Another victim of the "banana war": Some reflections on the status of the principle of liability in the absence of unlawful conduct in the community legal system*

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Abstract: Articles 235 and 288 second paragraph EC provide remedies for damages caused by Community institutions, to individuals, legal bodies or States that concern legal obligations outside the scope of contractual relations. Although it did not receive any real application, the principle of liability in the absence of fault is mentioned by the Court in a couple of cases. This article seeks to explore this principle in its due context and in the light of comparative law. To that effect, it is first necessary to make a short recall of the historical case law in this field, to analyze afterwards the latest jurisprudential developments (FIAMM/FEDON case), and finally to consider the future prospects of this principle in the Community law through two options. One alternative would be to adopt more lenient conditions for the application of Community's liability for fault and notably a progressive abandon of the current serious fault regime and the adoption of the simple fault regime. Another option would be to remove the tort nature from the no-fault liability and to move from the reparation of damage to a compensation for the breach of the equality.

Key words: non-fault liability; European court; justice; WTO; FIAMM/FEDON.

1. Introduction

Articles 235 and 288 second paragraph European Community Treaty (hereafter 'EC Treaty') provide remedies for damages caused by Community institutions, to individuals, legal bodies or States that concern legal obligations outside the scope of contractual relations. They concern therefore the so-called non-contractual liability.[1] Unlike the contractual liability, which is governed by the law applicable to the contract in question, the non-contractual liability is exclusively governed by Community law[2] and applies to any institution or organ,

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[1] Vesting.(2003). *Die vertragliche und ausservertragliche haftung der EG nach art. 288 EGV*, (Peter Lang Verlag, Frankfurt,); Lazar. (2007). *Le recours en responsabilité extracontractuelle en droit communautaire*, in Studia Universitatis Babes-Bolyai, Studia Europaea, 127-128.

[2] Verhoeven.(1996). *Law of the European community*. Larcier, Leuven, 399; Heukels; McDonnel.(1997). *The action for damages in community law*, Kluwer Law International, The Hague, 153; Simon.(2001). *Le système juridique communautaire* (PUF, 3rd ed.). Paris, 582; Magnus; Wurmnest.(2002).*Casebook Europäisches haftungs- und schadensrecht*, Nomos, Baden-Baden.

including the European Court of Justice (hereafter 'ECJ').[3] In the absence of any contrary indication in the EC Treaty, the liability of the Community is subject to three conditions common to the laws of the Member States: (i) existence of a generating event, recognized as being likely to create, at the expense of the Community, an obligation to compensate, (ii) a damage fulfilling the conditions necessary to be compensated for, (iii) and a sufficient causal link between the two.

The non-contractual liability comes into play in two cases. Firstly, it is relevant to a damage caused by an illegality resulting from a legislative act or executive act. In this case, the Court developed a strict jurisprudence, in particular in assessing the existence of a fault. The claimants have to prove that the Community breached a *superior rule protecting individuals*[4] and that this breach was "*sufficiently serious*"[5] what undoubtedly refers to the concept of the serious fault.[6] As a result of this case-law, certain illegalities do not constitute a fault. Secondly, it can also apply to a damage that occurred in the absence of any fault. In this case, the conditions to be fulfilled are even stricter. The damage has to be "*unusual*" and "*special in nature*". If the generating act of the damage doesn't constitute a fault in the meaning of the ECJ case-law, it doesn't necessarily mean that it is without any illegality.

This article seeks to explore especially the second ground for the non-contractual liability of the Community. In order to examine the no-fault liability in its due context, it is first necessary to make a short recall of the historical case law in this field, to analyse afterwards the latest jurisprudential developments and finally to consider the future prospects of this principle in the Community law.

2. A long period of hesitation

Although it did not receive any real application, the principle of liability in the absence of fault is mentioned by the Court for the first time in *Compagnie d'approvisionnement de transport* and *Crédit de Grands Moulins de Paris* in 1971.[7] In *Biovilac*,[8] the Court considered that if the liability of the Community in the absence of fault was ever to be accepted in the EC law, the damage would have to fulfill conditions, which were, anyhow, not met in that case. The *De Boer Buizen* judgement is, however, slightly different from the previous ones, as the Court stated that if the plaintiffs prove that they have to bear a disproportionate share of the burden resulting from an EC legislation, it would be for the Community to remedy this damage by appropriate means.[9] Finally, the leading jurisprudence in this area is without any doubt the *Dorsch Consult*[10] case. The CFI's position, confirmed by the ECJ on appeal,[11] is particularly well illustrated in these two following points:

> "59. [...] if the Community is to incur non-contractual liability as the result of a lawful or unlawful act, it is necessary in any event to prove that the alleged damage is real and the existence of a causal link between that act and the alleged damage [...].
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> 80. [...] [I]n the event of the principle of Community liability for a lawful act being recognized in Community law,

[3] Van Raepenbusch.(1998). *Droit institutionnel de l'Union européenne et des communautés européennes*, De Boeck Université, Bruxelles, 564.
[4] For example, a general principle of law.
[5] Case 83/76, *Bayerische HNL*, [1978] E.C.R. 1229.
[6] Simon, cited above n.2, 601-602.
[7] Joined Cases 9/71 & 11/71, *Compagnie d'approvisionnement de transport et de crédit et grands moulins de Paris v Commission*, [1972] E.C.R. 391, paras 45 and 46.
[8] Case 59/83, *Biovilac v EEC*, [1985] E.C.R. 4057, paras 27, 28 and 29.
[9] Case 81/86, *De boer buizen v council and commission*, [1987] E.C.R. 3677, 17.
[10] Case T-184/95, *Dorsch consult v council and commission*, [1998] ECR II-667.
[11] Case C-237/98 P, *Dorsch consult v council and commission*, [2000] ECR I-4549, paras 17-19.

such liability can be incurred only if the damage alleged, if deemed to constitute a 'still subsisting injury', 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."

