

The concept of damage as an element of the non-contractual liability of the European Community

[Skadesbegrebet som et element af EF's erstatningsansvar
uden for kontraktforhold]

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*Dette speciale søger at analysere ét af elementerne ved de Europæiske Fællesskabers erstatningsansvar uden for kontraktforhold, nemlig skadesbegrebet. Det fastslås i specialet, at EF-Traktatens artikel 288, stk. 2, som omhandler erstatningsansvaret uden for kontraktforhold, er ganske tom for fortolkningsbidrag, og at det derfor har været en opgave for EF-domstolens dommere at udvikle bl.a. skadesbegrebet, som er en essentiel del af erstatningssøgsmålet. Analysen af EF-Domstolens fortolkning fokuserer på fire væsentlige aspekter af skadesopfattelsen. Indledningsvis analyseres bestemmelsens kontekst, og undersøgelsen viser, at erstatningssøgsmålets betydning er øget væsentligt fra at have været en ubetydelig variant af annullationssøgsmålet til at være anerkendt som en fundamental rettighed. For det andet undersøges Fællesskabets definition af et tab, og som resultat udfindes og forklares de fire prøver angående et tabs natur, som Domstolen opstiller. Specialet går så ind i en uddybende udforskning af Domstolens attitude over for de forskellige typer skade, den er blevet stillet over for. I undersøgelsen af materiel skade fastslås det, at Domstolen anerkender at dække damnum emergens, men at dens anerkendelse af *lucrum cessans* (tabt fortjeneste) stadig er noget restriktiv. Undersøgelsen viser yderligere, at adskillige typer ikke-materiel skade er omfattet af skadesbegrebet, og at specielle og usædvanlige tab under visse omstændigheder kan erstattes på objektive grundlag. Endelig undersøges skadesbegrebets grænser, og det fastslås herved, at tabsbegrænsningspligten og skadelidtes egen skyld indskrænker skadesbegrebet ganske betydeligt.*

ABSTRACT

This dissertation will analyse one particular element of the non-contractual liability of the European Communities, namely the concept of damage. It is established that Article 288(2) of the EC Treaty, which governs the non-contractual liability, is quite void of content, and that it has therefore been a matter for the Community judges to develop inter alia the concept of damage, which is an essential part of the action for damages. The analysis of the Court's interpretation will focus on four key aspects of the concept. Initially, the context of the provision is analysed, and the examination shows that the action for damages has risen in significance from being an insignificant variation of the action for annulment to being recognised as a fundamental right. Secondly, the Community definition of damage is examined, and as a result four tests regarding the nature of damage are discovered. The disser-

tation will then go into an in-depth exploration of the Court's stance towards the various kinds of damage to which it has been presented. In the examination of material damage it is established that the Court has accepted to award damages for *damnum emergens* but that its recognition of loss of profit remains somewhat restrictive. The examination further shows that the concept of damage also covers several kinds of non-material damage and that special and unusual damage under certain circumstances may be compensated even in the absence of an illegality. Finally, the borders of the concept of damage are explored and it is found that the duty to mitigate loss and the applicant's show of own fault may significantly influence the conception of damage.

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LIST OF ABBREVIATIONS USED IN THE DISSERTATION

Art.	Article (followed by the article number and the name of the legal source)
CFI	Court of First Instance (of the European Communities)
EC	European Community
ECJ	European Court of Justice
EIB	European Investment Bank
EP	European Parliament
EU	European Union. Also used as common denominator for ECSC / EEC / EC and EU.
MS	Member State(s) of the European Union
RoPCFI	Rules of Procedure of the Court of First Instance
RoPECJ	Rules of Procedure of the European Court of Justice
TEC	Treaty establishing the European Communities
TECSC	Treaty establishing the European Coal and Steel Community
TEU	Treaty on European Union
ToA	Treaty of Amsterdam

All article references to the TEC and TEU will use the *new* numbering system (post Amsterdam, which is maintained in the present Nice Treaty).

References in the footnotes to books, journals, and articles follow the ‘Harvard-system’:

Author’s surname (year published) page number.

These references can then be checked against the bibliography, located in the end of the dissertation, which contains full details on the sources in question.

All titles of CFI or ECJ cases are written in **bold types**. Especially important words or phrases in quotations of these judgements are written in *italic* types.

I wish to extend my thanks to my dissertation supervisor, *Sune T. Poulsen*, for his very kind and helpful advise, and to the Institute of Advanced Legal Studies, London, for letting me use their fabulous law library to carry out much of the legal research behind this dissertation.

This dissertation is dedicated to professor of public law, *John W. Bridge* of University of Exeter, for being not only an outstanding and admirable legal scholar, but also the person who awoke my fascination for EU public law.

1. PREFACE AND DELIMITATION OF FOCUS

This dissertation will endeavour to explore the concept of damage in cases regarding the non-contractual liability of the institutions of the European Union. The study of the liability of democratic institutions for wrongful acts has fascinated lawyers as long as such institutions have existed. The liability of *international*, democratic institutions adds new layers of fascinating topics to explore. With EU, being of a hybrid nature in possessing characteristics of both national and international legal systems,¹ the study becomes even more interesting - and complex! Moreover, the Treaty establishing the European Community (TEC) is probably the only constitutional charter of an international organisation in the world, which *expressly* provides for a separate action for damages against the Community.² In other words, this is an area of law that begs to be further explored!

The non-contractual liability of the EU institutions and their servants is governed by Art. 288(2) TEC which reads:

“In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties”.

What is striking and at the same time fascinating about this provision, is that it is so void of content and therefore can be said to leave the Court a *carte blanche* to find and develop common rules of law drawing inspiration from the various legal traditions in the MS of the EU. Much has been written about Art. 288(2) over the years, and this dissertation will by no means try to encompass every aspect.³ Indeed, the focal point of this dissertation will be just one word in that provision, namely the concept of “damage” as this is interpreted by the European Court.⁴ When focus has been laid on this, perhaps the most fundamental condition of liability, it is in part because this is one of the aspects of Art. 288(2), which has given rise to the fiercest controversy and as a result of that the Court has elaborated significantly on the concept. Also I have noticed the curious tendency that by far the most academic writers in the field of non-contractual liability focus on the admittedly also very important concept of culpa, and therefore pay very little attention to the concept of damage. On that background I feel there is a pressing need to devote more attention to how the concept of damage is interpreted by the Community Court, and this dissertation is therefore intended to fill in this empty gap in legal research! Moreover, I dare argue that the study of the rules of compensation makes little sense unless one has an idea about the losses which can be claimed compensated, and as shall be shown below, I claim that there are several interesting remarks to be made on the Community Court’s interpretation of the concept of damage.

¹ Hartley (1998) p. 258.

² Heukels and McDonnell (1997) p. 1

³ As such the entire question of Member State liability for breach of EC law will not be discussed here, nor will almost all questions of admissibility (see in this regard University of Exeter seminar paper by Schousboe (2001) available at www.sitecenter.dk/eurokrat).

⁴ This dissertation will refer to the European (Community) *Court* in the singular form of the word (i.e. not Courts) although the author fully appreciates that when the CFI was established in 1989 it was given jurisdiction over *inter alia* actions for non-contractual liability. The ECJ now works as an appellate court.

In essence, the aim of this dissertation is to enable a potential, hypothetical claimant to gain an overview over the present state of law regarding the concept of damage in order to assess his or her chances of winning a case before the Court. The intended method to reach this aim will be to extract all relevant dictums and principles in the Court's case-law, set them up in a structured manner and then comment and criticise this where relevant.

The dissertation is divided into six chapters with this introductory part being the first. Chapter 2 will discuss the context of Art 288(2), which I argue is a necessary study in order to fully appreciate the impact of the provision. Chapter 2 will therefore be of a more political nature than the more legal-analytical style used in the remainder of the dissertation. Chapter 3 will go into an in-depth examination of the Court's definition of damage and chapter 4 will analyse the views the Court has adopted on the various types of damage which claimants have brought before it. Chapter 5 will take a close look on the duty to mitigate the loss and on applicant's own fault as these factors have significantly influenced what can be deemed to fall within the concept of recoverable damage, and finally chapter 6 will draw up the essence and the overall conclusions.

2. ART. 288(2) IN ITS CONTEXT

2.1. Compensation as a fundamental right

A study of the preparatory works⁵ of the recently decided EU Charter of Fundamental Rights⁶ shows that right from the outset the Drafting Convention considered it obvious to include a reference to Art. 288(2). Art. 41(3) of the Charter therefore now provides the following:

“Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States”.

Although the wording is almost identical to Art. 288(2), the semantics reveal that the drafters seemed to consider the system of compensation developed under this provision as a *right* - indeed a *fundamental* one. The strictly legal meaning of Art. 41(3) of the Charter is admittedly rather limited given the fact that the Charter remains merely a political declaration without the power to be enforced. Perhaps the proper way to understand Art. 41(3) is therefore as a *signal* - an indication that the EC's non-contractual liability is an area of EC law which is to be taken seriously and which is hoped to benefit from increased interest from both the citizens and the courts of EU in the future.

The first trace of a codification of the provision for the non-contractual liability of the Community institutions is to be found in Art. 34 TECSC of 1951, which speaks of “equitable redress” to undertakings which have suffered “direct and special harm” by decisions or recommendations of the Commission involving a “fault of such a nature as to render the Community liable”. Art. 40 TECSC provides for compensation for “injury caused by a personal wrong by a servant of the Community in the perform-

⁵ Charter 4422/00 Convent 45.

⁶ O.J. 18.12.2000.

ance of his duties”. The Treaty of Rome of 1957 establishing the EEC does not use the phrases known from TECSC, but introduces the present wording (see above), which is even more laconic as to the conditions governing the liability. The only guideline to the legal contents of the provision now seems to be that ECJ decisions in this field must be “in accordance with the general principles common to the laws of the Member States” - whatever they are!

In contrast to the *contractual* liability of the Community, which is laid down in Art. 288(1) TEC, cases of *non-contractual* liability are subject to the jurisdiction of the ECJ, and since 1989 also CFI, according to Art. 235 TEC:

“The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288”.

The study of case-law below will show that the ECJ judges did in fact seek inspiration in the wording of the TECSC when they decided cases under the EEC Treaty, but the lack of guidelines in the former Art. 215(2) clearly presented them with a major challenge: how to design a coherent legal system governing the delicate matter of non-contractual liability of the then new institutions of a newly created community, and doing this by drawing upon general principles *common* to the then 6 Member States. The ECJ’s initial approach to this challenge was twofold: Instead of commencing the seemingly hopeless task of finding the common legal denominator of all MS, French law was chosen as the main source of inspiration, as this *acquis* of law was considered the most elaborate in this field.⁷ Second, the case-law should be as restrictive as possible, as this would constitute a floodgate that would keep the number of pending cases down at an acceptable level.

It is worth noticing that the enlargements of EC to now 15 MS has not led to amendments of Art. 288(2) apart from the numerical alteration with the Treaty of Amsterdam in 1998,⁸ and the task of finding principles *common* to (all) the MS has therefore not become easier. In consequence the Court has not felt itself bound by the wording, and it is now generally recognised that a principle of law does *not* need to be present in *all* MS for it to be used by the Court.⁹ Thus, the Court does not need to search for the lowest common denominator, nor need the principle be found in the majority of MS.¹⁰ The flip side of this coin is that plaintiffs do not *per se* have a *right* to invoke a principle known from their own national legal order but may content themselves with appealing to the Court to recognise the particular principle. Most recently this is what can be seen with the ongoing debate on strict liability, which will be examined in section 4.3.2.

The competence of the Court should thus rather be conceived as a right for the Court to *freely* develop supra-national principles of non-contractual liability, but in such a way that the Court in developing these may draw inspiration from the different Member States. Conceived this

⁷ The French judicial structure has actually been the main source of inspiration when the ECJ was designed. For instance the idea of having Advocate Generals setting out impartial and reasoned opinions as to how to decide the cases comes from the French Administrative Courts. Also the working language of the Court is French.

⁸ The present TEC, which was concluded by the Nice summit and entered into force on 1 February 2003, maintained the article numbers from the ToA.

⁹ Hartly (1998) p.131.

¹⁰ Wyatt & Dashwood (2000) p.253.

way, the ongoing eastern enlargement of EU¹¹ is much less troublesome for the Court than had been the situation, if the entire case-law had to be adjusted to East European principles of non-contractual liability!

