EU liability for contributions to member states' breaches of EU law

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The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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EU LIABILITY FOR CONTRIBUTIONS TO MEMBER STATES' BREACHES OF EU LAW

MELANIE FINK*

Abstract

This article analyses the circumstances under which the EU incurs liability for contributing to breaches of EU law committed by Member States. It proposes to distinguish between what will be called primary liability, i.e. the liability that directly arises from the violation committed by the Member State, and associated liability, i.e. the liability arising for having contributed to the Member State's violation. Systematically analysing the ECJ's case law on primary and associated EU liability for contributions to breaches of EU law, this article identifies patterns in the Court's approach and ultimately provides a clearer picture of the conditions under which liability may arise.

1. Introduction

The implementation of EU law is a task shared between a plurality of actors across different jurisdictions, including various Member State authorities and EU bodies. For this multi-actor and multi-level administrative system to function, cooperation is essential. It allows the national and supranational authorities to benefit from each other's expertise and to make decision-making processes more effective.[1] At the same time, the constant interaction also means that breaches of the law that occur in its

* Post-doc, Europa Institute, Leiden University. Parts of this article were developed from the author's recently published monograph *Frontex and Human Rights: Responsibility in "Multi-Actor Situations" under the ECHR and EU Public Liability Law* (OUP, 2018). The author wishes to thank the editors and anonymous reviewers as well as Maarten Aalbers, João Pedro Quintais, and Ben Van Rompuy for their valuable comments on previous drafts.

1. Hofmann, "European administration: nature and developments of a legal and political space" in Harlow, Leino and della Cananea (Eds.), *Research Handbook on EU Administrative Law* (Edward Elgar, 2017), pp. 28–30, 34–36; Chiti, "The administrative implementation of European Union law: a taxonomy and its implications" in Hofmann and Türk (Eds.), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elgar, 2009), p. 11; Craig, *EU Administrative Law,* 3rd ed. (OUP, 2018), pp. 4–35; Schmidt-Aßmann, "Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft", 31 EuR (1996), 270.

implementation may be the result of conduct of the EU and one or more Member States acting together.[2] Suppose a Member State restructures its banks and thereby violates the right to property of bank depositors. Though implemented by the Member State, the restructuring may have been a measure adopted in close consultation with *inter alia* EU institutions in order for the Member State to benefit from assistance by the European Stability Mechanism (ESM).[3] Or suppose a Member State rejects an asylum application and expels an individual from its territory in violation of the prohibition of *refoulement*. Whilst the rejection and expulsion are decisions of the Member State, they may have been based on country guidance notes drawn up by the European Asylum Support Office.[4]

The involvement of several authorities that belong to different legal systems in an unlawful outcome raises a broad range of challenges, especially regarding how to guarantee accountability and effective judicial protection.[5] Which act can be reviewed as to its legality? Does cooperative action that causes damage give rise to joint liability? Which court is competent to adjudicate on such matters? Answering these questions is particularly complex because within the EU the mechanisms ensuring accountability are not integrated to the same extent as the administration, but generally speaking all operate within their own jurisdictions.[6] At the heart of this article is one aspect of this challenge: the question of liability in situations where an EU body, in fulfilling its administrative tasks, contributes to breaches of EU law committed by Member States.

An EU body can contribute to breaches committed by a Member State authority in two ways. The first is through action. A Union body may have actively contributed to the infringement by formally participating in taking the unlawful decision. This may occur in the context of so-called composite

2. Hofmann, Rowe and Türk, *Administrative Law and Policy of the European Union* (OUP, 2011), p. 877.

3. This example is loosely based on the facts at the origin of Case T-786/14, *Bourdouvali and Others* v. *Council and Others*, EU:T:2018:487, appeal pending (C-598/18), and Joined Cases C-8-10/15 P, *Ledra Advertising* v. *Commission and ECB*, EU:C:2016:701. Note, however, that no violation of the right to property was established in these cases.

4. This is a hypothetical example based on the work of the European Asylum Support Office established with Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010, O.J. 2010, L 132/11.

5. Hofmann and Türk, "The development of integrated administration in the EU and its consequences", 13 ELJ (2007), 253, 266–270; Eliantonio, "Judicial review in an integrated administration: the case of 'composite procedures'", 7 REALaw (2014), 65, 67–68.

6. Cassese, "European administrative proceedings", 68 *Law and Contemporary Problems* (2004), 21, 35; Hofmann, "Composite decision making procedures in EU administrative law", in Hofmann and Türk (Eds.), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, (Edward Elgar, 2009), pp. 157–159; Eliantonio, op. cit. *supra* note 5, 67, 77, 96.

administrative procedures, where decision-making is shared by design.[7] Such procedures, for instance, require a Member State to consult an EU body before taking a final decision or empower the latter to approve the national decision before it takes full effect.[8] In addition, even when it is not formally provided for within the framework of a specific administrative procedure, a Union body may be actively involved in decision-making at the national level in an informal manner. Especially the Commission, in fulfilling its task of administrative supervision of Member State administrations, may provide information, give interpretive guidance, or offer advice to national authorities when they implement EU law.[9] In a similar vein, agencies or other EU bodies can also contribute to national decision-making within and outside formalized procedures. The European Asylum Support Office, for instance, drafts country guidance notes that Member States *can* take into account when deciding on asylum applications and *must* take into account if the Regulation establishing the European Union Agency for Asylum enters into force.[10] Another example is the European Data Protection Board, whose task it is to ensure the consistent application of the General Data Protection Regulation *inter alia* by issuing guidelines on its interpretation and application that may be used by national data protection supervisory authorities in their application of the Regulation.[11]

The second way in which an EU body can contribute to a Member State's breach is through omission. This occurs when a Union body fails to step in and thereby "contributes" to the coming into existence of a Member State's violation of EU law. This is especially relevant for the Commission in its role as "Guardian of the Treaties".[12] Consider, for instance, a situation in which a

7. Della Cananea, "The European Union's mixed administrative proceedings", 68 *Law and Contemporary Problems* (2004), 197; Hofmann, op. cit. *supra* note 6, pp. 138–148; Eliantonio, op. cit. *supra* note 5; Brito Bastos, "Derivative illegality in European composite administrative procedures", 55 CML Rev. (2018), 101.

8. For examples of composite procedures see della Cananea, op. cit. *supra* note 7, 199–205; Eliantonio, op. cit. *supra* note 5, 69–77, 93–96; Röhl, "Procedures in the European composite administration" in Barnes (Ed.), *La transformación del procedimiento administrativo* (Global Law Press, 2009).

9. Rowe, "Administrative supervision of administrative action in the European Union" in Hofmann and Türk, op. cit. *supra* note 1, see in particular p. 187; Hofmann, Rowe and Türk, op. cit. *supra* note 2, pp. 708–712, 756–758.

10. Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) 439/2010, COM(2016)271, Art. 10.

11. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), O.J. 2016, L 119/1, in particular Art. 70.

12. Art. 17(1) TEU.

clear breach of EU law by a Member State is brought to the Commission's attention, but the Commission does not take any action in fulfillment of its supervisory obligations. Even though the Commission enjoys wide discretion in this respect, it is not unfettered, and overstepping the limits of discretion may give rise to liability.[13] Beyond the Commission, other EU bodies may also have supervisory roles conferred on them in their founding regulations. An example is the EU agency Frontex, which is required to oversee that EU law is complied with during joint border control and return operations.[14] Just as in the case of the Commission, it is conceivable that a body like Frontex contributes to a Member State's violation of EU law by failing to step in to accomplish its supervisory tasks.

Situations where an EU body contributes, through action or omission, to an infringement of EU law by a Member State have one thing in common: the final decision or course of conduct in violation of EU law is taken by a Member State. The EU played a part, but did not itself commit the infringement. From the perspective of liability law, this raises two crucial questions. First, does the EU have to compensate damage that arises from a Member State's violation of EU law to which it contributed? Is the EU liable, for instance, to make good – partly – the damage caused by a Member State's unlawful restructuring of its banks or by a Member State's unlawful rejection of an asylum application on account of its involvement in or influence over the national decision-making processes? Second, how does the EU's contribution affect the Member State's liability? Can a Member State which, for instance, adopted an unlawful decision, rely on the EU's involvement in order to reduce or exclude its own liability?

This article develops a conceptual framework to study liability for contributions by the EU to unlawful acts of Member States and applies that framework systematically to analyse the case law of the Court of Justice of the European Union (ECJ or the Court) on this issue. The ECJ has in the past been called upon to deal with the consequences for liability of different types of EU contributions to Member State breaches, such as active participation in or influence over national decision-making,[15] approvals of national measures,[16]

13. See *infra* section 4.2.2.

14. Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 Sept. 2016 on the European Border and Coast Guard, O.J. 2016, L 251/1, especially Arts. 22(3)(b), 25.

15. See e.g. Case 217/81, *Interagra* v. *Commission*, EU:C:1982:222.; Case T-786/14, *Bourdouvali*.

16. See e.g. Joined Cases 5, 7, 13–24/66, *Kampffmeyer and Others* v. *Commission*, EU:C:1967:31; Case C-55/90, *Cato* v. *Commission*, EU:C:1992:168; Case T-309/10 RENV, *Klein* v. *Commission*, EU:T:2016:570.

but also failures to react to violations of EU law.[17] Yet, the Court does not seem to conceive of such situations as a group of cases raising similar legal questions. For that reason, it does not typically engage with its own previous case law, unless it concerns the same policy area. By bringing together ECJ case law on liability for contributions to breaches of EU law from various areas of EU law in a systematic manner, this article aims to identify patterns in the Court's approach and ultimately provide a clearer picture of the conditions under which liability may arise.

The action for damages is not the only procedure that may serve to address a Union body's contribution to a Member State's infringement of EU law. Other possibilities are the actions for annulment and failure to act, the preliminary ruling procedure, or the infringement procedure. However, whilst some research has been conducted on the question of judicial review and rights of private parties in the context of the action for annulment, the potential of the action for damages in addressing the challenges of accountability in the EU's integrated administration has received very limited attention.[18] This is especially noteworthy in light of the practical importance of the action for damages in this regard. Contributory acts are often merely preparatory, informal, or factual in nature, expressed, for instance, in an email or even orally. As such, they are usually not considered to produce legal effects and do not qualify as "reviewable acts" for the purposes of an action for annulment.[19] Whilst the preliminary ruling and infringement procedures offer more flexibility in this regard, they are not available to private parties that may have suffered a disadvantage.[20] Hence, the action for damages is often the only action available to a private party to challenge EU contributions to Member State breaches of EU law.[21]

The article is structured as follows. Section 2 starts by giving a brief overview of the conditions under which the EU incurs non-contractual

17. See e.g. Case 4/69, *Lütticke* v. *Commission*, EU:C:1971:40.

18. For research on judicial review and/or rights of private parties see e.g. Brito Bastos, op. cit. *supra* note 7; Eliantonio, op. cit. *supra* note 5; Türk, "Judicial review of integrated administration in the EU" in Hofmann and Türk, op. cit. *supra* note 1; Mendes and Eckes, "The right to be heard in composite administrative procedures: Lost in between protection?", 36 EL Rev. (2011), 651; Hofmann and Tidghi, "Rights and remedies in implementation of EU policies by multi-jurisdictional networks", 20 EPL Law (2014), 147.

19. Hofmann, op. cit. *supra* note 6, pp. 159–163 (specifically on information exchange); Hofmann, Rowe and Türk, op. cit. *supra* note 2, pp. 803–808; Eliantonio, op. cit. *supra* note 5, 80.

20. On the question of the "reviewable act" in the context of the preliminary ruling procedure see Schermers and Waelbroeck, *Judicial Protection in the European Union* (Kluwer, 2001), pp. 290, 314–317; Hofmann, Rowe and Türk, op. cit. *supra* note 2, pp. 865–867.

