v Collins* [1998])

Slater v Buckinghamshire County Council **[2004]** EWHC 77 (29th January 2004)
Neither the Local Authority nor a contractor that operated a social services minibus (or the contractor's motor insurer) were liable in respect of injuries sustained by the Claimant (a Down's Syndrome sufferer) when he was hit by a minibus whilst crossing the road by himself to catch the minibus.

Vowles v Evans **[2003]** EWCA Civ 318 (11th March 2003)
A referee of an adult amateur rugby match (and through vicarious liability the Welsh Rugby Union) owed a duty of care to the players to take reasonable care for their safety when carrying out his refereeing activities and his breach of that duty caused the claimant's injury.

Matthews v Ministry of Defence **[2003]** UKHL 4 (13th February 2003)
An electrical mechanic who had served in the Royal Navy (1955-1968), where he came into contact with asbestos allegedly damaging his health, appealed against a decision that The Secretary of State issued a certificate under s. 10(1)(b) of the Crown Proceedings Act 1947, the effect of which was to preclude the claimant from pursuing a personal injury claim for damages from the Navy due to the Crown's immunity in tort during that period. The claimant sought a ruling that this infringed his rights under the Human Rights Act. Held: s. 10 did not infringe the claimant's right to a fair trial as it was a substantive and not a procedural limitation.

Thames Trains Ltd v Health and Safety Executive **[2002]** EWHC 1415 (23rd July 2002)
Whilst the Health and Safety Executive owed no general duties arising out of the Health and Safety at Work Act 1974, or by reason of the fact that the Executive was the safety regulatory body for railways (through the Railways Inspectorate), it was arguable that it owed a common law duty in respect of the particular facts of the Ladbroke Grove train crash. (Case refers to *Perrett v Collins* [1998]).

Reeman v Department of Transport **[1997]** 2 Lloyd's Rep. 648 (26th March 1997)
Government department issued incorrect safety certificate to a fishing vessel – department not liable for economic loss to a subsequent purchaser who bought the vessel relying on the information in the certificate. [The party was not identifiable at the time of the making of the certificate, therefore not sufficient proximity].

Gaisford v Ministry of Agriculture, Fisheries and Food **[1996]** Times, July 19, 1996 (28th June 1996)
The Ministry of Agriculture has no duty of care to buyers of imported goats which are found to have diseases when released from quarantine. The court held that there was no liability on the ground that there was not sufficient proximity, the defendants did not have total control over the animals whilst in quarantine and that the appropriate action was against the sellers in contract law.

Tesco Stores Ltd v Wards Construction (Investment) Ltd **[1995]** 76 B.L.R. 94 (18th July 1995)
Claim against Council for failure to ensure the building regulations were complied with following the fast spread of a fire in a commercial centre. HELD: the statutory regimes of the Building Act

1984 and the Building Regulations 1985 SI 1985/1065 were concerned with questions of the health, safety and welfare of persons, not with avoiding damage to property or chattels (such liability was not envisaged in the statute).

Tidman v Reading BC **[1994]** 3 P.L.R. 72 (4th November 1994)
Council planning officers advising members of the public on planning matters do not owe a duty of care as to an informal enquiry. The Council is to be judged by different standards than a normal advisor as its overriding objective is to apply the planning law and to work in the general public interest.

Davis v Radcliffe **[1990]** 1 W.L.R. 821 (5th April 1990)
The Isle of Man Banking Licensing Act imposes no duty of care on the licensing authority to investors.

Ryeford Homes Ltd v Sevenoaks DC **[1989]** 46 B.L.R. 34 (26th January 1985)
The case concerned the Issue of flooded new homes as a result of negligently provided planning permission in adjacent land. Council found not liable for various reasons that were put forward. The new owners were not sufficiently proximate. The builders had only suffered economic loss (therefore not recoverable). Planning authority owes no duty of care in planning cases. No duty of care owed to individual landowners (not on an individual basis, only a general duty to the community as a whole). Public policy reasons invoked against awarded damages against local authorities.

13.3 Which statutory immunities exist as regards liability of public bodies?

Other than judicial methods used to limit the liability of public bodies, as discussed in section 2, certain bodies are doted with statutory limitation of liability, allowing of exemption for certain types of liability. Notably the Financial Services Authority (FSA) benefits from such exclusions of liability under s.102 (1) of the Financial Services and Markets Act 2000 (FSMA). The armed services used to benefit from a reduction in liability, however, since the Crown Proceedings (Armed Forces) Act 1987 this exclusion of liability no longer applies, however it could reapply under certain conditions via an order of the Secretary of State. Firstly the situation of the Financial Services Authority will be discussed, before explaining the situation of the armed services.

Financial Services Authority
Under s. 102 (1) of the Financial Services and Markets Act 2000, 'neither the competent authority nor any person who is, or is acting as, a member, officer or member of staff of the competent authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the authority's functions'. This subsection therefore statutorily excludes the liability of the FSA for actions taken or omitted to be taken by the authority. However, this is subject to the caveat in s. 102 (2), which provides that the exclusion of liability in s. 102(1) does not apply - (a) 'if the act or omission is shown to have been in bad faith'; or (b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998'.

S. 6(1) of the Human Rights Act 1998 states that 'it is unlawful for a public authority to act in a way which is incompatible with a Convention right'. This section does not apply if the relevant public body could not have acted differently as a result of the provisions of primary legislation (s. 6(2)(a) HRA).

Therefore in order to establish the liability of the FSA for any action or inaction on its part, there is a difficult hurdle to overcome, in that one must either establish that it has (i) acted unlawfully in breach of a Convention (ECHR) right, or (ii) that the act or omission was done in bad faith, with the obvious difficulties in proving this latter ground for liability, despite the recent enlargement of the ambit of this exception.

Military/The Armed Forces

A person subject to service law[319] is not entitled to seek redress by ordinary law in the civil courts for an infringement of rights given to him, but only by the service law. Even as regards a common law wrong upon a person subject to service law, by a service tribunal or an officer, then so long as the act causing the personal injury or loss of liberty is within the jurisdiction of its perpetrator and occurs in the course of service discipline, an action will not lie in respect of it merely on the ground that what was done was malicious and without reasonable cause[320], but only for an abuse of authority carried out from motives of cruelty or oppression[321]. However, if such an authority, acting without or in excess of jurisdiction, inflicts or brings about a common law wrong on a person subject to service law, even though it purports to be done in the course of actual service discipline, an action for damages will lie against the authority or individual responsible[322].

Civil Liability

The Crown is no longer immune from general liability in tort, as of the coming into force of ss1, 2, 40(2)(b) and (c) Crown Proceedings Act 1947. Until 1987 the Crown still benefited from restricted liability under s.10 Crown Proceedings Act 1947, as regards private citizens actions in tort against a member of the armed forces or the Crown. The case of *Matthews v Ministry of Defence* [2003] UKHL 4 provides an example of the exclusion of liability under the old s.10 rules, involving alleged harm, through asbestos to an electrical mechanic during his service in the Royal Navy (1955-1968). The Secretary of State issued a certificate under s. 10(1)(b) of the Crown Proceedings Act 1947, the effect of which was to preclude the claimant from pursuing a personal injury claim for damages from the Navy due to the Crown's immunity in tort during that period. The court held that s. 10 did not infringe the claimant's right to a fair trial, as it was a substantive limitation and not a procedural limitation.

However, this exclusion form liability under s.10 Crown Proceedings Act 1947 also came to an end, with the Crown Proceedings (Armed Forces) Act 1987, whereby the restricted liability under s.10 Crown Proceedings Act 1947 no longer had effect. s. 1 Crown Proceedings (Armed Forces) Act 1987 provides that s. 10 Crown Proceedings Act 1947 (exclusions from liability in tort in cases involving the armed forces) shall cease to have effect except in relation to anything suffered by a person in consequence of an act or omission committed before the date of the passing of the Crown Proceedings (Armed Forces) Act 1987, which was the 15th May 1987. A recent example of such military liability in tort is the recent case of *Dennis v Ministry of Defence* [2003] EWHC 793, where the Ministry of Defence was found liable to an individual in common law nuisance for noise created by military aircraft.

However, s. 2 (1)(a) Crown Proceedings (Armed Forces) Act 1987 provides that the Secretary of State may at any time, by order (by statutory instrument), revive the effect of s.10 Crown Proceedings Act 1947 either for all purposes or for such purposes described in the order. The Secretary of state may likewise, under s. 2(1)(b) Crown Proceedings (Armed Forces) Act 1987 upon the existence of such an order, provide that s.10 cease to have effect. s. 2(2) prescribes the conditions under which the Secretary of State may make such an order, namely where it appears to him necessary or expedient to do so (a) by reason of any imminent national danger or of any great emergency that has arisen or (b) for the purposes of any warlike operations in any part of the world outside the United Kingdom or of any other operations which are or are to be carried out in connection with the warlike activity of any persons in any such part of the world. S. 4 provides that such orders are not to have retroactive effects and s 5 provides that such an order shall be subject to annulment by a resolution of either House of Parliament.

The only public body therefore which specifically has statutorily limited liability is the Financial Services Authority, although the possibility of the revival of s. 10 by an order of the Secretary of State limiting the liability in tort of the armed forces should also be borne in mind.

319 'Service law' includes the Naval Discipline Act 1957, military law and air force law.
320 *Heddon v Evans* [1919] 35 TLR 642.
321 Wall v M'Namara [1799], and O'Conner v Isaacs [1956] 2 OB 2888. However, under s 2(1)(a) Crown Proceedings Act, the Crown itself will be held liable for the torts of its servants.
322 *Heddon v Evans* [1919] 35 TLR 642.

13.4 How is the current situation as regards liability of public bodies estimated?

Concerning this topic, there have been two recent subjects of discussion analysed. Firstly, the Better Regulation Task Force[323] produced a recent report of May 2004 entitled 'Better Routes to Redress' dealing with the issue of the compensation culture in the UK. Although this report focused generally on the compensation culture, reference was also made to public bodies. Secondly, the public law team of the law commission produced a discussion paper in October 2004 entitled 'Monetary Remedies in Public Law'. This was followed in November 2004 by a seminar on monetary remedies in public law.

Better Routes to Redress, Better Regulation Task Force
This report dealt with issues of the compensation culture, concerning which it was considered that although the compensation culture may be a myth, the perception of it results in real and costly burdens. The goal of the report was to consider how better to ensure that those with a genuine grievance could secure appropriate redress efficiently and effectively, whilst ensuring that the legal system was not clogged up by spurious claims.

One of the most concerning perceived problems was that the media and management claims firms create the inaccurate impression that large sums of money are easily accessible. However, this perception is not justified[324] as the judicial process is very good at distinguishing between bona fide and spurious claims, so the report states. The problem therefore, is not the compensation culture, but that redress for genuine claims is being hampered by spurious claims. The large number of claims made places burdens on organizations trying to handle claims, incurring costs in the handling of the claims, more than in inflated payouts to spurious claims.

The concern is therefore as to how people with genuine grievances can have better access to appropriate address. It was stressed that compensation is not the only form of redress available and that the government should try remedies such as mediation, no-fault rehabilitation and apologies. The main recommendations concern action to be taken as regards claims management companies, the small claims track, ombudsmen, mediation, rehabilitation, contingency fees, occupational health, managing risk and lower insurance premiums.

Recommendations have been listed as follows: (i) regulation of claims management companies by a Code of Practice drawn up by the Claims Standards Federation, and approved by the Office of Fair Trading, or failing that, action by the Department of Constitutional Affairs (DCA); (ii) advice for consumers against claims management companies, published by the DCA; (iii) guidelines by the Chief Medical Officer and the NHS Chief Executive, to NHS hospitals and surgeries on the content of advertising by claims management companies on their premises; (iv) that the government raise the limit (currently set at £1000) under which personal injury claims can be pursued through the small claims track (the lowest compensatory level of civil claims) and to justify any limit lower than £5000; (v) to remove overlap between the work of the various public services ombudsman; (vi) better publicity of ombudsman work to all sections of society; (vii) strengthening of the pre-action protocol[325] rules on mediation and rehabilitation, requiring parties to explain any rejection of mediation or rehabilitation as a means of resolving the dispute; (viii) that research is undertaken by the DCA to consider the viability, impact and effectiveness of contingency fees, making legal charges more transparent and less subject to dispute; (ix) assessment (by the Chief Medical Officer leading a cross-departmental group) of the economic benefits of greater provision of rehabilitation by the NHS; (x) research (lead by the Department for Work and Pensions) into developing mechanisms for earlier access to rehabilitation; (xi) better publicity by the Health and Safety Executive of information on beneficial tax provisions relating to employers purchasing occupational health support; (xii) the extension by the Association of British Insurers of the "Making the Market Work" scheme to other organizations such as schools, hospitals and local authorities, who could benefit from better insurance terms for good risk

323 The Better Regulations Task Force is an independent advisory body set up in 1997, whose members are appointed by the Minister for the Cabinet Office. Its website address is: www.brtf.gov.uk.
324 In 2002 over 55% of county court awards were for less than £3000.
325 Pre-action protocols are civil procedure codes of conduct to encourage parties to better cooperate and also to encourage parties to settle before the case reaches the later stages of litigation. Failure to comply with such pre-action protocols can have costs implications upon trial.

management.

What needs to be tackled therefore is not the compensation culture, which is not deemed to exist, but the false perception of its existence, which leads to the courts being clogged up by spurious claims, creating undue costs on the state paying for court time and services in such cases and also slowing the justice system for those with meritorious claims.

Monetary Remedies in Public Law, Public Law Team, Law Commission

A discussion paper entitled 'Monetary Remedies in Public Law'[326] was prepared by the public law team of the law Commission on 11th October 2004 to be considered for discussion at the ensuing seminar in November 2004, with an view to considering any possible proposals for a project in this area.

The discussion paper addresses the question of possible reform of the current availability of monetary remedies as against public bodies. Firstly it analyses the current law as it stands, considering judicial review (for which monetary remedies are not available unless the applicant can also establish a private law cause of action)[327], private law actions against public bodies (misfeasance in public office, breach of statutory duty[328] and negligence[329]) and extra-judicial remedies (ombudsmen recommendations, statutory compensation, *ex gratia* compensation).

The paper then considers the impact of (i) the 1998 Human Rights Act (notably article 6, under which public bodies are liable in damages if found to have breached an individual's human rights, but also its wider implications) and (ii) EC law (particularly the possibility of adopting the community 'sufficiently serious breach' test in domestic law), on damages awards.

The paper then addresses the relationship between public law unlawfulness and liability in damages, considering whether a distinct concept of public law liability could be created, particularly in the area of negligence. This involves a consideration of different forms of maladministration and unlawfulness, the concept of fault and ways of addressing any resulting loss.

This is followed by a consideration of procedural implications. The paper outlines the procedural division between public law proceedings and private law proceedings (the principle of procedural exclusivity, which is increasingly under pressure), leading to the two procedural methods of seeking judicial redress against a public body; either via a judicial review action accompanied by a private law claim, or by a claim for damages in an ordinary private law action.