It follows from the relevant provisions of the EC Treaty and the abovementioned case-law that the principle of liability in the absence of unlawful conduct, or the so-called objective liability, is not to be *a priori* ruled out.[12] However, there was also no judgement of the Court to confirm *expressis verbis* the existence of such a liability in Community law. There are several possible explanations to this absence.[13] According to the first one, the EC Treaty refers, in the case of non-contractual liability, to the general principles common to the Member States. Since only few Member States accept the no-fault liability of public authorities,[14] the ECJ tends to prefer the more wide-spread solution that recognizes the Community liability only when its institutions committed a fault.[15] The second explanation could be that the Court had never really dealt with a case where the damage was so unusual and special in nature.[16] This also finds some support in the previous case-law. However, it is said, that the ECJ's assessment of those two criteria related to the damage is particularly strict. The reading of these rulings leaves, nevertheless, an unclear impression about the Court's position on the issue. The jurisprudence revealed a hesitating Court that, on the one hand, didn't exclude the very existence of the no-fault liability, but, on the other hand, rejected its application in concrete cases. Such an attitude might have been a result of a judicial policy to wait for directions from the ongoing primary law reforms before making any big step forward. The third argument could be an economic one. As the EC's objectives are realised mainly through normative action with economic implications that do not necessarily suit everyone, the Community could be under permanent threat of liability claims even if it did not commit any fault. Furthermore, it could be argued, that by accepting the no-fault liability, the ECJ would become a judge of the actual political choices made by the institutions. All this would hinder the EC's policies and ultimately the fulfillment of the Treaty objectives. Finally, there could be a political explanation, which is particularly valid in cases that concern the consequences of the EC's non-compliance with the WTO rules. WTO is an organization driven by, and based on, reciprocity and mutual benefit, leaving an important place to negotiations and political manoeuvring. Therefore, if it was possible to challenge Community action falling into the scope of WTO, the European institutions would be restricted on their margin of manoeuvre unlike their trade partners.[17]

However, as the Community courts' position seemed a little ambiguous, individuals might have legitimately hoped to be able to rely on the no-fault liability principle in order to seek compensation for damages they suffered as a result of the Community's breach of WTO law.

3. Clarifications resulting from the FIAMM and FEDON ruling

[12] Craig, De Búrca.(2007). *EU Law—Text, cases and materials*, (OUP, 4th ed), Oxford, 591.

[13] Lazar, cited above, n.1, 132.

[14] Schragel.(2003). *Kommentar zum amtshaftungsrecht* (Manz, 3rd ed.) Vienna; Ergec.(2007). *Quelques doutes sur la soumission du droit de la responsabilité civile de la puissance publique*,444; Gonzáles Pérez.(2004). *Responsabilidad patrimonial de las Administraciones Públicas*, Civitas, Madrid; Gwynn Morgan, Hogan. (1998). *Administrative law in Ireland* (Round Hall Sweet and Maxwell, 3rd ed.) Dublin; Drgonec.(2007). *Ústava slovenskej republic—Komentár*, (Heuréka, 2nd ed.), Šamorín.

[15] Lazar, cited above, n.1, 132.

[16] Simon, cited above n.2 at p. 603.

[17] Mangilli. *Droit de l'OMC et ordre juridique communautaire: Le Tribunal de première instance confirme la jurisprudence restrictive.* Retrieved January 13, 2006 from http//:www.unige.ch/ceje, actualité n279.

This was precisely the case of FIAMM and FEDON, manufacturers and exporters of stationary accumulators and glasses cases when they were subjected in the United States of America to import surcharges on their products as retaliatory measures against the European banana trade regime[18] in force before 2001[19] and declared incompatible with the World Trade Organization's (hereinafter "WTO") rules by its Dispute Settlement Body (hereinafter "DSB"). Considering that their rights had been violated, FIAMM and FEDON seized the Court of First Instance of the European Communities (hereinafter "CFI") with an action for non-contractual liability of the Community by reason of unlawful conduct of its institutions or on the subsidiary ground of non-contractual liability in the absence of unlawful conduct. The judgements of first instance[20] recognized the existence of the no-fault liability principle in the EC law, but rejected the claims of FIAMM and FEDON as the concrete conditions for the application this principle were not met. These judgements were subject to appeals before the Court of Justice, which has delivered its decision in the Grand Chamber on September 9th, 2008.[21]

An analysis of the Court's reasoning (A) will be followed by conclusions that could be drawn as to the current state of the no-fault Community liability principle (B).