2.2. The independent nature of the action for damages

Another matter which is relevant for the understanding of the role of the action for damages and the concept of damage as such, is the relation between the action for damages and the actions for annulment (Art. 230) and failure to act (Art. 232) - a relation which has been the focus of debate on several occasions. Because there is no *locus standi* requirement of *direct* and *individual* concern under Art. 288(2) and because actions can be instituted for much longer time (5 years¹²) than the 2 months after the publication of a measure as is the case with Art. 230,¹³ the action for damages can be brought in more situations than actions under Arts. 230 and 232. This is important because most actions for damages are based on the allegation that an institution has passed an illegal act, and the Court will consequently have to examine in substance whether the act is in fact illegal. Therefore it has been claimed, that the action for damages provides applicants with an opportunity for reaching a result, which could not have been reached by way of an action for annulment because such an action was inadmissible.¹⁴

This was first claimed in **Plaumann**.¹⁵ The ECJ held that Plaumann had no *locus standi* in the action for annulment in respect of a Community decision refusing to lower the duty on clementines. However, simultaneously Plaumann also applied for damages under Art. 288(2) equivalent to the duties and tax he had to pay as a result of the decision to refuse lower duties. In this, the very first action for damages, the Council and the Commission argued that these actions should be dismissed because they were trying to circumvent the restrictions on the action for annulment, and therefore in effect were “actions for annulment in disguise”.¹⁶ The ECJ followed this viewpoint;

“...In these circumstances it must be declared that the damage allegedly suffered by the applicant issues from this Decision and that the action for compensation in fact seeks to set aside the legal effects on the applicant of the contested Decision.

In the present case the contested Decision has not been annulled. An administrative measure, which has not been annulled cannot of itself constitute a wrongful act on the part of the administration inflicting damage upon those whom it affects. The latter cannot therefore claim damages by reason of that measure. *The Court cannot by way of an action for compensation take steps which would nullify the legal effects of a decision which, as stated, has not been annulled.*

The action brought by the applicant must therefore be dismissed as unfounded”

As Hartley observes,¹⁷ that decision was oddly strict - especially considering that ECJ only two years earlier in the **Vloeberghs**-case¹⁸ had stipulated that Arts. 230 and 288 (2) are quite separate proceedings with different objec-

¹¹ Decided by the Copenhagen Summit, 13 December 2002.

¹² Art. 43 of the Statute of the Court of Justice.

¹³ Art. 230 (5). An action for failure to act may be brought within two months after the institution has had two months to act since being called upon to do so, cf. Art. 232 (2).

¹⁴ Gulmann & Hagel-Sørensen (1995) p. 280.

¹⁵ Case 25/62 **Plaumann**.

¹⁶ Gulmann & Hagel-Sørensen (1995) p. 280.

¹⁷ Hartley (1998) p. 463 ff.

¹⁸ Cases 9 & 12/60 **Vloeberghs**.

tives. Furthermore, nothing in the TEC suggests that a reviewable act that has not been annulled cannot later be the subject for an action for damages. Nevertheless, it took 8 years before the Court reversed its position, as it did in the **Lütticke**-case¹⁹ regarding the action for failure to act. The Court held:

“The action for damages provided for by [Art. 235 and Art. 288 (2)] was established by the Treaty as an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use, conceived with a view to its specific purpose. It would be contrary to the independent nature of this action as well as to the efficacy of the general system of forms of action created by the Treaty to regard as a ground of inadmissibility the fact that, in certain circumstances, an action for damages might lead to a result similar to that of an action for failure to act under [Art. 232]”.

Two years later in **Zuckerfabrik Schöppenstedt**²⁰ the ECJ had an opportunity to reiterate the importance of regarding Art. 288(2) as a completely autonomous action from - this time - the action for annulment.²¹

It was therefore a surprise that the Court years later in **Krohn** reopened the question of the relationship between the action for damages and the action for annulment by, and seemingly returned to the **Plaumann**-doctrine. Since then the Court has swayed between stressing on the one hand the autonomy of the action for damages and on the other hand the need to avoid undermining the other actions.

Philip Mead argues convincingly that even in this swaying case-law there does exist a definitive boundary between damages and annulment:

“...where a Community measure is of direct and individual concern to the applicant, and any damage suffered comprises sums due (and expenses incurred) by virtue of the measure in question, alternatively any other loss and damage which arises would not have arisen had the measure in question been declared unlawful, then, it is suggested, **Krohn** and **Plaumann** will bite and the Court will declare inadmissible any damages claim where there has been no recourse to Article [230(4)]. On the other hand, if an applicant has no effective remedy, [...] it is more likely, as in **Krohn**, that the autonomy of the damages remedy under Article [288(2)] would prevail”.²²

In conclusion, it would therefore seem, that an action for damages may only be barred in a situation where an individual has *had* the possibility to contest a decision addressed to him under Art. 230, but where the time-limit in Art. 230 has expired so that the decision has become definitive.

2.3. The basic conditions for liability

A further, necessary remark on the context of the concept of damage is its interaction with the other conditions for Community liability. Once an action for damages has been declared admissible, the Court will go into the substance of the case. In the absence of codified conditions governing the non-contractual liability, the Court has developed a *mantra* on the basic requirements for liability, which is reiterated with slight variations in the

¹⁹ Case 4/69 **Lütticke**.

²⁰ Case 5/71 **Zuckerfabrik Schöppenstedt** at para. 3.

²¹ Rasmussen (1998) p. 189.

²² Mead (1997) p. 257 f.

wording in all cases concerning the action for damages. In **Grifoni**,²³ for example, it was put like this:

“The Court has consistently held that the Community’s non-contractual liability and the right to compensation for damage suffered depend on the coincidence of a set of conditions as regards the *unlawfulness* of the acts alleged against the institution, the fact of *damage*, and the existence of a *direct link* in the chain of *causality* between the wrongful act and the damage complained of”.

The notion of an *act* is very wide and covers both administrative and legislative acts, but also physical acts (e.g. like driving a car) and verbal statements, in fact anything capable of causing harm to others. Omissions are also included provided there was a duty to act.²⁴

The uncodified condition of *unlawfulness* has proved the hardest condition to satisfy, and also the condition, which has undergone the most extensive interpretation. Basically, it is necessary to differentiate between liability for legislative and administrative acts. A legislative Community act has been held to be *unlawful* when it infringes a superior rule of law for the protection of the individual. A superior rule of law may be a rule in the TEC itself, but also various Court developed principles like the protection of legitimate expectations, proportionality and fundamental rights have been declared superior rules of law for the protection of the individual.²⁵ In **Schöppenstedt**²⁶ it was decided that in cases involving measures of economic policy, the breach of the superior rule of law has to be *sufficiently serious*, which again was a term open for interpretation.

Liability for administrative acts, by which is understood acts in which the administration applies general rules in individual cases or otherwise exercises its powers in an individual manner, in theory only requires proof of damage, causation, and illegality. However, as observed by Craig and de Búrca, this still leaves open the precise meaning of illegality. “It is possible to list a variety of errors which *might* lead to liability [...], but the mere proof of such an error will not always ensure success in a damages action”.²⁷ If it can be established that the claimant has failed to meet one of the conditions for incurring non-contractual liability (damage, illegality, causation and remoteness / directness), it is unnecessary for the Court to examine the other conditions.²⁸

Bearing this context in mind, we shall now take a much closer look on the concept of damage itself.

3. THE ECJ DEFINITION OF A LOSS

The most fundamental requirement for a claimant to be allowed to bring an action under Art. 288(2) against the Community institutions is that (s)he must have suffered some sort of loss or damage:

²³ C-308/87 **Grifoni** at para. 6.

²⁴ Hartley (1998) p. 451.

²⁵ Tridimas (1999) p. 316.

²⁶ Case 5/71 Zuckerfabrik Schöppenstedt at para. 11.

²⁷ Craig & de Búrca (1998) p. 529 f.

²⁸ See *inter alia* T-152/95 **Odette Nicos Petrides Co.** at para. 108.

[T]he Community shall... ‘make good *any damage* caused by its institutions...’

This seems rather straight forward, but has nevertheless given rise to many discussions and a rather elaborate case-law setting out certain rather restrictive conditions, which will be attempted to be categorised in the following.

First, it should be observed, that to help the Court identify whether the loss possesses the required characteristics, applicants are required under Art. 46(1)(c) of the Rules of Procedure of the European Court of Justice (RoPECJ),²⁹ to make their application precise as to the alleged wrongful conduct and the nature of the damage sustained. It became clear with **Asia Motor France**³⁰ that the requirement of “clarity and precision” is to be taken very seriously, as the case will otherwise be dismissed. In this connection it should be observed that this requirement is among the bars to proceeding, which the Court may raise of its own motion at any time, cf. Art. 92(2) of the RoPECJ.³¹

In the early days of the ECSC the Court made it clear, that for the action for damages to be successful the applicant’s injury must be “actual, significant and definite”,³² “direct”,³³ “real”,³⁴ and “actual and certain”.³⁵ Later, under the EEC Treaty, Advocate General Capotorti developed four criterions in his opinion to the **Quellmehl and Gritz**³⁶ case complex, which should be met for the injury to be recognized; the injury should be “direct”, “certain”, “specific” and “serious”.³⁷ “Direct” damage relates to the requirement of a causal connection between the damage and the events giving rise to liability, and as such an investigation of this concepts falls outside the scope of this dissertation. But to discover the contents of the other terms, it will be necessary to analyze other parts of the not always coherent case-law.

3.1. Loss must be “certain”

The fact that a loss can only be claimed compensated if it is held to be “certain” carries the meaning that a hypothetical loss³⁸ or a mere risk of a future loss is insufficient.³⁹

In **FERAM**⁴⁰ the ECJ held the application for damages stemming from the winding up of a scrap equalization scheme for premature as it was launched before the scheme had actually ended.⁴¹ The Court observed dryly that at the most it was “a future damage, which can neither be assessed at this point nor even regarded as certain to occur”.

However, in **Kampffmeyer II**⁴² the Court held that it is possible to institute an action for damages in respect of “imminent damage foreseeable with sufficient certainty *even* if the damage cannot yet be precisely as-

²⁹ This provision corresponds to Art. 38(1)(c) in the RoPCFI.

³⁰ T-387/94 **Asia Motor France** at para. 108-110.

³¹ This provision corresponds to Art. 113 in the RoPCFI.

³² Case 23/59 **Feram**.

³³ Case 18/60 **Worms**.

³⁴ Case 4/65 Metallurgique Hainaut-Sambre.

³⁵ Cases 67-85/75 **Lesieur**.

³⁶ Case 238/78 **Ireks-Arkady**.

³⁷ Toth (1997) p.180.

³⁸ Stefanou & Xanthaki (2000) p. 94.

³⁹ Gulmann & Hagel-Sorensen (1995) p. 286.

⁴⁰ Cases 9&25/64 **FERAM**.

⁴¹ Toth (1997) p.181.

⁴² Cases 56-60/ **Kampffmeyer II** at para. 6.

sessed”, and thus marked a clear departure from the jurisprudence under the TECSC. This decision should be seen in the light of the duty to mitigate loss, as discussed later, as it may entail fatal consequences for an undertaking if it will have to wait right until the damage has been fully developed and assessed before it can claim compensation and put an end to the wrongdoing. In his opinion to the case, General Advocate Reischl says that “sufficient certainty” normally would mean that the events giving rise to liability (the Community action) must have taken place, whilst the caused damage need not have developed fully. Under such circumstances the applicant can obtain a declaration of his entitlement to compensation once the loss has been finally assessed.⁴³ Stefanou & Xanthaki point out that the broad interpretation of “certainty” is coherent with the legal use of the word in the Member States.⁴⁴

In the recent **New Europe Consulting**⁴⁵ it was held that loss of profit would only be “real” and “certain” if the undertaking was *entitled* to be awarded the PHARE project contract in which it had shown an interest. In the Court’s view that was not the case for this applicant.

As the Court’s case-law is not always consistent, other words have also been used to describe what is encapsulated by “certain” as described above. Among other similar words the Court has held that a loss must be actual, concrete⁴⁶ and real.⁴⁷

3.2. Loss must be “specific”

For the loss to be recoverable, it must concern the applicant in a specific and individual way. The underlying thought is that the nature of compensation is to offset an unlawful inequality endured by *one* legal person but not other persons in a comparable situation. If, however, the inequality affects all individuals in a given sector, they will not suffer in relation to each other, and as such there is no need for compensation.

Although this train of thought can be followed, it might reasonably be subjected to certain criticism, with the main counter argument being, that if an EC institution’s illegal conduct has entailed a loss to several legal persons, they all ought to be awarded compensation regardless of their relative situation. The fact that the consequences of an unlawful act extend to more than just a specific group of legal persons should not deprive this group of having their loss recognized as such by the European Courts. At least, that corresponds best with the wording of the Charter Art.41(3) (“*Every person...*”). Rather, this discussion should be taken in the context of liability for general versus individual acts. Yet, that is not the approach taken by the Court, and this stipulates just how closely connected the issues of what can be regarded a recoverable loss is to the question of for which acts and omissions the institutions may incur non-contractual liability.

