

MEMBER STATES' LIABILITY FOR JUDICIAL ACTS OR OMISSIONS: MUCH ADO
ABOUT NOTHING?

CASE C-224/01 *Gerhard Köbler v. Republic of Austria* is the first case before the European Court of Justice ("the Court") on Member State liability for judicial acts or omissions.

Mr. Köbler applied for the length of service increment payable to university professors in Austria. His application was dismissed on the ground that he had not served fifteen years in the Austrian university system. Mr. Köbler claimed that Austrian law was contrary to Article 39 of the EC Treaty on the free movement of

workers, as it did not take into account periods of service in other Member States and was therefore discriminatory.

The *Verwaltungsgerichtshof* (the Austrian Administrative Supreme Court) dismissed Mr. Köbler's claim. Mr. Köbler subsequently brought an action before the *Landesgericht für Zivilrechtssachen* (the regional civil court) for damages against the Republic of Austria in respect of the *Verwaltungsgerichtshof*'s decision. Several questions concerning the liability of the State for judicial acts or omissions were referred to the Court.

Upholding Advocate General Léger's Opinion, the Court explicitly ruled for the first time that national courts should not, in principle, be immune from an action in damages as a result of their acts or omissions. The State is a subject of international law and it is viewed as a single entity, notwithstanding its internal division of powers. Moreover, acknowledging the responsibility of national courts is the necessary corollary of the important role that they play in directly, immediately and effectively protecting the rights which individuals derive from Community law.

In line with previous case law on Member State liability, the Court then confirmed that three conditions had to be met for a damages action against a Member State to succeed:

1. the rule in question must be intended to confer rights on individuals,
2. the breach must be sufficiently serious, and
3. there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party.

The Court finally held that, on the facts, Austria was not liable in damages, as its breach of Article 39 was not sufficiently serious.

This judgment raises several issues.

First, the question arises of how a sufficiently serious breach should be assessed. Both the Advocate General and the Court agreed that the assessment of whether a breach was sufficiently serious should be particularly strict in relation to judicial acts, so as to leave the necessary margin of discretion to national courts to exercise their function effectively. In particular, it appears that the Court has limited the liability of national courts to courts of last instance. Further, it held that State liability could be incurred only in the exceptional case where the court had "manifestly infringed the applicable law". The Court listed several factors which should be considered in making this assessment of manifest infringement: the degree of clarity and the precision of the rule infringed, whether the infringement was intentional, the position taken by a

Community institution, and the non-compliance by the national court in question with its obligation to make a reference under Article 234 of the Treaty. However, the application of these factors to judicial acts or omissions is particularly controversial and certainly not straightforward. Indeed, the Advocate General and the Court applied a similar test but nonetheless reached a different outcome on the facts of the case. The duty which courts of last instance have to refer questions of interpretation of Community law under the third paragraph of Article 234 further complicates the issue. More specifically, the question arises whether a national court could commit a sufficiently serious breach if it invoked the *acte clair* doctrine in a case which did not satisfy the *CILFIT* criteria. Obvious misuses of this doctrine would probably give rise to a successful claim in damages. The widely discussed judgment of the French *Conseil d'Etat* (the Administrative Supreme Court) in *Cohn-Bendit* should fall within this category, especially as the *Conseil d'Etat* had refused to follow the advice of its *Commissaire du Gouvernement* to seek a preliminary ruling from the Court. However, the question is arguably much more delicate when a grossly negligent, as opposed to a wilful, misuse of the doctrine is at stake.

Secondly, the requirement that there should be a direct causal link is also likely to cause difficulties in claims concerning judicial acts or omissions. If a national court has not applied Community law when required to do so, the problem remains that it is still necessary to determine the extent to which this failure has contributed to the applicant's loss. It may be that the contentious question of Community law was only one question among several others. In such a case, how can an individual establish successfully that he would have been in another position if the national court had referred the relevant preliminary questions to the Court?

Finally, there is the question of practical enforcement. State liability is a Community remedy which is enforced in national courts. Thus, an individual who has suffered a loss as a result of the act or omission of a court of last instance has to lodge a claim in damages before a national court of first instance. Serious difficulties could arise if this lower court was somehow related to the court of last instance which took the contentious decision in the first place. In other words, how could a lower court decide that national law did not comply with a specific provision of Community law if the court of last instance held that it did? Also, how could a lower court rule that the *acte clair* doctrine did not apply when the court of last instance held that it did? The difficulty

involved in finding a suitable forum is exacerbated in Member States with a strict doctrine of binding precedent. For example, is it realistic to expect the High Court to rule that the House of Lords committed “a manifest breach of Community law” and award damages as a result? It is likely that High Court judges will systematically either dismiss such claims in damages or refer them to the Court under Article 234. Moreover, it can be doubted whether an aggrieved individual could seriously contemplate lodging an appeal against the damages judgment of the lower court if that meant that he would have to appear before the higher court against which his claim in damages was directed.

In *Köbler*, the United Kingdom, which made some observations to the Court, submitted that the question of enforcement was highly problematic in the context of State liability for judicial acts or omissions. In particular, it pointed to “the difficulties in determining the court competent to adjudicate on such a case of State liability, particularly in the United Kingdom where there is a unitary court system and a strict doctrine of *stare decisis*”. However, the Court dismissed the argument by simply stating that determining the competent court was a question for Member States to resolve.

This judgment lays down a principle which flows from the Court’s previous case law and which unequivocally confirms, first, that Member States are single entities and, secondly, that national courts have a duty to ensure that Community law is upheld. However, it is difficult to assess, at this stage, whether the remedy of State liability for judicial acts or omissions will have any practical impact: not only is the *Köbler* test extremely restrictive but it is also unlikely to be applied in national courts. It is arguable that *Köbler* raises more questions than it provides answers.

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