3.1 A clear dismissal of FIAMM and FEDON's appeals

After having dismissed, in accordance with settled case-law, the first plea in law of the appellants concerning the conditions required in order for liability in tort of the Community to be engaged, the Court continued to review the other pleas in law regarding the no-fault liability. Since Spain and the Council introduced cross-appeals[22] against the contested parts of the judgment, which recognized at the Community level the existence of no-fault liability principle,[23] the Court stated that the second ground of FIAMM and FEDON's appeal, relating to the concrete conditions of the no-fault liability, would only be dealt with if the cross-appeals were rejected.[24] Therefore, this has leaded the Court to start with the question of the very existence of such a liability. Indeed, in these circumstances, where the CFI explicitly recognized the no-fault liability in the Community legal system, and subsequently this recognition has been directly challenged, unlike in the previous cases, it would not be possible for the Court to simply reject the main appeal and avoid to address the most important question due to lack of

[18] These cases occurred in the context of the "banana war" that can be broadly summarized as follows: The banana market is mainly composed of two blocks. On the one hand the "dollar" banana which is predominantly produced by the Latin America countries under the umbrella of the two big American multinationals (Chiquita and Dole), controlling around 80% of the world trade of bananas. On the other hand, there are the "European" bananas, coming from the ACP region (especially the Caribbean, and former colonies of Member States of the European Union). The EU is trying to protect the "European" bananas by taxing the "dollar" bananas, setting unfavourable quotas for the "dollar" bananas and by subsidizing the "European" banana producers.

[19] To be clear in the timeline, it was the Regulation (EEC) n 404/93 of February 13, 1993 on the organization of the market in bananas. Following the decision of the DSB on September 25th, 1997, the EC institutions have amended, with effect from January 1st, 1999, the banana trade with third countries by Regulation (EC) n 1637/98 of July 20, 1998 amending Regulation (EEC) n 404/93, supplemented by Regulation (EC) n 2362/98 of October 28, 1998. Believing that the new banana import regime maintained the illegal elements of the previous regime, the United States received from the DSB on April 19, 1999 a permission to levy tariffs on some imported products imports from the EU. Some of them were manufactured by FIAMM and FEDON. As a result of negotiations with all parties concerned, the Community has adopted amendments to the new organization of the banana market by Regulation (EC) n° 216/2001 of January 29, 2001. Then, by Regulation (EC) n 896/2001, of May 7, 2001, the Commission defined the terms of the new import regime for bananas introduced the latter Regulation. The United States then suspended the application of the increased customs duty with effect from June 30, 2001.

[20] Joined Cases T-69/00 & T-135/01, *FIAMM and FIAMM technologies v council and commission & FEDON and figli v council and commission*, [2006] E.C.R. II-5393.

[21] Joined Cases C-120/06 P & C-121/06 P, FIAMM and FIAMM technologies v council and commission & FEDON and figli v council and commission, not yet reported.

[22] Article 116 (1), of the rules of procedure of the court.

[23] The Commission has put forward the same argument in its written observations.

[24] Paras 161—163 of the C-121/06 P judgement.

interest.

The examination of the no-fault Community liability principle started, curiously, by a vigorous reminder of the conditions required to engage the liability of the Community, of which the unlawful conduct of institutions would be the keystone.[25] This enabled the ECJ to state that, contrary to liability for fault, the no-fault liability is not firmly rooted in the Community legal system. Then, in an attempt to clear all uncertainty, the Court declared that it had never accepted until now a no-fault Community liability principle. It only proceeded to specify the conditions under which such liability should be subjected to, if it were ever transposed in the Community legal order.[26]

Having precised this, the Court continued to assess the existence of a Community liability in the absence of fault on a *tabula rasa*. The ECJ refers, on one hand, to Article 288 EC which submits the non-contractual liability regime to *"general principles common to the laws of Member States"*, and, on the other hand, to the jurisprudence according to which, an unlawful act or failure to act gives rise to an obligation to make good the damage caused. The meaning and importance of this second reference might however seem contradictory to the question of no-fault liability.

The reasoning continued with an analysis focused on the conditions under which a normative action or omission may result in a Community liability. In this regard, the Court first pointed out that the solutions accepted in this matter by the Member States' legal systems vary substantially but, that it is yet possible to notice that normative acts expressing economic policy choices only exceptionally and only in special circumstances incur the liability of public authorities.[27] Secondly, and in the light of its previous jurisprudence, the Court recalled that the liability of Community institutions due to their normative activity or their failure to act can only be established in the presence of a sufficiently serious breach of a superior rule of law protecting individuals or conferring rights upon them .[28]

Admitting that the conditions for the application of a Community liability due to its normative activity are rather restrictive, the Court insisted on explaining why. There is a twofold justification. On one hand, the legislator and/or the regulatory authorities should not be hampered by the prospect of compensatory actions when taking measures of general interest and, on the other hand, the broad discretion that the EC institutions enjoy while implementing Community policies requires the that the Community is liable only in cases of manifest and serious violation of the limits imposed upon the exercise of its powers. However, the Court made again a double reference to its case-law on liability for fault, although the pending question was whether or not a principle of liability in the absence of any unlawful conduct exists. In any event, such a reference enabled the Court to reiterate, as it has already done in paragraphs 167 and 168 of the commented judgement, that contrary to the liability for fault, the no-fault liability has no basis in Community law.