⁴³ Hartley (1998) p. 457.

⁴⁴ Stefanou & Xanthaki (2000) p. 94.

⁴⁵ T-231/97 **New Europe Consulting** at para. 51 f.

⁴⁶ Case 26/74 **Roquette Frères** and Case 74/74 **CNTA**.

⁴⁷ T-231/97 **New Europe Consulting** at para. 29.

3.3. Loss must be proved

The burden of proof of the loss in actions for damages under Art. 288(2) lies with the claimant⁴⁸. He must produce evidence of the existence and size of the loss. According to Art. 45 RoPECJ the Court will decide which measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved. So far its willingness to admit evidence has been rather restrictive. To quote Advocate General Trabucchi from his opinion to **Roquette**:⁴⁹

“[To] claim compensation for injury it is not enough to show that it was likely; it is also necessary to demonstrate that it was actually sustained”.

As observed by Toth⁵⁰ quoting **Brazzelli Lualdi**,⁵¹ overall statistical figures showing disadvantageous trends in trade and unverifiable purely subjective economic considerations will not suffice, whereas “statistics based on precise and published data which have not been contested by the defendant institution, and which are capable of objectively proving certain facts, are acceptable evidence. The applicant cannot escape the burden of proof by claiming nominal damages only”.

The standard of proof is thus very high and many cases have been lost on the grounds of insufficient proof of damage. It should be noted, however, that the institutions must help the applicant in providing documents and information in their possession if they are not publicly available.⁵²

Since the establishment of CFI in 1989 the ECJ has no competence in appeal cases to reassess evidence of the endured damage.⁵³ The evaluation of the existence of damage carried out by the CFI must therefore be accepted by the ECJ on appeal. Also CFI alone may assess the most *appropriate* compensation.⁵⁴

3.4. Loss must be “quantifiable”

That the loss has to be “quantifiable” means that it must be possible to express the loss in terms of money. In other words the claimant is required to clearly state in his application the exact monetary value of the alleged damage, cf. also RoPECJ Art. 38(1)(c). It is not enough to just claim “compensation” in the application, yet in complex cases, the Court is willing to accept that the exact figures on which the amount of damage allegedly suffered is calculated may wait to be produced until a later stage than in the application, i.e during the procedure, at least if this will not render the defendant institution unable to discuss the alleged loss in its rejoinder and during the oral procedure.⁵⁵

As seen in **CNTA**,⁵⁶ where the Commission violated the legitimate expectations of several community undertakings by the unannounced withdrawal of the monetary compensatory amounts applicable to colza and rape

⁴⁸ Case 26/74 **Roquette Frères** at para. 24 and C-362/95 P **Blackspur DIY** at para. 31.

⁴⁹ Case 26/74 **Roquette**.

⁵⁰ Toth (1997) p.184.

⁵¹ T-17, 21 & 25/89 **Brazzelli Lualdi**.

⁵² Case 29/63 **Usines de la Providence** as cited in Toth (1997) p.185.

⁵³ C-390/95 P **Antillean Rice Mills** at para. 29 and EU-oplysnigen, Faktablad nr.4, March 2002.

⁵⁴ Toth (1997) p. 185.

⁵⁵ Cases 29/63 **Usines de la Providence**.

⁵⁶ Case 74/74 **CNTA** of 14 May 1975 and 15 June 1976.

seeds, the Court is also willing to admit applications which are inadequate as to the statement of the exact loss (where this requires a time consuming expert's opinion), where the infringing act or omission is appropriately dealt with in a separate action (e.g. for an interlocutory judgment) and then deal with the nature and size of the damage later.

The Court is not bound by the parties' claims but has discretion to assess the amount of damage on its own - if necessary assisted by an independent expert as for instance in **Usines de la Providence**.⁵⁷ In this connection it is well worth remembering AG Capotorti's statement on the Court's task in his opinion to **Ireks-Arkady**⁵⁸ in 1978:

“The object of compensation is to restore the assets of the victim to the condition in which they would have been apart from the unlawful act, or at least to the condition closest to that which would have been produced if the unlawful act had not taken place: the hypothetical nature of that restoration often entails a certain degree of approximation. [...] These general remarks are not limited to the field of private law, but apply also to the liability of public authorities, and more especially to the non-contractual liability of the Community”.

The Court will in other words compare the applicant's situation with that of other legal persons in the relevant sector who have remained unaffected by the contested act or omission. As mentioned by Toth elaborating on **Usines**, the Courts “always aims at an exact assessment of the damage based on all available evidence. Since, however, the Court is involved in reconstituting a hypothetical situation, it may be faced with circumstances in which certain elements of the damage cannot be calculated with complete accuracy. In such cases the Court is prepared to accept realistic approximations, such as averages based on comparisons, reached by sampling methods customarily used in economic surveys, provided that the basic facts are sufficiently reliable”.⁵⁹

As seen in **Zuckerfabrik Schöppenstedt**,⁶⁰ “compensation” cannot take form of “annulment” of a given legislative or administrative act, as this does not meet the requirement of being quantifiable, but as was later held it can take form of payment of an amount of money which *de facto* would put the applicant in a situation equivalent to what (s)he would be in, if a particular act had been annulled.

4. ANALYSIS OF RECOVERABLE TYPES OF DAMAGE

4.1. Which types of *material* damage can be claimed?

Above it has been examined which general characteristics a loss must possess in order to be accepted as such by the European Courts. The following chapter will examine the Court's stance and willingness to compensate the various types of damage it has been presented for. First, we shall look at the concept of material damage.

⁵⁷ Case 29/63 *Usines de la Providence*.

⁵⁸ Case 238/78 **Ireks-Arkady**.

⁵⁹ Toth (1997) p.186.

⁶⁰ Case 5/71 *Zuckerfabrik Schöppenstedt*.

4.1.1. Reduction of assets (*damnum emergens*)

The ECJ is usually unwilling to make *obiter dicta* and to elaborate on general principles more than is strictly necessary for any given case. As such it has never laid down any general principles regarding what types of damage that the Court is willing to accept as recoverable under Art. 288(2), nor how the loss is calculated. Instead the Court operates after an *ad hoc* principle and tackles the problems as they appear before it - an approach that contributes to the lack of overview over a matter, which is complex enough in its own. Again, it is therefore necessary to piece information together from the case-law in the attempt to create the big picture.

As Advocate General Caporti explained it in **Ireks-Arkady**,⁶¹

“...the legal concept of damage [used by the ECJ] covers both a material loss *stricto sensu*, that is to say a reduction in a person’s assets [*damnum emergens*], and also the loss of an increase in those assets which could have occurred if the harmful act had not taken place” [*lucrum cessans* / loss of profit].

Although it is for the applicant to precisely state his or her loss in the application, it falls within the Court’s jurisdiction to assess the quantum of damage that is just in each case.⁶² A guideline can be found in **Mulder II**, where the Court held that the amount of compensation payable by the Community should correspond to the damage which is caused.⁶³ *Damnum emergens* includes direct damage caused by an unlawful act or omission. The recent - and very fascinating - case of **Embassy Limousines**⁶⁴ is a good example of a case that spells out in detail different kinds of *damnum emergens*. The case concerned an undertaking, which was participating in a public tender for the transport of EP personnel and wrongfully was encouraged by the EP to make irreversible investments *before* the tender process was over. It therefore suffered various kinds of damage when eventually another tenderer won the contract. Embassy was granted compensation *inter alia* for the following expenses:

- cost of active fleet reserved for the Parliament from 1 January 1996 until 31 March 1996 and insurance for 36 cars
- parking expenses for 36 vehicles
- expenses of breaking off the contract for the fleet of 25 vehicles
- preparation of the contract, feasibility study and statistical analysis
- assistance and preparation of data, tender and organisational advice
- preparation, negotiation for fleet of vehicles, telephone contract and parking
- travel and representation expenses
- secretarial expenses (flat-rate basis)
- fax, telephones, administration, copying and printing
- expenses in connection with recruitment, medical examinations, training (drafting of contracts, hiring of a meeting room) and familiarisation expenses for the drivers

⁶¹ C-238/78 **Ireks-Arkady** as cited in Craig & De Búrca (1998) p. 539.

⁶² Toth (1997) p. 187.

⁶³ Cases C-104/89 and C-37/90 **Mulder II**.

⁶⁴ T-203/96 **Embassy Limousines & Services**. Incomplete quotation from para. 89.

- fees of Mr Hautot, working exclusively on the tender and subsequently on the setting up of the Parliament contract.

On the other hand the CFI denied Embassy the reimbursement of expenses relating to the preparation of the tender:

“charges and expenses incurred by a tenderer [whose tender has *not* been accepted] in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages” (para. 97)

In other cases material damage in the sense of Art. 288(2) has been held to include e.g. the payment of an illegal import levy,⁶⁵ loss arising from an illegal abolition of a compensatory scheme⁶⁶ or loss of earnings resulting from an accident at a Community institution failing to comply with the local rules concerning the prevention of industrial accidents.⁶⁷ It also includes more indirect damage such as “expenses necessarily and reasonably incurred such as for example penalties paid for the repudiation of contracts made necessary by the wrongful act or expenditure caused by an accident”.⁶⁸

There has also been cases where compensation has been claimed for losses sustained from unlawful Community assistance to an undertaking’s competitors. This has not been finally settled by the Court because the cases have been dismissed on other grounds, and moreover, it will be difficult to satisfy the requirement of a *causal* connection in such cases.⁶⁹

Damage which is not caused instantaneously, such as damage occurring from day to day over a period of time, as a result of the maintenance in force of an unlawful measure, also falls within the meaning of damage under Art. 288(2). This was the case in **Quiller & Heusmann**⁷⁰ - one of the many “milk reference quantity” cases in the wake of Council Regulation (EEC) No 857/84 of 31 March 1984, where the damage was sustained for so long as the applicants were prevented from obtaining a reference quantity and therefore delivering milk.

In **Pantochim**⁷¹ the applicant alleged to have incurred losses due to the fact that it was not allowed to produce biofuel under the French national duty exemption rules, and that the Commission was liable for unlawful inaction as it should have ensured that the French government altered the unlawful conditions governing the grant of duty exemption. The Commission, on the other hand, claimed as an established fact that “damage arising from the impossibility of receiving *unlawful* aid could not afford entitlement to compensation”. However, the CFI decided the case on the absence of a basis of liability and therefore did not give any statement as to whether it is possible to claim the above mentioned damage.

⁶⁵ Cases 5, 7 and 13-24/66 **Kampffmeyer I**.

⁶⁶ Case 74/74 **CNTA**.

⁶⁷ C-308/87 **Grifoni**.

⁶⁸ Toth (1997) p. 187 quoting **Kampffmeyer I** and **Grifoni**.

⁶⁹ See for instance 26/74 **Roquette** as mentioned in Hartley (1998) p. 455.

⁷⁰ T-195 & 202/94 **Quiller & Heusman**.

⁷¹ T-107/96 **Pantochim SA** at para. 33 ff.

4.1.2. Loss of profit (*lucrum cessans*)?

Despite AG Caporti's statement in **Ireks-Arkady** above, it would seem that the European Courts are more reluctant to grant compensation for the loss of profit - that is to say potential income - than for the loss actually suffered. In **Kampffmeyer I**⁷² the ECJ held that the profits that Kampffmeyer lost were "speculative" (given the sudden, large number of applications when the levy on maize for a time was 0%), and it therefore reduced its compensation to 10% (!) of the lost profits. In **CNTA**⁷³ it was held that claims for loss of profit could not be compensated where the claim was founded on the principle of legitimate expectations of a Community compensatory scheme. In its view legitimate expectations were only to protect against loss by reason of the withdrawal of those amounts - it did not ensure that profits could be made.⁷⁴

Later on, the Court has been more generous and has allowed compensation for lost profits as for instance in **Peine-Salzgitter**⁷⁵ where the Commission's wrongful denial of adjusting the undertaking's steel production ration was held to entail a loss of profit. In **Mulder II**⁷⁶ it was confirmed that loss of profit is part of the concept of damage under Art. 288(2) and this must therefore be regarded settled case-law.

