

Effective Judicial Protection at the National Level Against Breaches of EC Law: The Current Nightmare of Procedural Hurdles

Helen Xanthaki*

A. Introduction

In the long dispute on the balance between national procedural autonomy¹ and effectiveness of remedies for breaches of EC law, the latter seems to be the prevailing doctrine.² Leaving aside the qualifiers to this position introduced by a number of cases brought before the ECJ,³ the right of EU citizens to access to justice by use of effective national remedies against state breaches of EC law remains. With it remains my frequently confessed distrust of the effectiveness of such remedies brought before the national courts of the Member States.⁴

* Dr. Helen Xanthaki is a Senior Lecturer at the Institute of Advanced Legal Studies, University of London, and the Academic Director of the Sir William Dale Centre for Legislative Studies. I would like to thank Prof. Rosa Maria Greaves, Prof. Janet Dine, Prof. Alessandro Pizzorusso, Ms. Holly Cullen and Dr. Constantin Stefanou for their valuable comments on earlier drafts of this paper. Remaining inadequacies can of course only be attributed to the author.

¹ See *Case 33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, [1976] ECR 1989.

² See *Cases C-177/88 Dekker v Stichting voor Jong Volwassenen (VLV) Plus*, [1990] ECR I-3941; *Case C-377/89 Cotter and McDermott v Minister for Social Welfare and Attorney General*, [1991] ECR I-1155; *C-208/90 Emmott v Minister for Social Welfare*, [1991] ECR I-4269; *C-271/91 Marshall v Southampton and South West Area Health Authority II*, [1993] ECR I-4367; *C-410/98 Metallgesellschaft and Hoechst v Inland Revenue*, [2001] ECR I-1727.

³ See *C-338/91 Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, [1993] ECR I-5475; *C-410/92 Johnston v Chief Adjudication Officer*, [1994] ECR I-5483; *C-66/95 R. v Secretary of State for Social Security, ex parte Eunice Sutton*, [1997] ECR I-2163.

⁴ See *C. Stefanou and H. Xanthaki*, *A Legal and Political Interpretation of Article 215(2) [new Article 288(2)] of the Treaty of Rome: The Individual Strikes Back*, Ashgate/Dartmouth, Aldershot-Brookfield USA-Singapore-Sydney 2000; *H. Xanthaki*, *Establishment of Foreign EU Public Limited Companies in France, Italy and Greece: EU Breaches and Redress*, Sakkoulas/Giuffrè/Kluwer, Athens/Milan/Den Haag 2003; *C. Stefanou and H. Xanthaki*, "Are National Remedies the Only Way Forward? Widening the Scope of Article 215(2) of the Treaty of Rome" in *J. Lonbay and A. Biondi (eds.)*, *Remedies for Breach of EC Law*, John Wiley and Sons 1997, pp. 85-100; *C. Stefanou and H. Xanthaki*, "Restitution for EU companies under Article 215(2)EC and Integration Theory", 6 *European Financial Services Law* 1999, pp. 58-66; *C. Stefanou and H. Xanthaki*, "The Principle of the Effective Protection of Individual in EC Law and the Dialectic of European Integration Theory", 50 *Northern Ireland Legal Quarterly* 1999, pp. 213-

European Journal of Law Reform, Vol. V, no. 3/4, pp 409-446.

© Helen Xanthaki 2005.

The hypothesis of this paper is that even after *Francovich* and the development of the state liability doctrine, national courts cannot be trusted with the task of securing effective judicial protection for EU citizens suffering damages from breaches of EC law by the state. For the purposes of this analysis, protection at the national level signifies judicial routes leading to compensation by use of the national courts. This includes national court cases where the state liability doctrine as a general principle of EC law is applied. In order to discuss protection at the national level in adequate detail, three countries were selected as case studies: France, Italy and Greece. All three countries follow the civil legal tradition, thus facilitating their comparative analysis. All three countries are often accused of being amongst the worst violators of EC law, as demonstrated by the number of infringement proceedings brought against them by the Commission, thus rendering the conclusions of this analysis all the more crucial.

In July 1999, the new Greek *Code of Administrative Procedure* came into force.⁵ Albeit mainly a mere codification of pre-existing provisions, the new Code regulated some issues – such as enforcement of administrative judgments and the state's obligation to comply with administrative judgments – in a different manner. The novelty of the provisions, the consequent lack of interpretative works and implementing judgments, as well as the lack of an express declaration by the Greek legislator on the status of pre-existing provisions that are abolished or modified after the new Code, render the final provisions of Greek law on these matters uncertain and unclear.⁶ For this reason, reference is made both to pre-existing laws and the new Articles of Code.

B. Procedural Conditions for Achievement of Compensation

The main common feature of the French, Italian and Greek legal systems on the topic discussed in this paper (which primarily led to the methodological decision to examine all three jurisdictions in parallel) refers to their court structure. In the widely acceptable, classical Dutreil classification on the administration of justice in Europe, the three countries fall within the group of jurisdictions that follows the Latin model commonly found in the countries of the Council of Europe.⁷ The

233; C. Stefanou and H. Xanthaki, "Restituzione sotto lo scenario di passività concomitante di Articolo 215(2) e il dialettica di teoria del integrazione europea", IX *Rivista Italiana di Diritto Pubblico Comunitario* 1999, pp. 1059-1088.

⁵ See Law 2727/1999 Code of Administrative Procedure, ΦΕΚ 97 Α'/17.5.1999.

⁶ See A. Karamichalelis, "The New Code of Administrative Procedure", 3 [1999] *Συνήγορος*, pp. 26-29.

⁷ See R. Dutreil, "L'administration et les juges en Europe" 42 *Rivista trimestrielle di diritto pubblico* 1992, pp. 1017-1025, at p. 1017. The other two groups are the countries of separate administrative jurisdiction (the German model) and the countries of the British model, where no separate administrative jurisdiction is recognised.

main characteristic of this model is the existence of a separate administrative jurisdiction, which is headed by an institution acting as the highest administrative court and also as the legal councilor of the government.⁸ Indeed, in all three selected countries, there is a separate court structure for administrative justice headed by the French *Conseil d'Etat*, the Greek *Συμβούλιο Επικρατείας* (Council of the State) and the Italian *Consiglio di Stato*.⁹

The main legal basis for the introduction of a third type of courts, apart from the civil and criminal, in all three selected countries lies with the basic constitutional principle of the separation of powers. The principle signifies that ordinary courts are not competent to hear disputes of an administrative character.¹⁰ A contrary solution would lead to the unacceptable situation of the judiciary controlling the legislature and the executive. This would be a breach of the doctrine of the separation of judiciary, executive and legislature as the three distinctive functions of a modern democratic state.¹¹ It is important to note that the principle of the separation of powers and the consequent doctrine of the independent judiciary constitute a legal argument which justifies, rather than abolishes, judicial control of the administration. In order to secure obedience to the law from both the administration and the judiciary, the Constitutions of all three countries introduce judicial control over the legality of administrative acts. In view of the principle of the separation of powers, this judicial control is undertaken by the administrative courts.¹²

As a general rule, therefore, the judicial control of acts of the legislature and the administration (including the government) in all three selected countries is conducted by the administrative courts. However, in order to determine with further precision the national courts with the competence to judge on breaches of EC law by the state, it is necessary to establish the type of liability incurred. This can only be achieved through the identification of the main possible case scenarios which may be presented before the national judges by natural or legal persons seeking compensation for damages suffered as a result of breaches of EC law by the state. These possible case scenarios can be divided into two wide categories, namely breaches resulting from national legislative measures, and, perhaps more frequently, acts or omissions of the administration, which breach primary and secondary EC legislation.¹³

In the first type of violations, individuals suffer damages as a result of a national binding legislative text, which brings in a legislative measure

⁸ See *ibid.*, p. 1018.

⁹ See *Ph. Vegleris*, *Administrative Justice and its Problems*, Sakkoulas, Athens 1977, p. 31.

¹⁰ See *C. Dadomo and S. Farran*, *The French Legal System* Sweet and Maxwell, London 1996, p. 46.

¹¹ See *J. Rivero and J. Waline*, *Droit administratif*, Dalloz, Paris 1994, pp. 9 and 14; see also *T.G. Waitkin*, *The Italian Legal Tradition*, Ashgate/Dartmouth, Aldershot/Brookfield USA/Singapore/Sydney 1997, p. 151.

¹² See *P. Dagtoglou*, *Administrative Procedural Law*, Sakkoulas, Athens 1994, pp. 74-75; see also *L. Bocchi*, "Considerazioni sul processo amministrativo: tra ipotesi di riforma costituzionale e recenti normative ordinarie" 74 *Foro amministrativo* 1998, pp. 288-300, at 288.

¹³ See *E. Spiliotopoulos*, *Droit administratif hellénique* LGDJ, Paris 1991, pp. 163-164.

introduced in a discriminatory manner. Examples of such breaches of EC law include the restrictive national laws on tourist guides in all three states, the law on commercial agents in Italy and France, and the Greek laws which restrict the export of capital. In this type of breach the mere existence of an illegal national legislative text suffices, as long as the law is still in force. The individual suffering damages due to this legislation will turn against the national legislature for its failure to comply with its obligation to abolish all measures in clash with EC law and to refrain from introducing new illegal legislative texts.

In the second – most frequent – type of violations, the individual will turn against the administrative authorities of the state, who restrict the enjoyment of EU rights awarded to them under EC law in a discriminatory manner through prohibiting administrative acts. In this second type of violations, the existence of a discriminatory legislative framework does not suffice. The individual must have tried to ensure enjoyment of their rights and the necessary permission or relevant facilitation must have been denied. In this case, the illegality of the state's treatment lies in a particular administrative act that is contrary to EC law, even though it may be legal under national law. For example, in the case of the restrictive Greek law on private schools, a person must have applied to the Minister of Education for establishment permission in Greece and that application must have been rejected on the basis of the applicant's nationality. Omissions of the state may also constitute sources of state liability. The state's omission to consider the person's application for establishment or trade activity permission within reasonable time, its omission to proceed to necessary internal operations, or even its forestalling to proceed to material acts necessary for the completion of the requested task may constitute the basis of a claim for compensation by the state.¹⁴

From this analysis it is clear that the same national laws may constitute the source of compensation under both types of violations. However, in the first type it is the illegality of the legislative regime which constitutes the basis of the individual's claim, whereas in the second case the basis of the claim is a concrete illegal administrative act issued on the basis of this illegal legislative regime. Although in both situations the state is clearly at wrong, it must be admitted that it is in the second type of violation where the case of the individual is stronger, at least in practice. This is due to four main facts. First, the individual will be turning against a published act and not a general legal regime whose interpretation and application in practice can be debated by the state. Second, the act is issued by a concrete organ of the state (basically the respective Minister), which can be identified beyond doubt and easily called to the stand to clarify the state's position. Third, the administrative act in question will inevitably include the justification of the state's refusal to allow the establishment or pursuance of activity of the foreign applicant. This justification is indicative of the reasoning of the state and will guide both the applicant and, ultimately the court, in the evaluation of the arguments of the state and the legality of its policy. Fourth, it is fair to say that the liability of the state for

¹⁴ See *ibid.*, pp. 164-165. See also ΣτΕ 1218/78, ΤοΣ, 1978, 367; ΣτΕ 4677/83.

legislative acts is a very recent doctrine mainly introduced through the recent case-law of the ECJ. As will be demonstrated in this paper, in the three selected countries, the success of the relevant claim for compensation is uncertain.

I. Which Court?

In France and Greece, disputes involving ‘the administration of the state’ are brought before the administrative, rather than the ordinary courts.¹⁵ Disputes are defined as issues on which there is legal doubt, which are presented before the court for resolution.¹⁶ In an attempt to clarify the complex distinction between disputes falling within the jurisdiction of the administrative courts and those falling within the ordinary jurisdiction, Cairns and McKeon state that administrative disputes are those that involve the administration in the widest possible meaning of the term. This includes ‘any administrative unit, be it the state itself or the smallest local authority.’¹⁷ Katras defines administrative disputes as those involving a legal debate between the state and the citizen.¹⁸ The criterion of the public legal personality of one of the plaintiffs is used by Spiliotopoulos, who defines administrative liability as the liability of public legal persons.¹⁹ This criterion is reminiscent of the notion of *service public* as the determining factor for the classification of disputes as administrative. According to the older case-law of French and Greek administrative courts, all actions falling within the organization and functioning of general and local public services constitute administrative operations giving rise to administrative disputes.²⁰ Despite its support in the case-law of the French courts, this criterion has been strongly criticized for its imprecision in the dividing line between private and public persons; inability to adapt to the complexity and diversity of contemporary social and commercial transactions; and unawareness of the common aim of private and public law rules, of introducing legal provisions that aim to protect the general interests of society.²¹ The recent introduction of private contracts in the functioning of traditional public services and the

¹⁵ See *G. Danet Bâtonnier and B. Weiss-Gout*, “France” in *M. Sheridan and J. Cameron*, *EC Legal Systems: An Introductory Guide* Butterworths, London-Dublin-Edinburgh-Brussels, 1992, p. France-8; see also *Y. Gramatides*, “Greece”, *ibid.*, at Greece-8.

¹⁶ See *Dagtolou*, *supra* note 12, p. 111.

¹⁷ See *W. Cairns and R. McKeon*, *Introduction to French Law*, Cavendish Publishing Limited, London, 1995, p. 138.

¹⁸ See *I. Katras*, *Codification of Administrative Procedure*, Sakkoulas, Athens, 1996, p. 1237.

¹⁹ See *Spiliotopoulos*, *supra* note 13, p. 160.

²⁰ See C.E., 6 fév. 1903, Gr. Ar., no 12, concl. Romieu, Rec., p. 94; see also T.C., 8 fév. 1873, Blanco, Gr. Ar., 15; T.C., 29 fév. 1908, Feutry, Gr. Ar., no 20; T.C., 13 avr. 1908, de Fonscolombe, Rec., p. 448; C.E., 4 mars 1910, Théron, Gr. Ar., no 24; C.E., 20 avr. 1956, Epoux Bertin, Gr. Ar., no 91, concl. Long, note Waline, R.D.P., 1956, p. 869; C.E., 12 avr. 1957, Mimouni, D., 1957, p. 413, concl. Talcot, note P. L.J.; C.E., 19 oct. 1956, Soc. Le Béton, Gr. Ar., no 92, concl. Long, D., 1956, p. 81. See also Athens Court of Appeal 4163/87, ΕλλΔνη, 1987, 942; Athens Court of Appeal 7261/86, ΕλλΔνη, 1986, 156; AΠ 418/78, ΝοΒ, 1978, 192.