21. Hofmann, op. cit. *supra* note 6, pp. 159–163; Hofmann and Türk, "Legal challenges in EU administrative law by the move to an integrated administration" in Hofmann and Türk, op. cit. *supra* note 1, p. 375.

liability. Its main aim, however, is to develop a conceptual lens through which to analyse contributions within EU non-contractual liability law. It proposes to distinguish between what will be called primary liability and associated liability. Sections 3 and 4 then examine the Court's case law on primary and associated liability respectively. Section 5 addresses the question whether the liability of the EU arises jointly with the liability of a Member State. Section 6 concludes with a brief summary and a discussion of the findings.

2. Contributions and liability: A conceptual framework

2.1. *Non-contractual liability in EU law*

The non-contractual liability of the EU is based on Article 340(2) TFEU, according to which the Union shall make good any damage caused by its institutions or by its servants in the performance of their duties.[22] The ECJ is competent to rule on the liability of the Union.[23] Article 256(1) TFEU allocates the competence to hear actions for damages at first instance to the General Court.[24] The Court of Justice hears actions for damages in appeals on points of law.[25]

Even though Article 340(2) TFEU provides a basis for the Union's liability, it leaves the elaboration of the conditions for it to arise to the Court, which for that purpose shall be guided by the "general principles common to the laws of the Member States". On that basis, the Court has consistently held that liability is subject to three cumulative conditions: the unlawfulness of the conduct complained of, the occurrence of damage on the part of the victim, and a causal relationship between the unlawful conduct and the damage.[26] The condition of unlawfulness is qualified in two ways. First, breaches of EU law give rise to liability only if the rule infringed is intended to confer rights on individuals. Second, a breach of Union law does not lead to liability unless it qualifies as "sufficiently serious".[27]

22. Art. 340(2) TFEU.

23. Art. 268 TFEU.

24. Previously, disputes between the Union and its servants fell under the jurisdiction of the Civil Service Tribunal, see Statute of the Court of Justice of the European Union, Protocol (No 3) to the Treaties, O.J. 2012, C 326/201, annex, Art. 1.

25. Ibid., Arts. 56–58.

26. One of the first clear statements of the ECJ on the conditions for liability is in Case 4/69, *Lütticke*, para 10 (of the grounds of the judgment).

27. Case C-352/98 P, *Bergaderm and Goupil* v. *Commission*, EU:C:2000:361, para 42; Case C-282/05 P, *Holcim (Deutschland)* v. *Commission*, EU:C:2007:226, para 47; Case C-440/07 P, *Commission* v. *Schneider Electric*, EU:C:2009:459, para 160; Case C-611/12 P, *Giordano* v. *Commission*, EU:C:2014:2282, paras. 35, 44; for a concise overview of the Court's case law see

These three conditions – qualified unlawfulness, damage, and causation – are necessary but also sufficient for liability to arise. Consequently, no type of conduct is excluded as a potential source of liability. Liability may arise for acts or omissions, be it of a legislative, administrative, judicial, or factual nature. Therefore, also conduct that does not consist of any formal legal act is capable of triggering liability if unlawful.[28] Moreover, there is no requirement that the provision breached be particularly important within the hierarchy of EU law. This means that liability may arise for breaches of any provision that is binding under EU law and confers rights on individuals, no matter whether the latter is contained in the Treaties, the Charter of Fundamental Rights of the European Union (CFR), secondary law, or general principles of EU law.

It is important to note that the condition of unlawfulness has changed considerably over time. In the Court's early case law a distinction evolved between legislative and administrative conduct. Whereas in the case of the latter simple unlawfulness was sufficient, liability for legislative conduct arose only in case of a "sufficiently flagrant violation of a superior rule of law for the protection of the individual" (the so-called *Schöppenstedt* test).[29] The case of *Bergaderm* brought two important changes to the *Schöppenstedt* test and shaped the conditions as they apply today. First, the Court found that to be capable of giving rise to liability, a rule does not need to be "superior".[30] For the current purposes, this means that pre-*Bergaderm* case law is not relevant to the extent it concerns the question of the "superiority" of a rule. Second, with *Bergaderm* the Court abandoned the dichotomy between legislative and administrative measures and the requirement of a sufficiently serious breach was determined to be applicable to all situations. This has no bearing on the following analysis inasmuch as it can be assumed that administrative conduct that did not lead to liability pre-*Bergaderm* would also not do so now. However, all other pre-*Bergaderm* case law has to be relied on more cautiously when it comes to the question of the seriousness of a breach. To the extent such cases are used for the purposes of the following analysis, the reason for their continued relevance will be specifically pointed out.

Finally, as a matter of Union law, Member States are also liable for any breaches thereof.[31] The conditions for State liability correspond in substance

Gutman, "The evolution of the action for damages against the European Union and its place in the system of judicial protection", 48 CML Rev. (2011), 695.

28. Türk, *Judicial Review in EU law* (Edward Elgar, 2009), p. 241; Van der Woude, "Liability for administrative acts under Article 215(2) EC" in Heukels and McDonnell (Eds.), *The Action for Damages in Community Law* (Kluwer, 1997), pp. 119–121.

29. Case 5/71, *Zuckerfabrik Schöppenstedt* v. *Council*, EU:C:1971:116, para 11.

30. Explicitly see Case T-415/03, *Cofradía de pescadores "San Pedro" de Bermeo and Others* v. *Council*, EU:T:2005:365, para 85.

31. Joined Cases C-6 & 9/90, *Francovich and Bonifaci* v. *Italy*, EU:C:1991:428.

to those for Union liability, even though Member States are free to grant compensation under more lenient conditions.[32] The competence to hear actions for damages against Member States lies exclusively with their respective national courts. The ECJ is only involved in proceedings relating to the non-contractual liability of Member States indirectly, when a Member State court asks for a preliminary ruling according to Article 267 TFEU. The following analysis takes into account case law of the ECJ but not of national courts.

2.2. *Analysing liability in triangular relationships*

When a Member State commits a violation of EU law that a Union body contributed to, this results in a triangular relationship between the Member State, the EU, and the person who suffered damage. The complexity in determining liability stems from the fact that there are two potential "perpetrators", two courses of conduct, but only "one damage" to compensate. In order to analyse liability for contributions to unlawful conduct, this article distinguishes between what will be called primary liability and associated liability.

Primary liability is the liability that directly arises from the violation committed by the Member State. Since it concerns Member State conduct, one would intuitively assume that it lies with the Member State. Whilst this assumption is compelling in situations where the Member State acts freely, it is less so when the Member State is, for instance, forced to adopt an unlawful course of conduct. If the premise is accepted that there are situations in which liability for *prima facie* Member State conduct may shift to the EU, the crucial question is under what circumstances that occurs. Can a contribution by the EU to a Member State's breach of EU law ever be of such a nature that the Union has to be considered the "true author" of the *prima facie* Member State violation, shifting liability from the Member State to the Union?

The legal operation of finding the "true author", i.e. "assigning" a specific course of conduct to a particular entity, is in the following referred to as "attribution of conduct". Whilst this term is employed for this purpose especially in public international law,[33] it is occasionally also used by the ECJ

32. Joined Cases C-46 & 48/93, *Brasserie du pêcheur* v. *Bundesrepublik Deutschland and The Queen/ Secretary of State for Transport, ex parte Factortame and Others*, EU:C:1996:79, paras. 42, 51; Case C-352/98 P, *Bergaderm*, paras. 39–44.

33. See in particular ILC, "Report of the Fifty-Third Session: Articles on Responsibility of States for Internationally Wrongful Acts" ("ASR") (UN Doc A/56/10, 2001), Arts. 2, 4–11; ILC, "Report of the Sixty-Third Session: Articles on the Responsibility of International Organizations" ("ARIO") (UN Doc A/66/10, 2011), Arts. 4, 6–9.

itself.[34] Still, the ECJ does not consistently stick to specific terminology. It uses "attribution of conduct" interchangeably with "attribution of damage" or "imputation"; sometimes it simply describes a specific course of conduct as being "in fact the responsibility of [the Union]".[35]

In the context of EU liability law, attributing conduct to either the EU or a Member State, and thus allocating primary liability for that course of conduct, has to occur at the admissibility stage of the proceedings. This is because the Court is only competent to rule on the liability of the Union. Hence, if the conduct complained of is *prima facie* Member State conduct, the Court has to establish that it is in reality attributable to the Union before being able to deal with the substantive part of an action. In other words, allocation of the relevant unlawful conduct to the Union is a precondition for the competence of the Court to adjudicate on the substance of the case.[36]

The observation that primary liability has to be allocated at the admissibility stage, rather than the merits stage, of proceedings has substantive consequences. Most importantly, the allocation of primary liability is not a matter of causation in that it does not depend on the question which actor caused the damage. Of course, if the infringing course of conduct is not attributable to the EU, the EU can also not be considered the direct cause of the damage that results from the non-attributable conduct. However, strictly speaking, the reason is the lack of conduct attributable to the EU, the lack of causation being a mere consequence of that.[37] This is important because the thresholds for causation and attribution are not the same. Whilst the Court has consistently held that a causal link exists when an infringement of the law was

34. See e.g. Joined Cases 89 & 91/86, *Étoile commerciale and CNTA* v. *Commission*, EU:C:1987:337, para 18; Case T-279/03, *Galileo International Technology and Others* v. *Commission*, EU:T:2006:121, para 129; Case C-234/02 P, *Ombudsman* v. *Lamberts*, EU:C:2004:174, para 59; occasionally "attribution" is explicitly listed as a fourth condition of liability, see e.g. Case T-317/12, *Holcim (Romania)* v. *Commission*, EU:T:2014:782, para 86; in Case T-250/02, *Autosalone Ispra* v. *EAEC*, EU:T:2005:432, the lack of attribution to the Community led to the dismissal of the action, see in particular paras. 42, 68–98; in literature see in particular Türk, op. cit. *supra* note 28, p. 241; Fines, "A general analytical perspective on Community liability", in Heukels and McDonnell, op. cit. *supra* note 28, pp. 16–18.

35. See e.g. Case 175/84, *Krohn* v. *Commission*, EU:C:1986:85, paras. 19, 23 ("attribution of conduct" and "unlawful conduct . . . is in fact the responsibility of . . . "); Joined Cases C-104/89 & C-37/90, *Mulder and Others* v. *Council and Commission*, EU:C:1992:217, para 9 ("attribution of damage", citing *Krohn*); Case T-54/96, *Oleifici Italiani and Fratelli Rubino Industrie Olearie* v. *Commission*, EU:T:1998:204, para 67 ("attribution" and "imputation"); Case T-786/14, *Bourdouvali*, para 80 ("unlawful conduct . . . is in fact the responsibility of . . . ").

36. Explicitly see Case T-277/97, *Ismeri Europa* v. *Court of Auditors*, EU:T:1999:124, para 49.

37. See also ibid. paras. 48–49; the General Court, however, expressed a different view in Case T-786/14, *Bourdouvali*, para 97.

a necessary and sufficiently direct condition for a damage to occur,[38] the threshold for attribution of conduct has less clearly been spelled out in case law and will be the subject of the analysis in section 3.1.

If it turns out that primary liability does not shift to the EU, the question arises whether the Union may incur liability for its contribution as such, e.g. for the advice to adopt an unlawful decision or for the approval thereof, as opposed to for the unlawful decision itself. This is referred to here as "associated liability". It is "associated" in that it arises for conduct that is closely linked to, or "associated with", conduct directly breaching EU law. Since associated liability undoubtedly concerns EU conduct, the Court is (exclusively) competent to hear such cases.