Finally, the report addresses the contours of such public body liability, involving consideration of the economic and operational implications of liability and the extent of bodies which are covered within the scope of such liability, before assessing whether there is a case for reform.

The causes for concern identified by the discussion paper are as follows: (i) that it is constitutionally inappropriate for the courts to determine the principles governing public bodies' liability for acts performed in the public sphere; (ii) the suitability of the use of private law to determine the proper extent of public body liability; (iii) problems as to the extent of liability under the current law; (iv) problems where individuals are unfairly precluded from recovering compensation, and (v) situations where compensation is at an unjustly high level. Finally possible courses of action are considered, including judicial and legislative solutions, and the different forms that such solutions could take.

The ensuing seminar 'Monetary Remedies in Public Law' was held in November 2004, involving more widespread discussions and interventions from legal practitioners, academics, government, ombudsmen and members of the judiciary. The discussions first identified current problems in the system of compensation for acts of public bodies, in particular the inadequacies of the law of tort in this field, and the lack of damages in judicial review proceedings. The importance of maintaining the role of ombudsmen in examining instances of maladministration

326 http://www.lawcom.gov.uk/files/Monetary_Remedies_-_disc_paper.pdf

327 The remedies available in judicial review actions are (i) quashing orders; (ii) prohibitory orders; (iii) mandatory orders; (the prerogative remedies) (iv) declarations; and (v) injunctions. All remedies in judicial review proceedings are discretionary.

328 As regards breach of statutory duty, the paper highlights the restrictive approach of the courts in imposing private law liability for a breach of statutory duty, other than that expressly imposed by statute.

329 As regards negligence they observe that recent case law seems to indicate that public policy factors against holding public bodies liable are now invoked more to lower the standard of care expected of a public body, rather than to deny the existence of such a duty of care.

was then underlined, followed by the specific difficulties which public authorities face in the performance of their functions.

The discussions then moved on to consider possible solutions. It was generally agreed that private law was an inadequate base for public body liability. It was also considered that 'fault' and 'public law unlawfulness' should be kept as separate concepts. It was generally accepted that there should be limitations on awards of compensation against public authorities, although any such limitations should be more flexible than the procedural limitations (notably the relatively short limitation period) applicable for judicial review cases. Subjects were discussed, such as, the possible type of cause of action, the definition of 'public authority', the relationship between the role of the courts and the role of the ombudsmen and possible inter-relations between damages in tort and any potential monetary remedy for public law unlawfulness. There was then some discussion as to the suitability of the courts or parliament to introduce such reforms, ending in some preference for legislation to lay out the general principles within which the courts could adapt to the cases in question. The accessibility of any monetary redress to the consumer was also considered. It was also highlighted that any introduction of a new monetary remedy in public law must be placed within the context of other public law remedies. Finally there was discussion as to how the law commission should proceed with a view to including this topic in its draft ninth programme of reform.

Following the seminar, the law commission decided that the focus on monetary remedies was too narrow and that a wider project should be undertaken, including consideration of the public interest in good administration, the type of remedies actually sought against public authorities, the possibility of enlarging the role of ombudsmen, and how to encourage the system to provide better feedback on how to improve administration. The law commission plans to publish this further study in 2005-2006.

As can be seen from the recent evolutions in the case law, and the law commission discussion and papers, this is an area of law which is currently under consideration for possible review.

13.5 What are the amounts of compensation following the Banking Directives?

The Financial Services Compensation Scheme (FSCS) is the statutory fund of last resort for customers of authorised financial services firms. The Scheme can compensate consumers if an authorised firm is not able to pay the claims against it.

The FSCS can consider claims for losses relating to; insurance, deposits, investment activities, mortgage advice and selling, arranging, administering and advising on general insurance. Different rules and compensation limits apply to each.

The Scheme was set up mainly to assist private individuals, although small businesses are also covered and all policyholders are covered for compulsory insurance policies. The FSCS operates under a set of rules made by the FSA under the terms of the Financial Services and Markets Act 2000 (FSMA), particularly s. 212ff. The FSCS is a separate organisation from the FSA.

If a bank, building society or credit union goes out of business, the scheme pays the first £2,000 in full of the total amount you have in accounts with the bank, building society or credit union and 90% of the next £33,000. This means a maximum compensation of £31,700. Joint holders of a deposit account are each eligible to make a claim for compensation for their respective shares.[330]

13.6 Are supervisors insured against liability?

Other than some of the smaller local authorities, nearly all government bodies self-insure against their legal liabilities (the risk is spread as between the tax payers); others have liability insurance[331]. Even self-insurers sometimes purchase partial cover for unexpected liabilities[332]. It

330 http://www.fsa.gov.uk/consumer/01_WARNINGS/compensation/mn_compensation.html.

331 Zurich claims to be the leading insurer of local authorities, specialising in risk management and insurance

would therefore appear that whilst liability insurance is not obligatory for public bodies, it is relatively common practice, particularly amongst smaller public bodies, such as the smaller local authorities, to take out liability insurance to protect themselves against the risks of litigation.

solutions www.zurich.co.uk.
332 'In the Public Interest: Publication of Local Authority Inquiry Reports', The Law Commission, public law team, p. 23 of the report, to be found at http://www.lawcom.gov.uk/files/lc289.pdf.

14 France

Prof. Dr. Marie-Anne Frison-Roche*

Introduction

Before beginning the technical report on the French system, I would like to emphasize that the system of independent regulators is quite new, established in the 90s, and doesn't correspond to the traditional political organisation, based on a centralised State, leaded by a strong Government. The current question of the liability of the economic regulators refers to the intellectual and concrete fight between this former representation of the sole power of the Government, politically legitimate because responsible before Parliament, and the present organisation of these independent regulators, criticised for their irresponsibility because their failings in supervising are supported by the State. This is why the question of the liability of economic regulators is first and foremost a political question.

14.1 Public bodies responsible for controlling market behaviour or health and safety

In the economic area, the first independent regulator was the *Commission des Opérations de Bourse* (COB, the Securities Transactions Commission) set up in 1967 and put in charge of the financial markets regulation, transferring the US *Securities and Exchange Commission* model. It was reformed in 2004 and became the *Autorité des Marchés Financiers* (AMF, the Financial Markets Authority). This independent administrative body (*Autorité administrative indépendante*) has the power to adopt and implement general rules (quasi-legislative power), the power to authorize companies to exercise regulated activities, the power to punish companies and professionals who don't comply with its regulation. It cooperates to financial regulation at European and international levels. This Regulatory Authority is headed by a chairman, currently Michel Prada, and a board (*collège)*, Its services are headed by a secretary general. It contains an investigation service. In order to respect the prescription of the European Convention on Human Rights (article 6), since 2004, the sanctions are adopted by a special section, which decides the cases brought by the board. Since this new legislation, the *Autorité des Marchés Financiers* has the legal personality and can bring a case before a court. Its decisions may be criticised before a special chamber in the *Cour d'Appel de Paris*, the Appeal Tribunal in Paris, but, for a number of cases, the law has given the competence to the *Conseil d'Etat* , the head of the administrative courts order.

For the insurance sector, a *Commission de contrôle des assurances* (CCA, insurance control Commission) was set up to control more insurance companies than the insurance market itself. It is composed of a Chairman, a Board and a Secretary General. It takes individual decisions of sanction, and gives authorisation to exercise insurance activity. Its decisions may be contested before the *Conseil d'Etat*. During the reform of 2003 on the Financial Markets Regulation, the idea to merge in one body the financial markets supervision and the insurance activities supervision wasn't adopted.

The banking sector regulation is organised more classically. The prudential regulation and the task to grant authorisation to exercise the banking activities, is given to the *Comité des Etablissements de Crédit et des Etablissements d'Investissement* (CECEI, committee of Credit providers and investment providers), in connexion with the *Banque de France* (France Bank). This regulator is headed by the Governor of the Banque de France himself, Christian Noyer. The *Banque de France* supervises the sector, for example by deciding investigations in banks. When a decision must be taken, for example the withdrawal of the authorisation to exercise banking

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activities, this task is given to the *Commisson Bancaire*, also headed by the Governor, which has a disciplinary function. Its decisions may be carried before the *Conseil d'Etat*. France refused to merge the Financial Markets Regulator and the Banking Sector Regulator. The latter stays in a quite traditional conception of public supervision.

About Antitrust matter, a bill of 1986 set up the *Conseil de la concurrence*, another independent administrative body. Currently, its chairman is Bruno Lasserre, a former member of the *Conseil d'Etat*. Just like the AMF, the public body is composed of a Board and a secretary general heads the services. It doesn't have an investigation service, the enquiries being led by the Competition service of the Ministry of Economy. This Regulatory Body has the power to sanction anticompetitive behaviours, such as abuse of dominant position or conspiracy, and knows simple economic discrimination behaviours also, but gives a simple and non madatory advice about merger cases, decided by the Minister of Economy. Since the new E.U. regulation 2003/1, it belongs to the national competition regulator network and applies E.U. regulation. It doesn't have the power to adopt general rules. Such as the *Autorité des Marchés Financiers*, its decision may be contested before the *Cour d'appel de Paris* or the *Conseil d'Etat*. In contrast with the *Autorité des Marchés Financiers*, which monitors the Financial Markets, the *Conseil de la concurrence* is more like a specialised court, reacting *ex post* to prohibit behaviours, pronouncing financial sanctions.

Because of the trend of liberalisations since the 1980s', the opening of previously monopolised by State enterprises, France set up new independent regulators in order to resolve the conflict of interest created for the State to maintain a public capital of the historical operators, such as *France Telecom* in the telecommunications sector, or *E.D.F.* in the energy sector, in competition with new entrants. This is why the bill adopted in 1986 set up the *Autorité de Régulation des Télécommunications* (A.R.T., Authority of Telecommunications Regulation), in charge of building a new competition, of converting this section from a monopoly into a competitive sector. This is an asymmetric regulation, against the State company to favour new competitors, but, under the French conception, the Regulator is also in charge of the public service and the protection of the general interest. This Regulator is managed by a Chairman, Paul Champsaur, an engineer, and a Board. The services are headed by a general Director. It doesn't have an investigation services yet. The A.R.T. has the power to fix some prices, notably the price of the access to the network for the competitors of *France Telecom*, which is the owner of this essential facility. It can decide sanction on the operators which infringe the Telecommunication regulations, and cooperate with the *Conseil de la concurrence*, ever more since the new legislation adopted in 2004, implementing the EU package of regulations and directive of 2002. The *Autorité de Régulation des Télécommunications* gives advice to the Government, notably about the procedure and price fixing of public authorisation (UMTS case). It can settle disputes between companies when they rely to the network access. Its decisions may be criticised before the *Cour d'Appel de Paris* or, for certain cases, before the *Conseil d'Etat*. In 2005, it will be in charge of the regulation of the postal sector, through the new transposition of the EU directive of 1997 on the postal sector liberalisation, in order to favour the competition for certain services, in balance with the public interest and public service.

Newer, the *Commission de Régulation de l'Electricité* (CRE, Commission of Electricity Regulation), was set up in 2000, through the transposition of the EU directive of energy sector liberalisation of 1996. It became the *Commission de Régulation de l'Energie* (always CRE, Commission of Energy Regulation) since the new competitive organisation of the gas sector was set up by a bill of 2003. It is headed by Jean Syrota, an engineer. It has a board and a director general. Such as the A.R.T., which constituted the institutional model for the Energy Regulator framework, it is in charge of an asymmetric regulation, against the State enterprise *E.D.F.*, but also of the general interest. It has the power to adopt sanction and to settle disputes relying to the network access. As every French independent economic regulator, its decision may be contested before the *Cour d'appel de Paris* or, for certain decisions, before the *Conseil d'Etat*.

As opposed to the fundamental evolution of setting up new independent public bodies to regulate sectors, the area of health and safety stays in a quite traditional organisation, because of the lack of legal obligation to move, especially without EU prescription. This is why factory inspection, health inspectorate, building inspectorates, child protection, are assumed by the Ministries of Labour, of Health, of Industry, of Justice, and so on. Their services work in a classical organisation, under the power of the Minister and through the classic public law. Their decisions may be contested before an administrative court.

We can only focus on the *Agence française de sécurité sanitaire des produits de santé* (AFSSAPS, French agency of sanitary safety of health products), established in 1998, which really supervises the sanitary safety. It is not an independent regulator, but it is a public establishment, staying under the control of the Minister of health. It is headed by a Director General, Jean Marimbert, member of the *Conseil d'Etat*, and is composed of a board and technical services, notably a strong and powerful service of investigation. It gives the authorisation of putting new drugs on the market. Its decisions may be contested before an administrative court.

Ever about Independent regulators, theses bodies are centrally organised, based in Paris, according to the French tradition of Jacobinism. It is moreover a feature of the new independent regulators which regulate one sector, simply *ex post* in the case of the *Conseil de la concurrence*, or with not so many operators, such as the financial markets operators, or telecommunication or energy operators, to be based in Paris. For traditional administration on the other hand, in charge of labour or health inspectorate, which concern many companies and many people, it is organised on a central service in the competent Ministry in relationship with regional or local services. It is exactly the case for the labour inspection or for the control of food.

14.2 Liability for inadequate supervision and enforcement

The rule is rather simple. Because of the principle of the due process of Law, the liability for damages caused by an inadequate supervision or enforcement could always be engaged by a court decision. The *Conseil d'Etat* expressed the principle for third parties to claim damages against the State for the misconduct of its public bodies in a decision of March 29th 1946. As I will specify later on, there is no statutory immunity. Only the category of Government acts, a very strict qualification, escape from this general rule, and of course supervision and enforcement are technical functions, which cannot belong to this high political category.

We can except to the system of the regulators liability the situation of the *Conseil de la concurrence*, because, as we said, it works as a specialised court, doesn't really monitor or supervise a sector, doesn't have the task of implementing more general prescription (the *Conseil de la concurrence* is an independent public body but actually more a "supervisor" than a "regulator"). In fact, nobody has ever tried to engage a public liability linked to the *Conseil de la concurrence*. If we try to imagine it, two complaints could be possible. The first would be linked to its judicial activity, punishing anticompetitive behaviours. In this case, a similar rule as the courts' liability would apply i.e. the liability of the States for the fault committed by its courts. The text (article 781.1 of the judiciary organisation Code) requires a serious fault. The other case could be the complaint against the State because of the power of the *Conseil de la concurrence* to open itself a case and to sue enterprises directly before itself (*droit d'auto-saisine*), and one can imagine a complaint for not using the power timely. In fact, the *Conseil de la concurrence* doesn't use this power very frequently, but for the time being, nobody, a competitor for example, had the idea to make such a claim.