²¹ See *Dadomo and Faran*, *supra* note 10, p. 22.

increasing state commercial and industrial activity has led to a wide recognition of the fact that the notion of public service is no longer a suitable criterion for the determination of the competent court.²² The currently prevailing criterion for the distinction between ordinary and administrative competence lies therefore with the nature of the provisions applicable in each case,²³ or – expressed in a different manner – with the existence of an administrative activity as the source of the dispute.²⁴ If the activity at the source of the dispute is of a private nature, then the actions of the administration fall within the scope of private disputes and are judged on the basis of civil law by the ordinary courts.²⁵ If, however, the administration acts within its competence of public power, the provisions of administrative law are applicable and any dispute must be brought before the administrative courts.²⁶ Thus, as Dickson notes, administrative courts judge disputes ‘concerned with relationships in public law, or which relate to situations or powers which are different from those involving private individuals.’²⁷

In the case of the disputes of interest in this analysis, there is little doubt that it is the administrative courts that have the competence to hear the case. It is obvious that the state uses public power when passing a national law or issuing an administrative act rejecting the application of the individual.²⁸ Moreover, the interpretation of the Treaties and the compatibility of French law with the provisions of EC legislation fall within the competence of the administrative judge.²⁹ As Dantone-Cor puts it, it is the task of the administrative judge to ensure that EC normative texts are applied in France.³⁰ The question is whether

²² See C.E., 31 juil. 1912, Sté des granits prophyroïdes des Vosges, Gr. Ar., no 29; T.C., 22 janv. 1921, Sté Commerciale de l’Ouest africain, Gr. Ar., no 40; C.E., 28 juin 1963, Nancy, R.D.P., 1963, p. 1188; C.E., 22 nov. 1974, Fédération des industries du sport, J.C.P., 1975, I, NO 2724; C.E., 23 janv. 1953, Audoin, J.C.P., 1954, II, no 7916, note Vedel; C.E., 13 juillet 1967, Allegretto, A.J., 1967, p. 538; T.C., 26 mai 1954, Moritz, J.C.P., 1954, II, no 8334, note Vedel; C.E., 5 fév. 1954, El Hamidia, J.C.P., 1954, ii, NO 8136; T.C., 10 juillet 1965, Sté Bourgogne-Bois, Rec., p. 586; C.E., 13 octobre 1973, A.D.A.S.E.A. du Rhône, D., 1979, p. 249, note Amsleek et Waline.

²³ See *J. Rivero and J. Waline*, *Droit administratif*, Dalloz, Paris, 1994, p. 146; see also AED 5, 6, 8, 9 AED, ΔΔ, 1989, 779; Athens Three-member Administrative Court of First Instance 15222/90, ΔΔ, 1991, 1067.

²⁴ See *Georges*, *infra* note 32, p. 254; see also *G. Mitsopoulos*, *Civil Procedure A’*, Sakkoulas, Athens, 1972, p. 105.

²⁵ See C.E., 5 fév. 1954, El Hamidia, Rec., p. 77; T.C., 15 janv. 1968, *Air-France c. Epoux Barbier*, R.D.P., 1968, p. 393; T.C., 22 janv. 1921, *Bac D’Eloka*, Gr. Ar., no 40; C.E., 21 avril 1962, *Dame Agnesi*, D. 1962, p. 535; see also AII 132/79, ToΣ, 1986, 177.

²⁶ See *Dagtolou*, 1994, *supra* note 12, p. 112.

²⁷ See *B. Dickson*, *Introduction to French Law* Pitman Publishing, London, 1994, p. 30.

²⁸ See *M. Jarvis*, *The Application of EC Law by National Courts: The Free Movement of Goods*, Clarendon Press, Oxford, 1998, pp. 398-399; see also C.E., 23 mars 1984, *Alivar*, Rec. Lebon, 1984, p. 127, RTDE, 1984, 341.

²⁹ See C.E., 29 juin 1990, GISTI, unreported; see also *B. Stirn*, ‘Le Conseil d’Etat et le droit communautaire’, 49 *Actualité Juridique: Droit Administratif* 1993, pp. 244-246, at 244; for the negative response of the Conseil d’Etat on this matter until 1989, see *N. Brown and J. Bell*, *French Administrative Law*, Clarendon Press, Oxford, 1998, pp. 284-286.

³⁰ See *N. Dantone-Cor*, ‘La mise en jour de la responsabilité de l’Etat français pour violation du

the French administrative courts can also hear claims for compensation or whether their competence is limited to applications for annulment of illegal administrative acts or declarations of illegality of normative legislative texts. The widely accepted position is that although companies are expected to attack the validity of the legislative provision grounding the administrative decision in the individual case,³¹ even simple claims for compensation against the legislature or the administrative authorities of the state are heard before the administrative courts. A contrary solution would 'undermine the separation of administrative and judicial authorities.'³² In any case, claims for compensation for damages resulting from legislative texts in breach of EC law have been considered admissible by administrative courts.³³ Similarly admissible by administrative courts are claims for compensation for wrongful administrative acts.³⁴

In Greece, the determination of the courts with the jurisdiction to judge on such claims for compensation against the state was expressly introduced by Law 1406/1983, which was based on the general provisions of Arts.94 and 95 of the Constitution of 1975/86. According to these provisions, which were re-affirmed by Arts. 1, 2 and 71 of the Greek *Code of Administrative Procedure*, administrative disputes (and only administrative disputes)³⁵ are heard exclusively before the administrative courts.³⁶ Claims for state liability are disputes falling within the competence of the ordinary administrative courts that have jurisdiction in matters of *plein contentieux*, that is, of claims for compensation.³⁷ One type of relevant claims is requests for compensation based on the 'non passing of legislative or administrative provisions for the complete adaptation of Greek law with EC legislation.'³⁸ Such claims may be heard by the administrative courts during the trial for the annulment of the illegal administrative act or the declaration of the illegality of the law.³⁹

droit communautaire" 31] RTDE 1995, pp. 471-507, at 472.

³¹ See *Brown and Bell*, *supra* note 29, p. 286.

³² See *P. Georges*, *Droit public: Concours administratifs*, Sirey, Paris, 1992, p. 349.

³³ See, for example, Cour administrative d'appel de Paris (form. plen.), 1 juillet 1992, Sté Jacques Dangeville, AJ, 1992, p. 768.

³⁴ See, for example, CE, 28 fév. 1992, AJ, 1992, p. 210.

³⁵ Civil disputes may not be added to the jurisdiction of administrative courts, not even by law. See AEA 1/91, EλλΔνη, 1991, 1480; OλAΠ 490/82 NoB, 1982, 204; OλAΠ 488/82, EλλΔνη, 1982, 29.

³⁶ See AΠ 595/85, EλλΔνη, 1985, 300.

³⁷ See Athens Court of Appeal 1878/88, EλλΔνη, 1988, 349; Athens Court of Appeal 13605/88, EλλΔνη, 1988, 361; Athens Tri-member Court of First Instance 860/88, ΔιΔικ, 1, 122; Athens Court of Appeal 7711/87, EλλΔνη, 1987, 329; Athens Administrative Court of Appeal 1711/89, ΔιΔικ, 1, 1362.

³⁸ See *S. Koukoulis-Spiliotopoulou*, "Issues Arising From the Effect of Community Legislation to the Provision of Judicial Protection", 1992 NoB, pp. 825-847, at 845.

³⁹ See Art. 26 of Presidential Decree 341/78, ΦEK 71/10.5.1978, as codified in Art. 124 (1) Code of Administrative Procedure; see also *A. Liagas*, "General Introduction on the Competence of Administrative Courts" in *A. Liagas, V. Skouris and A. Sofialidis*, *Delimitation of the Competence of Civil and Administrative Courts*, Sakkoulas, Thessaloniki, 1990, pp. 5-25, at 17; ΣTE 4052/1985, ΔΔ, 1986, 180.

The Italian position on this issue is different. The determination of the courts that can adjudicate in the cases of the breaches of EC law examined in this thesis is based on the distinction between subjective rights and legitimate interests. Disputes deriving from subjective rights are brought before civil courts, and disputes deriving from legitimate interests are judged by administrative courts.⁴⁰ The French and Greek criterion of the nature of the applicable provisions is irrelevant in Italy. Thus, even in administrative disputes, the ordinary courts adjudicate over subjective rights.⁴¹ Despite the crucial importance of the distinction between the concepts of legitimate interests and subjective rights for the application of Italian law, they have not been adequately interpreted by the Italian courts.⁴² Doctrine suggests that for the establishment of a subjective right, the existence of a general legitimate interest is inadequate: what is required is not only the illegitimacy and inappropriateness of the act or fact, but the acceptance that ‘a perfect and entrusted subjective right has been harmed.’⁴³ Doctrine also accepts that the jurisdiction of ordinary courts in disputes deriving from acts of the state is limited to the examination of the effects of the act on the applicant, which may not extend to the revocation or modification of the act.⁴⁴

In the case of disputes deriving from refusals of requests for authorizations in Italy, the subject matter is not the right itself but the exercise of the right. The latter gives rise to subjective rights which fall within the jurisdiction of ordinary judges.⁴⁵ Similarly, disputes deriving from non-discretionary registration in professional organizations as a condition for permission to trade in Italy are adjudicated by the ordinary courts.⁴⁶ However, an action for mere annulment of the administrative act turns against its legitimacy. It attacks the legitimate interest to the right, which is a matter for the administrative courts.⁴⁷

This observation is not too dissimilar to the conclusion reached in the analysis of the French and Greek positions. In all three countries, only administrative judges may judge on the legality of administrative or legislative acts. However, there is one significant difference. In France and Greece the

⁴⁰ See *G. Manca, A. Corrao and L. Longo*, “Italy” in *M. Sheridan and J. Cameron*, *EC Legal Systems: An Introductory Guide*, Butterworths, London/Dublin/Edinburgh/Brussels, 1992, p. Italy-23; see also *L. Certoma*, *The Italian Legal System*, Butterworths, London, 1985, p. 251; *Cass. sez. un.*, 1 ottobre 1982, n.5030, *Giust. civ.*, 1982, I, 2916; *Cassazione* 18 novembre 1977, n.5042, *Giust. civ.*, 1978, I, 19; *Cass.* 15 novembre 1983, n. 6767, *Foro it.*, 1984, I, 1009; *Cass.* 15 ottobre 1980, n.5456, *Foro it.*, 1981, I, 2530; *Cass.* 14 ottobre 1972, n.3060, unreported.

⁴¹ See *T. Watkin*, *The Italian Legal Tradition*, Ashgate/Dartmouth, Aldershot/Brookfield USA/Singapore/ Sydney, 1997, p. 151.

⁴² See *La C. cost.*, 25 marzo 1980, n.35, *Foro it.*, 1980, I, 889

⁴³ See *Landi and Potenza*, *infra* note 48, p. 330.

⁴⁴ See *M. Severo Giannini and A. Piras*, “Giurisdizione amministrativa” in *Enciclopedia del diritto*, Giuffrè, Milano, 1970, pp. 229-294, at 270.

⁴⁵ See, *ibid.*, p. 276.

⁴⁶ See *Cons. St.*, sez. IV, 11 maggio 1966, n. 370, *Cons. St.*, 1966, 928.

⁴⁷ See *Cass. civ.*, 9 giugno 1995, n. 6542, *Responsabilità civile e previdenza* 60 (1995), pp. 710-712, at 711; see also *Cass.*, 4 marzo 1985, n.1808; *Tribunale Roma*, 20 marzo 1987, *Foro am.*, 1987, 3540; see also *Brown and Bell*, *supra* note 29, p. 273.

applicants will submit their claim for compensation to the administrative judge who also has the competence to award damages. Italian law, however, has to take into account the persistent case-law of the *Corte Suprema di Cassazione*, which accepts civil liability of the administration only if a legitimate interest has been found to be injured.⁴⁸ Thus, for the establishment of civil liability, the applicant will have to prove as a *conditio sine qua non*⁴⁹ harm to a legitimate interest. As this can only be declared before the administrative courts, there seems to be only one legal route for the applicant: first to attack the act before the administrative courts and then to seek compensation for damages before the ordinary civil courts.⁵⁰ This has led Benvenuti to state that, quite simply, the existence of subjective rights signifies the lack of a valid administrative act, and the existence of an administrative or legislative act excludes any ground for recourse before the ordinary courts.⁵¹ Similarly, many authors note that a claim for compensation pre-supposes the annulment of the act giving rise to the dispute.⁵² This position reflects the change in the case-law of the *Corte di Cassazione*, which no longer accepts the evaluation of the legality of an act by the civil court as a preliminary issue, or the simple non-application of the act by the civil judge.⁵³

In the particular case of claims for compensation against the Italian state for its failure to comply with its EU obligations, the *Corte di Cassazione* has held that claims based on any legislative or administrative act that leave even the smallest margin of discretion to the state give rise to legitimate interests which are protected, at least in the first place, by the administrative courts. Discretion to the state may refer either to the evaluation of the fulfilment of certain generically introduced conditions or to the determination of compliance with

⁴⁸ See *G. Landi and G. Potenza*, *Manuale di diritto amministrativo*, Giuffrè, Milano, 1990, p. 330.

⁴⁹ See Cass., 5 ottobre 1979, n.5145; see also Cass., 5 ottobre 1979, n.5146; *F. Satta*, "Responsabilità della pubblica amministrazione" in *Enciclopedia del diritto*, Giuffrè, Milano, 1988, pp. 1369-1381, at 1374.

⁵⁰ See Cass., sez.un., 22 ottobre 1984, n.5361, *Foro it.*, 1985, I, 2358; Cass., 6 aprile 1983, n.2443, *Foro it.*, 1983, I, 2498; Cass., 1 ottobre 1982, n.5027, *Foro it.*, 1982, I, 2433; Cass., 16 luglio 1985, n. 4151, *Foro it.*, 1986, I, 2206; see also *V. Caianiello*, "Il giudice amministrativo ed i nuovi criteri di riparto delle giurisdizioni" 74 *Foro amministrativo* 1998, pp. 1943-1955, at 1946; see also *Trib. di Roma*, 23 settembre 1987, *Giust. civ.*, 1988, 785, which states that the prohibition to open a pharmacy is a mere interesse legittimo and cannot give rise to claims for compensation until the relevant subjective right is born through the annulment of the act.

⁵¹ See *F. Benvenuti*, "Giustizia amministrativa", *Enciclopedia di diritto*, Giuffrè, Milano, 1970, pp. 588-612, at 602; however, see contra *Corte cost.*, 8 maggio 1998, n.165, *Giur.it.*, 1998, 1929.

⁵² See *A. Toscano*, "La responsabilità civile della p. a.", 38 *Giustizia civile* 1988, pp. 1042-1045, at 1042-1043; *G. Zanobini*, *Corso di diritto amministrativo*, Giuffrè, Milano, 1958, p. 339; see also *Trib. Roma*, sez. I, 30 giugno 1987, *Giust. civ.*, 1988, 1041.