The ECJ concluded that "as Community law currently stands, no liability regime exists under which the Community can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts".[29] Following this premise, the Court declared that the CFI erred in law by accepting the

[25] Paras 164—167 of the C-121/06 P judgement.
[26] Paras 168—169 of the C-121/06 P judgement.
[27] Paras 170—171 of the C-121/06 P judgement.
[28] Paras 172—173 of the C-121/06 P judgement.
[29] Para 176 of the C-121/06 P judgement.

existence of a regime of a no-fault Community liability with regard to its normative activities.[30]

This answer was accompanied by two precisions. Firstly, the legislator may himself provide a compensation for harmful effects caused by his normative actions.[31] Secondly, a violation of fundamental rights may engage as well the liability of the Community. In the present case, it was the right to property and the freedom to pursue a trade or profession that came into play. However, these rights are not absolute, but must be *"viewed in relation to their social function"*. Consequently, in order for the Community to be held liable in the absence of fault, the Community legislative measure has to breach the very substance of those fundamental rights in a disproportionate and intolerable manner given that the mere loss of market shares, does not meet these criteria.[32]

In application of these criteria, the Court could only dismiss the second ground of the main appeals.

3.2 A "qualified" rejection of the Community's no-fault liability principle

If the Court dismissed the appeal against the CFI's ruling regarding the existence of a Community no-fault liability principle, its scope should be well measured. Indeed, having a closer look, the drafting of the relevant paragraphs of the ruling[33] can lead to different interpretations.

The following ones seem to define the maxima and minima limits of this judgement. A broad interpretation of the ruling is ipso facto restrictive of the Community's no-fault liability. It is based on paragraph 179 according to which the CFI erred in law by accepting the existence of a Community's no-fault liability regarding its normative activities. This could mean that the subjects of the Community law would not, in principle, be able to invoke such liability each time the cause of their damage is the normative activity of the Community institutions. This would be a substantial limitation of the liability in the absence of fault, since the vast majority of the Community activities, find, without any doubt, expression in normative action. Liability in the absence of fault would therefore only be left to apply on activities without a normative character. Acting as a regulator, the Community has no army, no police force and no executive body in the true sense of the word, as it is the case for Member States. It seems that, only decisions of the Commission (and EU agencies) are concerned, particularly those dealing with competition, state aid, security of food and chemical substances. We admit having difficulties in finding many others.

This exclusion of the Community's liability in the absence of fault concerning its normative actions is nevertheless subject to two limitations, already briefly mentioned above. Firstly, the legislation can itself provide compensation. It would certainly be a very clear and relatively easy solution to implement, since the compensation would no longer depend on the restrictive criteria defined by the Court. This is a matter for Community institutions exercising the legislative powers to take this option into consideration. However, a problem still remains. How could compensation be anticipated for a damage resulting from a failure of the legislator to act, as in the present case?

Secondly, an objective liability may be caused by a violation of fundamental rights by the legislative or the regulatory power. Though, isn't this a contradiction? No-fault liability was set up in case of fundamental rights violation? Hence, the importance of the precision made in the introduction, defining the concept of liability in the absence of fault as a liability for a lawful act but also including acts violating fundamental rights, that do not meet the strict conditions of liability for fault, particularly the test whether an EU institution manifestly and gravely disregarded the limits on its discretion. The no-fault liability of the latter comes into play when its normative in

[30] Para 179 of the C-121/06 P judgement.
[31] Para 181 of the C-121/06 P judgement.
[32] Paras 182 to 185 of the C-121/06 P judgement.
[33] Paras 161—190 of the C-121/06 P judgement.

action goes against fundamental rights, without being a manifest and grave breach of law in order to be consider under the fault liability principles.[34]

A narrow interpretation of this ruling should be considered next. In its paragraph 176, the Court concluded, that in the current state of Community law development, a scheme for Community no-fault liability for an act falling under its normative action does not exist, since its eventual non-conformity with the WTO rules cannot be invoked before the Court. One could argue that the wording of this paragraph does not contain any explicit reference to the liability in the absence of any unlawful conduct. It is however the whole context of the reasoning, which enables us to conclude that the ECJ refers to the no-fault liability. As for the scope of the exclusion of this kind of liability from the Community law, it seems that the retained formula suits the present facts almost down to the ground. Therefore, this paragraph rejects the existence of a liability in the absence of fault in cases where the determining cause of damage would be a normative in action, incompatible with the WTO agreements which in any event do not usually have direct effect in Community law. Though, it is still too early to conclude with certainty whether the no-fault liability will then be applicable in all other situations.

Regarding the interplay between paragraphs 176 and 179, it might seem that they do not reach identical solutions. It could although be argued that the paragraph 176 is the outcome of the review of the no-fault liability principle's existence, whereas the paragraph 179 gives the actual answer to the appeal against the CFI's judgement. This argument is supported by the fact that the less restrictive wording in paragraph 176 is later repeated in paragraph 188 that closes the Court's reasoning on the no-fault liability.

The status and the contours of the Community liability in the absence of fault remain to be seen. Therefore, its possible future developments will now be examined.

4. Could there be "compensation" for the breach of the equality between the Union's citizens?

No proposal suitable for the Community legal system (B) can be conceived without a critical analysis of the *status quo* (A).

4.1 Status quo after the FIAMM and FEDON judgement

Besides the numerous references to the conditions of application of the liability in tort that we have already mentioned and that do not fit easily into the assessment of the existence in Community law of a no-fault liability principle, two main observations could be prima facie made with regard to the Court's reasoning.