However, claims for loss of profit are often invoked unsuccessfully in cases regarding public tenders. In the recent case of **Embassy Limousines** the CFI held that Embassy Limousines could *not* claim for the loss of profit:

"In this case, it has been established that the fault committed by the Parliament gives rise to non-contractual liability on the part of the Community. On the other hand, no contractual liability has been incurred. In the circumstances the applicant is not justified in claiming compensation for its loss of profit, *since that would result in giving effect to a contract which never existed*".⁷⁷

The CFI's statement seems to indicate that loss of profit can never be claimed in cases of non-contractual liability. If so, that is in direct opposition to the previous ECJ-cases mentioned above. The logic of the statement bears reminiscence of the difference between the *contractual* concepts of full expectation damages, where loss of profit is recoverable, and reliance damages, which only restores the injured person to his or her pre-contractual position. *Had* there been a contract, which then unjustly was annulled, these two concepts would have come into play. However, in the absence of a contract the rules of *non-contractual* liability govern the matter. And according to previous case-law of non-contractual liability, loss of profit *is* recoverable unless it is deemed "speculative".

Therefore, if one is to understand **Embassy Limousines**, one will need to stress the fact that the liability arose from a public *tender*, unlike the above mentioned cases, and because Embassy was only *likely* to win the contract, the alleged loss of profit was not "certain". Moreover it cannot be excluded that it was on the CFI's mind that Embassy was a bit "greedy" in

⁷² Cases 5, 7 and 13 to 24/66 **Kampffmeyer I**.

⁷³ Case 74/74 Comptoir National Technique Agricole (CNTA) at para. 45 f.

⁷⁴ Craig & De Búrca (1998) p. 539.

⁷⁵ T-120/89 **Stahlwerke Peine-Salzgitter** as confirmed by the appeal case C-220/91P.

⁷⁶ C-104/89 and 37/90 **Mulder II**.

⁷⁷ T-203/96 **Embassy Limousines** at para. 96.

their claims for the loss of profit; the claim was laconically worded as follows:

“loss of profit estimated over five years on the basis of a three-year contract renewable for two twelve-month periods: BEF 10 000 000” (para. 89c).

Similar cases all stress the fact that damage resulting from the loss of profit in tendering procedures presupposes that the applicant was entitled to be awarded the contract. These cases also state that proof of this requires more than the recommendation of the evaluation committee, as the contracting authority is not bound by this recommendation, but has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract.⁷⁸ In conclusion it would therefore seem virtually impossible for applicants to claim for loss of profit in public tenders.

4.1.3. Interest as part of the concept of damage

If the applicant convinces the Court that a Community institution has wrongfully occasioned a loss, he or she will most likely claim that the defendant institution in addition to the established loss should pay interest, since a delay in payment adversely affects the value of the amount of money due.⁷⁹ Such a claim raises two interesting questions, namely from when interest starts to run and at which rate.

The legal theory in most Member States distinguish between two types of interest; default interest and interest on the judgment debt. Default interest is damages for wrongful delay in the performance of an obligation and starts to run from the time of the default.⁸⁰ A claim for default interest is usually only admissible where the principal loss can be established with certainty, either by agreement or by objective criteria.⁸¹ Interest on the judgment debt starts to run on the date of the final judgment, and seeks to create an incentive for the convicted defendant to pay the judgment debt as soon as possible as well as to make up for the decrease in value of the compensatory amount over time.

In cases on non-contractual liability the European Court has tended to award interest only on judgment debt. Claims for default interest have mostly arisen in staff cases where it is not as much the amount of damage (the salary), as the other conditions for liability which are at dispute. The cases are in some disarray as to the rate of default interest and the date on which default interest starts to run. In many cases the Court's approach seems to be to take very practical and equitable decisions as to the rate and starting date based on the individual merits of the cases, rather than pursuing principles.⁸²

As regards interest on judgment debt, the Court has consistently held that the obligation to pay damages arises on the day of the final judgment, and therefore interest starts to run from that date.⁸³ Unlike most Member States the EC interest rate is not based upon a statutory rate, but is a result of judge made law. There is therefore a more urgent need for stating the reason

⁷⁸ T-13/96 **TEAM** at para. 76.

⁷⁹ Casteren (1997) p. 200.

⁸⁰ von Eyben: Juridisk ordbog, 11. udg. (1999).

⁸¹ Lasok (1994) p. 549.

⁸² Lasok (1994) p. 549.

⁸³ See e.g. C-152/88 **Sofimport** at para. 32.

behind the applied rate of interest, but so far the Court has showed no willingness in giving a detailed explanation for the level of interest.⁸⁴ For many years the rate of interest was fixed at 6%, but in more recent cases the Court has awarded 7% and even 8%. Advocate General Slynn has said it was appropriate for the Court to adopt rates of interest reflecting the contemporary financial realities, whereas Advocate General van Gerven has suggested that “the guideline should be the level of legal interest which is applied [...] in the Member States in which the applicants worked and in which they would therefore normally use or invest the compensation due to them”. This argument has been opposed by Advocate General Mancini who fears that interest rates based on the geographical situation of the creditor might lead to discriminatory treatment.⁸⁵ For certain seems therefore only, that the Court may not award a higher rate of interest than the applicant has claimed.

4.2. Which types of non-material damage can be claimed?

Not just material damage may be compensated under Art. 288(2). Various kinds of non-material damage (i.e. damage which does not entail a decrease in assets or lost profit) have also been recognized as recoverable, and thus part of the concept of damage used by the Court. The value of the *non-material* damage is naturally determined differently than in the case of material damage, but the applicant will still have to prove that the damage is “actual”, “certain”, and “quantifiable” and cannot, in principle, confine itself to pleading the wrongful nature of a Community institution’s conduct.⁸⁶ The Court is free to assess on its own *ex aequo et bono* what it considers to constitute equitable damages. Again, the Court has made no general comments on what is covered, but by examining case-law it will be demonstrated that the Court has a well developed and coherent practice.

In order to maintain a strict systematism, the cases of non-material damage should be divided into two categories; those which involve mental harm and those which concern bodily harm, both of which categories can be sub-divided into whether there exists an employment relation (staff cases) or not (third parties).

4.2.1. Non-physical harm: Emotional harm and harm to image and reputation

In the early days of the TECSC the ECJ held that some community servants’ prospect of wrongful dismissal caused them the non-material damage of “shock”, “disturbance” and “uneasiness” for which they were granted 100 European Monetary Units in compensation.⁸⁷ On the other hand the Court found that “a reduction in grade does not constitute appreciable non-material damage and cannot prejudice the applicants’ social standing”. Later, in response to the related question of what to do in respect of faulty or missing periodic personnel reports -on which the regular process of the servants’ career is dependant- the Court has once decided to award BEF 10.000 (1977) in damages for the consequential “uncertain and anxious state of

⁸⁴ Casteren (1997) p. 205.

⁸⁵ Slynn in his opinion to **Leussinck-Brummelhuis**, cited in Lasok (1994) p. 549; van Gerven in his opinion to **Mulder II**, and Mancini in his opinion to Case 256/81 **Pauls Agriculture**, both cited in Casteren (1997) p. 202.

⁸⁶ T-230/95 **BAI** at para. 38.

⁸⁷ 7/56 & 3-7/57 **Algera** at para. 67.

mind with regard to [the applicants] professional future”.⁸⁸ More “*uncertainty* and *anxiety* with regard to the recognition of a servants rights and professional future” was at play in the recent case of **Hautem**,⁸⁹ who was wrongfully dismissed from the EIB, and who due to the indeterminate nature of his present work status faced difficulties in finding new employment. However, in this case Mr. Hautem already had the CFI’s word for the illegality of the dismissal, yet the EIB refused to follow the judgment as it intended to appeal against that judgment. That made Hautem institute another action for damages and the CFI was furious at the EIB:

“With regard to damage, the refusal by a Community institution or body to comply with a judgment of the Court of First Instance, even if such a refusal is limited to the period between delivery of that judgment and that of the judgment to be delivered by the Court of Justice on the appeal, will adversely affect the confidence that litigants must have in the Community judicial system, which is based, in particular, on respect for the decisions made by the Community Courts. Consequently, irrespective of any material damage which might result from non-compliance with a judgment, an express refusal to comply with it will *in itself* involve non-material damage for the party who has obtained a judgment in his favour”. (para. 51)

Institutions cannot, in other words, wait with the fulfilment of judgments unless the Court decides otherwise. For the endured non-material damage Mr. Hautem was therefore awarded €25.000, which the CFI assessed to be more *appropriate* than the €60.000 for which he had claimed.⁹⁰

The above mentioned cases concern Community staff, but damages for non-material, emotional harm are also awarded to persons without an employment relation to a Community institution.

Substantial compensation was awarded for the damage endured by the very unfortunate employee of Hoffmann-La Roche, **Adams**,⁹¹ who helped the Commission to discover La Roche’s abuse of a dominant position contrary to the present Art. 82 TEC. Negligently, the Commission revealed his name to La Roche, and in the causal wake of that Mr. Adams lost his job, had to flee his country, was imprisoned, and ultimately his wife committed suicide because of the stressful situation. The ECJ ordered the amount of damage to be settled between the parties and according to The Times of 18 October 1986, Adams accepted £100.000 for “mental anguish” and another £100.000 for economic loss.⁹²

Damage to the *reputation* or *integrity* of physical or legal persons has also been claimed in several cases. In addition to the claims for material damages, the above mentioned case of **Embassy Limousines** also involved a claim for non-material damage arising from the broken promises to the shareholders and third parties and the false rumors about its solvency, the quality of its services and the reliability of its administrators. The claim, which was for BEF 5.000.000 was not underpinned by any evidence and therefore not “proved”. Nevertheless, the CFI did acknowledge that by sending Embassy no information concerning the outcome of the tendering procedure despite many requests, the EP placed it in a position of uncertainty and forced it to make useless efforts with a view to responding to the

⁸⁸ 61/76 **Geist** at para. 48f.

⁸⁹ T-11/00 **Hautem** at para. 52.

⁹⁰ T-11/00 **Hautem** at para. 51, 55 and 22.

⁹¹ 145/83 **Adams**.

⁹² Hartley (1998) p. 460

urgency of the situation. It therefore awarded Embassy BEF 319.345 in non-material damage ...not because this exact amount was thought to be equitable but because that in addition to the meticulously calculated amount of material damage nicely rounded up the total figure of compensation to BEF 5.000.000. It can thus be seen that in these cases of emotional and non-physical harm the Court assesses the damages *ex aequo et bono*,⁹³ and that this is not the first time that Court's judges have let their sense of equity be blinded by the magic of numbers!

Similarly, non-material damage can be incurred for the damage resulting from the *harm to a company's image*, as was the case in **New Europe Consulting**⁹⁴ (NEC) in which the responsible Commission official had warned the PHARE-programme co-ordinators in various east European applicant states against NEC and asked them to pass on the message that NEC could not be considered a reliable partner. The allegation later proved to be unfounded. Referring to **Embassy Limousines**, the CFI also acknowledged that the manager of NEC, Mr. Brown, who owned 99% of the shares in NEC and had started it as a one man business, had suffered non-material damage in that the Commission had "placed him in a position of uncertainty and forced him to make fruitless efforts to change the situation brought by the Commission itself". Interestingly, as regards the amount of damages, the NEC had claimed €300.000 for harm to the company's reputation and €100.000 for the [unspecified] non-material damage suffered by Mr. Brown, *alternatively*, that a committee of experts be appointed in order to evaluate the damage suffered. Laconically and owing to the "circumstances of the case", the Court found it unnecessary to appoint such a committee and then decided on its own that it was "fair" to grant €100.000 to NEC and €25.000 to Mr. Brown in damages for the harm to their image and reputation.

It can thus be inferred from this case that the European Courts are confident in the assessment of damage and will not appoint experts to do this unless in very special circumstances. Such special circumstances include *inter alia* the medical assessment of bodily invalidity.

Damage on *integrity and reputation* may also arise from the publication of annual or special reports of the European Court of Auditors in the Official Journal if they are not substantively correct or the interpretation placed on facts which are substantively correct is erroneous or one-sided.⁹⁵

As mentioned above I had found it relevant to divide the case-law on non-material damage into the two categories of those concerning emotional or other non-physical harm and those concerning bodily harm. Yet, it is inevitable whenever a rigid theoretical structure is applied to describe real life that some cases fall in between two categories. This can be said to be the case in the case of **Mrs. V**,⁹⁶ a member of the Commission staff who was involved in something as -presumably- unusual as a regular fist fight at work! Mrs. V complained about the incident to the relevant instances in the Commission, but to her disappointment nothing much happened in the direction of investigating the incident and taking appropriate action, and therefore she instituted the action before the Court *inter alia* for non-material damages. The ECJ said:

⁹³ From Roman law. Comparable to the principle of *equity* which supplements the British Common Law.

⁹⁴ T-231/97 *New Europe Consulting*.

⁹⁵ T-277/97 *Ismeri Europa* at para. 82 and 110 as confirmed by the appeal C-315/99.

⁹⁶ Case 18/78 *Mme. V*.