⁵³ See Cass. civ., 9 giugno 1995, n. 6542, *Responsabilità civile e previdenza* 60 (1995), pp. 710-712, which signalled a departure from the then prevailing view reflected in Cass. civ., Sez. un., 22 ottobre 1984, n.5361, *Resp. civ. prev.*, 1985, 625. The latter decision referred to the case where the illegitimacy of the act leads to its non-application by the civil court. For an analysis of the older position, see *M. Cerrato*, "Il giudice amministrativo e le direttive comunitarie" 70 *Foro amministrativo* 1994, pp. 2010-2049, at 2026.

national acts. These legitimate interests give rise to subjective rights, for which compensation may be sought only after the annulment of the relevant legislative or administrative measure.⁵⁴ Claims based on legislative or administrative measures, which leave absolutely no ground for discretion to the state, give rise to subjective rights that are directly adjudicated by the civil courts.⁵⁵ In any case, violations of EC law constitute the source of civil liability of the state and are mainly heard by the administrative courts.⁵⁶ The latter may take into account judgments of the ECJ declaring that the relevant legislative or administrative practises are in breach of EC law.

This brief reference to the problem of the determination of the court with the jurisdiction to judge on claims of foreign secondary establishments against the French, Greek and Italian states has led to the conclusion that in all three states, claims for compensation against the state for breaches of EC law fall mainly within the competence of the administrative courts. The situation is quite clear in Greece, where the issue is resolved by the express provision of Law 1406/83, as amended by Arts.1, 2 and 71 of the new *Code of Administrative Procedure*, which subjects all claims for compensation against the state to the administrative courts. This provision is successful in creating a situation of legal certainty for individuals. In France, the position seems to be equally clear. Indeed, the French legislator has attempted – and to a certain degree has managed – to clarify the French position through the Law of 16-24 August 1790 in combination with a series of judgments by the French courts. It must be accepted, however, that the general terms in which this ancient law is expressed in combination with the lack of a strict doctrine of precedent in French law poses some uncertainty over the exact distinction between the ordinary and administrative competence in each particular case. This has led to the criticism, albeit mild, of the French system for lack of specific provisions, which would delimit the two competencies beyond dispute.⁵⁷

Unfortunately, the Italian system is even less clear. In fact, the complex and fluid distinction between legitimate interests and subjective rights has been severely criticized for abolition of all commercial stability and legal certainty, for limitation to the access of individuals to compensation and for the “typically Italian discourtesy” of its encouragement of subsequent trials between the administrative and the civil courts for the final achievement of compensation.⁵⁸ Some authors support the view that this criterion should be abandoned in favour of “a clearer distinction on the basis of content”, if only as a sign of the Italian willingness to contribute to the harmonisation of administrative laws within the

⁵⁴ See Cass., sez. un., 18 giugno 1981, n.3967, Giust. civ., 1981, 2217.

⁵⁵ See C.S., 26 aprile 1977, n.1561; sent. 15 ottobre 1975, n.3334; sent. 18 settembre 1970, n.1572.

⁵⁶ See Cons. St., Sez. V, 4 novembre 1991, Foro am., 1994, II, 1257; Sez. IV, 18 gennaio 1996, n.54, Giust. civ., 1996, 1191; Sez. II, 19 giugno 1991, n.570, Foro it., 1994, III, 66; TAR Sardinia, 22 dicembre 1994, n.2204, TAR, 1995, I, 944; TAR Calabria, 19 dicembre 1989, n. 502, Riv. dei appalti, 1990, 133.

⁵⁷ See *Georges*, *supra* note 32, p. 248.

⁵⁸ See *Caianiello*, *supra* note 50, pp. 1946 and 1948.

EU.⁵⁹ Another point of criticism refers to the consequent subjective criterion for the classification of acts and disputes,⁶⁰ which may only lead to further confusion on the choice of the competent courts.⁶¹ A third point of concern refers to the introduction of a dual jurisdiction. It is felt that the complex rules about the competence of the courts to judge claims for compensation create difficulty and confusion as to the court with the competence to hear each dispute.⁶² Moreover, due to the lack of a strict doctrine of precedent in civil law jurisdictions, the judgments of the administrative courts seem to be of intermediary rather than final value for the civil judge, who may decide to apply or merely consult them for the final formation of a judgment.⁶³

When analyzed with reference to claims for compensation for state liability, the Italian position creates two additional points of unease. The first point concerns the need for the applicants to establish the non-compliance of the act or law giving rise to state liability before the claim for compensation is heard. Since many breaches of EC law never reach the ECJ while many ECJ judgments rest in the declaration of breach of merely one relevant EC provision, it seems that applicants will often have to undergo the additional burden of proving non-compliance with the provision that is most relevant to each case. This will inevitably take place before the national courts under the procedure of preliminary rulings, whose effectiveness is under debate.⁶⁴ This is even more significant, if the need for two separate actions before two different national courts is taken into account. Thus, the second point of concern refers to the possible ineffectiveness of the protection offered to EU citizens by a system which refers them to two different national judges, who may lack in knowledge and willingness to identify the issue as one of EC law, or to recognize the necessity to apply EC rather than national legal provisions.⁶⁵

II. The Choice of the Suitable Remedy Before the National Courts

In the three selected jurisdictions, the first *forum* for the hearing of cases of breaches of EC law by the state is the administrative courts.⁶⁶ In order to achieve

⁵⁹ See *Bocchi*, *supra* note 12; for reference to doctrine supporting this view see *ibid.*, note 8.

⁶⁰ See *Landi and Potenza*, *supra* note 48, p. 224.

⁶¹ See *B. Spampinato*, "Sull'estensione della giurisdizione amministrativa agli atti del privato concessionario", 73 *Foro amministrativo* 1997, pp. 977-998, at 977.

⁶² See *E. Reggio d'Acì*, "Verso una giustizia amministrativa sostanziale?", 66 *Foro amministrativo* 1990, pp. 2515-2531, at 2526.

⁶³ See *H. Simon*, *Il comportamento amministrativo*, Bologna, 1979, p. 106.

⁶⁴ See *M. Chiti*, "I signori del diritto comunitario: la corte di giustizia e lo sviluppo del diritto amministrativo europeo", 41 *Rivista trimestriale di diritto pubblico* 1991, pp. 798-831, at 821-822.

⁶⁵ See *Trib. Parma*, 23 aprile 1994, *Foro it.*, 1994, I, 2526, which stated that the non-implementation of a directive does not need to be declared by the ECJ, but national courts must ascertain whether a situation of non-compliance with EC law exists.

⁶⁶ Since the aim of this paper is to evaluate the judicial protection offered to companies in the three selected countries administrative remedies heard internally by administrative organs are outside the scope of this analysis and will not be referred to here. For administrative remedies in France

a full examination of all aspects of the case, including an evaluation of the legality of the measure giving rise to the alleged liability and the claim for compensation, the applicant will make use of the French unrestricted action (*contentieux de pleine juridiction*) or the similar Greek *prosfygi* brought on any possible ground of law or fact for the assessment of actions in tort against the state (*contentieux de la responsabilité*).⁶⁷ This action takes into account the whole administrative or legislative activity, not only under the profile of legitimacy, but also the evaluation of fact and merit.⁶⁸ In other words, the power awarded to the administrative judge in this type of action is far more extensive compared to actions for mere annulment: the judge is asked to acknowledge the existence of a right, to declare an illegal harm to this right and to rectify this situation.⁶⁹ Within this last framework, the judge may even amend the illegal act.⁷⁰ The action is open to the beneficiaries of the legal right whose damage is claimed, or their legal successors,⁷¹ and it is only these persons who are legally bound by the court's judgment.⁷² With this type of action, the applicant may seek both the annulment of the act and compensation for damages suffered.⁷³ This joint action is of particular use to applicants who may have suffered damages in the past as a result of breaches of EC law by the Greek and French national authorities, but who still wish to pursue their activities in these countries in the future. In this case, the applicants' action before the courts will both achieve compensation for damages suffered in the past, as well as ensure the future observance of their legal rights by the national authorities.

In Italy, however, such a wide examination of a case is impossible. In the first, administrative stage of the action, the applicant has to seek annulment of the act that caused the alleged damage. In order to achieve this, the applicant must establish *legitimatio ad causam*, interest to act and *legitimatio ad processum*.⁷⁴ In other words, the judge needs to be satisfied that the subject of the remedy falls within the jurisdiction of the administrative courts,⁷⁵ the

and Italy, see *M. Protio*, "La riforma del contentieux administratif" 72 *Foro amministrativo* 1996, pp. 2117-2162; see also *B. Pacteau*, *Contentieux administratif*, Presses Universitaires de France, Paris, 1997.

⁶⁷ See *Cairns and McKeon*, *supra* note 17, pp. 142-143; see also *Dagtoglou*, 1994, *supra* note 12, p. 479; *N. Soleidakis*, *Application for Compensation*, Nomiki Vivliothiki, Athens, 1998.

⁶⁸ See *Landie and Potenza*, *supra* note 48, p. 674; see also *Brown and Bell*, *supra* note 29, p. 277.

⁶⁹ See *Rivero and Waline*, *supra* note 23, p. 181.

⁷⁰ See *Dadomo and Farran*, *supra* note 10, p. 224; see also *Dagtoglou*, 1994, *supra* note 12, p. 465.

⁷¹ See Art. 24, par.1 of the Greek Presidential Decree 341/78, ΦΕΚ 71 Α'/10.5.1978 in combination with Art. 4 of Law 1406/83, ΦΕΚ 182 Α'/14.12.1983; as codified by Art. 71 CAP.

⁷² See Art. 57 of the Greek Presidential Decree 341/78, ΦΕΚ 71 Α'/10.5.1978, as codified by Art. 197(3) of the new CAP. In contrast, the effect of an ultra vires action apply erga omnes. See *Cairns and McKeon*, *supra* note 17, p. 143.

⁷³ See *Rivero and Waline*, *supra* note 23, p. 181; see also Art. 26 of the Greek Presidential Decree 341/78, ΦΕΚ 71 Α'/10.5.1978; Art. 2, par.3 of Law 1649/1986, ΦΕΚ 149 Α'/3.10.1986; Art. 19, par.1 of Law 1868/989, ΦΕΚ 230, Α'/10.10.89, as codified by Arts.79-80 CAP.

⁷⁴ See *S. Satta*, *Diritto processuale civile*, CEDAM, Padova, 1981, p. 132.

⁷⁵ See *C. S.*, sez. IV, 29 aprile 1980, n. 473; *C. S.*, ad. plen., 19 ottobre 1979, n. 24; *Cass.*, 8

applicant has a personal, direct, actual and concrete interest in attacking the act whose annulment is sought,⁷⁶ and they can participate in a trial before an Italian court.⁷⁷ The applicant will also have to prove the illegitimacy of the act under attack on the basis of one of the restrictively introduced grounds of incompetence – excess of power or violation of law.⁷⁸ If all these conditions are fulfilled, the administrative judge annuls the measure and either refers it back to the competent authority in case of incompetence, or annuls the measure in whole or part in cases of excess of power and violation of law.⁷⁹

The Italian position on the issue of remedies for state liability due to violations of EC law is quite restrictive in comparison with the relevant Greek and French provisions. The most obvious constraints for the applicants' access to justice refer to the delimitation of the circle of persons that may attack an illegitimate act. Although similar procedural restrictions are introduced by the French and Greek laws, these refer to the procedural ability of the applicant to be heard by the national courts, rather than to the quality of the right allegedly harmed by the act. An even more significant constraint concerns the delimitation of the grounds under which the application for annulment can be achieved. A consequent constraint refers to the extent of examination afforded by the Italian legal system with reference to the act. Although the legitimacy of the act is evaluated, there is no possible assessment of its merits. Similarly, there is little flexibility in the power of the administrative judge to rectify the damage caused, as there is no possibility of amending the act. Having said that, the decision of the Italian courts seems to be much stronger in legal value, as it is binding not only on the parties of the dispute, but *erga omnes*. This point is of particular significance to the three selected civil law jurisdictions, where – at least in theory – there is no obligation to follow precedents of other courts, especially those of different competence.

III. The Evolution of the Case Before the National Courts

In France and Greece, the hearing of the case in the first instance takes place before the French Administrative Court of First Instance and the Greek Tri-member Administrative Court of First Instance of the region where the wrongful administrative act was issued or where the head office of the administrative authority which omitted to issue the wrongful administrative act is based.⁸⁰ After

maggio 1978, n. 2208, TAR. Em. Rom., 26 gennaio 1977, n. 28.

⁷⁶ See C. S., sez. V, 28 febbraio 1975, n.233; TAR. Cal., 7 aprile 1975, n. 16; TAR. Lazio, sez. II, 17 dicembre 1975, n.575.

⁷⁷ See E. Picozza, "Processo amministrativo" in Enciclopedia del diritto, Giuffrè, Milano, 1987, pp. 463-519, at 474.

⁷⁸ See *Watkin*, *supra* note 41, p. 153.

⁷⁹ See *Certoma*, *supra* note 40, p. 259.

⁸⁰ See Art. 7, para. 6 in combination with para. 5 of Law 702/1977, ΦΕΚ 268, Α'/19.9.1977, and Art. 2, para. 1 and Art. 3, para. 1 of Presidential Decree 341/1978, ΦΕΚ 71, Α'/10.5.1978, as codified by Arts. 6 and 7 CAP.

the French reform of 1987, judgments of the administrative courts of first instance are subject to appeal before the *Cour administrative d'appel* of the region where the court issuing the judgment in the first instance is located.⁸¹ The first instance judgment is subject to appeal before the Administrative Court of Appeal,⁸² in the region of which sat the Administrative Court of First Instance that decided the case in the first instance. It would be a good idea to revise the above sentence because the use of 'which' twice makes it slightly confusing. The appeal can be based on any ground of law or fact,⁸³ as long as the relevant argument is concrete and precise,⁸⁴ and has been put forward by the appellant.⁸⁵ The court judging the appeal may quash, in part or in whole, or modify the judgment under appeal.⁸⁶ Moreover, the court of appeal may nullify or modify the administrative act under attack for any reason, irrespective of whether it has been put forward by the appellant or not.⁸⁷ The applicant may seek the cassation (*anairesei* or *cassation*) of the decision of the Court of Appeal⁸⁸ before the Greek or French Council of the State for matters of law only.⁸⁹ Admissible grounds of cassation are excess of power of the court whose judgment is under cassation, wrongful or illegal membership of the court, wrongful interpretation or application of law, violation of procedural law, and existence of two conflicting judgments on the same case.⁹⁰ Cassation on the basis of wrongful evaluation of facts,⁹¹ errors concerning facts,⁹² wrongful interpretation of the documents submitted as means of proof,⁹³ or violation of a non-binding internal administrative document has been unsuccessful before the Greek Council of the State.⁹⁴ The latter may reject the application or accept it, and quash the judgment under attack in part or in whole. In Greece, the result of a successful cassation is the return of the case to the court of first instance,⁹⁵ which is legally bound to

⁸¹ See the Law of 31 December 1987, as codified by Art. 7(4) CAP; see also C.E., 12 juillet 1969, L'Etang, Rec. Lebon, 388; *Rivero and Waline*, *supra* note 23, p. 161.