4.1.1 The question on when a general principle is common to the laws of Member States

The first step is to define the concept of general principle common to the laws of Member States. In this respect, the CFI considered without any further details that the national rules of the extra-contractual liability of public authorities permit, although in varying degrees, to obtain legal compensation for some damages, without their generating act being necessarily illegal.[35] This conclusion has however been directly contradicted by the Court, according to which the comparative examination of Member States' legal systems would not reveal a convergence in the acceptance of a no-fault liability of the public authorities, and in particular when the generating act of the damage is of a legislative nature.[36] A review of these diverging assessments is obviously necessary.

Although, the notions of general principle common to laws of Member States and general principle of

[34] Maybe the future jurisprudence and doctrine will be able to specify under what circumstances, a violation of fundamental rights is not at the same time a manifest and grave breach of law.
[35] Para 159 of the T-69/00 judgement.
[36] Para 175 of the C-120/06 P judgement.

Community law might not be exactly the same, we think that they present enough similarities so that the rules governing their recognition or adoption in the Community legal system apply by analogy. According to established jurisprudence, in order for a legal principle to become a general principle of Community law, it must pass through two tests. Firstly, it must stem from one of the three privileged sources of law for the Court. Legal traditions of Member States are naturally one of the three (a).[37] Secondly, it must pass a compatibility and necessity test in the community legal system (b).[38]

(1) The origin test

Although the article 288 EC imposes the choice of the source, it gives no indication about how the examination of national laws should proceed. One could assume at first that this review is empirical and that the satisfaction of the first criterion depends on the existence and nature of the principle under consideration by the Court in national laws. But it is unclear how many national legal systems have to recognise that principle. Since the treaty indicates that the principle must be common to the laws of Member States, it is possible to argue that it means law of all Member States. Such a conception would be nevertheless difficult to apply, insofar as the absence of this law from a single legal order would foil its acceptance at the Community level.[39] This conception would lead as well to the adoption of solutions reflecting the lowest denominator, which would not really develop the rights of the Union's citizens. Moreover, for nationals of Member States with more open systems, there would be a risk of asymmetry between the judicial protection before national and Community courts.

One could also uphold that it is sufficient if the principle in question is applied in a majority of Member States. Is it yet a matter of a simple majority of 14 Member States among the 27 or of a qualified majority? Here again, should the importance of Member States' legal traditions be perhaps weighted the same way as provided by article 205 (1), EC regarding the voting in the Council? Finally, should only the States that were members of the Union at the time of the facts of the case be considered, or also those who have acceded to the EU afterwards? This question arises in particular with regard to the FIAMM and FEDON case that had been pending in the Community courts for more than eight years, during which the European Union increased by 12 new Member States. Would it be conceivable that a legal principle shared in the majority of Member States and established as general principle of Community law before an enlargement, loses its status, insofar as it becomes a minority legal principle?

However, it seems that a minority position of a legal principle, if not its total absence from national legal systems, is not necessarily exclusive to its recognition as a general principle of Community law, or as a general principle common to laws of the Member States, if this principle is particularly necessary and compatible with Community law. Let us recall in this respect the acceptance of the legitimate trust principle, which at the time only existed in a single Member State,[40] and the recognition of the right not to testify against oneself in competition law.[41] In fact, the existence of a certain principle in the majority of national legal systems is nothing but an indication, an advantage, or one more weight in the balance. Similarly, a limited existence, or its non-existence, is therefore only a disadvantage that can be compensated by the second test.

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[37] The other two being the international law and especially international instruments for the protection of human rights, as well as the general legal system established by the basic treaties. The concept of general principles common to laws of Member States differs from the concept of the general principles of law. If the former has an obvious source in the national legal traditions, the latter has three possible sources.

[38] Lenaerts & Van Nuffel.(2005). *Constitutional law of the European Union*, (Sweet & Maxwell, 2nd edition), London, 711.

[39] Jacqué.(2004). *Law of the European Union*, Dalloz, Paris, 513.

[40] Case 148/78, *Ratti*, [1979] ECR 1629.

[41] Case 374/87, *Orkem v commission*, [1989], ECR 3283.

The mere statement that the comparative review of national laws did not demonstrate a convergence towards the acceptance of the public authorities' no-fault liability principle, especially when the generating act of the damage is of a legislative nature, the FIAMM and FEDON judgement does not give us any real hints on the conduct of this assessment.

(2) The compatibility and necessity test

It is generally accepted that this second test is more decisive than the first one. As previously mentioned, it can reverse a solution that would have been favoured after the origin test. In paragraph 174 of the FIAMM and FEDON judgement, the compatibility and the necessity test is applied. The narrow definition of Community liability (in the presence as well as in the absence of fault) due to its normative action is according to the Court justified, on the one hand, by the desire not to see the exercise of this action hampered by the prospect of actions for damages and, on the other hand, not to undermine the broad discretion of the Community institutions, essential for the implementation of the Community policies.

Some might say, that such justifications would seem rather surprising to citizens of a Community governed by the principle of rule of law.[42] Firstly, doesn't the rule of law imply a duty to make good all damages resulting from unlawful acts committed by the public authorities and not only by those which illegality is flagrant and manifest? Isn't Union's citizenship also synonymous for some kind of solidarity between the citizens, in the sense that, one or some of them should not be "sacrificed" on the altar of the interests of the others? In this regard, it must be noted that if the Court's jurisprudence has greatly developed the rights of the Union's citizens, with regard to the Member States,[43] such an evolution seems still to be absent vis-à-vis the Community.[44] Secondly, arguments based on economic[45] or administrative[46] difficulties have never been accepted by the Court in order to justify violations of Community law committed by Member States.