“[I]t must be acknowledged that the applicant is entitled to a gesture from the commission in compensation for the non-material damage which she has suffered as a result of the defendant’s clear lack of vigour in fulfilling its duty to provide protection. In that respect the award of *symbolic damages* appears to offer suitable satisfaction. The commission should therefore be ordered to pay to the applicant a sum corresponding to one *European Monetary [Unit]* by way of compensation for the non-material damage which she has suffered”.

What in other words started out as a case of bodily harm ended up concerning hurt feelings. However, cases like this where the award is for *symbolic damages* alone underline that the role of the Court - and of the action for damages as a whole - is as much to ensure the moral *rehabilitation* of injured MS citizens as it is to be the distributor of monetary damages.

4.2.2. *Loss flowing from the infliction of bodily harm*

4.2.2.1. *Community staff*

If an act imputable to a Community institution causes bodily harm to a member of the Community staff - for instance due to an accident at work - the question of non-material damage is regulated by the insurance scheme provided for by the Staff Regulation. An examination of the Staff Regulation insurance scheme rules *per se* falls outside the scope of this examination of the concept of damage, however, the grant of compensation from the staff insurance scheme does not exclude the possibility of instituting an action for damages before the European Court, if the awarded compensation is thought to be insufficient. The ECJ has granted itself this competence based on an interpretation on the staff insurance rules, which provide that the official is to subrogate the Communities to his rights against the tortfeasor, but in such a way that the official retains a prior claim to the sums which may need to be added to the amount of indemnity in order to obtain full compensation. On this background the ECJ found that an official cannot be denied the right to institute an action for *additional* damages.⁹⁷

The Community Courts remain competent to assess the fairness of the awarded damages and to interpret the Staff Regulation. An example of the Court’s interpretation of the Staff Regulation was seen in the case of **Miss B**⁹⁸ who allegedly suffered permanent invalidity from an accident in the course of her employment with the Commission. In cases like these, expert doctors will give their assessment of the gravity of the damage, typically expressed in a percentage grade of complete invalidity. But despite the expert opinions it remains the Court, which has the final word. In this case the ECJ held that psychological and non-physical consequences must be taken into account when determining the rate of invalidity under the insurance scheme provided for by the staff regulations and that this was to be done irrespective of any degree of incapacity for work, which may result from that accident.

This approach must be welcomed on the grounds that from the point of view of the Community citizens, the endured damage may affect their personal lives significantly despite the fact that the damage may not have diminished their capability to work correspondingly. As such, the stance

⁹⁷ Case 169/83 & 136/84 **Leussink** at para. 9ff.

⁹⁸ Case 152/77 **Mlle B**.

adopted by the Court may be an indication that Community citizens henceforth should be appreciated for more than their ability to work!

In the similar case of **Gerhardus Leussink**,⁹⁹ a Community official who on a Community mission was involved in a traffic accident in a community car and suffered injury on his hearing, sense of smell and sense of taste, the Court found that the psychological and non-physical consequences *had* been taken into account when the damages under the insurance scheme was assessed. This was done by adding an additional rate of 10% (of total invalidity compensation) for the psychological and non-physical injury. This in itself is interesting, and calls for a moment of reflection. As will be recalled from the examination above, non-material damages may be recovered for anxiety, hurt feelings, and damage to reputation etc. as a direct consequence of a Community act. In this case, the Court assumes that *physical* damage to a community official as a result of a wrongful community act or omission (*in casu* inadequate maintenance and inspection of the vehicle) *automatically* also entails the right to damages for non-physical damages - in this case worth 10% of total invalidity. Admittedly, it may verge on the pedantic to stipulate that there *is* a conceptual difference as to whether the direct or immediate consequence of the wrongful Community act or omission is non-physical damage or if it is physical damage *which in turn* leads to non-physical injury, as both kinds of damage are recoverable under EC-law. When, however, it is *not* pedantic but in fact relevant to distinguish, it is because of the necessity to stress, that in theory it should be possible for the Community to be liable to pay damages for physical damage *alone*, and that non-physical damages following a physical injury should only be awarded upon individual examination of each case - not just by adding 10% by routine. Yet, the Court went further than that. It used its competence to assess the damage *ex aequo et bono* and held that in view of the extreme gravity of the non-economic consequences which the accident had had for Mr. Leussink, it was equitable to award him *additional* compensation of 2 million Belgian Francs (the claim was for 5 million).

The case of **Gerhardus Leussink** also gives useful information about the interaction between the concept of damage and the requirement of *directness*. Apart from Mr. Leussink's own claim, his wife and four children sought compensation worth nothing less than 7 million Belgian Francs for the impaired family relationship with Mr. Leussink due to his change of psychological character following the accident. To this the Court responded:

“22 Although there can be no doubt about the reality of those effects or about the existence of a link with the accident, they are nevertheless the *indirect result* of the injury suffered by Mr. Leussink and do not constitute part of the harm for which the Commission may be held liable in its capacity as employer. This is borne out by the fact that the legal systems of most member states make no provision for compensating such effects.

23 It follows that the application lodged by [the wife and children] must be dismissed”.

The Court here seems to confirm, that the impaired family relationship is indeed something which falls within the concept of damage, thus making it a rather broad concept as far as non-material damage is concerned. It should

⁹⁹ Joined cases 169/83 and 136/84 **Gerhardus Leussink**.

nevertheless not be criticised that the Court finds this damage *indirect*, as the line must be drawn somewhere. It is, however, not clear whether the indirectness is caused by the fact that the applicant is *another* person than the Community employee or whether such damage is simply not *foreseeable* in the particular situation.

4.2.2.2. *Other persons than Community Staff*

In the jurisprudence of ECJ and CFI cases in the field of personal injury are rare, and of those that do exist the majority concern Community staff. The explanation for this disproportionate relation is obviously that unlike national administrative institutions, the Community institutions, with the tasks they carry out, have very little *physical* contact with the citizens. Nevertheless, occasional accidents do happen. A wrongful Community act or omission may inflict bodily harm also on other persons than Community officials, i.e. independent workers and ordinary citizens. In this case the insurance scheme under the staff regulation is of course not applicable. Instead, the claim for non-contractual damages may be based on Art. 288(2) alone.

The infliction of bodily harm to a person may give rise to several types of loss. As was the case in **Grifoni**¹⁰⁰ where a worker - an independent third party - was injured in a Community building due to the Commission's failure to take the safety measures prescribed by the Italian legislation, the recoverable loss may constitute the sum of the medical expenses (and expenses related to the treatment and recovery) caused by the accident to the extent they can be proved by original vouchers and other admissible evidence. The infliction of bodily harm on a person who at the time of the accident was employed or otherwise engaged in economic activity may also lead to total or partial temporal incapacity and to permanent invalidity. Unless an agreement between the parties can be made, the Court will order an expert medical report on the status of the injured person to be made and will rely on the outcome of that report as fact. If in the period of recovery the injured person is completely unable to work, the Court will calculate the consequential loss by multiplying the number of days away from work by the average daily income of that person in the time before the accident. Once the person recovers so much that he/she is able to work again it may be necessary to consider if the person is still partially temporarily incapacitated. If this is the case, the compensation will amount to a lump-sum based on the result of the number of days where the injured person has been working while being partially temporarily incapacitated multiplied by a percentage grade situated between total temporary incapacity (100%) and the permanent invalidity as set out in the expert medical report. When the compensation usually takes the form of a lump sum in this situation it is because of the difficulty in assessing the precise reduction of the persons ability to work at any time and the speed of recovery.

The calculation of the loss flowing from permanent invalidity is more difficult to perform, given that this in essence is an estimate of a future loss and therefore entails a significant degree of approximation. Again in the case of **Grifoni**, the applicant maintained that the assessment of the loss flowing from his permanent invalidity must be made on the basis of his annual earnings in accordance with the formula used in Italian law. This for-

¹⁰⁰ C-308/87 **Grifoni**, 27 March 1990 (interlutory decision) and 3 February 1994 (Judgment).

mula introduces a capitalization coefficient corresponding to natural life expectancy and a rate of deduction reflecting the expectation of active life. The Court stressed that Italian law did not apply in the case, but as the Community rules of non-contractual liability are founded on the general principles common to the laws of the MS, the Court examined the formula and found it in accordance with available statistical information. The loss flowing from the applicant's permanent invalidity was therefore found to be "equal to his total annual earnings divided by the degree of invalidity and by the capitalization coefficient (16.104 having regard to the age of the victim [...]), to which a reduction of 20% was applied representing the difference between natural life expectancy and the expectation of active professional life".¹⁰¹

In view of the fact that cases involving disputes over the rates of temporary incapacity and permanent invalidity may take several years (Mr. Grifoni for example waited more than 8 years for his compensation), the Court may take account of the annual inflation since the event that gave rise to the loss by granting an additional lump sum, as it did in this case.

4.2.3. *Compensation for violations of administrative rules*

In recent years there has been an increasing focus on the formal rules of good administration and on the sanction for violations of these. By formal rules is meant rules which govern the decision making *process*, whereas material rules are those which constitute the basis for the decisions themselves. Inevitably, there has therefore been a tendency to regard the material rules as more important than formal rules, but presumably because of the increased attention to individuals' rights in society as such, formal rules have gained in significance. Formal rules like the duty to give adequate reason for all public acts (Art. 190), the right of access to documents (Art. 255),¹⁰² and the obligation to conduct hearings of parties before a decision is taken,¹⁰³ ideally aim at ensuring the correctness and the legality of the decisions. In certain national legal systems it has thus successfully been argued that the mere violation of these formal requirements causes damage to the claimant worth a considerable compensation. The question which is to be investigated in this context is therefore: Can it give rise to a claim for damages under Art. 288(2) if a Community institution violates such a formal rule?

This question cannot be answered by a simple yes or no. Following the doctrine set out in **Schöppenstedt**,¹⁰⁴ which was the first case where ECJ set out the principles governing Community liability for a legislative act, it will be necessary to distinguish between measures of general application and measures of individual application. Acts of general application are regulations and directives cf. Art. 249, although the Court has held that the Schöppenstedt-test will not apply where the disputed act is labelled a regulation, but in fact is a legislative measure of individual application. Conversely, the test *will* apply to measures labelled decisions (which usually are acts of individual application) if they in fact are of general application.¹⁰⁵ If

¹⁰¹ C-308/87 **Grifoni**, 3 February 1994.

¹⁰² Since 3 December 2001 the right of access to documents is governed by Regulation 1049/2001. See for a detailed analysis Schousboe (2001) on <http://home20.inet.tele.dk/eurokrat/Transp.doc>

¹⁰³ Introduced as judge made law in Case 17/74 **Transocean Marine Paint**.

¹⁰⁴ 5/71 **Zuckerfabrik Schöppenstedt**, 2 December 1971.

¹⁰⁵ Wyatt & Dashwood (2000) p. 256 f.

the act in question is of general application as would be the case with a directive or a regulation, the Court must decide if the violated rule (e.g. the duty to give reasons) is a superior rule of law for the protection of individuals. Only if this is the case the Court will admit the claim.

In **Julius Kind**¹⁰⁶ the Court was asked if the duty to give reasons was a superior rule of law for the protection of individuals and answered this in the negative. An act of general application flawed with an inadequate or even nonexistent statement of reasons therefore cannot give rise to a claim for damages, nor can it be annulled on that ground.¹⁰⁷ So far no formal rule of good administration has been tested positive in the Schöppenstedt-test and it must be assumed that this is now settled case-law.¹⁰⁸

However, the Schöppenstedt-test only applies to measures of general application. The critical question is therefore if a violation of a formal rule in connection with an act of individual application can form the basis of a claim for damages under Art. 288(2). So far, this question can only be answered by a maybe! The ECJ was presented with the problem in **Compagnia Italiana Alcool**,¹⁰⁹ which concerned a deficient statement of reasons for a Commission decision. In response the Court answered the question regardless of whether illegality of that kind may render the Community liable, as it found that there was no causal link between the damage allegedly suffered by CIA and the deficient statement of reasons. It supported its finding by stating that in the absence of that deficiency the damage allegedly suffered by CIA would have been the same.

In essence, this may therefore suggest that a claim for damages for violation of a formal rule in the decision making process of a measure of individual application can only be successful if it can be proved that the outcome *could* or *would* have been different in the absence of the illegality. In that event, the award of damages is likely to be granted instead of annulment.¹¹⁰ At least that approach was adopted in **Mavridis**,¹¹¹ where a procedural requirement under the staff regulation was violated. The ECJ held that although the infringement of that requirement did not automatically mean that the disputed measure was void, it could in certain circumstances justify the award of damages, if the person concerned had suffered injury as a result.