⁸² See Art. 8, para. 2 of Law 702/1977, ΦΕΚ 268, Α'/19.9.1977; Art. 2, para. 2 and Art. 66, para. 1 of Presidential Decree 341/1987, ΦΕΚ 71, Α'/10.5.1978, as codified in Art. 6(6) CAP.

⁸³ See Art. 95 CAP.

⁸⁴ See ΣτΕ 1275/89, ΔΔ, 1989, 1285.

⁸⁵ See ΣτΕ 531/89 and ΣτΕ 4664/84, ΔΔ, 1990, 786, note Papahatjis; 75/90, ΔΔ, 1990, 788; see also C.E., 27 juin 1919, Vierrat et fils, Rec. Lebon, 561.

⁸⁶ See Art. 174, para. 1, ΚΦΔ; Art. 75, pars.1 and 2 of Presidential Decree 341/1978, ΦΕΚ 71, Α'/10.5.1978, as codified in Art. 98 CAP; see also *Dadomo and Farran*, *supra* note 10, p. 239.

⁸⁷ See ΣτΕ 633/75, unreported; see also *Georges*, *supra* note 32, p. 263.

⁸⁸ Decisions in the first instance are not subject to cassation even after the end of the prescription period for the submission of an appeal. See ΟλΣτΕ 654/93, ΔΔ, 1993, 67; ΣτΕ 1648/93, ΔΔ, 1993, 714. See also CE, 7 fév. 1947, d'Aillières, G. Ar., no 68.

⁸⁹ See Art. 95, para. 1b of the Constitution; see *Dagtolou*, 1994, *supra* note 12, p. 698. For France, see C.E., 9 juillet 1956, Trassard, p. 310.

⁹⁰ See Art. 56 of Presidential Decree 18/89 of 30.12.1988, ΦΕΚ 8, Α'/9.1.1989; for France see reasons same *Rivero and Waline*, *supra* note 23, p. 199.

⁹¹ See ΣτΕ 2283/95, ΔΔ, 1995, 618; ΣτΕ 2625/89, ΕλλΔ, 1989, 374.

⁹² See ΣτΕ 1955/87, ΝοΒ, 1987, 716.

⁹³ See *Katras*, *supra* note 18, p. 310, note 10.

⁹⁴ See ΣτΕ 113/96, ΔΔ, 1996, 611.

⁹⁵ See ΟλΣτΕ 1470/90, ΔΔ, 1990, 713; see also ΣτΕ 1338/93, ΔΔ, 1993, 714.

follow the decision of the Council of the State.⁹⁶ In France, however, the *Conseil* may either refer the case back to the court whose decision it decides to quash, or keep it and decide on its substance as a court of first and final instance.⁹⁷

The Greek and French provisions on the remedies against the liability of the state have proven to be very similar. The applicant has the opportunity to present the case in two instances, before the court of first instance and the court of appeal. Both courts decide fully on the case and may adjudicate issues of both substance and law. This system is quite similar to the procedure before the civil courts for private disputes. Equally similar is the procedure of cassation, judged before the hierarchically highest court, which adjudicates on matters of law only. From this brief reference to the procedure before the administrative courts, it seems that applicants seeking compensation due to state liability suffer no additional burden in comparison with similar actions turned against private individuals.

This conclusion, however, does not take into account two areas where the state has maintained its privilege. First, both in Greece and in France, the submission of an action for appeal or cassation against the state lacks the suspending effect which is introduced for similar remedies adjudicated before the civil courts.⁹⁸ This means that the initial judgment can be executed even if an appeal or cassation is submitted. Consequently, persons who have lost their application against the state in the first instance and are suffering damages due to a wrongful administrative or legislative act or omission will continue to be bound by the act and, as a result, continue to suffer additional damages while the appeal or cassation against the allegedly wrongful initial judgment comes to an end. This wouldn't have been the case in claims for damages against private individuals.⁹⁹ It must be noted that cassations submitted by the Greek state do have suspending effect. This provision has been strongly criticized as a breach of the principle of equality amongst plaintiffs.¹⁰⁰

Second, the prescription periods introduced for the submission of the appeal and cassation are much shorter in comparison to actions against private individuals heard by the civil courts.¹⁰¹ In France, the appeal and cassation must be submitted within two months from the day that the judgment under attack was issued.¹⁰² In contrast, in civil law, the limitation period begins with its

⁹⁶ See ΣτΕ 173/90, ΔΔ, 1990, 714.

⁹⁷ See *Rivero and Waline*, *supra* note 23, p. 199; see also *Georges*, *supra* note 32, p. 264.

⁹⁸ In the case of Greece, see *Dagtoglou*, 1994, *supra* note 12, p. 672 for appeals and Art. 54 of Presidential Decree 18/89 of 30.12.1988, ΦΕΚ 8, Α' /9.1.1989; for France see *J. Vincent and S. Guinchard*, *Procédure Civile*, Dalloz, Paris, 1994, pp. 830-831; see also *Dadomo and Farran*, *supra* note 10, p. 239.

⁹⁹ See *Dickson*, *supra* note 27, p. 134.

¹⁰⁰ See Art. 19 of Emergency Law 1715/1973 and Art. 54 of Presidential Decree 18/1989 of 30.12.1988, ΦΕΚ 8, Α' /9.1.1989; see also *Dagtoglou*, 1994, *supra* note 12, p. 708.

¹⁰¹ See *Georges*, *supra* note 32, p. 262; see also *Vincent and Guinchard*, *supra* note 98, p. 824; *Soleidakis*, *supra* note 67, pp. 39 and 131-132.

¹⁰² See *Dadomo and Farran*, *supra* note 10, p. 239; see also *C. Gabolde*, *La Procédure des Tribunaux Administratifs et des Cours Administratives d'Appel*, 1998, Dalloz, Paris, p. 466;

notification to the plaintiff.¹⁰³ In civil law, this prescription period may be extended to two years, when the judgment has not been served to the applicant.¹⁰⁴ In Greece, these prescription periods are even shorter. The limitation period for the appeal is only one month starting from the next day after the notification of the judgment under attack and ending on the same day of the next month.¹⁰⁵ In any case, the appeal must be submitted within one year from the publication of the judgment, whereas in a civil trial the relevant prescription period is three years.¹⁰⁶ Following once again the French model, the Greek cassation must be submitted within 60 days starting from the notification of the judgment to the applicant or within 60 days starting from the date of publication of the judgment for the state.¹⁰⁷ In both France and Greece, the difference in the initiating event of the prescription period is a violation of the principle of equality amongst plaintiffs, which – in view of the delays in the publication of administrative judgments and the consequent longer limitation periods for the state – proves to be beneficiary to the state.¹⁰⁸

Without a doubt, the applicant's claim for compensation against the state would benefit from a dual-grade procedure and a cassation before the highest administrative court. However, it would have to overcome the procedural hurdles set by the Greek and French law in favour of the state, namely lack of suspending effect of the judgment under attack and shorter limitation periods in comparison with the relevant procedures introduced for claims against private persons.

In Italy, the applicant's case will be heard before the *Tribunale Amministrativo Regionale* (TAR) in the first instance.¹⁰⁹ Under Art.25 CPC, the *tribunale* of the place where the head-office of the relevant *Avvocatura dello Stato* is located, has the territorial competence to judge the case.¹¹⁰ As a general rule, the aim of the procedure before the TAR is to attack the legitimacy and expediency of the administrative or legislative measure that constitutes the source of the applicant's damage.¹¹¹ The court may annul the measure under

C.E., 8 décembre 1972, *Ministre de l'Intérieur*, D.A., 1973, 27.

¹⁰³ See Art. 528 CPC; see also *Cour d'Appel*, civ., 2, 13 janv.1983, *Gaz. Pal.*, 1983, 444, note du Rusquec.

¹⁰⁴ See Art. 528, para. 1 CPC; see also *Guinchard*, *infra* note 108, p. 290.

¹⁰⁵ See Art. 4 of Law 1406/83, ΦΕΚ 182 Α'/14.12.1983, which refers to Art. 167 of Presidential Decree 331/85, ΦΕΚ 116, Α'/31.5; see also ΣτΕ 3504/91, ΔΔ, 1991, 294.

¹⁰⁶ See Art. 5, para. 2 of Law 702/1977, ΦΕΚ 268, Α'/19.9.1977 and Art. 58, para. 3 of Presidential Decree 18/1989 of 30.12.1988, ΦΕΚ 8, Α'/9.1.1989. See also Art. 518, para. 2 of the Code of Civil Procedure.

¹⁰⁷ See Art. 53 of Presidential Decree 18/89 of 30.12.1988, ΦΕΚ 8, Α'/9.1.1989. See also *B. Papachristou*, *Limitation Periods for and against the State and Public Enterprises*, Sakkoulas, Athens 1993, p. 227; ΣτΕ 1084/1984, ΝοΒ, 1985, 342.

¹⁰⁸ See *Dagtolglou*, 1994, *supra* note 12, p. 706; see also *S. Guinchard*, *Code de Procédure Civile*, Litec, Paris, 1997-1998, p. 289.

¹⁰⁹ See Art. 6 Reg. Proc. TAR; see also Art. 35 Cons. St. and 6 reg. proc. Con. St.

¹¹⁰ See also Royal Decree n.1611 of 30 October 1933; Law n. 260 of 25 March 1958; Law n. 103 of 3 April 1979, as subsequently amended.

¹¹¹ See *Certoma*, *supra* note 40, p. 259.

attack for incompetence, excess of power or violation of law, or uphold it.¹¹² The merits of the case are irrelevant.¹¹³ The judgment of the TAR is subject to appeal for matters of law and fact before the *Consiglio di Stato* within a short prescription period of sixty days from the notification of the decision in the first instance to the applicant.¹¹⁴ Contrary to France and Greece, this period can be extended to the one year introduced by the relevant provision of civil procedure,¹¹⁵ in cases where the notification never took place or was undertaken in an illegal manner.¹¹⁶ As in Greece and France, however, the appeal before the *Consiglio di Stato* does not have suspending effect.¹¹⁷ Under Art.362 CPC, the decision of the Council of the State is subject to cassation before the *Corte di Cassazione* for jurisdictional grounds only.¹¹⁸ Having succeeded in annulling or modifying the administrative or legislative measure that caused damage to the applicant, and thus having acquired a subjective right, the applicant will bring the claim for compensation before the civil court. This will probably be the *Tribunale*, which adjudicates claims of above 750,000 Lire.¹¹⁹ Its decisions are subject to appeal on matters of law and fact before the *Corte d' Appello*, which must be submitted within the prescription period of thirty days starting from the day of the publication of the first instance judgment.¹²⁰ The decision on this appeal is subject to cassation before the *Corte di Cassazione* on matters of law only.¹²¹ Valid grounds for cassation include errors in the jurisdictional process,¹²² competence errors,¹²³ violation or false application of the law,¹²⁴ invalidity of the sentence or the procedure,¹²⁵ and omission or insufficient or contradictory legal basis.¹²⁶

¹¹² See *Watkin*, *supra* note 41, p. 155.

¹¹³ See *Certoma*, *supra* note 40, p. 258.

¹¹⁴ See Art. 28, para. 2 of Law 1034 of 6 December 1971; see also *Landi and Potenza*, *supra* note 48, p. 800.

¹¹⁵ See Art. 327 CPC.

¹¹⁶ See *F. Benvenuti*, "Processo amministrativo", *Enciclopedia del diritto*, Giuffrè, Milano, 1987, pp. 454-519, at 504.

¹¹⁷ See *Landi and Potenza*, *supra* note 48, p. 800.

¹¹⁸ See Art. 37 of Royal Decree no. 1443 of 28 October 1940; see also *Maisto and Miscali*, *Business Law Guide to Italy*, 1992, CCH Editions Ltd., Great Britain, p. 370.

¹¹⁹ See Arts.339 and 343 CPC; Cass. Civ., sez. III, 11 ottobre 1978, n. 3542; also *Certoma*, *supra* note 40, p. 188.

¹²⁰ See Art. 341 CPC; Cass. Civ., sez. III, 11 gennaio 1979, n. 220; see also *Watkin*, *supra* note 41, p. 105.

¹²¹ See Art. 111 of the Constitution; Art. 59 of Law 353 of 26 November 1990; see also *Maisto and Miscali*, *supra* note 118, p. 361; Cass. civ., sez. Un., 30 luglio 1953, n.2593.

¹²² See Cass. Civ., sez. II, 15 aprile 1987, n. 3725; Cass. Civ., sez. I, 8 luglio 1986, n. 4455.

¹²³ See Cass. Civ., sez. I, 17 gennaio 1980, n. 385; Cass. Civ., sez. I, 4 febbraio 1980, n. 776; Cass. Civ., sez. I, 14 aprile 1993, n. 4442; Cass. Civ., sez. I, 16 luglio 1979, n. 4139; Cass. Civ., sez. II, 5 febbraio 1979, n.764.

¹²⁴ Cass. Civ., sez. II, 25 gennaio 1980, n. 617; Cass. Civ., sez. II, 8 gennaio 1980, n. 124; Cass. Civ. Sez. II, 16 novembre 1985, n. 5622; Cass. Civ., sez. Lav., 18 gennaio 1993, n. 550; Cass. Civ., sez. I, 26 gennaio 1987, n. 713.

¹²⁵ See Cass. Civ., sez. Lav., 25 giugno 1985, n. 3810.

¹²⁶ See Cass. Civ., sez. Lav., 10 maggio 1986, n. 3113; Cass. Civ., sez. I, 22 febbraio 1986, n.

The Italian procedure for the achievement of compensation for state liability is characterized by its complexity,¹²⁷ which has already been mentioned. From the analysis of the evolution of the case before the Italian courts, other disadvantages of the Italian position become obvious. First, the applicant claiming damages from the Italian state will have to seek the annulment of the relevant administrative or legislative measure on very limited grounds as compared to the relevant provisions of French and Greek law. Indeed, the Italian grounds for the annulment of the act are limited to excess of power, incompetence and breach of law. This leaves little ground for annulment on the basis of wrongful interpretation of the evidence produced, wrongful ignorance of evidence or other matters of fact. This limitation in the grounds for annulment of the relevant measures acquires particular significance in the evaluation of the protection offered under the Italian provisions, if one takes into account that failure of the applicant to establish a valid reason for the annulment of the act signifies lack of a subjective right, which in turn means lack of opportunity to achieve compensation. Second, in Italy, the cassation in the administrative trial, allowed on matters of law only before the French and Greek Council of the State, is limited to purely jurisdictional issues. This withholds the applicant's right to a two-grade trial with the opportunity for a cassation on matters of law, which would normally be the case in claims for compensation against private individuals in the civil procedure. Third, as is also the case in France and Greece, the decisions of the Italian administrative courts lack suspending effect, a fact which disadvantages the applicants and favours the state.¹²⁸

Having said that, in Italy the time-limits set for the submission of appeals and cassations are the same in the administrative and civil process creating no difference between actions for compensation against the state and private individuals.¹²⁹ Moreover, in the Italian administrative stage of the claim for compensation, the presence of the applicant in court to defend its recourse is not necessary.¹³⁰ This signifies that the case will evolve even if, for any reason, the applicant does not appear before the administrative judge. In addition to this, the administrative judge has the power and the obligation to examine the validity of all grounds for annulment put forward by the applicant, but based on all possible arguments. This provision introduces a more in-depth examination of the merits on which the claim of the applicant is based.