In summary, it is always possible to claim damages for a prejudice caused by a fault committed by the regulatory body, referring to the general French principles of the liability. There is no legal ceiling to award damages to the victim, and another general principle, the principle of full reparation, will apply. For the moment, in legal terms, the liability engaged through the regulator's behaviour is the State liability, because of the public nature of theses bodies. Because the State is its own insurer, no insurance mechanism exists. It could change with a new attribution of the legal personality to several regulators, the *Autorité des Marchés Financiers* and the *Commission de Régulation de l'Energie*, because this new nature opens the legal possibility for claimant to sue the regulator directly.

But in fact, no many complaints are exercised against the State for its regulators' behaviours, for three reasons, altogether sociologic and legal. The first reason is cultural: until now, French society is more leaded by the Law, essentially the general rules voted by Parliament, implemented and enforced by Administration, than by the judicial and case-Law system. It is not usual to sue the State for everything. Generally, the regulatory bodies are composed of high civil servants, headed by them, and, despite the new system of public independent regulators described before, it is always the traditional French organisation of power which endures, with a very strong administrative power and a quite weak judicial power. People don't think of claiming

before a court. This first and very important reason could disappear in a few years, because the French society is changing, heading for a more powerful judicial power and for a more demanding conception that people have of their own rights and of the State's duties. France has more and more lawyers, associations of investors are more and more powerful, the Government itself has declared its volition to import the *class action* mechanism, and this cultural reason could move away quickly.

The second reason is a mix of legal and sociological dimensions. The State's liability is engaged by an administrative court. We have insisted on the French duality of courts order before. The principle, built by the French Revolutionary, is that a judicial court must be forbidden to condemn the State for behaviour of its administration, because it would constitute a violation of the principle of powers separation. This was the reason why this special order of administrative courts was set up en 1792 to protect the Government from a judicial authority which must not interfere with the executive power. Until now, if a public regulator has committed a fault and has caused damages, the claim is carried before an administrative court. Now, the jurisprudential point of view of these administrative courts is of course to protect people against abuses of power that the administration could commit but also to understand the difficulties and the specificities of public affairs and to protect the State power of action. Classically, it was usual to present administrative judge as "judge-administrator", who can understand the administration mission and behaviour. This is why the order of administrative courts has the tendency to protect the States against complaints.

As for the first motives, the tendency could change, for two reasons. Firstly, the administrative jurisprudence is changing and is trying to protect more people, notably recognising the importance of fundamental rights. Complaints even before administrative courts would be more welcomed and, for instance, the *Cour administrative d'appel de Paris*, as we will see after, tried to give up the criteria of serious offence in order to make easier the condemnation of the State.

Secondly, the legal rules are changing and, for complex legal reasons, the State liability could be engaged before a judicial court if the behaviour of the Financial Market regulator was in question. This is because of the competence of the *Cour d'appel de Paris* to examine actions against decisions taken by this regulatory authority, along with its ability to examine the linked liability. In a case entitled *Diamantaires d'Anvers*, a victim of a wrongdoing committed by the Commission des Opérations de Bourse (the previous regulator, before the *Autorité des Marchés Financiers* was set up in 2003), decided to sue the State for damages. The *Tribunal des Conflits* (the Tribunal of Conflicts, competent to determine, case by case what order of courts has the jurisdiction), declared in a decision of June 22nd,1993 that the judicial courts order was competent and not the administrative courts order. At the end, the State liability was engaged, and confirmed by the *Cour de Cassation*, the head of the judicial courts order. The complexity of the distribution of competences between the two orders of courts makes it difficult to ascertain what court would be competent for the other public bodies, but it remains that a judicial court is more inclined to engage the liability of a responsible body, even if it is an administrative body.

Some people have understood the facility and we observe a new sort of action: some people, notably minority shareholders, are trying to engage the criminal liability of the persons who run the regulatory body. It is the case in the *Vivendi* affair, where a shareholder asked for the opening of a repressive procedure against the Chairman and the Secretary General of the *Autorité des Marchés Financiers*, because of a letter sent by A.M.F. to the chairman of the firm, authorising him to make a movement on the firm's shares and to not reveal it to the market.

Under these conditions, it is possible that French government will rather permit the State's financial liability than support this sort of very aggressive action against civil servants personally.

The third reason which could explain a quite rare State liability for its regulators' behaviour is the legal requirement of a special fault, a "serious offence". This is the key rule, which characterises the whole system of the State liability for its activities of control. This is where the legal rules become special in comparison with the general principles of liability. For decades, the *Conseil d'Etat* settled that the State liability could be for simple fault, even without fault in certain cases, but if the behaviour which could engage the State liability is linked to a public activity of control, the claimant must prove an especially serious fault. The requisite of a serious fault was immediately expressed by the *Conseil d'Etat* at the same time, in the Stavisky scandal. In a decision of March 29th 1946, the Conseil d'Etat decided the principle of the State's liability itself. The traditional ground of this case-law solution, which applies for every administrative activity of

control, is that the control is a very difficult task and a simple fault isn't accurate to this difficulty.

Now, this reason isn't solid enough, principally because, on one hand, if the damage is caused by a private organisation, judicial courts engage its liability on the basis of a simple misconduct only. This distortion between the judicial and the administrative courts solution would be difficult to admit. On another hand, if we consider the liability principle not only through the behaviour but more in consideration of the damages suffered by the victim, it is difficult to oppose to the claimant the sole difficulty of the task. When for example the medical liability is engaged without fault or on the basis on a simple fault, before a judicial court but also, since a new case-Law rules, before an administrative court, the difficulty of the task is not a good argument, even if the medical activity is complex surely.

This is why the courts were tempted by an evolution towards the sufficiently simple fault, especially the *Cours administratives d'appel* (the Administrative Appeal tribunals which are just below the *Conseil d'Etat*). The *Cour administrative d'appel de Paris* (the administrative Appeal Tribunal of Paris) tried to make a distinction between the activities of the regulator, assuming that its jurisdictional activity needed the demonstration of serious offence to hold it liable, but in its administrative task of supervision, simple misconduct is sufficient to constitute a breach of duty. This is what was decided by the administrative Appeals Court of Paris about the *BCCI* bankruptcy, on 30 March 1999.

This case law movement was stopped by the Conseil d'Etat in the *Kechichian* case concerning the behaviour of the *Commission Bancaire.* The *Conseil d'Etat* had maintained the requisite of a serious offence, in this decision of November 20th 2001. It decided in a same trend in the case *Groupe Norbert Dentressangle*, in a decision of February 18th 2002, about the behaviour of the *Commission de contrôle des assurances*. More surprising, when the same choice between the specific solution of the serious fault and a return to the general rule of a simple fault was given to the *Cour de cassation*, this latter retained the State liability for the behaviour of the financial market regulator, due to the new competence of judicial courts as we saw. But in this case *Diamantaires d'Anvers*, and through several decisions, of October 26th 1993, July 9th 1996 and November 30th 1999, the judicial courts, not only the *Cour de cassation* but also the *Cour d'Appel de Paris* (the Appeal Tribunal of Paris), required the demonstration of serious offence to hold the regulator or the State liable. Of course, it is possible to explain this very special solution, because in private Law, the principle is that the most minor fault is sufficient to create liability, we can imagine the judicial courts' desire to avoid a divergence of jurisprudence with the Council of State, but we can also explain the solution, quite strange in a context of a general return to the simple fault, with new reasons. The first idea is to distinguish the liability of the operators themselves, such as the banks which were bankrupt, liability engaged on a simple fault, and the liability of the regulator, which has the duty to supervise only. More relevant, the second idea is based on the incentive theory. It is incoherent to ask regulators to intervene and to exercise their power strongly, in order to build a real competition on a market open recently or to prevent a systemic risk, and to sanction it if it has used these power too quickly or without enough information This argument is particularly relevant concerning the systemic risk, and this is why the cases where the *Conseil d'Etat* has taken the opportunity to reaffirm the necessity of a serious fault.

These cases have created a great debate on the conditions of the State liability because it referred to a political and global conception of the action of the State and the corollary power of the courts, but in fact, it is quite easy for a court to decide that a particular behaviour constitutes a simple or a serious fault. This discretion is based on the rule that this sort of appreciation is made by the subjective judgment of the judges, without a legal definition or a legal list of what could be or not a serious fault.

For example, in the *Kechichian* case, the *Conseil d'Etat* maintained the requisite of a serious fault, but pointed immediately after that the *Commission Bancaire* has committed a serious fault in this case. In the *Diamantaire d'Anvers* case, the *Cour de cassation* excluded the possibility for an appeal tribunal to engage the State liability only on a simple fault, but, after that, recognised the State liability because the behaviour of the financial market regulator constituted a serious fault.

In this very casuistic way, what sort of regulators behaviours could amount to serious fault? It is difficult to know precisely, because of the lack of cases concerning the regulators of the economic sectors built on an essential infrastructure with a task to facilitate the growth of competition, such as the *Autorité des Télécommunications* or the *Commission de Régulation de*

l'Energie. We can only study the cases about banking, insurance and financial markets regulators.

In this way, an illegality isn't sufficient for constituting a serious fault, neither a simple violation of procedural rules of due process, which are applied to the regulator, especially through Article 6 of the European Convention of Human Right. However, if the illegality is gross, it could be a serious fault. For instance, in a decision of July 9th 1996, the *Cour de cassation* distinguishes the situation where the regulator takes an illegal decision, which constitutes a simple misconduct only, and the situation where the regulator exceeds its powers, which constitutes a serious misconduct, engendering a liability for the State. For instance, in the *Diamantaire d'Anvers* case, the financial market regulator committed an excess of power by exercising a power of authorising which didn't belong to it. On the contrary and in another case, hold by a judicial court, the *Cour d'appel de Paris* , the fact to use confidential documents against a regulated company is construed by the court as a simple illegality and not as a serious misconduct above it (decision of January 26th 1999, *Cauval industries*).

In the same vein, in a decision of the *Conseil d'Etat* of January 18th 1989, the court mentions that an illegal decision taken by an administration could be a serious offence "under the concrete circumstances of the case". This rule gives a lot of discretion to the courts which appreciates the behaviour case by case.

It could be useful to distinguish between the activities of the independent regulators, when it has a jurisdictional function (for instance when it takes decision of sanction), when it has a simple task of individual control, and when it exercises normative power to adopt general rules to regulate the market. Concerning the first and second powers, the court which appreciates the liability that could be retained for misconduct, could distinguish these two tasks effectively. But it is not really relevant because the solutions are the same, even if it is not on the same justification. If we take the solution about the *Commission de contrôle des banques*, a former banking regulator, the *Conseil d'Etat* held that the State's liability would be engaged only if the claimant could prove a serious offence when this banking supervisor acted as a court (for instance decision of December 29th, 1978, *Darmont*). The same rule applies when the public body exercises a jurisdictional activity or a supervisor activity (for instance decision of February 12th 1960, *Kampmann*) since they are both control activities.

But the future evolution will say if the third power, the quasi-legislative power detained by public bodies which not only supervise but also regulate a sector, justifies or not a special solution. In fact, in the *Deloisson* case, the *Tribunal administratif de Paris* (the Administrative Tribunal of Paris) decided that when the excess of power was committed in the regulation power and not simply in the individual application of theses general rules, the misconduct required is only a simple fault. In this decision of April 11th 2002, the State's liability was engaged for the simple fault of the Financial Market Regulator exercising its normative power.

It is difficult to appreciate the scope of this solution, because it comes from a first instance court only, but the decision is recent, taken after the confirmation of the *Conseil d'Etat* of the serious offence requisite, and it could be a new trend and a relevant distinction between the powers of the public body.

The sort of behaviours depends on the sectors considered rather on the powers exercised. For example, the question of the time chosen by the regulator to step in and, for instance, to remove the authorisation to exercise, is specific to the banking regulatory tasks. Concerning the behaviour of the *Commission bancaire* in the *Kechichian* case, it constituted a serious offence, not because of the delay to interfere but because the banking regulator didn't react after the bank didn't comply with its requirements. It is also an application of the general rule that an absence of action engages liability as a positive action might.

More generally, even if it is difficult to speak about a scope of duties, because the French legal system prefers to refer to general principles rather than to a listed obligations and duties, the liability will be appreciated in connexion with the powers of the regulators and the final purpose they were set up for. It is exactly what the decision *Kechichian* says, in general terms, speaking of "the whole diligences which behove the Commission, taking in consideration the purpose of its control and the skills it has". For example, it is more difficult to engage the State liability for the Telecommunications regulator or the Energy regulator behaviours because the real competition permitted by the liberalisation is rather in relation with the own strategy of the new entrants than with the decisions of regulators. In this sort of area, I think the liability could be engaged rather for the regulator's behaviour itself, such as violation of due process or violation of

business confidentiality or corruption, than for the regulator's technical choice.

In the same reasoning, the court takes in consideration the relationship between the task given to the public body and its concrete tools, financially and technically, to do so. For example, the *Conseil d'Etat* appreciated the technical capacity of the body to investigate and the fact that it didn't manage to discover serious misconducts in the supervised bank (decision of 14 February 1973, *Association diocesaine d'Agen*).

But, because the requisite of a serious misconduct is effective, the courts are quite indulgent with regulators. For example, in the *Kechichian* case, the *Conseil d'Etat* estimated that the lack of reaction is a serious misconduct, but in another case, the *Edition Sorman* case, in a decision of 19 December 1995, the Administrative Appeal Tribunal of Paris decided that this same supervisor didn't commit a serious misconduct but only a simple fault when, informed of the financial risk in a financial firm, it didn't react, because in order to commit a serious offence, it is necessary that it had been specially alerted.

In this casuistic way, it is difficult to predict the future evolution, but, on one hand, because the reaffirmation of the necessity of a serious offence by both the *Conseil d'Etat* and the *Cour de cassation* is common and recent, we can anticipate this special rule's maintain. On another hand, because the question of the accountability of the regulators, the supervisors and the courts, is a very debated question, we can imagine that, case by case, the appreciation of their behaviour will be less clement.

Coming to the questions of causation and damage, they are less studied in France, and someone says it is because the centre of the French system of liability is the fault and not the remedies question. If we try to find some rules or topics situations, they will be relevant for the banking and financial sectors only because the difficulty in determining the damage doesn't result from the specific nature of the offence or of the nature, administrative or private, of the organisation, but rather from the action of the bank itself and from the incertitude of the financial and economic system.

For the first question, there are two damages that we must distinguish: first of all, the bank's of the A .listed company's collapse, and after that the loss of deposit or the loss for shareholders, the temptation could be to affirm the causation of the loss of deposit is the firm collapse, and the causation of the bankruptcy is the wrongdoing of managers, or the wrongdoing of professionals in charge of the internal or external control. If we examine the situation of a bankruptcy of an A .listed company, another argument is the approval of financial risk by shareholders and stakeholders, in contrast with the situation of a depositor who seeks the absence of risk.