4.3. The controversial “special loss”

4.3.1. A connection between loss and liability. - A study of national law

As will be remembered from above, the Court has repeatedly held that for the Community institutions to incur liability, the applicant must prove the existence of damage, causation, and of a wrongful or illegal act imputable to the Community. As such, all successful applicants in the cases above have been able to prove an illegality of the contested act. However, for decades of the Court’s history it has been an ongoing question if liability can be incurred even in the absence of an illegality (i.e. liability for *valid* legal measures), and although it may seem striking in a dissertation on the concept of

¹⁰⁶ Case 106/81 **Julius Kind**, 15 September 1982 at para. 12 - 15.

¹⁰⁷ Wyatt & Dashwood (2000) p. 257.

¹⁰⁸ See for instance the more recent cases C221/97P **Schröder** and T-43/98 **Emesa Sugar**.

¹⁰⁹ C-358/90 **Compagnia Italiana Alcool**, 7 April 1992.

¹¹⁰ Usher (1998) p. 119.

¹¹¹ Case 289/81 **Mavridis** at para. 25.

damage to discuss this aspect of the condition of *fault*, it is, as will be shown, nevertheless very relevant to do so.

To cope with claims concerning liability without fault the European Courts of Justice have drawn heavily on French national law, which operates with a principle according to which *liability* is not always interred with the nature of the disputed *act* or *omission*, but can be incurred if the *loss* is of a special and unusual nature. Göran Lysén explains the doctrine in his classic work on non-contractual liability in the European Community:

“The general basis of liability without fault is the *rupture of equality* with respect to public charges imposed on the citizens. If a public authority undertakes measures in *the public interest* knowing in advance that these measures will or may injure certain persons in society inasmuch as a supplementary sacrifice is imposed on these persons affected by the measures, the rupture has to be corrected by an indemnity. [...] A further condition [for strict liability to be incurred] is that the nature of the damage must be *special* and of a *sufficient gravity* which is always required in actions for indemnity not based on a committed fault”¹¹².

Also German law operates with a similar concept, known as *Sonderopfer*, where damages are awarded for legal public acts like for example diverting traffic away from shops which rely on the flow of bypassing customers, where this would result in abnormal, excessive and special damage to the retailer.¹¹³

Such a situation can easily occur in the EC. Bronkhurst illustrates the dilemma by focussing on the Common Agricultural and Fisheries Policy, which in the beginning mainly existed as a price support mechanism, but which now has been transformed into an instrument imposing quantitative production limits. He observes that the Community institutions has had recourse to various instruments, including production quotas and that at the same time, other instruments like the length of fishing beams and the size of net have been introduced to reduce overproduction and asks the key question: “Does a fisherman, who, on very short notice, has to make important changes to his vessel, thus incurring substantial financial costs, have an action for compensation, even if the Community measures as such can not be challenged on the grounds of illegality?”¹¹⁴

4.3.2. The “special and unusual” loss in Community jurisprudence

Initially, in the 1970’s, the Court took a somewhat restrictive stance and found the question of strict liability for the Community quite inconceivable.¹¹⁵ Later in the **CNTA**¹¹⁶ case, it restricted the principle only to apply where no overriding matter of public interest could justify the Community measure. A more open attitude - and an attitude which corresponds better with the obligation to make good any damage caused by the Community institutions in accordance with the general principles common to the laws of the Member States - was first seen in December 1984. Here the ECJ gave judgment in the **Biovilac**¹¹⁷ case in which a Belgian producer of animal feed made from skimmed-milk powder claimed compensation for a drastic re-

¹¹² Lysén (1976) s. 103 f.

¹¹³ Bronkhurst (1997) p. 157.

¹¹⁴ Bronkhurst (1997) p. 153 f.

¹¹⁵ Cases 9 & 11/71 *Compagnie d’Approvisionnement et Grands Moulins de Paris* at para. 45 - 46.

¹¹⁶ Case 74/74 **CNTA**, at para. 43.

¹¹⁷ Case 59/83 **Biovilac**.

duction in his sales following the introduction of a Community regulation which allowed for the sale of skimmed-milk powder at a much reduced price in order to reduce the existing surplus within the Community. The regulation was held to be fully legitimate, but the applicant put forward an alternative claim for compensation even in the absence of illegality based both on the French and the German concept. The ECJ said:

27 To support its alternative claim the applicant relies on the German law concept of "*Sonderopfer*" (special sacrifice) and the French law concept of "*rupture de l'égalité devant les charges publiques*" (unequal discharge of public burdens). It contends that, even in the absence of any illegality, the Community is nevertheless liable, under the second paragraph of Article 215 of the EEC treaty [present Art. 288(2) TEC], to make good any loss of property which an individual suffers in consequence of general measures which are lawful in themselves if he is particularly affected and harmed by them, namely if he is affected in a different way and much more seriously than all other traders and producers.

28 In this regard it need only be observed that the Court has held in a consistent line of decisions that an action for damages brought under Article 215 of the treaty for *unlawful* legislative action cannot succeed unless the damage alleged by the applicant *exceeds the limits of the economic risks inherent in operating in the sector concerned*. That principle would have to be applied *a fortiori* if the concept of liability without fault were accepted in community law".

The Court then adopted a very practical approach. Instead of elaborating on the existence of the principle of strict liability, it went on to evaluating whether the limits of the economic risks had been exceeded and found this not to be the case. There is good reason to criticise this minimalist approach. It was disappointing that the Court missed such an excellent opportunity for making a clear statement on the existence of strict liability in Community law. The theories of *Sonderopfer* and of *rupture de l'égalité devant les charges publiques* can be said to have their origin in the well established principle of equality. The obligation to treat the citizens equally obliges the administration not to hold a particular and limited group of individuals responsible for burdens which are to the benefit of the entire community without due compensation. The decision whether or not to grant such compensation, and whether or not to introduce severe restrictions for obtaining such compensation inevitably poses the question of who the system wishes to protect; the Community administration or the Community citizens. If "special" and "unusual" losses even in the absence of fault are not recognised as part of the concept of damage under Art. 288(2), or if severe restrictions for recognising such claims are introduced, that system is verging on a conflict with the obligation to make good *any damage* caused by the Community institutions, and is hardly in accord with the citizen friendly and rights orientated vision of the Community set out in the Charter Art. 41(3). The need for genuine recognition of strict liability is therefore of paramount importance.

However, although it was disappointing that the Court missed such an excellent opportunity for making a clear statement on the existence of strict liability in Community law, the statement was nevertheless an indirect recognition of the existence of that principle, and it must be welcomed that the Court gave an indication of the nature of the recoverable damage, i.e. that it has to exceed the inherent risks in the particular economic sector.

Yet another decade should pass before the Court elaborated even further on the conditions under which the Community can incur liability for lawful acts, i.e. liability without fault.

This could be observed in the recent **Dorsch Consult Ingenieurgesellschaft**-case.¹¹⁸ Dorsch was a company, which had an on-going contract with an undertaking in Iraq when the *first* Gulf War started. In the wake of this, the Council introduced a trade embargo, which eventually meant that Dorsch became unable to recover its outstanding debts in Iraq. The embargo was undisputedly lawful, so Dorsch alleged that the Community was also liable for lawful acts (strict liability). The CFI had the following response:

“In the event of the principle of Community liability for a lawful act being recognised in Community law, such liability can be incurred only if the damage alleged [...] *affects a particular circle of economic operators* in a disproportionate manner by comparison with others (unusual damage) and *exceeds the limits of the economic risks inherent in operating in the sector concerned* (special damage), without the legislative measure that gave rise to the alleged damage being justified by a *general economic interest*. [...] A Community undertaking whose claims against the government of a non-member country [Iraq] have become irrecoverable following the imposition by a Community regulation of a trade embargo against that country cannot be regarded as having suffered special damage where not only its claims were affected but also those of all other Community undertakings which, when the embargo was imposed, had not yet been paid. Furthermore, the damage resulting from the suspension of payments by that non-member country cannot be regarded as unusual damage, falling outside the *foreseeable risks* inherent in any provision of services in a 'high-risk' [no insurance company wanted to insure Dorsch against the risk of loss in its deal with Iraq] non-member country”.

Again the Court used a very careful wording; “in the event of the principle...being recognised in Community law”, and thus seemed reluctant to take the full step and recognise the principle of strict liability. Likewise, we see the Court restricting the scope of strict liability by saying that lawful acts entailing a special and unusual loss will nevertheless not amount to recoverable damage if the contested measure can be justified by a general economic interest.

However, given the rather elaborate consideration on the conditions which must be fulfilled for the damage to qualify for compensation, it may be argued that **Dorsch** was *de facto* a recognition of the existence of strict liability in the Community and that the Court was simply just cautious not to open any flood gates unintentionally.

Moreover, by making strict liability subject to “general economic interest”, **Dorsch** uses a different wording¹¹⁹ that the seemingly similar principle set out in **CNTA**, which makes strict liability subject to an *overriding matter of public interest*. It would therefore seem that the Court has limited the field of application for the restriction, as the term “general economic interest” necessarily must cover a narrower area than any “public interest”.

The essence of **Dorsch** is in other words that in claims regarding strict liability, the damage must not only be “special” and “unusual”; the nature of the damage must also (in addition to the features set out in Chapter 3) have the following three features for the loss to be recoverable:

¹¹⁸ T-184/95, **Dorsch Consult Ingenieurgesellschaft**. Quotation from para. 80 and para. 6.

¹¹⁹ The new wording is confirmed in the most recent case on strict liability, T-170/00 **Förde-Reederei**, 20 February 2002 at para. 56.

- i) the damage must affect only a particular circle of economic operators in a disproportionate manner;
- ii) the damage must exceed the risk in the particular sector;
- iii) the damage must be unforeseeable.

Affect only a particular circle of economic operators (“unusual” harm)

The first criterion set up by **Dorsch Consult** regarding the “particular circle of economic operators”, dubbed “*unusual damage*”¹²⁰ by the CFI, entails that the Court must compare the applicant’s situation with that of his competitors within his or her particular branch including - if relevant - in other MS. This phrase must be assumed to be just another way of saying that the loss must be of a “specific” nature.

That the level of affectedness also has to be disproportionate is a criterion, which the Court has not elaborated upon, but which must be assumed to aim at eliminating very trivial cases.

Exceed the risk in the particular sector (special harm)

This element in the definition of what constitutes a recoverable loss, dubbed “*special damage*” by the Court is frequently referred to in cases of non-contractual liability, and has been used in cases like **Ireks-Arkady**¹²¹ concerning liability for *unlawful* legal acts as part of the test to determine the existence of “grave and manifest disregard” of the limits on the exercise of discretionary power. The phrase targets the imprudent legal persons, who have failed to take account of ordinary fluctuations in the market. Yet, where the Court here seems to play on the well-known chord of elaborating on the duty to mitigate loss (as discussed below), one could argue, that at least in this case, the Court’s approach is actually rather sensational. At least I find it curious that the Court so blatantly ties the test of *damage* to the test of *liability*. Intuitively, one should think that the test of liability relied on the *act* rather than the consequential *damage*. Yet, what the Court is saying is that institutions will only incur liability for valid (or invalid) legislative acts, if this results in damage that it is so big that exceeds what prudent producers could expect in that particular sector. - It is therefore not an unreasonable question to ask how much damage from democratic institutions one may have to expect and thus accept as a calculated risk! Tantalizing is the admittedly speculative question of why the Court did not admit that there *was* a basis of liability, but that the *loss* could not be recognized as recoverable as it ought to have been avoided according to the duty to mitigate loss?

Unforeseeable

This element is to do with the duty to mitigate the loss or rather the related duty to *avoid* potential losses, which seem certain to occur. As such it must be assumed that the requirement of the damage to be “unforeseeable” does not only relate to liability for legislative acts, but to all cases of non-contractual liability.

To sum up, the applicant in **Dorsch** had concentrated his procedure on establishing this as a case of strict *liability*, but interestingly the Court fo-

¹²⁰ In the official summary the Court used ‘special damage’ to describe this, whereas the decision itself uses the term ‘unusual damage’ for exactly the same thing (and vice versa). This does not help to clear out the confusion.

¹²¹ Case 238/78 **Ireks-Arkady** at para. 10.

cussed on the suffered *loss* instead. This is no coincidence. One could have the unholy thought that the Court specifically wanted to avoid giving a statement on the possible existence of Community liability for valid legislative acts. It *could* have simply said that the present state of Community law does not recognize strict liability, so there is no basis of liability and therefore no non-contractual liability can be incurred. But for some reason it chose not to. Perhaps it is considered that at the present time the Community is simply not ready to accept liability for lawful legislative acts. Or rather, that the Courts' judges are not willing to institute full accountability on the Community institutions yet - at least in this authors view, the air of *deni de justice* is overwhelming. Thus, this again demonstrates why it is so important to study the concept of damage together with the basis of liability. Albeit of a distinct nature, the two conditions are inseparably intertwined.