Associated liability in principle arises in addition to the Member State's primary liability.[39] Since it presupposes that the direct breach is attributable to the Member State, the central challenge is not to attribute the breach, but to define the circumstances under which a contribution to it may as such give rise to liability. This raises questions of substance to be dealt with at the merits stage of the proceedings: Can a contribution to a violation in itself be a violation of EU law? Can a contribution qualify as a sufficiently serious breach? Can it be considered a direct enough cause for the damage arising from the primary violation? How does the liability of the Union for its contribution relate to the Member State's primary liability?

Contributions to a violation may – and have indeed been found by the Court to – give rise to primary liability *or* associated liability. However, the two types of liability are mutually exclusive. The contribution of the EU to a violation is either of such intensity that the violation committed by the Member State becomes attributable to the EU, in which case it gives rise to the EU's primary liability. Or it is not, in which case it may still give rise to associated liability if the contribution as such fulfils all the conditions for liability. The two questions are sequential. The analysis of primary liability must precede that on associated liability, since a finding of the first makes it unnecessary to assess the second. The two questions are also "hierarchical". Whilst liability is binary – the EU either is or is not liable – it is also quantifiable in that the amount of compensation to be afforded may vary. In that sense, primary liability is "more" than associated liability. In the case of primary liability, the conduct by a Member State in violation of EU law is attributable to the EU. Accordingly, the EU is liable for all consequences of the breach, not only for those directly resulting from its contribution. In contrast, in the case of associated liability,

38. On the threshold for causation see Toth, "The concepts of damage and causality as elements of non-contractual liability" in Heukels and McDonnell op. cit. *supra* note 28, p. 192. See also *infra* section 4.2.3.

39. For more detail see section 5, *infra*.

the EU is only liable for its own contribution, not the actual breach of the Member State. This means the obligation to afford compensation would also have to be limited to the damage that was a direct consequence of the contribution itself (as opposed to the violation contributed to). In light of this, a case concerning a contribution by an EU body to a Member State's violation of EU law should be approached according to the scheme set out in Figure 1.

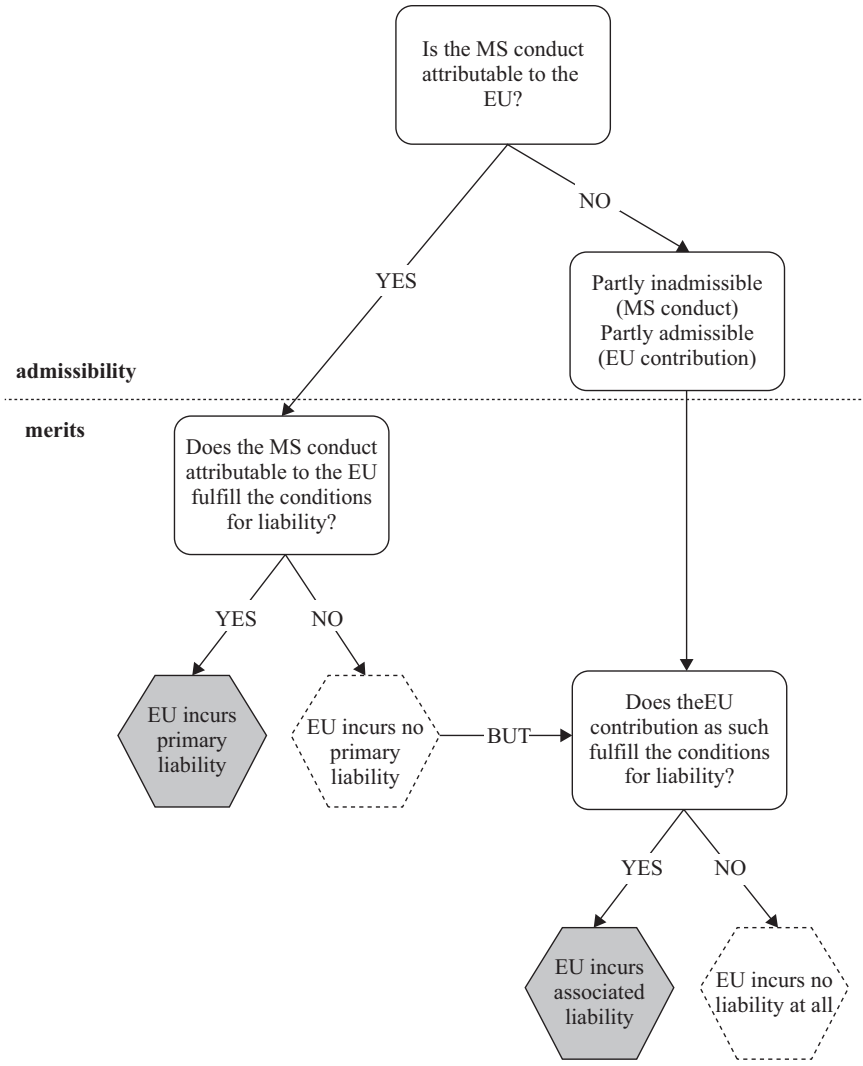

Figure 1

2.3. *Situating the Court's case law within the conceptual framework*

There are a number of benefits in analysing cases involving EU contributions to Member State violations through the lens proposed in the previous section. Most importantly, it offers a tool to structure the analysis and achieve more consistency and legal certainty in how EU public liability law deals with contributions to violations. This would at the same time help applicants to decide on the forum for their claim for compensation (ECJ or national courts) and assess their chances of success beforehand.

On some occasions, the Court indeed seems to have adopted a similar analytical framework to the one presented in the previous section. A particularly good example in recent case law is the General Court's decision in *Bourdouvali*.[40] The case concerned losses the applicants had suffered as a result of the bank restructuring Cyprus undertook as part of the conditions for receiving financial assistance from the ESM. The applicants argued that the involvement of several EU institutions in the adoption by Cyprus of the legal framework in relation to the bank restructuring made the Union liable to compensate their losses. The General Court recalled that it had no jurisdiction to hear claims for compensation directed against unlawful conduct the author of which is not the EU, but for example a Member State.[41] However, this, in the view of the General Court, did not exclude its jurisdiction with respect to conduct that even though adopted by a national authority is "in fact the responsibility of [the EU]" and "cannot be regarded, in reality, as attributable to the national authority".[42] In addition, it found it had jurisdiction in relation to the (allegedly) unlawful acts of the Union institutions they may commit when fulfilling their tasks, in this case under the ESM Treaty.[43] The General Court noted that the dispute therefore raised two questions. The first was whether the allegedly unlawful measures, "formally attributable to the Republic of Cyprus, are, in reality, attributable to the [EU] in whole or in part" – hence, the question of primary liability.[44] The second was whether the Union's conduct could as such, irrespective of the attribution of Cyprus' conduct, give rise to non-contractual liability on the part of the EU – hence, the question of associated liability.[45]

In other cases, however, the ECJ is less explicit and it has to be deduced from the reasoning in a specific case whether it analyses primary or associated

40. Case T-786/14, *Bourdouvali*; under appeal Case C-598/18 P, *Council* v. *Bourdouvali and Others,* pending.
41. Case T-786/14, *Bourdouvali,* para 79.
42. Ibid., para 80.
43. Ibid., para 81.
44. Ibid., para 95.
45. Ibid., para 96.

liability. This may be challenging at times. In part, this is because the Court's use of relevant terms and concepts has not always been consistent.[46] More fundamentally, the Court sometimes conflates the meaning of attribution (Is there conduct of a Union body?) and causation (Did the Union's conduct cause the damage?), making it difficult to understand whether it deals with a question of Union liability for a violation directly committed by a Member State or for the EU's own unlawful contribution to that breach.

A good illustration is *Oleifici Italiani*.[47] The case concerned a dispute on the reimbursement of storage costs for olive oil incurred by the Italian company Oleifici. Under the rules in force at the time, reimbursement was to be granted by the competent national authority, provided the olive oil in question fulfilled the quality requirements set out in EU law. After a lengthy back and forth, the Commission sent a letter to the Italian authorities, expressing the view that a new analysis had to take place to determine the quality of the olive oil stored by Oleifici. Until it received the results of that analysis, the national authority was advised to block any payments to the applicant. Oleifici sought to annul the "decision" contained in the letter and requested compensation from the Commission for the damage suffered as a consequence of the letter before the ECJ. The General Court held that "the failure to reimburse storage costs could not be attributed to the conduct of the Commission's services in their informal cooperation with the Italian authorities but was due to a deliberate and independent choice by those authorities". On that basis, it found it did not have jurisdiction to award damages to the applicant. Even though the General Court seemed to perform a test of attribution of conduct (and therefore admissibility), it introduced the question as one of causation at the merits stage, thereby blurring the distinction between the two.[48] Whilst the argument as such indicates that the General Court dealt with primary liability, not associated liability, it ultimately remains inconclusive.

Cases such as these pose a challenge because they do not allow an unequivocal determination of whether the Court's findings are relevant for the question of primary or associated liability. In the following sections, the main factor taken into account in order to identify the type of liability at stake is the nature of the substantive argument used to allocate liability to one actor or another. As a secondary factor, the procedural stage at which the involvement of several actors in causing the damage is problematized will be considered. Less emphasis will be placed on terminology used by the Court. For instance, following this approach, *Oleifici Italiani* will be considered a case concerning primary liability.

46. See *supra* text to note 35.
47. Case T-54/96, *Oleifici Italiani.*
48. Ibid., para 67; another example is Case T-279/03, *Galileo,* paras. 129–130.

3. The EU's primary liability

3.1. *Attribution of prima facie Member State conduct to the EU*

Many of the cases that deal with the threshold required to attribute conduct of Member State authorities to the Union concern the agricultural sector, an early example of shared administration.[49] They typically involve an allegedly unlawful decision by a Member State authority in implementing EU law, e.g. turning down applications for export refunds or certificates,[50] requiring the applicant to repay subsidies received,[51] not granting or blocking certain payments,[52] or rejecting an application for monetary compensation amounts.[53] There, the Commission was actively involved in the decision-making process by way of giving advice on the application of relevant EU law. This advice was provided in various forms, a letter or a telex message for example,[54] or was otherwise implicit in the Commission's conduct.[55] The applicants essentially argued that the national authorities adopted the unlawful decision on "orders" from the Commission. For this reason, they were of the view that the conduct of the Commission was at the origin of their damage and the Union had to compensate them for it, regardless of the fact that a Member State formally took the final decision.

In all these cases, the Court consistently held the actions to be inadmissible.[56] It found in essence that the Commission's involvement in the national decision-making in question was not attributable to the Union because it was not binding on the national authorities.[57] A good example is

49. Craig, op. cit. *supra* note 1, pp. 7–9.

50. Case 133/79, *Sucrimex and Westzucker* v. *Commission*, EU:C:1980:104; Case 217/81, *Interagra*.

51. Joined Cases 89 & 91/86, *Étoile commerciale and CNTA*.

52. Case T-54/96, *Oleifici Italiani*.

53. Case 132/77, *Société pour l'Exportation des Sucres* v. *Commission*, EU:C:1978:99.

54. Case C-50/90, *Sunzest* v. *Commission*, EU:C:1991:253, involved a letter; so did Case T-54/96, *Oleifici Italiani.* A telex message was involved in Case 133/79, *Sucrimex and Westzucker*; and in Case 217/81, *Interagra*.

55. Joined Cases 89 & 91/86, *Étoile commerciale and CNTA*; Case 132/77, *Société pour l'Exportation des Sucres*.

56. Case 133/79, *Sucrimex and Westzucker*, para 25; Case 217/81, *Interagra*, paras. 10–11; Joined Cases 89 & 91/86, *Étoile commerciale and CNTA*, paras. 20–21; Case C-50/90, *Sunzest*, para 20; less clear, however, Case T-54/96, *Oleifici Italiani*, paras. 67, 70; Case 132/77, *Société pour l'Exportation des Sucres*, para 28; Case T-212/06, *Bowland Dairy Products* v. *Commission*, EU:T:2009:419, para 41.