In consequence, the question is: had the supervisor fulfilled its duty, could the firm's collapse, bank or a listed company, have been avoided? If not, we miss the causal link between the depositors and shareholders or securities holders' damage and the Regulator misconduct. Generally, the collapse is due to the misfeasance of the managers, and it is true both for financial regulation and banking regulation. It is why the courts calculate by division of damages in consequence of division of causes.

Moreover, in the *El Shikh* case, the *Cour d'appel administrative de Pari,s* in a decision of March 30th 1999, refused to examine the question of the fault, because the claimant wasn't able to establish the causation relation between the bank collapse and the regulator's behaviour. In fact, even if it is less debated than the fault question, the requisite of causation, which is a general requisite in the liability legal system, is the stronger barrier against irrelevant lawsuits.

In the *Kechichian* case, the damages allowed were only 10% of deposits. This is a quite strict appreciation and a quite subjective appreciation of the causation level, almost arbitrary. Maybe, it is a trivial way to limit liability actions against the State and the regulators, but it is not possible to impose this solution by the division of damages, which is more accurate than the requirement of regulator serious misconduct, through of text because it depends on case by case.

The second difficulty is about the loss of the deposit. The French legal system refuses to allow punitive damages and we must stay with the principle of full compensation: all the damage but only the damage.

If the victim is a depositor, he could be tempted to deduce that he has the right to seek compensation not only for the money that he has lost but also for the benefits he could have earned from investing the money elsewhere. It is the problem of opportunity costs. The argument is stronger for financial instruments because the investments in a financial market are by nature speculative. But the argument could be reversed:, this money might have been badly invested and been lost ! It is difficult to say with certainty what would have happened.

Another consideration is that, under Law, only the direct damage can be compensated and, even if we can imagine the profits or the losses which would have resulted, this sort of damage is indirect. The French Case Law varies quite a bit on this question but generally, when the compensation is for a deposit, the damages include the sum itself and the legal interest, and no more. But when the compensation is for shares and financial instruments, the judicial courts generally apply the theory of the loss of opportunity.

In applying these principles to find the right level of compensation, in consideration of the causal link or of the opportunity costs, the courts are not very rigorous on the way they calculate the damages, and decide by a sort of intuition to reduce or to increase the sum allowed. If we study case by case the calculation of damages made with this theory of the loss of opportunity, we realize that the main criteria is … the nature of the misconduct: if the offence is serious, the damages will be increased and if it is a minor offence, the damages will be reduced. We all know this reality: civil damages are a sort of punishment. This way is not necessarily wrong because, in regulatory systems, the punishment is more motivating for the regulator and civil damages may have this function.

14.3 Which statutory immunities exist as regards liability of public bodies?

Strictly speaking, there is no statutory immunity, in France. Only members of Parliament and recently the President of the Republic have one, and it is always possible to claim damages, but it is important to bear in mind that people who want to complain must do so against the State and not against the Regulatory Authority itself. It would be different if the new legal personality of the Financial Markets Regulator or the Energy Regulator transform this rule, opening claims directly against the public body, but we must wait for an appreciation by courts on this point.

Referring to the traditional public law, it would be different if the victim can prove a personal fault committed by one of the people who compose the body, a personal fault detachable from the service, but this notion of “personal fault detachable from the service” is very strict and a claim formed directly against a person, such as the chairman of a regulatory body never happened.

The legal rules allow the State to exercise an action against members of the Regulatory body to be paied back for damages it was condemned to grant to claimant, if its liability had been retained because of a misconduct of these members. But this never occurred.

In fact and for the moment, the impact of the liability on the members who head the regulatory body is indirect - it doesn’t mean it is without importance- because of the bad effect on these members’ notoriety.

For the time being, these financial penalties are a drop in the bucket for the State’s budget, because of the small numbers of cases, of penalties and because of the division of damages. Honesty obliges to mention the bank *Crédit Lyonnais* case: it was never brought in court, and it is not a legal case, but the Government confessed that the cost of this hidden bankruptcy amounted to almost forty billions of Francs (5,5 billions of Euros).

14.4 How is the current situation as regards liability of supervisors estimated?

In France, this question of the liability of regulators is debated strongly, in the legal literature - rather by professors of public law than by professors of business law - but also at the political level. Of course, the question of the choice between simple misconduct and serious offence had animated the debate between specialists, but the political debate relies on a more general question. The most important political argument is: is it possible to organise the independence of economic regulators when the financial consequence of their misconduct, even if they are serious misconducts, is supported by the taxpayers, through a Government which is politically responsible before the Parliament but is not allowed to give instruction to these independent regulators ? As we can see the question of regulators’ liability is linked to the accountability question in the public debate and the problem brought about by the distinction between who decides and who pays.

In summary, the rule is considered as well done in its technical side, and this association

between principle of the State's liability for its activities of control and special requisite of serious offence and division of damages through the requisite of causation, which limits the damages effectively granted, but it reveals a crucial political problem, which is its downside.

The question is not the effective protection of people, investors, depositors, and so on, because of other systems of guarantees, especially in the banking or insurance sectors. The debate is political and, for some people, leads to a sort of radical alternative: we must either organise a real accountability of the economic regulators, in a right balance with their independence … or renounce to the new and quite Anglo-Saxon system of independent regulators.

14.5 What are the amounts of compensation following the Banking Directives?

Before the EU Banking Directive, France had a system of financial solidarity, supported by banks and, in order to increase the *ex ante* protection of depositors, the legal rules organised a complex and insecure system where the Governor of the Bank of France had the power to make an "invitation" to shareholders of a bank which had difficulties to fill their obligations, legal or prudential ones, to reinvest in the social capital of this bank. Moreover if the shareholders were also a bank, their obligations were a form of the solidarity duty. But the judicial courts, in bank bankruptcy cases, decided that this "invitation" of the Governor wasn't binding … and no shareholder accepted to reinvest one more time.

This is why the French legal system preferred to give up the inefficiency system while adopting European rules because this latter *Ex Post* rules had the same purpose as investors' financial protection and the French system was already in accordance with the European requisite. Article L.312-16 of the *Code monétaire et financier* (the monetary and financial Code) says that the ceiling of the compensation given to depositors is fixed by the Minister of Economy. In fact, Article 5 of a regulation adopted in 1999, provides for compensation up to 70.000 Euros to be paid to depositors. The ceiling is applied for all the investments made by a person in one bank, whatever is the number of his counts, but the compensation works for each bank where he has some financial assets.

14.6 Are supervisors insured against liability?

I don't think so, because the liability engaged is the State's one and the State is its own insurer. The new legal personality given to the *Autorité des Marchés Financiers,* since 2003, and to the *Commission de Régulation de l'Energie*, since 2005, might change the situation if it becomes legally possible for claimants to try to sue the regulator directly, but more probably, the claims will continue to concern the State and only about financial and banking regulatory decision taken by independent supervisors. As a matter of fact, for the moment and through informal information, it appears that the *Autorité des Marchés Financiers* didn't have a liability assurance policy and is its own insurer, meanwhile the *Commission de Régulation de l'Energie* is thinking about this contractual mechanism to protect itself from financial consequences of a lawsuit engaged against itself directly. This is quite paradoxical because, for the moment, only the banking and financial markets or insurance markets regulators' behaviours had justified judicial liability actions, and never the energy regulator's behaviour. Its volition to insure itself in the perspective of its liability is a signal for a new conscience inside the French public regulatory bodies of their possible and direct liability in the future.

15 Italy♦

Prof. Roberto Caranta*
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15.1 Public bodies responsible for controlling market behaviour or health and safety

15.1.1 Premise

In the past decades the organisation of Italian Government has been subject to a substantial reform aimed at the decentralisation of powers and the specialisation of administrative intervention. This process peaked with the enactment of Article 3 of the Constitutional Law of October 18th, 2001 modifying the sphere of competence of the State and local authorities and giving exclusive legislative power to the Regions with respect to any matters not expressly reserved to State law.

Article 117 of the Italian Constitution now grants the State legislative power in relation, amongst the others, to the protection of savings, financial markets, competition, the currency system, the organization and administration of the State and of national public bodies, the determination of the basic standards of welfare related to those civil and social rights that must be guaranteed on the entire national territory, as well as social security and the protection of the environment, of the ecosystem and of the cultural heritage.

The protection and safety of labour, health protection and food control are amongst the activities subject to concurrent legislation of both the State and the Regions. In matters of concurrent legislation, the Regions have legislative power except for fundamental principles which are reserved to state law.

As a practical matter the supervision of various sectors of the Italian economy has been progressively pursued trough the institution of independent administrative authorities (*autorità amministrative indipendenti*).[333] One of the main reasons which lead to the institution of independent administrative authorities is of a constitutional nature. Article 97 (1) of the Italian Constitution lays down the principle of impartiality which can be read as a rule against (mainly political) bias. Administrative action should not be driven by partisan considerations. Traditionally, politics has tended to take the upper hand in Italy, shredding impartiality. Ministers and other elected officials acting at a regional and local level have been known to meddle with everyday administrative activities, bending it to partisan ends. Ministerial responsibility has been of very little or no avail; the majority is far too ready to condone any biased activity advancing its own partisan interests.

Thus, independent administrative authorities were introduced as a way to break the link between the politicians and the administrative decision makers[334]. The standard formula

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♦ The analyses and conclusions developed in the paper have been jointly developed by both Authors. However, for scientific purposes paragraphs 1, 4 and 6 shall be ascribed to Prof. Roberto Caranta, while paragraphs 2, 3, and 5 shall be ascribed to Dott. Filippo Rossi.

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333 *Autorità amministrative indipendenti* was a term of art in Italian law well before it was applied in any legislative act. Italian scholars versed in comparative law immediately pointed out that Italy was walking the path taken almost a century before by the United States of America and - from a later date - by France. The U.S. experience is considered with reference to the Italian developments by N. Longobardi 'Les autorités administratives indépendantes, laboratoires d'un nouveau droit administratif' in *Petites affiches* 1999, n° 171, pp. 4 ff. In actual facts, the term was a direct translation from the French *Autorités administratives indépendantes*. See M. D'Alberti *Diritto amministrativo comparato* (Bologna, il Mulino, 1992) pp. 144 ff.

334 Another way has been to differentiate the tasks of elected officials and public servants, limiting the say of the former in everyday administrative activities: R. Caranta 'Point de vue sur les reformes récentes en matière de

employed in the legislation starting form 1990 has it that the authority operates in full autonomy and with independence of judgement and evaluation[335]. Independent administrative authorities are in no way linked to the traditional ministerial structure. The Government does not have the power to give directives to the authorities. Consequently, ministerial responsibility does not play any role with reference to the activities of independent administrative authorities[336]. At times independent administrative authorities are charged with supervisory powers which extend to certain aspects of the Government's activities. This is the case for instance with the authority charged with overseeing public works procurement.

Independent administrative authorities have closer links with Parliament. They are set up by statutes, that is by act of Parliament. The act outlines their jurisdiction. It also lays down the rules the authorities will have to apply in their activities. Parliament usually plays an important role in the appointment of members of the authorities. Normally the authorities report to Parliament on a regular basis; in many cases they may also give advice on bills proposed to the Houses of Parliament.[337]

Independent administrative authorities enjoy a nation-wide jurisdiction. There are no specific rules concerning their relationships with regional and local governments, some of whose activities can fall under the jurisdiction of this of that authority.[338]

Generally speaking, neither the government nor any minister has the power to give orders to independent administrative authorities, to issue guidelines as to how they must discharge their duties, to take a decision in their stead or to quash decisions taken by them. The core idea is that these authorities must have a significant, albeit variable, degree of insulation from politics[339]. In a sectarian polity like Italy, this is to ensure they act in unbiased ways: they are also considered to be authorities possessing impartiality to a high degree (*autorità ad alto livello di imparzialità*).[340] The insulation from politics, and more importantly from the Government and the majority in Parliament, is the one feature setting administrative independent authorities.[341] This does not mean all administrative independent authorities in Italy conform to the same invariable pattern. Quite the contrary, significant differences exist, mainly as to the ways their independence is granted and as to the powers which are bestowed upon them. The '90s were the heyday of independent administrative authorities in Italy. Many new authorities were created and some pre-existing ones were granted such prerogatives and powers as to be considered independent.[342]

15.1.2 Financial market supervisions

In various jurisdictions there has recently been a trend towards the institution of single regulators, agencies responsible for the overall supervision of the traditional sectors of the financial markets. On the contrary the Italian system of financial market supervision remains characterised by a "mixed approach" of institutional and functional approach, with different duties imposed on a plurality of independent agencies. This system can be summaries as follows.

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fonction publique en Italie', in in *Perspectives pour la fonction publique. Conseil d'État - Rapport public 2003* (Paris, La documentation française, 2003) 399.

335 E.g. Art. 10 (2) l. 10 ottobre 1990, n. 287, concerning the Antitrust Authority: «*L'Autorità opera in piena autonomia e con indipendenza di giudizio e di valutazione*».

336 See however Cons. St., Comm. Spec., May 29th, 1998, n. 988/97, in *Foro amm.* 1999, 414.

337 E.g. Art. 22 Law October 10th, 1990, n. 287, concerning the Antitrust Authority.

338 The recent constitutional reform, which has made Italy's institutional structure closer to the federal model, has not addressed the position of independent administrative authorities. The question is likely to surface again in the near future in the framework of the progressive federalisation of the Italian State.

339 F. Merusi and M. Passaro *Le autorità indipendenti* (Bologna, il Mulino, 2003) p. 7, go as far as writing that independent administrative authorities were set up out of spite for politics and politicians; T.A.R. Lazio, Sez. I, April 10th, 2002, n. 3070, *T.A.R.* 2002, I, 844; *T.A.R.* 2002, II, 411, note M.P. Santoro 'Il sindacato del giudice amministrativo sull'operato della CONSOB', held that independent administrative authorities were set up to dispell the suspicion that decisions taken in given matters were politically motivated (point 9.4).

340 Again M. D'Alberti *op. cit.* p. 144.

341 F. Merusi and M. Passaro *Le autorità indipendenti*, cit., pp. 54 ff.

342 C. Franchini 'Le autorità indipendenti come figure organizzative nuove' in S. Cassese - C. Franchini (edds.) *I garanti delle regole* (Bologna, il Mulino) 1996, pp. 69 ff., makes the case that independent administrative authorities are a new form among others in a deeply changing institutional architecture.

a) Supervision in the banking sector

The supervision over banking institutions is delegated to the *Bank of Italy* with regard to stability, transparency and competition law.[343] As we shall see below, as supervisory authority Bank of Italy is charged, under provisions of the Legislative Decree n. 385 of 1993 (thereinafter "the 1993 Banking Law") and Legislative Decree n. 58 of 1998 (thereinafter "the 1998 Securities Law"), with supervisory powers on the banking system, other financial institutions, wholesale market of government securities. Bank of Italy also collects information from banks (under provisions of article 53 of the 1993 Banking Law) regarding borrowers exposures towards the whole banking system.