From the analysis of the possible evolution of the trial before the national courts of the three selected jurisdictions, it becomes clear that the applicant's claim against the state is more complicated and difficult compared to claims against private individuals.

1981; Cass. Civ., sez. I, 16 gennaio 1991, n. 357; Cass. Civ., sez. I, 18 settembre 1986, n. 5656.

¹²⁷ See *Benvenuti* 1987, *supra* note 116, p. 462.

¹²⁸ See *F. Bartolini*, *Il nuovo codice di procedura civile*, Editrice la tribuna, Piacenza, 1995, pp. 536-537.

¹²⁹ See Art. 369 CPC, as modified by Art. 4 of Law 793 of 18 October 1977. For a criticism on the practice of introducing shorter time-limits, see Trib. di Roma, 11 febbraio 1993, *Foro it.*, 1993, 2391.

¹³⁰ See *ibid.*, 1987, p. 460.

IV. Enforcement and Compliance

Having followed the procedural aspect of the applicant's claim for compensation against the state in the three selected countries and having established that claims against the state in all three jurisdictions tend to be burdened by special provisions introduced in favour of the state, it is time to refer to an issue which is especially problematic in claims against the national authorities of these states. Perhaps the most important point of reference for the assessment of the efficiency of the protection offered to individuals at the national level refers to national provisions on the execution of the relevant judgments. In other words, for the evaluation of the level of access of applicants to justice at the national level, it is important to establish that the judgment of the national court awarding compensation to the applicant can be efficiently used for the final payment of the awarded sum to the foreign public limited.

In Italy, final judgments of civil and administrative courts may be enforced against the state. The procedure of execution or enforcement of civil court judgments is regulated by the third *Libro* of the CPC. As a general remark, it would be fair to state that in Italy (as in most civil law countries) the aim of the judicial system is to establish the existence of rights rather than to enforce these rights.¹³¹ As a consequence of this philosophy, the execution process is initiated at the demand of the plaintiffs, who must acquire one of the exclusively introduced executive documents of Art.474 CPC. These include final judgments of the civil and administrative courts.¹³² The powers awarded to Italian judges in the area of enforcement are wide and include all means under which the order of the final judgment on the substance of the case can be realized. Examples of such powers include an order to the administration to proceed to the realization of the judgment without delay, or an order to the administration to issue a new act without delay, or the decision of the court to take action *in lieu* of the administration.¹³³ As a rule, plaintiffs may seek the enforcement of previous judgments only when the state has failed to act in compliance with a previous final decision.¹³⁴ However, actions for enforcement have been considered admissible even in cases of pseudo-acts or wrongful acts.¹³⁵ Judgments on compliance are subject to appeal.¹³⁶

In France, the enforcement of final judgments¹³⁷ in the administrative process depends very much upon the goodwill of the administration, as there is practically no means of forced execution against the state.¹³⁸ This is mainly

¹³¹ See *Watkin*, *supra* note 41, p. 106.

¹³² See *Picozza*, *supra* note 77, p. 515.

¹³³ See *G. Paleologo*, "Le juge administratif italien", *Rivista trimestriale di diritto pubblico* 1993, pp. 615-628, at 619.

¹³⁴ See Cons. St., sez. V, 5 giugno 1985, n. 230; Cons. St., ad. plen., 19 marzo 1984, n.6.

¹³⁵ See Cons. St., ad. plen., 14 luglio 1973, n. 23; Cons. St., ad. plen. 29 gennaio 1980, n. 2.

¹³⁶ See *Picozza*, *supra* note 77, p. 518.

¹³⁷ See C.E., 15 mars 1963, Centre hospitalier régional de Grenoble c/ Bossé, Rec. Lebon, p. 173; C.E., 5 février 1969, Port autonome de Bordeaux, D.A., 1969, 109.

¹³⁸ See *Rivero and Waline*, *supra* note 23, p. 194.

based on the belief that there is a need for the state to enjoy certain privileges in order to serve the general good more effectively.¹³⁹ The weakness¹⁴⁰ of the administrative courts to force the national authorities to comply with their judgments is addressed via three routes: first, the right of the minister concerned to seek the assistance of the *Conseil d'Etat* on the appropriate matter in which a judgment against him may be enforced; second, the possibility of a *Conseil d'Etat* initiative to point out to the administration the implication of final judgments; and third, the right of the plaintiff to report difficulties of enforcement to the *Conseil*.¹⁴¹ Insofar as orders to payment of compensation are concerned, the state has the obligation to proceed with payment within four months of the publication of the judgment. If the state does not conform to this obligation, the *Conseil d'Etat* has the power to order financial penalties and a fine for each day of non-compliance.¹⁴² It must be noted, however, that the admittedly significant control awarded to the *Conseil* for the effectiveness of judgments against the state is clouded by the very cautious use of this action so far and the small number of successful actions.¹⁴³ Thus, there is little doubt that enforcement of final administrative judgments against the French national authorities is a problematic process. This is mainly due to the lack of execution mechanisms, as is the case with enforcement against private individuals. The introduction of indirect means of coercion of the French state to comply with administrative judgments can be of some help to those seeking the payment of compensation for violations of EC law. The usual compliance of the French authorities, albeit delayed, is also a fact that must be taken into account in the evaluation of the effects of this provision on the access of EU citizens to justice at the national level.¹⁴⁴ However, it would be unfair to say that this privilege of the French state does not radically and adversely affect the right of EU citizens to effective judicial protection, even after the violation has been declared by the courts and compensation has been ordered.

In Greece, the provision on compliance has been modified after the introduction of the new *Code of Administrative Procedure* of July 1999. According to the pre-existing system in Greece, as in France, there was no specific provision expressly introducing the obligation of the state to comply with the judgments of the administrative courts. Greek law introduced three methods of coercion for the state and its servants, so as to achieve compliance of the Greek authorities to the judgments of the courts. First, state employees who did not fulfil their duties were punished under Art.259 CrC. However, despite the undoubted application of this provision in the case of civil servants who

¹³⁹ See *Protio*, *supra* note 66, p. 2156.

¹⁴⁰ See C.E., 13 juillet 1962, Bréart de Boisanger, D., 1962, p. 664.

¹⁴¹ See *Dadomo and Farran*, *supra* note 10, p. 238; see also Arts. 58 and 59 of Decree of 31 July 1963.

¹⁴² See Act of 16 July 1980 as supplemented by decree of 12 May 1981; see also *Cairns and McKeon*, *supra* note 17, p. 189; C.E., 30 novembre 1923, Couitéas, G.A., 247.

¹⁴³ See *Rivero and Waline*, *supra* note 23, p. 197; see also C.E., 17 mai 1985, Mme Menneret, A.J.D.A., 1985, p. 454; C.E., 15 octobre 1986, Mme Leroux, A.J.D.A., 1986, p. 716.

¹⁴⁴ See *Gabolde*, *supra* note 102, p. 418.

failed or omitted to comply with administrative court judgments on compensation for state liability, its implementation in practice was hindered by the need to prove that the relevant civil servants acted with intent and that their aim was either personal illegal gain or the provocation of harm to the state or third persons. Second, Art.205 of the Employer's Code introduced disciplinary liability to employees who failed to fulfil their duties through wrongful acts or omissions. However, the successful action against civil servants who failed to comply with administrative judgments would only succeed if the plaintiff managed the impossible task of ignoring the collective policy of the particular department and managed to attribute liability to a specific person. Third, the failure or omission to comply with court judgments gave rise to state liability. In practice, however, the Greek authorities tended to use "inertia, stalling and silent rejection" as means of non-compliance.¹⁴⁵ Thus, even these three methods were not considered capable of persuading the state to comply.

This position changed, albeit basically in theory, after the 1997 ratification of the 1966 UN International Agreement on Personal and Political Rights by the Greek Parliament.¹⁴⁶ The Agreement, which guarantees the execution of judgments against the authorities of the state, led a small number of Greek judges to recognize that forced execution was possible even against the state.¹⁴⁷ The new *Code of Administrative Procedure*, in force since July 1999, introduces the first Greek legislative provision on the obligation of the state to comply with the judgments of the Greek administrative courts. Art.198 *CAP* regulates that administrative authorities have the obligation to comply with the content of judgments on disputes brought before the courts under the procedure of *prosfygi*. In cases of non-compliance, state employees who fail or omit to comply are punished under Art.259 of the Penal Code and are personally liable to compensate those injured by their actions or inaction. There is little doubt that Art.198 is a revolutionary provision whose introduction can be seen as a guarantee for the effective protection of natural and legal persons claiming compensation for damages by the Greek state. Indeed, a guarantee of compliance by the Greek administrative authorities with the judgments of the administrative courts would signify unhindered access to justice for individuals suffering damages as a result of the Greek failure to comply with EC legislation. The question is, whether this new provision really guarantees this compliance. The interpretation of this provision by the Greek courts and its implementation by the administrative authorities in future cases will demonstrate its value. However, even without the benefit of adequate case-law on this new provision, there are three points of concern in relation to its possible benefits. First, Art.198 refers to judgments under *prosfygi* only. In the cases examined in this thesis, this signifies the state's obligation to comply with the judgments of the administrative courts concerning the validity of administrative acts and their compliance with EC legislation. However, it seems that the state's obligation to

¹⁴⁵ See *Dagtolou*, 1994, *supra* note 12, p. 608.

¹⁴⁶ See Art. 1 of Law 2462/1997 ΦΕΚ Α' 25/26.2.1997.

¹⁴⁷ See 1212/1999 ΜοβΠρΑθ (Ασφ.), ΝοΒ, 1999, pp. 986-988.

comply does not cover applications for damages suffered due to illegal acts or omissions of the state. It seems therefore that there is little guarantee for the final payment of compensation by the Greek state. Second, the result of non-compliance is not a liability of the state as such, but personal criminal and civil responsibility of the state employee whose action or inaction is considered to be in clash with judgments of the administrative courts. The value of these provisions was discussed in the analysis of the old position on non-compliance. The criminal liability of the employee requires proof of intent to harm and aim of personal gain, whereas the civil liability of the employee requires attribution of liability to an action or inaction of a particular natural person employed in one of the departments dealing with the file of the injured party. Third, in view of the express abolition of prior provisions on issues covered by the new Code,¹⁴⁸ it is doubtful whether the disciplinary punishment of such employees – introduced in the old system, but ignored in the Code – is still valid.

On the basis of the analysis of the Code so far, it is fair to say that the provision of the new Code on compliance is a timid act of the Greek legislator, which does not guarantee the effective protection of EU citizens suffering damages due to the non-compliance of the Greek authorities with EC legislation. However, a final assessment of the new Code would be incomplete without reference to the issue of enforcement. In the past, in Greece – as in France – there was no mechanism for the enforcement of civil, criminal or administrative judgments against the state and its authorities.¹⁴⁹ This position was strongly criticized as a direct breach of the constitutional principle, which introduces unhindered access of all citizens to justice.¹⁵⁰ Art.199 of the new Code regulates that for the enforcement of judgments reached under the procedure of application for damages, plaintiffs must follow the enforcement procedure of the Greek Code of Civil Procedure. In other words, for the enforcement of judgments on compensation, applicants can seize assets of the Greek state under the procedure followed in the case of seizure against private individuals.¹⁵¹ This constitutes the ultimate weapon for the coercion of the Greek state into compliance with the relevant orders for the payment of compensation by administrative courts. However, in view of the novelty of the provision on seizure against the state, there is uncertainty over the practical application of this provision. It is difficult to imagine which assets of the Greek state will be seized and, when liquidated, which particular department or organ will be entitled to the excess remaining after the subtraction of the sum ordered by the court. Moreover, there is scope for an argument that the seizure of assets of the state clashes with the general principle of the prevalence of public interest, which in this case is the unhindered functioning of the Greek administrative authorities. Furthermore, there is a problem concerning the legal basis of the applicant's

¹⁴⁸ See Art. 285 CAP.

¹⁴⁹ See Law 2052/52 of 24-28 April 1952; see also Art. 909 CCP; ΟΛΑΠ 108/71, ΝοΒ, 1971, 601.

¹⁵⁰ See Art. 20, para. 1 of the Constitution; see *Dagtoglou*, 1994, *supra* note 12, pp. 52-53; see also Athens Single-member Court of First Instance 6990/78, ΤοΣ, 1979, 649.

¹⁵¹ See Travaux Préparatoires of Law 2717/1999, Art. 199.

request for the enforcement of judgments ordering compensation: as these are brought before the administrative courts under applications for damages, rather than under the procedure of *prosfygi*, the state has no obligation to comply. Since the state is not obliged to comply, it is doubtful that a seizure of assets will be theoretically sound and, consequently, practically allowed by the Greek judges who have always exercised their right to refrain from applying a procedurally valid Greek law, if they consider it illegal or unconstitutional. Last but not least, this provision can only benefit future claims for damages and is inapplicable to orders for compensation already declared by the courts.¹⁵² From the analysis of the old and new regimes on the obligation of the Greek authorities to comply with administrative judgments and on the issue of enforcement, it is clear that even the new Code fails to guarantee final payment to applicants, even after a final judgment ordering compensation has been reached.

The issue of enforcement and compliance of the state with court decisions is of crucial importance for the evaluation of the effectiveness of the protection offered to EU citizens suffering damages as a result of state violations of EC law. In France and, seemingly still in Greece, there is little evidence that the applicants who manage to acquire court orders for compensation will be able to use them and achieve payment in practice. The French express provision of non-enforcement against the state and the Greek ambiguity in the practical implementation of the new, seemingly permissive provisions on enforcement, constitute a significant blow to the effectiveness of judicial protection in practice. As they limit the right to compensation, these doctrines can be viewed to be in direct clash with the principle of the effective protection of the individual and, consequently, can be deemed illegal under EC law. This, however, is only one side of the problem. The final payment of compensation may satisfy the right of applicants to achieve restoration of damages suffered in the past. In both French and Greek law there is little, though, which could prevent future damages, as the national authorities may still refuse to comply with legality through the final rectification of the administrative or legislative act constituting the source of past damages. The constant persecution of authorities or employees for compensation due to their failure to comply with prior court's judgments, declaring the relevant acts illegal, is little comfort for applicants whose main aim is to finally establish and pursue their economic activity within the Member State of their choice.

C. Substantive Conditions for Achievement of Compensation

The analysis of the procedural conditions for the achievement of compensation for applicants suffering damages due to violations of EC law by the French,

¹⁵² See Art. 278 CAP.