The **Dorsch** criterions were confirmed three and a half years later in **Area Cova**¹²² in which the CFI after a careful examination of variations in fishing quota did not find the introduction of a total allowable catch (TAC) on Greenland halibut in 1995 to be "unusual" damage as required for the Community to incur liability for lawful acts, nor was it "an *unforeseeable* change, either in principle or even in extent, having regard to the circumstances and in particular to the extreme determination of the Canadian Government, which was well known from the beginning of 1994".

The most recent case on strict liability, **Förde Reederei**¹²³ of February 2002 has contributed nothing new to the interpretation of the principle, so at present it is only possible to conclude that "special" and "unusual" harm which is unforeseeable and does not flow from a lawful act which is adopted in the general economic interest of the Community will *in theory* fall within the concept of damage. But so far no applicant has successfully convinced the Court that he or she has suffered such a loss!

5. REDUCTIONS IN THE COMPENSATION

This next chapter will focus on a different aspect of the obligation to make good *any damage*. It will analyse how the Court interprets "damage" as in Art. 288(2) TEC in a situation in which the existence of damage of a kind which fulfils all the above mentioned criteria has been established, but where the applicant him- or herself is somehow to blame for either the occurrence or the size of the damage. This study is necessary because the concepts of the applicant's own fault and the so-called obligation to mitigate the loss give valuable knowledge of what can be expected to fall within the concept of recoverable damage under Art. 288(2). Reductions in compensation flowing from the applicant's own fault or the obligation to mitigate a injured loss are not innovations, as they are found as common principles of law in all Member States. The Community Court has, however, elaborated on the principles to such an extent that it is necessary with a close scrutiny of the case-law for clarification of the contents and scope of the said principles as they appear in Community law. In the following it will therefore be attempted to divide the case-law up into particular categories which will

¹²² T-196/99 **Area Cova SA** et altere, 6 December 2001, para. 162 ff.

¹²³ T-170/00 **Förde-Reederei**, 20 February 2002 at para. 56.

shed light on the different aspects of factors which will entail a reduction in the compensation, and thus delimit the concept of damage.

5.1. Aspects of the applicant's own fault

The Court will refer to the applicant's "own fault" in instances where the applicant's own conduct, whether action or inaction, has contributed to the *occurrence* of the damage. In its most basic form the concept of the applicant's own fault goes to say that compensation should be reduced partly or fully if not only the Community institution which has committed the fault (or incurred liability even in the absence of fault) but also the applicant is to blame for his or her own misfortune. In a consistent line of case-law the European Courts have not gone into a close consideration of how to precisely distribute the blame equitably, but sticks to either 0%, 50% or 100% reductions in the compensation according to the degree of own fault.

Examples of this from the case-law can be found in for instance the **Grifoni** case¹²⁴ in which not only the Commission's failure to take certain safety measures prescribed by Italian law at the Commission's Research Centre at Ispra (installation of a protective rail on rooftops) but also Mr. Grifoni's own lack of care for his own safety when carrying out his work contributed to the *occurrence* of the damage (he fell from a roof 4.5 metres above ground level and suffered serious physical injury). The Court explained that as a specialist in the field Mr. Grifoni ought to have taken the requisite precautions and refused, if necessary, to carry out his work before the safety measures had been implemented. On that background the ECJ found that the responsibility for the occurrence of the accident was to be shared equally between the Commission and Mr. Grifoni, and that the damages for which he had applied could only amount to 50% of the loss he actually suffered.

Grifoni is here used to show that an injured person, who actively *does* something he or she shouldn't have done, must bear the burden of his or her own negligence. But the Court has also held that sometimes there may appear a *duty to act* if the applicant is to avoid a reduction in compensation - i.e. that own fault will also apply to blameworthy *inaction*. This was for example the issue in the **Sommerlatte**-case,¹²⁵ in which a retired Community official instituted an action for damages on the basis of the Commission's liability for failing to inform retired officials of certain amendments to national legislation on sickness insurance schemes. The Court held that the damage was caused partly by the Commission's failure to give sufficient information, but *also* by the fact that Mrs. Sommerlatte 1) had failed to inform the Commission of her situation and 2) had not shown that she made the requisite efforts to inquire if it was possible to disaffiliate from the national scheme. The Commission was therefore ordered to pay to the applicant only 50% of the monthly contribution to the national sickness insurance scheme, which she was now required to pay each month.

In the fairly straight forward cases like these two it does indeed seem to be an equitable solution to distribute the blame in equal parts and thus only allow the damages to be set to 50% of the injured damage. However, as I also have criticised above, it may turn out to prove a very inflexible or

¹²⁴ C-308/87 **Grifoni**, at para. 16 ff.

¹²⁵ C-229/89 **Maria Sommerlatte**.

even unreasonable devise to always resort to the magic of numbers when the Court is to evaluate the share of blame between multiple wrongdoers. To reduce a compensation by 50% will inevitably have grave economic consequences for the injured party and the Court's unwillingness to be more flexible, by for example operating in incremental steps of 5% or 10%, or to go into a deeper and more nuanced evaluation of the exact distribution of blame, is potentially capable of undermining the confidence in the Court as an impartial distributor of justice.

As such the *deni de justice* seems blatant in the above mentioned **Adams**-case¹²⁶ where the compensation was reduced by 50%, worth £ 200.000 (1986 value), because the Court found that Mr. Adams was to blame for several actions and inactions:

“The applicant failed to inform the Commission that it was possible to infer his identity as the informant from the documents themselves, although he was in the best position to appreciate and to avert that risk. Nor did he ask the Commission to keep him informed of the progress of the investigation of Roche, and in particular of any use that might be made of the documents for that purpose. Lastly, he went back to Switzerland without attempting to make any inquiries in that respect, although he must have been aware of the risks to which his conduct towards his former employer had exposed him with regard to Swiss legislation”.

“Consequently, the applicant himself contributed significantly to the damage which he suffered”.

Considering that Mr. Adams had made his admirable disclosure of information, which enabled the Commission to sanction Hoffmann-La Roche for abuse of a dominant position, subject to the Commission's sincere assurance of non-disclosure of Mr. Adams identity to Roche, and considering that the Commission was in the best position to keep Mr. Adams informed of the progress it made in the case (not vice versa), and finally considering that Mr. Adams, at the time of going back to Switzerland where he was arrested, did *not* know that there was a substantial risk for his arrest and conviction of economic espionage, it would seem to me well founded to declare the reduction of 50% for Mr. Adams's own fault a very strict decision verging on the quite unreasonable. It almost appears like the Court has merely looked at the Commission, which claimed a 100% reduction, and the applicant, who argued for a 0% reduction, and then just took the crude average of those two figures and drew up some casual remarks in support of that finding!

5.2. The duty to mitigate the loss

The obligation on injured parties to try their best to keep a sustained loss at a minimum, is another common principle of law found in the Member States. The purpose of that obligation is obviously twofold, namely to minimise the expenses of the Community purse and to create an economic incentive for the citizens to behave prudently in their public affairs. The Community Court has implemented this principle in the concept of damage under Art. 288(2), but although it has been assumed to be more or less identical to reductions because of own fault,¹²⁷ it must be stressed that there is a conceptual difference between the two. Where own fault is applicable when the applicant's own conduct has contributed to the *occurrence* of the harm-

¹²⁶ C-145/83 Stanley **Adams**.

¹²⁷ See *inter alia* Lasok (1994) No. 2 p. 68.

ful event, the Court will only refer to the duty to mitigate the loss in situations where the applicant has failed to take sufficient measures to keep his or her loss as small as possible *after* the initial event, which gave rise to damage to the applicant. As with own fault, a failure to comply to the duty to mitigate the loss will result in a reduction in compensation. However, in contrast to own fault cases, the Courts *will* go into an *exact* economical calculation of the size the reduction in cases regarding failure to mitigate the loss.

For this dissertation it will be relevant to analyse what the Court requires the applicant to do with a sustained loss in order for it to fall within the concept of recoverable damage under Art. 288(2).

5.2.1. Exhaustion of legal remedies

The first trace of the duty to mitigate the loss in the Community Court's jurisprudence is found in the **Kampffmeyer II** case¹²⁸ from 1976 in which the ECJ allowed an action for damages before the full loss was actually assessable. The Court justified this by saying that it was necessary to allow the case in order to prevent even greater damage, and thereby pre-supposed that there is a duty to mitigate loss in Community law. What can be inferred from this is that there may be a duty to bring a claim for damages before the Court as soon as the cause of the damage is certain, as there may otherwise be a risk that the damage will increase. If the damage is allowed to increase after the applicant has become aware of the cause of damage, it must be assumed on this background that the Court will only compensate the amount of damage which had occurred at the time where the applicant first became aware of the damage and the cause. Potential applicants cannot therefore sit back and let the damage materialise to its fullest extent.

In its later jurisprudence the Court has consistently held that applicants must show "*reasonable diligence*" in limiting the extent of the loss *inter alia* by availing them in time of all legal remedies available to them.¹²⁹ The standard of "*reasonable diligence*" in itself gives very little information about the extent of the measures an injured applicant must take. It was therefore welcomed, though not by the applicant (!), that the Court gave a more detailed statement on the contents of the duty to mitigate the loss in **Mulder II**.¹³⁰

5.2.2. Replacement activity

The "Mulder-tiology" is a landmark complex of cases concerning the Commission's and the Council's adoption of general rules for the application of an additional levy on milk (Regulation No. 857/84). A number of Community milk producers pursued the Community scheme, which introduced premiums for the non-marketing of milk and the conversion of dairy herds, and did therefore not deliver milk for a period of time. When the milk producers subsequently wanted to resume the delivery of milk, they were only allowed to produce a certain quantity based on the amount of milk produced in previous years (the reference years) due to the new regulation. As the producers in question (J. M. Mulder and others) naturally had had no production of milk in the reference years, they were prevented from produc-

¹²⁸ C-56-60/74 **Kampffmeyer II**.

¹²⁹ Edward & Robinson (1997) p. 348.

¹³⁰ C-37/90 **Mulder II** et altere of 19 May 1992.

ing as much milk, as they had rightfully been able to make and had intended to make, and they therefore instituted an action for damages. The disputed Regulation No. 857/84 was in **Mulder I**¹³¹ held by the ECJ to be adopted in breach of the principle of the protection of legitimate expectations of the milk producers and was in the absence of a higher public interest therefore deemed unlawful. **Mulder II** arose because the applicants on the one side and the Commission and the Council on the other disagreed fundamentally in their understanding on the concept of damage under Art. 288(2) and how to calculate it. The ECJ therefore had to give a detailed statement on how to calculate the damage, but could not do so without giving a statement on the duty to mitigate the loss.

Firstly, the Court held that the calculation of the compensation to Mulder and others was not equal to the full value of the denied milk quota but had to take account of the income from the sale of milk that Mulder was *actually* able to produce in the absence of a Community reference quantity. In other words, the recoverable damage under Art. 288(2) does not correspond to the total “value” of the wrongful community act as such. “Damage” under Art. 288(2) is the difference between the income that could have been made if it were not for the wrongful act (the *hypothetical* income), and the income which was actually made in spite of the wrongful act (the *actual* income). In itself this is not surprising as it is a fundamental expression of the duty to mitigate the loss found throughout the Community. The calculation of the *hypothetical* income in **Mulder II** was extremely complex given the many technical and sector specific factors involved in agricultural production. However, as the Court stated, because of the essentially hypothetical nature of the evaluation of loss of earnings, the *expert’s report* came to play a leading role, as is always the case where none of the parties are able to prove the accuracy of the data or figures on which that party relies and those data or figures are contested.¹³²

The Court went further than that. It found that Mulder and the other applicants could not rely only on the continued but now reduced sale of milk in order to mitigate their loss sufficiently. The applicants had to initiate *replacement activities*, i.e. other ways of making money, if they were to avoid reductions in the compensation, and the money made from *all* the replacement activities would then be deducted from the compensation. The duty to mitigate loss is therefore not only a duty to stop the outflow of money - it is also a duty to try in the best possible way to *create an income*. The applicants *had* in fact resorted to such replacement activities. Mulder had created an income from the sale of cull cows, i.e. cows intended for slaughter and from the sale of calves. The income resulting from these sales had to be deducted from the compensation, as they are incomes which would not have been possible to conclude for Mulder, being a producer of milk, in the absence of the wrongful Community act. But the Court tightened the Community purse even further. It adopted a rather strict position on the fact that the burden of proof lies with the applicant; It rejected Mulder’s assessment of his alternative income (the value of which was to be deducted from the loss flowing from the reduced sale of milk) and substituted it with a calculation of *average* alternative income based on statistics:

¹³¹ C-120/86 **Mulder I**.