Bank of Italy was established by Law August 10th, 1893, n. 449, which merged together some pre-existing financial institutions. According to Article 20 of the Royal Decree Law March 12th, 1936, n. 375, the Bank of Italy is a public body. The growing independence of the Bank is much more a matter of fact than a matter of law: in the past decade or so, most of the shareholding banks were privatised; as such they are no more under the direct influence from the Government.[344] The tenure of the Governor is not fixed and he can be removed from his office only following the same procedure as that of the appointment. Traditionally, most of the powers of the Bank were exercised in strict co-operation with the government, more specifically with the Ministry of Treasury. Starting in the early '90s the Bank was granted autonomous decision-making power. This was the case for instance with Law February 7th, 1992, n. 82; it gave the Bank the power to set interest rates; the 1993 Banking Act did away with the practice of having the Bank financing the State budget by the compulsory buying of State bonds which went unsold on the market; the same piece of legislation further but not fully emancipated the Bank's vigilance functions over the banking system from governmental guidance.

Actions for damages against Bank of Italy are mainly brought in the area of supervision of banks and other financial institutions and, in few cases, in that of financial services provided as State's agent, whilst, at the present time, no action turns out to be taken against Bank of Italy in its role of monetary policy authority and overseer of payment systems and securities settlement systems.[345] Since the Bank is not financed from the State budget, taking its resources directly from its operations, the burden of payment due for compensation for losses is born by Bank of Italy itself.

b) Supervision over investment services

Supervision over investment services offered by banks and investment firms and over collective investment undertakings, is under the responsibility of the Commissione Nazionale per le Società e la Borsa (thereinafter "Consob") in relation to transparency and investor protection and of Bank of Italy in relation to both the limitation of the risk and financial stability. In particular, the separation of roles between the Bank of Italy and Consob is delineated according to the specific field concerned:

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343 Following to the collapse of the Parmalat group, there has been a legislative proposal to confer competition law supervision in the banking system to the Italian Antitrust Authority (the *Autorità garante per la concorrenza ed il mercato*, thereinafter AGCM). The AGCM was set up by Article 10 of Law October 10th, 1990, n. 287 . Its members are named by the Presidents of the two Houses of Parliament acting jointly. The rules on the proceedings in front of the Authority are laid down in a statutory instrument adopted following a deliberation by the government. The authority has the power to decide on its internal organisation and on how to spend its budget; it is financed from the national budget. The Authority was originally charged with the application of Italian antitrust law; Italian antitrust law is quite in line with Art. 81 and 82 (formerly Art. 85 and 86) of the EC Treaty; Art. 1 (4) Law October 10th, 1990, n. 287, which states that Italian antitrust law has to be construed in conformity to Community law. In preparation for the decentralised application of EC antitrust law, art. 54, 5° comma, of Law February 6th, 1996, n. 52, made the Authority competent also with reference to EC law. Later Legislative Decree n. 74 of 1992, gave the Authority powers concerning misleading commercial ads.

344 State and Regional Government retain some control over important banks such as San Paolo- IMI, Unicredito and other through the *Fondazioni*, non profit organisations often under the influence of the State and / or Regional governments which are major shareholders in those banks.

345 For a detailed discussion of the liability of the Bank of Italy for the institutional functions conducted not related to the supervision of the banking market, see F. Rossi and R. d'Ambrosio, "The Accountability of national and supranational regulators. The Italian system", paper presented at the conference on "The Accountability of national and supranational regulators" at the British Institute of International and Comparative Law, March 21st, 2003, London.

i) *Regulation and supervision of intermediaries*: According to article 5 – purpose and scope – of the 1998 Securities Law, the general purpose of the supervision of intermediaries is to ensure transparent and proper conduct and the sound and prudent management of authorised persons, having regard to the protection of investors and the stability, competitiveness and proper functioning of the financial system. In this respect Bank of Italy is responsible for matters regarding the limitation of risk and financial stability while Consob for the ones regarding transparent and proper conduct.

ii) *Regulation and supervision of markets* is structured into two levels. The day-to-day supervision is conducted by a management company, which is a private corporation. The Bank of Italy, in agreement with Consob, is responsible for the operation of the clearing and settlement service and the gross settlement service for transactions involving financial instruments. Furthermore, in cases of necessity and as a matter of urgency, the Bank of Italy shall adopt appropriate measures to ensure the timely closure of settlement, including its acting in the place of the administrators and managers of the systems and services referred to in Articles 69 and 70 of the 1998 Securities Law (Article 77 of the 1998 Securities Law). On the other hand, Consob is responsible for the orderly conduct of trading with the aim of ensuring the transparency of the market and the protection of investors (Article 74 of the 1998 Securities Law).

iii) *Regulation and supervision of issuers* is the responsibility of Consob, which shall exercise its powers having regard to the protection of investors and the efficiency and transparency of the market in corporate control and the capital market (Article 91 of the 1998 Securities Law). According to Article 129 – issues of debt securities – of the 1993 Banking Act, Bank of Italy has the responsibility to ensure the efficiency and the financial stability in the issuing of bonds.

The Consob, was first set up under Law Decree April 8th, 1974, n. 95 and Law June 7th, 1974, n. 216.[346] Its quite old origins are the reason for the central role played by the Government in the choice of the Commission's members, who are named by the President of the Republic acting on the proposal of the Prime Minister; the role of the Parliament is quite limited, since all it can do is to audition proposed members[347]. In the beginning the Consob was but one specialised organ within the structure of the Ministry of Treasury; its tasks were limited to vigilance over companies listed on the Italian Stock Exchange. Today the Consob oversees all kinds of financial operations. Apart from policing the listing on the Stock Exchange and on other lesser exchanges, the Consob oversees the operation of every financial intermediary; it determines which information is to be disclosed to actual and prospective investors. Law June 4th, 1985, n. 281, severed the Consob from the ministerial structure, setting it up as separate legal entity acting in full autonomy.[348]

Since 1995 Consob has been funded partly through a specific allocation from the central government budget and partly through fees collected directly from markets participants for the activities it carries out.[349] Thus the burden for payments due to compensation losses is partially born by the Commission itself and by the State.

346 See www.consob.it .

347 M. Passaro *Le Amministrazioni indipendenti*, cit., pp. 139 ss. maintains that this does not really bite on the independence of the authority, since the choice has to be made among people having specific knowledge, experience, and of known moral standing and independence; this however is quite a usual and fairly generic formula applied to many other independent administrative authorities, which by itself does not seem to be enough of a remedy against partial behaviour.

348 M. Passaro *Le Amministrazioni indipendenti*, cit., p. 135.

349 Article 40, Law December 23rd, 1994, n. 724: "Misure di razionalizzazione della finanza pubblica". See G. De Minico *Antitrust e Consob. Obiettivi e funzioni* cit.; see also E. Cardi and P. Valentino *L'istituzione CONSOB* (Milano, Giuffré, 1993); S. Cassese 'La Commissione Nazionale per le Società e la Borsa – Consob e i poteri indipendenti' in *Riv. soc.* 1994, I, 412; N. Marzona 'Il regolamento sull'organizzazione e sul funzionamento della CONSOB' in *Giorn. dir. amm.* 1995, 522.

c) Supervision in the insurance sector
Insurance undertaking and intermediaries are supervised by the *Istituto di Vigilanza sulle Assicurazioni Private e di Interesse Collettivo* (thereinafter "Isvap") in relation to stability and transparency.

The Isvap, was originally created by Law August 12th, 1982, n. 576[350]. The President of the Isvap is named by the President of the Republic acting on the proposal of the Government; the other members are directly chosen by the Government itself[351]. Originally the Isvap was grafted onto the organisation of the Ministry of Industry and its powers were in the main confined to giving advice to the Minister. Most functions concerning the insurance market have been transferred to Isvap; they include the issue and withdrawal of licences to insurance firms, the supervisory powers over the insurance market, and regulatory powers aimed at policing insurance contract conditions to inform and protect customers. The transfer has been gradual, with a long and almost exasperating list of pieces of legislation, the last of them being Law March 5th, 2001, n. 57.[352]

The Isvap has full financial autonomy, being financed from contributions the law imposes on insurance firms[353]. Thus it bears all expenses due to compensation for losses it caused.

d) Supervision over pension funds
Article 16 of the Legislative Decree April 21st, 1993, n. 124, identifies in the *Commissione di Vigilanza sui Fondi Pensione* (thereinafter "*Covip*") the competent authority for the supervision over pension funds. The Ministry of Labour, in accordance with the Ministry of the Treasury, issues general directives in relation to the supervision of pension funds and supervises the Commission. Every authorised person carrying out a financial activity for the pension fund is, in addition, subjected to its ordinary regime of supervision.

15.1.3 Health and Safety Supervision

According to Article 32 of the Italian Constitution, it is the duty of the Republic to protect health as a fundamental right of the individual and interest of the general public. The protection of public health and safety is now under the responsibility of the Ministry of Health.

Public health and safety supervision is carried out by the *Servizio Sanitario Nazionale* (the "*SSN*"), a complex multilevel administrative structure composed by the Minister of Public Health and the *Consiglio Superiore della Sanità* (the "CCS"), as well as local and central authorities.

The principal central authorities of the SSN are: *i)* the *Istituto Superiore della Sanità* (the ISS),[354] a technical public body mainly deputised at the research and experimentation as well as supervision and development of public health and medicines (cd. "*farmacovigilanza*");[355] *ii)* the *Istituto Superiore per la Prevenzione e Sicurezza del Lavoro* (the "ISPESL"), entrusted with research and control of healthy and safety of working places;[356] *iii)* the *Agenzia per i Servizi Sanitari Regionali* (the "ASSR"), which essentially supervises the activity of local authorities of the SSN;[357] *iv)* the *Istituti Zooprofilattici Sperimentali* (the "II.ZZ.SS.") which are public bodies provided with administrative autonomy and deputized to the technical control of the health and sanitary conditions of animals, animal derivate food and farms.

At a local level, the Regions are charged to programme, organise and supervise, within their own jurisdiction, all activities related to the protection of public health as well as to coordinate the activity of the *Aziende Sanitarie Locali* (the "*ASL*") which are charged with providing the health

350 See www.isvap.it .
351 Here again M. Passaro *Le Amministrazioni indipendenti*, cit., pp. 139 ss. maintains that independence in not in danger due to the specific requirements nominees must have.
352 See F. Merusi and M. Passaro *Le autorità indipendenti*, cit., pp. 25 f.; less recent developments were analysed by R. Caranta 'La nuova ISVAP' in *Resp. civ. prev.* 1998, pp. 17 ff.
353 As M. Passaro *Le Amministrazioni indipendenti*, cit., p. 153, remembers, contrary to other administrative independent authorities, the ISVAP is not exempted from audit by the *Corte dei conti* (the Italian Court of audits).
354 See website: www.iss.it .
355 See Legislative Decree n. 44 of 18 February 1997, which implements the Directive 93/39/CE.
356 See website: www.ispesl.it .
357 See website: www.assr.it .

service within their territory, and of public hospitals (the "*Aziende ospedaliere*").

15.2 Liability for inadequate supervision and enforcement

In the last decade the liability of public authority - in general - and of supervisory bodies - in particular - has been substantially influenced by the evolution of European law. In the system this process can be conveniently presented distinguishing three different stages. We will first look at the general tort law regime provided by Article 2043 of the Civil Code and the traditional judicial immunity conferred to public authorities as well as its subsequent weakening. We will then deal with the Vitali decision; the actual leading precedent for tort liability of public authorities. The final subparagraph will present the most recent decisions dealing with the liability of public authorities.

15.2.1 Tort liability of public authorities

Public authorities are subject to the provisions of the article 28 of the Constitution. This provision states the joint and several liability of the public authorities and theirs employees for unlawful acts that cause an unjustified injury to a person. Nevertheless, the liability of public employees is confined by article 23 of the Presidential Decree n. 3 of 1957 to the cases of fraud and gross negligence.

Thus under Italian law public authorities are subject to the ordinary law of tort ("*responsabilità extracontrattuale*"). Article 2043 of the Civil Code, the central provision of the Italian legal system governing tort liability, establishes: "*a deliberate or negligent act of any sort, which causes an unjust harm to another, obligates the person who committed it to compensate for the harm*". [358] According to Article 2043 c.c. for liability in tort to arise there must be:

i) a fact: this can be either an act or an omission;

ii) the capacity to understand and intend: that the fact must be referable to the defendant (*i.e.* it must be an act of a person who is capable of understanding and intending the fact);

iii) blameworthiness: the act must be "deliberate" or "negligent". The definition of these elements is provided by Article 43 (Mental Element of the Offence) of the Italian Criminal Code. According to Article 43 (1) a crime is intentional "when the harmful or dangerous event which is the result of the act or omission, and of which the law makes the existence of the crime depend, is foreseen and desired by an actor as a consequence of his own act or omission". According to Article 43 (3) a crime is committed with negligence "when the event, even though foreseen, is not desired by the actor and occurs because of carelessness, imprudence, lack of skill, or failure to observe laws, regulations, orders or instructions";[359]

iv) an unjust damage: a damage is generally defined as "the injury of a legally protected interest" while the injustice of the damage is inferred by its illegality: "the damage is unjust and result in compensation where it arises thorough the illegitimate injury of the legal sphere of another subject".[360] This means that an unjust damage occurs in every case in which it was caused not for any lawful reason.[361]

v) causation: there must be a casual link between the act or omission and the event.

Each of the ingredients listed by Article 2043 of the Civil Code rises several issues.[362] Dealing with the element of an *unjust damage*, until recently Courts created a judicial rule according to

358 See T.G. Watkin, *The Italian Legal Tradition*, 1997, Ashgate, p. 247
359 M. Wise, *The Italian Penal Code*, Sweet & Maxwell Limited, London, 1978.
360 G. Leroy Certoma, *The Italian Legal System*, Butterworthss, London, 1985,p. 367
361 See T.G. Watkin, *op. cit*, p.253
362 Most of those issues fall outside the purpose of the present paper and will therefore not be discussed.

which for a damage to be unjust it should be both *non jure*, that is the injury or damage which results from conduct or action non justified by another legal provision, and *contra jus*, that is when a subjective right (*diritto soggettivo*), as opposed to the subjective position of legitimate interest (*interesse legittimo)*, is violated.[363] The subjective right is commonly defined as "the power to act for the satisfaction of an interest which is recognised and protect by the legal system". It is "the power to act within the limits indicated by the relevant norm or, in other words, the legal possibility of taking a stance in relation to a given legal situation".[364] The legitimate interest can be defined as "the pretence that the administration validity exercises its power to sacrifice or expand a right" or, in other words, "the pretence that the administration exercises its power in accordance with the norms which regulates the exercise of its power".[365]

The distinction between subjective rights (*diritti soggettivi*) and legitimate interests (*interessi legittimi*) has some bearing with the English dichotomy distinguishing private and public law rights. One of the criteria commonly adopted to distinguish these two subjective positions is the one related to the scope of the provision breached by the public administration.[366]

According to this theory, the public administration's activity is ruled by two different kinds of provisions, namely *norme d'azione* and *norme di relazione*. The first category of rules – *norme d'azione* - covers those deputised to rule the public administration's activity taking into account only the public interest.