Italian and Greek authorities has demonstrated that the privileges enjoyed by the state in such disputes impede, to a certain extent, the applicants' case for compensation. Even though the relevant provisions are slightly different in the three selected countries, mainly as a result of the Italian civil courts' competence to award compensation against the state as opposed to the French and Greek unitary system of administrative justice, the content of the relevant procedural provisions was found to be rather similar. Probably more so are the substantive provisions on the establishment of state liability in the three countries, which all follow the civil law tradition.¹⁵³ In general, the conditions of liability in the three selected jurisdictions are wrongful act, damage and a causal link between the first two elements. Since the civil law principles of liability are also applicable to state liability,¹⁵⁴ these elements also apply to the cases examined in this thesis. Let us examine each one of these elements separately.

I. Wrongful Act or Omission

The source of the damage must be a wrongful act or omission by the authorities of the state. For the purposes of establishing state liability in the three selected countries, an act is defined as a judicial or material activity accomplished under the rules of administrative law or an omission of such activity.¹⁵⁵ Activity of the public administration giving rise to state liability can be acts, operations or any external expression of behaviour.¹⁵⁶ Material facts include negligence, error, delay or even failure to act within the time-limits introduced by the laws of the state.¹⁵⁷ Omissions are defined as violations of the legal obligation of national authorities to issue an act, or the ignorance of an act which is beneficiary to the citizen or which may prevent future damage to the citizen in question.¹⁵⁸ An omission presupposes a "concrete legal obligation" to act.¹⁵⁹ It goes without saying that the relevant state act must be a result of willing and conscious behaviour.¹⁶⁰ The classification of the relevant act as enforceable under the national provisions of procedure is irrelevant for its characterisation as a

¹⁵³ See *P. Poulitsas et al.*, Interpretation of the Civil Code, Sakkoulas, Athens, 1955, at Arts. 104-106 ΕισΑΚ, paras. 9-10.

¹⁵⁴ See *Rivero and Waline*, *supra* note 23, p. 232; *A. Pizzorusso*, Manuale di istruzioni di diritto pubblico, Jovene Editore, Napoli, 1997, p. 537; *Spiliotopoulos*, *supra* note 13, p. 163. See also Arts. 104-106 ΕισΑΚ for Greece; Art. 2043 CC for Italy and Art. 1582 CC for France as applied in the case of state liability.

¹⁵⁵ See *Spiliotopoulos*, *supra* note 13, p. 163.

¹⁵⁶ See *Landi and Potenza*, *supra* note 48, p. 330; see also *Soleidakis*, *supra* note 67, p. 94.

¹⁵⁷ See *Cairns and McKeon*, *supra* note 17, p. 139; see also ΑΠ 106/1969, ΝοΒ, 1969, 676; ΑΠ 1616/1981, ΕΕΝ, 1981, 861.

¹⁵⁸ See Athens Court of Appeal 1335/1899, Θεμ., ΙΑ, 262; ΑΠ 315/1911, Θεμ., ΚΓ, 81; see also Athens Court of Appeal 2041/1906, Θεμ., ΙΗ, 601; Athens Court of Appeal 458/1934, ΕΕΝ, Α, 400.

¹⁵⁹ See the Italian C.C., 83/908, 82/2134.

¹⁶⁰ See *G. Cian and A. Trabucchi*, Commentario breve al Codice Civile Cedam, Padova, 1988, p. 2043.

possible source of state liability.¹⁶¹ Even emanations of legislative acts that are “irregular and faulty” may give rise to state liability on the basis of the damage they may cause in the future to individuals against whom the relevant legislative act may be applied.¹⁶² This aspect of state liability will be examined separately. In Italy, the action of the authorities must also harm a subjective right of the citizen. Such a subjective right may derive from the existence of a wrongful judicial act, an administrative regulation or a simple behaviour.¹⁶³

The act or omission giving rise to state liability must be illegal, in other words it must be *contra ius*, namely contrary to the authority’s duty to comply with and apply the national laws and regulations.¹⁶⁴ However, the law which the national authorities breach in each particular case must be introduced in order to benefit the citizens of the country. The breach of acts introduced for the exclusive protection of the general public interest cannot give rise to state liability.¹⁶⁵ As a rule, state liability occurs as a result of unlawful acts only.¹⁶⁶ In fact, illegality is widely considered to be a necessary pre-requisite for the establishment of state liability. This is the currently prevailing view, which however is subject to possible change due to the recent development of a more liberal doctrine of state liability for legal acts by the ECJ.¹⁶⁷ However, so far there is little evidence to demonstrate that national courts are willing to accept state liability for legal acts. This is more so in Italy, where the illegality of the act must be declared by an administrative court before the subjective right, giving rise to a right to compensation, can be conceived.¹⁶⁸

In order to establish state, rather than personal liability, the act or omission must have taken place within the framework of the provision of public service by the authority that issues or omits to issue the act giving rise to a claim for compensation. If this is the case, the state is liable for compensation and not the

¹⁶¹ See Athens Court of Appeal 446/1901, Θεμ., ΙΓ, 38; 506/1915, Θεμ., ΚΖ, 548; 1203/1910, Θεμ., ΚΒ, 519.

¹⁶² See *Zanobini*, *supra* note 52, p. 339.

¹⁶³ See *Landi and Potenza*, *supra* note 48, p. 332; see also Trib. Roma, Sez. I, 30 giugno 1987, Giust. civ., 1988, 1041; *L. Attolico*, “La responsabilità civile della p. a.”, 38 Giust. civ. 1988, pp. 1042-1045, at 1042.

¹⁶⁴ See *Poulitsas et al.*, *supra* note 153, para. 25; see also *F. Piga*, “Responsabilità civile degli amministratori pubblici: nuovi profili”, 64 Foro amministrativo 1988, pp. 747-770.p. 748; Trib. Roma, Sez. I, 30 giugno 1987, Giust. civ., 1988, 1041; ΔΠρΑθ. 10472/1990, Αρμ., ΜΕ, 1991, 93.

¹⁶⁵ See ΑΠ 20/1929, Θεμ., Μ, 277; ΑΠ 130/1932, Θεμ., ΜΓ, 413; ΑΠ 729/1981, ΝοΒ, 1982, 231; Athens Court of Appeal 130/1904, Θεμ., ΙΣΤ, 360; see also *Spiliotopoulos*, *supra* note 13, p. 168. Laws referring to compensation for state liability are not set for the protection of general public interest; see *N. Kalogirou*, *The Criminal and Civil Liability of Members of the Government and the Civil Liability of the State in Greece*, Sakkoulas, Athens/Komotini, 1993, p. 229.

¹⁶⁶ See *K. Kerameus and P. Kozyris*, *Introduction to Greek Law*, Kluwer/Sakkoulas, The Netherlands, 1993, p. 42; see also *R. Chapus*, *Droit administratif général*, Editions Montchrestien, Paris, 1987, p. 904; see also C.E., 11 mai 1979, Boulanger, 202.

¹⁶⁷ See *Cian and Trabucchi*, *supra* note 160, p. 1539; see also *Zanobini*, *supra* note 52, pp. 337 and 350.

¹⁶⁸ See *Attolico*, *supra* note 163, p. 1043; *Zanobini*, *supra* note 52, p. 339; see also *P. Pavlopoulos*, *Civil Liability of the State*, Sakkoulas, Athens, 1986, p. 258.

civil servant who acts or omits to act.¹⁶⁹ This is so, because the state authority and its employers are bound by a relationship of representation or order, which signifies that the state is bound by the actions or omissions of its employees as long as these fall within the framework of their contract of representation or order.¹⁷⁰ Activity within the framework of their public service is defined as the action within the circle of the competence of their functioning, which is regulated by legal rules introducing the conditions of legality of their acts.¹⁷¹ However, if the civil servant acts or omits to act outside the framework of the activity undertaken by the department to which s/he is employed, or if the service provided to the citizen is in the name of the natural or legal person undertaking it on behalf of the state, the act or omission cannot be attributed to the state.¹⁷² This could occur when the civil servant undertakes an action totally foreign to the work of the authority where s/he is employed with intent to achieve personal benefit.¹⁷³ In any other case, liability must be attributed to the state as a general rule.¹⁷⁴

The source of illegality of the state's activity, or lack of, is the violation of law, which constitutes a sufficient element for the establishment of state liability as an objective factor. This means the citizen will not have to prove the existence of fault of the administration in any of the three countries examined here.¹⁷⁵ Thus, the public administration is at wrong every time the law is broken. The theoretical justification of the prevalence of objective state liability lies with the impossibility in the attribution of subjective fault to particular organs in complex procedures of legislative and administrative decision-making. It is felt,

¹⁶⁹ See ΑΠ 864/1954, Θεμ., ΞΣΤ, 68; Π.Πατρ. 1458/1932, Θεμ., ΜΓ, 808; Εφαθ 1103/1953, Θεμ., ΞΔ, 792; ΑΠ 352/1953, Θεμ., ΞΔ, 736.; see also *G. Braibant*, *Le droit administratif français*, 1999, Dalloz, Paris, p. 267; and *G. Braibant and B. Stiru*, *Le droit administratif français*, 2002, Presses FNSP, Coll. Amphithéâtre.

¹⁷⁰ Art. 28 of the Italian Constitution; *G. Landi and G. Potenza*, op. cit., p. 337; *Zanobini*, *supra* note 52, p. 340; *Rivero and Waline*, *supra* note 23, p. 238. *Poulitsas et al.*, *supra* note 153, para. 49.

¹⁷¹ See *G. Papahatjis*, *System of Administrative Law Applicable in Greece*, Sakkoulas, Athens, 1983, p. 42.

¹⁷² See Cass., 17 febbraio 1939, Foro it., repert., 1939, 1568; Cass., 1 luglio 1941, Foro amm., 1941, II, 90; Trib. Milano, 11 giugno 1947, Mon. trib., 1947, 237; Cass., 23 giugno 1949, Foro it., repert., 1949, 1429.

¹⁷³ See Cass., 18 gennaio 1985, n.485; Corte dei Conti, Sez. Basilicata, 10 febbraio 1998, Foro am., 1998, 2579; Corte dei Conti, Sez. riun., 23 settembre 1997, Foro am., 1998, 1238. Even then, liability can only be established for positive damage, not mere loss of profits. See *Kerameus and Kozyris*, *supra* note 166, p. 43.

¹⁷⁴ See Cass., 17 dicembre 1986, n.7631; 22 ottobre 1984, n.5333.; *F. Piga*, op. cit., p. 759; *Braibant*, *supra* note 169, p. 267.

¹⁷⁵ See *Kerameus and Kozyris*, *supra* note 166, p. 43; *Spiliotopoulos*, *supra* note 13, p. 168; ΑΠ 466/1969, ΝοΒ, 1969, 50; *Jarvis*, *supra* note 28, p. 400; Trib. admin. de Strasbourg, 5 juin 1984, Société Trench-Alsacaves, [1986] 2 CMLRev. 625; Trib. admin. Dijon, 15 avril 1986, Société venicole Berard SA, Rec. Lebon, 1986, 311, RTDE 1988, 112, note Soler-Couteaux; Cour d'Appel Admin. de Nantes, 20 juin 1991, Rec. Lebon, 1991, 742; C.E., 28 février 1992, AJDA, 1992, pp. 210-226, at 220; see also *Pizzorusso*, *supra* note 154, p. 538; Cass., Sez. un., 20 gennaio 1964, n. 126; see Trib. di Roma, Sez. I, 30 giugno 1987, Giust. civ., 1041.

and rightly so, that the introduction of subjective fault as an additional element of state liability would make its proof by the individual citizen impractical. It would be humanly impossible for ordinary citizens to pinpoint all the particular natural and legal persons involved in the legislative or administrative act which is the source of liability. It would be equally impossible for ordinary citizens to attribute the exact percentages of such liability to each person involved.¹⁷⁶ Although the end result for the applicant is the same in all three countries, namely subjective fault of the administration does not have to be proven for the success of the claim for compensation, it would not be right to state that fault is not an element of liability in France. In the past, the French courts did indeed declare that state liability is one of no fault.¹⁷⁷ However, this position was battered by vocal critics who characterized it as “a disgrace” for the French legal system.¹⁷⁸ Rather than a reaction to the principle of no-fault state liability, this was the expression of adverse feelings towards the background to the decision of the French courts to introduce the principle in the first place. In other words, this was the well camouflaged attempt of French judges to avoid the examination of the preliminary issue of the legality of the act or omission.¹⁷⁹ As a result, the position of the French courts has recently changed and fault, albeit not subjective, is indeed an element of state liability. However, fault is required in the objective sense, namely as an element which is fulfilled with the existence of a violation of law.¹⁸⁰ For violations of EC law specifically, all three jurisdictions examined here now accept that the basis of liability is the breach itself.¹⁸¹ The legal basis of this doctrine is the French and Greek recognition of the primacy of EC law, and the Italian doctrine on the *obbligatorietà* of EU provisions.¹⁸²

Despite the legal basis of the national provisions on wrongful acts or omissions as elements of state liability in the three selected countries, the fact still remains that the applicant suffering damages as a result of a state violation of EC law does not have to prove a subjective fault by the administration. This means that the wrongfulness of the act or omission will be judged on the basis of its non-compliance with EC law and not on the basis of alleged negligence or intent by the national authority that issued the act or undertook the omission. It

¹⁷⁶ See *Zanobinbi*, *supra* note 52, p. 342.

¹⁷⁷ See C.E., Ass., 28 mars 1984, *Société Alivar*, A.J., 1984, 396.

¹⁷⁸ See *B. Genevois*, “Responsabilité de la puissance publique”, 40 AJDA 1984, pp. 396-398, at 399.

¹⁷⁹ See C.E., Ass., 28 février 1992, *Société Arizona Tabaco Products*, A.J., 1992, 210, concl. Laboque; see also *Jarvis*, *supra* note 28, p. 400.

¹⁸⁰ See Cour d’Appel Admin. de Nancy, 9 juillet 1991, *Ministre de l’ économie, des finances et du budget v Société Lefebvre*, Rec. Lebon, 741; C.E., 20 janvier 1988, *Aubin*, Rec. Lebon, 1988, 20; JCP, 1989, II, 21169, note Moderne, AJDA, 1988, 418, note Prétot; Cour de Cassation, ch. comm., 21 février 1995, *Dalloz*, 1995, IR 100; C.E., 28 février 1992, [1993] 1 CMLRev. 252; *Dantonel-Cor*, *supra* note 30, p. 493.

¹⁸¹ See *D. Simon*, “Droit communautaire et responsabilité de la puissance publique”, 49 *Actualité Juridique Droit Administratif* 1993, pp. 235-243, at p. 237; see also *G. Alpa*, “Nuove figure di responsabilità civile di derivazione comunitaria”, 63 *Responsabilità civile e previdenza* 1998, pp. 5-28, at 24; *Dagtolou*, 1994, *supra* note 12, p. 69.