57. Case 132/77, *Société pour l'Exportation des Sucres*, paras. 23–27; Case 133/79, *Sucrimex and Westzucker,* paras. 16, 22; Joined Cases 89 & 91/86, *Étoile commerciale and CNTA*, paras. 19–20; Case C-50/90, *Sunzest*, paras. 13, 18, 19; Case T-92/06, *Lademporiki and*

Interagra.[58] In that case, French authorities denied the applicant an export refund after having consulted the Commission on the matter, who had informed them that under Community legislation in force at the time, Interagra's request was to be rejected. The applicant sought compensation from the Community, arguing that in fact the Commission's conduct was the source of their damage, since the French authorities had acted on the basis of the Commission's instructions when refusing the refund. The Court, however, found that the Commission's communications were merely "part of the internal cooperation between the Commission and the national bodies responsible for applying the Community rules in this field and as a general rule . . . cannot make the Community liable to individuals".[59]

The Court came to a different conclusion in *Krohn*.[60] The German company Krohn had requested that the competent national authority issue import licences for manioc products from Thailand. The relevant Community legislation provided that such licences were to be granted, except where the Commission informed the competent national authority otherwise. The Commission did so in relation to Krohn's application, on the basis of which the national authority refused the issue of an import licence. As a consequence, Krohn had to pay the full rate of import levy for a subsequent shipment of manioc products. Krohn *inter alia* brought an action for damages seeking compensation from the Community.

In his Opinion, Advocate General Mancini offered two solutions. The first was based on the argument that the refusal decision was taken by a national body who therefore ought to bear liability for it. He suggested that the unjust consequences for the Member States could be offset by granting them reimbursement from the Community. Mancini conceded that this approach might be "excessively formalistic", which is why he was "not altogether convinced" by it. However, the second solution gave him "still greater cause for doubt". The second solution was to assess in each case the powers conferred upon the Commission and the national body. If the Commission's involvement was to be considered a mere suggestion, the national authority would be liable. In contrast, if the Commission's opinion was binding, the decision at the national level would be attributable to the Commission and render the Community liable. In Mancini's view, this solution was "theoretically more plausible", but he could "scarcely imagine a worse" one. It would have "disastrous practical consequences" since applicants would

Parousis & Sia v. *Commission*, EU:T:2006:248, para 26; Case T-212/06, *Bowland Dairy*, para 41; the same was confirmed for contractual liability, see Case 109/83, *Eurico* v. *Commission*, EU:C:1984:321.

58. Case 217/81, *Interagra*.
59. Ibid., para 8.
60. Case 175/84, *Krohn*.

have to "pore over every document in the procedure leading to the measure adversely affecting them in order to establish whether the national body or the Commission made the greater contribution to its adoption". This, Advocate General Mancini argued, would be difficult to reconcile with the principle of legal certainty "which requires that all rules, and rules conferring jurisdiction most of all, be defined in a clear and intelligible manner". He suggested that the Court adopt a decision based on the first solution.[61]

The ECJ opted for the second solution. It stated that in order to establish its jurisdiction in situations where a decision adversely affecting the applicant was adopted by a national authority in implementation of Community legislation, it is necessary "to determine whether the unlawful conduct alleged in support of the application for compensation is in fact the responsibility of a Community institution and cannot be attributed to the national body".[62] The Court pointed out that there was no doubt that the Community legislation in question empowered the Commission to give legally binding instructions to the Member States, an authority which the Commission used in the particular case.[63] On that basis, it concluded that "the unlawful conduct alleged . . . is to be attributed not to the [national authority], which was bound to comply with the Commission's instructions, but to the Commission itself".[64] Accordingly, the Court was competent to hear the action. Deciding on the substance of the case in a separate judgment, the Court found that the decision to refuse Krohn's import licence was in conformity with EU law and the Union incurred no liability.

The same rule was applied recently by the General Court in *Bourdouvali*.[65] Having recalled that it would only have jurisdiction for conduct adopted by a national authority if it was in fact the responsibility of the EU, the General Court went on to analyse whether the allegedly unlawful measures, "formally attributable to the Republic of Cyprus, are, in reality, attributable to the [EU] in whole or in part".[66] Explicitly relying *inter alia* on *Krohn*, the General Court held that the Cypriot acts were attributable to the EU only if and to the extent that an EU institution required Cyprus to adopt them without leaving it discretion to choose a different course of conduct.[67] Applying this rule to the case, the General Court found that Cyprus was indeed under an obligation to maintain in force one of the impugned measures, namely the conversion of deposits in one of the banks into shares, without having any discretion to

61. A.G. Mancini, Opinion in Case 175/84, *Krohn*, pages 760–762.
62. Case 175/84, *Krohn*, para 19.
63. Ibid., paras. 21–22.
64. Ibid., para 23.
65. Case T-786/14, *Bourdouvali;* see also *supra* text to notes 40–45.
66. Ibid., paras. 79–80, 95.
67. Ibid., paras. 99, 80.

revoke it.[68] Consequently, this measure was, "at least in part, attributable to the Union".[69] Whilst the General Court hence had jurisdiction to rule on the lawfulness of this (*prima facie* national) measure, it denied the EU's liability because it did not consider the measure to be unlawful.[70]

The rule that emanates from this case law is that a contribution, such as guidance or support, by a Union body to a Member State's infringement, may only render the Union liable for the conduct of that Member State if the Union was empowered to determine the impugned conduct in a legally binding manner. The overarching reason for this approach seems to lie in the fact that non-binding guidance does not limit the discretion of the "guided" authorities. They remain free to adopt measures other than those suggested, which means that the choice to act unlawfully was made by the acting Member State itself, not the "guiding" EU institution.[71] Thus, primary liability is allocated to the authority that enjoys sufficient discretion to make a lawful choice, or in other words according to legal decision-making power.

This attribution rule seems consistent with the Court's own case law on related questions. In particular, it applies also in the reverse scenario where a Member State is empowered by Union law to predetermine a Union body's final decision in a legally binding manner.[72] In addition, the same principle governs situations where compensation is sought for damage that is a direct consequence of Member States' application of binding EU law (rather than, for instance, a binding Commission instruction) that leaves them no discretion.[73] Thus, the precise reason for the Member State's lack of discretion is irrelevant, as long as its origin is EU law. Whether it is EU legislation or an EU body's binding instruction, if a Member State applies EU law unlawfully but did not have discretion to make a lawful choice, the source of that

68. Ibid., paras. 100–192, in particular paras. 180 and 190.

69. Ibid., para 191.

70. Ibid., paras. 244–508.

71. For commentary see Biondi and Farley, *The Right to Damages in European Law* (Kluwer, 2009), p. 189; Säuberlich, *Die Außervertragliche Haftung im Gemeinschaftsrecht: Eine Untersuchung der Mehrpersonenverhältnisse* (Springer, 2005), pp. 90–96; Oliver, "Joint liability of the Community and the Member States" in Heukels and McDonnell op. cit. *supra* note 28, p. 306; Wils, "Concurrent liability of the Community and a Member State", 17 EL Rev. (1992), 191, 194, at note 15.

72. Case C-97/91, *Oleificio Borelli* v. *Commission*, EU:C:1992:491, paras. 11, 20; Joined Cases C-106 & 317/90 and C-129/91, *Emerald Meats* v. *Commission*, EU:C:1993:19, paras. 36–41, 56; Case T-93/95, *Laga* v. *Commission*, EU:T:1998:22, para 47.

73. See e.g. Joined Cases C-104/89 & C-37/90, *Mulder and Others* v. *Council and Commission*, para 9. In Case T-786/14, *Bourdouvali*, the General Court made the connection between *Krohn*-type of cases and *Mulder*-type of cases more explicit by relying on both *Krohn* and *Biret* (itself part of the *Mulder* line of case law) when explaining that it is competent to hear cases involving damage caused by Member State conduct, when that conduct is in fact attributable to the EU, see Case T-786/14, *Bourdouvali*, para 80.

unlawfulness is considered to be the Union and liability for the consequences lies with the Union. Finally, the rule does not seem to be specific to actions for damages, but also applies when the Court is called upon in actions for annulment to determine the lawfulness (and its jurisdiction to rule on the lawfulness) of decisions resulting from composite procedures.[74]

3.2. *Extending attribution to "factually binding" conduct?*

In light of the Court's case law, contributions by EU bodies to violations by Member States that involve the power to pre-determine the Member State conduct in a legally binding manner reach the threshold required for attributing the Member State conduct to the EU. In contrast, those that consist of non-binding involvement, omissions, or *ex post facto* conduct (like approvals by the Commission of national measures) do not. Since in the context of administrative cooperation Union bodies are not usually empowered to instruct national authorities in a legally binding manner,[75] this means that contributions only very exceptionally give rise to primary liability.

In reality, however, legally non-binding influence may shape Member State conduct to a greater degree than the attribution rule suggests. Whilst Member States are legally speaking free to disregard, for example, an advice of an EU body, it may be difficult to do so in practice, especially when the EU body in question has more expertise than the national authority.[76]

At least on one occasion, the Court did acknowledge that the "factually binding" nature of an advice may influence the assessment of liability. *KYDEP* concerned a note sent by the Commission to all Member States regarding limits to the radioactivity tolerance for certain products in the aftermath of the nuclear accident that occurred at Chernobyl in 1986.[77] In that note, the Commission informed the Member States that the EU would not bear the costs for intervention purchases or export refunds regarding Community products that exceeded a certain limit. KYDEP, a Greek agricultural cooperative, alleged that as a result it was not able to market the products from the year of the Chernobyl accident as anticipated. The ECJ acknowledged that the note in

74. Case C-97/91, *Borelli*, paras. 12–13. For a detailed assessment see Brito Bastos, op. cit. *supra* note 7, 114–119; Brito Bastos, "The Borelli doctrine revisited: Three issues of coherence in a landmark ruling for EU administrative justice", 8 REALaw (2015), 269.

75. In this vein see also Hofmann, Rowe and Türk, op. cit. *supra* note 2, pp. 759–764.

76. Czaja, *Die ausservertragliche Haftung der EG für ihre Organe* (Nomos, 1996), pp. 131–132; for more commentary on this attribution rule see Wils, op. cit. *supra* note 71; see also Oliver, op. cit. *supra* note 71, p. 306, arguing that it "appears harsh", but only on first sight because the actual loss in the relevant cases (*Sucrimex* and *Interagra*) was borne by the European Agricultural Guidance and Guarantee Fund; Biondi and Farley, op. cit. *supra* note 71, p. 189.

77. Case C-146/91, *KYDEP* v. *Council and Commission*, EU:C:1994:329.

question was not binding on the Member States, but contained only an opinion of the Commission with respect to the interpretation of relevant Community law.[78] However, it found that it was nonetheless "likely to prompt the competent authorities of the Member States to refuse to buy in for intervention agricultural products whose radioactivity levels exceeded certain maximum limits or to grant export refunds for such products".[79] This was so in particular because they would otherwise be at risk of having the reimbursement of their expenditure refused by the Community. For that reason, the Court proceeded to examine the alleged incompatibility of the Commission's note with Community law.[80]

Also in *Bourdouvali* the General Court noted that the determination whether Cyprus had any discretion to choose not to implement the contested measures may include an "assessment of whether the contested acts are obligatory *and of the economic and financial pressure to which the Republic of Cyprus was confronted*".[81] Even though in the actual assessment of Cyprus' discretion the General Court then focused on the legally binding nature of the contested acts, it thus somewhat left the door ajar to consider "factually binding" conduct for the purpose of attributing conduct to the EU body.[82]

4. The EU's associated liability

4.1. *How to assess associated liability*

There are two approaches, representing opposite ends of a spectrum, to assess the EU's liability for its own contribution to a Member State's breach. The crucial distinction between the two lies in the extent to which the Member State's breach is taken into account for the purposes of establishing the EU's liability.