In this case individuals' subjective position is the one of legitimate interest. Consequently they are merely legitimated to request the administration to act in accordance with the provisions regulating the exercise of its power. The second category of rules – *norme di relazione* – includes those deputised to rule the relationship between the public administration and the single individual, conferring him a subjective position of substantive right.

The distinction between subjective rights and legitimate interests has been for a long time the key element to properly understand the issues arising in the field of the public administration's liability. According to Article 2 of Law March 20th, 1865, n. 228, All E, civil courts have jurisdiction when civil or political rights are involved, while claims involving legitimate interests must be decided by administrative judges. Administrative courts are authorised by the administrative jurisdiction to evaluate the legitimacy of the actions of public authorities. Individuals cannot claim an individual right against public authorities when the case involves administrative discretionary powers.

This old system can be summarised as follows: damages for breach of a legitimate interest were recognised only in case of a legitimate interest related to a public act which is adverse to the citizen (legitimate interest "oppositivo"), while they cannot be asked in case of a legitimate interests related to a favourable act by the public administration (legitimate interest "pretensivo"). For damage to a legitimate interest "oppositivo" to be recovered, a condition was the annulment of the illegitimate act by administrative courts. Following to the annulment of the illegitimate act, the action in damages should have been brought before a civil court.

One of the clearest examples of the concrete application of this judicial immunity is provided by a decision of the Corte di Cassazione in a case relating to the supervision of building safety.[367] The case arose from the collapse of a residential building in Barletta, a town in the Southern Italy region of Apulia, on September 1959. Fifty eight people died and many more were injured. The building had originally been a one floored row of garages. Then, in 1957, a firm asked the local authority permission to build three more flat floors on the top of it. Permission was granted after the project submitted by the firm was reviewed by the technical building commission of the local authority; the commission only required some minor aesthetic changes. The project was in breach of many existing building regulations and was ridden with obvious mistakes in the way engineering calculations had been made. The project was further incorrectly executed, resulting in breach of the licence which had been granted. Even before the building was completed,

363 E. De Marzio, *State liability for the breach of European Community Law and the effect of the* Francovich *case on the Italian legal system*, p.7.
364 G. Leroy Certoma, *op. cit.*, p. 20
365 G. Leroy Certoma, *op. cit.*, at p. 23.
366 The distinction between *norme d'azione* e *norme di relazione* has been elaborated by Gucciardi, *La giustizia amministrativa*, Padova, 1957.
367 Cass., Sez. un., 17 novembre 1978, n. 5346, in *Giust. civ.* 1979, I, 17, with critical annotation by A Postiglione 'La tutela della salute nell'urbanistica e la responsabilità della p.a. nel caso di rovina di edificio'.

however, the local authority issued a certificate stating that it was fit for human dwelling. An action for damages was brought by some of the victims and their estate against the local authority. It snailed all the way up to the Corte di cassazione which handed down its judgement in 1978. The court, on what it claimed to be the true construction of relevant statutes, held that all the powers conferred on local authorities were aimed to protect the general interest to a more harmonious development of town and villages, and this both from the socio-economic and the aesthetic points of view, minding also the further general interest to minimal hygienic conditions of dwellings. The relevant provisions were not minded to confer any rights to specific individuals. According to the established national catchwords, only *interessi legittimi* but not *diritti soggettivi* flew from those rules, and this also due to the discretionary nature of many of the powers vested into the local authority. One could say that the local authorities have a duty to the general public to allow only beautiful and sterilised dwellings, never mind if they fall down killing some dozen specific and named individuals. The court totally failed to appreciate that, even if the tragic story was riddled with illegal decisions, public law remedies were of no help to those harmed.

A similar solution was provided in a case concerning the alleged liability of the public authority in charge of providing the authorisations for the foodstuff's trade subsequently to an illegal order to destroy product for alimental consumption.[368]

In the field of financial services supervision the issue of public authority liability in negligence, arose for the first time in 1958, in the *Banco De Calvi* case.[369] Some investors sued in damages both the Minister of the Treasury and the Bank of Italy arguing, on the one hand, that the authorisation given to the *De Calvi* enterprise to define itself as "*banco*" was provided in breach of the relevant Banking Law (Law March 7th, 1938, n. 141), because of the absence of sufficient funding in the enterprise. On the other hand, investors held that the defendants failed to supervise the *De Calvi*'s activity even after the investors' announcements of the irregularities committed by it.

In the 1960's and 1970's there were two cases decided by the Tribunal of Rome, the *Banca Bertolli*[370] and the *Banca Privata Italiana*[371] judgments. In the latter the Bank of Italy has been sued in damages for its negligence supervision over the merger between several banks which disappear in the *Banca Privata Italiana*, operation which caused losses to both investors and depositors of these banks for the irregularities committed by the merging companies.

In the eighties and nineties we can find some other cases dealing with the issue, namely: the *Banco Ambrosiano*,[372] the *Cassa di Risparmio di Prato*, the "*HVST*", the "*Sgarlata*", the salvage plan for the *Perfin-Montedison*[373] group and, finally, the "*Zoppi SIM*".

With the relevant exception of the *Sgarlata* and *Cassa di Risparmio di Prato* decisions, all investors' claims were rejected on the basis of a two steps test:

i) investors can sue the public administration in damages only if they suffered a damage to an individual right, not being sufficient a damage to a legitimate interest;[374]
ii) the supervision activity provided by the public bodies is given only in the public interest and it involves administrative discretionary powers. Consequently investors had only a subjective position of legitimate interest and not an individual right.

15.2.2 First departure from judicial immunity in the field of financial services supervision

The evolution of European law and its influence on the Italian system led to a departure form this judicial approach recognising the liability of the public authority in a limited set of circumstances. This new judicial trend can be appreciated in the decisions of the Corte di Cassazione in the

368 Cass., sez. un., November 9th, 1989, n. 4708, Giust. civ. Mass. 1989, fasc.11.
369 Court of Appeal of Genoa, January 15th, 1958, reported in Banca Borsa e Titoli di Credito, 1958, II, p. 52.
370 Tribunal of Rome April 30th, 1963, reported in Banca Borsa e Titoli di Credito, 1964, II, p. 106.
371 Tribunal of Rome April 27th, 1977, reported in Banca Borsa e Titoli di Credito, 1978.
372 *Corte di Cassazione* March 29th, 1989, n. 1531, reported in Banca Borsa e Titoli di Credito, 1990, II, p. 425.
373 Tribunal of Milan June 23rd, 1997, reported in Giur. It., 1998, p. 100.
374 The question of establishing if plaintiffs have a cause of action in damages was considered to be related to the definition of their subjective position, which was not a question of jurisdiction but of merit to be, consequently, decided in front of the ordinary judge.

Sgarlata and the *Cassa di risparmio di Prato* cases, mentioned above.

In the *Sgarlata* case[375] a liability action was brought personally against a former Minister for the Industry, commerce and crafts, Mr Altissimo. That is in itself a rare occurrence. As seen above, it is true that under Art. 28 of the Italian Constitution all public servants are individually and personally responsible for breaches of individual rights. Civil actions are however usually brought against public bodies whose solvency is not in doubt.[376] The Minister was the authority at that time responsible for supervision of financial institutions other than banks.

A number of claimants claimed that he had revoked the authorisation to one of such institution due to serious mismanagement, but, at the same time, he had allowed it to transfer its activities to another company being part of the same financial group. The latter company had later collapsed leading to financial losses for the claimants. Mr. Altissimo defended himself claiming that as a supervisory authority he enjoyed wide discretionary powers; even if he had been mistaken in the use he had made of his powers, the depositors could only claim a breach of *interessi legittimi* not sounding in damages.

The *Corte di cassazione* departed from its earlier case law. It held that in principle a public authority, even in the field of discretionary powers, has to act in respect of both Article 97 of the Italian Constitution, which establishes the principle of legality, impartiality and good administration, and of the *neminem leadere* rule. In the case of a public administration causing a damage to an individual right in breach of one of these principles, it can be sued in tort under article 2043 civil code.

The *Cassa di Risparmio di Prato* decision arose from the alleged misfeasance of the Bank of Italy in authorising a public offering and placement of atypical securities.[377] The *Corte di Cassazione*, deciding on point of law, established that the subjective position of an investor suffering loss as a consequence of the negligent activity of a supervisory authority has to be qualified as an individual right, namely the "diritto all'integrità del patrimonio" established for the first time in the *De Chirico* case.[378] The case was then referred to a trial judge for a new decision on the facts.

15.2.3 The Vitali decision

The old judicial approach to governmental liability has recently been overruled. As seen above Italian courts interpreted the element of an unjust damage as requiring both the condition of being *non jure* and *contra jus*. This situation was commonly resented as unacceptable, last but not least because it conflicted with Community law provisions providing that a remedy in damages is to be available in case of breach of rules on public procurement and more generally with the European Court of Justice case law on Member States' liability.[379] The *Francovich* judgment had a great influence on the Italian tort law, because thus "the Italian practice of denying State liability in cases of *interessi legittimi* was now officially conflicting with the ECJ position to the subject".[380]

The result was achieved only in 1999 with the *Vitali* decision.[381] The facts of the case are straightforward. A local authority had assented to an urban development plan; when amending the existing urban plans, however, it failed to introduce those changes necessary to implement the development plan; the developer was successful in challenging the new urban plans and have them quashed by the administrative courts; then he went to the civil courts asking for damages.

The *Corte di Cassazione*, finding for the plaintiff, reinterpreted Article 2043 of the Civil Code

375 Cass., s. u., June 2nd, 1992, n. 6667, in *Resp. civ. prev.* 1993, 576.
376 M. Clarich, 'The Liability of Public Authorities in Italian Law' in J. Bell and A.W. Bradley *Governmental liability: a comparative study* (UKNCCL London 1991) 207, 233 ff.
377 Tribunal of Prato January 13th, 1990, in Banca Borsa e Titoli di Credito, 1991, II, 63; Court of Appeal of Florence May 20th, 1991, reported in Banca Borsa e Titoli di Credito, 1991, II, p. 459. Corte di Cassazione October 27th, 1994, n. 8836, in Banca Borsa e Titoli di Credito, 1995, II, p. 525.
378 *Corte di Cassazione* May 24th, 1982, n. 2765.
379 Among others G. Greco, 'Interesse legittimo e risarcimento dei danni: crollo di un pregiudizio sotto la pressione della normativa europea e dei contributi della dottrina' in *Riv. it. dir. pubbl. comunitario* 1999, 1108.
380 E. De Marzio, op. cit.
381 *Corte di Cassazione* s.u., July 22nd, 1999, n. 500.

and held that the element of unjust damage requires the damage to be only *non jur*e (*i.e.* the damage must be caused in the absence of an excusing rule), without any need for it to be *contra jus* (*i.e.* affecting an individual right),[382] being sufficient a damage to an "individual interest relevant for the legal order".

In sum, following to the *Vitali* decision, the ingredients to establish a cause of action in tort pursuant article 2043 of the Civil Code against the public authority are:

i) the existence of a damage;

ii) the damage being referred to an individual interest relevant for the legal order; this can be either a subjective right or a legitimate interest;

iii) the existence of a casual link between the public act or omission of the public authority and the damage;

iv) the negligent, reckless or intentional behaviour of the public administration: the evidence of the negligent behaviour of the administrative authority cannot be inferred from the illegality of the administrative act but lies on the violation of the rules of impartiality, fairness and good administration as set forth by article 97 of the Italian Constitution.

15.2.4 Leading cases in the field of financial markets supervision

This new approach of the Italian courts has been confirmed in the HVST decision decided in March 2001.[383] The case is extremely instructive for present purposes since it captures the judicial evolution in the subject matter. The decision of the Tribunal of Milan and of the Corte di Cassazione in the first hearing reflected the traditional approach adopted by courts. The judgment of the Court of Appeal of Milan can be reconciled with the judicial trend aiming at weakening this judicial immunity. The principles established by the Corte di Cassazione in the second hearing and the decision of the Court of Appeal of Milan in its second hearing constitute the current leading cases in relation to tort liability of supervisory authorities.

The case concerned the alleged liability of the Consob for negligence in supervising the completeness and truthfulness of the information provided by a company in relation a public offering of atypical securities. On July 1983 a group of promoters published a prospectus according to article 18 of the Law June 7th, 1974 n. 216 in order to promote the placement with the public of the securities of the Hotel Villaggio Santa Teresa company. At the beginning the offering was a success and a large amount of securities were subscribed by the public. Later the press published news concerning the irregularities committed by the promoting company. The prospectus contained a warning by the Commission. Investors were informed, first, that the Commission did not review the merit of the investment. Secondly, that the publication of the prospectus did not imply any guarantee that the information furnished through the prospectus was truthful and complete. Finally, that the issuer was the only person responsible for the information contained in the prospectus.

On December 1985 the Tribunal of Milan declared two of the promoters' corporations bankrupted and the H.V.S.T. was put into liquidation.[384] A group of subscribers decided to sue

382 The principle affirmed by the *Corte di Cassazione* has been applied in other decisions: Corte di Cassazione February, 18th, 2000 No. 1814, published in Foro It. 2000, I, p. 1857, in Giust. Civ. 2000, I, p. 2655, in Urbanistica e appalti 2000, p. 1197; Corte di Cassazione March 28th, 2000, No. 3726, published in Danno e Responsabilità 2000, p. 878; Corte di Cassazione November 11th, 2000, No. 14432, published in Giust. Civ. Mass., 2000, p. 259.

383 *Corte di Cassazione* March 3rd, 2001 n. 3132. In order to understand properly the HVST case it must be noticed that the issue of the Consob's liability had to be decided according to the relevant law at the moment of the public offer (Law 7 June 1974 No. 216 as amended by Law March 23rd, 1983 No. 77). The old legislative framework has been recently replaced by the 1998 Securities Law, which is a fully comprehensive restatement of the relevant dispositions in the filed of financial activities. The Commission is nowadays provided with even more powers in relation to public offering. The solution adopted by the *Corte di Cassazione* is therefore applicable even after the introduction of the 1998 Securities Law.

384 Tribunal of Milan May 10th, 1985, Foro It., 1986, I, p. 560

the Chiefs executive of the promoting company according to Article 2395 of the Civil Code.[385]

The plaintiffs sued also the Consob's relevant officers before the Tribunal of Milan to recover all or part of the money they lost as a consequence of the incorrect information contained in the prospectus.[386] On a preliminary hearing dealing with jurisdictional issues the *Corte di Cassazione* held that the question of establishing whether plaintiffs have a cause of action was related to the definition of their subjective position. This was not a question of jurisdiction but of merit which had to be decided in front of the ordinary judge.[387] In an important *obiter dictum*, the *Corte di Cassazione* suggested the Tribunal of Milan the solution of the issue, in affirming that the law ruling the Commission's activity, having as its object not the protection of the investors but the public interest, did not confer rights to the subscribers. This implied that the investors had no cause of action if they suffered losses in consequence of negligent supervision of the Commission.