¹⁸² See *ibid.*, pp. 41 and 69; C. St., Sez. IV, 18 gennaio 1996, n. 54, *Giust. civ.*, 1996, 1191.

is widely accepted that the lack of a subjective element of fault is a guarantee of unhindered access of the applicant to justice.¹⁸³ Indeed, the introduction of the mere demonstration of the existence of an EU violation as a proof of wrongfulness could not have been more liberal and beneficial a provision for the applicant. In any case, any concept of fault going beyond illegality would clash with the EU doctrine of *Brasserie* and would therefore be an unacceptable limitation to the access of applicants to justice at the national level.¹⁸⁴

II. Damage and Causation

The other two elements of state liability are damage suffered by the applicant as a result of the state's violation of EC law and a causal link between wrongful act and damage. Since these elements of liability are regulated by the relevant doctrines of civil law, they will be analysed briefly. Damage is defined as any loss suffered by the citizen in his/her corporal or incorporeal goods, or as any reduction in the legal interests of the citizen.¹⁸⁵ According to a well established civil law principle applicable in the vast majority of civil law countries, damage is compensated only if it is certain, direct and subject to financial evaluation.¹⁸⁶ The damage is certain, if it is existent and actual. Having said that, future damage may be compensated for, as long as it can be currently evaluated and its realization is certain, or at least quite probable.¹⁸⁷ As a general rule, the damage must be quantifiable. However, even where this is not the case, some damages will be awarded.¹⁸⁸ Damages can be awarded for financial loss, moral loss and loss of chance, that is, loss of the opportunity to gain.¹⁸⁹ In the last case, the chance to gain must be established with sufficient certainty.¹⁹⁰ This would be the case in the loss of the chance to enter into a contractual agreement, or to acquire

¹⁸³ See *Simon*, *supra* note 181, p. 241.

¹⁸⁴ See *Jarvis*, *supra* note 28, p. 404.

¹⁸⁵ See *Spiliotopoulos*, *supra* note 13, p. 165; see also *Piga*, *supra* note 164, p. 753; C.C., Civ., 13 février 1923, D.P., 1923, 1, 52.

¹⁸⁶ See *Braibant*, *supra* note 169, p. 293; see also *Rivero and Waline*, *supra* note 23, p. 234; *Certoma*, *supra* note 40, pp. 366-367; *Soleidakis*, *supra* note 67, p. 107.

¹⁸⁷ See *Georges*, *supra* note 32, p. 363; see also *Braibant*, *supra* note 169, p. 293; A. Iatrou, *An Outline of the Greek Civil Law*, Tsapepas, Athens, 1986, p. 106; *Kalogirou*, *supra* note 165, p. 229; Athens Court of Appeal 5432/1979, NoB, 1979, 1638.

¹⁸⁸ See C.E., 27 janvier 1988, Giraud; see also *Brown and Bell*, *supra* note 29, p. 201; *Certoma*, *supra* note 40, p. 367.

¹⁸⁹ See C.E., 27 may 1987, Aubin, Rec. Lebon, 1988, 20; JCP, 1989, II, 21169, note Moderne, AJDA, 1988, 418, note Prétot; C.E., Ass. plén., 6 mars 1959, Secrétaire d'Etat à l'agriculture c/ Sté Fros Frères, Rec. Leb., 157; C.E., Ass., 28 février 1992, AJDA, 210; see also *Brown and Bell*, *supra* note 29, p. 210; see also *Spiliotopoulos*, *supra* note 13, pp. 165-166; *Landi and Potenza*, *supra* note 48, p. 348; Corte dei Conti, Sez. Basilicata, 10 febbraio 1998, Foro amm., 1998, 2579; AII 515/1980, NoB, 1980, 1946.

¹⁹⁰ See C.C., Civ., 2e, 20 juillet 1993, D., 1993, 526, note Chartier. It must be taken into account, however, that by nature an opportunity is never totally certain. See C.C., Crim., 9 octobre 1875, Gazz. Pal., 1976, 1.4.

funding which would have added to the property of a person.¹⁹¹

Moreover, in order to succeed in its claim for compensation, the applicant must prove that the relevant damage is direct. In other words, the applicant must prove that the damage is an immediate and direct consequence of the wrongful act or omission.¹⁹² This occurs when, under normal circumstances, the wrongful act or omission would lead to the damages suffered.¹⁹³ Thus, the applicant seeking compensation will have to concentrate on two elements for the proof of causality between wrongful act and damage, namely the criteria of normality and proximity. The applicant will have to prove that the damage is the normal consequence of the wrongful act or omission, and that he/she was close to the act in time, space and situation that caused harm.¹⁹⁴ Thus, it is the theory of the *causa adequata* which is applicable in this case.¹⁹⁵

In the case of individuals suffering damages as a result of the state's violation of EC law, the applicant will seek compensation for losses suffered until the hearing of the trial and amounting to expenses incurred for the procedure necessary for the acquisition of state permission to establish or trade. However, the main claim of the applicant would be compensation for the loss of the opportunity to gain through trade within the state in question, or trade in a specific area of commercial activity within the state extending both before and after the hearing and until the annulment or modification of the wrongful act. This would amount to the profit which is normally expected to accrue in the ordinary course of things or by reference to specific circumstances where preparatory measures have been taken.¹⁹⁶ The positive damage incurred is obviously certain and quantifiable. As far as the *manque de chance* is concerned, it may be future loss but the applicant will have little difficulty in proving that authorization from the state would produce gain, which they now missed. Means of proof in this direction could be the production of annual profit of companies dealing in similar areas of trade, or reference to contracts which would have been entered into if the applicant were allowed to establish within the host state. The main problem with this loss of opportunity to gain, however, lies with the evaluation of the damages suffered. Although this damage is very difficult to

¹⁹¹ See C.E., 19 avril 1985, Comm. de Vitrolles, RDP, 1985, 1701; C.C., Crim., 3 novembre 1983, JCP, 1985, II, 20360; for other types of loss of chance, see C.E., 3 novembre 1971, Dlle Cannac, 650; C.E., 17 mars 1972, Dlle Jarrige, 222; C.E., 22 janvier 1986, Dlle Grellier, AJ, 1986, 694; C.E., 6 février 1974, Gomez, AJ, 456.

¹⁹² See *Georges*, *supra* note 32, p. 363; see also *Certoma*, *supra* note 40, p. 367.

¹⁹³ See *Spiliotopoulos*, *supra* note 13, p. 166; See *F. Galgano*, *Diritto Civile e Commerciale: Le Obligazioni e I Contratti*, CEDAM, Padova, 1990, p. 301; C.C., Crim., 10 mai 1984, D., 1985, 256, note Penneau; AΠ 316/1983, NoB, 1983, 1571; AΠ 913/1988, ΕλΔνη, 1989, 1331; Athens Court of Appeal 13613/1988, NoB, 1989, 1299.

¹⁹⁴ See *Braibant*, *supra* note 169, p. 293; Cass., 20 dicembre 1986, n. 7801, Mass. Foro it., 1986, 480; ΔΠρΑθ 10472/1990, Αρμ, ME, 1991, 93; AΠ 462/1957, NoB, 1957, 111; AΠ 64/1955, NoB, 1955, 495.

¹⁹⁵ See *Iatrou*, *supra* note 187, p. 107; *Piga*, *supra* note 164, p. 753; *G. Goubeaux and P. Bihl*, *Code Civil*, Dalloz, Paris, 1995-1996, p. 931.

¹⁹⁶ See *Iatrou*, *supra* note 187, p. 106; Cass., 24 febbraio 1987, n. 1937, Arch. circolaz., 1987, p. 471; C.C., Civ., Ire, 18 octobre 1978, Gaz. Pal., 1979, 1, 118, note Damien.

quantify, the applicant should expect some level of compensation from the courts. Furthermore, the applicant will have to establish the direct causal link between act and damage as introduced by the prevailing doctrine on civil and administrative liability in the three selected countries, the *causa adeguata*. In practice, this would be quite easy, as without the state's prohibition to establish or trade, the applicant would have been allowed to make profit anyway. This brief reference to the issue of damage and causation demonstrates that the relevant national provisions allow a fair opportunity for the applicant to achieve compensation for all possible types of loss.

III. Restitution

In the case of individuals suffering damages from acts of the national authorities that are contrary to EC law, *in natura* restitution is not possible. In fact, it is accepted that restitution *in natura* cannot be requested by the state due to the principle of the separation of powers, which prevents the intervention of the judicial function in the executive function.¹⁹⁷ This argument is not without legal basis. *In natura* restitution would involve an order by the competent judge to the authorities to abolish a precise act. The theoretical and practical problems of such interference by the judiciary in the executive have already been analysed. In any case, *in natura* restitution would signify reversal to the situation before the occurrence of the damage, that is, abolition of the administrative or legislative act in question. However, this form of restitution could not be considered complete, as it would still not rectify the applicant's loss of the opportunity to gain.¹⁹⁸ Since the judge may order *in natura* restitution only when this type of compensation is not contrary to the interests of the applicant,¹⁹⁹ this type of restitution cannot possibly be ordered in the case of applicants suffering damages as a result of breaches of EC law by national authorities. Indeed, in order to achieve full restitution, the judge in the case will have to order a lump sum for the expenses incurred and the loss of opportunity until the date of the trial, as well as a daily rate for compensation of future damages until the administration abolishes the wrongful act or proceeds with the act so far omitted.²⁰⁰ For the evaluation of the compensation awarded, the judge will base the judgment on the particular circumstances of the case and the detailed

¹⁹⁷ See *Poulitsas et al.*, *supra* note 153, para. 70; see also *Rivero and Waline*, *supra* note 23, p. 245.

¹⁹⁸ See *Poulitsas et al.*, *supra* note 153, para. 70; *Cian and Trabucchi*, *supra* note 160, p. 2043; *Chapus*, *supra* note 168, p. 855; *P. Dagoglou*, *General Administrative Law*, Sakkoulas, Athens/Komotini, 1992, p. 801.

¹⁹⁹ See *Spiliotopoulos*, *supra* note 13, p. 171; *Iatrou*, *supra* note 187, p. 108; *Certoma*, *supra* note 40, p. 368.

²⁰⁰ See *Galvano*, *supra* note 193, p. 307; *Iatrou*, *supra* note 187, p. 140; Cass., 16 gennaio 1987, n. 333, *Mass. Foro it.*, 1987; *Corte dei Conti*, Sez. I centrale, 6 agosto 1997, *Foro amm.*, 1998, 1243; Athens Court of Appeal 523/1960, *Δικ.*, 1960, 581.

liquidation of losses submitted by the applicant.²⁰¹ A daily interest may also be awarded running from the date that the damage occurred until the date of payment of compensation.²⁰²

The Greek, French and Italian provisions on restitution for damages resulting from state liability are a replica of the relevant provisions for compensation in private disputes, to which they refer anyway. The compensation awarded to applicants equals the amount of money by which their fortune has decreased due to the wrongful act or omission of the administration.²⁰³ This principle, also known as *Differenztheorie*, prevails in all cases of compensation in the three selected jurisdictions and, being non-discriminatory, is in full compliance with the criteria of restitution introduced by the EU doctrine on state liability.²⁰⁴

IV. Compensation for Legislative Acts

The analysis of the substantive conditions for the establishment of state liability in France, Italy and Greece has demonstrated that the elements of state liability for breaches of EC law in the three selected countries do not set limitations to access to justice. However, although reference was made to both administrative and legislative acts as sources of possible damages for which compensation is sought, the issue of the recognition of state liability from legislative acts has not been explored. The acknowledgement of state liability for legislative acts is a doctrine recently introduced and developed by the ECJ after *Brasserie* and its subsequent judgments.²⁰⁵ Since EC law introduces an obligation of the state to make good, damages suffered as a result of a legislative act or omission of the state, the evaluation of the level of protection offered at the national level would be incomplete without reference to the issue of legislative state liability.

Such liability is not unknown to the three jurisdictions analysed here.²⁰⁶ State liability is accepted for any illegal action or omission of the national authorities. The legislature is a national authority whose duty is to ensure that legislative texts passed by it are in compliance with the Constitution and, insofar

²⁰¹ See *Rivero and Waline*, *supra* note 23, p. 246; *Galgano*, *supra* note 193, p. 307; *Spiliotopoulos*, *supra* note 13, p. 171.

²⁰² Arts. 1153 and 1154 of the French Code Civil; Arts. 293-294 and 346 of the Greek Civil Code; Arts. 1223, 1226 and 1227 of the Italian Civil Code.

²⁰³ See C.E., Ass., 28 février 1992, AJDA, 1992, 210; Cass., 3 octobre 1987, n.7389, Mass. Foro it., 1987; *Braibant*, *supra* note 169, p. 294; *Chapus*, *supra* note 168, p. 876; *Spiliotopoulos*, *supra* note 13, p. 171; *Attolico*, *supra* note 163, p. 1044.

²⁰⁴ See *E. Scoditti*, "Profili di responsabilità civile per mancata attuazione di direttiva comunitaria: il caso Francovich in Cassazione", 119 Foro italiano 1996, pp. 503-511, at 509; see also Pretura di Pistoia, 20 ottobre 1992, Giust. civ., 1993, 1, 301.

²⁰⁵ See mainly case C-352/98 *Laboratoires Pharmaceutiques Bergaderm SA and Goupil v. Commission* [2000] ECR I-5291.

²⁰⁶ See *Poulitsas et al.*, *supra* note 153, para. 58; *I. Kyriakopoulos*, Greek Administrative Law, Sakkoulas, Athens, 1954, p. 491; *Rivero and Waline*, *supra* note 23, p. 253; *Cerrato*, *supra* note 53, p. 2018.

as EU citizens are concerned, the regulations of the EU.²⁰⁷ Thus, legislative acts in clash with EC law are illegal and may lead to compensation for damages under the general provisions on state liability.²⁰⁸ Despite the acceptance of this position in the legal theory of all three selected jurisdictions, state liability for legislative acts is not accepted unconditionally. In all three countries, legislative acts set for the protection of the general interests of the citizens of the state, general economic interest or social order, albeit illegal, may not give rise to legislative state liability, as any subsequent damage would not be abnormal and special.²⁰⁹ Moreover, legislative state liability can only derive from a positive legislative action rather than an omission of the legislator to regulate a specific situation.²¹⁰ Last but not the least, despite the support of the principle of legislative state liability by most Greek authors, the Greek *Areios Pagos* (the highest civil court) refuses to recognize liability for legislative acts.²¹¹ Thus, in Greece state liability for legislative actions is not accepted and compensation for a relevant case has never been awarded.

Even in France and Italy, national law introduces two important restrictions. First, there is a limitation concerning the means with which this liability may occur. Contrary to one of the main general doctrines of civil and administrative law, an action is required whereas an omission is not sufficient. In principle, there is little to justify this limitation to the rights of individuals seeking compensation for legislative state liability. However, in practice the omission of the state to legislate on a particular issue would signify the existence of a *lacuna* in the relevant national legislation. For individuals wishing to benefit from EC law, this would be filled with reference to the relevant principles of EC law, thus restricting their rights within the territory of the host state. If the latter refuses to apply the relevant EC law provisions, then liability of the state would occur from a precise administrative act expressing the state's intention. In this case, the applicant is owed compensation on the basis of this illegal administrative act, rather than on the basis of the omission of the legislator to issue an act in compliance with EC law. Apart from the lack of practical value of this limitation, the theoretical background of its introduction seems to be the principle of the separation of powers. Although judicial control of an existing law is accepted to be not only a right but also a duty of the judicial function of a

²⁰⁷ See *Jarvis*, *supra* note 28, p. 402; *Chapus*, *supra* note 168, p. 955.