In our opinion, a no-fault liability regime could have been considered as not only compatible, but also necessary for the efficient functioning of the Community legal system. In paragraph 171 of the ruling under review, the ECJ emphasized the fact that under national rules, the responsibility of the legislators is engaged only exceptionally, in particular when the acts in question reflect economic policy choices. But the two following paragraphs clearly point out that the reasoning simply shifted to an assessment of liability for fault. Yet, in many Member States, it is the legislator who embodies sovereignty. And traditionally, the "sovereign can do no wrong".[47] It is precisely to compensate for the absence of legislator's liability for fault[48] that the concepts of

[42] Case 294/83, *Les Verts v Parlement*, [1986] ECR 1339, para 23.

[43] Klučka & Pecho.(2008). Citizenship in international and European law. In: *The process of constitutionalisation of the EU and related issues*, Groningen, Europa Law Publishing, 131.

[44] In the same way, one wonders whether the progress in the fundamental right to an effective judicial remedy of citizens before their national courts will result in a relaxation of locus standi of individuals under Article 230, fourth paragraph EC. See Van Waeyenberge & Pecho "L'arrêt *Unibet* et le projet de Traité modificatif – un pari sur l'avenir de la protection juridictionnelle effective", (1-2/2008) Cahiers de Droit Européen.

[45] Cases 95/81, *Commission v Italy*, [1982] ECR 2187; and 206/80, *Orlandi*, [1982] ECR 2147.

[46] Cases C-286/01, *Commission v France*, [2002] ECR I-5463, para 13; C-211/02, *Commission v Luxembourg*, [2003] ECR I-2429, para 7; and C-130/04, *Commission v Greece*, unpublished, paras 9 and 10.

[47] See, for example methodical Encyclopedia: or by order of materials: a company of men of letters, scientists and artists ... Pankoucke, 1784, p. 160; Marigna, The King can do no wrong. The King can never be wrong, the King can do no wrong, Imprimerie Le Normant, 1818; Article 63 of the Belgian Constitution 1831. However, this principle became recently less absolute, as the ECJ developed its jurisprudence of Member State's liability due to the breach of Community law. This case-law concerns any Member State's organ, judiciary ones included.

[48] CAA, Paris, 1er juillet 1992, *Sté Jacques Dangeville S.A. Rec. Leb.* p. 558, AJDA, 1992, p. 768, obs. X. Prérot; et C.E. Ass. 30 octobre 1996, *Ministre du budget c/ Sté Jacques Dangeville S.A., Rec. Leb.* p. 399. See also CJCE, 5 mars 1996, *Brasserie du pêcheur et Factortame III*, C-46/93 et 48/93, *Rec.* p. I-1029.

liability in the absence of fault have emerged. Without bringing any legal tradition to the forefront, let us only point out that in France, the legislator's liability for fault does only exist in cases of violation of international conventions (incl. EC law) binding this Member State. Hence, this absence is partly compensated by a certain liability in the absence of fault. For example, in its famous ruling *La Fleurette*[49], the French *Conseil d'État*[50] recognized the liability of the State for a legislative act, without holding the legislator responsible for any fault. However, a closer look proves that there was indeed an illegality: The one of not having anticipated a compensation for a flagrant breach of the so-called principle of republican equality and especially the principle of equality of all citizens before public charges. But, in that legal system, it would have simply not been possible to sanction this violation, this illegality. That is the reason why La Fleurette had been compensated through a new legal concept that does not require the designation of a "guilty" party.

Similarly, in the Community legal system, the legislative power's liability is subject to particularly strict conditions. A no-fault liability regime could therefore complete it, in order to ensure greater equality and solidarity among the citizens of the Union. Such a principle is also supported by the fundamental right to effective judicial protection. Failing to meet all the conditions in order to request the annulment of a Community act under article 230 (4) EC, which is a preventive action, a liability in the absence of an unlawful conduct on the basis of the article 288 (2) EC, could restore the balance of rights and obligations in case of unusual or even extraordinary breach of equality.

As the advocate General Poiares Maduro underlined, the application of this principle could actually prove to be very useful in the context of litigations, where Community acts are challenged under WTO rules. Firstly, the liability in the absence of fault could be considered as a good and fair compensation for the absence of direct effect of these rules in the Community legal system, including the DSB decisions.[51] Secondly, the possibility of such liability would heighten even more the competent Community bodies of the necessity to balance the interests in question and of the risks caused by normative acts by ricochet to their own citizens. Thirdly, the existence of such a possibility of compensation would paradoxically strengthen the negotiating position of the Commission within the WTO, since our trade partners could no longer in a sovereign manner, or even arbitrarily, choose the economic sectors of the Community they would wish to weaken by their retaliatory measures. The costs of these measures would be covered by the Community and not exclusively by the designated sectors.