The principle affirmed by the *Corte di Cassazione* was accepted by the Tribunal of Milan in its decision of March 21st, 1996. Thus, the claim of the investors was rejected, their position being qualified as legitimate interest. The decision of the Tribunal of Milan was appealed before the Court of Appeal of Milan[388] which upheld the decision of the Tribunal.

The Court of Appeal of Milan rejected the claim of the investors. According the Court of Appeal's decision the statute applicable to the case did not provide the Consob with any investigative power over the merits of the information provided with the registration statement. Furthermore, the validity of the two exclusions clauses provided by the Commission was upheld. Thus, the only subject which could be considered liable for the truthfulness and completeness of the information furnished through the prospectus could be the promoting company. On causation the Court of Appeal established there was no casual link between the action or omission of the Commission and the damage suffered by the investors, damages being caused merely by the wrong investment decisions leading the investors to pay a higher price per every share. Finally, the risk of the operation should be known by the investors because of the news published on the press about the irregularities committed by the promoters. Significantly, the Court of Appeal qualified the investors' subjective position as a substantive right, namely the *diritto all'integrità del patrimonio* established for the first time in the *De Chirico* case.

In deciding on the appeal proposed by the damaged investors, the *Corte di Cassazione* held that the Consob should exercise its power to carry out both a preventive and subsequent verification of the completeness and truthfulness of such information, failing which it can be held liable for the damages suffered by the investors. The *Corte of Cassazione* upheld the judgment of the Court of Appeal is so far as it qualified the investors' subjective position as a substantive right, namely the *diritto all'integrità del patrimonio* established for the first time in the *De Chirico* case. The Corte di Cassazione found the qualification provided by the Court of Appeal was "*coherent*" with the judicial rule of law established in the *Vitali* case. The negligent diffusion of false information misled the investors to agree to a risky business which have caused them economic losses. This element was sufficient to differentiate the damaged investor's position from the one of the others potential subjects to whom the information contained in the prospectus was directed.

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385 See Tribunal of Milan July 17th, 1997, reported in Rep. Foro It. (Società), n. 666. Article 2395 of the Civil Code (Personal action available to member or third persons) establishes "The provisions of the preceding articles do not affect the right to compensation for damages of an individual member or a third person who has been directly injured as a result of malice, fraud, or negligence of the directors". Translation by M. Beltramo, G.E. Longo, J.H. Merryman, *The Italian Civil Code and complementary legislation*, Oceana Publications, 2001, Inc., Dobbs Ferry, N.Y.

386 The plaintiffs alleged that authorisation granted by the Consob in relation to the public offer of atypical securities was unjust and they had been consequently wrongly induced to subscribe the proposal. Furthermore the identification of the irregularities did not require any particular investigation being sufficient a diligent analysis of the documents deposited by the Commission. In particular, the Commission failed to realise that the real value of the assets of the company was not of IT Lire 44 billion as stated in prospectus but of IT Lire 20 million, and thus because the fee simple on the tourist village real estate had not been acquired. In any case, even after the acquisition of the title on the real estate (January 1984) the assets of the company did not exceed the value of IT Lire 22 billion. Consob had a duty to advise the investors of the real value of the assets when the first news on the irregularities committed in the financial activities by the promoting company appeared.

387 *Cass., s.u.*, January 14th, 1992 n. 367.

388 Court of Appeal of Milan November 11th, 1998, in *Le Società*, 2001, n. 5, pp 570.

In so far as the powers of the Commission are concerned, the *Corte di Cassazione* held that, once verified that the information contained in the prospects was untrue, the Commission had a duty to act in order to stop the public offering. At the time of the public offer the Commission's activity was ruled by the Law June 7th, 1974 No. 216, as amended by the Law March 23rd, 1983 n. 77, which imposed additional disclosure requirements for any promoter who wanted to engage a public offer of financial investments. According to Articles 18 and 18 *bis*, *ter* and *quarter* of Law June 7th, 1974 No. 216, promoters were responsible for the completeness and fairness of the information furnished to the Commission through the prospectus registration. The *Corte di Cassazione* held that Law June 7th, 1974 n. 216 (especially article 18 *quater*) already provided the Commission with the enforcement powers throughout the registration process.[389] The Commission is nowadays provided with even more extensive powers in relation to public offerings. The solution adopted by the *Corte di Cassazione* is therefore applicable even after the introduction of the 1998 Securities Law which has replaced Article 18 of the Law n. 216 of 1974 with Articles 94 and ss.[390]

On the mental element, the *Corte di Cassazione*, in line with the principles established in the *Sgarlata* case, held that public authorities have to act in respect of both Article 97 of the Italian Constitution, which establishes the principle of legality, impartiality and good administration, and of the *neminem leadere* rule. The Court found that the conduct of the Commission amounted to a gross misconduct. The falsified information contained in the prospectus appeared *ex actis* (*i.e.* it could and should have been detected using normal diligence in the review of the documents).[391]

According to the trial court and the Court of Appeal, the two exclusion clauses generated in the damaged investors the burden of proving the gross negligence of the Commission. This creates a sort of immunity for damages caused by simple fault. In overruling the two previous

389 The solution adopted by the *Corte di Cassazione* was based on the fact that: i) according to the Law 7 June 1974 No. 216 as amended by Law 23 March 1983 No. 77, every subject who wanted to promote the placement to the public of a financial instrument had to provide to the Commission all the information concerning, on the one hand, the public offer and, on the other, the organisation, financial position, evolution and future perspectives of the promoting company; ii) Article 18 (3) recognised the Commission the power to ask the promoter supplementary information; iii) Article 18-*quater* gave the Commission the spread and penetrating power to check the truthfulness and completeness of the information provided by the promoting company during all the approval proceeding and that, in order to achieve this object, the Commission had the authority of providing production and integration of documents, inspections and inquiries; iv) Article 18 (4) authorised the Commission to stop *in limine* or to intervene in the public offer in the event of the promoting company failing to comply with the Commission's prescriptions established in order to guarantee the required informative standards.

390 The 1998 Securities Law creates two different regimes in relation, on one hand, to financial products both non listed and non diffused by the public (Article 116 of the 1998 Securities Law) and, on the other, to already listed financial products. As far as the already listed financial products are concerned, the prospectus should be communicated to the Commission which has 15 days to ask the promoting company to provide further information or to impose certain conditions on the publishing of the prospectus. After a 15 days period the promoting company can proceed with the public offering (Article 94 (3) of the 1998 Securities Law). In relation to financial products both non listed and non diffused by the public, the Commission has the power to authorise the publishing of the prospectus (Article 94 (3) of the 1998 Securities Law) within 40 days from the communication of the prospectus by the promoting company (Consob Regulation May, 14th, 1999, No. 11971). The Commission has furthermore the power: to ask the promoter company supplementary information besides the ones generally required within a year from the publication (Article 97 (4) of the 1998 Securities Law); to suspend the registration process for a period no longer than 90 days in every case Commission suspect a breach of the statutory provision by the promoting company (Article 99 (1.a) of the 1998 Securities Law); to prohibit the publication of the prospectus in every case in which the promoting company has breached one of the rules indicated in Article 99 (1.a) (Article 99 (b) of the 1998 Securities Law). Article 95 of the 1998 Securities Law recognises the Commission the regulatory power to discipline both the content of the prospectus and the modality of the public offering. Finally Article 97 (4), establishes that where Consob has a well-founded suspicion of the violation of the provisions related to pubic offering it may, within one year of the subscribe or the purchase, require purchasers or subscribers of the financial products to communicate data and information and transmit records and documents and lay down the related time limits, in order to acquire evidences. Such power may also be exercised with respect to persons suspected of making public offerings in violation of Article 94.

391 The general rule in assessing the issue of the public authorities' negligence is that this cannot be inferred from the illegality of the administrative act. More in detail two different tests have been adopted by courts. The Corte di Cassazione, in its recent judgment n. 500 of 2000, held that negligence can be inferred from the violation of the rules of impartiality, fairness and good administration. On the other hand, the Consiglio di Stato, in its judgment n. 3169 of 2001 criticised this criterion for being non exhaustive, and proposed the different test of the seriousness of the violation which occurs when a general rule on the administrative proceeding is breached.

judgments, the *Corte di Cassazione* held that the two clauses were *contra legem* and that they could be only considered as advertising that the registration of the prospectus did not imply an evaluation of the Commission on the offering.

On the ground of causation the Corte di Cassazione overruled the decision of the Court of Appeal. The existence of a casual link has to be determined through a prognosis of what should have been the effect of a timely and correct exercise of the Commission's powers on the subscribers' investment, looking especially at the eventual concurrence of charges of other subjects in accordance with Article 41 of the Criminal Code,[392] which is applicable to tort law.

Dealing with the effect of the news published on the press in relation to the behaviour of the promoting companies, the *Corte di Cassazione* held, on one hand, that these far from being sufficient to advise the public of the real estate of the promoting company and of their investment, imposed on the Commission a duty to prevent the causation of damages to the investors. On the other hand, the publishing of the news on the irregularities committed by the promoting company should have been taken into consideration to establish a potential contributory negligence of the Commission and of the damaged investors ex Article 2056 and 1227 of the Civil Code.[393] This meant that the investors, who had subscribed the prospectus after the press news on the irregularities committed by the promoting company, could have potentially received a lower compensation (or no compensation at all) for the damages they suffered. The case was finally returned to another division of the Court of Appeal of Milan that has to decide the case taking into account the rule of law established by the *Corte di Cassazione*.

On the second hearing the Court of Appeal of Milan[394] applied the principles established by the Corte di Cassazione, enters a judgment in favour of the damaged investors and held that no contributory negligence from the part of the investors could be found. The Consob has withdrawn its right of appeal before the Corte di Cassazione.[395]

Finally, one of the most meaningful case law concerning the liability of the Ministry of Public Health for negligent supervision arose in relation to the control on the production, importation and distribution of blood and its derived products. During the '70 and through the '90 haemophiliacs or other patients subject to blood transfusion contracted the HIV virus or hepatitis B and C. Starting from the end of the '90 some of these patients sued the Ministry of Public Health alleging his responsibility for negligently omitting the introduction of suitable precautions (*e.g.* screening tests) which would have prevented the contagion of hundred of patients. The case law essentially followed the decision of the Tribunal of Rome in a pivotal case decided on November 1998,[396]

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392 Article 41 Criminal Code (Concurrent Causes), translation by E. M. Wise, The Italian penal code, Sweet & Maxwell Limited, 1978, London: "(1) The presence of pre-existing, simultaneous or supervening causes, even though independent of the act or omission of the offender, shall not exclude a casual relationship between his act or omission and the event. (2) Supervening causes shall exclude a casual relationship when they were in themselves sufficient to bring about the event. If, in that case, the act or omission previously committed itself constitutes an offence, the punishment prescribed therefore shall be applied. The previous provisions shall apply even when the pre-existing, simultaneous or supervening cause consists of the unlawful act of another person".

393 Article 2056 of the Civil Code (measure of damages) establishes: "(1) The damages owed to the person injured shall be determined in accordance with the provisions of Articles 1223, 1226 and 1227". According to Article 1227 of the Civil Code (contributory negligence of the creditor): (1) "If the creditor's negligence has contributed to cause the damage, the compensation is reduced according to the seriousness of the negligence and the extent of the consequences arising from it. (2) Compensation is not due for damages that the creditor could have avoided by using ordinary diligence" (Translation by M. Beltramo, G.E. Longo, J.H. Merryman, op. cit.

394 Court of Appeal of Milan, October 21st, 2003, in Le Società 2004, with comment of F. Fanti, "*Vigilanza sui mercati, responsabilità della Consob e risarcibilità del danno*"; in Contratti, 2004, 329, with comment of G.M. Santucci, "*Responsabilità della Consob per omessa vigilanza*"; in Corr. Giur., 2004, pagg. ___ e ss. with comment of A. Tina, "*Responsabilità della Consob per omessa vigilanza sulla veridicità delle informazioni contenute nel prospetto informativo*"; in NGCC, 2004, pt. 1, with comments of E.L. Guastalla, "*Falsità del prospetto informativo, danno agli investitori e responsabilità civile della Consob*" and of B. Andò, "*Nesso di causalità fra omessa vigilanza e danno risentito dagli investitori. Criteri di quantificazione del danno*"; in Giur. It., 2004, pagg. 800 e ss., with comment of G. Mignone, "*Vigilanza Consob e responsabilità: brevi osservazioni sul tema*"; in Foro It., 2004, pt. 1, 584 e ss., with comment of L. Caputi, "*Sulla responsabilità della Consob per insufficiente vigilanza*".

395 See news appeared on the weekly journal *Il Mondo*, June 25th, 2004, n. 25, page 32, quoted in M. Tuozzo, "*La Consob è dunque responsabile in concreto*", in Contratto e Impresa, 2004, a pag. 593.

396 See Tribunal of Rome, November 27th 1998, in Foro it. 1999, I, 313, Questione giustizia 1999, 548 with note Lamorgese; in Danno e Responsabilità, 1999, page 214, with note U. Izzo, "La responsabilità dello Stato per il contagio da HIV ed epatite di emofilici e politrasfusi: i limiti della responsabilità civile", and on appeal Court of Appeal of Rome, October 23rd, 2000, in Danno e resp. 2001, 106, with note U. Izzo, "*La responsabilità dello Stato*

brought by some four-hundred patients were the Ministry of Public Health was held responsible for the damages suffered by the claimants pursuant to article 2043 of the Civil Code.[397] Finally, Article 3 of the Law June 23rd 2003, n. 143 allocate the sum of Euro 98,5 million and Euro 198,5 million for settling pending law suits with infected patients respectively in for 2003 and 2004/5.[398]

15.2.5 Controlling mechanisms

a) Scope of the norm, investors subjective position

As seen above the qualification of the subjective position conferred to the individual in its relationship with the public authority has been for a long time the key element to control liability of public bodies. Damages could be awarded merely for a breach of a subjective right as opposed to a mere legitimate interest. Following to the *Vitali* decision, this dichotomy has lost much of its importance being sufficient the existence of damage "relevant for the legal order".

Despite this new test for assessing liability, it is still necessary to understand the extent to which the legislator intended to protect the individual. In the field of the health, citizens naturally enjoy a position of subjective rights which has been granted at a constitutional level. Article 32 of the Italian constitution establishes: "The Republic safeguards health as a fundamental human right and interest of the public". Thus any damage suffered by individuals in this respect is likely to be considered "relevant for the legal order".