The premise of the first approach is that each actor can only be held to account for their own conduct. Accordingly, the EU's liability has to be assessed independently of the Member State's breach. This has two important implications. On the one hand, it means that only a contribution that constitutes a violation of EU law gives rise to liability. In particular, if an EU body approves a national scheme that is not in conformity with EU law, gives advice that leads to a violation, or fails to take steps to prevent a Member

78. Ibid., paras. 24–25.
79. Ibid., para 26.
80. Ibid., para 27.
81. Case T-786/14, *Bourdouvali*, para 99 (emphasis added).
82. Ibid., see the assessment of the General Court in paras. 182–190.

State's breach, this may breach an obligation to supervise the Member State's compliance with EU law. The most obvious example is Article 17(1) TEU which requires the Commission to "oversee the application of Union law", but there are also more specific supervisory obligations both in the Treaties themselves as well as in secondary law for the Commission or other EU bodies.[83] On the other hand, assessing EU liability independently of the Member State's breach means that EU liability arises only if the contribution itself fulfils all the conditions for liability, i.e. if the breach of the *supervisory obligation* is sufficiently serious, if the *supervisory obligation* confers rights on individuals, and if the breach of the *supervisory obligation* has a sufficiently direct causal link to the damage suffered.

The premise of the second approach is that the cooperative context in which the actions of all involved actors take place has to play a role in the assessment of liability. Accordingly, instead of requiring that both the Member State and the EU independently fulfil the conditions for liability, the events that result in the damage are assessed as a whole. Along these lines, the EU may incur liability if it contributes to a sufficiently serious breach of a rule of law conferring rights on individuals, without the contribution as such having to fulfil the conditions for liability. This is, of course, provided the EU body is competent to supervise Member State conduct or is otherwise under an obligation to prevent the unlawful outcome. Certainly this is the case where the contribution consists of an omission, since omissions generally only give rise to liability if they amount to an infringement of an obligation to act.[84]

The first approach sets the threshold for EU liability very high. By entirely separating the violations of EU law of the Member State and the EU body, it neglects the fact that multiple actors were involved in causing the damage. In an extreme case, neither the Member State conduct nor the EU conduct may on its own fulfil the conditions for liability, only together they do.[85] In contrast, the second approach sets the threshold for EU liability very low. Despite the limitation to areas of supervisory competence, it would be far-reaching. This is so in particular for the Commission, given its general supervisory obligation under Article 17(1) TEU, but also for agencies with a supervisory mandate in their founding instruments.[86] Ultimately, the second approach comes close to a general prohibition under EU law of contributing to

83. See also Rowe, op. cit. *supra* note 9, pp. 185–186; Hofmann, Rowe and Türk, op. cit. *supra* note 2, pp. 708–710, 747–752; for an overview of the Commission's powers in supervising and enforcing EU law see Gil Ibáñez, *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits* (Hart, 1999), part II.

84. See e.g. Case T-250/02, *Autosalone Ispra,* para 41.

85. See also section 5, *infra*.

86. See already the example of the EU agency Frontex, mentioned in section 1, *supra*, Regulation (EU) 2016/1624, cited *supra* note 14, especially Arts. 22(3)(b), 25.

breaches of others. In that sense, it bears similarity to the concept of "aid or assistance" under public international law, according to which States and international organizations are responsible for rendering aid or assistance in the commission of an internationally wrongful act, regardless of whether they thereby breach a specific international obligation prohibiting such assistance.[87]

The Court seems to have followed a moderate version of the first approach, generally requiring the contribution by the EU body to fulfil all conditions for liability, but taking the extent of the Member State's breach into account when assessing the conditions.[88] In this light, the following sections analyse in more detail under what circumstances the Court found supervisory obligations to confer rights on individuals, breaches of supervisory obligations to be sufficiently serious, and breaches of supervisory obligations to have a direct causal link to damage suffered.

However, before engaging in that analysis, it should be noted that there are also instances where the Court of Justice leaned towards approach two. This was the case in the Grand Chamber judgment of September 2016 in *Ledra Advertising*.[89] At the origin of the dispute was the financial assistance Cyprus received between 2013 and 2016 from the ESM to recover from economic difficulties it had been facing. Assistance by the ESM is subject to conditions set out in a Memorandum of Understanding (MoU) between the ESM and the receiving State. In that context, Cyprus committed to restructuring two large banks, the costs of which had to be borne partly by the depositors. Since some depositors suffered considerable losses as a consequence thereof, they were of the view that the MoU at issue infringed their right to property guaranteed under Article 17(1) CFR. On that basis, they brought actions before the General Court, seeking annulment of the MoU and compensation for the damage suffered. These actions faced a major challenge: the ESM is not an EU institution, but an international organization with a separate international legal personality. Yet, to exercise its functions, it makes use of EU institutions, namely the Commission and the European Central Bank. The Commission, in particular, conducts the negotiations with the State concerned and signs the MoUs on behalf of the ESM. Thus, the case revolved around the question whether the involvement of the Commission could trigger EU liability.

The General Court rejected found the claims in part inadmissible and in part manifestly lacking any foundation in law; and on appeal to the Court of Justice, that Court found that the MoU was not attributable (in the Court's

87. ASR, cited *supra* note 33, Art. 16; ARIO, cited *supra* note 33, Art. 14.
88. See cases referred to *supra* in sections 4.2–4.4.
89. Joined Cases C-8-10/15 P, *Ledra Advertising*.

words: "imputable") to the EU.[90] This meant that the MoU was not open to annulment by the Union courts, however it did not "prevent unlawful conduct linked . . . to the adoption of a memorandum of understanding on behalf of the ESM" giving rise to liability.[91] Even though the ECJ never explicitly explained what it meant by conduct "linked" to the adoption of the MoU, it essentially went on to analyse "whether the Commission contributed to a sufficiently serious breach of the appellants' right to property" (by including unlawful paragraphs in the MoU, or by failing to prevent that).[92] Eventually, no liability was found, as the MoU was deemed not to breach the right to property in the first place.[93]

In the ECJ's assessment of EU liability, one point is particularly noteworthy. The Court noted that the Commission is under an obligation to "ensure that . . . a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter".[94] It relied on the Commission's general supervisory obligation in Article 17(1) TEU and Article 13(3) and (4) ESM Treaty, which require the Commission to ensure that the MoUs concluded by the ESM are consistent with EU law.[95] However, for the Commission's contribution to trigger liability it seemed that it would have been sufficient had the MoU (note: not the contribution itself) breached a rule of law conferring rights on individuals in a sufficiently serious manner. The Court, in particular, noted that Article 17(1) CFR, the right to property, "is a rule of law intended to confer rights on individuals" but did not find it necessary to establish whether Articles 17(1) TEU or 13(3) and (4) ESM Treaty, i.e. the supervisory obligations in question, are too.[96] In addition, it examined "whether the Commission contributed to a sufficiently serious breach of the appellants' right to property", rather than whether it contributed *in a sufficiently serious manner* to a breach of the appellants' right to property.[97] Hence, in the ECJ's view, the EU's liability was completely dependent on the ESM's breach.

However, it is open to doubt to what extent we can generalize from *Ledra Advertising*. First, the case concerns an EU contribution to an alleged unlawfulness by an international organization. Even though the same

90. Ibid., paras. 51–54. Case T-289/13, *Ledra Advertising* v. *European Commission and ECB*, EU:T:2014:981.
91. Joined Cases C-8-10/15 P, *Ledra Advertising,* para 55.
92. Ibid., paras. 63, 68; see also Case T-786/14, *Bourdouvali*, paras. 200–203.
93. Joined Cases C-8-10/15 P, *Ledra Advertising*, paras. 69–75.
94. Ibid., para 67.
95. Ibid., paras. 59, 67.
96. Ibid., para 66.
97. Ibid., para 68.

threshold for liability may apply – and reliance by the General Court in *Bourdouvali* on the case certainly suggests so – there is no certainty on that. Second, and more importantly, in *Ledra Advertising* the Court itself does not engage with prior case law on the question of liability for contributions (a more general challenge, of course) or specifically explain that liability for contributions arises even when only the original breach – but not the contribution as such – fulfils the conditions for liability. In this light, for the purposes of the following section, it will be assumed that associated liability in principle only arises if the contribution breaches a separate obligation in a sufficiently serious manner and has a sufficiently direct causal link with the damage. It will be essential to observe in future case law whether the Court picks up the strands of reasoning left in *Ledra Advertising* to move from approach one towards approach two, thereby lowering the threshold for associated liability.

4.2. *Supervisory obligations as rules of law conferring rights on individuals*

Breaches of EU law give rise to liability only if the rule infringed is intended to confer rights on individuals.[98] Even though the ECJ has given little guidance as to what precise characteristics qualify a rule as one "intended to confer rights on individuals", it has by and large interpreted the individual rights condition generously.[99] The most important requirement is that the provision in question includes the protection of the individual concerned, even though it is not necessary that this is its only purpose.[100] In this light, a supervisory obligation of an EU body can form the basis for liability, if it can be considered to aim not only to ensure respect for Union law more generally, but also to serve the protection of individuals.

Applicants have occasionally relied on the Commission's general supervisory obligation in Article 17(1) TEU, alone or together with other provisions, as a basis for the Union's liability when they found that the Commission failed to take steps in relation to unlawful conduct of Member

98. Case C-352/98 P, *Bergaderm*, para 42; see also references *supra* at note 27.

99. For a detailed analysis of the Court's case law in this area, see Aalto, *Public liability in EU law: Brasserie, Bergaderm and beyond* (Hart, 2011), pp. 111–132, 158–176; on the protective scope question in the case law on Member State liability see Dougan, "Addressing issues of protective scope within the *Francovich* right to reparation", 13 EuConst (2017), 124.

100. E.g. Case T-415/03, *San Pedro*, para 86; Case T-341/07, *Sison* v. *Council*, EU:T:2011:687, para 47; Case T-437/10, *Gap granen & producten* v. *Commission*, EU:T:2013:248, para 22.

States,[101] candidate States,[102] or international organizations.[103] However, on its own, Article 17(1) TEU seems to be considered not to confer rights on individuals because it only defines the Commission's powers in a general manner and is thus a provision of institutional nature.[104] This is the case even if invoked together with the principle of protection of legitimate expectations. In *Cato*, Advocate General Darmon argued that (at least detailed) supervisory obligations may give rise to legitimate expectations on the part of individuals that conduct of national authorities is in compliance with Union law. The failure to perform sufficiently the supervisory obligations breaches that legitimate expectation, which is, in his view, "sufficient to show that there has been a breach of a superior rule of law designed for the protection of individuals".[105] The ECJ did not engage with that argument in *Cato*. However, it has on other occasions expressed the view that whilst the principle of the protection of legitimate expectations is a general principle of EU law which confers rights on individuals, such legitimate expectations only arise when an individual has received precise assurances by an EU body. Consequently, supervisory obligations as such do not give rise to legitimate expectations that can form the basis of an action for damages.[106]

Applicants have, however, also invoked more specific supervisory obligations in order to hold the EU liable. *Lütticke*, for example, concerned the obligation of the Commission to supervise Member States in their application of provisions on taxation, explicitly mentioned in former Article 97(2) EEC (repealed in the meantime).[107] Other cases concerned the Commission's obligations to ensure that State aid complies with EU law, set out in what is now Article 108(2) and (3) TFEU.[108] Finally, in a number of cases applicants sought compensation for damage they suffered as a result of the alleged failure

101. Case T-90/03, *Fédération des industries condimentaires de France (FICF) and Others* v. *Commission*, EU:T:2007:208; Case T-375/07, *Pellegrini* v. *Commission*, EU:T:2008:466.

102. Joined Cases T-546/13, T-108/14 & T-109/14, *Šumelj and Others* v. *Commission*, EU:T:2016:107.

103. Case T-289/13, *Ledra Advertising* v. *Commission and ECB*, EU:T:2014:981; on appeal, Joined Cases C-8-10/15 P, *Ledra Advertising*.

