

State Liability, Fundamental Rights and EU-Law

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The Finnish case of Tarmo Lehtinen (Case C-470/03) offered the chance to revitalise and consolidate the forgotten second track of Union and Member State responsibility under EU law: vicarious State liability. It requires a tort of a public servant in performing his official duties (ex-Art. 40(2) TECSC, Art. 340(2) TFEU). In so far there are general principles common to the Member States governing this type of State liability. The intricacy of the Lehtinen case was that the subject matter was not a regular everyday tort, but the tort of breach of EU law (effective infringement of free movement of goods – Art. 28 TFEU) by statements of a public servant. To determine an unjustified breach of EU law by the servant the Court would have had to weigh and balance the fundamental freedom of the manufacturer and the servant's fundamental right of freedom of expression. If the statements were not justified as protected disclosure of risks (legitimate whistle-blowing) a tort of breach of EU law exists leading to (exclusive) vicarious liability of the Finnish State.

The ECJ missed the problem of the case completely. It pressed the public warning into the scheme of breach of EU product safety law. Therefore acts of public servants must be transformed into acts of the State itself. The Court thus introduced a new type of semi-vicarious EU State liability unknown to Member States law and to the international law of the ECHR. Last but not least the Court missed the chance to make freedom of expression and public warnings outside the safeguard procedure compatible with the rigid structure of the EU product safety law.