In Italy depositors receive protection already at Constitutional level. Article 47 (1) of the Italian Constitution establishes that: "The Republic encourages and safeguards savings in all forms. It regulates, co-ordinates and overseas the operation of credit".[399] The rationale lying behind the constitutional provision was to impose a duty on the State to supervise banks in the interest of depositors but, as we saw earlier, this result has been achieved only recently. The definition of the investors and depositors' subjective position has nowadays to be found in the new legislative framework provided by the 1998 Securities Law and the 1993 Banking Law.

The 1998 Securities Law contains provisions clarifying that the Commission's statutory objectives are the protection of the investors and the fairness and transparency of the financial markets. These are:

i) *Article 5 (1) of the 1998 Securities Law* provides that the object of the Commission's supervisory activity is the transparency and the correctness of the behaviour and the honest and cautious management of the authorised persons, taking into account the "protection of consumers" and the stability, the competitiveness and good working of the financial system.

ii) *Article 74 (1) of the 1998 Securities Law* similarly clarifies that the Commission has to supervise the financial markets in order to ensure the transparency, the fairness of the transactions and the "protection on the investors".

iii) *Article 91 (1) of the 1998 Securities Law* settles that, when the Commission exercise the power provided by articles 92 and ss., it must take into account also the "protection of the

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per il contagio da HIV ed epatite di emofilici e politrasfusi: oltre i limiti della responsabilità civile")

397 See U. Izzo, "*Blood, Bureaucracy and Law: Responding to HIV-Tainted Blood in Italy*", in E. Feldman, R. Bayer, "*Blood Feuds: AIDS, Blood, and the Politics of Medical Disaster*", New York – Oxford, Oxford University Press, 1999, 213 – 241. For the other pivotal case brought by some three-hundred-fifty claimants see Tribunal of Rome, June 14th, 2001 in Corriere giuridico 2001, 1204 with note Carbone, and in Danno e resp. 2001, 1072 nota with note U. Izzo *La responsabilità dello Stato per il contagio da HIV ed epatite di emofilici e politrasfusi: oltre i limiti della responsabilità civile*). Finally there were some other claims broth by individual patients (amongst them see Tribunal of Rome, November 27th, 1998, in Foro it. 1999, I, 313; Court of Appeal of Florence, June 7th 2000, in Foro it. 2001, I, 1722; Tribunal of Rome, June 15th, 2001, in Rass. dir. farmaceutico 2001, 488; Tribunal of Naples, January 15th, 2002, in Giur. napoletana 2002, 121; Tribunal of Rome, June 10th, 2002, in Giur. merito 2002, pages 1250 et seq.; Tribunal of Rome, December 19th, 2002, in Giur. merito 2003, 631 and, finally Tribunal of Bari, March 20th, 2004, n. 562).

398 Law June 23rd 2003, n. 143, Article 3 in Danno e Responsabilità, 2003 at pages 907 – 910, with comment of U. Izzo.

399 Article 47 (1) of the Constitution: "La Repubblica incoraggia e tutela il risparmio in tutte le sue forme; disciplina, coordina e controlla l'esercizio del credito".

investors";

iv) *Article 94 (2) of the 1998 Securities Law* provides that the prospectus provided to the Commission by the promoting company must contain all the information necessary "to enable the consumers to take a mature evaluation" of the promoting company and its products.

Looking at the relevant provisions of the 1998 Securities Law it is possible to come to the conclusions that in all the relevant fields in which supervision is conducted (intermediaries, markets and issuers) one of the main objectives of financial regulation and supervision is the protection of investors. This may lead to the conclusion that the 1998 Securities Law entails a right to investors to a diligent supervision.

As far as the subjective position of depositors is concerned, the objectives of supervision over banks and intermediaries under Article 107 of the 1993 Banking Law, are set out in Article 5 of the 1993 Banking Law. Article 5 (1) - purpose and scope of supervision - reads: "The credit authorities shall exercise the powers of supervision conferred on them by this Legislative Decree having regard to the sound and prudent management of the persons subjected to supervision, to the overall stability, efficiency and competitiveness of the financial system and to compliance concerning credit".

It may therefore be argued that Article 5 does not include expressly the protection of investor within the aims of banking supervision.[400] The only issue in which consumer protection is taken expressly into account is in the field of compensation schemes (Article 96 of the 1993 Banking Law). There is however the question of interpretation in conformity with Article 47 of the Constitution.

Finally, the recent leading case of the plenary session of the Corte di Cassazione of March 2[n,] 2003, n. 6719 confirmed that investors and depositors' position vis-à-vis financial markets regulators has to be qualified as a subjective right.[401] The utility of the controlling mechanism related to the scope of the norm has been therefore reduced by latest judicial developments.

b) Discretion

A further controlling mechanism which can be invoked in the activity conducted by financial regulators is related to the possibility of judicial review for technical decisions involving a measure of discretion. The main issue arising in ascertain the lawfulness of public administration's activity is in fact to establish to what extent courts are allowed to review public authorities' decisions whenever these involve the use of powers characterised by a technical discretion. In the past judicial review was confined to an external control limited to the verification of the absence of any gross negligence or mistake, without the adoption of any technical test.[402]

Since administrative courts were recognised with the power to consult experts (CTU),[403] judicial review has progressively moved from an external control to an internal one (*i.e.* a review of the whole decisional process conducted by the public authority).[404]

However, a distinction has been introduced to avoid a judicial review of the merits of the decision adopted by the public authority. Where the decision involves a balancing of different or even conflicting interests, as the case may be in the relevant fields under examination, the case law is favourable to a mere control of the technical reasonableness and coherence of the final decision.

c) Contributory negligence of authorised persons or investors

Depending on the concrete factual circumstances contributory negligence may be a useful device to control the expansion of tort liability of supervisors. As seen above Article 1227 of the Civil Code, applicable to tort law by virtue of Article 2056 of the Civil Code, provides that if the creditor's negligence has contributed to cause the damage, the compensation is reduced

400 Consumer protection is an element which nevertheless influenced the whole structure of the 1993 Banking Law.

401 *Cass., s.u., 2 maggio 2003, n. 6719*.

402 See amongst the others Cons. Stato, October 3rd, 1994, n. 1473; Cons. Stato, September 1st, 2000 n. 4658.

403 Art. 35 (3) of the Legislative Decree n. 80, of 1998 and Article 16, Law n. 205 of 2000.

404 Cons. Stato, April 9th, 1999, n. 601; Cons. Stato, October 6th, 2000, n. 5332; Cons. Stato, March 5th, 2001, n. 1247; Cons. Stato, October 6th, 2001, n. 5287; Cons. Stato, December 11th 2001, n. 6217.

according to the seriousness of the negligence and the extent of the consequences arising from it. Furthermore compensation is not due for damages that the creditor could have avoided by using ordinary diligence.

It has however to be noticed that in its second decision on the HVST case, the Court of Appeal of Milan refused to held the investors' contributory negligence despite the publication on the national press of the irregularities committed by the promoting companies. The factual circumstances would have hypothetically allowed to reach either conclusion.

15.3 Which statutory immunities exist as regards liability of public bodies?

Currently no statutory immunity is provided for the liability of public bodies. In the field of financial market supervision its introduction may potentially be unconstitutional pursuant to Article 47 (1) of the Italian Constitution.

15.4 How is the current situation as regards liability of supervisors estimated?

The liability of regulators is certainly one of the main issues currently debated in Italy. In the field of financial market supervision this is even more so following to the decision of the *Corte di Cassazione* in the HVST case. However, differently from other European countries where the discussion has been primarily conducted at a policy level, in Italy the debate has focused primarily on legalistic aspect of the issue at stake. This is probably because the HVST decision referred to a clear case of gross negligence from the Commission. Thus, almost no scholar questioned the finding of the liability on the part of the authority.

As noted in a previous analysis referred to the liability of financial regulators,[405] different arguments are relevant in this regard. Some of them may be useful to support regulator immunity, and namely:

i) *Inhibition argument*: regulators may need a certain degree of protection in order to carry out their functions in a reasonable and proper manner. This is certainly the most persuasive argument supporting immunity. In its first core principle the Basel Committee recognises that one of the conditions to obtain "a suitable legal framework for banking supervision is … legal protection for supervisors". This concept is then clarified in the Core Principles Methodology where it is explained that the system should provide "legal protection to the supervisory agency and its staff against lawsuits for actions taken while discharging their duties in good faith". There is a need for "supervisory agency and its staff" to be "adequately protected against the costs of defending their actions while discharging their duties";

ii) *Floodgates argument*: regulators may need protection in order to avoid the possibility to become "*defendants of last resorts*" when all other defendants are bankrupt or defunct.[406] In this respect it has nevertheless to be noticed that, whatever immunity a legislator may recognise to its regulator there will always be a field to sue it. The *Three Rivers* litigation – dealing with the alleged misfeasance of the Bank of England - may be a clear example of this aspect. The only solution could be a blanket immunity, but there is still the problem of incompatibility with Article 6 of the European Convention of Human Rights;

iii) *Alternative relief argument*: the presence of compensations schemes may reduce the need for further sources of compensation. This argument is however not applicable in relation to cases where such schemes are not available (e.g. insurance sector);

405 Filippo Rossi, *Tort Liability of Financial Regulators. A Comparative Study of Italian and English Law in a European Context*, E.B.L.R., 2003, vol. 14, Issue 6, pagg. 643 – 673. See also B. S. Markesinis, J.-B. Auby, D. Coester-Waltjen and S.F. Deakin, *Tortious liability of statutory bodies: a comparative and economic analysis of five English cases*, Hart publishing, Oxford, 1999.
406 T. Blyth and E. Cavalli, *The liability of the Financial Services Authority after the Three Rivers*, J.I.F.M., 2001.

iv) *Moral Hazard*: some authors argued that the possibility for consumer to obtain compensation from regulators is a potential source of moral hazard. Investors may be less careful in deciding the investment they are going to undertake. However, even though this argument may be theoretically correct, in concrete in the field of regulators' liability it is not relevant. Moral hazard arises in situations in which there is no risk of suffering losses. The lengths of civil proceedings, the unpredictability of the litigation result and litigation expenses are in fact elements which circumscribe the validity of this argument.

On the other hand, several arguments may suggest the imposition of a liability on regulators:

i) *Consumer protection*: this is certainly the main argument in favour of the regulators' liability;[407]

ii) *EC Law and ECHR*: the recent development of both European Law and the ECHR suggests that in the future, if not in the present, regulators' liability in negligence may become a general rule; see the ECJ decision in Peter Paul

iii) *Information asymmetry*: it must be taken into account that, because of the existence of asymmetric information, investors are compelled to rely on the information and supervision provided by regulators. In this respect it seems reasonable that whenever a public authority has the power to act in the interest of a specific class of citizen it may be held liable if it negligently does it.

15.5 What are the amounts of compensation following the Banking Directives?

15.5.1 Depositors' compensation schemes

The Directive 19/94/EEC on deposit insurance has been implemented in the Italian system through the enactment of Legislative Decree n. 659 of 1996. Since 1987 an Interbank Deposit Protection Fund (the *Fondo Interbancario di Tutela dei Depositanti*) has been established in Italy to protect depositors. The Fund, established as a voluntary consortium, is now a private-law mandatory consortium, recognized by the Bank of Italy, the activities of which are regulated by the Statutes and by-laws. The purpose of the Fund is to guarantee the depositors of member banks. Member banks undertake to pay the contributions to the consortium fund and, upon request of the Fund, to make regular payments to defray operating expenses.

Following the provisions of article 96 of the 1993 Banking Law, the principle of mandatory membership in a deposit guarantee system has been introduced in Italy. According to Article 96 of the 1993 Banking Law"[408] Italian banks shall join one of he depositor guarantee schemes established and recognised in Italy.[409]

Notwithstanding the fact that Directive 94/19/EEC provides a minimum level of guarantee of 20,000 Euro per depositor, the Italian legislator has increased the amount up to 103,291.38 Euro (Article 96-Bis (5), of the 1993 Banking Law), which, as set forth in the Fund's Statutes, is the maximum level of compensation per depositor. Payment shall be made, up to an amount equivalent to ECU 20,000, within three months of the date of the decree of compulsory

407 See Article 5 (1), 74 (1), 91 (1) of the 1998 Securities Law.

408 Article as amended by Article 2 of Legislative Decree 659/1996. The legislative decree implements European Parliament and Council Directive 94/19/EC of 16 May 1994 on deposit-guarantee schemes, Official Journal L 135 of May 31st, 1994.

409 According to Articles 96 and 96-bis of the 1993 Banking Law, branches of EC banks operating in Italy may join an Italian guarantee scheme for the purpose of supplementing the protection offered by the guarantee scheme of their home member state. Branches of non-EC banks authorized in Italy shall join an Italian guarantee scheme unless they participate in an equivalent foreign guarantee scheme. Guarantee schemes shall be private-law entities. The financial resources for the pursuit of their purposes shall be provided by participating banks. Guarantee schemes shall make payments in cases of compulsory administrative liquidation of banks authorized in Italy. For branches of EC banks in Italy which are members of an Italian guarantee scheme on a supplementary basis, payments shall be made where the guarantee scheme of the home member state has intervened. Guarantee schemes may provide for additional cases and forms of intervention (Article 96-Bis, of the 1993 Banking Law).

administrative liquidation. The time limit may be extended by the Bank of Italy in exceptional circumstances or special cases for a period not exceeding a total of nine months. The Bank of Italy shall establish the procedures and time limits for payment of the balance due and shall revise the ECU 20,000 limit in order to adjust it to any changes in Community legislation (Article 96-*bis* (7), of the 1993 Banking Law).[410]

15.5.2 Investors' compensation schemes

Directive 93/22/EEC provided for the establishment of investor's compensation schemes. The Directive has been implemented in the Italian system through Articles 35, 36 and 62 of the Legislative Decree July 23rd 1996, n. 415. This statute established the *Fondo Nazionale di Garanzia* whose activity was disciplined through the Decree of the Minister of the Treasury of November 14th, 1997, n. 485. Currently the relevant legislative statute dealing with investors' compensation scheme is the Legislative Decree n. 58 of 1998 (the 1998 Securities Act). Article 59 provides that the provision of investment services shall be subject to membership of a compensation system for the protection of investors recognized by the Minister for the Economy and Finance after consulting the Bank of Italy and Consob. The compensation system is now governed by the decree of the Minister of the Treasury, the Budget and Economic Planning of June 30th, 1998 and March 29th, 2001. Article 5 of the Decree establishes a maximum coverage for each investor of Ecu 20.000, which cannot be cumulate with the coverage offered by deposit compensation schemes.

15.5.3 Insurance compensation schemes

No compensation scheme is currently provided for clients of insurance companies.

15.6 Are supervisors insured against liability?

None of the supervisors in the financial sector is insured against liability. The burden for judgments awarding damages is therefore on the supervisory authority, where this enjoys full funding independency, or on the State, where it contributes to financing its activity.

410 On the Italian depositors' compensation scheme F. Pistelli, International Deposit insurance systems, Rome, November 1999, see http://www.fitd.it/en/activities/publications/essays/surdepins.pdf.