104. Case T-90/03, *FICF*, paras. 61–62; Case T-375/07, *Pellegrini*, para 19; see also A.G. Wahl Opinion in Joined Cases C-8-10/15 P, *Ledra Advertising*, EU:C:2016:290, paras. 75–80; in literature see Czaja, op. cit. *supra* note 76, pp. 101–128; Säuberlich, op. cit. *supra* note 71, pp. 208–213.

105. A.G. Darmon, Opinion in Case C-55/90, *Cato*, EU:C:1992:52, para 41; similarly also Joined Cases 9 & 12/60, *Vloeberghs* v. *High Authority*, EU:C:1961:18, pages 216–217.

106. See Joined Cases T-546/13, T-108/14 & T-109/14, *Šumelj,* paras. 72-77 and case law cited.

107. Case 4/69, *Lütticke*.

108. Case 40/75, *Produits Bertrand* v. *Commission*, EU:C:1976:42; Case T-230/95, *BAI* v. *Commission*, EU:T:1999:11.

of the Commission to lawfully exercise supervisory powers granted to it in specific Union legislation.[109]

The argument can be made that if general supervisory obligations do not confer rights on individuals, this must also be the case for specific supervisory obligations, since they fulfil no substantially different purpose. In *Lütticke*, Advocate General Dutheillet de Lamothe defended this view.[110] He found that the supervisory obligation in question was "not intended to protect individual interests but to ensure the observance of the institutional equilibrium brought about by the Treaty" and served to protect the "Community public policy", rather than more specific interests of individual importers.[111] A similar approach may have informed the Court's decision in *Peter Paul* in the area of Member State liability.[112] The case revolved around the question whether the obligation in EU banking directives to subject banks to "prudential supervision" conferred a right on depositors to have the competent national authorities take supervisory measures in their interest. In essence, the ECJ found that deficient supervision over credit institutions could not give rise to Member State liability, because individual rights protection only appeared as a minor purpose among many and was not necessarily the overall aim of the rules at stake.[113] It is, however, questionable whether *Peter Paul* can be relied on for the current purposes. It has been argued that this narrow interpretation of the individual rights condition in *Peter Paul* may have been motivated by policy considerations and the financial implications resulting from liability for failures in banking supervision.[114] Even more importantly, it is unclear whether the obligation of a national authority to supervise a private actor can be treated similarly to the obligation of an EU body to supervise a national authority, thus another public actor.

Indeed, in the area of Union liability the Court seems to have taken a more flexible approach when it comes to the capacity of more specific supervisory obligations to confer rights on individuals. A number of cases suggest that the Court does not categorically exclude the possibility that specific supervisory obligations may confer rights on individuals, as it directly engaged in a

109. Joined Cases 5, 7, 13–24/66, *Kampffmeyer*; Case 14/78, *Denkavit Commerciale* v. *Commission*, EU:C:1978:221; Case C-55/90, *Cato*; Case T-309/10 RENV, *Klein*.

110. A.G. Dutheillet de Lamothe, Opinion in Case 4/69, *Lütticke*, page 345, EU:C:1971:17.

111. Ibid., pp. 345–346.

112. Case C-222/02, *Peter Paul and Others* v. *Bundesrepublik Deutschland*, EU:C:2004:606.

113. Ibid., paras. 40–46.

114. Tison, "Do not attack the watchdog!: Banking supervisor's liability after *Peter Paul*", 42 CML Rev. (2005), 639, 668–670; Prechal, "Protection of rights: How far?" in Prechal and Van Roermund (Eds.), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (OUP, 2008), p. 167.

discussion of the lawfulness of the Commission's conduct.[115] In some cases the Court explicitly confirmed that the specific supervisory obligations at stake conferred rights on individuals. This was the case, for example, in *Kampffmeyer* and in *Klein*. *Kampffmeyer* concerned a protective measure taken by a Member State which suspended the favourable conditions under which the applicant had been importing maize.[116] In *Klein*, Member State authorities prohibited the placing of a medical device on the market since it did not, in their view, comply with EU law.[117] In both cases, the relevant national decision had to be notified to the Commission, which was then under an obligation to confirm or reject it.[118] Whereas in *Kampffmeyer* the Commission did approve the national measure, it took no action at all in *Klein*. The applicants brought actions for damages against the Union for a failure of the Commission to fulfil its supervisory obligations. The Court considered both supervisory obligations to confer rights on the applicants for the purposes of the action for damages. In *Kampffmeyer*, it held that the Commission's supervisory obligation had to be seen in the context of the more general aims of the regulation, which included the development of the free movement of goods. On that basis the Court found the interests of the applicants to be included in the protective scope of the provision.[119] In *Klein* it noted that the supervisory obligation in question requires the Commission to consult the manufacturers of the prohibited medical device when deciding on whether the Member State's measure was justified or not and inform them of the conclusion reached.[120] For that reason, the Court found that the supervisory obligation of the Commission was intended to serve the protection of manufacturers of medical devices.[121] Thus, whilst Mr Klein did not come within the protective scope of the Commission's supervisory obligation in his

115. Case 4/69, *Lütticke*, paras. 11–19 (of the grounds of judgment); similarly see also Case 14/78, *Denkavit*, paras. 8–25; Case C-55/90, *Cato*, paras. 23–29; see also Case 40/75, *Produits Bertrand* and Case T-230/95, *BAI*, where the Court dismissed the actions for the lack of a causal link between the damage and the Member State's conduct the Commission allegedly failed to supervise; in literature see Oliver, op. cit. *supra* note 71, pp. 299–303; Säuberlich, op. cit. *supra* note 71, pp. 207–225.

116. Joined Cases 5, 7, 13–24/66, *Kampffmeyer*.

117. Case T-309/10 RENV, *Klein*.

118. In *Kampffmeyer* this concerned what was then Art. 22 of Council Regulation 19. In *Klein* it concerned Directive 93/42, Art. 8(2). The General Court initially denied on the facts of the case that the Commission was under an obligation to act, see Case T-309/10, *Klein* v. *Commission*, EU:T:2014:19. However, this was overturned by the ECJ, see Case C-120/14 P, *Klein* v. *Commission*, EU:C:2015:252, paras. 63–80.

119. Joined Cases 5, 7, 13–24/66, *Kampffmeyer*, pages 262–263; A.G. Gand in *Kampffmeyer* was of the same view, see pages 274–275.

120. Case T-309/10 RENV, *Klein*, paras. 61–62.

121. Ibid., paras. 59–67.

capacity as the inventor of the medical device, he could invoke it in the name of the manufacturer, which had transferred its claims to him.[122]

In light of these cases, it seems that whilst Article 17(1) TEU alone generally does not confer rights on individuals, more specific supervisory obligations may, especially when they require the EU body to actively approve a national measure to "confirm" its EU law compatibility.

4.3. *Sufficiently serious breaches of supervisory obligations*

A breach of Union law does not lead to liability unless it qualifies as "sufficiently serious".[123] The decisive criterion in this respect is whether the Union authorities in question "manifestly and gravely disregard the limits on their discretion".[124] A breach is manifest when the authority in question blatantly infringes its legal obligations, i.e. when the violation is obvious, "clear-cut", or flagrant. A breach is grave when an authority exercising ordinary care and diligence would clearly not have committed it, i.e. when the violation is reprehensible or "inexcusable". Therefore, in essence, the seriousness of a breach depends on how clear the line demarcating lawful from unlawful conduct is, and how reprehensible overstepping that line was in a specific case.[125]

The seriousness of a breach of a supervisory obligation can ultimately only be determined on a case-by-case analysis. However, based on the typical characteristics of supervisory obligations, four general remarks can be made. First, supervisory obligations typically afford wide discretion to EU bodies. For instance, whilst the Commission is obliged under Article 17(1) TEU to supervise Member States' compliance with EU law, it may choose how to do so. In this vein, the Commission can, in particular, not be compelled to make use of its power under Article 258 TFEU to start infringement proceedings, or to bring a Member State that may be violating EU law before the ECJ.[126] This is relevant because the extent of discretion plays a central role in determining

122. Ibid., paras. 63–67; this part of the General Court's reasoning was confirmed on appeal Case C-346/17 P, *Klein* v. *Commission*, paras. 87–96.

123. Case C-352/98 P, *Bergaderm*, para 42; see also references *supra* note 27.

124. Ibid., para 43.

125. This is further developed by this author in Fink, *Frontex and Human Rights: Responsibility in "Multi-Actor Situations" under the ECHR and EU Public Liability Law* (OUP, 2018), pp. 244–267.

126. Since Art. 258 TFEU merely enables the Commission to bring a case, a failure to do so cannot in itself be considered a violation of the Commission's supervisory obligations, see Case C-130/16 P, *Gaki* v. *Commission,* EU:C:2016:731, para 24; Case C-72/90, *Asia Motor France* v. *Commission*, EU:C:1990:230, para 13; Case T-571/93, *Lefebvre and Others* v. *Commission*, EU:T:1995:163, paras. 60–61; Case T-201/96, *Smanor and Others* v. *Commission*, EU:T:1997:98, paras. 30–31; Case T-202/02, *Makedoniko Metro and Michaniki*

the seriousness of a breach. The rationale of the Court seems to be that the line demarcating lawful from unlawful conduct is less clear in areas of wide discretion, so breaches are often not "manifest".[127] However, it is important to note that the wide discretion supervisory obligations usually entail does not entirely exclude the possibility of breaches being sufficiently serious to trigger liability.[128] In addition, even in an area where an EU body enjoys wide discretion in principle, discretion can be reduced or non-existent in relation to specific activities.[129]

Second, supervisory obligations tend to be obligations of means – not result – in that they require authorities to make the effort that they can reasonably be expected to make in the circumstances of the case.[130] Hence, if an EU body does everything a reasonable authority would, it is typically not considered to have infringed its obligations to supervise, regardless of whether the unlawful outcome occurs anyway. As noted above, this standard of the "authority exercising ordinary care and diligence" at the same time determines whether a breach is sufficiently serious. This means that the factors that determine the existence of a breach of a supervisory obligation are very similar to those that determine the seriousness of a breach. Consequently, the question of the diligence exercised by the EU body is crucial. Whether this is analysed in the context of the existence or the seriousness of the breach is ultimately irrelevant for the purposes of non-contractual liability.

Third, there usually needs to be a trigger for supervisory obligations to arise in a specific case. The trigger is commonly related to the knowledge an EU body has, or should have, of the risk of unlawful activities or their continuation. Simply speaking, the EU body is under an obligation to prevent a breach only if it has, or should have, knowledge thereof. This is a gateway for the seriousness of the Member State's original breach to influence the assessment of the seriousness of a breach of the supervisory obligation. For

v. *Commission*, EU:T:2004:5, paras. 43–44; relying in particular on Case 247/87, *Star Fruit* v. *Commission*, EU:C:1989:58, paras. 11–12.

127. See e.g. Case C-198/03 P, *Commission* v. *CEVA and Pfizer*, EU:C:2005:445, para 66; for a more detailed discussion of the place of discretion in the assessment of a breach's seriousness see Fink. op. cit. *supra* note 125, pp. 216–222; Hilson, "The role of discretion in EC law on non-contractual liability", 42 CML Rev. (2005), 677.

128. See e.g. Case C-337/15 P, *European Ombudsman* v. *Staelen,* EU:C:2017:256, paras. 103–131, where the Court found liability to arise despite the "very wide discretion" (para 38) enjoyed by the Ombudsman; for a discussion see Vogiatzis, "The EU's liability owing to the conduct of the European Ombudsman revisited: *European Ombudsman* v. *Staelen*", 55 CML Rev. (2018), 1.