²⁰⁸ See Cour admin. d' appel de Paris, 1 juillet 1992, AJDA, 1992, 768, note Prétot; 12 novembre 1992, Rec. Lebon, 1992, 790.

²⁰⁹ See *Poulitsas et al.*, *supra* note 153, para. 58; see also *Simon*, *supra* note 181, p. 242; *Rivero and Waline*, *supra* note 23, p. 254; C.E., 14 janvier 1938, La Fleurette, Leb., 1938, 25; C.E., 22 octobre 1943, Ste. des Etablissements Lacaussade, Leb., 1943, 231; C.E., 21 juin 1944, Caucheteux et Desmond, Leb., 1944, 222; C.E., 5 janvier 1963, Bovero, Leb., 1963, 53; C.E., 18 décembre 1981, Ministre de la Culture et de la Communication, Leb., 1981, 478; C.E., 23 décembre 1988, Martin, Leb., 1988, 470; Cour admin. d' appel de Lyon, 16 février 1989, Bente, JCP, 1990, II, 21521.

²¹⁰ See Cour admin. d' appel de Paris, 1 juillet 1992, AJDA, 1992, 765, note X. Prétot.

²¹¹ See *Dagtoglou*, 1992, *supra* note 198, p. 826; see also AII 115/1935, Θέμις MB', 1935, 333; AII 37/1957, EEN, 1957, 483; AII 665/75, ΤοΣ, 1976, 495.

modern state, a court order forcing the legislature to take a particular legislative step or, even worse, an attempt by the judiciary to create a legislative regime through a court judgment would be an obvious and vulgar interference of the judiciary in the function of the legislative authorities of the state. Thus, the limitation of state liability to damages caused exclusively by legislative actions is justified by reference to the principle of the separation of powers.

A second restriction introduced in the area of legislative state liability refers to the nature of damages suffered by the applicant. These have to be abnormal and special, a result of a legislative act which was set for the protection of a particular circle of people, rather than the general interest. Admittedly, the French *Conseil d'Etat*, whose case-law also has an indirect effect on its Italian and Greek counterparts, seems to be quite liberal in its interpretation of this provision.²¹² In any case, the effect of the legislative action on a specific circle of persons is an obvious expression of the German *Schutznormtheorie*, according to which the state is only liable when the interests of a closed circle of persons are injured by its action.²¹³ This doctrine also prevails in EC law as demonstrated by the ECJ's judgments in *Schöppenstedt* and *Brasserie*.²¹⁴ There is little doubt that this condition limits the access of individuals to justice at the national level. In fact, the introduction of additional conditions for the establishment of legislative state liability has been strongly criticized for its reluctance to "de-sanctify" the legislative function of the state.²¹⁵ It must be accepted, however, that the protection required from Member States is merely one equivalent to the level of protection made available under EC legislation. Thus, the restrictive provisions for the establishment of state liability are a general problem applicable to judicial protection at both national and EU level. For the purposes of this paper, it suffices to state that the national provisions on legislative state liability in France and Italy are in compliance with EU standards, but are still restrictive for the access of EU citizens to justice. In contrast to this, the Greek position on this issue clashes with EC law and is another blow to the effective protection of individuals seeking damages due to breaches of EC law by the Greek authorities.

The analysis of the substantive conditions for the establishment of state liability in the three selected countries has revealed that protection to EU citizens is offered by reference to the provisions applicable in the case of claims for compensation against private persons. In fact, the substantive prerequisites of state liability seem to be very liberal for the applicants, who need not even prove the existence of fault in their claim. For the successful claim for compensation due to state liability, EU citizens need to establish a minimum set of conditions, whose content is unusually favourable for the applicants.²¹⁶ These conditions are

²¹² See *Chapus*, *supra* note 168, p. 957.

²¹³ See *E. Grabitz*, "Liability for Legislative Acts" in *H. Schermers, T. Heukels, and P. Mead* (Eds.), *Non-Contractual Liability of the EC*, Martinus Nijhoff, London, 1988, pp. 1-11, at 6.

²¹⁴ See *Case 5/71 Aktien-Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975; see also *Case 46 and 48/93 Brasserie Du Pêcheur Sa v Germany, Regina v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-1029.

²¹⁵ See *Simon*, *supra* note 181, pp. 242-243.

²¹⁶ See *Iatrou*, *supra* note 187, p. 138.

very similar to those introduced by the EU doctrine of state liability. This is due to the recognition of EC law as a source of national administrative law; a doctrine that encourages the highest administrative national courts to create a state liability doctrine based on ECJ case-law.²¹⁷ In fact, Zanobini argues that the development of a doctrine even considering the possibility of state liability due to legal acts demonstrates how state liability has departed from ordinary, civil liability for damages and how extended the legislator seems to want it to be.²¹⁸

D. Conclusions

The analysis of the national provisions on the procedural and substantive conditions for the establishment of state liability in France, Italy and Greece has led to a number of valuable findings. Despite the existence of three types of courts in the selected jurisdictions and the consequent creation of an administrative law of tort, state liability borrows most of its provisions from the general doctrines of civil torts. The elements of state liability are those applicable to any tort and include a wrongful administrative or legislative act, damage to the applicant and a causal link between the two. The requirements for the characterization of an act as wrongful are flexible in favour of the applicant. Indeed, the inclusion of omissions in the concept of wrongful acts for the establishment of state liability can only be seen as an advantageous extension of the possible sources of state liability and, consequently, an amplification of the field of application of the liability of the state. More importantly, the only condition for the classification of an act or omission as wrongful is its objective illegality. The subjective element of fault is not a prerequisite of liability. In fact, in Greece and Italy fault is not required at all, whereas in France the precondition of illegality as the exclusive means of demonstrating the existence of fault leads to its practical exclusion from the deliberation of the competent judges. This is reflected in recent judgments of the French courts who “intentionally” avoid all reference to fault.²¹⁹ The unusual exclusion of subjective fault is of paramount assistance to applicants. Had the situation been different, they would have had to meet the impossible task of tracing negligence/intent to specific employees of the national authority and attributing percentages of it to members of the circle of administrative or legislative officials who dealt with the particular file.

The regulation of damage as an element of state liability is equally auspicious to the applicant. Replicating the most accommodating of provisions in this area of civil law, the legislator allows compensation for state liability even for future damages whose certainty (an essential characteristic) is

²¹⁷ See *Dagtoglou*, 1994, *supra* note 12, p. 39; see also *Alpa*, *supra* note 181, p. 27; C.E., 19 février 1988, *Association des propriétaires riverains et plaisanciers du cingle de Tremolat-Cales-Mauzac et autres*, AJDA, 1988, 418.

²¹⁸ See *Zanobini*, *supra* note 52, p. 347.

²¹⁹ See *Dantonel-Cor*, *supra* note 30, p. 502.

debatable. Along the same generous lines is the provision on the nature of damages which may be compensated for. These include positive damage, moral damage and loss of the opportunity to make profit. It is the last type of damages which is of particular interest to applicants suffering harm due to breaches of EC law in the field of the freedom of establishment. The inclusion of *perte de chance* allows the applicants to seek restitution for the major part of their damages, which will derive most probably from the loss of the opportunity to establish in the host state or to trade in a particular field of commerce therefore preventing them from making profit. Even when the damages in question are difficult to quantify the applicant will receive some compensation. Moreover, in order to submit a successful claim, the applicant will have to prove that the harm occurred is a direct consequence of the act or omission of the state. This is another provision borrowed from the civil law of torts, which favours the theory of *causa adequata* in all three selected jurisdictions. The permissive substantive conditions for the establishment of state liability are complemented by a similarly accommodating doctrine of full compensation equal to the amount of money by which the applicants' fortune decreased due to the act of the national authorities.

The evaluation of the substantive elements of state liability in France, Greece and Italy draws an ideal picture of tolerance and permissiveness in the relevant provisions whose aim clearly is to allow applicants compensation for damages suffered as a result of a wrongful act or omission of the host state. This conclusion seems to be confirmed by reference to the doctrine of state liability due to wrongful legislative acts, which is recognized in France and Italy. Provided that the additional conditions of existence of a positive legislative act affecting only a closed circle of people are met, the applicant may claim compensation for damages suffered as a result of a national legislative text, whose provisions breach EC law. These conditions, albeit identical to those introduced by the EU doctrine of legislative state liability, in combination with the reluctance of some judges to apply the relatively new concepts of legislative state liability, render compensation due to this source somewhat uncertain.²²⁰ It is therefore more effective for the applicant to seek permission to establish or to trade in the host state, so that a precise administrative act, albeit prohibitive, is issued. This act will assist the applicant with the establishment of a sounder legal basis for compensation, as well as with the provision of information on the concrete competent administrative organ and the detailed reasoning for the rejection of the applicant's request. This would be the only option available to the applicant in Greece, where legislative state liability is not accepted. In France and Italy, however, even though it is advisable for the applicant to try to establish state liability due to administrative acts or omissions, the recognition of legislative state liability presents an additional legal basis for the claim for damages which can be of particular use in the admittedly rare cases, where permission by the authorities is not conceivable or extremely expensive and time-consuming.

²²⁰ See *Dantonel-Cor*, *supra* note 30, p. 499.

Thus, in principle, the three selected jurisdictions award a high level of protection to individuals at the national level. From the point of view of the substantive provisions, this is mainly due to the harmonization in the national case-law of EU Member States resulting from their reception of relevant ECJ and CFI precedents.²²¹ However, this picture of effectiveness becomes somewhat tainted when the procedural conditions of compensation for state liability are examined. The first sign of problems appears well before the application for damages is lodged in the resolution of the preliminary issue of the choice of competent court. The existence of three types of courts in the selected countries forces applicants to determine the court with the jurisdiction to rule on its application for damages against the state, very early on in the process. Leaving aside the increased difficulty involved for applicants whose state of origin does not follow a system of separate administrative court structure, the determination of the competent court seems a difficult task, mainly due to the complexity and fluidity of the criteria introduced for this purpose. Greece is the only country of the three examined in this thesis, which has adequately resolved this problem through the express subjection of claims for compensation against the state to the competence of its administrative courts. In contrast, France seems to suffer from the fact that the rules determining the right court derive from case-law and are therefore based on previous courts' judgments on specific cases. This method of introduction of legal provisions is problematic in a civil law country where the value of precedent is only limited to the parties in each dispute. However, the French uncertainty and complexity is only minimal when compared to the Italian position. The latter is based on the doctrine of subjective rights and legitimate interests, which has been criticized for its complexity and distorting intricacy.²²²

These characteristics are carried onto the procedure of the trial, where the applicant needs to refer the case first to the Italian administrative courts for the annulment of the wrongful act or declaration of illegality of the omission of the authorities and then to the Italian civil courts, which have the exclusive competence to adjudicate on the issue of compensation. This position creates delays in the dispensation of justice. Since a final decision by the administrative judge could take up to twenty years, there is little doubt that these long delays "threaten the efficiency of justice" and force individuals to turn to other routes of restitution outside the rules of law.²²³ Another consequence of the Italian position is the imposition of a double-risk for applicants, who are forced to face the common reluctance of national judges to identify their case as one tackling

²²¹ See *E.G. de Enterría*, "Perspectivas de las justicias administrativas nacionales en el ámbito de la Unión Europea", *Rivista trimestrale di diritto pubblico* 1999, pp. 1-14, at 10.

²²² See *E.R. D'Aci*, "Notazione minime, ma non troppo, sullo stato della giustizia amministrativa", *66 Foro amministrativo* 1990, pp. 2508-2514, at 2510 and 2511; see also *Alpa*, *supra* note 181, p. 1306.

²²³ See *Paleologo*, *supra* note 133, p. 623. It should be noted that the article was written in 1993. To my knowledge, there is no recent calculation on this issue. See also *R. Chieppa*, "Giustizia amministrativa, efficienza e pubblica amministrazione", *72 Foro amministrativo* 1996, pp. 2500-2515, at 2504.

issues of EC law and to refer to the ECJ for a preliminary ruling twice.²²⁴ A third consequence of the two-trial Italian system is the constraint on the circle of persons with the *locus standi* to seek compensation, in terms of the grounds on which such claims may be successful, and in terms of the powers of the adjudicating judges. These are limited to the persons, merits and powers introduced for actions for annulment of acts or omissions of national authorities. Therefore, they are not as extensive as the ones provided for in France and Greece. There claims for compensation can be based on all possible factual and legal grounds of illegality which may lead not only to the annulment but also to the modification of the measure in question. It can be argued that this Italian handicap is counteracted by the increased protection offered by a double system of appeals and cassations. True as this argument may be, the resources and time constraints involved in such a long process render the detailed examination of the case before the Italian courts an exercise not worth pursuing for most applicants.²²⁵ Even if the time and money for the completion of this process, which may also entail preliminary rulings to the ECJ, were available, the French and Greek systems are preferable since the merit, *locus standi* and court power limitations still impede access to justice in Italy.

Another problem of the protection offered at the national level refers to the state privileges in the case of compensations for state liability. These involve shorter prescription periods for the submission of appeals or cassations against judgments of the courts of first instance, which are introduced in a discriminatory manner in favour of the state. The introduction of shorter time-limits for the appeal of applicants against court decisions is a significant impediment to the access to justice. However, a crucial finding of this paper refers to the lack of mechanisms for the enforced execution of court judgments in France and Greece. This signifies the lack of practical value of court judgments against the state, whose authorities only execute court judgments if they so wish. The problem is one based on the constitutional principle of the separation of powers and extends in all judgments against the state, irrespective of the identity or nationality of the applicant. However, it can only be seen as a terrible blow to the fight of EU citizens to achieve restitution for damages suffered as a result of wrongful acts or omissions by the host state. In fact, it can be stated that both the shorter prescription periods and the Greek and French problem of execution against the state are national provisions which, albeit non-discriminatory, impede the efficiency of the protection of EU nationals at the national level considerably.

The main aim of this paper was to prove its hypothesis: the effectiveness of national remedies for breach of EC law is still rather doubtful. In achieving its aim, this paper has shown that our neglect of the procedural hurdles in state liability cases continues to render judicial protection at the national level a

²²⁴ See *Chiti*, *supra* note 64, p. 824.

²²⁵ For the need to put efficiency before legality, see *F. Ledda*, "Dal principio de legalità al principio d'infallibilità dell' amministrazione", 73 *Foro amministrativo* 1997, pp. 3303-3327, at 3307.

446

Helen Xanthaki

utopia for EU citizens.