Fourthly, it would seem logical and judicious that the damages, of which the determining factor is, in fact, a Community measure taken in the common interest, and, which is by no means a consequence of the victim's reproachable conduct[52] are borne by all. Otherwise, those who would have not to bear the costs of the measure, but would have benefited from it, would undeniably find themselves in a situation of unjust enrichment. In this regard, although in different contexts, the Court's jurisprudence has not permitted such enrichment.[53]

4.1.2 The breach of fundamental rights justifying the application of the no-fault liability

In response to the cross-appeal introduced by Spain, which has questioned the very existence of the no-fault principle in the Community law, FEDON upheld that this principle would be justified by the fundamental right to property and the freedom to pursue a trade or profession. These arguments have been taken into consideration by

[49] C. E. Ass. January 14, 1938, Société Anonyme des produits laitiers *La Fleurette*, Rec. Leb. p. 25.
[50] The highest administrative court.
[51] Case C-377/02, *Van parys*, [2005] ECR I-1465.
[52] Case *La Fleurette*.
[53] Cases 68/79, *Hans Just*, [1980] ECR 501; 199/82, *San Giorgio*, [1983] ECR 3595; C-218/95, *Comateb*, [1997] I-165, paras 27 and 28; and C-309/06, *Marks & Spencer*, not yet reported.

the Court in paragraphs 180 to 182, in which mitigations are applied to the answer, according to which the Tribunal erred in law by ruling that a Community no-fault liability principle exists for activities falling within the normative sphere.

However, were the fundamental rights invoked by FEDON, and therefore analyzed by the Court, the most relevant ones? Regarding the right to property, it is difficult to uphold that an extra-tax charged by an economic partner of the Community to its exporter, even in the extreme case of a special tax levied ad personam, is similar to an expropriation. Otherwise, all tax systems should be characterised in the same way. Moreover, no one doubts that the right to property is not absolute. An extensive jurisprudence of the European Court of Human Rights relative to Article 1, of the European Convention on Human Rights' first protocol, clearly demonstrates this. As for the freedom to pursue a trade or profession the American retaliatory measure has not prevented all imports of the products in question to the United States, it has "only" rendered them more difficult.

We believe that a thorough discussion could have been initiated, if the parties had invoked two other general principles of law. On the one hand, they could have based themselves on the general principle of equality[54], and in particular, the principle of equality before public charges is a particular expression. This principle of equality is without any doubt accepted and recognized in all Member States. Therefore, the question that should have probably been asked is whether requiring few citizens to pay the costs of a European policy, intended to be of benefit to all its citizens, does not break the principle of equality before public charges. In this case, there seems to be indeed a breach of equality. FIAMM and FEDON, by not being active in the field of banana imports, could not derive any particular benefit from the EC measures in question. Yet, under the WTO rules, which were violated by these measures, companies in different sectors suffered the consequences of this illegality. Therefore, they unintentionally acted as a guarantor for the entire Community. And this rather unfair result should lead to compensation provided by the Community. Additionally, in order for this equality to be perfect, why not consider the establishing of a tax beard by the economic sector that takes benefits from the Community measure, declared illegal by the DSB[55]?

On the other hand, the use by the Court of the fundamental right to effective judicial protection could have also resulted in a different outcome. Indeed, the annulment under Article 230 (4) EC of Community measures which were the determining cause of the United States' retaliatory measures would certainly not be possible, since the damage did not result directly from those Community measures and since FIAMM and FEDON have certainly let the two months deadline of Article 230 (5) EC to expire. None of these companies could have known within the two months following the adoption of the Community measures, that (1) they would be contrary to WTO rules and (2) which companies would be targeted by possible retaliatory measures. Moreover, WTO rules are not directly applicable. As a result, in the absence of any possibility to declare the Community acts as illegal under Article 230 (4) EC, an *ex post* compensation could be the only way to ensure for FIAMM and FEDON an effective judicial protection and to restore the equality between citizens of the Union before public charges. However, in the framework of direct actions, like extra-contractual liability actions and appeals against judgements of the CFI in this field, the Court does not have the necessary freedom to raise, ex *officio,* grounds, which are not of public order.[56]

[54] Cases 1/72, *Frilli*, [1972] ECR 457, para 19; 45/75, *Rewe-zentrale des lebensmittel grosshandel*, [1976] ECR 181, para 24; and 117/76, *Ruckdeschel and others*, [1977] ECR 1753, para 19.

[55] This latest proposal is of course a matter for the EC legislator to decide.

[56] Pecho & Michel. (2007). *Commentaire de l'arrêt du 26 juin 2007, Ordre des barreaux francophones et germanophone*, Revue du droit de l'Union européenne.

4.2 The possible ways-out

We admit that semantically speaking, the notions of "liability" and "no-fault" are somewhat contradictory. Though, if it is possible to conceive that a damage generated by an executive action of the public authorities (referring notably to the activity of the armed forces), without actually fulfilling the conditions of fault, can be compensated under the no-fault liability concept, it seems to be more difficult when the damage results from a normative action. The concept of liability in the absence of fault can be misunderstood in such context. But as we have already noted above, one must understand this kind of liability as aiming not only at damages resulting from an absence of a fault, but also at those caused by an illegality, but which is not, for legal reasons, able to result into the public authorities' liability for fault. In most cases, the violated norm is the principle of equality in all its forms, including the equality of citizens before public charges.

One alternative would be to adopt more lenient conditions for the application of Community's liability for fault and notably a progressive abandon of the current serious fault regime and the adoption of the simple fault regime[57]. In parallel, the Court could align the Member States' liability for infringement of Community law with such newly defined Community liability, since the protection of the rights that individuals derive from Community law should not vary according to the national or Community nature of the authority that caused the damage[58]. This solution would benefit not only to Union's citizens but also to its institutions and Member States, since the obligation to respect Community law would be strengthened. Needless to say, in a Community governed by the rule of law, this would be in everyone's interest.