129. Case C-337/15 P, *Staelen*, para 57; see also Vogiatzis, op. cit. previous note, 17–19.

130. Compare also to Case C-337/15 P, *Staelen*, para 38, where the Court speaks of the obligation to use "best endeavours" in relation to the Ombudsman, who may not supervise Member States, but other EU bodies.

instance, a serious breach by a Member State may be more obvious to the EU body, making a failure to adequately react to it more likely to be serious too.

Fourth, supervisory obligations are by nature dependent on the Member State's conduct. If there is no infringement of EU law by a Member State, or risk thereof, there can be no failure to act upon one. Accordingly, where the unlawfulness of the Member State's conduct has not yet been established, it may be necessary to do so as a preliminary analysis in order to determine the Union body's unlawful conduct. However, supervisory obligations vary in extent. A supervisory obligation may, for instance, be limited to ensuring Member States comply with specific rules, rather than the whole body of EU law. In this vein, the ECJ in *Cato* held that the obligation in question only required the Commission to verify whether the national measures complied with the objective of the directive in question.[131] Any other inconsistencies, e.g. "[t]he fact that the actual conduct of the [national] authorities in the course of events may not be entirely free of blame", did not, "no matter how regrettable", fall within the Commission's supervisory obligations.[132] Since the national measures complied with the objective of the directive, the Commission had lived up to its supervisory obligations.[133] Thus, establishing a breach (and the seriousness of a breach) of a supervisory obligation sometimes requires an analysis not only of the *existence* of the violation by the Member State, but also the *type* or *extent* of that violation. This is a second gateway for the (seriousness of the) Member State's original breach to affect the assessment of the seriousness of a breach of the supervisory obligation.

In light of the above, the most likely scenarios in which the EU may incur liability is when a supervisory obligation exists, but the EU body in question takes no measures whatsoever, even though it is clear from the situation that a certain action would be required. This was the case, for example, in *Klein*. In the view of the General Court, the Commission enjoyed no discretion to decide *whether* to take action and would have acted, had it exercised ordinary care and diligence. As a consequence, it considered the lack of any action

131. Case C-55/90, *Cato*, paras. 23–24.

132. Ibid., para 28.

133. Ibid., paras. 25–27, 29. It is noteworthy that A.G. Darmon reached the opposite conclusion regarding the Commission's liability. The crucial difference was his wider interpretation of the extent of the supervisory duty. In particular, he was of the view that the Commission's obligation amounted to ensuring full compliance of the national measures with Community law (see Opinion 1 of 18 June 1991, para 20). Since he found that the scheme introduced by the UK revealed some infringements of Community law, the Commission had failed to comply with its supervisory obligation in such a way as to incur liability (see Opinion 1, paras. 36, 38; Opinion 2, of 4 Feb. 1992, paras. 11–13). See also Säuberlich, op. cit. *supra* note 71, pp. 120–121.

being undertaken by the Commission to amount to a sufficiently serious breach of its supervisory obligations.[134]

If the EU body takes some measures, it is necessary to assess whether a reasonably acting authority could have considered them appropriate and sufficient to respond to the violations at stake. As a rule, the more obvious and persistent a breach of EU law by a Member State, the more actively and decisively the EU body can be expected to take measures. In *Lütticke*, for example, the Court found that in the exercise of its "special power of supervision" conferred on it by the Treaty, the Commission enjoyed discretion to appraise the factors which the State took into consideration in applying the relevant rules under Union law.[135] In addition, in light of the unclarity of the rules in question and the different views among experts, the view of the Commission that the reduced German rate was in conformity with Community law was one of several justifiable solutions.[136] Since the Commission's view was reasonable, it had not infringed its obligations regarding the supervision of Member States' compliance with Community rules on taxation.[137] Another example is *Denkavit Commerciale*, which concerned a considerable delay by the Commission in requiring Italy to repeal a measure that constituted an obstacle to trade. Having investigated the Commission's decision-making process in that case, the Court found that the Commission could not be blamed for the delay, in particular due to the complexity of the matter. It therefore concluded that the conduct of the Commission was not such for it to incur liability.[138] In contrast to *Lütticke* and *Denkavit Commerciale*, the Court found in *Kampffmeyer* that the Commission's conduct was not "excusable", since it had not merely mistakenly evaluated some facts, but had ignored certain provisions of the supervisory obligation that were "of a crucial nature". This conduct "constituted a wrongful act or omission capable of giving rise to liability on the part of the Community".[139] Whilst *Kampffmeyer* was decided before the conditions qualifying unlawfulness for the purposes of liability were developed, the wording used by the Court suggests that it considered the breach to be of a serious nature.

It can be concluded that the requirement for a breach to be sufficiently serious poses a significant hurdle. Demonstrating that the EU body in

134. Case T-309/10 RENV, *Klein*, paras. 43–58.

135. Case 4/69, *Lütticke*, paras. 14–16 (of the grounds of judgment).

136. Ibid., para 18.

137. Ibid., para 19.

138. Case 14/78, *Denkavit,* paras. 9–25; see also the Opinion of A.G. Mayras, pages 2511–2515.

139. Joined Cases 5, 7, 13–24/66, *Kampffmeyer*, page 262; for the facts, see *supra* text to notes 116 et seq.

question did not act with the diligence that could be expected from a reasonable authority will often be a high threshold. This is especially due to the discretion EU bodies typically enjoy in choosing how to supervise Member States and the inherent difficulties in supervising other public authorities. It seems that liability is only likely where the EU body did very little or nothing at all, or where the supervisory obligation in question is particularly far-reaching.

4.4. *Causal link in the context of breaches of supervisory obligations*

A right to compensation arises only when the damage suffered was caused by the unlawful conduct in question. In principle, there is a causal link when the infringement of Union law was a necessary and sufficiently direct condition for the damage to occur.[140] A breach is too remote or indirect if an intervening event "breaks" the chain of causation. This may be the occurrence of exceptional or unforeseeable events, or imprudent conduct by the applicant or other public authorities, if either of these prove to be the determinant cause of the damage.[141]

By definition, cases involving liability for breaches of supervisory obligations concern the indirect involvement of the Commission in a violation of EU law directly committed by a Member State. The question is whether the fact that a Member State's unlawful conduct was the immediate cause for the damage "breaks" the chain of causation between a Union body's breach of an obligation to supervise and the damage suffered. The case law of the Court is inconclusive on this matter. There are indeed cases where "exclusive" causation seemed to be necessary for liability.[142] However, other cases indicate that the unlawfulness alleged does not need to be the sole cause of damage in order for the link between them to qualify as "sufficiently direct".[143] In other words, damage may have several determining causes that

140. Joined Cases 64 & 113/76, 167 & 239/78, 27, 28 & 45/79, *Dumortier* v. *Council*, EU:C:1979:223, para 21; Case C-419/08 P, *Trubowest Handel and Makarov* v. *Council and Commission*, EU:C:2010:147, para 53; Case C-331/05 P, *Internationaler Hilfsfonds* v. *Commission*, EU:C:2007:390, par 23; Toth, op. cit. *supra* note 38, pp. 192–193.

141. Case C-419/08 P, *Trubowest*, paras. 59, 60–61; Joined Cases 64 & 113/76, tc. *Dumortier,* para 21.

142. E.g. Case C-419/08 P, *Trubowest,* para 61.

143. Case F-50/09, *Missir Mamachi di Lusignano* v. *Commission*, EU:F:2011:55, para 181; citing in particular Case C-308/87, *Grifoni* v. *EAEC*, EU:C:1990:134, paras. 17–18; Case T-178/98, *Fresh Marine* v. *Commission*, EU:T:2000:240, paras. 135–136; in literature see also Toth, op. cit. *supra* note 38, pp. 193–194; Czaja, op. cit. *supra* note 76, p. 112; Säuberlich, op. cit. *supra* note 71, pp. 236–237; Aubin, *Die Haftung der Europäischen Wirtschaftsgemeinschaft und ihrer Mitgliedstaaten bei gemeinschaftsrechtswidrigen nationalen Verwaltungsakten* (Nomos, 1982), p. 104.

all contributed decisively to its occurrence. This latter view seems more suitable to assess liability for breaches of supervisory obligations. The reason is that supervisory obligations of Union bodies are specifically aimed at preventing unlawful conduct of Member States and may, under the conditions discussed above, confer rights on individuals to invoke liability. Those rights would be meaningless if liability was precluded by imprudent conduct on the part of Member States.[144]

In this vein, the advocates general in a number of cases all expressed the view that a Member State's conduct that is at the origin of a breach, does not necessarily render a Union body's failure to supervise too remote for the Union to incur liability.[145] Advocate General Darmon in *Cato* even suggested that the exercise of the supervisory tasks may under certain circumstances alter causal link between the original unlawful conduct of the Member State and the alleged damage. He pointed out that in the case in question the Member State measure could never have been applied, were it not for the approval by the Commission. Hence, in his view, the Member State's failure to comply with the provisions of the directive "was not capable *per se* of causing the damage suffered by Mr Cato". Rather, the "direct origin" of his damage was the unlawful approval of the national scheme by the Commission.[146]

If a breach of a supervisory obligation can have a sufficiently direct causal link with damage suffered by an individual as a consequence of an unlawful national measure, the question is under what circumstances that is the case. The critical point seems to be the effect the EU body's lawful execution of its supervisory obligations would have had. If lawful behaviour would have prevented the Member State's unlawful conduct altogether, led to the repeal of the national measure, or eliminated its negative consequences, it can be argued that the breach of the supervisory obligation was in itself the cause of the damage directly stemming from the national measure.[147] One of the main difficulties in this respect is that it is unclear what level of certainty is required

144. Säuberlich, op. cit. *supra* note 71, pp. 237–238. A similar argument was made by the Court in the area of State liability, see Case C-140/97, *Rechberger and Others* v. *Republik Österreich*, EU:C:1999:306, paras. 73–77. It held in particular that the question whether imprudent conduct by others may "break" the chain of causation also depends on the purpose of the specific obligation breached.

145. A.G. Römer, Opinion in Joined Cases 9 & 12/60, *Vloeberghs*, page 240; A.G. Gand, Opinion in Joined Cases 5, 7, 13–24/66, *Kampffmeyer,* page 279; A.G. Mayras, Opinion in Case 14/78, *Denkavit,* page 2511; A.G. Dutheillet de Lamothe, Opinion in Case 4/69, *Lütticke*, page 346; implicitly also A.G. Darmon, Opinion in Case C-55/90, *Cato,* para 44 (Opinion 1).

146. A.G. Darmon, Opinion in Case C-55/90, *Cato,* para 45 (Opinion 1).

147. Czaja, op. cit. *supra* note 76, pp. 112–121; Renzenbrink, *Gemeinschaftshaftung und mitgliedstaatliche Rechtsbehelfe: Vorrang, Subsidiarität oder Gleichstufigkeit?* (Peter Lang, 2000), pp. 60–63; Aubin, op. cit. *supra* note 143, pp. 104–113.

regarding the impact of the EU body's lawful execution of its supervisory obligations on the final outcome.[148]

In *Lütticke*, Advocate General Dutheillet de Lamothe argued for a high threshold in this respect. According to him, the link between the national measure and the "reaction" by the Community must be "so close that they are indissociable" in that the action by the Community "would necessarily and almost automatically have had the effect of altering" the relevant conduct of the Member State concerned.[149] The ECJ has not unequivocally pronounced itself on this question. In *Klein*, the General Court argued that it was uncertain that the Commission, if it had acted, would have taken a decision in favour of the applicant and dismissed the action for lack of a causal link.[150] This was an odd argument to make in the particular case. It was for the General Court to establish whether conduct in conformity with EU law would have required the Commission to approve or reject the national measures. Precisely that remained open though, because the General Court never discussed the lawfulness of the Member State's decision to prohibit the placing on the market of the medical device in the first place. It was in this sense not really "uncertain" how lawful Commission behaviour would have affected the national measure, but a question of law the General Court simply did not assess. The Court of Justice did overturn the General Court's reasoning on this aspect. However, in doing so, rather surprisingly, it found that the certainty regarding the decision the Commission would have taken was not relevant at all in establishing a causal link, but instead had to be assessed as a question of whether actual damage was suffered by the applicant.[151] The question of how precisely to establish a causal link in such cases remained open, since the Court of Justice dismissed the action because the applicant had not adduced sufficient evidence as to the existence of damage.[152]

5. Joint liability with a Member State?

An EU body's contribution to a Member State's breach of EU law not only raises questions of EU liability, but may also affect Member State liability. In particular, can a Member State rely on the EU's involvement to reduce or

148. See the two views, of the applicant and the Commission, presented in Case F-50/09, *Lusignano*, EU:F:2011:55 para 178.