¹³² C-37/90 **Mulder II** at para. 84.

“167 As the Advocate General observes in point 79 of his Opinion, the alternative income is in principle comprised of real income obtained from activities actually carried on. It is therefore necessary to take into account all sums actually received by the applicants in that respect, particularly since it is only the damage actually suffered which must be made good.

168 Nevertheless, in accordance with the general principle, referred to in paragraph 33 of [**Mulder I**], that an injured party must show *reasonable diligence* in limiting the extent of his loss, *the alternative income encompasses that which an applicant could have obtained if he had reasonably engaged in replacement activities*. The application of that principle means that the *average alternative income* is at all events relevant in so far as it is not exceeded by the *actual income*”.

In his commentary on the case in the Common Market Law Review, Ton Heukels is sceptical about this approach:

“[A]ctual losses from replacement activities are in principle denied any relevance for the determination of the indemnification. Consequently, *fictitious* income from *possible* replacement activities is to be taken account of, *real* losses from *actual* replacement activities are not. This has been criticized in legal doctrine, since it excludes the award of damages for losses incurred from activities “die zu Beginn durchaus betriebswirtschaftlich sinnvoll waren und etwa im deutschen Zivilrecht nach der Adäquanztheorie dem Schädiger zugerechnet würden”.¹³³

It can thus be inferred from **Mulder II** that wrongfully injured parties immediately must engage in replacement activities, and that “reasonable diligence” in pursuing these activities requires a significant degree of professionalism if applicants are to prevent the Court from reducing the compensation with a fictitious estimate of what the applicants *could* have earned from their replacement activities. Even at present it is not clear just how far injured parties must go in their attempts to initiate replacement activities. Mark Hoskins highlights the need for further interpretation in this field:

“In essence, the applicant is required to prove a negative: that it is unable to adopt an alternative line of business. Furthermore, it will be difficult for an applicant to anticipate in advance how widely it should cast its argument. Does a company which specializes in apple distribution have to show why it could not move into distributing oranges and bananas? Does it have to show that it could not move into distributing vegetables, and so on? This may seem an extreme example, but the practical problems for litigants which it highlights are very real. The problem is exacerbated by the tendency of the Court of Justice to accept statements by the institutions which are unsupported by evidence as establishing facts, or as being sufficient to shift the burden of proof to the applicant”.¹³⁴

The issue here raised by Mark Hoskins remains unanswered by the Court, and applicants are therefore left to guess - or rather just hope that whichever replacement activity they have initiated will satisfy the Court, although some indication was given in **Area Cova**,¹³⁵ concerning the Community fisheries regulations. Here it was held that “even if the measures in question

¹³³ Heukels in Common Market Law Review 30, p. 385, 1993. The German quotation is from Winkler and Trölitzsch, 21 EuZW 1992 and translates roughly: ...activities “which started off as completely economically reasonable and which in German civil law according to the ‘remoteness theory’ would be blamed the tortfeasor”, i.e. the Community institutions which adopted the wrongful regulation (my translation).

¹³⁴ Hoskins (1997) p. 269

¹³⁵ T-196/99 **Area Cova** and others at para. 176.

had the effect of limiting the possibilities of fishing for Greenland halibut in the Regulatory Area, they did not totally prevent the pursuit of such fishing, or prevent Community vessel owners from transferring their activity to the fishing of *other fish in that area, or of the same or other species in other areas*". This statement, however laconic it is, *does* give an indication of the extent of the obligation to initiate replacement activities. Seemingly the Court admits that the activity must be of a somewhat similar or at least comparable nature, since it does *not* explicitly require the applicants to start catching *other fish in other areas*, nor turn to other maritime activities.

The reference to replacement activities as a means of mitigating the loss is also often invoked in cases concerning wrongful dismissals of officials from Community jobs. Such officials must accept whichever replacement job they are offered. They are not allowed time for consideration of the offer as that "would be to accept that an official may, by his failure to act, increase the damage he suffers, even though the institution which is at fault has taken all necessary steps to limit the damage flowing from its breach of Article 40(4)(d) of the Staff Regulations."¹³⁶ In **Sergy**¹³⁷ it was even held to be negligent of a wrongfully dismissed Community official to satisfy himself with a promise from the Commission that he would be informed of the first available position in which he could be re-employed. As the months passed by he should have made additional inquiries or have searched for other jobs in order to live up to the Court's interpretation of showing reasonable diligence in mitigating the loss by way of initiating replacement activities. His failure to do so therefore was to be taken into account in the calculation of the due compensation.

5.2.3. Loss passed on to consumers

An additional feature on how the obligation to mitigate the loss influences the concept of damage was introduced in Community law with the **Ireks-Arcady**-case,¹³⁸ which concerned the wrongful abolition of the production refunds for quellmehl. The Council and the Commission took a different view than the claimant on what was to be understood as "damage" as expressed in Art. 288(2). They argued successfully that if the producer [i.e. claimant] eliminated the damage or *could* have done so by passing on the loss resulting from the abolition of the refunds in their selling prices, the applicant would then have received due compensation, and "damage" in the sense of Art. 288(2) would not have been incurred. The ECJ confirmed this principle but in the particular verdict it laconically stated that no statistical evidence or arguments put forward by the parties permitted the conclusion that Ireks-Arcady actually had or could have passed on the loss resulting from the abolition of the refunds in its selling prices. In a later case the Court verified that it is for the applicant to prove that it could *not* mitigate the loss by passing on the loss to its consumers in order for the action for damages to be considered well founded.¹³⁹

However, although the applicant in **Ireks-Arcady** did not in fact experience a reduction in compensation, the principle that "damage" in the sense of Art. 288(2) does not comprise a loss which could have been pre-

¹³⁶ C-284/98 P **Roland Bieber** at para. 57.

¹³⁷ Case 58/75 Jacques Henry **Sergy** of 1 July 1976 at para. 43 - 47.

¹³⁸ C-238/78 **Ireks-Arcady** GmbH at para. 14 ff.

¹³⁹ Joined cases 256, 257, 265, 267/80, 5 and 51/81 and 282/82 **Birra Wührer** at para. 26 - 28.

vented by passing it on to the consumers in terms of a price increase was irrevocably introduced in EC law. The introduction of this principle may be criticized, as by Toth,¹⁴⁰ on two grounds: In the first place, Toth argues, there is no legal or economic connection whatsoever between the abolition of the production refunds and the applicant's pricing policies. The price of the commodity depends upon several factors including market conditions, competition, and profit motives. It will therefore be very difficult to assess to what extent an increase in the price compensates for the loss of refunds. But even if this could be established, Toth points out that the benefit derived from the increase in price, as a matter of principle, cannot be set off against the damage, as benefit and damage are of an entirely different nature.

Secondly, it is asserted by Toth that the entire principle rests upon a fundamental injustice:

“Moreover, the principle as formulated by the Court [...] seems to impose an unreasonable duty on the injured party. While it is true to say that the latter must exercise due diligence to avoid or reduce the damage [...], it cannot be expected even of a “prudent and experienced” producer to have passed on to his customers losses resulting from unlawful actions of public authorities. Such an obligation would ultimately mean that damage caused by the Community institutions in clear infringement of Community law should be borne by the customers of the injured party, and through them by society at large, rather than by those responsible for it.”

On that background one can therefore only appeal to the Court to modify its conception of damage to the effect that compensations should only be reduced if the applicant already *has* increased his or her prices, and if so *only* to the extent to which it is raised beyond reasonable doubt that the price increase was meant to compensate the economic impact of the illegality.

6. CONCLUDING REMARKS

The aim of this dissertation has been to explore how the concept of damage under Art. 288(2) TEC is interpreted by the European Court of Justice. For potential claimants this is a very important question, as many claimants in the past have incurred substantial costs in vain because of lack of knowledge of and understanding for the Community concept of damage.

I have found that there is very little guidance to be found in the codified sources such as the Charter or the TEC itself as regards the contents of the concept of damage. The entire concept is an example of judge made law built upon fragments of national, especially French jurisprudence. Inevitably, this poses the question, if the Community concept of damage is fully - or at least sufficiently developed in the Court's jurisprudence. In spite of the analysis above, it is difficult to give a clear cut answer to this. Especially because “sufficiently” is a difficult term to grasp. If what is meant is whether the concept is coherent and operable, the answer is a sound yes. As the dissertation has shown, every decade has brought an increasing number of more claims and especially since the late 1980's the number of successful claimants has risen significantly. If, however, the question is whether the concept is fair, the answer is much more hesitant. By its very nature, the

¹⁴⁰ Toth (1997) p. 189.

question of how to delimit the concept of damage is a balancing act between the generous and the restrictive stance. In this connection it should, of course, be observed, that in the end the bill for the damages paid by the institutions ultimately is paid by the EU citizens. On that background one should think that the ideal guideline to fairness should be to only award damages when the economic drawback of a Community act for the injured individual is greater than the drawback for the Community as a whole for paying the extra money. But then again, this is no exact measure. So rather than attempting a final verdict on whether or not the concept of damage is fair, I shall settle for stating my observations as regards the more remarkable aspects of the current interpretation of the concept.

Above all, it must be welcomed that the action for damages has risen in significance from being an insignificant variation of the action for annulment to being recognised as a fundamental right and an independent form of action, which can be brought irrespective of the outcome of a simultaneous action for annulment or failure to act, save only in the case of attempted circumvention of those actions. Compensation *does* seek a different goal than annulment, and independence is the only status, which can be accepted if the action for damages is to be considered a fundamental right as written in the Charter.

The examination of the Community definition of a loss revealed that the Court applies a number of tests to the claims brought before them. It could be feared that these tests of certainty, specificity, provability, and quantifiability would make the concept of damage too restrictive, but the examination showed that all tests aimed at ensuring the genuine existence of the loss, and merely excluded hypothetical and future losses. In accordance with that it was subsequently shown that the Court is quite willing to compensate the various kinds of material damage, with the possible exception of loss of profit, which the Court has been much more hesitant to recognise as an integral part of the concept of damage. There is now, however, sufficient authority in the case-law to verify that loss of profit can be claimed compensated, but it would be warmly welcomed if the Court would spell out some details as to the standard of proof in this field.

The examination of the Court's attitude towards non-material damage turned out somewhat surprisingly to show that there is a vivid and wide ranging case-law in this area. One could have imagined that the concept of damage was still heavily influenced by the fact that initially the action for damages was to do with coal or steel undertakings and their financial losses. Admittedly, that was also the initial approach, but in the present interpretation of the concept of damage various kinds of personal anxiety and emotional harm, harm to image and reputation and losses flowing from the infliction of bodily harm are encompassed. Operating with such a broad interpretation of damage will certainly promote the action for damages as a useful and indeed fundamental right for EU citizens.

Having said that, some reservations beg to be mentioned. The value of the lump sum compensations, which the Court is willing to grant in such cases, is varying a lot from case to case, and the need for the Court to make a statement on a clear guideline would be very useful. At least that would benefit the transparency into the sometimes oracular decisions of the Court.

Another area that in my opinion needs much more attention is the current unwillingness to grant compensation for violations of administrative

rules. For a Community administration, which claims to be citizen friendly and focused on citizen rights, it is appalling to bluntly reject damages in this regard. Such procedural rules exist to guarantee the lawfulness and correctness of the Community acts. If the Community is genuinely after a more flattering Eurobarometer opinion polls, then violations of such rules should be struck down upon with awards of sizeable damages.

As concluded above, the question of strict liability for special and unusual losses needs further recognition in Community law, as the current evasive statements from the Court leave too much to be guessed by claimants and legal scholars. And besides, the lack of recognition of liability for lawful acts probes the politically uncomfortable question of who the rules of non-contractual liability seek to protect; the institutions or the affected citizens?

Finally, the examination of factors, which will entail a reduction in the compensation, and thus delimit the concept of damage, showed an unfortunate uncertainty as regards the extent of replacement activity and a doubtful attitude towards losses, which have been passed on to consumers. It also showed a disappointing unwillingness to operate with more incremental deductions due to applicants' own fault. Failure to do so ultimately infringes the obligation to adapt the compensation to the individual merits of the case.

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When in 1975 Advocate General Mackenzie-Stuart concluded his article in CMLR, he compared the non-contractual liability of the EEC with a colonial map of Africa: "The coast is shown; we see the deltas of the great rivers; but where they lead and where they have their sources are as yet uncharted".¹⁴¹ Now, 28 years later, this dissertation allows me the conclusion that the concept of damage under Art. 288(2) has been subjected to such considerable interpretation that the concept, which was once quite void of content, is now on the whole a coherent and operable concept with only fragmental areas left to be further developed. The action for damages is now prepared to be considered a fundamental right, when the Charter is declared binding.

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