Another option would be to remove the tort nature from the no-fault liability and to be inspired by conceptions, which already exist in private law. For example, we could use the theory of "neighbourhood troubles"[59], which can result from a breach of equality in the enjoyment of equal rights, without being able to attribute any fault, punishable under the tort law[60] to the author of the troubles. We will thus move from the reparation of damage to a compensation for the breach of the equality.

In any case, patience is needed. The liability of public authorities in the absence of fault is a principle of long gestation. It will be sufficient to recall in this regard, that even in France, pioneer in the field, a whole century was necessary for its adoption.[61]

5. Conclusion

From a legal point of view, both solutions (*status quo* and recognition of the principle) were viable. In this respect, by considering that the European Union institutions must not be weakened by a too generous jurisprudence during the constant difficult negotiations taking place within the WTO, the Court has chosen the pragmatic path.

Some could consider this choice as applying unequal standards. Indeed, it may look like that the existing case law was more protective of the Community institutions than the individual European citizens (we are thinking of

[57] Chapus.(2001). *Droit administratif général*. Vol. I(15th ed.). Montchrestien, Paris, 1303.
[58] Case C-352/98, *Bergaderm and goupil v commission*, [2000] ECR I-5291, paras 40 and 41.
[59] Article 544 of Belgian, French and Luxembourg Civil codes, see ROMAN, J.-F.(2006), La théorie des troubles de voisinage: un principe général du droit en équilibre, mais non en expansion, reconsidéré à la lumière de la théorie des principes généraux du droit. *RCJB*, 735-777.
[60] Article 1382 of the Belgian French and Luxembourg civil codes.
[61] In 1838, the French *Coneil d'etat* concluded in Duchâtelet, Rec. Leb. p. 7 to the total irresponsibility of the legislator.

the strict conditions needed to engage the extra-contractual liability for fault[62]). Moreover, the current jurisprudence has built a system of extra-contractual liability in which many illegalities cannot be compensated. Besides the issues that this system raises with regard to the rule of law principle, this observation leads us to ask ourselves the question–particularly important in the difficult political environment of trust crisis undergone nowadays - of the kind of relationship the EU must maintain with its citizens.

The Community legal system is in many respects a model of administration, transparency and non-discrimination. A further step could have been taken today so as to give these fundamental principles, and on which a broad consensus exists, a new scope. Moreover, taking into consideration the experience acquired by some Member States that have in their legal systems similar principles and have not suffered from them, it did not seem unreasonable to make the jurisprudence evolve in the direction of a better protection for the subjects of the EC law. Of course, the compensation conditions would have to remain strict in order not to open a Pandora's Box and flood the Community courts with countless actions from claimants who disagree with the choices of the Community legislator. The damage should remain unusual and special in nature, but it seems to us that in cases such as those presented in this article, retaliatory measures must be faced by the concerned economic sector or the Community itself and not by sectors selected in a discretionary manner by our WTO partners. It is the duty of our institutions to protect its citizens against sovereign actions of other States. It is also through this type of decision that it will be possible to restore the confidence of the citizens in their European institutions, because a legal order that provides fair and accessible remedies, means that it chooses to place the citizens at the top of its concerns.

Despite the delivery of this ruling, we believe that the Court has not yet said its last word. Faithful to its bold reputation, especially in times when the Community is in a period of stagnation due to political difficulties,[63] the Court will certainly not miss the opportunity to consider a system in which all illegality causing damage to the EU citizens will have to be repaired and each breach of equality before public charges will be compensated.

As a sign of a possible future opening in the field of the no-fault liability could be mentioned the judgement in *Masdar*, delivered on 16 December 2008 by the Grand Chamber.[64] This case opposed the Commission to a subcontractor (Masdar) of its own co-contractor (Helmico) in the execution of the TACIS program. The subcontractor that has allegedly executed his obligations towards the co-contractor without having received the full payment considers that the Commission, who ultimately profited from its services, found itself therefore in a situation of unjust enrichment. Even without entering into the details of the Court's reasoning, that merits for sure a complete comment;[65] it is possible to identify the most important contributions of this case.

First of all, the court recognises that according to the principles common to the laws of the Member States, a person who has suffered a loss which increases the wealth of another person without there being any legal basis for that enrichment has the right, as a general rule, to restitution from the person enriched, including the Community, up to the amount of the loss.[66] Not resulting from any contractual obligation, individuals can prevail

(to be continued on Page 50)

[62] See, in particular, case T-212/03, *My travel group v commission*, not yet reported, in which the CFI has ruled that although it had annulled the decision of the Commission prohibiting the acquisition of First Choice by MyTravel, it does not automatically incur the liability for fault of the Community, since the Commission did not commit in its economic assessment an enough serious breach of the law.

[63] One example is the "glorious" year in 1974, where the court gave the law of the founding principles, still valid today.

[64] Case C-47/07 P, *Masdar*, not yet reported.

[65] V. Michel.(2009). *Responsabilité extracontractuelle de la Communauté et action de in rem verso et negotiorum gestor, Europe*, 17.

[66] *Masdar*, paras 44-47.