149. A.G. Dutheillet de Lamothe, Opinion in Case 4/69, *Lütticke*, pages 346–347, he denied the existence of a causal link on that basis. In his view, it was unlikely that the Community's diligent exercise of its supervisory function would have avoided the alleged damage.

150. Case T-309/10 RENV, *Klein,* paras. 77–81.

151. Case C-346/17 P, *Klein*, paras. 135–136.

152. Ibid., paras. 151–154.

exclude its own liability? Or does EU liability arise jointly with the one of the Member State? If so, where and how do applicants bring actions for joint liability?

EU primary liability (see section 3 above) seems to exclude Member State liability, presumably for lack of decision-making power on the part of the Member State. Whilst never having ruled on this question explicitly, the Court suggested in *Krohn* that the Member State would not incur liability for unlawful conduct it adopted on the basis of a legally binding instruction of the Commission.[153] This is confirmed in the reverse scenario. Where a Member State authority predetermines a Union body's final decision in a legally binding manner, the Court found EU liability to be excluded.[154] In this light, the only possibility for joint liability between the Union and a Member State in this context appears to be the (less likely) situation in which they share legal decision-making power with respect to a specific course of conduct.

Also where the EU incurs associated liability (section 4), or even no liability at all, there may be circumstances under which a Member State can rely on the EU's involvement to exclude its own liability. In some cases the ECJ considered positions taken by the Commission relevant factors in finding that the breach at stake may not have been sufficiently serious to trigger liability. In *British Telecom*, for instance, the Court pointed out that the Commission had not taken any action against the United Kingdom when it adopted the measures in breach of Union law.[155] In *Robins*, a position taken by the Commission in a related report was of relevance, since it could have reinforced the (incorrect) view of the Member State concerned when transposing the relevant provision into national law.[156] If these general expressions by the Commission on the lawfulness of the Member State's conduct play a role in rendering the Member State's breach "excusable", a recommendation or a legal advice by an EU body may also render the Member State's breach in following the advice not serious enough to trigger its liability. This is particularly problematic in situations where the EU's involvement falls below the threshold to give rise to liability. If the contribution by a Union body is insufficient to render the Union liable, but sufficient to exclude Member State liability, none of them is liable precisely because of the role the other played in the breach. As of yet there does not seem to be a case where a Member State's liability was excluded because of an EU contribution that

153. Case 175/84, *Krohn*, paras. 19, 23; similarly see Joined Cases 89 & 91/86, *Étoile commerciale and CNTA,* para 18.

154. Case C-97/91, *Borelli,* para 20; Joined Cases C-106/90, C-317/90 & C-129/91, *Emerald Meats*, paras. 36–41.

155. Case C-392/93, *The Queen* v. *H.M. Treasury, ex parte British Telecommunications*, EU:C:1996:131, para 44.

156. Case C-278/05, *Robins and Others*, EU:C:2007:56, para 81.

itself was found not to give rise to liability. However, the possibility of this occurring shows how reaching coordinated and consistent results in situations involving several potential wrongdoers is challenging when the liability of each actor is determined by different courts.

With the exception of this scenario, though, the EU incurs associated liability in addition to, not instead of, the Member State. This possibility of joint liability between the EU and a Member State has been unequivocally recognized by the ECJ in *Kampffmeyer*.[157] Yet, the respective actions cannot be brought before a single court. Whilst the ECJ deals with EU liability, national courts retain jurisdiction to hear claims for compensation against national authorities.[158] Procedurally, the action for damages against the Union is not subsidiary to the action before a national court. Thus, an application is not inadmissible merely because a national authority may be liable for the same damage. This means that applicants do not have to first seek compensation from the Member State. The only exception is the general "*Unifrex* rule", according to which actions for compensation of damage that consists of a sum unduly charged by a national authority require exhaustion of national remedies that offer reimbursement of these amounts.[159] In this light, applicants can choose to bring their action against either the EU or the Member State or institute parallel proceedings in Union and national courts.

However, the latter choice has consequences for each of the proceedings. These were set out by the Court in *Kampffmeyer*.[160] The applicants in relation to whom the Court had found the Community to be liable in principle informed the Court of parallel actions instituted against Germany concerning the same damage. The Court held that in order to "avoid the applicants being insufficiently or excessively compensated for the same damage", it was "necessary for the national court to have the opportunity to give judgment on any liability on the part of the Federal Republic of Germany" before the damage for which the Community should be held liable could be determined.[161] The Court thus stayed the proceedings awaiting the decision of

157. Joined Cases 5, 7, 13-24/66, *Kampffmeyer*; Säuberlich, op. cit. *supra* note 71, pp. 238–247; Oliver op. cit. *supra*, note 71, pp. 301–303; Renzenbrink, op. cit. *supra* note 147, pp. 113–115; Harding, "The choice of court problem in cases of on-contractual liability under E.E.C. Law", 16 CML Rev. (1979), 389, 402–405; see also Case C-30/66, *Becher* v. *Commission*, EU:C:1967:44; *Becher* will not be further referred to, since it merely reiterates the findings in *Kampffmeyer*.

158. Oliver, op. cit. *supra* note 71, pp. 286–289.

159. Case 281/82, *Unifrex* v. *Council and Commission*, EU:C:1984:165, paras. 11–13; this was applied in Joined Cases 5, 7, 13–24/66, *Kampffmeyer*; more recently this approach was confirmed in Case T-138/03, *É.R. and Others* v. *Council and Commission*, EU:T:2006:390, paras. 40–43; Case T-317/12, *Holcim (Romania)*, paras. 73–77.

160. Joined Cases 5, 7, 13–24/66, *Kampffmeyer*.

161. Ibid., page 266.

the national court on the matter. In two more recent cases, the General Court reiterated that where the same damage is subject to parallel actions for compensation before the ECJ and national courts, it may be necessary to await the outcome of the national proceedings.[162]

This approach has been widely criticized, in essence because it renders Union liability substantively subsidiary to Member State liability and may make it particularly lengthy and complicated for applicants to obtain compensation.[163] In *Kampffmeyer*, after the ECJ had decided to stay the proceedings awaiting the final decision of the German courts on the matter, a German court at first instance, in a decision that was later overturned on appeal, did the very same. As a consequence, the applicant concerned was caught in "a vicious circle, the European Court and the German court waiting for each other's final judgment".[164] Altogether, the proceedings in *Kampffmeyer* remained stayed for almost 20 years before they were removed from the Court's register.[165]

As a result, even where it in principle exists, it is difficult for applicants to implement the joint liability of the EU and one or more Member State(s). In order to avoid a *Kampffmeyer* scenario, it seems that applicants would have to bring proceedings against either the Member State or the EU, but not both of them. This would, however, *de facto* exclude the possibility of joint liability altogether.

6. Conclusion

This article analysed under what circumstances the EU incurs liability for contributing to breaches of EU law committed by Member States. For that purpose, it developed a conceptual framework to study liability for contributions, proposing to distinguish between primary liability, i.e. the liability that directly arises from the violation committed by the Member State, and associated liability, i.e. the liability for the contribution as such. An overview of the Court's case law through that conceptual lens suggests that

162. Case T-138/03, *É.R.*, para 42; Case T-317/12, *Holcim (Romania)*, paras. 78-83, this question was not addressed upon appeal.

163. Oliver, op. cit. *supra* note 71, p. 288; Säuberlich, op. cit. *supra* note 71, pp. 242–243; Renzenbrink, op. cit. *supra* note 147, pp. 61–162, 176–183; Harding, op. cit. *supra* note 157, 403–405.; see also A.G. Darmon in Case C-55/90, *Cato*, para 18 (Opinion 2), who suggested that the Court take the opportunity presented by *Cato* to respond to the criticism voiced against *Kampffmeyer*.

164. Elster, "Non-contractual liability under two legal orders", 12 CML Rev. (1975), 91, 95; also Renzenbrink, op. cit. *supra* note 147, pp. 163–164.

165. Oliver, op. cit. *supra* note 71, p. 302.

the EU (and only the EU) is liable for damage arising from a Member State's violation of EU law (primary liability) if an EU body made use of a power to instruct that Member State in a legally binding manner to follow a specific course of conduct. Of course, at the level of administrative cooperation, the large majority of Union bodies' powers do not go beyond the possibility to advise Member States or reject, or confirm their measures *ex post*. Since none of these can pre-determine the Member State's conduct in a legally binding manner, liability directly arising from the Member State's unlawful conduct in most cases rests exclusively with the Member State. However, there may be situations in which the EU incurs liability in addition to the Member State. This is the case if the EU's contribution to the Member State's breach itself breaches an obligation to supervise (associated liability). Liability in these situations in principle arises under the same conditions as any other type of liability: if the obligation to supervise confers rights on individuals; if the failure to meet that obligation was sufficiently serious; and if the failure to supervise has a sufficiently direct causal link to the damage suffered. This is a high threshold to pass. So far, liability was found to arise especially in circumstances where the Commission took no action at all but was clearly obliged to do so, or where the Commission wrongly approved a national measure that was in violation of EU law.

Overall, in the Court's case law most contributions by the EU to Member States' infringements of EU law do not lead to EU liability. Whilst the question whether the EU *should* bear liability for contributions was not the subject of this article, two aspects should be pointed out in this respect. First, the EU is a system based on the rule of law in which the administration must be accountable for action that is not in conformity with the law. Second, private parties have a right to effective judicial protection, which, in the case of fundamental rights infringements, means they are entitled to an effective remedy before a court. In this light, loosening the conditions for liability for contributions may help fill a gap where no other accountability mechanisms exist.

Using the conceptual framework developed in this article to bring more structure and clarity into the Court's case law also exposed a number of issues where the case law remains inconclusive. Under what circumstances can *de facto* (as opposed to *de jure*) binding guidance impact attribution of conduct? To what extent does the assessment of the unlawfulness of the Member State's conduct play a role in determining EU liability? What factors are taken into account when establishing the causal link in the case of a breach of a supervisory obligation? How are private parties supposed to hold the EU and a Member State jointly liable, without making the EU's liability subsidiary to the Member State liability?

A particular difficulty for the Court in addressing these questions, and more generally situations involving more than one potential wrongdoer, may be the specific nature of EU public liability law. In the absence of detailed rules at Union level, national legal systems provide the main source of inspiration for the development of the EU's public liability law. However, national law does not have to respond – to the same extent EU law does – to the challenges of ensuring accountability in a highly integrated administrative system characterized by interaction and cooperation across different jurisdictions. As a result, national liability law cannot always offer suitable solutions for these situations. Looking forward, it may therefore be worth considering using public international law, in particular the law of international responsibility, as a source of inspiration in further shaping how EU liability law deals with cooperative action. In contrast to national law, multiple actors that cooperate across multiple levels of jurisdiction are the rule in international law, not the exception. Given that in the realm of international organizations, the EU legal order stands out with particularly refined and comprehensive mechanisms of judicial supervision, the ECJ would thereby also contribute significantly to the development of international law in this respect.

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